

RESOLVING THE PARADOX OF UNSOLICITED PPP PROPOSALS FOR INFRASTRUCTURE PROJECTS

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Faced with declining state capacity, South Africa (SA) is revisiting public private partnerships (PPPs) as a potential solution to deliver more innovative solutions to its infrastructure challenges. Despite a 2009 legal framework that accommodates unsolicited proposals (USPs), SA has never executed a PPP project conceptualised as USP. This raises the question as to whether the policy framework creates sufficient incentives to ignite private interest in USPs. More critically, if the public sector is capable of recognising and managing innovative USPs at institutional level. The paper uses an integrative literature review to unpack the source of USP problems. The aim is to come up with governance mechanisms at the pre-tendering phase that is critical due to the implied nature of USPs. The objective of the paper is to explore whether the failure to utilise USPs can be because of the principal's shirking or perfunctory. The research findings are that USP failures are because of actors' actions, public sector capacity and lack of selection criteria. It recommends an extension to agency problems to include the principal's power asymmetry.

Keywords: unsolicited proposals; public private partnerships; agency; governance

INTRODUCTION

The public sector has increasingly sought to leverage the private sector's capacity in the provision of infrastructure through either solicited or unsolicited PPPs. A USP is a unique and innovative submission by a private proponent to the public institution without an explicit request (Hahm and Neves 2019; Ayat, Ullah and Kang 2022; Osei-Kyei, Chan and Dansoh 2020). It is different from solicited proposals (SP), which emanate from the public sector soliciting submissions from the private sector. Resultantly, they are viewed as an avenue of corruption and nepotism due to their opaqueness and implicit nature (Hahm 2019; Nwangwu 2020).

SA's PPP frameworks allow for the adoption of USPs as one of the models for conceptualisation of infrastructure projects. However, SA has had no PPP project conceptualised as a USP that has been approved to date since adoption of the National Treasury (NT) USP framework in 2009. Similarly, those pursued through parastatals such as the South African National Roads Agency (SANRAL) framework have been stuck at negotiation phase with some cancelled or abandoned. This raises questions as

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to whether the USP problems in SA lie beyond policy frameworks or it's an issue of lack of innovative and unique ideas from the private sector.

The objective of this paper is to look at how SA could come up with mechanisms that go beyond framework amendments to addressing flaws, which impact on the utilisation of USPs as a credible conceptualisation model for unique, complex and innovative PPP infrastructure Projects. Although USPs have increasingly been examined with some researchers focusing on the SA USP as a viewpoint (Hahm and Neves 2019; Nwangwu 2020), they have not looked at how USP actors' relation and asymmetry impact on project delivery. The extension of agency problems to include the principle's problems of power asymmetry in relation to the USP has not been explored.

The research starts by reviewing USP challenges with a focus on SA and compares it with selected countries of interest. It then explores on the innovative aspect of USPs before divulging into the actors' relations through the lenses of agency theory before drawing up conclusions and making recommendations.

USP Challenges as a Paradox

USP Governance failures

Ramokgopa (2021) observed that the SA's PPP framework was benchmarked on UK's private finance initiative (PFI) and considered among the best. However, the paradox is that there has been diminished confidence in the PPP delivery framework with only 2% of infrastructure investment secured through it since inception. Hahm (2019) added that PPPs conceptualised as USPs present a paradox as, while public institutions especially in developing countries are motivated to pursue USPs as a way of bridging the capacity gap, the successful implementation of USPs requires even greater capacity than publicly initiated projects. Thus, Mugarura, Ndevu and Turyakira (2020) conceded that the use of PPPs has remained low mainly due to poor understanding and neglecting to review the relationship among actors. Khatleli (2020) observed that whilst the benefits of PPPs can be attested to in several jurisdictions, there are instances where relations have been difficult, and the optimal performance of PPPs has not been reached.

Further, a study by Casady and Baxter (2022) established that while only 3% of the countries' regulatory frameworks prohibit USPs, 40% do not regulate them at all. However, two-third of researched countries that regulate USPs did not witness any change in the number of USP submissions and approval despite the enactment of framework. This led to a conclusion that a USP framework alone does not seem to provide sufficient means to catalyse the USP pipeline (PPIAF 2014; Nduhura *et al.*, 2022). For example, the SA government had to step in as the implementation of the PPP on the Mangaung Correctional Centre was found to be flawed (Howden *et al.*, 2020). (Howden *et al.*, 2020). As such, there has been confusion on the preferred form of PPP as whether to adopt a more contractual or loosely coupled relation/partnership-based model (Klijn 2010).

USPs in SA context

SA is one of the developing countries that has USP regulatory framework in place. While Hahm (2019) claims that SA receives between two to four USPs annually, NT has yet to approve any USP using the NT's USP framework. Even though SANRAL has had a better success in pursuing USPs in SA, there has not been a change in the number of projects recorded since the report of Hodges and Dellacha (2007) tabulated in table 1, which have faced various challenges and took more than two decades.

Table 1: Status of USP projects undertaken by SANRAL in SA

#	Project Name	Value (millions)	Status as per original author in March 2006	Updated status as of 2024
1	N1-N2 Winelands Toll Highway	\$400	Was projected to be publicly tendered in 2006	Was challenged in court and withheld
2	N2 Wild Coast Toll Highway	\$600	Set aside but not rejected because of the ministerial decision from the National Department of Environmental Affairs and Tourism	Initial contractor abandoned the project in 2019. Works to restart on the bridge alone.
3	R300 -Cape Town Ring Road	\$300	Under review and to be submitted to the Minister of Environmental Affairs and Tourism	Still stuck at the concept and viability phase
4	John Ross Highway	Unknown	Abandoned	

Although reviewing of the current SA PPP policy framework is at its final stages, it is yet to be seen if it will result in positive impact without focusing on the information and power asymmetry. Linder (2013) argued that incentives and revision to policy framework alone are not ideal under all circumstances as there is empirical evidence of their failure in captivating private interest in USPs. Wang *et al.*, (2019) research on incentives in PPP highway projects established that impetuously increasing the amount of a reward or a penalty is not an effective way to guide an investor's behaviour but that adopting flexible incentive mechanisms during different stages of a project proves effective in influencing investors' willingness to cooperate with the government as well as in maximising the benefits they realise from the project.

Determining the innovativeness and Uniqueness of USP

The public institutions basis of selecting a USP concept in most countries requires that a proponent's submission must be innovative. However, there is no consensus on innovation definition as it is left to different interpretations. This has possibly contributed to the confusion of what is deemed to be innovative and what is not (Chen *et al.*, 2022; Wang, Xu and Liu 2023). In some instances, innovation has been mistaken to a novel concept, which does not recognise incremental or adjacent innovation. As such, it ignores innovation that builds from what already exists and trying to either make it better or provide an alternative.

There has been little focus in coming up with acceptance criteria or gauge of innovativeness or uniqueness. Bergere (2015) echoed that although public institutions have been fixated on innovation as the determining factor in USP selection, experience has shown that most USPs do not represent real innovations but are simply projects that were not in the government's pipeline. For example, in countries such as Nigeria, there is no express requirement for the USP to be innovative despite guidelines demanding that innovation should be the core reason requirement in USP submission (Nwangwu 2020). Table 2 shows selected USP projects across countries that were found not to be innovative though pursued under that banner.

ESCAP (2008) conceded that the challenge with USP PPPs lies in striking a balance between reinvigorating private sector participation in innovative infrastructure delivery and maintaining transparent or competitiveness procurement process, which does not erode the public sector's accountability. A study by Howden *et al.* (2020) established that even with the use of transaction advisors (Tas), full engagement of the public sector is vital.

Table 2: Selected USP projects across countries

#	Country	Project	Explanation
1	Australia	West Gate Tunnel (WGT) and Victoria Police Centre (VPC)	On both projects, VAGO raised several issues on uniqueness of proposals and following policies among others.
2	USA State of Virginia	I-495 Beltway Highway	Though touted as innovative, public officials found themselves in weak negotiating position.
3	Nigeria	Ikere Gorge Dam:	Partially built in 1998 then later taken over as USPs policies were not adhered to and no innovation or ingenuity delivered on project.

Beyond Regulations: Amelioration of Agency Theory

The identified USP challenges are linked to the principal and agent relationship, which impacts on how USPs are governed. Agency theory is underpinned on the assumption of a perfect/ ideal/ absolute contractual arrangement between the principal and the agent whereas the principal delegates work to the agent with a contract used as a basis of agreement (Jensen and Meckling 1976; Eisenhardt 1985; Nguyen *et al.*, 2023). Thus, under agency theory, it has been recognised that USPs are affected by overregulation and the principal's shirking compared with sultan's trembles or perfunctory (Khatleli 2022). This is in addition to the well-researched private sector's information asymmetry.

Agency Theory's Blind Spot: The Principal's Shirking

Agency problems result from an agent not acting in the principal's best interest. This can either be due to adverse selection, which is because of the principal choosing a wrong agent for the job or moral hazard resulting from the chosen agent acting dishonestly on a delegated task. However, both adverse selection and moral hazard only identifies the agent as the source of the agency problems. The agent's opportunistic behaviour using information asymmetry exacerbated by concealing of information due to claims of intellectual property (IP) in USPs is well documented Howden *et al.*, (2020). However, there is little focus on impact of the principal's actions as well as power asymmetry. Resultantly, most attention has been on how the principal manages the behaviour of the agent.

Thus, the agency theory has been criticised as being unrealistically one-sided, trivial, dehumanising, and even "dangerous". This is because of its neglect of potential exploitation of workers, providing a partial view of the world as it ignores much of the complexity of a firm. Yukari and Jun-ichi (2021) admit that the principal-agent relationship does not always produce the desired results as information asymmetry makes it a challenge for the principal to grasp and monitor the behaviour of agents. Additionally, incomplete contracts make it impossible to accurately predict, describe, and verify the events that may occur after a contract is concluded. Zogning (2017) argues that the agency theory's attempts at guarding against the agent's perceived opportunistic behaviour could stifle initiatives, creativity and entrepreneurial innovation, which is a feature that is highly sort after in USPs. The portrayal of the agents as opportunistic and the only source of agency problems has been criticised as narrow and misses an opportunity of finding ways in which the contract can be made more efficient and disregard contingencies that may be more reflective of realities in economic relationships (Rothaermel 2017).

Contrary to Rausser and Ameden (2010) claims that public institutions have diminished bargaining power, the problem can also be seen from the agent's

perspective who has a risk of choosing (to work for) the wrong principal and the risk of the principal being opportunistic especially in implicit situations like USPs. Wagner (2019) recommended that to understand the principal-agent relationships, there was need of perceiving and describing the principal's failure to perform duties either due to selfish interest, dishonest behaviour, opportunism or incompetence as "shirking" that could be likened to Seltan's "trembles", which includes subtle forms of dominance such as excessive monitoring or manipulative political practices. Thus, shirking in this case implies the influence possessed by the principal coupled with power asymmetry in the agency relationship, which equally impacts on the outcome of the USP as the agent's information asymmetry. Other scholars have described shirking as the collaborative inertia largely resulting from different interests among actors, which could be alleviated through equating the interests with common but diverse needs, goals and reinforcement (Zhu and Chen 2021). It is similar to perfunctory, which is an environment where the legislation is not robust, and the corporate governance is still fledging lead to opportunistic behaviours characterised by malicious compliance (Khatleli 2022).

Even though the agency theory offers insights into agency problems, it is inadequate to explain the management behaviour of the principal or public institutions. Thus, there is need of incorporating the agency perspective in a broader framework to cover the problems resulting from a lack of control by a principal other than the agent (Eisenhardt 1989; Nguyen *et al.*, 2023). The principal uses contracts and control structures mediated by environmental factors to induce managers or agents to behave in a manner consistent with their interest.

Eisenhardt (1989) established that the agency theory becomes more effective when coupled with complementary perspectives and recommended the incorporation of cooperative governance structures. Wagner (2019) proposed an extended definition of opportunism to show that whilst agent opportunism largely rests on information asymmetry, principal opportunism feeds itself off power asymmetries. Although Dowrick (1954) looked at the agent's legal power to alter the principal's legal relations, this only applies under the delegation role when dealing with third parties but not on the direct relationship between the principal and the agent. Thus, there is asymmetric distribution of power in favour of the principal who at will choose to abuse this authority resulting in a distorted relationship performance.

Contract vs Partnership Relations/ Behaviour

Dowrick (1954) opined that the composition of the legal relation between the principal and agent has always been riddled with a view of being a single person resulting in many well-known incidents of agency being contractually implied. From Lukianoff and Haidt (2018) writings on the failures resulting from the contrast of good intentions and bad ideas, negative effects of overprotection on university students using warnings and safe spaces could only be resolved by adopting a positive social culture without using the divisive methods. This can be likened to the control mechanisms adopted by principals due to misconception on the agent's intentions.

Though governments recognise the need for mutual commitment and cooperation in their PPP policy documents, in practice, PPPs are always transformed into 'contracting', which ex ante governance conditions rarely allow private actors to innovate and that the interdependence between partners outside the formal contract is minimal resulting in loss of flexibility (Hodge and Greve 2010; Roberts and Siemiatycki 2015; Mugarura, Ndevu and Turyakira 2020). This is exacerbated by the

nature of USPs at conceptualisation stage were contracts are incomplete and non-existent, which makes the actors' behaviour play a huge role in their success.

Theoretical Recommendations

PPPs conceptualised as USPs are more complicated to handle than SPs due to their implied nature at the inception stage. This paper recommends looking beyond the regulatory frameworks, contracts and selection index proposed by Osei-Kyei, Chan and Dansoh (2020) to having mechanisms of managing the relationship among actors that will ensure mutual interest and trust. Thus, there is a need to put in various mechanisms that will respond to the unique nature of the implied principal and agent relationship without an incomplete but no contract at all. Khatleli (2020) recommended the setting up of functioning and politically independent PPP units to deliver transparent procurement processes appealing to private participants.

Ameliorate the agency theory to include principal problems

The research recognises that the information asymmetry exists as per agency theory (does not dispute this part of literature) and proposes that it should be extended to also cover power asymmetry that the principal possesses coupled with shirking. This can be achieved by restructuring the actors' relationship in PPP from principal and agent to a collaborative network. In collaborative network governance, the government's role shifts from leading and monitoring to coordinating, recognising instruments, and shaping conditions in a way that motivates networks and ensure cooperation functions efficiently.

Creation of an independent and capacitated unit handling USP submissions

There is need of removing the principal from being the participant and regulator in the USP process. The setting up of an independent regulator without self-invested interests would be needed to reinvigorate and captivate interest among stakeholders and be responsible for handling the USP pre-tendering phase, thus creating a transparent process, to facilitate and nurture a positive perception and recognition of USPs. The proposed administrative unit should be capacitated than the current PPP Unit, which only provides advisory role.

Criteria for defining, determining and selection of innovative USP submissions

The component that sets USPs apart from SPs is the implicit submission of proposals deemed unique and innovative. However, the criteria of determining what is innovative and unique has barely been discussed and determined. Current regulatory frameworks only require USP submissions to be innovative and unique, which is a broad and unrealistic expectation. This is open to different and subjective interpretation especially when dealing with a biased and corrupt environment. There is a need of coming up with models and tools that will guide the private sector in packaging innovative ideas based on the public sector's expectations.

CONCLUSIONS

Literature reviewed has shown that frameworks adopted by various countries have done little to spark success in PPPs conceptualised as USP. Of interest is that SA has never had any USP concept approved despite the 2009 NT legal framework. Those undertaken through SANRAL framework have also been stuck at inception phase, leading to conclusions that a framework alone might not be an enough solution. USPs are complex to implement than SPs due to their implied nature that does not only lead to ex ante contractual incompleteness but a complete lack of contract at pre-tendering phase. Further, IP claims coupled with information asymmetry and lack of capacity

makes it a challenge for the public sector to determine the innovativeness and uniqueness of the USP. In developing countries like SA, this is exacerbated by some public officials misusing the power asymmetry of being both the regulator and participant coupled with shirking to engage in corrupt and nepotistic practices.

There is need of coming up with procurement strategies that resonate with the unique nature of USP and assist in reviewing the potential proposals while choosing a realistic set of contractual terms and their performance measures. To do this, there is need to relook at the agency relationship by reviewing the impact of the public sector being both the participant and regulator. Thus, it is recommended that screening, evaluation and selection of USP concepts be handled by an independent unit that serves beyond the current PPP unit's mere advisory role but capacitated with a team of experts in USPs. In addition, there is need of establishing a known gauge of determining innovativeness of the proponent's concepts, which is a key component of USPs. To resolve the asymmetry among actors, there is need to address procurement and evaluation mechanisms that neither makes the USP process rigid nor compromises the public sector procurement regulations and system.

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