

GENERAL INFORMATION

Capital: Gaborone

Population: 2,6 million (2021)

GDP (USD): 17,61 billion (2021)

LEGAL AND INSTITUTIONAL FRAMEWORK

PPP Laws

- Public-Private Partnership Policy and Implementation Framework, 2009 (PPPPIF 2009)
- No PPP dedicated law

Other Applicable Sectoral Law

- Public Procurement Act, 2021 (PPA);
- Public Procurement Regulations, 2023 (PPR);
- Public Finance Management Act, 2011 (PFMA);
- Public Procurement and Asset Disposal Act, 2001 (PPADB Act); and
- Public Procurement and Asset Disposal Regulations, 2006 (PPADB Regulations).

PPP Units

- A PPP Unit within the Ministry of Finance
- Public Procurement and Asset Disposal Board (PPADB)

Definition

Both the PPPPIF and PFMA define a PPP.

(Art. 3.1 of PPPPIF, 2009)

(Art. 2 of PFMA, 2011)

For the PPPPIF “a Public-Private Partnership” involves a contractual arrangement between a governmental institution and a private party whereby the private sector party provides public infrastructure and/or infrastructure related services and where the provision of such infrastructure and/or infrastructure related services is:

- (a) Based on measurable output (end result) specifications;
- (b) Governed by a payment mechanism that provides payment only on delivery of services at required standards;
- (c) Accompanied by a transfer of financial and operational risks with consequential financial effects; and
- (d) Demonstrates Value for Money to Government (Art. 3.1)

For the PFMA a “Public Private Partnership means a commercial transaction between an entity to which the act applies and a private party in terms of which the private party:

- (a) for commercial purposes performs a public function or undertakes the establishment, maintenance or management of public property, whether on behalf of the entity or for own

- account;
- (b) assumes substantial financial, technical, operational risk; and
- (c) receives a benefit for the performance of the function or for the establishment, maintenance or management of the public property, which benefit may be in the form of:
 - (i) consideration paid by the entity from its funds;
 - (ii) charges or fees collected by the private party from customers for the provision of the public function or for the establishment, maintenance or management of the public property, or
 - (iii) a combination of such consideration, charges or fees.

General Principles

(Art. 3.19 of PPPPIF, 2009)

Implementation of the Public-Private Partnership Policy has to accord with the following principles:

- (a) public Sponsoring Institutions purchase services, not assets;
- (b) the services to be purchased are expressed as outputs or service standards, rather than on input specifications;
- (c) risks are allocated to the party best able to manage them;
- (d) the private party is compensated according to performance and penalties are imposed where performance fails to meet established performance indicators;
- (e) a public-private partnership must demonstrate “Value-for-Money” based upon affordability to the public institution and transfer of significant risk to the private party;
- (f) processes for the procurement and implementation of public-private partnerships must be transparent and accountable; and
- (g) Standardized procedures, as listed in the Public-Private Partnership Framework, must be used to minimize transaction cost and time.

Tendering and contracting procedures/ Choice of the private partnership

(Art. 5.7 and 5.8 of PPPPIF, 2009)

(Art. 12-28 PPR, 2023)

Project Procurement Phase (art. 5.7 / 5.8, and Annexure 3 of PPPPIF 2009)

The procurement phase will commence once approval of the feasibility study has been secured from the PPP Unit. PPP procurement, like other forms of government procurement, is required to follow the highest standards of transparency and will be implemented under the relevant procurement regulations.

(Art. 53 PPA, 2021)

The procurement methods are established under Part IV of the PPR:

- Open domestic and international competitive bidding (art. 14 and 15 PPR);
- Restricted domestic and international bidding (art. 16 and 17 PPR);
- Request for proposal with competitive negotiations (art. 21 PPR)
- Competitive dialogue (art. 22 PPR);
- Unsolicited bids (art. 24 PPR);
- Best and final offer (art. 25 PPR); and
- Negotiated procedure (art. 26 PPR).

When a procuring entity conducts procurement by means of an unsolicited bid, a bidder assumes responsibility of the project preparation costs. Unsolicited bids are channeled into a competitive procurement process and procuring authorities are allowed to apply the Swiss Challenge system as procurement strategy (art. 24 PPR).

Except as otherwise prescribed, a procuring entity shall conduct procurement by means of an open domestic bidding. (art. 53 PPA)

A procuring entity may use a method of procurement other than open domestic bidding to accommodate the circumstances of the procurement concerned but shall seek to maximise competition to the extent practicable. (art. 53 PPA)

If a procuring entity uses a method of procurement other than open domestic bidding, it shall, subject to the approval by an Accounting Officer, provide justification for the use of that method. (art. 53 PPA)

Project Evaluation

(Annexure 3 of PPPPIF, 2009)

Guidelines of this step include the business case/feasibility study (appointment of transaction advisor, undertaking detailed analysis of project in terms of costs and risk assessment and determining preferred option) by institutions, transaction advisors, Project Committee and PPP Unit

Negotiation and Signature of PPP Contracts

(Art. 84 and 85 of PPPPIF of Annexure 3, 2009)

When all details are recorded, and reflected in the PPP agreement and schedules and all conditions precedent clearly defined, formal settlement arrangements may be initiated. At this time, the Institution should commence discussions with the preferred bidder on development of the Institution's contract management plan (art. 84)

When the PPP agreement is in a form suitable for execution, it must

be presented by the PPP project committee to the PPADB, for contract award (art. 85)

Rights and Obligations of the public partner
(Art. 25 PFMA, 2011)

Any sum of money due from Government in respect of any debt lawfully incurred for and on behalf of Government including but not limited to payments made pursuant to contracts entered into for the provision of goods and services through public private partnership mode of procurement, shall be charged on and paid out of the Consolidated Fund.

Rights and Obligations of the private partner

No provision in the Policy.

Obligations of both public and private partners

No provision in the Policy.

Applicable Law / Dispute resolution
(Clauses 37 and 38 of Annexure 2 of PPPPIF, 2009)
(Art. 104, 112 PPA 2021)

Governing Law and Jurisdiction, states that the PPP Agreement is governed by the laws of the Republic of Botswana (clauses 37 and 38 of Annexure 2 – Standard Clauses for Use in PPP Agreements)

A contractor who is aggrieved by a breach of any of the provisions of the Public Procurement Act shall, at first instance, lodge a complaint before an Accounting Officer for review. (art. 104)

A contractor who is aggrieved by any decision of an Accounting Officer may appeal to the Public Procurement Tribunal within 14 days from the date of the decision of the Accounting Officer. (art. 112)

EXAMPLE OF PROJECTS STRUCTURED AS PPP

Power

KSE Orapa, Mmashoro IPP

Water & Sanitation

Glen Valley Wastewater Treatment Plant