



CONTRIBUTION BY

HON. NICO SMIT, MP

DTA OF NAMIBIA

ON

**THE PUBLIC PRIVATE PARTNERSHIP BILL AS INTRODUCED BY THE MINISTER OF
FINANCE**

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PARLIAMENTARY OFFICE

T: +264-61-288 2563 | **F:** +264-61-226 494
E: g.martin@parliament.na | **W:** www.dtaofnamibia.org
Parliament Building, Southern Wing, Office 154, Windhoek, Namibia
PO Box 41272, Ausspanplatz, Windhoek, Namibia



Honourable Speaker, Honourable Members,

I rise today to comment on the Public Private Partnership (PPP) Bill as tabled in this August House by the Minister of Finance, Honourable Calle Schlettwein. The stated aim of leveraging private sector capital to finance infrastructure development projects, and thereby lessen the burden on already strained state coffers, places critical significance on the manner through which the former is intended to be achieved, namely Public – Private Partnerships. Although limited, Namibia has some experience in this method of public and private sector collaboration towards the provision of basic services and/or infrastructure development. In essence then, the PPP Bill serves also as an indication of Government's shift in focus and priority towards PPP as a vehicle for service delivery.

There can be no denying that Namibia's developmental and infrastructural needs are enormous, and therefore it cannot be expected that the burden of financing such must fall to government alone. Even in developed countries with advanced economies, governments are unable to carry the cost of financing infrastructure development by themselves. Because Government has traditionally been solely responsible for the delivery of public services, the extent to which it can develop additional infrastructure is determined by the extent of fiscal space available for the undertaking of such projects. In this regard, private sector investment has the potential to close funding gaps and boost infrastructure development.

Honourable Speaker, Honourable Members,

An article in a local publication reports that “PPP projects will include economic assets and related services in sectors like roads, railway, ports, airports, electricity, the communication, tourism infrastructure and amenities,” and “will also apply to social services like healthcare, education, accommodation, public housing, court and correctional facilities, municipal assets and related services. These include water supply, sanitation, refuse collection, sewage disposal, water treatment plants, municipal markets, rural roads and bus stations. Other focus areas for PPPs are industrial infrastructure, common laboratory and testing facilities for industries, and industrial parks.”

From the above it is quite obvious that PPPs are viewed by Government as an ideal vehicle for service delivery in an extensive range of areas. One of the objects of the PPP Bill is to set out the guidelines and regulations for public private partnership projects. Two further objects of the Bill are to promote private sector participation and investment in the provision of public services and/or public infrastructure assets or services. While the Bill deals at length with sections containing regulations regarding PPP projects, there is very little contained within the sections thereof that speak to promoting private sector participation in public service provision, and more specifically private sector investment in public infrastructure asset or service provision.

It is therefore important that one pause to reflect on the basic business principles that underpin public and private sector entities in the discharge of

their respective functions. Public sector entities responsible for the provision of public services are run on a cost recovery basis, meaning that the recovery of the cost of providing a particular service is the primary driving principle. In contrast, private entities providing a service/function or product do so on a profit driven motive, which in turn means that a specific entity providing a good and/or service not only aims to recover the cost of provision, but aims to derive a profit from rendering such goodand service.

It is therefore of utmost importance that PPP projects amount to more than the effective privatization and/or outsourcing of public service provision. It is imperative that PPP projects be in the public interest in terms of their nature, as well as the financial risk and capital commitments that public entities will be exposed to through these initiatives. A further key priority must be to ensure that services provided and infrastructure developed be done at an affordable rate. Unfortunately, recent local examples of PPP experiments have yielded the delivery of services that have proven unaffordable to most ordinary Namibians. The recent servicing of land in the Academia neighbourhood in Windhoek, and the development of the Emona Private Hostel at the University of Namibia (Unam) Campus in Windhoek are cases in point.

Honourable Speaker, Honourable Members,

The PPP Bill is a welcome and much needed development in Namibia's legal framework. Firstly, and as mentioned, it seeks to establish a set of rules and guidelines for joint infrastructure development and public service provision

between the public and private sectors. Considering the range of areas in which PPP projects can be initiated, and the repeated emphasis placed thereon by the Finance Minister himself as a source of financing, further points to the importance thereof. ~~Secondly~~ the PPP Bill also deals with public procurement, and because PPPs, ^{vehicle} as it can be expected, will become a frequently used and significant ~~in~~ terms of the value of PPP projects ~~vehicle~~. In this sense the Bill is significant, as from the outset it should by all means aim to instil credibility, fairness, transparency and accountability in the process.

In applying my mind to the PPP Bill as tabled by Hon Schlettwein, I have come across a number of issues I wish to raise. In the first instance, Part Two of the Bill deals with the Public Private Partnership Committee, namely its establishment, powers and functions and composition etc. What this section however lacks entirely are provisions that make the proactive declaration of assets and interests by members of the Committee and related persons a mandatory requirement. This is the third time in a session of Parliament during this year, that in a contribution to proposed legislation I have stated the need for proactive asset and interest declaration. I will however repeat, for a third time, my assertion that one of the primary reasons why conflict of interest presents itself as such a significant problem in Namibia is that a legal requirement for asset and interest declaration is often absent.

Secondly, Section 16(1) states that the public entity must undertake or cause to be undertaken a feasibility assessment to determine the public private partnership is in the public interest. Section 16(2) outlines the specific components to be included in such feasibility study. Considering that the PPP

project will be initiated by a public entity and private entity, it is questionable whether to allow a public entity or its hypothetical private sector partner to conduct a feasibility assessment on a project in which both parties have a material interest. Instead, it is my submission that Section 16(1) be altered to require that such feasibility assessment be conducted by an independent third party.

Honourable Speaker, Honourable Members,

Section 17 deals with the review and approval of a feasibility assessment, along with Transaction Approval 1. This section requires that a public entity must submit the feasibility assessment referred to in the above paragraph, to the PPP Committee for approval, prior to which clearance from Treasury must be obtained regarding the acceptability of government funding commitments. It further sets out steps for action once the PPP Committee has received a response from Treasury. What is lacking from these provisions is a clause that bestows upon the Committee the authority to review all feasibility studies submitted to it, for in the absence of such, the PPP Committee in this regard merely serves as a go between Treasury and the public entity. ?

The establishment of a Procurement Committee by a public entity entering into a PPP project is provided for in Section 18 of the Bill. This section calls for either the establishment of the procurement committee, or that use be made of a procurement committee which it has established in terms of the Procurement Act. I wish to pause here and ask which Procurement Act Section 18(b) refers to,

for as I recall the Public Procurement Bill was tabled in this August House for discussion in 2015, later withdrawn and is yet to make a re-appearance.

Furthermore, Section 18 is mum on the composition, and functions and powers of the procurement committee, save to say that such entity is established to evaluate bids and recommend results ^{of} the procurement officer. Directly related to the above is Section 27(1) which, in the context of selection of the preferred bidder, states that "the first ranked bidder must be referred to as the preferred bidder." Under the Definitions as set out in the PPP Bill, "preferred bidder" refers to the bidder whom has been ranked number ¹ in accordance with the process and criteria set out in request for proposal. Also related to this is Section 29, dealing with the exclusive competency of accounting officer. This section bestows upon the accounting officer of a public entity the sole authority to enter into a PPP agreement on behalf of that public entity.

18, 27(1) + 29

The connection between these three sections of the Bill is as follows. The issue I am plagued with when considering Section 18 is why the procurement committee has only been afforded the limited authority to recommend results of the procurement process to the accounting officer. By definition, the procurement committee, in recommending results of the procurement process to the accounting officer, must necessarily recommend that ^{the} bidder which has emerged from that process as the preferred bidder. However, the Bill is silent on whether the accounting officer is mandated by law to accept the recommendation, but instead confers upon him/her ultimate authority in entering into PPP agreements.

Experts

The Namibian case provides ample examples of instances where private entities have emerged as “preferred bidders” from public procurement selection processes, only to have an accounting officer award the contract/tender to another entity, or for such a contract/tender to be cancelled and ultimately re-advertised often with terms and conditions favouring specific private entities. The problem is that too much authority is vested with the accounting officer in this regard, and considering the political nature of the appointment of Permanent Secretaries and accounting officers in Namibia, it is no surprise that the process has been subject to political influence and personal interest.

In an endeavour to ensure credibility, transparency and accountability of the process it is imperative that a number of issues be addressed in this regard. In the first instance, the definition of a bidder that has been ranked number one by the selection process should not be referred to as the “preferred bidder”, but instead should be the “outright winner” of that process. The imperative is close the space where legal loopholes exist, and thereby engender confidence in the process. Secondly, the recommendation of the procurement committee must have a binding effect on the accounting officer, who should also be afforded the authority to call for a review of the selection process should there be grounds justifying such. In this case, provisions relating to such review are also needed in the Bill.

Honourable Speaker, Honourable Members,

Of course, a glaring oversight and an effective knock-out blow to the PPP Bill is the fact that it lacks, in its entirety, a section dealing with financial accounting and reporting. There is nothing in the Bill that requires PPPs to adhere in internationally accepted standards of accounting and reporting, to keep or cause to be kept such records. Furthermore, as it stands there will be no legal requirement for PPPs to submit such accounting and financial records to the Office of the Auditor General. *and from there to parliament* Wherever public monies are spent or financial risk is placed on a public entity, it is of paramount importance that legal provisions require the adherence to the abovementioned standards.

Section 36 of the Bill deals with exemptions from a provision thereof, where Subsection 2(a) confers upon the Minister the authority to grant a public ~~an~~ exemption as contemplated above. This section of the Bill is sufficiently vague that if confers upon the Minister the authority to grant a public entity such an exemption on virtually any grounds. Once again, as lawmakers charged with defending the public interest, our driving imperative must be to ensure that the space created by legal loopholes is closed. In doing so, we strengthen not only the legal framework, but also confidence in and credibility thereof as well as that of the processes it governs. What is required in this regard is to set out in specific detail the conditions under which a Minister may grant such exemption.

Honourable Speaker, Honourable Members,

I have spoken at length today, and I am grateful that you have indulged me as such. The truth is that the PPP Bill will become an important part of Namibia's legal framework, considering our country's developmental deficit and the prioritisation of public private partnerships as an important vehicle to overcome this. While I support the development of a legal framework that aims to govern and regulate the engagement in collaborative projects between Government and the private sector in principle, I must however state that the PPP Bill in its current form suffers from significant shortcomings. Our aim must always be to move forward, and as such we cannot create new processes and systems that will be plagued by the same issues as current systems and processes against our better judgement.

In conclusion, subject to the issues raised with respect to Part Two of the Bill, Sections 16(1), 17, 18, 27(1), 29, 36, the definition of "preferred bidder", and the omission of clauses relating to international standards of accounting and financial reporting, in principle I support the Bill.

I so move.