

An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa

Abstract

Public-private partnerships (PPPs) are generally envisaged by countries around the world as major innovative policy tools that will remedy the lack of dynamism in traditional public service delivery by increasing investment in infrastructure as well as improving the delivery of social services. To this end, since 1999 the South African government has adopted the use of PPPs as an integral strategy in its national and international developmental plan. However, with the growing trends in international best practice for accountability and good governance in PPPs noticeable loopholes and omissions have been observed in the existing PPP legal framework. Therefore, if the government needs to fulfil its developmental aspirations, there is a need to instill the confidence and competitiveness amongst bidders to use PPPs as coherent and development-orientated best value tools to deliver services and infrastructures to taxpayers. Hence, this paper draws attention to some of the accountability challenges resulting from the PPP legal framework and suggests some techniques that could serve as a platform for the possible review and amendment of core competencies

Keywords

Public-private partnership, accountability, community participation, transparency, Millennium Development Goals

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1. Introduction

Public-private partnerships (PPPs) are envisaged by countries around the world as major innovative policy tools that will remedy the lack of dynamism in traditional public service delivery by increasing investment in infrastructure as well as improving the delivery of social services. To this end, since 1999 the South African government has adopted the use of PPPs as an integral strategy in its national and international developmental plan to improve its deeply rooted socio-economic, political, fiscal, and societal problems. Examples of the development strategies are the Millennium Development Goals (MDG),¹ the Accelerated and Growth Initiative for South Africa (Asgi-SA²), the Medium Term Strategic Framework (MTSF, 2009–2014),³ and the National Development Plan (NDP) that charts the development and progress of the country until 2030. South Africa is the leading sub-Saharan country in PPPs, with robust legislation and policies. The country has completed some of the most successful PPPs, amongst which are the Gautrain state-of-the-art rapid rail network,⁴ the Inkosi Albert Luthuli Hospital, and toll roads such as the N1, N2, N3, and N4. However, with the growing trends in international best practice for accountability noticeable loopholes and omissions have been observed in the existing legal framework for PPPs., resulting in accountability gaps. Therefore, if the government has to fulfil its developmental aspirations, there is a need to instill confidence amongst bidders that PPPs remain a coherent and development-orientated best value tool to deliver services and infrastructures to taxpayers.

This paper therefore draws attention to some of the shortcomings of the PPP legal framework in relation to enhancing accountability and suggests some techniques that could

¹ The Millennium Development Goals (MDGs) were developed at the United Nations Millennium Summit in 2000 by 193 United Nations member states and several international organizations to achieve eight critical economic and social development priorities by 2015. These eight priorities are poverty eradication, primary education, gender equality, maternal and child health, the reduction of HIV/AIDS and other diseases, clean water and sanitation, environmental sustainability, and the development of global partnerships.

² South African strategy for raising economic growth and reducing poverty and unemployment by 2014.

³ The Medium Term Strategic Framework (MTSF, 2009–2014) is a statement of government intent. It identifies the development challenges facing South Africa and outlines the medium-term strategy for improving living conditions of South Africans. The MTSF outlines ten priority areas that are intended to give effect to these strategic objectives.

⁴ The Gautrain is Africa's first world-class, modern rapid rail and bus service PPP in South Africa.

serve as a platform for the possible review and amendment of the core competencies for PPPs. First, taking stock of the fast-growing literature on PPPs, a working definition of PPP is proposed. The second section expounds on the concept of accountability. The third section provides an appraisal of the challenges to accountability in PPPs in South Africa. The fourth section suggests some mechanisms for enhancing accountability in PPPs.

2. What are PPPs?

Although PPPs have existed in some form since the Roman Empire, e.g., private tax and toll roads, there remains some ambiguity as to what exactly this concept entails. The definition varies amongst authors' jurisdictions and contexts. In general, it accommodates a variety of cooperative, long-term arrangements between the government and the private sector whereby risk, rewards, resources, skills, expertise, and finance are shared to improve infrastructure networks and enhance service delivery in the form of contracting out, outsourcing, donation, or privatization of public good. Two definitions are relevant to the understanding of PPPs within the context of this paper. First, PPPs are defined as a partnership between the public and private sector pursuant to a long-term contractual agreement involving high capital cost, lengthy contract periods, and sharing of risks (Australia 2006). The second definition specifies relationships beyond contractual commitments and captures elements of trust, mutual commitment, and social and community obligations. To this end, Bovaird (2004) defines PPPs as working arrangements based on a mutual commitment over and above that implied in any contract between a public-sector organization and any other organization outside the public sector.. The different models of PPPs already in implementation in South Africa are the Design Finance Operate (DFO); Design, Finance, Build, Operate, Transfer (DFBOT); Design and Transfer (DT); Build Operate, Transfer (BOT) and equity partnerships (Treasury Regulation 16; South Africa 2004c).

3. Accountability in PPPs

Accountability is rooted in the effective principles of good governance and the fundamental values of a democratic society. It is increasingly recognized that governance principles and norms should be incorporated in the operationalization and designated

objectives of PPPs (Hodge and Greve 2005; Clifton and Duffield, 2006; UNECCE 2008; Brinkerhoff and Brinkerhoff 2011). Given the increased use of PPPs, issues surrounding their accountability are becoming critical. Three main dimensions of accountability that are useful for understanding accountability in PPPs in practical terms are the hierarchical perspective, the horizontal perspective, and accountability as a virtue. The hierarchical perspective is based on the traditional mode of accountability, where the vertical chain of authority and the principal and agent relations are inherent in hierarchical and bureaucratic situations (Mulgan 2003; Armstrong 2005; Bovens 2007). Within the context of PPPs, hierarchical accountability reflects a structure where individuals perceive themselves as responsible for reporting, justifying, or explaining their actions to others and being liable to sanctions in the event of errors and shortcomings. For example, citizens in a democratic society have an obligation to hold elected officials accountable for how they formulate and implement contracts and provide public goods and services. However, due to its focus only on reporting and formal sanctions, hierarchical accountability is less suitable to PPPs because of the multiple, complex, and conflicting undertakings of stakeholders, resulting in blurring of public-and private-sector responsibilities (Mörth 2007).

Therefore, the horizontal dimension of accountability, also known as management of expectations, provides a practical and realistic approach to understanding accountability in PPPs. Accountability as management of expectations facilitates discussions on how multiple expectations generated within and outside the partnership, often with conflicting objectives are managed in a nonhierarchical way (Romzek and Dubnick 1987; Kearns 1994; Acar, Chao, and Kaifeng 2008; Willems and Dooren 2011). This involves identifying each partner's expectations, aligning goals, adjusting strategies, assessing implementation, communicating performance, and facilitating learning (Kearns 1994; Romzek and Dubnick 1987).

The third perspective of accountability in PPPs is accountability as a virtue, that is, having a conscience or a moral responsibility about what one is doing. It is considered a means of dealing with potential problematic situations that necessitate excuse-making, justification, rationalization, and other forms of account-giving (Dubnick and Romzek 1991; Demirag and Khadaroo 2011). These three perspectives of accountability inform the four different frameworks of accountability considered in the next section.

4. Frameworks for Accountability

The different frameworks for accountability considered in this section are the institutional framework (Romzek and Dubnick 1987), the virtue framework (Blagescu et al. 2005), a hybrid framework (Dubnick and Romzek 1991) and international accountability standards (Gilbert et al. 2011). The Institutional accountability framework is typical in the British, Australian, and European scholarly debates and considers accountability as a social or institutional arrangement. The virtue accountability framework is a normative framework common in American academic and political literature. The hybrid framework embodies accountability both as a virtue and as an institutional mechanism. The different international accountability standards are voluntary, predefined rules and procedures geared at improving an organizations social responsibility.

4.1 The Institutional Framework

The institutional framework is a social mechanism or institutional arrangement in which an actor can be held to account by a forum. This is similar to the traditional perspective of accountability that embodies the agent/principal relationship. In this framework, actors have the ability to demand an explanation or justification from other actors for their actions and to reward or punish those actors on the basis of their performance or explanation (Mulgan 2003; Armstrong 2005; Bovens 2007). Here the focus of accountability is not the behavior of public agents, but the way in which these institutional arrangements operate and the general acceptability of rules and structures. The following are some of the key institutional accountability mechanisms that have been modified and built upon over the years: bureaucratic, political, legal, contractual, market, communal, managerial, professional, administrative, and collaborative (Romzek and Dubnick 1987; Sinclair 1995; Stone 1995; Deleon 1998; Flinders 2004; Mulgan 2003; Dowdle 2006; Mashaw 2006; Scott 2006; Bovens and Schillemans 2009; Koliba, Mills, and Zia 2011).

Bureaucratic accountability embodies the classical principles ascribed to hierarchical bureaucratic structures such as “unity of command and span of control,” where the public manager advances through vertical chains of authority within the government. Public interest is enhanced when the bureaucrat is held to account to higher authorities and elected officials who sit at the apex of the institutional chain of command (Kearns 1994).

Political accountability, on the other hand, is the responsiveness of public stakeholders to the needs and concerns of political constituents such as citizens and their votes, parliament, elected representatives, ministerial responsibility, constituency representatives, political parties, and other governmental bodies. For example, during elections, citizens hold government to account directly through the exercise of their votes. In between elections, citizens may directly hold public organizations accountable through horizontal ties such as open meetings, sunshine laws and freedom of information acts. Another dimension of political accountability is accountability to other governmental bodies reflected in the principle of separation of powers amongst the judiciary, the legislature, and the executive branch (Behn 2001). That is, the legislature has the constitutional power to scrutinize the actions of the executive branch. Ministers are accountable to their departments via the parliament, and to their political parties and the governed. Political accountability, however, exhibits represents a weak measure of control because there is a high degree of discretion as to how to respond to expectations for performance.

Legal accountability is often referred to as adherence to the rule of law—civil and criminal law and legislative mandates. Laws and regulations, explicit standards and norms, substantive rights and legal and binding contractual agreements are ensured through legal accountability (Stone 1995). Legal accountability also focuses on the role that the judiciary and quasi-judiciary procedures play in ensuring the execution of sound and reasonable judgments in civil, criminal, or quasi-judicial arenas such as the administrative tribunals and the World Trade Organization Dispute Settlement Mechanism (Romzek and Dubnick 1987; Mashaw 2006; and Koliba et al. 2011).

Contractual accountability is closely related to legal accountability. It consists of a legally binding agreement on standards of performance that are laid down in writing in specific, enforceable terms (Dubnick 1998). It involves the creation of rights, obligations, and liabilities between two or more parties towards the PPP that are enforceable through the judicial process. Bovaird (2004) notes that accountability in PPPs is linked to the relationship created between, and the obligations and requirements accepted by, government and private firms, and on clarifying responsibilities in this relationship.

Market accountability is prevalent in corporate structures where there is a need for answerability to relevant stakeholders, shareholders, and consumers about the consequences of a firm's actions and omissions (Scott 2006). In legal parlance, corporate directors have the fiduciary duty to make decisions that are in the best interest of shareholders, thus pushing

companies to undertake the most efficient set of practices possible in order to maximize profits.

Treating citizens as consumers within the New Public Management (reforms that aim at rendering the public sector more effective by shifting the emphasis from traditional public administration to public management) makes consumer accountability an imperative (Koliba et al. 2011). This approach is predicated on the ability of consumers to choose between alternative competing goods and services.

Stakeholder accountability refers to the role of labor unions, collective bargaining, corporate social responsibilities and the “triple bottom line”—people, planet, and profit. Stakeholders may use traditional instruments such as crucial dialogue with the government, protest actions, strikes, and aggressive protest campaigns to put the executive branch under pressure and influence the political agenda.

Communal accountability consists of responding to societal needs through dialogue with interest groups (Roberts 2002; Shearer 2002). It seeks the legitimacy and consensus of citizens and stakeholder groups in participating and designing policies and in the decision-making process.

Managerial accountability structures are set up to implement, monitor, and evaluate programmes and can influence value for money (Sinclair 1995). Similar to bureaucratic accountability, those with delegated authority are answerable for producing outputs and using resources to achieve certain ends. Public Financial Initiative contracts include an internalized managerial accountability system developed for the period of the contract (Sinclair 1995; Demirag and Khadaroo 2011).

Professional accountability relies on the skills and expertise of professionals to inform sound judgments and discretion (Romzek and Dubnick 1987). It is characterized by placing control over organizational activities in the hands of the employee with the expertise or special skills to get the job done, in compliance with professional or industrial best practices and rules or codes of ethics. Members of professions in all sectors may find themselves answerable to each other through shared networks and collegial relationships. In self-regulating professions like law and medicine, professionals are accountable to disciplinary bodies drawn from the professions.

In administrative accountability, civil servants and top-ranking administrators within the administration of government may inquire on government actions and recommend certain

courses of action. This includes courts of audit, internal inspections, visitations, advisory councils, ombudspersons, public protectors, and commissioners.

Lastly, collaborative accountability binds actors as partners and peers and is similar to horizontal accountability. Social network theorists have equated horizontal relationships with cooperative behaviors and norms of trust and reciprocity (Thompson 2003). In sum, the above institutional structures are all interrelated and linked with the dynamics of hierarchical and horizontal accountability.

4.2 The Virtue Framework

The virtue framework assesses the actual behavior of public agents using standards for the evaluation of the behavior of public actors. According to this framework, the criteria for effective and efficient public service delivery are based upon values (accountability, integrity, transparency, and publicity), attitudes (transparency and responsibility) and aptitudes (knowledge, communication skills) that can be measured or evaluated. This approach involves a sense of responsibility, adherence to legislation and codes of conduct, and inherent dispositions, attitudes, and virtues of the public official. One example is Nolan's seven principles of public life (Chapman 2000, 230-231), that provide a valuable framework for evaluating the ethical behavior of public officers. These principles are Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty, and Leadership. The Global Accountability Framework developed by Blagescu, De las Casas, and Lloyd (2005) for large transnational organizations also attempts to operationalize accountability as a virtue. Blagescu et al. (2005) identified three central components essential in measuring partnership accountability: "giving account," "taking account," and "being held to account" (4). Giving account is the mechanism that partnerships have in place to provide information on their activities in terms of input (sources and amount of funding, nonmonetary resources); throughput (governance structures, performance, goals, attainment); and output (use of financial resources, performance, and goal attainment). Taking account is directed at increasing responsiveness to stakeholders' participation in the activities of the partnership through the exchange of information in forums such as focus groups, workshops, and mailing lists. Being held to account refers to mechanisms used to sanction undesired activities on the part of the partnerships; these include noncompliance with rules, withdrawal of support, and public criticism.

4.3 The Hybrid Framework

The hybrid framework (Dubnick and Romzek 1991; Dubnick 1998; Dubnick and Justice 2002; Dubnick 2003; Dubnick 2005) provides an ethical and institutional analytical tool to explore accountability and also identifies appropriate cultures of accountability processes and mechanisms. Dubnick (1998) links the institutional and ethical perspectives of accountability by illustrating the theory of moral push and moral pull. He suggests that accountability is effective and ethical when moral pulls and moral pushes are effective. Moral push emphasizes the importance of being good and gives bureaucrats the feeling that something is the right thing to do rather than being forced to do something, while moral pull highlights the need to regard and respect the values of others. He argues that liability creates a moral pull for the parties to adhere to the terms stipulated in the contract, which are external to the individual, while obligation creates a moral push of conduct and the desire to comply with the laws to avoid legal sanctions.

Drawing from the works of social psychologists and ethnomethodologists on the one hand, and from political scientists on the other hand, Dubnick (1998, 73) identifies two main perspectives of accountability known as “accountability of conduct” and “conduct of accountability,” and four different cultures of accountability in real public-sector situations: answerability, liability, blameworthiness, and attributability. Accountability of conduct is similar to accountability as a virtue. It highlights the role accountability plays in an individual’s conduct from both social and psychological perspectives and emphasizes the functional and emergent properties of account-giving behavior and the use of excuses and rationalization by individuals who are perceived to make wrong decisions. On the other hand, conduct of accountability is similar to the institutional framework and focuses on the structures and procedures through which accountability is achieved. Dubnick (1998) argues that the potential linkage between accountability of conduct and conduct of accountability provides a common foundation for the four different cultures of accountability. Answerability reflects a hierarchical structure where individuals perceive themselves as responsible for reporting, justifying, or explaining their actions to others. Liability arises from external frameworks and represents settings where individuals and organizations are held liable for their actions and rewarded for their good performance subject to a system of rules and laws that carry the potential for sanction. Blameworthiness stresses the sense of responsibility within a moral community where expectations are generalized rather than specific to

individuals or their role in society. Attributability refers to the roles that individuals play and the expectation associated with these roles (Dubnick 2003).

4.4 International Accountability Standards

International accountability standards are voluntary, predefined rules, procedures, and methods to systematically assess, measure, audit, and communicate the social and environmental behavior and performance of firms (Gilbert et al. 2011). These standards are relevant because PPPs operate within a corporate governance structure. The four major accountability standards are principle-based standards, certification standards, reporting standards, and process standards. The principle-based standards are sets of principles that attempt to shape corporate behaviors by providing a baseline of foundational values and principles that responsible companies can attempt to adhere to. Examples of principle-based standards are the UN Global Compact (2009), the Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises (2008), and the Clarkson Principles of Stakeholder Management (2003). A number of companies in South Africa have adopted principle-based standards by joining the UN Global Compact. Amongst these are Sasol, Eskom, Barloworld and Deloitte, and the UNISA Centre for Corporate Citizenship (UN Global Compact South Africa, Executive Guide 2009). Certification standards involve the certification, verification and monitoring of production facilities according to predefined criteria. One of the most widespread certification standards for social issues is the SA8000, based on the International Labor Organization's score labor conventions (Gilbert and Rasche 2007). Reporting standards such as the Global Reporting Initiative provides comprehensive and standardized frameworks for nonfinancial reporting on economic, social, and environmental issues. The King III Report that details South African corporate governance structure recommends sustainability reporting and refers to the Global Reporting Initiative as a guideline. Process standards focus on how organizations can achieve corporate accountability through the provision of managerial guidance (Leipziger 2010). The Accounts Ability AA1000 Assurance Standard (AA1000AS) is an example of a process standard that defines processes used by corporations to develop organizational frameworks around corporate accountability. These different international standards are not legally binding obligations enforceable through courts of law, and they have been criticized as "credibility cover" that perpetuates business as usual and does not necessarily lead to significant improvements in social accountability (Clapp 2005; Behnam and MacLean 2011).

5. Overview of Accountability Challenges in PPPs in South Africa

Before examining the accountability challenges inherent in the PPP legal framework, an overview of the different legislation and policies governing PPP is crucial. The overarching requirement of transparency and accountability in the procurement of PPPs is captured in Section 217(1) of the Constitution (Act No 108; South Africa 1996) which states that “when an organ of state in the national, provincial or local sphere of government or other institution identified in the national legislation contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent and cost-effective.” Treasury Regulation 16 (South Africa 2004c), issued in terms of the Public Finance Management Act (PFMA; Act No.1 of 1999 as amended by Act 29 of 1999; South Africa 1999) governs PPPs at the national and provincial level. In addition, the Municipal Systems Act 32 of 2000 (MSA; South Africa 2000a), the Municipal Finance Management Act 56 of 2003 (MFMA; South Africa 2003b), and the Municipal Supply Chain Management Regulations (South Africa 2005c), in terms of section 168 of the Local Government, regulate PPPs at the municipal level. Other laws governing PPPs in South Africa are the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA; South Africa 2000b), and the Broad-Based Black Economic Empowerment Act 53 of 2003 (South Africa 2003a). Furthermore, policy documents such as the PPP Manual (South Africa 2004a) and Standardised PPP Provisions (South Africa 2004b), issued as Treasury PPP Practice Notes, guide the implementation of PPPs at the national level, while the National Treasury Municipal Guidelines of Municipal Service Partnerships (South Africa 2006) facilitate the implementation of PPPs at the municipal level.

The above legal and policy framework contains several noticeable shortcomings. One is the distinction between municipalities and municipal entities on the one hand and the national and provincial entities on the other. Although it may be argued that the decision-making and institutional processes with respect to municipal PPPs differ from that those dealing with provincial PPPs, it stands to reason that these different pieces of legislation will overlap because the requirements of affordability, value for money, and adequate risk transfer are consistent in both regulations. Modern PPP legislation enhances consistency by adopting single Acts. Typical examples are the Punjab PPP Infrastructure Act IX of 2010 (Punjab 2010), the Manitoba PPP Transparency and Accountability Act 2012 (Bill 34; Canada 2012),

and the Tanzanian PPP Act No. 18 of 2010 (Tanzania 2010). Another shortcoming pertains to certain complex provisions that sometimes require careful interpretation. Examples are the MFMA Act 56 of 2003 (South Africa 2003b) and the MSA Act 32 of 2000 (South Africa 2000a) which require feasibility studies to be undertaken before a municipality conducts PPPs. While the period for feasibility studies in Section 78 of the MSA is approximately two years, in the MFMA it takes an average of six months. A municipality is therefore faced with the challenge of having to satisfy the requirements of both Acts. Consequently there are instances where procuring authorities and the private sector tend to avoid application of PPP legislation by forming partnerships that are outside of its structures (Mitchell 2007).

Furthermore, although the different policy documents may be of some value, their overall effect is diluted for the following two reasons. First, these are “living documents” that are supposed to be updated from time to time, based on the opportunities that the implementations of PPPs present, but these are outdated, and are only recently undergoing revision (Haaroff 2008; Aiello 2010). As a result, many unclarified issues in the provisions, such as force majeure, penalties, and indemnity caps, result in projects being deemed unbankable and unpalatable due to unmanageable risk (Haaroff 2008; Aiello 2010). Second, these policy documents are subjective guidelines and not laws. Therefore, the loopholes in the legal framework have exposed amongst others the following three accountability issues: transparency, lack of public consultation, and management and evaluation of PPPs.

Transparency is defined as the unfettered access by the public to timely and reliable information on decisions and performance in the public sector (Armstrong 2005). The major issues of transparency within the legal framework in South Africa are vaguely worded provisions and omissions that have resulted in amplified discretionary power for procurement officials. For example, Treasury Regulation 16.3.1 stipulates that “as soon as an institution identifies a project that may be concluded as a PPP, the accounting officer must register the PPP with the relevant authority.” The absence of a clear procedure for systematic planning and identification of a project leaves broad and arbitrary powers with the institution and its accounting officer. This is in contrast to modern PPP legislation such as such as the Tanzanian Public-Private Partnership Act No. 18 of 2010 (Tanzania 2010) and the Punjab Public-Private Partnership for Infrastructure Act IX of 2010 (Punjab 2010), where there are established procedures for identifying and preparing a portfolio of potential PPPs. The United Nations Economic Commission for Africa (UNECA 2011) outlines the following as some of the criteria for identifying a PPP project: supply and demand gaps, social and economic

benefits, readiness for implementation, master plans and other planning documents or studies by the institution.

Another example of a vaguely worded provision is Treasury Regulation 16.5.3 (a) (South Africa 2004c), which provides for “procurement to be in accordance with a system that is fair, equitable, and transparent, competitive and cost effective.” Although this is in line with the Constitutional provision of section 217, (Act No. 108; South Africa 1996) there are no expressed implementing mechanisms to guarantee transparency during different stages of procurement; neither is there any specification of the criteria or expectations for achieving transparency and fairness. Furthermore, there is no integrated anticorruption approach throughout the procurement process, other than a provision in the PPP Manual (South Africa 2004a) that provides for the signing of an anticorruption policy and the calling for forensic audits if fraud or corruption is suspected. Although it may be argued that the PPP Unit is charged with exercising quality control by certifying specific Treasury approvals at the different stages of PPP from inception to procurement, the fact that on average only two PPPs have been rolled out per year at the national and provincial levels since 2004 and that the process takes between twenty-four and thirty-six months (Burger 2004; Aiello 2010) may be attributed to the lack of clarity in the procurement procedures. Further to this, the need for sound procurement policies has been emphasized lately (Venter 2011; Creamer 2012). For example, a review by the Correctional Services Minister on Prison PPPs highlights a number of financial and operational problems with the PPP model, resulting in the suspension of four new prisons in order to undertake another review of the model (Venter 2011).

Furthermore, subregulations 16A.6.4 of Treasury Regulation 16 and Regulation 36 of the Municipal Supply Chain Management 2005 (South Africa 2005c) provides the procurement officer with wide discretion to decide on very subjective grounds when and how to use alternative methods of procurement. In this regard, subregulation 16A.6.4: stipulates that “if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.” According to Regulation 36, “the accounting officer may dispense with the official procurement processes established by this policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only in an emergency.”

Besides such vagueness, the omissions of important provisions have also raised transparency concerns. For example, Treasury Regulation 16.5.4 states that “after the evaluation of bids but prior to appointing the preferred bidder, the institution must submit a report for approval by the relevant treasury demonstrating how the criteria of affordability, value for money, and substantial technical and operational and financial transfer were applied in the evaluation of the bids demonstrating how the criteria was transferred in the preferred bid.” There is no mention of the evaluation criteria for selection of tenders; neither are there preselection criteria for scoring bids. The Model Legislative Provision for Private Finance Management Projects developed by the United Nations Commission on International Trade Law (UNCITRAL 2004) affirms the need for interested bidders to meet an objectively justifiable criterion.

Another example of omission is the absence of a mechanism for disclosure of relevant facts and practices to the public. For example, negotiations between public and private partners are often conducted in closed private settings on the grounds of “commercial-in-confidence” “proprietary rights” or data protection. Although the need to protect trade secrets and negotiating positions does warrant keeping some documents out of the public domain, secrecy must not come at the expense of the public right to know and of the proper disclosure of information (Institute of Public Policy Research 2001). To this end, the need for commercial confidentiality should not be “devalued.” As Gosling (2004) observed, the government should at least be open about issues of value for money, Public Sector Comparator (tools that compare the cost of PPPs and traditional procurement), and performance of a project, because it is the taxpayer who ultimately pays for the projects through taxation. It is not necessary to disclose sensitive information about internal processes. The lack of appropriate and rigorous public scrutiny makes it difficult for the public to identify hidden costs that private sectors transfer to the government in the long run. To this end, the leader of the main South African opposition party, the Democratic Alliance, called for the Gautrain Rapid Rail Link contract to be made public and lamented that too much had been done in secret (Campbell 2011). Furthermore, the South African PPP Unit provides superficial and inconsistent disclosure of PPP information online through the PPP Quarterly. The last quarterly report was in December 2010.

Also, there is no institutionalized internal communication mechanism within the PPP framework; neither is there any internal accountability mechanism. This is in contrast to the United Kingdom, where Public Financial Initiative contracts include an internalized public,

contractual managerial, communal accountability system developed for the period of the contract (Sinclair 1995; Demirag and Khadaroo 2011). This leads us to the second accountability challenge, which is the lack of community participation.

The expectations for meaningful community participation in decision-making that pervade sections 151(1) (e) and 151 (2) of the South African Constitution and are further enhanced in the “developmental” municipal legislation: the MSA Act of 2000 (South Africa 2000a); the White Paper on Local Government (South Africa 1998b); the Municipal Structures Act (South Africa 1998a); and the MFMA (South Africa 2003b). However, policies such as the Batho Pele⁵ are missing in the PPP Manual (South Africa 2004a). Community participation gives ordinary people a meaningful opportunity to exercise their voices in processes that shape the outcome of development that has a direct bearing on their daily lives through involvement in a wide range of administrative and policy-making activities (Kakumba and Nsongo 2008). The more service providers are held accountable by citizens, the more service delivery improves (World Bank 2004). PPPs such as the Manitoba PPP Transparency and Accountability Act (Bill 34; Canada 2012) provide for public consultation and reasonable opportunities for members of the public to comment. There is no doubt that there are several inherent challenges with regards to community participation. Amongst these are: the community rarely speaks with a unified voice; facilitators tend to manipulate participatory processes to exclude marginalized groups and present their own views as those of the whole community; participation systems are time-consuming and hard to scale; and policymakers fear community participation will slow implementation. An example is the ward committee system installed by the “developmental” legal frameworks as a model for community participation, which is largely perceived in practical terms as ineffective in advancing community participation. The committees serve more as consultative forums providing an advisory and facilitating role than as forum for the community to express their voices (Nyalunga 2006; Buccus et al. 2007). These ward systems are therefore increasingly considered as an item to be checked off on the official’s checklist of the project. Generally, the lack of community participation in political and municipal processes remains one of the major challenges to democracy in South Africa. This has resulted to costly service

⁵ Batho Pele, a Sotho translation for “People First,” is an initiative of the South African Department of Public Service and Administration to get public servants to be service oriented, to strive for excellence in service delivery, and to improve efficiency and accountability to the recipients of public goods and services. The eight principles which allow citizens to hold public servants accountable for the level of services they deliver are: consultation service standards, access, courtesy, information, openness and transparency, redress, and value for money (South Africa 2005a).

delivery, protest demonstrations, and violent confrontations (Atkinson 2007). The Gautrain has been criticized for its lack of significant public consultations and legislative debates before it was approved and put to tender.

The third and final accountability challenge within PPPs is their management and evaluation. Not much thought has been given to this phase of PPPs. This may be partly due to the precontractual focus of the PPP Unit and a legislative vacuum in this area. Treasury Regulation 16.7.1 (2004) provides for the following: “The accounting officer or accounting authority of the institution that is party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved in Treasury for (a) measuring the outputs of the PPP agreement; (b) monitoring the implementation of the PPP agreement and performances under the PPP agreement; (c) liaising with the private party; (d) resolving disputes and differences with the private party; (e) generally overseeing the day-to-day management and (f) reporting on the PPP agreement in the institution’s annual report.” Several challenges are observed in this provision.

First, it provides broad powers to the accounting officer of the institution to implement, manage, enforce, and monitor PPPs according to the mechanisms and procedures as approved in Treasury. In reality, the institution’s accounting officer does not have much authority over the private party because the private party is not part of the government’s democratic chain of command. Second, there is no express provision for a monitoring and evaluation framework. The Tanzanian PPP Act No. 18 (Tanzania 2010) provides for a monitoring and evaluation framework comprised of a project management plan, performance criteria, external audit and reporting requirements, submission of progress reports, verification of project assets and value, and stakeholder communications. Third, although the auditing and reporting of PPPs is implied, the role of the Auditor-General is vaguely defined. The PPP Manual (South Africa 2004a) charges the Auditor-General with auditing the annual report of an institution in terms of Treasury Regulation 16 to the PFMA (South Africa 1999) and the Auditor-General Act No. 12 of 1995 (South Africa 1995), which are founded on the relevant provisions of the constitution. There are no specific principles and guidelines for internal and external auditing of PPPs. Furthermore, it is optional for the Auditor-General to conduct performance audits on any aspect of a PPP, and there are no provisions for social and environmental auditing of PPPs or follow-ups on the Auditor-General’s audit. It is only recently that the Parliamentary Standing Committee on Public Accounts followed up on the

Auditor-General's three qualified audit opinion reports issued in 2007/2008, 2009/2010, and 2009/2010 by oversight visits to the PPPs in the Free State, the Northern Cape, and Limpopo (South Africa Parliamentary Communication Service 2011b).

Fourth, although mention is made of dispute regulations, there is no provision for arbitration, and disputes involving customers or users of PPP facilities. UNCITRAL (2004) underscores the need for arbitration and a provision for disputes involving customers and users. It is implied from the PPP Manual (South Africa 2004a) that disputes are settled by mediation, amicable negotiations, or in courts, but there is no mention of arbitration. One may infer that this is because the legislative framework for arbitration in South Africa, which is principally regulated by the South African Arbitration Act No. 42 of 1965 (South Africa 1965) is widely considered to be outdated and in need of reform. UNESCAP (2011) advocates that most dispute resolution mechanisms should be in line with international practices and requirements given the expectation of large-scale investments from the foreign private sector.

6 .Techniques for Enhancing Accountability

Having examined the challenges to accountability inherent in the legal framework, it stands to reason that an appropriate legal and policy framework with simplified and clearer legal procedures, few interpretation possibilities, and practical and comprehensive operation manuals for implementation would enhance accountability. The first section below suggests some guidelines for legal and policy considerations, while the second sections provide some specific considerations for amendments.

6.1 Guidelines for Review of Legal and Policy Framework

The Intergovernmental Relations Act No. 13 of 2005 (South Africa 2005b) provides a framework for national, provincial, and local governments to facilitate coordination in the implementation of policy and legislation. In this regard, the different spheres of government may establish governmental forums on PPPs to deal with issues of alignment, integration, and coherence. To this effect, amendment might take the form of a single national PPP legislative framework that would guide uniformity in procurement in the different spheres of government. Such a framework would provide for a single, coherent, and detailed set of rules that apply equally to all public entities with clarity, consistency, and flexibility. This would be consistent with the trend in modern PPP legislation such as the Tanzanian PPP Act No. 18

of 2010 (Tanzania 2010); the Punjab PPP Infrastructure Act IX of 2010 (Punjab 2010); the Zambian PPP Act, 2009 (Act No. 14; Zambia 2009); and the Manitoba PPP Transparency and Accountability Act (Bill 34; Canada 2012).

For a start, the various universally acceptable legislative principles for PPP and strategies for enhancing accountability developed by international organizations should be adopted and harmonized within the South African PPP context. For example, UNCITRAL (2004) has developed a set of recommended legislative principles and model provisions to assist domestic legislative bodies in establishing favorable legal frameworks for privately financed infrastructure projects. Also, several strategies for accountability have been outlined by international organizations such the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP 2011), the United Nations Economic Commission for Europe (UNECE 2008), the Organisation for Economic Co-operation and Development (OECD 2007), and the United Nations Economic Commission for Africa (ECA 2005). Amongst these principles are coherent PPP policy, capacity building, risk sharing, putting people first, transparency, responsiveness, the rule of law, and the present and future needs of society.

Furthermore, the different PPP policy guidelines should be timely updated and formalized, taking into consideration lessons learned from implementation of PPPs, in order to ensure that the operation of PPPs is consistent with these policies. There are several factors to be considered in the revised PPP policy. One is for the policies to elaborate on techniques of enhancing transparency by providing for the following: more competition in the tendering process; judicial review of procurement decisions; legal constraints on government discretion during bidding processes; protection of private property; and the limit of preferred treatment to certain classes of suppliers. Another consideration is for the policy manual to incorporate mechanisms of public, contractual, managerial, and community accountability together with planned policies and strategy for community engagement. Furthermore, PPP policies should adopt the principle of openness towards document disclosure, while acknowledging the need to protect commercial confidentiality where appropriate. Also, these policies should clearly define the responsibilities of each partner, ensure clarity of responsibilities even as roles develop, and monitor the achievement of goals over the duration of the PPP. This is because there is a tendency for shared accountability in PPPs to become in practice joint irresponsibility with no one accountable (Jones and Stewart 2009). In addition, high-risk sanctions should be considered in case of noncompliance. Sanctions should not be perceived

only as “slap on the wrist,” “symbolic,” or “window dressing,” or aim at protecting senior management from blame, as these would negatively impact important ethics-related outcomes and employee commitment to the organization. Finally, the various incentive techniques for the different parties involved in PPPs should be carefully considered during the negotiation of a partnership contract. For example, while elected officials have the incentive of meeting the demands of voters, municipal officials may be encouraged through performance measurement that is linked directly to successful delivery through the partnership. Private partners, on the other hand, have the incentive of maintaining a sustainable business and winning future contracts.

6.2 Suggested Areas for Amendment

Three major areas for legislative amendment are considered in this section. These are transparent procurement procedures, community participation, and effective and efficient monitoring evaluation systems.

6.2.1 Transparent Procurement Procedures

A simplified and efficient procurement process will lower transaction costs and shorten the time taken in negotiating and completing deals. Nelson (2001) considers the following four variables for assessing transparency that may be useful in establishing transparency within PPP: completeness of the disclosed information, i.e., what is disclosed or kept confidential; accessibility in terms of location, language, and cost; timeliness; and the existence and quality of recourse for stakeholders who are not satisfied.

With regards to completeness of disclosed information, mechanisms for information disclosure that will provide a better understanding of the project by the general public, remove misgivings, and facilitates public participation are crucial. For example, the cabinet should regularly disclose revenue figures from the concessions it awards. The South African government has taken a positive step to disclose the cost estimates of the Gautrain rapid rail link that had ballooned from R3.5-4 billion in 2000 to R30.462 billion in 2011. Also, the National Treasury took a serious step in enhancing compliance monitoring and improving transparency and accountability in supply chain management with the Insurance Instruction Note in terms of the terms of section 76(4) (c) of the PFMA (South Africa 2011a). The Note provides for the following: publication of names of bidders with respect to advertised competitive bids above the threshold value of R5 million; verifying the names and identity

numbers of directors and shareholders of companies; auditing bidding processes for bids in excess of R10 million, and publication of awards in the *Government Tender Bulletin* and other media. Another measure to enhance the disclosure of information would be to establish adequate procedures within the legislation for identifying, evaluating, and selecting a tender, and also the criteria for scoring bids. Establishing a two-step tendering process might avoid costly design exercises in the first stage and would ensure wide participation of private bidders by eliminating costly design efforts (UNESCAP 2011). Also, a provision that clearly defines the rights and responsibilities of the private partner and a clear procedure for systematic planning and identification of a project is crucial.

Accessibility includes ensuring that information is communicated in a language appropriate to all. Besides the media, other channels of communication such as workshops, open public discussions, and public hearings ensure that the poor and those living in informal settlements are reached. Community structures such as School Governing Bodies (SGBs), Community Policy Forums (CPFs), Development Forums (DFs), Clinic Committees, and Roads Forums can provide citizens regular opportunities to solve problems and make decisions.

Timeliness refers to disclosure of useful information in a regular and consistent manner. A timely disclosure of risks and the performance of a PPP during the developmental stages, for example, enables the public to carefully monitor the project. To this end, it is important for each project's website to provide consistent disclosure of proactive information to the public on risk and performance of the contract as well as on accounting systems. Also, the parliament, through its committees on PPPs, should examine PPP contracts timely from inception to development, ensure that they are delivered according to the provisions of the contract, and ensure that due follow-up is made on the Auditor-General's report. In this way, the findings of the Auditor-General will achieve the desired effect of correcting aberrations and improving operations. In the United Kingdom, for example, the National Audit Committee investigates and discloses inefficient utilization of public funds and reports to the public (English and Guthrie 2003).

Finally, with regards to the existence and quality of recourse for dissatisfied customers, a complaints handling mechanism for customers with guidelines, that record complaints, and monitor and evaluate service delivery is relevant. Call centers such as those obtained for the Gautrain are a possibility for all PPPs. However, it is crucial that measures are taken to ensure that those at the call center at any given time are knowledgeable on a

given PPP and are able to act promptly on customers' complaints rather than just being there to answer phones. Also, the dispute resolution provision should be reviewed in line with international practices and requirements, given that large-scale investments from the foreign private sector are expected. Therefore, complaint resolution should go beyond the current process of dialogue, mediation and the judicial processes implied in the PPP Manual (South Africa 2004a) to include arbitration, expert determination, and adjudication by a regulatory authority. The UNCITRAL (1985) guideline on financed infrastructure projects provides clauses related to dispute resolution that may be considered for inclusion in the contract (UNESCAP 2011).

In addition to the above four principles of information disclosure, accessibility, timeliness, and recourse for dispute, the current anticorruption clause in the PPP Manual (South Africa 2004a) and other clauses of commitment to ensure that PPPs adhere to norms linked to accountability would enhance transparency. One of these clauses is the Integrity Pact developed by Transparency International. It provides an agreement between the government department and the bidder for public-sector contracts to abstain from bribery during both the selection and the implementation of the contract, and to disclose all commissions and similar expenses paid in connection with the contract (Farlam 2005). Another clause is the Extractive Industries Transparency Initiative (EITI) launched at the World Summit on Sustainable Development in Johannesburg, South Africa, in September 2002. This is a PPP between governments, international organizations, companies, nongovernmental organizations, investors and business, and industrial organizations to increase transparency, avoid corruption, and improve governance transactions between governments and companies in the extractive industries (Aaronson 2011). It should be mandatory for every PPP to adopt and comply with the following four international accountability standards: principle-based standards, certification standards, reporting standards, and process standards. The Gautrain has taken a positive step in this regard; it has an Independent Certifier, an Independent Environmental Control Person, an Independent Socio-Economic Monitor, and a Dispute Resolution Board. Finally, Batho Pele's eight principles of consultation, service standards, access, courtesy, information, openness and transparency, redress, and value for money (South Africa 2005a) should be incorporated within the PPPs.

6.2.2 Monitoring of PPPs

There are several ways in which the monitoring of PPPs within the legal framework may be enhanced. First, although the management and monitoring of PPPs is implied in the PPP Manual (South Africa 2004a), an efficient monitoring and evaluation framework within the legislation is crucial. Second, the scope of the power of the Auditor-General should be elaborated. A starting point might be to incorporate and customize the principles and guidelines for auditing PPPs drawn from the International Organization of Supreme Audit Institutions (INTOSAI) to the South African context in ways that encourage transparency, accountability, and value for money. In India, the principles and guidelines for auditing PPPs are currently drawn from INTOSAI and customized within the Indian context in ways that bring out transparency, accountability, and value for money (Comptroller and Auditor General of India 2009). In addition, besides exercising financial supervision and control over the delivery of PPPs, the Auditor-General should be able to detect and investigate the outcomes of PPPs, as well as handle issues on environmental, administrative, and managerial fairness. The Auditor-General office should serve as a point of contact between government agencies and the public with regards to complaints or problems requiring investigation of accountability in PPPs. Furthermore, given that a corporate governance structure is implied within the PPP Manual (South Africa 2004a), it should be mandatory for all PPPs to operate within the corporate governance structure, with the roles of the internal auditor, the external auditor, and shareholders clearly specified. To this end, the internal auditor should be concerned with the future of the PPPs and the external auditor with the past PPP activities, while shareholders focus on the overall performance of the PPPs.

Third, it would be useful to provide for civil society organizations and the critical voice of the mass media, the press, and investigative journalism to monitor and evaluate the quality of service and performance of PPPs. It is possible to emulate the example of Bangladesh (Transparency International 2010), where a Community of Concerned Citizens consisting of youths, nongovernmental organizations, civil society organizations, and other interested parties was formed to monitor and evaluate the quality of service and performance of PPPs and make reports through the press and the media. This Community of Concerned Citizens may conduct service delivery surveys through the use of household questionnaires, key informant interviews, and community surveillance. With the impending approval of the Protection of State Information Bill, there is a need to strengthen the Freedom of Information laws to help the media in their watchdog role. Also, the systematic and institutional use of

client feedback mechanisms such as citizen report cards, independent peer reviews, and social surveys would serve as a check mechanism.

6.2.3 Community Participation

A built-in mechanism for public participation throughout the PPP process would enhance accountability. UNECA (2011) advocates for a widely representative participatory decision-making process that takes into account concerns of stakeholders, including those who may be adversely affected. Given the inherent limitations of the current representative ward committee system of participation and the constraints to effective community participation, a participatory system in both the invited and invented spaces that goes beyond the current system envisaged in the developmental legislations is crucial. Adopting the standard set of procedures for participation outlined by the United Nations Tools Model to Support Participatory Urban Decision-Making (2001) may increase efficiency gains in PPPs. The Tools Model outlines the following four phases of the participatory decision-making: preparatory and stakeholder mobilization, issue prioritization and stakeholder commitment, strategy formulation and implementation, and follow-up consolidation.

7. Conclusions

In a liberal democracy like South Africa, where the government is responsible to the citizens and the local community for exercising its authority in a way that reflects public interest, accountability to an innovative policy tool such as the PPP is crucial. This paper has identified several noticeable shortcomings that have emerged from the PPP legislation as a result of the increasing international best practice in accountability and good governance. These are issues of transparency, disclosure and participation. If the South African government is to attain the Millennium Development Goals by 2015 and also to carry out its other national development strategies, it has to serve public interest and deliver public goods and services more effectively through PPPs. Given that there is an overarching requirement of transparency and accountability in the procurement of PPPs already captured in Section 217(1) of the Constitution (Act No. 108; South Africa 1996), an appropriate legal and policy framework with simplified and clearer legal procedures, transparent procurement procedures, an effective and efficient evaluation system, and community participation is crucial.

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