

# SWAZILAND GOVERNMENT



## PUBLIC PRIVATE PARTNERSHIP POLICY

## CONTENTS:

1. FOREWORD.....	4
2. Introduction.....	7
3. Applicability .....	7
4. Custodians of the PPP Policy .....	7
5. Policy vision and rationale for Public Private Partnerships .....	8
6. Prerequisites for successful implementation of the Public Private Partnerships Policy framework.....	9
7. Public Private Partnerships.....	10
8. Principles Governing Implementation of PPPs.....	11
i. Principle 1: Public interest.....	12
ii. Principle 2: Value for money .....	12
iii. Principle 3: Transparency .....	13
iv. Principle 4: Stakeholder consultation.....	13
v. Principle 5: Consumer rights .....	13
vi. Principle 6: Consumer access guaranteed .....	14
vii. Principle 7: Measurable performance .....	14
viii. Principle 8: Creation of an appropriate regulatory framework .....	14
ix. Principle 9: Appropriate sharing of risk.....	14
x. Principle 10: Structuring contracts to manage future uncertainty.....	14
xi. Principle 11: Provide specific mechanisms for future price adjustments.....	15
xii. Principle 12: Participation by Swazi Citizens must be facilitated.....	16
xiii. Principle 13: Regulations- The legislative framework that will ensure the public sector enters into PPP contracts that will secure the interests of the public and the private sector.....	16
INSTITUTIONAL FRAMEWORK.....	18
9. The establishment of a PPP Unit within the Ministry of Finance.....	18
10. Use of transaction advisers .....	19
11. Steps in setting up a PPP .....	20

12.	The process of launching a PPP project .....	21
13.	Management of Projects .....	22
14.	Training Considerations .....	22
15.	Prerequisites for successful implementation of the Public Private Partnerships Policy frameworks.....	23
ANNEXURE 1 .....		24
Terminology: A Glossary.....		24



## 1. FOREWORD

The Government of Swaziland is currently facing challenges in infrastructure development and public service delivery. Government has made slow progress in addressing the infrastructure gap due to low implementation rate of capital projects, low economic growth rate and the most recent cash flow challenges faced, not only by Swaziland but by international economies as well. The demand from the citizenry for more and efficient social service delivery has also increased. There is demand for better quality education services, better health care facilities and service to name a few.

Though infrastructure development and public service delivery has traditionally been perceived as the sole responsibility of the public sector, increasingly, this perception has been changing. Both the private and public sectors have realized this as a collective responsibility and have joined hands in pursuance of this goal resulting in the development of Public Private Partnerships (PPPs).

Through PPPs, both the private and public sector stand to benefit. The public sector is able to leverage private sector resources for infrastructure development, improvement and maintenance. The public sector is also able to tap into private sector efficiencies and also benefit from skills transfer from the private sector. The private sector, on the other hand, gets an opportunity to influence and introduce changes and innovations to 'traditional Government methods' both for infrastructure development and service delivery because PPPs are based on the

output and the process is left to the private sector. They also provide a good financial and skills resource investment opportunity for the private sector.

The Swaziland Government is no exception and has also come to a point of acknowledging the role to be played by the private sector in infrastructure development and service delivery thereby contributing not only to improving the lives of Swazis but also stimulating the economy which will result in economic growth.

This justifies the need to put in place a policy framework that sets out the principles for implementing PPPs.

In furtherance of this objective, (harnessing private sector resources to improve and develop infrastructure and improve service delivery), the Ministry of Finance has developed the PPP policy. This policy seeks to facilitate use of the PPP approach through:

1. Setting out broad principles for developing projects through PPPs;
2. Providing a framework for identifying, approving, structuring, awarding and managing PPP projects;
3. Standardizing some vital interpretations and processes so that a clear, consistent and common position is adopted and followed in key issues;
4. Ensuring value for money rationale is adopted with fair and optimal risk allocation in project structuring; and,
5. Developing governance structures to facilitate competitiveness, fairness and transparency in procurement.

Development of this policy is just the first of many steps to be taken on our journey to our ultimate destination where we will have the necessary legal and institutional framework and skilled PPP experts both in the public and private sector. This journey requires that both sectors collaborate, engage and create relationships underpinned by transparency, good faith and commitment. I should

emphasize that this should all be done with the betterment of the Swazi citizen at the core. While the private and public partners will both benefit, we should always have it in our hearts that the intended beneficiary of these partnerships is the Swazi Citizen.

**MAJOZI V. SITHOLE**  
**Minister for Finance**

## **2. Introduction**

The Government of the Kingdom of Swaziland is committed to improving the quality of life of its citizens through the provision of quality infrastructure and services. This is in recognition of the economic developmental role infrastructure plays in any economy. In pursuance of this goal, the Government acknowledges the role the private sector can play in the provision of infrastructure and services through Public Private Partnerships (PPPs).

Public Private Partnerships provide a means of cooperation between public and private sector for development and/ or operation of infrastructure and provision of services, help improve quality and efficiency of public services, provide the necessary resources to cover investment needs and also provide a means to harness private sector investment, in particular private finance and the related operational efficiencies in the provision of public assets and services.

Whilst PPPs offer a number of advantages, they are not a miracle cure to all infrastructure and service challenges of the public sector. PPPs tend to be very complex hence the need for a policy to guide and regulate its implementation.

## **3. Applicability**

This policy shall apply to all Ministries and Government Departments, state owned or state controlled enterprises and local authorities.

## **4. Custodians of the PPP Policy**

The overall responsibility for the implementation of this policy rests with the Ministry of Finance.

Line Ministries and Departments, state owned enterprises and local authorities have the responsibility to identify potential projects and initiate placing them in the budget cycle and to conduct the initial feasibility study.

#### 5. **Policy vision and rationale for Public Private Partnerships**

Government's vision in adopting this PPP policy is to accelerate the provision of infrastructure at a high level by utilising the resources of the private sector and providing an investment opportunity for the private sector. (It is important to provide a balance of interest in the rationale for the partnership.)

The rationale for adopting a PPP approach is based on the following:

***Speeding up delivery*** – this refers to the fact that private sector capital is obtained through PPPs, thereby avoiding delays in obtaining necessary budgetary allocations through government procedures.

***Efficiency*** – the private sector is generally better at delivering projects on time and on budget than the public sector.

***Managing maintenance*** – PPPs can provide for maintenance services thus preventing under-provision for maintenance due to the low political profile of maintenance operations and budgetary constraints.

***Cost savings*** – the private sector can be more innovative in terms of construction and design, thus delivering products at a lower capital and/or life-cycle costs.

***Ease of Capital Budget Planning*** – PPP procurement enables government to more easily budget for its capital costs over an extended period of time through planned unitary payments, rather than attempting to manage large capital budgets over multiple periods.

*Better services to customers* – the private sector tends to be more flexible and service oriented than the public sector, especially where user-fees are concerned.

*Enabling the public sector to concentrate on its core functions* – by removing much or all of the responsibility for peripheral functions, PPPs allow the government to concentrate on its key functions.

*More efficient use of state owned land.* Often government owns land in strategic locations but without the capacity to develop it.

## 6. Prerequisites for successful implementation of the Public Private Partnerships Policy framework

Government will ensure the successful implementation of PPP projects by:

- Having a strong political commitment to policy implementation;
- Adopting an appropriate legal framework;
- Ensuring that private sector participants are able and willing to participate in the processes sponsored by the Government. This will include ensuring that the prospective private sector participants will be able to provide the necessary services and capital required by Government;
- Create effective regulatory authority or authorities where necessary, especially when private sector monopolies are expected to exist;
- Creating appropriate management and information systems, including the introduction of generally accepted accounting practices;

- Explanation of the potential benefits (and costs) of private involvement to the general public, including labour;
- Maintaining full transparency and accountability in all processes;
- Avoid inappropriate Government interference except in respect of any regulatory responsibility;
- Create a technical assistance unit situated in the Ministry of Finance with a sufficient budget to provide an advisory and support role to agencies embarking on PPPs, and given the appropriate regulatory authority.

## 7. **Public Private Partnerships**

Public private partnerships are defined as “the contractual agreement between Government or public enterprises or other Government entities and the private sector whereby the private sector will provide services and or facilities in sectors and services traditionally provided by the public sector.” Such contracts will be characterized by:

- a real and substantial transfer of risk to the party best suited to manage it; ( alternatively efficient risk allocation)
- A long term relationship;
- Ownership of the assets vests in the government.

PPPs arrangements differ in purpose, service, scope, legal structure and risk sharing. Annexure 1 includes brief descriptions of most of the different models and the acronyms commonly used.

Four main types of PPPs can be distinguished:

- a. Management contracts where the private sector is given responsibility for maintenance and operation of a specific facility,

such as water or sewage treatment works. This includes lease contracts.

- b. Projects which are implemented by private companies with state funds. These range from Build, Operate, Transfer (BOT) to Design, Build, Operate and Maintain (DBOM, or DBO). In these cases the private companies receive a fee for their services.
- c. Projects financed by the private sector where the capital expenditure and operating costs are remunerated by the state on an annual basis. These are known as Design Build Maintain and Finance (DBMF) or Design Build Operate, Maintain and Finance (DBOMF). This method can be used to provide buildings to be used by the public sector.
- d. Concession projects partly or fully financed by the private sector and fully remunerated by user charges – this is common in the roads sector where tolls are charged to meet the costs. Management includes responsibility for meeting the demands of new customers, maintenance of the whole network, collection of user fees etc. Concessions are typically for a period of over 20 years to allow the cost of investment and of good maintenance to be recovered. This includes franchise contracts.

## **8. Principles Governing Implementation of PPPs**

Swaziland is at the beginning of the learning curve as far as PPPs are concerned. It is therefore essential that policies and procedures are kept straightforward, with the minimum of red tape and scope for government interference. The following are some of the principles, which should form the basis for PPPs.

PPPs should:

- Be in the public interest;
- Provide value for money;
- Be conducted transparently;
- Be procured transparently;
- Be developed with full stakeholder consultation;
- Not infringe consumer rights;
- Share risk.

This policy should be based on the following key principles:

i. Principle 1: Public interest

PPPs must be designed in the public interest. This means that they must stand the test of good value, and must provide an enhanced service to the public.

Over the life of the contract, the PPP should provide better value than the current public sector arrangement. In order to establish this, good practice requires that the current costs of providing the service should be established in advance. These costs should be in present-day “net present value” (NPV) terms.

ii. Principle 2: Value for money

Although this is the main adjudicating factor it must be applied in a broad context. There are sometimes delivery issues due to budgeting and personnel and skill constraints which must be considered. These must be considered when evaluating the value that a PPP brings. Value for money must be considered in terms of the overall project (which might include in-

kind contributions from the public sector, typically land), and in terms of the PPP contract.

This requires comparison between the life-time cost of providing a service through public sector channels and the PPP. It must take the long term view, and look at the totality of expenditure and income. Such calculations, however, must be undertaken with an understanding of the difficulty of making financial forecasts into the future.

When comparing bids, value for money is the most important criterion. Care must however be taken in so doing to ensure that like is compared to like (e.g. using the same assumptions regarding base date, discount rate, inflation assumptions etc).

#### iii. Principle 3: Transparency

PPPs must be designed and operated with the maximum transparency compatible with good business practice and generally accepted accounting and procurement practices.

#### iv. Principle 4: Stakeholder consultation

PPPs must recognise the interests of all stakeholders, and full consultation must be undertaken. PPPs must respect existing conditions of service and long-term pension rights. Affected public sector employees must be informed at the earliest possible stage and have the opportunity to contribute positively to the development of projects.

#### v. Principle 5: Consumer rights

PPPs must be regulated to ensure that consumer rights are protected in any potentially monopolistic situations.

vi. Principle 6: Consumer access guaranteed

PPPs must be designed so that no consumer is unfairly excluded from receipt of a service. This does not prevent charges for services being made, but requires that the charges are fair and reasonable.

vii. Principle 7: Measurable performance

Contracts must be structured so that payments are made on measurable performance, and performance specifications, intervention rights and censure will be important components of the contract.

viii. Principle 8: Creation of an appropriate regulatory framework

An appropriate regulatory framework must be created, including monitoring and regulation of the project after closure.

ix. Principle 9: Appropriate sharing of risk

Although the principles regarding risk allocation should be clearly established in the guidelines, the final balancing of risk and reward has to be the subject of negotiation. The negotiation of risk, and the use of risk mitigation measures (such as insurances and guarantees) by the private party, should be used to reduce the risk cost to the government. At the same time government must work to limit any risks which are within its control. Among these is to ensure that bids are dealt with fairly, transparently and speedily.

x. Principle 10: Structuring contracts to manage future uncertainty

Contracts should be drafted to permit unforeseeable changes in circumstances without jeopardising the fundamentals of the contract, or exposing either party to undue risks.

While these principles should be at the core of the policy, it should be remembered that in the early stages the rigid application of a government policy can stifle creativity. It is therefore desirable for the legislative and administrative framework to:

- Give public entities flexibility in the types of agreements they may enter into but ensuring that the laid down the procurement process is adhered to;
- Allow contracts to be awarded on the basis of best value, not just lowest price;
- Allow a mix of private and public funding;
- Allow for a mix of private, public, donor and other multilateral funding possibilities;
- Allow long-term leases of government assets;
- Provide a procedure for dealing with unsolicited proposals;
- Avoid the need for legislative or regulatory change in the implementation of a contract.

xi. Principle 11: Provide specific mechanisms for future price adjustments

Mechanisms must be provided for the mutually equitable adjustment of the fee or the structure of user charges in such a way as to prevent profiteering at the cost of either the public entity or the private sector.

- xii. Principle 12: Participation by Swazi Citizens must be facilitated

Provision must be made for the participation of local citizens in both small and large contracts whether through prescribed sub-contracting, partnerships or equity holding in the special purpose vehicle (SPV).

- xiii. Principle 13: Regulations- The legislative framework that will ensure the public sector enters into PPP contracts that will secure the interests of the public and the private sector.

The law shall be articulated in terms of this policy for the protection of the public sector and to give certainty to the private sector taking into account the privatisation policy and procurement process.

### **Public sector**

The law will include provision -

- To ensure line departments operate within the policy guidelines and that due process is followed;
- To ensure that acceptable processes are followed, which will include, *inter alia*, placing the project on the public entity's budget according to normal planning and budgetary guidelines, and the completion of a proper Feasibility Study;
- To ensure transparency and fairness between bidders;
- To ensure consultation with stakeholders;
- To ensure that PPPs are affordable by the public sector entity over the long term;

- To force line Ministries and Departments to follow a normal proactive budget process and not a reactive process;
- To create a PPP unit;
- To allow for flexible shortened processes for small and shorter term projects;
- To ensure that a sector regulator is in place where required;
- Ensure that line departments monitor the PPP project and act accordingly if and when deviations occur;
- The public sector entity will be obliged to nominate a specific individual to take overall responsibility for the PPP project;
- To mandate the Auditor General to monitor projects at random to ensure the application of value for money;
- To include contractual clauses on dispute resolution and arbitration, termination, monitoring of projects and management of contracts to empower Government to restructure projects and make decisions.

### **Private sector**

The law will include provision to:

- Give certainty to the private sector;
- Ensure that cost recovery mechanisms are formalised;
- Provide rectifying actions in case of Force Majeure, on performance deviations and default;
- Create opportunities for the local private sector and stipulate requirements for the involvement of local firms and private individuals.

## **INSTITUTIONAL FRAMEWORK**

The creation of competent, autonomous and accountable regulatory authority will include the following-

### **9. The establishment of a PPP Unit within the Ministry of Finance.**

The PPP Unit with a small permanent staff complement will be created in the Ministry of Finance to fulfil the following functions:

- Assist line ministries and departments to identify opportunities and conceptualise PPPs in priority sectors;
- Enhance private sector participation in the creation of state assets and provision of better services;
- Provide advice and support to line departments contemplating a PPP;
- Appoint sector specialist consultants to assist line ministries and departments ;
- Administer and manage the consultants' budget outside the normal budget cycle on a multiyear basis;
- Act as a technical secretariat to the committee instituted to approve PPP projects;
- Keep a record of the long term commitments in terms of fees and other expenses incurred by the implementation of PPP projects;
- Ensure proper and regular monitoring of the projects by the line departments;
- Act as the first stop in dispute resolution to attempt to amicably resolve differences;

- Mitigate risks to government by ensuring equitable risk allocation;
- Avoid future disputes by ensuring fair reward for risk.
- Be the appropriate regulatory authority for PPPs.

#### **10. Use of transaction advisers**

It will be a requirement that all line ministries and departments employ suitably qualified transaction advisers, unless they can clearly demonstrate that they have the skills in-house. Transaction Advisers are experienced individuals or teams (depending on the complexity and size of the project) who represent the interests of the ministry/ department in project design and contract negotiations. For larger projects transaction advisory teams typically consist of three or four people. They will include technical, legal, financial and environmental advisers and be responsible for advising on the

- Initial Feasibility Assessment ;
- Development of the draft contract, payment and performance mechanisms, allocation of risks between the parties ;
- Execution of the deal, including evaluation of the bids, and analysis of the technical components of the bids, and negotiation of a final contract.

They may also be involved in the implementation of the contract.

The PPP Unit would normally take responsibility for procuring the services of transaction advisers, and would use a competitive process to establish a panel (“a Framework Contract”) which could be called upon to assist when required. This form of procurement allows speedy appointments while retaining the competitive element.

## 11. Steps in setting up a PPP

- i) Cabinet provides priority areas for the medium term (three years);
- ii) The Government Ministry/ Department identifies a PPP project in line with the priority area;
- iii) Cabinet approval is sought for authority to proceed with the PPP. The request for Cabinet approval should address the following:
  - a. The strategic and operational benefits of the proposed PPP for the Government Ministry in terms of its strategic objectives, Government policy and priorities;
  - b. The affordability of the PPP for the Ministry- (PPPs usually have long term financial implications and therefore need to be budgeted for. Again, it is important that all PPPs are co-ordinated centrally so that Government is closely monitoring its commitments).
  - c. The proposed allocation of financial, technical, operational and any other risks between the parties;
  - d. Demonstrate the anticipated value for money to be achieved by the PPP; and
  - e. Demonstrate the Ministry's capacity to procure, implement, manage, enforce, monitor and report on the PPP.
- iv) The Procurement Procedure- must be in accordance with Regulations on public Procurement to:
  - Ensure transparency and accountability in public procurement while maintaining appropriate confidentiality of information;
  - Achieve economy, efficiency and maximum competition to ensure value for money in the use of public funds;
  - Promote more diverse private sector participation, through fair and non-discriminatory treatment of tenderers;

- Develop economic capacity in Swaziland, through the provision of opportunities for Swazi companies to participate.

The preferred procurement procedure for all PPP projects is the open tender method. All deviations for use of any other method must be approved by the Tender Board in line with Regulations on Public Procurement.

- v) Tender Board Approval- after evaluation of the bids, a report for Tender Board approval must be submitted.
- vi) Contract negotiation and signing- The Controlling Officer signs the negotiated contract with the preferred bidder.

## **12. The process of launching a PPP project**

To protect the interests of all stakeholders due process will be followed. This process will consist of the following minimum steps although some may be undertaken simultaneously.

- Consider and approve the suitability of the PPP process to the project;
- Include in the long term budget
- Undertake an initial appraisal and project development
- Submit to PPP Unit and cabinet for an “in-principle” approval
- Appoint transaction advisors
- Call for Expressions of Interest (EOI)
- Evaluate EOI and develop shortlist
- Submit for approval (Tender Board)

- Call for detailed proposals
- Evaluation of detailed proposals
- Approval (Tender Board)
- Negotiations with preferred bidder
- Contractual agreement signed

### **13. Management of Projects**

During implementation the responsibility for managing the project will vest with the project sponsor with recourse for advice to the technical assistance unit.

After commissioning of the project the management and monitoring of the project will remain the responsibility of the relevant line department, State Owned Entity or local authority. These entities shall also make all necessary budgetary provisions.

The Auditor General shall have the responsibility on a random basis to audit PPP projects to measure and assess the value for money obtained with public money. To give effect to this all contracts shall contain an empowering clause.

PPP projects shall also be subject to procurement audits by the Public Procurement Agency.

### **14. Training Considerations**

The PPP Unit will train project teams involved, or likely to be involved, in PPPs in all aspects of managing PPPs. Further training in business principles shall be considered where the PPP or outsourcing involves ex-employees undertaking the project. The PPP Unit shall work with relevant regional and international organizations for capacity building and support with project development, procurement and implementation.

**15. Prerequisites for successful implementation of the Public Private Partnerships Policy frameworks**

Government will ensure the successful implementation of PPP projects by:

- Having a strong political commitment to policy implementation;
- Adopting an appropriate legal framework;
- Ensuring that private sector participants are able and willing to participate in the processes sponsored by the Government. This will include ensuring that the prospective private sector participants will be able to provide the necessary services and capital required by Government;
- Create effective regulatory authority or authorities where necessary, especially when private sector monopolies are expected to exist;
- Creating appropriate management and information systems, including the introduction of generally accepted accounting practices;
- Provide explanation of the potential benefits (and costs) of private involvement to the general public, including labour;
- Maintaining full transparency and accountability in all processes;
- Avoid inappropriate Government interference except in respect of any regulatory responsibility;
- Create a PPP unit with a sufficient budget to provide an advisory and support role to agencies embarking on PPPs.

# ANNEXURE 1

## **Terminology: A Glossary**

Not all readers of this document will be familiar with the terminology used in the PPP environment. For the convenience of such readers a list of terms and expressions commonly used is given below. This also serves to avoid some confusion as there are variations in the use of the terminology in different parts of the world.

**Availability charge:** This is a fixed charge normally levied to recover capital and interest redemption and fixed operational expenditure.

**Buy Build Operate (BBOT):** A public asset is transferred to the private sector normally with upgrading and refurbishment clauses, operated by the private sector for the period and transferred back to the public sector or is operated in perpetuity.

**Build Own Operate (BOO):** The private sector is responsible for building, ownership in perpetuity and operating or providing a service.

**Build Own Operate Transfer (BOOT):** The private sector is responsible for designing building financing operating and transferring to government.

**Build Operate Transfer (BOT):** The private sector is responsible for building and operating specific infrastructure to provide a service for a limited period.

**Build Transfer Operate (BTO):** The private sector is responsible for building, transferring ownership to a government body and operating for a period to provide a service.

**Concession:** An agreement which government or a government agency concludes with the private sector whereby the private sector will undertake to provide a product, service or facility normally provided by the government and its agencies. In general the term concession is used to indicate that private capital has been employed and that the concessionaire will recover his costs from fees charged to the users.

**Corporatisation:** The process whereby government creates a state owned company to be managed according to private sector principles but with government remaining the sole shareholder. This is often the precursor to privatisation or the introduction of a PPP.

**Credit Enhancement:** A mechanism by which a third party will improve the quality of the credit exposure to a principal borrower or consumer by undertaking to make good any defaults that may occur in total or partially.

**Design and Build (DB):** Similar to a turnkey or Engineering, Procurement and Construction (EPC) contract.

**Design Build Finance Operate (DBFO):** The private sector is responsible for designing and financing the construction and managing the operation.

**Economic life of an asset:** The estimated period before the asset has to be replaced. In substantial projects this tool is also employed to ensure intergenerational equity.

**Engineering, Procurement and Construction (EPC):** A contract under which the private sector takes responsibility for the complete product from start of design until completion of construction.

**Franchise or Affermage :** Terms used to denote a concession to exploit an already constructed facility. It is similar to a concession but without the initial construction phase. The term service concession is also sometimes used.

**Life Cycle Design:** The approach of using net present value (NPV) calculations for both capital and future operating and maintenance costs to arrive at the lowest cost over the economic life of a project.

**An Off-Take Agreement :** An agreement whereby an undertaking is given by a specific consumer or consumers to purchase or pay for a minimum utilisation of infrastructure created to satisfy the demand of a specific consumer or group of consumers. This is also often referred to as a availability charge or levy.

**Private Participation in Infrastructure, Private Finance Initiative, Private Sector Participation and Privately Financed Projects** are all used to indicate the private sector's participation in infrastructure provision and services.

**Privatisation:** The process whereby government divest itself of a facility or the obligation to provide that service by selling it in its entirety or partially to the private sector.

**Prudential limit:** The limit that a financial institution sets itself as the maximum exposure on any individual client sector or geographic area at any given point in time.

**Public Private Partnership:** Normally defined as a partnership between the public sector and the private sector for the purpose of delivering a service or project traditionally falling within the ambit of public sector.

**Turnkey:** A contract under which the private sector takes responsibility for the complete product from start of design until completion of construction and hands over the completed project to the public partner.

**Usage Charge or Variable charge:** A charge normally covering operational costs which vary depending on utilisation.