



Public Private Partnerships and their Applicability in Malta: An Analysis

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Abstract

Purpose: We herein examine the private public partnership (PPPs) in Malta by (i) ascertaining the nature and assessing their definability, (ii) identifying and analysing the main alternative ways of formulating PPPs and finding the optimal ways of doing so, as well as (iii) assessing PPP monitoring and analysing any factors which may render such monitoring more effective.

Methodology: The study follows a qualitative mixed-methods design. It draws data from semi-structured interviews conducted with fourteen experts within the Maltese PPP scenario. These consisted of representatives from consultancy firms and from Government entities and private sector firms involved in PPPs.

Findings: The findings indicate that, if a formal statutory PPP definition were to be adopted, this would likely face substantial resistance. Moreover, specific case studies and detailed risk assessments are sine qua nons for optimal PPP formulations. Furthermore, at the PPP contract drafting stage, dilemmas too often arise regarding the inclusion of the appropriate level of detail about the different aspects of such contracts if one is not to render them too complex. In SPs procurement, respondents preferred the inclusion of a pre-qualification stage. Furthermore, while it is generally agreed that further skills and resources are required for effective Government monitoring, differences of opinion emerged as to how and when such monitoring is to be performed.

Originality/Value: This study is meant to raise public sector awareness on the need to improve Maltese PPP practices with respect to their definability, formulation and monitoring. It is hoped that the forwarded recommendations support the competent authorities in addressing the identified existing deficiencies, thus enabling them to enhance PPPs and render them improved vehicles for public sector development.

Introduction

Different international organisations and authors have attempted to conceptualise the notion of PPPs. In fact, one such definition which is being taken as the working definition for this study, is:

“Public-Private Partnerships (PPPs) are long term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks.” (Organisation for Economic Co-operation and Development [OECD] 2012, p.18)

Psaila (2016) argued that the Government should not work on its own if the private sector has better capability. However, research regarding PPPs in Malta is limited. Consequently, this research paper attempted to achieve the following objectives:

- i. To ascertain the nature of PPPs in Malta and to assess their definability;
- ii. To identify and analyse the main alternative ways of formulating PPPs within the Maltese scenario and to find the optimal ways within such scenario; and
- iii. To assess the monitoring of current Maltese PPPs and to analyse the factors, if any, which may render such monitoring more effective.

Literature Review

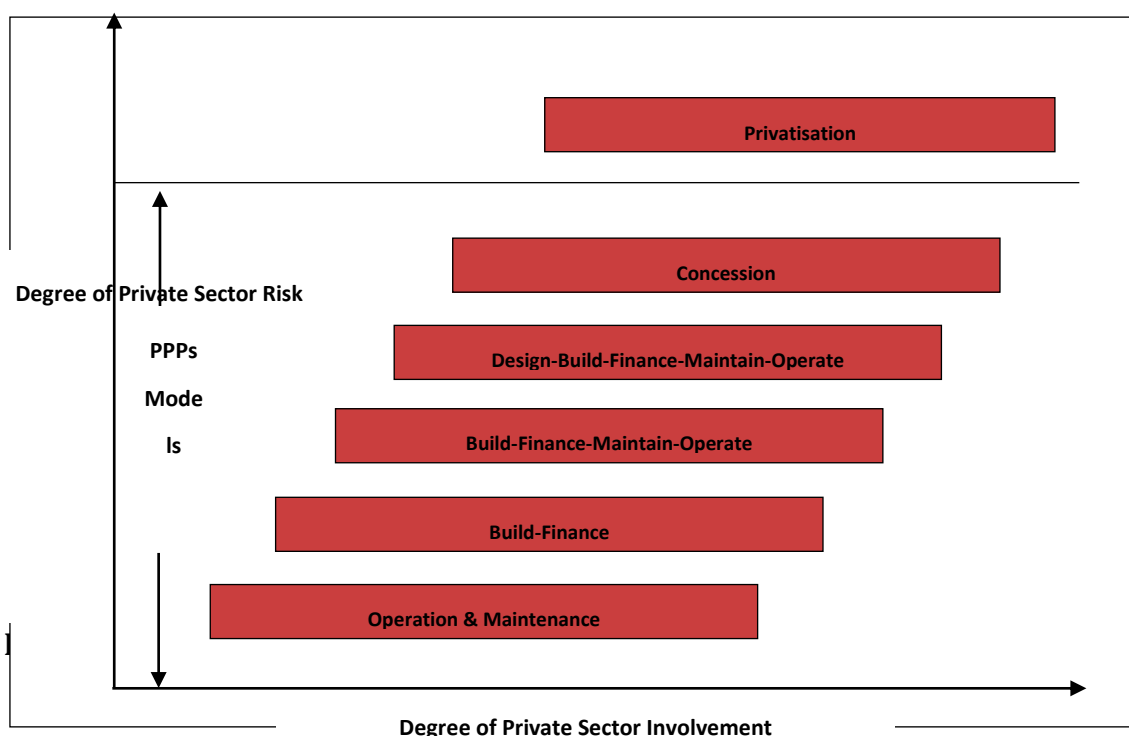
The Definition and Nature of PPPs

The definition of PPPs indicate that particular characteristics are present for the formulation of such partnerships. The UNECE (2008) and CEC (2004), claim that these partnerships between the public sector and the private sector usually:

- i. Are long-term in nature;
- ii. Involve the transfer of risk to the private sector;
- iii. May take different forms depending on the specificity of the case; and
- iv. Are financed by both private and public investments.

In this context, Burnett (2007) argues that the lack of definition at law shall not discourage the proper use of PPPs and stated that defining PPPs would create unnecessary risk, as public parties would attempt to bypass transparency measures set out by public procurement regulation.

Nonetheless, the EC (2003) emphasised that the correct identification of the PPP structure is required before forming such a contract, given that PPPs can take several forms. The different types are categorised according to the amount of risk transferred to the private sector and the responsibilities retained by Government (UNECE 2008). A summary of the main types of PPPs is found in Figure below, where those forms placed at a higher level in the diagram indicate a greater degree of risk transferred to the SP.



Source: Adapted from National Audit Office of Malta [NAO] (2015, p.29)

All these models would transfer the responsibility to SPs, as identified in their name, while any other responsibilities remain with Government (UNECE 2008). According to the European Court of Auditors [ECA] (2018), DBFMO is the most popular type of PPP.

The key point in relation to the nature of PPPs is that it is a contractual agreement between two parties, and thus, the terms can be tailored to the specific situation at hand (Farquharson, Torres de Mästle et al. 2011). Thus, the models described above are by no means an exhaustive list of PPP models but are models which are commonly used (EC 2003).

The Formulation of PPPs

Justifying the Use of PPPs

The first step, before starting to draft the PPP contract, needs to be one where Government considers whether a PPP is the best way forward for the project under consideration (PwC 2005). In fact, the OECD (2012, p.12) recommends that once Government decides to carry out a project, it should undertake a “*procurement option pre-test*” to identify that a PPP is a viable option. Thus, this necessitates Government to ascertain that a PPP will provide VfM in excess of that generated from other possible procurement methods (EC 2003). Moreover, Burnett (2007, p.103) argued that the decision to form a PPP “*should be justified on a case by case basis*”.

Usually, a Public Sector Comparator (PSC) is employed in carrying out the VfM assessment where the discounted cost of the PPP plan is compared against that of the most adequate traditional form of procurement (ECA 2018, OECD 2012).

However, the ECA (2018) criticised that most member states were not undertaking this initial assessment and stressed the potential future negative implications due to the PPP’s longstanding nature. In relation to the Maltese scenario, the NAO (2015) noted that two PPP contracts subjected to a performance audit (PA) did not consider other investment possibilities.

Burnett (2007) argues that the motives behind forming PPPs are either to obtain private sector competencies of better overall quality and financial advantages resulting in an improved bottom line, or to overcome financing restrictions. The EC (2003) attributed these financing restrictions to a decline in the availability of public funds, or as a result of projects that require a substantial initial outlay. In fact, Psaila (2016) argues that certain large infrastructural projects would not be viable without a cash injection from the private sector.

Risk Identification and Allocation in PPPs

After confirming that a PPP is the most beneficial option but prior to drafting the PPP contract, a detailed risk assessment (RA) needs to be performed where risks are identified and allocated (UNECE 2008). This step involves listing the risks and gathering those that are of similar nature, such as construction and operation risks,

in order to pinpoint the major risks on which to base allocation (World Bank [WB] 2017).

According to Deloitte (2006, p.5), Government should ensure that the risks of the project are assigned *“to the party best positioned to manage it”*. Therefore, the assignment of each risk should be rooted according to who has the best ability to control both probability and magnitude (Irwin 2007). However, Yescombe (2007, p.243) argues, that such party needs to do so *“at the lowest cost”* or else will undermine the VfM principle. In fact, UNECE (2008) stresses that for better governance, Government should accept a degree of risk or else it runs the possibility that in transferring all risks, the project becomes unfeasible. This is due to the notion that higher risk merits higher reward, which will be exercised by SPs (WB 2017).

Drafting PPP Contracts

Subsequently, there are two things to plan and execute. These are the drafting of an effective PPP contract and the procurement of the SP (Burnett 2007, Fenech 2005).

The WB (2017) states that the PPP contract is a critical document for PPP formulation as risk is assigned through setting the responsibilities of both parties, performance requirements, a system of compensation and penalties, along with procedures to tackle disagreements, adjustment and termination, amongst others.

Performance Requirements

The performance requirements, which should be matched with performance targets, set out Government's intentions and guide the SP (Burnett 2007). A crucial aspect of PPP contracts is that these requirements are established in respect of the amount and quality of the expected output, as opposed to specifying the inputs (WB 2017). This is an innovative feature when compared to traditional procurement contracts and helps Government to prevent monopolistic behaviour by prospective bidders, which in turn helps such bidders by providing a clearer picture, without restricting creativity (Farquharson et al. 2011, WB 2017). Farquharson et al. (2011, p.34) go on to argue that such requirements *“should be SMART—specific, measurable, achievable, realistic, and timely”* in order to add value to all parties involved and to aid in monitoring. Moreover, Burnett (2007, p.125) is of the same opinion, and most

notably writes “suppliers will tend to do what is measured”, motivated by the eventuality of penalties and thus aim to attain the prescribed targets.

Compensation and Penalty Mechanisms

The performance targets need to be the foundation for both Compensation and Penalty Mechanisms in PPP contracts and act as a “system of carrots and sticks” (Iossa, Spagnolo et al. 2007, p.33). Payment to SPs can take the form of a User-fee where the SP collects fees from end-users for using the product or service or an Availability-based mechanism, where the Government pays SPs for making the product or service available to end-users (Farquharson et al. 2011).

In case of an Availability-based Mechanism, the payment could take the form of a Usage-fee, which is based on usage, or simply a Lump-sum Payment, which is based on availability (WB 2017). Alternatively, payment could be a combination of both User-fee and Availability-based mechanisms (Yescombe 2007). The choice is embedded in demand risk acceptance, since Availability-based PPPs impose a continuous obligation for payment on Government, while User-fee PPPs depend on end-user demand, hence a mixed approach might be beneficial (Farquharson et al. 2011). Additionally, a cost for non-compliance with the contracted requirements needs to exist, which can take different forms, such as fines or a reduced compensation (WB 2017). All in all, the payment structure needs to be sufficient to cover costs and to motivate SPs but commensurate to the risk assumed (Iossa et al. 2007).

Dispute Resolution, Adjustment and Premature Termination Procedures

Given the long-term nature of PPPs and the inability to precisely predict the future, it is essential to include both adjustment and dispute resolution mechanisms to allow for the necessary changes (WB 2017). Ergo, flexibility needs to be ingrained in PPP contracts, although this goes against the concept of a contract since its very purpose would be to reduce the ability to circumvent around it (Iossa et al. 2007). Nevertheless, Iossa et al. (2007) state that a balance between possible abuse and flexibility is vital and can be achieved by stipulating rules about what, when and how adjustment provisions may be triggered. An example is by factoring for inflation in

the Compensation Mechanism and tweaking the output requirements according to emerging trends (WB 2017). With respect to solving differences, a straightforward procedure should be in place, which can range from a non-binding assessment of selecting an independent person to settle disagreements, to referring the matter to the relevant regulator. Additionally, for more serious matters, one may resort to the judicial system, amongst other options (European PPP Expertise Centre [EPEC] 2011).

Furthermore, such contract will cease, either on an agreed date or earlier, due to default by either parties or unforeseen events. Consequently, provisions for returning the asset back to Government, and in case of premature termination a pre-defined fee, ought to exist (WB 2017).

The Procurement Process

Another essential aspect in formulating PPPs is the procurement process, and according to EPEC (2010), it is crucial for PPPs to be successful. The purpose is to choose the SP to deliver the project's goals, and thus, an important theme here is to encourage competition and transparency, hence developing a procurement strategy becomes a must (Farquharson et al. 2011).

Pre-Qualification Questionnaire

Another aspect is planning whether to use a one-stage process or a process that includes a Request for Qualification (RfQ) (WB 2017). According to Fenech (2005), in Malta, such a stage is referred to as the Pre-Qualification Questionnaire (PQQ). In a one-stage process, bidders submit a detailed proposal for immediate evaluation (WB 2017). Conversely, in a process that includes a RfQ, interested parties are invited to register their interest by submitting a RfQ which needs to include information to corroborate their experience in the field and their financial and technical abilities (Yescombe 2007). Subsequently, such information is assessed by a procurement team and deficient applicants are rejected while the remaining bidders are invited to submit a detailed proposal for evaluation (Kerf, Gray et al. 1998). Farquharson et al. (2011) argued that including a RfQ is a fruitful exercise that results into a cost and time efficient procurement process and is recommended for sophisticated projects.

However, it may have a potential negative impact on competition and transparency goals.

Final Bids and SP Selection

Furthermore, Government needs to decide on a strategy to appraise the final bids in order to select the best one (WB 2017). Directive 2014/24/EU states that preference should be given to the “*most economically advantageous tender*” (MEAT) (EC 2014, art.67, par.1). This can involve either a two-tier or a weighted strategy but both strategies require the selection to be rooted in technical and financial criteria (WB 2017). In a two-tier strategy, the bids first need to pass the technical criteria and then, if successful, proceed to financial analysis stage. In a weighted strategy, both technical and financial criteria are evaluated simultaneously (Kerf et al. 1998).

The Monitoring of PPPs

Following the successful implementation of a PPP, it is essential to introduce mechanisms to monitor and enforce the terms stipulated by the contract throughout its duration (WB 2017). Yescombe (2007) argues that in PPP arrangements, since SPs generally have better information than Government, a principal-agent conflict may arise.

Skills and Resources in Monitoring PPPs

The Government’s task to monitor PPPs is usually entrusted to a specialised team or individual that has the proper skill and resources. Thus, it is paramount to plan for this role before PPPs start to operate (WB 2017). Fenech (2005) stressed that for effective monitoring, resources need to be commensurate with the assessed risk presented by the SP. Furthermore, according to 4ps (2007), competencies need to include interpersonal skills, negotiation skills to settle conflicts, analytical abilities and experience on monitoring PPP contracts.

Farquharson et al. (2011) described several helpful resources that may potentially aid in monitoring. These included hiring independent advisors which can be the same ones employed during formulation stage, providing adequate training to those in charge of monitoring, and creating a contract administration manual. The aim of such manual is for guidance purposes and it would need to focus on risk, and in detail,

describe the tasks and checks to be carried out (EPEC 2014). Furthermore, EPEC (2014) identified other necessary tools for effective monitoring which are a mechanism for obtaining valuable information about the PPP and an agreed financial model to calculate compensation due. Farquharson et al. (2011) wrote that PPP contracts should impose a duty on SPs to provide the requested information and to allow public authorities unrestricted access, even to audit.

Key Performance Indicators and Other Tools in Monitoring PPPs

The Global Infrastructure HUB [GIH] (2018) stated that Key Performance Indicators (KPIs) show the adequacy of the job being carried out by SPs, however, GIH (2018) claimed that the KPIs usefulness varies according to the payment mechanism used. If the payment mechanism is an Availability-based one, detailed KPIs are necessary, whereas if a User-fee Mechanism is used, KPIs are not important. This is because a User-fee Mechanism is within itself motivating to SPs, as if service quality declines end-users would stop using the PPP's services and consequently results into lower revenue (GIH 2018).

Additionally, PAs aid in monitoring as they are a third-party check that attempt to measure the economy, efficiency and effectiveness of PPPs (O'Leary 1996). In the Maltese scenario, the NAO (2015, 2017, 2018) has investigated a number of PPPs through PAs which in simple terms assessed whether the PPPs under review were "*a good deal for government*" (NAO 2018, p.16).

A National PPP Unit

Colverson and Perera (2012) wrote that many countries lack the experience required to obtain the capacity to formulate and monitor PPPs. Henceforth, the establishment of a nationwide PPP excellence centre, equipped to specifically deal with PPPs is considered as a beneficial investment (PwC 2005). The idea behind such Unit is to improve the PPP formulation process by employing skilled and experienced individuals who will drive and simplify the process by creating procedures and standardising the process based on best practises. Resulting benefits include a less costly and an accelerated tendering process, resolving legal and bureaucratic barriers and more useful monitoring (UNECE 2008).

Research Methodology

The Research Tool

The research tool considered most suitable to collect data to achieve the research objectives of this dissertation was the semi-structured interview. When preparing for the semi-structured interviews, the researcher produces an interview schedule which includes both open-ended and closed-ended questions that address the research objectives, as well as some prompting questions to allow for a better discussion (Harrell, Bradley 2009). Semi-structured interviews allow respondents to answer more freely, and consequently, give the researcher the opportunity to get a deep understanding of the interviewees' opinions. Nonetheless, since a standardised set of questions are used, data can be compared and statistically analysed (Macintosh, Morse 2015).

The interview schedule designed for this study was intended for Public Private Partnership Experts. The interview schedule included three sections with both open-ended and closed-ended questions. For the closed-ended questions, a five-point Likert Scale was used, with 0 being strong disagree/not important at all and 4 being strongly agree/ highly important.

The Sample Population

The target was to identify experts who were involved in the formulation and monitoring of PPPs. Capturing the consultants' knowledge and experiences in advising clients on various PPPs was deemed as important, as was capturing the experiences of both Government and the private sector firm representatives involved. Fourteen interviews were carried out with deemed experts where six of which were with consultants, five of which were with involved Government Entities representatives and three of which were with involved Private Sector Firms representatives.

Data Analysis

Qualitative data was collected through both the open-ended questions asked during the interviews and through the interviewees' remarks in justifying their ratings to the Likert scale questions. Such qualitative data was analysed by summarising the

transcripts of the responses for each question in the interview schedule. This allowed for easier evaluation and for the key similarities and differences in responses to be noted.

Quantitative data gathered through the responses to the closed-ended questions in the interview schedule was analysed through IBM SPSS Statistics. The Friedman test was used for the Likert scale questions in order to compare the mean rating scores provided to the different statements in each question. The main purpose of this test is to assess whether the mean rating scores provided by interviewees to the statements vary significantly or not. Conversely, the Chi-squared test was used for the Yes/No questions to investigate the association between the two categorical variables.

Research Limitations

One of the main limitations was that contact was made with twenty known experts in the field which were referred to by various sources, including previous respondents. However, five refrained from responding despite multiple attempts by the researcher, while another potential interviewee refused to participate.

Moreover, a degree of subjectivity was unavoidably present in responses provided by interviewees. Also, although limited, some inconsistencies were observed between the ratings given to Likert scale questions and other interview questions.

Furthermore, in view of time and word restrictions, this study has been limited to the major important aspects relating to the PPP's nature and definition, formulation and monitoring.

Findings and Discussion

The Nature and Definition of PPPs

What are the PPP Characteristics?

In the first question, interviewees were asked to rate their agreement with four characteristics of PPPs. Respondents strongly agreed that a PPP contract may take different forms ($\bar{x}=3.64$) and agreed that a PPP contract is long-term ($\bar{x}=3.29$), transfers risks to the private sector ($\bar{x}=2.86$) and is financed by both sectors ($\bar{x}=2.50$). Furthermore, a

significant difference ($p=0.006$) was found in respondent agreement with the different characteristics.

Clearly, the nature of PPPs was understood by respondents to take different forms. Regarding whether or not PPP contracts are long-term, two respondents commented that it had to be so. By long-term, they assumed that it needs to be a period of 25 years. However, two other respondents added that while still long-term, a ten-year term is ideal unless it needs to be extended for PPPs to be financially feasible. Regarding whether or not PPP contracts transfer risks to the private sector while agreeing, two respondents added that some risks are retained by Government. Another remarked that only operational risks are transferred while another stated that the degree of risks being transferred varies with Government's intentions. Regarding whether or not PPPs are financed by both parties, three respondents, while agreeing, added that most PPPs are not equally financed, while one emphasised that PPPs are normally financed by Service Providers (SPs).

Which are the Important Roles for Government and Service Providers?

Interviewees were next asked to rate the importance of three proposed roles of Government and four proposed roles of SPs.

Respondents found Government's roles of setting the SPs' requirements ($\bar{x}=3.93$) and of monitoring the SPs ($\bar{x}=3.57$) to be highly important, while Government's role of providing assets ($\bar{x}=2.86$) was deemed as important. This is in line with Burnett (2007) and EC (2003). Furthermore, the relative importance of the different roles was significantly different ($p=0.000$). As regards monitoring, two respondents added that such a function was at times provided by different branches of Government. As regards assets, three respondents added that such assets normally consisted of land. Respondents found the SP roles of deploying resources efficiently ($\bar{x}=3.93$), supplying managerial skills ($\bar{x}=3.79$) and adding end-users value ($\bar{x}=3.5$) to be highly important and the SP role to finance projects ($\bar{x}=3.14$) to be important. This is in line with Burnett (2007) and EC (2003). Furthermore, the relative importance of the different roles was significantly different ($p=0.002$). One respondent argued that whether or not resources are deployed efficiently depends on the original specification

requirements. For instance, efficiency declines if a continuing obligation to employ all present employees exists. Other interviewees stated that at times a further role of SPs is that of providing assets for the purpose of the project.

Should Government be Partnering with the Private Sector?

Interviewees were then asked whether it is better for Government to partner with the private sector rather than carry out the planned project itself. Nearly all respondents believed that it was better for Government to partner with the private sector. Eight added that this is because Government lacks the necessary expertise, in that, it lacks experience, innovation and efficiency. Furthermore, three respondents while still finding it better for Government to partner with the private sector emphasised that the benefit to Government was conditional on Government appropriately enforcing the contract and ensuring no detrimental consequences to the public.

The only dissenting respondent stated that in his/her experience, it may not be beneficial for Government to partner with the private sector and for any benefits to materialise to Government, any PPPs need to be preceded by a careful study.

Is the EU to Specify a Single Definition for PPPs?

Interviewees were then asked whether they found the fact that there is no single definition of PPPs within the EU as being more advantageous than disadvantageous. While a number of respondents found such a lack of definition as being neither advantageous nor disadvantageous, more respondents stated that they found this disadvantageous. The reason given was that consequently, there are no clear EU-wide parameters for PPPs across the EU, this leading to varying concepts about the nature of PPPs. As one added, the PPP term is thus *“used loosely to mean many things”*.

Contrastingly, four respondents found the absence of a definition advantageous and stated that PPPs by their nature are undefinable as they require flexibility of form, creative and tailor-made solutions and reflect particular circumstances. Thus, there is *“no one size fits all approach in PPPs”* as whilst a model might work in one sector (*e.g. health*), it may not work in another (*e.g. education*). Furthermore, one respondent

argued that a tight definition would not improve governance, as there would be a tendency not to abide to this.

Those who were neutral about the matter, reasoned that a definition is unnecessary but only when the concept works in practice, and one stated that PPPs are country specific and it would be futile to define on an EU level. Finally, one argued that such a definition was not a *sine qua non* one, as in practice, in PPP contracts one may insert an internal relevant working definition that clarifies the meaning of PPPs.

Which Arrangements are Considered as PPPs?

Interviewees were then asked which of the six arrangements fall within the parameters of a PPP. As shown, the response to the different arrangements was deemed to be significantly different ($p < 0.001$).

All respondents saw both DBFMO and BFMO as forms of PPPs while most saw Build-Finance, Operation and Maintenance and Concessions as other forms of PPPs. Additionally, only three respondents saw Part Privatisation as another form of PPPs. Three respondents added that Operation and Maintenance resembles a form of procurement rather than PPPs, while five others noted that Concessions are a “light” form of PPPs although not considered as such by law and for statistical purposes. In effect, the only difference is that “in Concessions, the end-users rather than the Government pay for the service”. Contrastingly, those who did not see Concessions as PPPs, considered them as “closer to privatisation than PPPs”.

As for Part Privatisation, those eleven in disagreement remarked that, while a relationship with the private sector exists, this is only tantamount to Government disinvestment and lacks the inherent characteristics of PPPs. Furthermore, two interviewees reasoned that what one considers as PPPs is “subjective” and that practical difficulties exist in classifying arrangements as PPPs.

The Formulation of PPPs

Should the Use of PPPs be Justified?

Two proposed reasons for forming PPPs in Malta were discussed with interviewees. Interviewees strongly agreed ($\bar{x}=3.5$) that SPs competencies of better quality and financial effectiveness is the main reason for forming PPPs in Malta. Moreover, three

added that such effectiveness commonly emanates from cost containment and better timeliness in project management. Nevertheless, another stated that this was so despite the fact that these competencies can be procured and not necessarily obtained through PPPs.

Moreover, interviewees agreed ($\bar{x}=2.79$) to the proposed reason of government's unavailability of initial finance due to the capital outlays involved and/or Government's reluctance or restrictions in financing by borrowing. One respondent stated that the unavailability of initial finance may be a reason for opting for PPPs in times of budget deficits and thus, the economic scenario is an important factor. Similarly, another added that EU rules require Government to include all the project's cost on its Balance Sheet upfront and through PPPs, it could keep the cost off Balance Sheet. However, two respondents disagreed and explained that Government always managed to obtain the necessary funds.

Respondents were then asked whether the launching of new PPPs needs to be justified by a specific case study, and twelve respondents agreed. One respondent added that without a case study, Government would be disadvantaged in negotiations with the private sector while another argued that a case study illustrates Government's commitment to accountability and transparency. Those in disagreement stated that in certain sectors PPPs' option has already proved successful and such a case study is only a bureaucratic exercise in the eventuality that the NAO performs an audit. Nevertheless, one suggested that a case study should be performed periodically and not for each PPP to ensure the concept's validity.

Furthermore, those respondents agreeing to a case study in the previous question were further asked whether a Public Sector Comparator (PSC) needs to be used in such a case study and nearly all agreed. The dissenting interviewee explained that the reasons why Government opts for PPPs are unmeasurable, this including the SP's knowhow and competencies, and thus a PSC would not establish the facts.

Finally, interviewees were asked about the extent to which such procedures are actually carried out in Malta. All respondents confirmed that a case study is prepared, three adding that it usually involves a cost-benefit analysis and the engagement of

independent consultancy firms. Yet, five emphasised that although “*one cannot aspire for perfection*”, improvements are needed as such studies are not comprehensive, are not sufficiently documented and too often are limited to a ticking box approach.

Risk in PPPs

Interviewees were asked how the Risk Assessment (RA) of PPPs is to be performed. Three respondents stated that brainstorming sessions need to be held so key risks are identified and subsequently mitigated through the PPP contract. Another three reasoned that a comprehensive RA needs to be made by both Government and SPs. Government needs to assess feasibility, probability of delays or non-completion and also whether public interest would be deteriorated, while SPs need to assess jurisdiction, financial and technical risks. Moreover, three others insisted that RA guidelines issued by various institutions such as EPEC have to be followed.

Additionally, two respondents argued that an RA is to be made in two stages. First, inherent risks need to be assessed before Government finds the SPs, and then, any residual risks are to be reassessed prior to contract finalisation. This ensures that Government is not taken “*lock, stock and barrel by SPs*”. Furthermore, one suggested that the various risks are to be weighted, while another recommended that risk owners need to be appointed for each risk type. Finally, one mentioned political interference and corruption risks.

Interviewees were then asked whether the RA is to consider who can manage the various risks at the lowest cost. All respondents confirmed this. However, a couple emphasised that better risk management involves higher costs, and so a balance needs to be found between the two.

Interviewees were then asked what major risks Government needs to retain. Four respondents stated that it depends on the nature of the projects but retaining major risks could reflect adversely on Government’s Balance Sheet. They elaborated that if Government does not wish for the PPPs’ debt to be shown on its Balance Sheet “*for statistical purposes*”, then transferring all risk is important, but it would not obtain the best Value for Money (VfM). Moreover, another four respondents mentioned that Government needs to maintain risks relating to any project disruption (*e.g.*

earthquake). Similarly, another two stated that, in deciding, Government needs to consider the public interest, for instance, to ensure availability in old people's homes, Government may take the demand risk upon itself. Furthermore, three explained that the price of shifting more risks to SPs is the higher return that will be required. Contrastingly, those three against Government retaining any risks emphasised that Government's role is to be limited to monitoring as it is not so well equipped for risk management and internal control evaluation.

Interviewees then were asked whether the above RA procedures are actually being employed in the formulation of PPPs, and twelve confirmed this. However, five stated that there is room for improvement as Government commonly lacks technical expertise. In fact, one stated that any RA being carried out is "*informal, generally fragmented and limited*". Two respondents pointed out that this situation could be improved by having international experts providing training to Government's personnel.

What are the Main Aspects in Drafting PPP Contracts?

Interviewees were next asked to rate their agreement with five main aspects (Sections 2.2.1, 2.2.2, 2.2.3) which are to be found in drafting PPP contracts. Interviewees strongly agreed to all aspects, in line with WB (2007).

Furthermore, one respondent explained that assigning risks and responsibilities is to be the most important aspect, as PPPs often fail when there are "*too many cooks*" with no one overall in charge. Moreover, another added that, in drafting PPP contracts, one needs to determine the appropriate level of detail or, as stated, that of resolving the dilemma of "*implementability vs. simplification*". In view of the difficulty in finding the "*right balance*", Government may tend not to undertake the PPP.

The Performance Requirements

Interviewees were then asked to rate their agreement to three proposed reasons for limiting PPP requirements to the expected output and quality rather than to input specifications. Interviewees agreed to the three reasons, that is, that prospective bidders may be more creative ($\bar{x}=3.43$), that a clearer picture is provided ($\bar{x}=3.00$) and that, this helps the prevention of collusive behaviour by prospective bidders ($\bar{x}=2.50$).

However, despite agreeing that creativity is enhanced, some respondents stated that basic input requirements are still to be stated to ensure quality (*e.g. nurse-to-patient ratio in the health sector*) and for the Government to be able to assess the different bidders. Moreover, two respondents emphasised the need not to limit inputs so that bidders may be allowed enough flexibility, a characteristic which is rare to find as permissible in public procurement. Another two were sceptical about either input or output restrictions helping to prevent collusive behaviour by prospective bidders.

Next, interviewees were asked how performance requirements are normally set up in Malta. Four stated that performance requirements are formed by way of negotiations with SPs while one specified that these focus on timeframes, the service given and payments. In this connection, another respondent added that given Malta's size, negotiations are needed, as initially, no one bidder tends to come forward to meet all Government's requirements. Moreover, another four explained that the more experienced the Government personnel or their consultants are, the more improved, specific and detailed are the performance requirements. Two respondents stated that while requirements are in fact increasingly becoming performance based, they are as yet not being given enough importance. Finally, two pointed out that performance requirements are subject to standards imposed by the relevant regulator, if there are any (*e.g. standards imposed by the Licensing Authority in health care*).

Thereafter, interviewees were asked how SMART output goals, if any, are being established. Nine respondents confirmed that such goals are normally being established, although there may be exceptions. However, one emphasised that SMART output goals do not always adhere to the specificity aspect. Another stated that whether or not output goals were SMART, varied with the competence of Government personnel responsible for drafting the contract. Contrastingly, those who disagreed stated that the goals which are being typically set are not really SMART. They only serve to induce Government to go "*after numbers*".

Compensation and Penalty Mechanisms

Interviewees were next asked to decide which is the superior Compensation Mechanism between an Availability-based Mechanism and a User-fee Mechanism. According to eight respondents it depends on the project under consideration as both mechanisms have their respective benefits. Half of these added that if Government wants to incentivise SPs to behave appropriately, demand risk must be transferred to SPs and thus a User-fee Mechanism would be needed (*e.g. in a heritage site*). Conversely, if Government wants guaranteed availability and financial stability, it needs to absorb demand risk and use an Availability-based Mechanism (*e.g. in old people's homes*). Similarly, another respondent stated that SPs would request higher prices for the higher risk in User-fee Mechanism and thus, if Government is confident on demand, an Availability-based Mechanism would result in better pricing. Using similar reasoning, the remaining respondents concluded that an Availability-based Mechanism is superior. One respondent added that in Malta, the expectation in certain sectors (*e.g. health and education*) is that Government pays and not the end-user.

Furthermore, interviewees were asked whether the better type of an Availability-based Mechanism is a Lump-sum Payment, Usage-fee or Other. Eight selected the Usage-fee type because it is motivating to SPs while Lump-sum Payments distort market prices. Even if the type of payment is Lump-sum, Government needs to be careful to limit such Lump-sum to two years or less as beyond that, it may not be VfM. On the other hand, another added that with a Usage-fee, Government keeps control and is able to investigate whether the PPP was loss-making. Contrastingly, three respondents were in favour of a Lump-sum Payment and argued that if such payments are given to end-users as opposed to SPs, it could result in “*cost optimisation*” as opposed to “*cost minimisation*” and a better service because such mechanism enhances competition. Three respondents were neutral about the choice, arguing that the type of mechanism chosen will depend upon whether a close link to performance is necessary.

Subsequently, interviewees were asked how far the performance targets are linked to compensation and penalty systems. They all remarked that, while such links are not consistently there, stronger links are being noted over the years in line with PPP evolution, especially in complex or service-oriented PPPs. Three respondents added that such link consolidation needs to progress in order to eliminate controversy, giving potential future examples such as bonuses to be awarded to SPs for exceeding expectations and, conversely, penalties for not meeting them.

Interviewees were then asked about the typical safeguards and/or penalties in PPP contracts normally inserted for non-compliance and whether these are sufficient. Safeguards involved contingency plans guaranteeing service continuity, and Government making the first payment only after SPs have arrived at a certain stage in their operation. Penalties included monetary ones, one respondent specifying that these now range from €100 to €1000 a day, as well as the loss of performance guarantees, and the revocation of licences of non-compliant SPs, the latter being particularly in the health sector. Yet, twelve respondents pointed out that such safeguards/penalties are typically insufficient with five making an exception when Government personnel are knowledgeable enough. Two respondents emphasised that a proper safeguard would be a joint committee, which meets regularly to discuss any non-compliance and the reasons thereof.

Dispute Resolution and Adjustment Procedures

Interviewees were asked if dispute resolution and adjustment procedures are adequately inserted in Maltese PPP contracts. In relation to dispute resolution procedures, twelve confirmed that normally they are adequately inserted, with one respondent stating that most PPP contracts refer to arbitration. In relation to adjustment procedures, eight interviewees stated that improvements are needed while four stated that such procedures are already adequate. One, emphasising the need for improvement, explained that better adjustment procedures would benefit both parties as in PPPs Government typically pays a rate to SPs which includes both capital and operational expenditure. Over the years, operational costs often need to be updated while the capital expenditure portion is not always removed. Finally, two

respondents argued that the adequacy of both adjustment procedures and dispute resolution could be ensured by proper prior planning.

Interviewees were then asked whether enough room is generally made for changing circumstances in long-term contracts. The matter is controversial as six agreed, others disagreed while two were neutral, the latter explaining that PPP “*duration*” actually varies with the “*level of SP investment*”. An interviewee upon agreeing, added that normally SPs exert enough pressure for an allowance to be made for changing circumstances. Contrastingly, two dissenting respondents added that irrespective of the initial contract, one cannot anticipate the future and it often results in insufficient room being made for changing circumstances. Consequently, as one added, addenda to PPP contracts are sometimes made.

Pre-Qualification Questionnaires

Interviewees were next asked to rate their agreement to three statements regarding Pre-Qualification Questionnaires (PQQs). Respondents agreed that a PQQ is required for sophisticated PPPs ($\bar{x}=3.45$) and that PQQs lead to a cost and time-efficient procurement process ($\bar{x}=2.73$) while they disagreed ($\bar{x}=1.18$) that they undermine competition and transparency, with response to the three statements being significantly different ($p=0.003$).

In relation to the first and second statements, two respondents added that PQQs are used for complicated projects so as to weed out potential financial and/or technical incompetent bidders immediately, while three others added that PQQs result in better standards but take more time. Furthermore, one added that PQQs may be completely avoided by including the necessary qualifications, thus excluding ineligible parties in the first place.

As to whether the PQQ undermines competition and transparency goals, two respondents added that competition is still retained among the relevant bidders, although on a limited scale and that PQQs could lead to more contract abuse, although neither is this completely eliminated in a one-stage process.

Interviewees were then asked if PQQs are actually included in the PPP process in Malta and if so, how an applicant is accepted or rejected. Ten respondents confirmed that PQQs are used in Malta and with two adding that by such PQQs, a Government-appointed committee obtains the needed preliminary information from prospective bidders prior to deciding on the necessary specifications. Five respondents added that this committee also assesses the bidders' financial strength and experience based on the submitted technical and financial information. Moreover, one added that such PQQs mostly consist of yes/no questions (*e.g. if in possession of a licence*) in order to facilitate the elimination of the ineligible potential bidders.

Interviewees were then asked whether they prefer a one-stage bidding process to a process which includes a PQQ. Ten respondents preferred a process which includes a PQQ, explaining that, for proper PPP contract drafting, PQQs need to be included in the first stage, owing to the complexity, size, and nature of bidders. However, one stated that s/he prefers a one-stage process. Moreover, another added that Government needs to engage market consultants rather than issuing PQQs.

Final Bids

Interviewees were then asked to describe how final bids are typically appraised and if any technical and financial criteria are commonly included. Eleven respondents remarked that the Most Economically Advantageous Tender (MEAT) system is used. The MEAT is either the cheapest technically compliant bid, or the bid with Best Price Quality Ratio (BPQR). The cheapest technically compliant bid refers to bidders having first to meet the technical criteria and, if not eliminated on such ground, they will then compete for the cheapest bid. On the other hand, the BPQR takes a weighted approach between financial and technical criteria. Two added that in BPQR, either the 70:30, 60:40 or, in rare cases the 80:20 ratios are used, but more importance is consistently allocated to the technical criteria. Additionally, four respondents emphasised that, in assessing quality under the BPQR, maximum scores need to be predetermined and specified in tender documents so as to eliminate subjectivity. Furthermore, one elaborated that BPQR is mostly used for PPPs.

Three respondents explained that a committee composed of different professionals appraises the bids. Moreover, one suggested that such committee members need to be different from those who had prior contact with the bidders so as to eliminate potential conflict of interest. Finally, three respondents mentioned that technical criteria vary with the project under review. For example, in old people's homes these could include the quality of food, activities that may be offered and other living conditions.

Are Maltese PPPs Commonly Well-formulated?

Interviewees were then asked whether, in their view, PPPs in Malta are commonly well formulated. Thirteen replied that PPPs are satisfactorily formulated but that there is room for improvement, with six respondents specifying that there are as yet deficiencies in Government knowhow and monitoring as well as in the regulatory framework. One also referred to the need to deal with the persisting negative public misperceptions of PPPs which ignore their economic benefits. However, another one considered PPPs as being very well formulated.

The Monitoring of PPPs

Skills and Resources in Monitoring PPPs

Interviewees were then asked to rate the importance of five proposed major skills in effective monitoring. A significant difference ($p=0.005$) emerged in the rating scores of the importance of these skills.

Respondents found negotiation skills to settle conflicts as highly important ($\bar{x}=3.79$) while analytical abilities ($\bar{x}=3.43$), interpersonal skills ($\bar{x}=3.14$), international experience ($\bar{x}=3.14$) and Maltese experience ($\bar{x}=3.14$) on PPPs were found to be important. As regards PPP experience, one added that while Maltese experience is important, it is as yet lacking.

Subsequently, interviewees were asked to rate their agreement to five resources which aid in monitoring.

Respondents strongly agreed that adequate training to those in charge of monitoring ($\bar{x}=3.79$), an agreed mechanism for obtaining valuable information ($\bar{x}=3.71$) and an agreed financial model to calculate compensation ($\bar{x}=3.57$) aid in monitoring.

Furthermore, two emphasised the importance of having pre-agreed mechanisms and models as *“judgements have to be based on facts”* and added that PPP contracts need to include clauses which allow Government entities to access SP records for auditing purposes. Moreover, respondents agreed that both hiring independent advisors ($\bar{x}=3.36$) and creating a contract administration manual ($\bar{x}=3.36$) aid in monitoring. One added that independent advisors are normally important, however only as long as Government lacks the necessary insource expertise. Finally, another one added that in his/her view, any contract administration manual could not be comprehensive in view of the uniqueness of each PPP.

Interviewees were then asked how Government ensures that relevant information, known by SPs, is sufficiently transmitted to it. Eight respondents stated that PPP contracts oblige SPs to provide Government with such information, but this does not ensure that such transmission is actually affected. Two specified that there is the need for a more comprehensive list and timing of the types of information to be required by Government for better monitoring, including items such as maintenance spending and monthly reports. Additionally, others suggested that Government needs to retain the options of different audits over the duration of PPPs.

PPPs Monitoring – How, Who and When?

Interviewees were asked about how, who and when is monitoring of PPPs typically being carried out. Four explained that these aspects vary with different PPPs. With regards to how, references were made to inspection, following terms of references designed in PPP contracts, and to the use of operational and financial KPIs. With regards to who carries out monitoring, reference was made to the Government entity ultimately responsible for the delivery of the PPP. However, four referred to engaging an outsourcer if technical knowledge is lacking, which commonly is the same one who sets up the PPP's original performance requirements. With regards to when, respondents explained that monitoring varies from being affected monthly to annually, at each stage of the PPPs, at times this simply preceding the periodic payments to SPs.

Are Performance Audits Beneficial in PPPs?

Interviewees were asked whether Performance Audits (PAs) are relevant in determining whether or not PPPs have been successful. All respondents confirmed such relevance, with one₇ adding that PAs often indicate any deficiencies both on the part of Government and the SPs. Five added that such PAs are currently carried out by the NAO but may also be carried out by external consultants, the Internal Audit and Investigations Department or the Contracting Authority.

The Need for a National PPP Unit

Finally, interviewees were asked whether a national PPP Unit is needed to help improve PPPs. Ten confirmed that such a Unit would be beneficial. Nine argued that as long as it is staffed by technically competent and experienced people, such a unit would help improve the regulatory framework, harmonise the whole process, specify the fundamental principles to form and operate PPPs and ensure that PPPs are no longer formulated by different ministries or other public sector entities. They also added that a separate section of such a Unit could act as a regulator. Contrastingly, two respondents stated that, in the first instance, a robust PPP framework needs to be drawn up. Another two stated that there are too few PPPs for the setting up of a new Unit to be justifiable.

Discussion

Oxygenating PPPs: Determining their Nature and Definition

Are PPPs by Nature Definable?

As has been seen Maltese PPPs take different forms, are long-term with a period ranging from ten to 25 years, transfer risks to the private sector and are financed by both sectors but not consistently to equal proportions. Such characteristics are in line with the literature.

Moreover, practical difficulties clearly exist in classifying arrangements as PPPs and what one considers as a PPP is “*subjective*”. In fact, arrangements which are mainly considered as PPPs include DBFMO, BFMO, Build-Finance, Operation and Maintenance and Concessions. Yet, not all arrangements are viewed to be on the same scale, as Concessions are viewed as a “*light*” form of PPPs. Thus, it would

probably be beneficial if the PPP term is clarified, especially since Concessions have been found to be separately identifiable for statistical purposes.

The CEC (2004) stated that the PPP term is not defined at the EU statutory level and the findings indicate that it is mainly disadvantageous. This is because, in the absence of a definition, the lack of EU-wide parameters induces misunderstandings and misperceptions. As a result, the PPP term tends to be inconsistently used by different consultants with reference to the same arrangements. Yet, the lack of a definition may be advantageous as PPPs by their nature require flexibility of form as well as creative and tailor-made solutions that may be constrained by a PPP definition. Therefore, a *“one-size fits all approach”* may not work in all sectors and consequently gives rise to situations where professionals try to find ways so as not to adhere strictly to such a definition. Consequently, it may be more beneficial if Government provides guidance on a non-legally binding PPP definition. This would allow for the formation of an internal working definition that is specific for each PPP.

Fuelling PPPs: Formulating their Course

The Preliminary Justification – Is it Worthwhile?

Burnett (2007) contended that a reason for forming PPPs are SP competencies, which include better quality products and financial effectiveness. Such a reason is also found to be a major one applicable in Malta. Yet, such competencies do not in themselves justify the formulation of PPPs as these can be alternatively obtained through public procurement. Moreover, as also contended by the EC (2003), the findings indicate that the formation of PPPs may be a way for Government to solve the unavailability of its initial financing, particularly in times of Government budget deficit. Therefore, the country’s economic scenario may play an important role in the decision to form PPPs.

As recommended by PwC (2005), the first step in optimally launching each PPP is to justify such a decision by undertaking a specific case study. This has also been confirmed by the findings. These have pointed out that, in the absence of such a study, Government will lack transparency, effectiveness in negotiations with SPs and VfM. Nonetheless, if in the past, the PPP option had already proved to be successful in

certain sectors, the undertaking of such an exercise may turn out to be merely bureaucratic and ritualistic and therefore not add any value. One proposed solution to such a dilemma was that, in such instances, one may limit case studies to some dubious PPPs rather than to all of them. Yet, Burnett (2007) argued that each PPP needs to be individually justified and therefore, the matter is not that simple. The claim is probably true that the PSC, as recommended by ECA (2018) and OECD (2012), may not capture why a PPP is the better option. Yet, undertaking such a study would make it possible to include considerations such as whether the PPP is in the public interest, whether asset regeneration may be improved by it and whether the PPP may give rise to more opportunities for irregularities. Therefore, the indication in the findings that there are more case studies currently being conducted in Malta than before, marks an improvement from the situation, as described earlier by NAO (2015) and ECA (2018). This is because undertaking such case studies for each PPP is probably a *sine qua non* if Government is to be helped to ensure appropriate decision-making. Of course, it needs to also be ensured that the quality and documentation backing such studies are of the appropriate level, which does not seem to be as yet the case.

The Risk Assignment – Is it Too Burdensome on Service Providers?

In line with UNECE (2008) and WB (2017), the findings indicate that a detailed RA needs to be performed to identify and allocate key risks by following RA guidelines issued by institutions such as EPEC. For optimal formulation, brainstorming sessions need to be held by both Government and SPs in order to identify their risks. However, the focus of each party needs to be different. Government needs to give priority to public interest, assessing the risks of project non-completion or delays, and of political interference or corruption. On the other hand, SPs need to assess their operational and financial risks.

Moreover, the study indicates that, in order to ensure appropriate PPP formulation, Government may best perform the RA in two stages. The first stage is before choosing the SP where the Government assesses the inherent risks. The second stage

is prior to contract finalisation and involves the reassessment of any residual risks in order to verify that the PPP deal is actually beneficial to Government.

Furthermore, a major question arises as to whether Government needs to retain some risks in each PPP. Yescombe (2007) and UNECE (2008) emphasised the need for this, and the study also confirms that this is acceptable in Malta on the basis that the more risks transferred to SPs, the higher the return that will be required by them. Evidently, considerations as to whether all risks are to be transferred to the SP are not to be influenced by whether or not a PPP's debt is to be off the Government's Balance Sheet - as claimed by some respondents⁷⁴ to have been frequently the case in the past - but rather by whether the transfer of all such risks would result in VfM and the public interest. An example of such public interest is the absorption by Government of demand risks in the case of old people's homes so as to ensure sufficient availability.

Therefore, a consistent policy of passing all the risks to SPs may not only be detrimental to Government but also too burdensome for some potential SPs to come forward to undertake the PPP. Yet, the decision to retain some risks in particular PPPs to result in VfM and in the public interest also hinges on the technical ability of the Government's side to manage those risks itself. In this regard, results⁷⁴ indicate that Government personnel need to improve their technical ability and that possibly, this may be done through the provision of training by experts with the appropriate international experience. Another condition which one may consider for appropriate risk retention by Government is for it to appoint specific risk owners for each type of retained risk.

The Contract Drafting – Is it Appropriate for Easy Implementation?

The findings indicate that optimal PPP formulation requires someone to be responsible for the whole process. Furthermore, those drafting the contract clauses of each PPP need to face the dilemma of specifying the nature and detail that such clauses are to have for easier interpretation and implementation at a later stage. The main aspects to PPP contracts, indicated hereunder, deliberate on this dilemma.

Performance Requirements – Input-based or Output-based?

As stated by WB (2017) and Farquharson et al. (2011), PPP performance requirements are to be based on quality and expected output, as opposed to input, as this allows prospective bidders to be creative in achieving the end goals. The local findings are in line with such literature. Yet, it must be kept in mind that basic input requirements also need to be stated, as otherwise, quality may tend to easily and unobtrusively decline, and thus Government may find it difficult to assess the different bidders. However, such requirements need to be kept simple if SPs are to have enough room for operational flexibility for implementation.

Indications have also emerged that performance requirements are normally “SMART”, as suggested by the literature. Yet, more qualitative output-based requirements need to be developed at the drafting stage. Government needs to avoid blind adherence to quantitative performance requirements and refrain from assuming that the PPP would be on its way to optimal formulation if quantitative targets are attained. Here again, issues seem to arise as to the competence of Government’s personnel in PPP formulation.

Furthermore, whenever performance standards are regulated in the industry, these are often automatically inserted in the drafting. However, the absence of such regulations will normally lead to the resetting and clarification of such performance standards at a later stage by way of negotiations with SPs because no one bid offer is then found to have met all of Government’s initial requirements as drafted. Such negotiations may possibly have to include timeframes, service delivery and settlement of payments.

Compensation and Penalty Mechanisms – Availability-based or User-fee?

As described by the literature, PPP Compensation Mechanisms can generally take either the form of an Availability-based Mechanism or a User-fee Mechanism. However, neither mechanism is perceived to be superior in Malta as each lends itself to different Government objectives, with the actual choice varying with the question of which of the two parties – Government and SPs – is to take on the demand risks. When the Government objective is to guarantee availability of service and to ensure

that the PPP remains financially stable, it typically takes over such demand risks by opting for the Availability-based Mechanism. On the other hand, a User-fee Mechanism is better suited to Government when its objective is to induce SPs towards appropriate behaviour. However, in the latter mechanism, the end-user, which may be the Government itself, will have to pay a higher price in view of the higher risk assumed by SPs. It therefore follows that if Government is confident that the PPP outputs will be subject to consistent demand, it is more economical for Government to opt for an Availability-based Mechanism, as this typically results in better pricing. In addition, the User-fee Mechanism may have limited practical use in Malta, as in most sectors, particularly in health and educational services, the perceptions are that public goods are to be funded by Government rather than end-users.

Moreover, as described by the WB (2017), an Availability-based Mechanism may take the form of either a Lump-sum Payment or a Usage-fee. A Usage-fee mechanism is probably more preferable in Malta as it is more motivational to SPs. Furthermore, it has been found that it is difficult for both parties to set a reasonable Lump-sum Payment for beyond the first two years of the PPP and that this will probably have to be revised biennially. Therefore, the obvious disadvantages arising from such mechanism are that both parties may either have to periodically go back to the negotiating table or are to accept the risks of drastically changing end-user demand.

Additionally, for optimal formulation, a “*system of carrots and sticks*” as described by Iossa et al. (2011) warrants serious consideration. This is because, with such a system, additional compensation in the form of bonuses is to be awarded if performance targets are exceeded. Conversely, penalties are to be levied when such targets are not reached. However, the indications are that in Malta the typical safeguards and penalties normally inserted for non-compliance are insufficient, this again probably being due to the prevailing lack of expertise on the part of Government. Furthermore, despite their insufficiency, such safeguards (*including contingency plans and guarantees of first payment timeline*) and penalties (*including loss of performance guarantees and licence revocation*) are implemented in the case of

some but not all PPPs and therefore it may be optimal if such safeguards and penalties are applied in all cases.

In view of the above issues, it would probably also be beneficial if in the PPP contract, arrangements are made for periodic meetings between the Government and the SP. Thus, both parties can be sure of meeting regularly to discuss any arising issues, particularly with respect to those impinging on safeguards and penalties.

Dispute Resolution and Adjustment Procedures – Are They Ever Sufficient?

EPEC (2011) stated that a straightforward dispute resolution procedure needs to be in place. In Malta, such a procedure typically takes the form of arbitration rather than court action. In contrast, adjustment procedures are not as well established, this sometimes emanating from inadequate planning on the Government part. In this connection, Iossa et al. (2007) stated that PPP contracts need to provide for flexibility and that this may be done by including rules about what, when and how adjustment procedures are to be triggered. However, the need for such adjustment procedures stems from the fact that PPPs are typically long-term. This is important because, in ensuring that the interests of Government and SPs are aligned, PPP duration needs to vary with the level of SP investment. As a result, it is difficult at the outset to allow sufficient room for changing circumstances, despite the attempts of SPs in this direction.

The PPP Procurement Process – Can it be Homogenous?

The Pre-Qualification Questionnaire – Is it Sufficiently Transparent and Invariably Needed?

According to WB (2017) and Fenech (2005), Government has to decide whether to include a stage involving a Pre-Qualification Questionnaire (PQQ) as part of the PPP procurement process. By means of such a PQQ, a Government-appointed Committee assesses the necessary preliminary information submitted by prospective bidders through a number of predetermined questions. In line with Yescombe (2007) and Kerf et al. (1998), such information may be both technical and financial and therefore expedites the comparative assessment of the financial strengths and experiences of the various prospective bidders. In such an assessment, the Committee is also known

to exclude details relating to the project design. The acquisition of such information may indeed be highly relevant for optimal PPP formulation. Yet, for the sake of transparency, it would probably be better if the questions themselves are not only predetermined but possibly also closed and dichotomous, although still permitting the possibility of additional comments by the respondents.

The indications are that this pre-qualification stage is preferred as a requirement for all sophisticated PPPs, this being in line with Farquharson et al. (2011). Such a requirement would ensure the immediate exclusion of those prospective bidders who are clearly unequipped in terms of their size, complexity and nature. Furthermore, the findings indicate that, if appropriately implemented, the PQQ would not only render the process more efficient but would also not bear the disadvantage claimed by Farquharson et al. (2012) of materially undermining competition and transparency goals.

On the other hand, with unsophisticated PPPs, it may be beneficial to engage market consultants in lieu of implementing a PQQ. In this case, such consultations may be enough to ensure their optimal formulation.

The SP Selection – A Two-tier or a Weighted Approach?

The bidder is selected, in line with Directive 2014/24/EU, WB (2017) and Kerf et al. (1998), on the basis of who presents the MEAT. In fact, this may involve one of two approaches, both based on financial and technical criteria - the two-tiered approach or the weighted one (the BPQR) - the latter being preferred and more used for PPPs in Malta, as it gives importance both to price and, in varying degrees, to technical criteria. However, the implementation of BPQR may have its dangers of subjective assessment with respect to quality. Thus, implementation would be easier if, prior to the issue of the tender document, maximum scores are predetermined to the various quality aspects. A further safeguard in ensuring objectivity may be that of having different members in the committee evaluating the final bids from those involved earlier in the procurement process.

Heating PPPs: Monitoring their Development

What Resources and Skills are Needed for Effective Monitoring?

According to the literature, Government needs to effectively monitor PPPs to ensure that the agreed contract terms are being adhered to. This importance was confirmed in the findings, and in line with NAO (2018) and 4ps (2007), effective monitoring ensures the issue of early warnings, the protection of the public interest and the motivation and appropriate compensation to SPs. Thus, the question might arise as to what resources and skills are required to ensure that such monitoring is effective.

The major skill required in effective monitoring is the ability to negotiate in order to settle conflicts. Additionally, in line with 4ps (2007), analytical abilities, interpersonal skills and experience on PPPs are considered important in effective monitoring. Moreover, both international and also the limited Maltese experiences on PPPs are considered relevant.

With respect to resources, Farquharson et al. (2011) and EPEC (2014) identified various resources in order to aid monitoring. Adequate training to those in charge of such monitoring is the most essential resource for effectiveness. Moreover, an agreed mechanism to objectively obtain valuable information, as well as an agreed financial model to calculate compensation also seem to be considered as important resources. Thus, Government entities need to have unrestricted access to SP records and to be able to conduct relevant audits. In this connection, the study confirms that specifying this in PPP contracts is not enough, as a comprehensive list and timing of types of information is to be required. Furthermore, other resources which could aid monitoring include hiring independent advisors and creating a contract administration manual. Yet, the latter may never be comprehensive given the uniqueness of each PPP.

Therefore, it would probably be helpful that, during PPP formulation, Government also prepares for the subsequent monitoring phase and accordingly plans for skilled personnel and the necessary resources. This could possibly be achieved through outsourcing the monitoring function, with such outsourcing possibly being open for international firms outside the EU. Moreover, it may be beneficial if provisions are

made for SPs to be charged for the cost of enhanced monitoring wherever they are uncooperative.

Can There be a Consistent Approach as to How, Who and When Monitoring is to be Carried Out?

As identified by WB (2017), Government is tasked with monitoring PPPs, but, how, by whom and when is monitoring carried out so as to ensure that it is effective? The findings indicate that these three aspects are not consistently applied within different PPPs.

In terms of the how, references are typically made to the relevant PPP contract's terms of reference, inspections and KPIs, the latter being developed for the purpose of monitoring each specific PPP. Yet, the extent of detail varies among the various PPPs and consequently these need to be improved. In line with GIH (2018), such improvement may be affected through better links to the compensation mechanisms.

In terms of the who, monitoring is to be the responsibility of the Government entity ultimately responsible for the delivery of the PPP, if need be with the help of outsourced services.

Furthermore, in terms of the when, this may vary from being carried out at predetermined separate stages of PPPs to being carried out periodically, say on an annual basis.

In this manner, effectiveness is likely to be enhanced if an overall consistent approach is agreed for all PPPs. A possible way of ensuring consistency is for a Monitoring Committee to be established to meet regularly and to identify those responsible for implementing the necessary decisions.

Is the NAO the Appropriate Authority to Conduct Performance Audits?

Over the years, the NAO (2015, 2017, 2018) has carried PAs to measure the economy, efficiency and effectiveness of PPPs. It seems that such PAs are relevant for effective monitoring, especially in highlighting deficiencies. However, it may be beneficial if other bodies, such as external consultants, the Internal Audit and Investigations Department or the Contracting Authority also conducts similar audits. More studies may be required in this regard.

A National PPP Unit – Is There a Role for It?

The overall indications are that a tighter regulatory framework is called for in order to ensure improvements in the formulation, operation and monitoring of PPPs, this being in line with Colverson and Perera (2012). Such a framework may include the following:

- a. the setting up of a separate and independent national unit responsible for PPPs (“National PPP Unit”) with its two main functions being that of regulating all PPPs by establishing guidelines for their formulation and that of monitoring their operations so as to ensure the implementation of such guidelines. The functioning of such a Unit could thus eliminate any current need of other public sector entities to form their own PPPs without any benchmarks;
- b. the harmonisation of the whole PPP process by clear provisions as to which arrangements are to be considered as PPPs and by the inclusion of the fundamental principles of formulation, operation and monitoring of such PPPs;
- c. the requirement that such a Unit as specified in (a.) will be managed by a variety of professionally qualified personnel. Furthermore, it is to take on the task of publishing justifications in the public interest for the launching of any new PPPs. One example of such justification may be that of the regeneration of idle Government assets for the derivation of economic benefits.

Conclusions

This study concludes that in Malta, PPPs are commonly well formulated and monitored. Yet, there is clearly still room for improvement. In this respect, one main contributor to the existing deficiencies in both formulation and monitoring is the insufficient level of expertise of Government personnel in both processes. Other factors contributing to such deficiencies include the lack of a specific regulatory framework for PPPs and the related absence of a central procurement authority.

Furthermore, the study concludes that well-conducted preliminary case studies are necessary to determine the feasibility of PPPs for the sake of transparency, effective

negotiations and VfM. However, while such case studies are generally being conducted in Malta, the danger is that these may at times turn out to be merely ritualistic exercises. Furthermore, with respect to RA exercises, the tendency is for these not to be exhaustive, thereby resulting in risks being transferred to SPs which may be too burdensome and not necessarily value-adding in the public interest. Additionally, in the drafting of PPP contracts, there is as yet the need to establish qualitative and basic input requirements in addition to the current output-based performance requirements set out by way of negotiations. It may also be concluded that while an Availability-based Compensation Mechanism results in better pricing and seems to be more appropriate for Malta, it may need to be subjected to revisions later in the contract period. In this connection, safeguards and penalties which are originally planned at the setting out of the contract, too often turn out later to be difficult to implement with consistency. Added on to this, while pre-set adjustment procedures may be difficult to determine at the outset, more emphasis on them is clearly needed to ensure long-term alignment of Government and SP interests. As for provisions relating to the premature termination of PPP contracts, more detailed transition plans are needed, despite the fact that such occurrences may be rare. Moreover, in the Maltese PPP procurement strategy, PQQs have their place and may often, although not always, need to be utilised in view of the complexity, size and nature of bidders. Furthermore, in selecting the ultimate SP for each PPP, a weighted approach is probably preferable in Malta as it permits enhanced focus on technical criteria and objectivity.

With respect to the effectiveness of monitoring, the study concludes that negotiation abilities to settle conflicts and adequate training for the involved Government staff are even here important requisites. Furthermore, PPP contracts do not as yet provide for unrestricted access to SP records and thus they do not facilitate their public sector auditing. Finally, the various approaches towards monitoring in PPP contracts give rise to variations in terms of frequency and extent of details. Such inconsistencies may act as a further barrier to effective monitoring of PPP contracts.

Reference was made to the three elements of oxygen, fuel, and heat for fires to fully start. In the same manner, it is hoped that this study has amply proved the point that all three elements of definability, formulation and monitoring of PPP contracts are essential if PPPs are to be successful future vehicles for public sector development. After all, as argued by one expert in the study, *"PPPs in Malta are separate species as yet in their infancy and therefore more efforts are to be dedicated for their successful growth"*.

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