

Forum: Practical Perspectives

Critical success factors of Public-Private Partnerships: political and institutional Aspects. Case study of highways in Portugal

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Public-Private Partnerships (PPPs) can be defined as institutional arrangements involving public and private actors in long-term contracts. Considered incomplete contracts, PPPs tend to have increased transaction costs and are associated with the typical problems of principal-agent relationships. In this context, the academy has devoted attention to the study of the critical factors to the performance of PPPs, including political and institutional factors, which is also the focus of this article. Through a qualitative study, based on in-depth interviews and intensive documental analysis, this article aims to study the case of PPPs of highways in Portugal, which have flaws and are currently under great public scrutiny.

Keywords: Public-Private Partnerships; institutional factors; political factors; road infrastructure; Portugal.

Fatores críticos de sucesso das Parcerias Público-Privadas: aspetos político-institucionais. Estudo de caso das rodovias em Portugal

As Parcerias Público-Privadas (PPP) são arranjos institucionais que envolvem atores públicos e privados numa relação contratual de longa duração. Assumindo-se como contratos incompletos, propendem para o aumento dos custos de transação e estão associadas aos problemas típicos das relações de principal-agente. Neste contexto, a academia tem dedicado atenção ao estudo dos fatores críticos para o bom desempenho das PPP, entre os quais, os fatores de natureza política e institucional, a que dedicamos o artigo. Por meio de uma metodologia qualitativa, assente na realização de entrevistas em profundidade e numa criteriosa análise documental, o artigo propõe-se estudar o caso das PPP de infraestruturas rodoviárias em Portugal, com falhas já identificadas e atualmente sob forte escrutínio público.

Palavras-chave: Parcerias Público-Privadas; fatores institucionais; fatores políticos; infraestruturas rodoviárias; Portugal.

Factores críticos de rendimiento de los Consorcios Público-Privados: aspectos político-institucionales. Estudio de caso de infraestructura vial en Portugal

Los Consorcios Público-Privados (CPP) son arreglos institucionales donde participen agentes públicos y privados en una relación contractual de larga duración. Como contratos incompletos, os CPP tienden a un aumento de los costos de transacción y están asociados con los problemas típicos de las relaciones de principal-agente. En este contexto, la academia ha dedicado atención al estudio de los factores críticos para el rendimiento del CPP, incluyendo los factores políticos y institucionales, al que dedicamos el artículo. A través de una metodología cualitativa, basada en la realización de entrevistas en profundidad y un análisis exhaustivo de los documentos, el artículo propone estudiar el caso de CPP de infraestructura vial en Portugal, con deficiencias ya identificadas y actualmente bajo un intenso escrutinio público.

Palabras clave: consorcios público-privados; factores institucionales; factores políticos; infraestructura vial; Portugal.

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1. INTRODUCTION

Public-Private Partnerships (PPPs) have increasingly been appearing on an international level. In Portugal, governments have promoted an extensive PPP program since the latter half of the 1990s, which deals mainly with highway infrastructure, even though the past few years have demonstrated that there have been various gaps in its application.

The international literature in this field has emphasized various critical factors, which create the conditions for good PPP performance. Through a qualitative methodology, this article will study the way in which governmental support factors (of an institutional and political nature) have dictated the performance of this case study of Portuguese highway infrastructure PPPs.

This article is current and pertinent and deals with a case study that has been insufficiently explored (that of Portugal). In doing so, it seeks to provide a deeper understanding of this phenomenon, which can inform the learning process of public managers in terms of PPPs.

2. PPPS AS CONTRACTS: NEO-INSTITUTIONAL CONTRIBUTIONS AND THE CONTRACTUAL APPROACH

In a generic manner, PPPs can be defined as collaborative instruments between public and private actors. In dealing with different practices, PPPs can take various forms. Among the most common uses of this concept is the definition of PPPs as: (a) long-term infrastructure contracts; (b) a new and alternative method of governance; (c) a body of language that seeks to hide intentions to privatize (Hodge and Greve, 2007).

PPPs of the contractual variety, which are the ones that are being addressed in this article, constitute well-formalized instruments, with clear delimitations of responsibilities, risks and benefits. The interaction between the partners is limited, given that the public partner defines the objectives and the goods and services to be delivered, which makes the relationship similar to that of a seller and a buyer (Firmino, 2014). These are incomplete contracts of long duration, characterized by transaction costs, which result from uncertainties in regard to the future and presence of specific assets (Zheng, Roehrich and Lewis, 2008). As principal-agent relationships, PPPs can permit the existence of opportunistic behavior on the part of the private partners (agents) who are more favored in an asymmetrical relationship in terms of information (Shapiro, 2005). To avoid this type of behavior, the principal (public partner) has an incentive to invest in selection instruments (through bidding procedures) and introduce contractual clauses, which make it possible to transfer risk and punish or reward the private partner for its performance (Chung, 2012).

3. CRITICAL FACTORS IN GOOD PPP PERFORMANCE: THE NEED FOR GOVERNMENTAL SUPPORT

Various advantages have been associated with PPPs. It has been argued that, in addition to making it possible to raise private funds, PPPs make it possible to get better value for money (VFM), by transferring risks to the private sector (Organization for Economic Co-operation and Development, 2008, henceforth OECD). Private initiative is seen as more efficient in offering public services because of its functionality based on a market perspective to make profit, making it more conducive to innovation and giving it a greater concentration of experienced specialized technical resources (Hofmeister and Borchert, 2004).

According to Hodge and Greve (2009), empirical evidence on the international level has noted mixed results in terms of the VFM provided by PPPs, pointing out various “traps” which threaten good performance. Thus, in an evaluation of its experience with PPPs, the World Bank observes various critical upstream and downstream factors that affect the work of PPPs. Among the upstream factors most relevant to the success of PPPs according to this organization, are public consensus and commitment, the existence of an appropriate sectoral strategy (PPP policy), the regulatory environment, institutional expertise and the adoption of best practices. Among the downstream factors most relevant to the success of PPPs are the capacity for financial investment, technical expertise and the project’s ease of execution, among others (World Bank Institute, 2013).

A box based on the literature is presented below (box 1), which groups the critical factors into three distinct categories: political factors, institutional factors and the context of private initiative (the last involves the downstream factors that affect PPPs and therefore this will not be studied in this article).

BOX 1 CRITICAL PERFORMANCE FACTORS FOR PPPS

Critical Factors		Dimensions
Political Factors	<i>Appropriateness of the PPP Model for this Project</i>	<ul style="list-style-type: none"> • Favorable cost-benefit analysis in terms of the realization of the project; • Correct estimate of the VFM for the PPP option (PSC); • Affordability of the expenses; • Technical viability.
	<i>Political Commitment</i>	<ul style="list-style-type: none"> • Stable political situation (political regime and system); • Relative political and social consensus in terms of the projects that the PPP will perform; • Sound PPP policy (clarity in terms of governmental positions and objectives).
	<i>Transparency and Accountability</i>	<ul style="list-style-type: none"> • Publication of the main information regarding the PPP; • Transparent partner bidding procedures.
Institutional Factors	<i>Legal and Regulatory Landscape</i>	<ul style="list-style-type: none"> • Overall legal framework of the PPP; • Sectoral and public bidding legislation; • Contract regulation: • Definition of the contractual terms regarding: payment mechanisms and the distribution of benefits; appropriate risk distribution matrix; safeguards and partner guarantees; performance indicators; renegotiation, exit from and termination of the contract; • Standardization of contract bidding procedures.
	<i>Institutional Expertise</i>	<ul style="list-style-type: none"> • Existence of a PPP Unit that is well-equipped in terms of resources; • Experience and technical expertise in PPP (not dependent on outside consultants); • Good public governance (organization and coordination of the responsible PPP entities).
	<i>Selection of the Private Partner</i>	<ul style="list-style-type: none"> • Competitive environment in the public bidding phase; • Well-defined bidding procedures and specifications, with indications of the technical requirements, performance indicators and evaluation criteria for the private partners.

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Critical Factors		Dimensions
Context of Private Initiative	Economic and Financial Environment	<ul style="list-style-type: none"> • Stable economic situation; • Sound economic policy; • Dynamic financial market open to investment.
	Private Partner Commitment	<ul style="list-style-type: none"> • Private partner has solid technical and financial expertise; • Attractiveness of the Project: executable project that is reasonable from a technical point of view; appropriate remuneration; guarantees by the State; access to the capital markets.

Source: Elaborated by the author based on Aziz (2007); Kwak, Chih and Ibbs (2009); OECD (2012).

4. METHODOLOGY

This study is based on the application of a qualitative methodology. Based on an interpretivist scientific paradigm, it seeks a deeper understanding of the reality under examination, centered on the points of view of the participating actors. In terms of data collection techniques, qualitative interviews have been used along with a critical analysis of documentation. The documents analyzed include the PPP audit reports from the Court of Accounts (CA), the legal regime of PPPs, the PPP highway contracts, and the transcriptions of the 70 public audits published by the Commission of Public Inquiry regarding PPPs (CPIPPP) as well as its final report.

These documents supply the data on which the interviews were based, and they were used to get a deeper understanding of this area as well as to clarify and confront facts presented by those investigated, the members of parliament of both parties who participated in the CPIPPP, and the public managers who participated in the preparation and awarding of these contracts and their monitoring.

The contracts were submitted to content analysis with the *a priori* definition of thematic categories (characteristics of the offering of services, the financing model, the sharing of risk, safeguard mechanisms, and rules of interaction), which were then further divided into subcategories. A residual category of units of analysis was also created, made up of items that at first glance were considered to be possibly pertinent, but were later included in new categories or discarded as irrelevant for this analysis.

The CPIPPP audits and the interviews were the subject of more flexible content analysis. In this instance, creating *a priori* categories was avoided. After an initial review of the empirical material, an initial codification of an open nature was performed using the basic thematic categories, which were identified, with text segments serving as the unit of analysis (entire or partial phrases). Throughout the analysis, the initial codification was continually reviewed through the successive comparison method to verify the appropriateness of including each unit. Then an axial and selective codification was performed, in order to establish interpretation standards and to develop the initial categories. Finally, this data analysis was cross-referenced with critical factors established by the literature, which indicated their frequency in the current case study.

5. THE PORTUGUESE CASE STUDY OF HIGHWAY INFRASTRUCTURE PPPS

5.1 THE PPP UNIVERSE IN THE PORTUGUESE STATE

The Portuguese State monitors a universe of 21 highway PPPs, which represent the largest number and the largest annual spending in terms of PPPs (Portugal, 2017:95). The respective contracts were awarded between 1995 and 2010, under various forms of financing.

Box 2 consists of a summary of the critical analysis of the functioning of Portuguese highway PPPs, based on the political and institutional factors mentioned above.

BOX 2 CRITICAL FACTORS IN THE PERFORMANCE OF PPPS: A CASE STUDY OF HIGHWAY INFRASTRUCTURE IN PORTUGAL

Critical Factors		
Political Factors	<i>Appropriateness of the PPP Model</i>	<ul style="list-style-type: none"> • Dubious budgetary behavior given the elevated number of PPPs. • Deficient evaluation of VFM (PSC absent or unreliable; cost-benefit studies made without sensibility analysis; unrealistic traffic forecasts).
	<i>Political Commitment</i>	<ul style="list-style-type: none"> • Inexistent political and social consensus, despite relative political stability. • Unilateral decisions to modify contracts by public entities.
	<i>Transparency and Accountability</i>	<ul style="list-style-type: none"> • Difficulty in terms of public scrutiny (reports that are incomplete and hard to understand for laymen). • Restricted access to information (contractual pieces that have only recently become public; the case base, the renegotiation documents, and some reports of a private nature).
Institutional Factors	<i>Legal and Regulatory Landscape</i>	<ul style="list-style-type: none"> • Legal PPP regime created in 2003 and altered to be more assertive. • Contracts include the definition of terms regarding the services offered, the financing model, the distribution of risk and the safeguards and guarantees of the partners. • Some gaps in the contracts and technical specifications (especially in the initial PPPs): • Absence of benefit distribution mechanisms; • Disadvantageous sharing of risks to the State (expropriations; environmental risks) or risks due to substantial contractual modifications (alteration of risk matrices with the assumption of traffic risks by the State); • Very onerous contractual clauses covering State decisions to renegotiate or abandon the contract; • Few sanction mechanisms for contract violations by private partners. • Inexistence of manuals listing best practices and standard procedures in the awarding of PPPs.
	<i>Institutional Expertise</i>	<ul style="list-style-type: none"> • Inexistence of a PPP Unit with well-consolidated management and monitoring functions. • Fragility of the PPP management and monitoring model: variable division of responsibilities and poor articulation between entities over time (HP, InIR, Parública).

Continue

Critical Factors	
	<ul style="list-style-type: none"> • Little experience and a lack of sufficient technical expertise during the first years of the PPPs. • A strong reliance on outside consultants. • Excessively close relationships between those involved (in the public sector in relation to the private sector and vice-versa).
<i>Selection of the Private Partner</i>	<ul style="list-style-type: none"> • Determined through international bidding process. • Projects based on the technical proposals and studies presented by potential private partners. • Limited market competition in terms of offers (reduced number of players and possible collusion).

Source: Elaborated by the author.

5.2 FROM POLITICAL CONSENSUS TO THE LACK OF COMMITMENT AND INSTABILITY OF PPP POLICY

Driven by insufficient public infrastructure and a scenario characterized by deficit and public debt constraints imposed by the European Union, Portugal enthusiastically adopted PPPs.¹ In the case of highways, this was combined with concerns related to regional equality, a reduction in accidents, and the 2000 National Highway Plan (Cruz and Marques, 2012). There was a broad political consensus on PPPs,² even though the points of view in terms of individual projects may differ.

According to the literature, this broad consensus has been considered to be positive, given that political will should be mirrored by sound public policy to avoid opposition on the part of citizens and political parties (Grimsey and Lewis, 2004). With contracts that last for a period much longer than the political cycles, the existence of a favorable consensus favors and guarantees the political commitment of subsequent governments, which is fundamental to helping establish the confidence of the private partner and avoid expenses motivated by unilateral modifications to contracts (Guasch, 2004).

Yet a lack of political coherence characterizes the Portuguese example, which has been marked by successive renegotiations initiated by unilateral governmental decisions: “The national experience has revealed itself to be a lack of a deeper alignment of public power, which can be seen in various PPPs in terms of alterations in the philosophy of initial projects, divergences in terms of various aspects of these same projects (alteration of routes, commercial policies, etc.) with onerous consequences for the State.” (Portugal, 2007:17).

5.3 TECHNICAL OR POLITICAL RATIONALITY: THE ASSESSMENT OF VFM IN PPP CONTRACTS

PPP are political decisions, even though they tend to be presented to the public as if they were technical (Coghill and Woodward, 2005:89). Technical rationality mirrors the option to develop a project through a PPP when this exhibits the best VFM (Grimsey and Lewis, 2004). Political

¹ In 2005 the country represented the largest investment in PPPs as a percentage of GDP (Pricewaterhouse Coopers apud OECD, 2008:30).

² “There was a clear desire to shift to the PPP model, to try it, to acknowledge that there would be risks, but to try it nonetheless” (representative of the Left Block (LB) in an interview).

preferences can be present in the ideological component (neoliberal orientation) or electoral motivations (wanting to show “work accomplished,” according to the Theory of Political-Economic Cycles). In the Portuguese case, PPPs have been used poorly, becoming “disproportionately, uncontrollably and asymmetrically powerful compared to the State” (CPIPPP Audit Report, June 28, 2012) due to its being a “very attractive instrument that does not involve immediate costs” (Chief Justice of the CA during an interview).

The VFM can be defined as a more favorable combination of the PPP’s whole life cycle cost, based on the quantity and quality of the good or service. This is quantitatively, objectively based and is expressed by the Public Sector Comparator (PSC), but also includes qualitative aspects, which are difficult to value (Morallos and Amekudzi, 2008). The PSC is the indicator, which contains the costs that the project would have if it were developed by the public sector (OECD, 2008). Some studies conclude that the calculations of the PSC can frequently be biased in order to favor the intended policy decision (Shaoul, 2005).

In the Portuguese case study, the PSC was instituted as a legal obligation with approval from the PPP’s legal regime, even though in reality it has not been used in most highway contracts (Portugal, 2007). When calculated, the PSC has been considered to be pro-forma:

The market option was chosen, because Highways of Portugal (HP) did not have the necessary structure [in terms of technical and human expertise] to guarantee the realization of projects of this size today. [...] The decision to use the comparator was useless when the decision to involve the private sector had already been taken. [interviewee from HP]

PPP projects should show a cost-benefit analysis favorable to their realization. “If the project does not have a positive result, then it will not benefit society just because it is a PPP, even if the comparator gives preference to this type of project” (CPIPPP Audit Report May 31, 2012). In terms of Portuguese PPPs, the opportunity to construct a few sections of highway is questioned. “There are traffic studies that are commissioned [from outside consulting firms] after the decision has already been made” (CPIPPP Audit Report June 19, 2012).

The ability of the public sector to always be able to face the costs of PPPs is designated as affordability (OECD, 2008). As a solution that guarantees “buy now and pay later,” PPPs can inspire more lenient economic and cost-benefit analyses and the acceptance of projects which have little public relevance (Monteiro, 2007). The elevated number of PPPs awarded by the Portuguese State translated into higher finance costs that reached 1.1% of GDP in 2011 (Portugal, 2013:14), putting sustainability at risk.

5.4 PUBLIC SUPPORT FOR THE UNKNOWN: THE LACK OF TRANSPARENCY AND ACCOUNTABILITY

For years PPPs have been far removed from the preoccupations of citizens, as long as their particular characteristics have not affected them (such as toll hikes or issues related to a particular section of highway). Poorly informed about the costs and drawbacks of the infrastructure that facilitates their movement and the promotion of local development, citizens have a positive view of PPPs.

The lack of initial scrutiny was due to the non-existence of publicly available documents as well as their poor quality or overwhelming complexity, which makes them inaccessible to common

citizens.³ With a scenario featuring the financial assistance of the *Troika*, made up of the IMF, the European Central Bank, and the European Commission, PPPs began to come under greater scrutiny. This became evident through the efforts made to produce clearer and more complete reports and to make PPP contracts available online. Even so, the documents that support the awarding of a contract and the selection of a private partner and some financial appendices of the contracts remain private.

5.5 PPP LEGAL AND REGULATORY LANDSCAPE

The legal regime for PPP leadership was approved in Portugal through Law-Decree n. 86/2003 of April 26. Currently, due to the revocation of the previous legislation, the governing law is the New Legal Regime of the PPPs (NLRPPP), instituted by Law-Decree n. 111/2012 of May 23.

The NLRPPP has been designed to reinforce the supervision of the awarding and monitoring of PPP contracts, involving the constitution of a new specialized unit, the Project Monitoring Technical Unit (PMTU). This is intended to combat the dispersion of participating entities and give the State the technical and human means necessary together with the necessary expertise.

The NLRPPP stipulates that opting for a PPP should result from a VFM evaluation, presupposing the adoption of the PSC, the realization of economic and financial viability studies, and a verification of budgetary affordability (Art. 6). The private partner should receive appropriate remuneration in light of the investment and risks it is assuming, according to the prevalent principle that the partner with the best capacity to manage these risks should assume them (Art. 7). In light of past PPP experiences in Portugal, the NLRPPP reinforces the rules for renegotiating contracts, making the calculation of financial consequences for the public partner mandatory as well as an evaluation of its respective affordability (Art. 20).

Portuguese highway PPPs are concession contracts that associate rights with obligations. The basic contracts have most of the rules associated with the lives of PPPs, but in Portugal, many have been renegotiated. In PPPs, the fundamental principle of risk allocation according to the ability of each partner to manage them can easily be subverted. Portuguese PPPs have gaps in their sharing of risk (like the assumption of expropriation and environmental risks by the public partner, as well as the lack of a contemplation of benefit sharing mechanisms), even though these contracts have improved over time.

The standardization of contracts is discussed within the context of best practices, as is the existence of PPP procedure manuals (Kwak, Chih and Ibbs, 2009). Making use of verified learning, the standardization of these procedures makes it possible to repeat best practices, avoiding errors and overcoming absences in terms of specialized technical expertise on the part of some public contractors, which accelerates contracting processes and provides greater efficiency on the part of the State in general (Van der Hurk and Verhoest, 2016). In Portugal, even though some intention has

³ “It is incomprehensible how these contracts are hidden from public knowledge [...] there is no access to this information and this reduces the space for transparency and efforts to enforce responsibility” (interview with LB representative). “The policy of publicizing reports made by the Inspector General of Finances has been, as long as I can remember [...] restrictive. [...] to tell the truth, there is a dilemma, which is the dilemma of transparency” (CPIPPP Audit Report June 20, 2012).

been shown in this direction, there are still no documents available as mentioned by the individual responsible for the PMTU.

5.6 INSTITUTIONAL EXPERTISE: PPP SUPERVISION MANAGEMENT MODEL

The management, supervision and monitoring of PPP contracts implies the establishment of entities with well-defined expertise that act in an articulated and coordinated manner. The literature gives a prominent role to the specific PPP units that, on the Public Administration level, supervise the processes and can develop guidelines and accompany project evaluations (Aziz, 2007).

Portugal displayed its lack of national experience in dealing with PPPs during their first years of existence.⁴ Outside consultants were frequently hired especially in the legal and financial areas (Portugal, 2008). In addition, there have been various cases in which PPP participants (politicians and technical positions) have exchanged roles, with them acting as representatives of the State at times, and at others representing the private partners. “It seems that on one side, there should be disgust sets to a certain point [...], and on the other, care taken to not work in exactly the same areas where they have worked before” (CPIPPP Audit Report June 19, 2012).

On the supervision and management model level, there are various participating entities under the control of the Ministry of Finance and the Ministry of Planning and Infrastructure. The main public entities involved have changed during the Portuguese experience, without the State managing to create “a solid and consolidated structure for an administrative corps which can guarantee the efficient supervision and management of PPP highways” (Firmino, 2014:184). These changes may have been responsible for the loss of institutional memory, the dispersion of documents and specialized human resources, which has had pernicious consequences for the learning capacity of the Portuguese State in terms of PPPs: “Every time there’s a change, [...] the State loses a bit of its ability to conduct a dialogue with their private partners on an equal footing to express the State’s point of view” (interview with the Head of HP).

5.7 SELECTION OF PRIVATE PARTNER

The existence of competition in PPP bids contributes to the diversity and quality of the proposals offered by the private partner candidates. In many cases, the number of competitors is less than desirable, which can translate into competition that is more apparent than real. The highway infrastructure market is very restricted in Portugal, which could be an opportunity for establishing a market cartel (interviews with the Chief Justice of the CA and the Head of HP).

After the signing of the contract, the necessary alterations and renegotiations are processed with the private partner now acting as a monopoly, with all its associated risks. To Guasch (2004), the alteration of a contract soon after its signing indicates poor preparation and could signify the presentation of an opportunistic offer on the part of the private partner.

⁴ Two technical specialists involved in the preparation and renegotiation of a PPP, when interviewed by the CPIPPP, recognized their inexperience during the initial period: “when I began, I did not know anything about the PPP” (Audit Report, June 5, 2012).

In the realization of public bids, the literature points out that it is necessary to establish a clear definition of the specifications (Kwak, Chih and Ibbs, 2009). In the case of the Portuguese PPPs, Cruz and Marques (2012) point to errors in the delimitation of the specifications filed by the first PPPs, which could have led to negotiating various contract specifications in a non-competitive environment.

6. CONCLUSIONS

The field literature discerns various factors, which are critical to the successful implementation of PPPs. Among these they emphasize political-institutional factors, which provide favorable governmental support for their development. The case study of Portuguese highway infrastructure projects illustrates various gaps in the PPPs, which has made them the subject of great public discussion and has enabled them to become a relevant source of international learning.

Despite a well-developed legal and regulatory landscape, the Portuguese case reveals the country's inability to establish political commitment and a correct evaluation of VFM through technically competent public entities.

Lacking infrastructure and with strong budgetary constraints, PPPs were attractive to governments, in some cases to deal with unresolved policy issues, and in others for electoral and ideological reasons.

At the end of 20 years of experience characterized by a slow learning curve, there still remains much to be done, especially in terms of improving best practices and standardizing contracts and procedures. The positive evolution of the last few years, however, offers hope that Portuguese PPPs will be better used in the future.

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