

# Enhancing accountability in public–private partnerships in South Africa

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## ABSTRACT

South Africa, like other developing countries, has joined other nations around the world in resorting to public–private partnerships (PPPs) as an integral strategy to improve its deeply rooted socio-economic, political, fiscal and societal problems and to meet the pressure of attaining the goals of national and international developmental projects. In spite of the reasons advanced for the importance of PPPs as an alternative service-delivery option, several doubts about the efficacy of accountability and suggestions that it may undermine public control have been expressed. Given the importance of accountability, this paper seeks to determine some approaches to enhance accountability in public–private partnerships in South Africa. It identifies some of the accountability challenges and suggests ways of overcoming them.

**Key words:** public–private partnership, accountability, South Africa, democracy, community participation

## Introduction

Over the last decade, South Africa, like many developing countries, has resorted to the use of public–private partnerships (PPPs) as a strategy to deal with its deeply rooted socio-economic, political, fiscal and societal problems. To this end, it has adopted the use of PPPs as an integral strategy in national and international developmental plans such as the Millennium Development Goals (MDGs),<sup>1</sup> Accelerated and Shared Growth Initiative for South Africa (AsgiSA),<sup>2</sup> Medium-Term Strategic Framework (MTSF 2009–2014),<sup>3</sup> and National Development Plan

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(NDP), which charts the planning and progress of the country until 2030. Given the growing value of commitment to infrastructure development through PPPs, there has been increased attention to issues concerning the accountability of PPPs as developmental projects. PPPs are alternative service-delivery arrangements to traditional public procurement that may enhance cost-effectiveness and service delivery through accountability (Ford & Zussman 1997; Bovaird 2004; Brinkerhoff 2007). The reasons advanced for the importance of accountability in PPPs include: keeping proper financial records, performance outcomes, programme effectiveness, efficiency, and manifesting expectations (Light 1993; McCandless & Wright 1993; Romzek & Dubnick 1987; Behn 2001; Acar, Chao & Kaifeng 2008; Jones & Stewart 2009). However, there are suggestions that PPPs can reduce accountability and undermine public control (Sands 2004; Grimsey & Lewis 2007; Hodge & Coghill 2007; Siddiquee 2011; Reeves 2011). Jones and Stewart (2009) argue that the tendency towards shared accountability in PPPs becomes joint irresponsibility in practice, with no-one ultimately being accountable. If public–private partnerships are to play an important role in the infrastructure development of South Africa and assist in realising national and international developmental plans, the problems of accountability must be addressed. The next section reviews PPPs within the context of developing economies, given that South Africa is a developing economy. This is followed by an overview of accountability in PPPs in South Africa. The various frameworks for accountability in the context of PPPs are then examined. This leads to a discussion of the techniques available for enhancing accountability in PPPs in South Africa. The paper ends with some concluding remarks.

### PPPs in developing economies

South Africa is the leading sub-Saharan African country with respect to PPPs and, like most developing countries, it is in the first stage of the PPP maturity scale that Deloitte and Touche (2006) refer to as the ‘developing market’. South Africa together with Latin America and the Asia Pacific region constitute the major rich and fast-growing markets in infrastructure PPPs in developing countries (Pessoa 2006). Statistics from the World Bank Private Participation in Infrastructure (PPI) database reveal that between 1999 and 2003, Brazil ranked first, Argentina sixth and South Africa 15th out of the top 25 developing countries with respect to PPPs in infrastructure (Thomson 2005). Furthermore, the use of PPPs peaked in 1999, totalling almost US\$755 billion in private investment across nearly 2 500 private infrastructure projects. Approximately 14% of public sector infrastructure in roads, schools, water reclamation, hospitals, prisons and the provision of health and social

services was provided through PPPs between 1990 and 2004 (Deloitte & Touche 2006). A PPP forum convened by the Organisation for Economic Co-operation and Development (OECD) in Vietnam in March 2008 shows that more than 75 000 greenfield projects initiated within a decade were PPPs (Capital 2012).

However, since 2003, the World Bank PPI database has recorded a continuous drop in investments in infrastructure PPPs in most developing countries with the exception of the Middle East and North Africa (Thomson 2005). A wide range of governance issues have limited the ability of PPPs to produce the desired outcomes, including lack of accountability, institutional weaknesses, widespread corruption, lack of transparency, poor regulatory environments, power imbalances between the private sector partners, lack of political commitment and lack of trust, skills, will and expertise to effectively manage the funds (Sader 2000; Thomsen 2005; Bangura & Larbi 2006; Aaronson 2011; Brinkenoff & Brinkenoff 2011). Furthermore, case studies on PPPs show a large number of existing projects that have been terminated or classified as distressed, or the terms have been renegotiated under duress (Thomson 2005; Pessoa 2006; Capital 2012). Logistics and policy requirements for successful PPP implementation have not been systematically explored (Jamali 2004). An overview of the accountability issues in PPPs in developing countries will reveal some of these accountability challenges.

## Accountability in PPPs in South Africa

Before considering the various accountability issues in PPPs, it is necessary to understand the meaning of the term 'public-private partnership'.

The South African Treasury Regulation No. 16 of 2004 defines PPPs as a contract between a government institution and/or municipality and a private party where the private party performs an institutional function and/or uses state property in terms of output specifications; and substantial financial, technical and operational risk is transferred to the private party, which benefits through unitary payment from government budget and user fees. This definition is limited to contractual commitments between the public and private party when risk is transferred. The regulation does not specify the degree of risk to be transferred; neither does it capture elements such as trust, mutual commitment, or social and community obligations, which are necessary accountability considerations in the definition of PPPs. Evidence shows that PPPs work well where there is commitment and trust between the government and participating enterprises (Rein & Stott 2009). The fact that the Minister of Economic Development advocated that partnerships be centred on trust and on the notion of two parties coming together to harness the diverse

interests of the nation for efficient delivery (Creamer 2012) is evidence of the need for close and mutually beneficial collaboration in PPPs. Therefore, Bovaird's (2004) definition provides an important dimension for understanding accountability in PPPs because it incorporates the concept of mutual commitment and captures the notion of trust. Bovaird (2004) defines PPPs as working arrangements based on mutual commitment over and above that implied in any contract between public sector organisations with any other organisation outside the public sector. Drawing from the above two definitions, PPPs within the context of this paper are considered as long-term contracts between the government and the private sector where there is manifestation of mutual commitment and trust, and whereby risk, rewards, resources, skills, expertise and finances are shared. Among the vast number of accountability issues that pervade PPPs in South Africa, the three that will be discussed in this section are the complexity of the legislation and policies, transparency and the monitoring of PPPs.

Firstly, on the issue of legislation and policies, several concerns have emerged. An overview of the different laws and policies will put these challenges into perspective. The overarching requirement of transparency and accountability in the procurement of PPPs is captured in Section 217(1) of the Constitution of the Republic of 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. Furthermore, the different laws and policies governing PPPs in South Africa emphasise accountability and transparency and advocate for value for money in the procurement of goods and services. Among these pieces of legislation are Treasury Regulation No. 16 of 2004; the Municipal Systems Act (No. 32 of 2000), the Municipal Finance Management Act (No. 56 of 2003) and the Promotion of Administrative Justice Act (No. 3 of 2000). The major policy documents that guide the implementation of PPPs at national level are the PPP Manual (NT 2004a) and Standardised Public–Private Market Provisions (NT 2004b) developed by the PPP Unit of the National Treasury. Notwithstanding the existence of these pieces of legislation and policies, several challenges have emerged. A major concern is that the legislation is cumbersome and complex, resulting in a culture of rule-bending and the tendency to use corrupt means to avoid these rules. It has been observed that a variety of partnerships have emerged over time, some strictly adhering to the terms of the law, and others established within the law, but outside the structures of the PPP legislation and policies (Mitchell 2007; Levinsohn & Reardon 2006). Perhaps, the complexity of legislation and policies may be the reason for the slow roll-out of PPPs. For example, the Municipal Finance Management Act

(MFMA) and the Municipal Systems Act (MSA) 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 faced with the challenge of having to satisfy the requirements of both Acts might rather defer to creating partnerships that are not consistent with the structure of PPPs (Fombad 2013b). On average, only two PPPs have been rolled out per year at national and provincial level since 2004, and the whole process from inception to procurement is long and complex, taking between 24 and 36 months (Burger 2004; Aiello 2010). Another concern is that the legislation and policies do not protect the legitimate interests of all stakeholders in fostering partnerships. In this respect there is little provision for input from citizens and other stakeholders from inception to procurement.

It could be argued that the involvement of the community might further slow down the PPP process because the community do not speak with a unified voice and often tend to be passive receivers of services rather than voluntary participants. The reality is that completely excluding the community on issues of PPPs undermines the provision of Section 152 of the Constitution and the Batho Pele<sup>4</sup> principles (DPSA 2005). For example, the Gautrain<sup>5</sup> has been criticised for the lack of significant public consultations and legislative debates before it was approved and put out to tender (Stephen 2005). Private companies have also expressed concern about the lack of a legislative framework that ensures private sector involvement in the management, financing and ownership of infrastructure (Haarhoff 2008). As a result, many unclarified issues in the provisions such as *force majeure*, penalty and indemnity caps have resulted in some projects being termed unbankable and unpalatable due to unmanageable risk. Another challenge is the lack of functional mechanisms to ensure that the different pieces of legislation are enforced. Furthermore, although the various policy documents are 'living documents' that are supposed to be updated from time to time, mindful of the opportunities that the implementations of PPPs present as stipulated in the PPP Manual (NT 2004a), the development of these policy documents appears to have been stagnant since 2004 and the documents have only recently received attention for review (Aiello 2010; Haarhoff 2008). Also, the reference in the PPP Manual (NT 2004a) that a PPP manual for municipalities will be developed has not yet been realised.

Secondly, notwithstanding the overarching requirements of transparency and accountability in procurement mentioned in section 217(1) of the Constitution and Treasury Regulation No. 16, several transparency concerns are evident in PPPs. Among these are procurement irregularities, non-disclosure and corruption. Procurement irregularities in PPPs are evident from the increasing demand for the

need of sound procurement policies that have been emphasised lately (Venter 2011; Creamer 2012). For example, a review by the Minister of Correctional Services on prison PPPs highlighted 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, Treasury Regulation No. 16.5.3 of 2004 states that the procurement procedure must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It does not specify exactly the criteria or expectation for achieving transparency and fairness. Furthermore, the provision of Treasury Regulation 16.5.4 stipulates 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, operational and financial transfer were applied in the evaluation of the bids, demonstrating how the criteria were applied with respect to the preferred bid. However, there is no mention of an evaluation committee for bid selection; neither is there any mention of the criteria for scoring the bids.

Furthermore, the credibility of a cost–benefit analysis to determine value for money in PPPs raises procurement concerns. There are no proactive steps to ensure that PPPs meet the criteria of affordability, value for money and substantial technical operational and financial risk transfer. Although the Public Sector Comparator (PSC) is used to determine value for money, it is a hypothetical scheme, and there is no provision for full publication of the details used for the calculations. Moreover, given the multitude of risks and the complexity of PPP contracts, the risk transfer process at the contract appraisal stage tends to be subjective and exaggerated, resulting in poor risk allocation and cost overruns. As a result, it is estimated, for example, that the Kimberley prison facility built at a cost of R300 million would end up costing R1.5 billion over a 15-year period (Venter 2011). Also, the initial cost estimates of the Gautrain Rapid Rail Link of R3.5 to R4.0 billion in 2000 escalated to R30.462 billion in 2011 (Flanagan & Serrao 2011).

The non-disclosure of PPP arrangements between the public and private partners on the grounds of ‘commercial confidence’ protection of ‘property rights’ or on grounds of data protection raises issues of transparency. The leader of the South African main opposition party, the Democratic Alliance, has thus called for the Gautrain Rapid Rail Link contract to be made public and has lamented that too much has been done in secret (Campbell 2011). Although the need to protect trade secrets does warrant keeping some documents out of the public domain, the lack of appropriate and rigorous public scrutiny makes it difficult for the public to identify hidden costs transferred to the government in the long run by the private sector.

It also makes it difficult for the public to make appropriate comparisons between alternative options and undermines attempts to regulate and monitor the outcomes. Secrecy must not come at the expense of the public right to know and the proper disclosure of information (IPPR 2001). This is particularly important, because public funds are committed for a long period of time. Therefore, in order to maintain public trust and ensure fairness, all parties must be willing to expose their proposals to public scrutiny.

Furthermore, the superficial and inconsistent manner in which information about PPPs is disclosed in the PPP quarterly report also raises transparency concerns. For example, the last quarterly report came out in December 2010. The information usually provided is limited to the name of the project, the government institution responsible for the project, the PPP type, contract duration, date of financial closure, private partner(s), financing arrangements, transaction advisors to government, value of the project, capital value of contracts signed to date, and procurement and benefit to government (NT 2009: 5).

Corruption is another important transparency issue surrounding PPPs. The PPP Manual (2004a) and Treasury Regulation 16 make provision for accounting officers to sign off an anti-corruption policy for PPP projects, and call for forensic audits if fraud or corruption are suspected. However, PPPs still offer considerable latitude for manipulation by companies and government officials, which is difficult for the public and anti-corruption agencies to spot. For example, South Africa's former Minister of Transport resigned as a director of First Rand Bank in 2003 after it was alleged that he had accepted gifts and payments worth more than R500 000 from a former African National Congress fundraiser whose company was part of the winning N3 toll road consortium (West 2003). In 2009, the South African Minister of Finance expressed concern about the number of government tenders that had become tainted by corruption and lamented the pervasive influence of the culture of gifts, wining and dining, and all manner of enticement (Creamer 2011). Furthermore, Treasury Regulation 16.5.3 provides that active measures must be taken to promote Black Economic Empowerment (BEE) at all stages of PPP by including preference for the protection or advancement of persons disadvantaged by unfair discrimination in compliance with relevant legislation. The Code of Practice for Black Economic Empowerment in the PPP Manual (NT 2004a) thus informs how BEE must be approached. However, BEE deals have been affected by 'fronting' where companies appoint nominal black directors or shareholders to win contracts that are in fact managed and owned by white people.

The third major accountability challenge in PPPs in South Africa is that little thought has been given to the monitoring structures within the PPPs. Treasury

Regulation 16 makes provision for the accounting officer or accounting authority of the institution that is party to a PPP agreement to ensure that the PPP agreement is properly implemented, managed, enforced, monitored and reported according to the mechanisms and procedures as approved by National Treasury. In reality, there are no mechanisms and procedures in place. Moreover, the institution's accounting officer usually has little authority over the private party, because the private party is not part of the government's democratic chain of command.

In addition, the PPP Manual charges the Auditor-General to audit the annual report of an institution in terms of Treasury Regulation 16, the Public Finance Management Act (No. 1 of 1999) (PFMA) and the Auditor-General Act (No. 12 of 1995), founded on the relevant provisions of the Constitution. However, the extent and scope of the powers of the Auditor-General in the PPP Manual (NT 2004a) are vague. In effect, there is no clarity as to what exactly is to be audited in PPPs, and there are no provisions for social and environmental auditing. The reality is that the implementation of PPPs also affects social issues such as land resumption, town planning, employment, heritage and environmental protection. The PPP Manual makes it optional for the Auditor-General to conduct performance audits on any aspect of a PPP. The focus appears to be more on regulatory auditing than on forensic and performance auditing. This is because there are guidelines on accounting for PPPs (Accounting Standards Board 2008), but there are no guidelines for auditing PPPs. Furthermore, the extent to which the Auditor-General's reports achieve the desired effect of correcting aberrations is doubtful, because there appears to be no evidence of external auditing of PPPs' activities by the Parliamentary Standing Committee on Public Accounts. There was a long-overdue follow-up of the Auditor-General's three qualified audit opinion reports issued in 2007/08, 2009/10 and 2009/11. It was only in 2011 that the Parliamentary Standing Committee on Public Accounts decided to conduct an oversight visit to the prisons' PPPs in the Free State, Northern Cape and Limpopo from 27–29 July 2011 (Parliamentary Communication Service 2011). Before examining the different techniques for enhancing accountability in PPPs, it will be useful to examine the various frameworks of accountability in PPPs.

## Accountability perspectives in PPPs

Accountability is a complex, elusive, abstract, multifaceted and contested issue that can be approached in different ways, depending on the role, institutional context, era and political perspective. Four different perspectives of accountability that are important in the context of PPPs are the hierarchical perspective, the horizontal



perspective, and accountability with respect to the management of expectations and accountability as a virtue (Fombad 2013a, b).

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). In 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 for sanctions in the event of errors and shortcomings. The core elements in this dimension of accountability are principal–agent, answerability, giving account, accepting responsibilities, sanctions and redress, and structures through which accountability is achieved. Among the paramount structures in this perspective are bureaucratic, political, legal, markets, contractual, communal, managerial, professional, administrative and collaborative accountability (Romzek & Dubnick 1987; Sinclair 1995; Stone 1995; DeLeon 1998; Flinders 2003; Mulgan 2003; Demirag, Melvin & Iqbal Khadaroo 2004; Dowdle 2006; Mashaw 2006; Scott 2000; Boven & Schillemans 2009; Kolbila, Mills & Zia 2011). Hierarchical accountability is relevant within the context of PPPs, because they are public investments that affect the rights and interests of the public, and it therefore stands to reason that government officials are obliged to explain to the public how they provide public goods and services and fulfil the substantive values of democracy. However, hierarchical accountability is not very effective in PPPs because of the multiple complex and conflicting undertakings of stakeholders, resulting in blurring of public and private sector responsibilities (Mörth 2007).

Therefore, accountability as the management of expectations provides a practical and realistic approach to understanding accountability in PPPs. The management of expectations facilitates discussion of how multiple expectations generated within and outside the partnership, often with conflicting objectives, are managed in a non-hierarchical way (Romzek & Dubnick 1987; Kearns 1994; Acar et al. 2008; Demirag et al. 2004; Willems & Dooren 2011). This involves identifying partners' expectations, aligning goals, adjusting strategies, assessing implementation, communicating performance and facilitating learning (Kearns 1994; Romzek & Dubnick 1987).

The importance of integrity and moral responsibility in the performance of a public duty makes the final dimension of accountability, known as accountability as a virtue, crucial. This entails formulating a set of standards for the evaluation of the behaviour of public actors. An example is the Seven Principles of Public Life established by the United Kingdom's (UK) Committee on Standards in Public Life (also known as the Nolan Committee), namely, selflessness, integrity, objectivity, accountability, openness, honesty and leadership, which provide a valuable framework

for evaluating the ethical behaviour of public officers (Chapman 2000: 230–231). Dubnick (1998) and Blagescu, De las Casas & Lloyd (2005) have also attempted to conceptualise accountability as a virtue. Dubnick (1998), drawing from the works of social psychologists and ethno-methodologists, refers to accountability of conduct as the role accountability plays in an individual's conduct from both a social and psychological perspective, whereas Blagescu et al. (2005), in the global accountability framework, consider accountability as being open with stakeholders, engaging with them in an ongoing dialogue and learning from the interaction.

By and large, the perspectives examined in this section are all practically useful for understanding accountability in PPPs, and each complements and offsets the weaknesses of the other. For example, hierarchical accountability serves as a check to those answerable for performances in PPPs, while the multiple accountability relations in PPPs result in performance expectations from diverse stakeholders who are not strictly hierarchical superiors. Furthermore, accountability as a virtue is helpful in compelling public managers to adhere to professional ethics and responsible behaviour. Having thus considered the accountability perspectives, the next section will examine the different techniques for enhancing accountability in PPPs.

## Enhancing accountability in PPPs in South Africa

Given the existing challenges to accountabilities in PPPs, there is no doubt that there is a need to enhance accountability in PPPs. Among the numerous techniques for enhancing accountability in PPPs, six major ones are discussed in this section, namely, clarifying accountability relations, monitoring structures, transparency, ethical standards, risk transfer and institutional reforms.

### Clarifying accountability relations in PPPs

PPP's bring in different stakeholders with varying interests, resulting in the blurring of public and private sector responsibilities to the extent that shared accountability may result in general irresponsibility from all involved if not checked. Therefore, understanding the different accountability relations and ensuring that all are working properly and reinforcing one another marks a positive step. This will provide insight on those responsible for providing accountability, those to whom accountability is rendered, and how accountability is sanctioned. In general terms, the public and private partners, elected officials, public officials and the government are agents responsible for accountability in PPPs. For example, the public and private partners are legally bound to the contract, the rules of law and all the requirements of PPPs

in terms of the Public Finance Management Act. Therefore, the public and private partners should understand each other's needs and objectives and work together in an atmosphere of trust, mutual collaboration, shared responsibility, transparency and open communication (Haque 2004; Enright & Roberts 2001; Rein & Stott 2009). Hence, collaborative and reputational accountability between the public and private partner are crucial, because they are engaged in long-term integrated responsibilities that cannot be easily severed as in short-term contracts. Apart from having to account in terms of the contract, the private parties in the PPP are also accountable to the government that hires them to provide goods and services. Therefore, they need to improve the quality of their services to the government and ensure that value for money is achieved in implementing projects. In addition, the private parties are also accountable to the local community and citizens, who are service users, because poor service may result in immediate loss of business. They are also accountable to the shareholders, business partners, insurers and investors.

Citizens, government officials, Parliament, the electorate, the courts, tax payers, shareholders and the local community are the principals in PPPs. Elected officials, politicians and administrators are obliged to explain to the public how they are carrying out the PPP responsibility. In this respect, the public officials engaged in PPPs are accountable to their government department, which is accountable to the Minister, who in turn is accountable to the electorate through Parliament. This is because PPPs are institutions exercising public powers, using public resources and providing public services, and therefore need to be accountable to those on whose behalf they act (Jones & Stewart 2009). Furthermore, the executive is held accountable to Parliament, to the voting public and to an independent judiciary or other independent quasi-judicial bodies (Watson 2003). Parliament could also act as a check on the executive by scrutinising the PPP policies. By and large, the different accountability relations should mutually reinforce one another and are ultimately fed back to the public, because the overall responsibility for monitoring PPPs should rest with the public. Another important technique for enhancing accountability is to strengthen the monitoring structures.

## Monitoring measures

A key to accountability is to ensure that the responsibility for PPPs does not end once the contract has been awarded but rather that they should be monitored throughout the lifespan of the agreement. National Treasury's PPP Unit currently focuses more on the pre-contractual stages, and not much thought has been given to the design of post-project evaluation mechanisms for PPPs. This creates an accountability vacuum

at the operational stages. Parliamentary oversight, administrative institutions, community monitoring and accountability structures are the different monitoring measures that may strengthen PPPs.

### *Parliamentary oversight*

It is important for Parliament, through a PPP parliamentary committee, to carefully examine contracts between the public sector and private sector provider from inception to development to ensure that these contracts are delivered according to the contractual provisions. The findings of the parliamentary committee should be tabled in parliament and made available to the public. Furthermore, the parliamentary committee should regularly disclose revenue figures from the concessions it awards. In this way, the public will be better able to understand the reasons for the fluctuation of the prices of goods and services and better appreciate their rights and obligations. In the UK, for example, the National Audit Committee investigates and discloses inefficient utilisation of public funds and reports to the public (English & Guthrie 2003). Positive follow-up steps should be taken by the parliamentary committee to ensure that the findings of the Auditor-General are not reduced to a ‘twenty-four hour talking point’ and thereafter forgotten, but rather achieve the desired effect of correcting aberrations and improving operations.

### *Administrative institutions*

Apart from the institution’s accounting officer, the current monitoring agents for PPPs stipulated in the PPP Manual (NT 2004a) are the Auditor-General and the PPP Unit. However, as noted in section 3, the scope of the powers of the Auditor-General are vaguely defined, the accounting officer does not have direct authority over the private party, while the National Treasury may be considered as a bureaucratic government department and is likely to be mired in the business of power and politics. The expansion of the scope of the powers of the Auditor-General and the creation of other administrative institutions will therefore mark a positive step in strengthening accountability.

Firstly, with regard to expanding the scope and power of the Auditor-General, it is imperative for the principles and guidelines for auditing PPPs to be drawn from the International Organisation of Supreme Audit Institutions (INTOSAI) and customised for the South African context in ways that foster transparency, accountability and value for money. India has taken a positive step in this regard in that the principles and guidelines for auditing PPPs are currently drawn from INTOSAI and customised for the Indian context in ways that foster transparency,

accountability and value for money (Comptroller & Auditor General of India 2009). In addition, apart from the Auditor-General's current role of exercising financial supervision and control over the delivery of PPPs, he/she should be able to detect and investigate the outcomes of PPPs, and deal with issues on environmental, administrative and managerial fairness from the public regarding the actions and decisions of the PPPs. The office of the Auditor-General should also serve as a point of contact between government agencies and the public with regard to complaints or problems requiring the investigation of accountability in PPPs.

Secondly, the first consideration in creating administrative institutions should be the creation of a project structure with a management agency within the governance structure of each PPP similar to what exists for the Gautrain project. The Gautrain Management Agency (GMA) in the Gautrain project is required to ensure proper implementation of the concession agreement on behalf of the government, while the special purpose vehicle set up for the project is responsible for ensuring the management of the construction company. The successful resolution of a dispute between the GMA and the Gautrain Construction Company was due to the efficient operation of the monitoring system. There is also an Independent Certifier attached to the Gautrain project, who is supposed to assess whether the milestones of the project have, in fact, been achieved (Fombad 2013). A management agency within each PPP should be responsible for monitoring the proper implementation of PPPs, conducting monthly operational review meetings, and presenting quarterly reports on the project. In the United Kingdom, the private finance initiative contracts are monitored internally by the public sector procuring agency through monthly operational review meetings and quarterly strategic review meetings (Demirag et al. 2004).

Thirdly, the current independent strategic monitoring authority of the PPP Unit may be complemented through the creation of another independent institution to oversee, monitor, evaluate and audit the procurement, implementation and development of projects. Dachs (2010) advocates the separation of advisory and regulatory functions when driving the deal flow. He suggests that the PPP Unit should move away from National Treasury into a new government component under the brand name of Partnerships South Africa that will be 100% government-owned and will mainly have a project development function. The regulatory function will be exercised by the Director-General (Drapak 2010). However, this paper suggests the creation of an independent statutory council comprising members of the public and private sector who have considerable interest in the area of infrastructure development, but no vested interest. For example, in Australia, the federal government soon after its electoral success in late 2007 established Infrastructure Australia to address the

inherent shortfall in Australian infrastructure development (Johnston & Kouzmin 2010). Another consideration might be to involve an independent regulatory agency to assess and administer the contracts as evident in the role played by the regulator in the UK (Clifton & Duffield 2006).

### *Community monitoring*

Early and serious engagement and participation by the community in the policy- and decision-making processes of PPPs and the checks and balances from the community on their activities will facilitate monitoring. According to a World Bank (2011) report, successful service outcomes depend on the government working with citizens to design, implement and evaluate services with each party, each of which holds the other accountable. Also, the United Nations Millennium Project (UNMP 2005: 98) stresses the need for public managers to work more closely with community-based organisations, which at the very least should participate in the design and monitoring of plans through representations of the strategy group and regular civil society consultation. Perhaps the first step in engaging the community in participation in PPPs may be to sensitise them through information awareness campaigns in an attempt to obtain a radical shift from the perception that they are mere service receivers to accepting their responsibility as participants in service delivery. Another way to secure community participation is to ensure that there are clear and transparent channels of communication where elected officials, politicians and administrators are obliged to explain publicly, fully and fairly to the citizens how they are carrying out responsibilities that affect the public, and where concerns can be discussed in a language acceptable to all. If television is used as a channel for communication, it is crucial that the various local languages are used to provide information. In order to accommodate the views of the poor and other members of the community living in informal settlements, who may not have access to television, other channels of communication such as dialogue, workshops, open public discussions and public hearings could be used.

With regard to the checks and balances from the community, the most frequently used measures for holding the government accountable on PPPs are through protest actions. It would be possible to follow the example of Bangladesh (Transparency International 2010), where a Community of Concerned Citizens consisting of the youth, non-governmental organisations, civil society organisations 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. Such a ‘community of concerned citizens’ could 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. It is crucial for the media to responsibly and judiciously report the results of assessments and to describe the efforts that community leaders are making to respond to the findings. Furthermore, the systematic and institutional use of client feedback mechanisms such as citizen report cards, independent peer reviews and social surveys, will serve as a check mechanism. The next section will examine the different accountability structures that will enhance the monitoring of PPPs.

### *Accountability structures*

Each PPP contract should include an internalised managerial, contractual, communal and public accountability system developed for the period of the contract. Such a system is already in place in the private finance initiative in the UK (Sinclair 1995; Demirag & Khadaroo 2011) and in Hong Kong (Athias 2009). An internal managerial accountability structure within the contract management clause is very important given the complexity of PPP projects, the numerous key performance indicators and the fact that contract management continues long after the contract has been awarded. Such a structure will enhance the supervision and monitoring of the quality of services of PPPs throughout the life cycle of the project in order to assess the extent to which they meet the agreed service standards in the contract. Although contractual agreements between the public and private sector already form the basis of accountability, a formal contractual accountability structure that unfolds within a quality assurance framework, with feedback systems that are streamlined to guard against defective contracts, is also important. The contractual accountability structure should match the standard service specifications with service output performance indicators, quality standards and penalties expressly included. A community accountability structure is necessary given the expectations for meaningful community participation in decision-making that pervades the South African Constitution and the subsequent ‘developmental’ municipal legislation. Finally, a public accountability structure within PPPs is fundamental in a democratic South Africa given that government draws its authority from the people and is ultimately owned by the people. Moreover, the government is the major agent and enforcer of accountability in society and is the body that establishes the contract in the first place. Nevertheless, the existence of proper monitoring structures without measures to enhance transparency will not fully achieve the objectives.

## Transparency

Several measures should be taken to enhance transparency in PPPs. A first step is to regularly publish information on how transparency efforts are being implemented. For example, the disclosure of the cost estimates of the Gautrain rapid rail link, which ballooned from R3.5–4.0 billion in 2000 to R30.462 billion in 2011, is one way of doing this. The cabinet should regularly disclose revenue figures from the concessions it awards. The selection of bidders, pre-project analysis, tendering process and procurement procedures should also be subject to public examination and review.

A second step might be to improve access to information. In this regard, a good balance should be struck between satisfying the public's desire to know and the private company's desire for commercial confidentiality and intellectual property rights. The PPP Unit should also move beyond providing superficial and inconsistent disclosure of PPP information online through the *PPP Quarterly* to providing documentation in a timely and relevant manner on its website. Information about eligibility, service-delivery procedures, budget and expenditure should be made available through the media and websites of government ministries and departments directly connected or through other information communication technology tools.

A third step to promote transparency is to institute transparency initiatives. One such initiative might be the signing of a PPP integrity pact. The integrity pact provides an agreement between the government department and the bidder in which they agree to abstain from bribery both during the selection and the implementation of the contract, and to disclose all commissions and similar expenses paid in connection with the contract; the pact also includes sanctions in case of violation of the contract (Transparency International 2010). In Tanzania, for instance, civil servants publicly make integrity pledges to avoid corrupt practices (Langan & Cooksey 1995). Another initiative in this regard might be the promotion of sound procurement procedures, such as conducting a pre-project analysis, setting up evaluation committees, selecting criteria for scoring bids, clearly defining the role of private partners and carrying out detailed assessment of PPP project risks.

Finally, transparency in PPPs can be improved by reducing the opportunities for corruption. One method might be through the simplification of legal procedures and regulations in the procurement process. The procurement policy should provide for more competition in the tendering process as well as a judicial review of the procurement decisions, impose legal constraints on government discretion during bidding processes, provide constitutional protection to private property, and limit preferential treatment to certain classes of suppliers. With regard to limiting preferential treatment to certain classes of suppliers, the Code of Practice for Black



Economic Empowerment has been affected by ‘fronting’ and has thus neutralised the whole purpose of black economic empowerment. Another way of realising the objective of this code might be to impose strong disincentives to corrupt firms, including civil penalties and blacklisting.

Meritocracy should be promoted by ensuring that officials engaged in PPPs have decent wages. Furthermore, sound financial management practices within the PPP arrangement, such as timely and efficient accounting systems, punctual and professional reviews by internal and independent auditors and immediate follow-up on the Auditor-General reports, would serve as a deterrent to corruption. National Treasury has taken some steps in this regard by enhancing compliance monitoring and improving transparency and accountability in supply chain management to government accounting officers on competitive bids exceeding R5 million. This has been realised through the National Treasury Instruction Note by virtue of Section 76(4)(c) of the Public Finance Management Act (NT 2011). In addition to transparency, it is also important that there is a strong value and ethical system with a code of conduct, internal review boards and professional associations.

## Ethical standards

Several measures should be taken to ensure that there is a common understanding among the public and private parties to deliver services with integrity. One way might be to conduct ethics seminars and workshops at which contracting officials are inculcated with a sense of a moral obligation to use their skills, expertise, sound judgement, discretion, business best practices, and rules and codes of ethics to meet the goals of the partnership, because it is the right thing to do rather than because they are being forced to comply with the laws to avoid legal sanctions. There should also be a general awareness among members of the partnership that non-compliance with the codes of PPPs will lead to sanctions. Furthermore, incorporating frameworks for evaluating the ethical behaviour of public officers in the performance management of PPPs, as well as a code of practice for PPPs with sanctions for non-compliance, might be useful. Examples of such frameworks are the UK Nolan Committee’s Seven Principles of Public Life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) (Chapman 2000: 230–231) and the eight Batho Pele principles (DPSA 2005). Above all, accountability can only be effectively implemented within a well-developed institutional reform framework.

## Risk transfer

The different types of risks common in PPPs are technical risk, design and construction risk, operating and maintenance risk, revenue risk, financial risk, *force*

*majeure*, legislative risk, political risk, environmental risk, uptake patronage risk and commissioning risk (Grimsey & Lewis 2007; Forrer, Kee, Newcomer & Boyer 2010). With the growing incidences of public bailouts in PPPs, there are questions as to whether the transfer of risk actually occurs in such partnerships. There are also concerns as to whether the private sector is capable of managing the risk transferred to it given that private capital is at risk and financiers will perform due diligence with respect to the ultimate outcome. Furthermore, the technical, legal, political and economic complexity of PPP infrastructure projects, and the many different stakeholders involved, make the management of risk difficult (Demirag, Khadaroo, Stapleton & Stevenson 2012). The provision in the PPP Manual (NT 2004a) that the allocation of risk between the public and private partners depends on an optimisation model of risk allocation implies that there is the tendency to budget for the best possible (often lowest cost) outcome, rather than the most likely, which has resulted in poor risk allocation and cost overruns. For example, the budget of the Gauteng Department of Roads and Transport for 2011/12 included an estimated R259 million in ‘patronage guarantee costs’ for the Gautrain project if the train did not attract enough passengers in the first nine months that it was due to be fully operational. It is therefore important for these risks to be evaluated by the public and the private bidder throughout the whole project life, and particular attention must be placed during the procurement process to enable free allocation of risk (Cheung, Albert & Stephen 2006).

Crucial factors in enhancing risk transfer include clear specification of requirements and proper allocation of responsibilities between the public and private partners, and better understanding of the risk and equitable risk allocation between the public and private partner. Furthermore, as Demirag et al. (2012) suggest, the allocation of risk between the public and private partners should no longer depend upon an optimisation model of risk allocation, but rather on the efforts of the partners to negotiate and transfer or diffuse risks elsewhere, which would enhance the risk transfer process. Public–private partnership involves the sharing of risk and projects financed by the private sector

## Institutional reforms

Institutional reforms on PPPs should focus on reviewing the following four issues: amending the legislative framework, reviewing the different policy tools, enhancing capacity and redefining the degree of political support.

Firstly, the PPP legislation should be updated and aligned in line with the operations and strategies of universally accepted principles of accountability outlined

by international organisations such the United Nations Economic Commission for Europe (UNECE 2008), the Organisation for Economic Co-operation and Development (OECD 2007) and the Economic Commission for Africa (ECA 2005). Among these principles are ensuring a coherent PPP policy, capacity-building, risk-sharing, putting people first, transparency, responsiveness and following the rule of law, as well as considering the present and future needs of society. In this regard, the PPP legislation should be made simpler and clearer, with few interpretation possibilities, and practical and comprehensive operation manuals for implementation. Although the Public Finance Management Act emphasises the need for transparency and accountability in public procurement, there is no overarching specific legal framework that addresses the different accountability challenges in PPPs. Another amendment to the PPP legislation should include a provision for the protection of the legitimate interests of all stakeholders in fostering the partnership. Above all, the National Treasury should enforce its discretion in terms of section 76(4)(c) of the Public Finance Management Act by issuing instruction notes and ensuring strong implementation and enforcement of PPP legislation, regulations and policies, given the inherent challenges with regard to impartial enforcement and implementation.

Secondly, the different policy requirements for successful PPP implementation need to be systematically reviewed. In this respect, the major policy tools developed by the PPP Unit, such as the PPP Manual (NT 2004a) and standardised public-private market, should be reviewed consistently and updated and formalised in operation manuals taking into consideration lessons learned from implementing PPPs. The long-awaited PPP manual for municipalities should also be developed. Also, the Code of Good Practice for Black Economic Empowerment in PPPs (NT 2004a) needs to be amended to include provisions for fines or imprisonment in case of non-compliance, given that the initiative for black economic empowerment has been devalued by 'fronting'. Moreover, public, contractual, managerial and community accountability mechanisms, together with planned policies and strategies for community participation, should be incorporated within the PPP Manual. The PPP Manual should also elaborate on the techniques for transparency and disclosure processes, while acknowledging the need to protect commercial confidentiality where appropriate.

Thirdly, the PPP Unit as a centre of expertise needs improved capacity development in the following range of skills that are required to manage a PPP programme: project evaluation, financial analysis, business development, municipal desk, information technology, and performance monitoring and evaluation. In this regard, the PPP Unit needs to live up to its expectations as a knowledge management centre and centre of expertise, and adopt knowledge management techniques geared towards

attracting and retaining staff within the unit. This could be done, for instance, by encouraging on-the-job learning, workshops and seminars in order to enhance the technical ability and willingness of those at the lower levels to be able to take up new roles and adapt to new situations. In this way, the confidence of potential private sector partners would be improved.

Finally, redefining the degree of political support will strengthen political accountability in PPPs through government's relentless commitment to PPPs at national and global levels. At national level, greater political oversight by the government of PPP projects may be achieved through participatory monitoring and budgeting linked to government action and decisions on PPPs. Governments should be willing to manage the performance of PPPs systematically and comprehensively over the life of the project rather than relying on once-off reports or enquiries from the Auditor-General when an aspect of the PPP goes wrong. In addition, it is the duty of the government to provide an enabling environment that ensures the proper functioning of the judicial system with respect to the rule of law, judicial independence and operational courts so that poor service delivery, inequities or inefficiencies can be exposed. The tendency for the executive to manipulate and exercise influence over the judiciary should be overshadowed by civil society organisations, the press, media and investigative journalism all acting as watchdogs.

At the global level, it is important for the government to adopt the different accountability pledges and international accountability standards and be held responsible by the community for implementing these pledges through shadow reports, scorecards and the social media. With regard to pledges, the government should consider signing and implementing the integrity pact tool developed by Transparency International (SAIIA 2005; Transparency International 2010). Benin, Nigeria and Bangladesh have formally implemented the principles contained in the integrity pact. Furthermore, the government should adopt the Extractive Industries Transparency Initiative (EITI) that was launched at the World Summit on Sustainable Development in Johannesburg, South Africa, in September 2002. This is a PPP between governments, international organisations, companies, non-governmental organizations, investors, and business and industrial organisations to increase transparency, avoid corruption and improve governance transactions between governments and companies in the extractive industries (Aaronson 2011). The government of Cambodia has effectively protected workers' rights through collaborations between the International Labour Organisation and multinational firms through the Better Factories Cambodia initiative (Wetterberg 2011). The government might also consider exploring the different hybrid models of PPPs that involve the combined efforts of a broad scope of private actors, governments, civil

society, businesses and alternate institutional structures. For example, Brinkerhoff (2011) explored the prospects of Diaspora organisations to strategically partner with government and donors for international development. Lipsky (2011) examined the potential advantages of faith-based organisations for partnerships targeting health service delivery in Africa. At the global level, the four major international standards of accountability that are crucial for the government to ensure that accountability is adopted and implemented within the context of PPPs are principle-based standards, certification standards, reporting standards and process standards (Gilbert & Andreas 2011).

## Conclusions

The paper underscores the centrality of the effectiveness of enhancing accountability in the delivery of PPPs. Given the challenges in terms of accountability in PPPs, in South Africa it is evident that several measures need to be adopted to enhance accountability if the vision of enhancing service delivery and realising the national and international developmental projects is to be attained, including clarifying accountability relations, monitoring measures, transparency, ethical standards, risk transfer and institutional reform. In essence, accountability in PPPs would prevent corruption, enhance effectiveness, control the abuse and misuse of public authority, promote adherence to the rule of law, and ensure fair and equal treatment in PPPs. Above all, the political leadership needs to live up to its rhetoric, exercise political will, and promote ethics and values through strident and relentless commitment to PPPs at national and global levels. Effective leadership would maintain the momentum of the partnership and ensure that goals are met in the agreed timeframe and that those responsible for missing deadlines are held accountable. Further research might involve examining the extent to which risks are transferred in PPP contracts in South Africa.

## Endnotes

1. The Millennium Development Goals (MDGs) were drawn up at the United Nations (UN) Millennium Summit in 2000 by 193 UN member states and several international organisations with a view to achieving eight critical economic and social development priorities by 2015, namely, 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 the living conditions of South Africans. The MTSF outlines ten priority areas that are intended to give effect to these strategic objectives.
4. Batho Pele, a Sotho term meaning ‘People First’, is an initiative of the South African Department of Public Service and Administration to get public servants to be service-orientated, strive for excellence in service delivery and improve efficiency and accountability to the recipients of public goods and services. Batho Pele is a simple and transparent mechanism that allows citizens to hold public servants accountable for the level of services they deliver.
5. The Gautrain is Africa’s first world-class, modern rapid rail and bus service PPP in South Africa.

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