

**NATIONAL TREASURY  
PPP TOOLKIT FOR TOURISM**  
**GETTING STARTED:**  
**2. CLARIFYING SOME KEY POLICY ISSUES**



# CONTENTS

INTRODUCTION	1
BLACK ECONOMIC EMPOWERMENT IN TOURISM PPPs	1
COMMUNAL AND PRIVATE LAND	15
UNSOLICITED PROPOSALS	20
ENVIRONMENT AND HERITAGE	21

## TEMPLATES

Template 1: Acknowledgement letter: Unsolicited tourism  
PPP proposal

Template 2: Outline business case: Unsolicited tourism  
PPP proposal



## INTRODUCTION

### Policy areas specifically affecting tourism PPPs

- Black economic empowerment (BEE)
- Communal and private land
- Unsolicited proposals
- Environment and heritage

## BLACK ECONOMIC EMPOWERMENT IN TOURISM PPPs

### Tourism BEE policy within the BEE and PPP policy context

South Africa has adopted a policy of black economic empowerment which is broad-based, inclusive and part of the country's overall growth strategy. It is articulated in the 2003 *Strategy for Broad-based BEE (BBBEE Strategy)* and is given effect in the Broad-based Black Economic Empowerment Act, 2003 (BBBEE Act).

**Of relevance to the *PPP Toolkit for Tourism*, the *BBBEE Strategy* specifically notes that BEE criteria will be applied whenever government 'grants a concession to a private enterprise to operate an asset or enterprise on behalf of the state' or 'enters into a public private partnership'.**

Following the further provisions of the BBBEE Act, 2003 and the relevant provisions of Treasury Regulation 16 to the Public Finance Management Act, 1999 (PFMA) National Treasury issued the *Code of Good Practice for BEE in PPPs (Code for BEE in PPPs)* as National Treasury PPP Practice Note Number 03 of 2004. This is published as Module 2 of National Treasury's *PPP Manual*. Consistent BEE terms for project-financed, service-type PPP agreements are contained in National Treasury's *Standardised PPP Provisions*.

In addition to providing for codes of good practice for BEE, the BBBEE Act, 2003 also provides that the Minister of Trade and Industry may publish and promote 'a transformation charter for a particular sector of the economy' if he or she is satisfied that such a charter 'has been developed by major stakeholders in that sector; and advances the objectives of the [BBBEE Act]'. In May 2005 the Minister of Environmental Affairs and Tourism launched the *Tourism BEE Charter and Scorecard*.

This Toolkit is a sector-specific refinement of National Treasury's *PPP Manual* (including the *Code for BEE in PPPs*) and *Standardised PPP Provisions*. It tailors the application of PPP regulations to commercial tourism opportunities

on state property, typically in protected areas. In relation to BEE it therefore takes particular direction from achievements and challenges experienced in tourism PPPs to date and from the *Tourism BEE Charter and Scorecard*, 2005.

For the practical implementation of BEE in the tourism sector to be as consistent as possible, the Toolkit's BEE approach is based explicitly on the *Tourism BEE Charter and Scorecard*, 2005. However, it has been adapted in two specific ways for private parties wishing to bid for tourism PPP opportunities:

- to accommodate the option of including community trust ownership<sup>1</sup> in the private party to a PPP
- to target specifically the local<sup>2</sup> impacts of the PPP in relation to strategic representation, employment (and hence local skills development), preferential procurement, and enterprise development.

## Tourism BEE scorecards

Tourism PPPs require that the private party to the PPP agreement is a special purpose vehicle which has the sole purpose of conducting the relevant PPP project. The private party to a tourism PPP agreement therefore has to be formed to meet targets of the 2009 Tourism BEE Scorecard and to increase these targets over time to meet those set in the 2014 Tourism BEE Scorecard.<sup>3</sup>

To qualify in the pre-qualification phase of the large cap PPP bid process, the lead companies of the bidding consortia must demonstrate that they are good BEE contributors<sup>4</sup>, according to the classification given in the *Tourism BEE Charter and Scorecard*, 2005 measured by the 2009 scorecard to end 2009, or by the 2014 scorecard after 2009.

The Toolkit's BEE scorecards<sup>5</sup> are applicable to both the small cap route and the large cap route<sup>6</sup> scenarios (with certain specified exemptions in relation to private parties with an annual turnover of less than R5 million). The scorecard applies to the wide product range and scale of projects that can be procured by institutions<sup>7</sup> as tourism PPPs.

The feasibility study sections of the Toolkit give guidance on how to plan for BEE in a tourism PPP, the procurement sections and template procurement documents show how to apply the scorecard in bid evaluation, and the template PPP agreements include consistent BEE provisions to hold private parties to their BEE commitments over the term of the PPP agreements.

---

1. See definition of community trust ownership on next page.

2. See definition of local on next page.

3. These two scorecards form part of the *Tourism BEE Charter and Scorecard*, 2005, a joint initiative of the Department of Environmental Affairs and Tourism and the Tourism Business Council of South Africa. They can be found at [www.tbcsa.org.za/bee/](http://www.tbcsa.org.za/bee/)

4. As defined in the *Tourism BEE Charter and Scorecard*, 2005.

5. The Toolkit scorecards have been adapted slightly from those presented in the *Tourism BEE Charter and Scorecard*, 2005. See 'BEE scorecards for tourism PPPs' further on, in this section.

6. Used throughout the Toolkit for easy reference, the colloquial term 'small cap' stands for 'small capital expenditure' and 'large cap' stands for 'large capital expenditure'.

7. See 'Annexure 1: Treasury Regulation 16': 16.1 Definitions.

All BEE components of the bids will be scored out of 100 points, and bidders must score at least 65 points to be considered by the institution. The BEE score achieved by a bidder is weighted 10 per cent of the overall bid evaluation, with the remaining 90 per cent allocated between functionality and price, as required by the Preferential Procurement Policy Framework Act, 2000.

All BEE definitions in the Toolkit are consistent with those used in the *Tourism BEE Charter and Scorecard*, 2005 with the following additions, where applicable<sup>8</sup>:

Community trust	A not-for-profit trust created in terms of applicable law by volunteer members for the purpose of channelling the proceeds of various activities and investments for the common good of persons ordinarily resident within a specific town, village or settlement.
Local	A geographic area specified by the institution in the request for proposals (RFP), being either within a specified kilometre radius of the proposed project site or named village(s) or town(s), or settlement(s) within such radius, village(s) or town(s).
Community trust ownership	Ownership in the private party, which, as a provision of the PPP, will be acquired by a specific community trust named by the institution in the RFP. The means by which such ownership will be acquired will be specified in the RFP, being either via own purchase, loans, shareholder loans, donor or state grants, donations, or a combination thereof.

### Why tourism PPPs are good for BEE

Tourism PPPs, involving the commercial use of state property, provide excellent opportunities for BEE. A number of these are listed below.

- Tourism PPPs typically take place on state land that is protected for conservation or heritage purposes or both. In remote rural and economically marginal locations, these PPPs bring new infrastructure investment, new trade in goods and services, new jobs and new skills. This kind of development is unlikely in such locations without projects like these and gives black people, and particularly poor households within local areas, the opportunity to benefit.

8. Community trust ownership may be a requirement in some tourism PPPs, but not all.

- A central principle of 21st-century management of parks, conservation reserves and heritage sites is that people living within the vicinity of these protected areas must receive direct benefits from the protection of the natural and heritage resources. Further, it is widely acknowledged that if people – particularly the poor – do not receive these benefits, conservation efforts cannot be sustained in the long term. The terms and structure of PPP agreements provide ample opportunity to ensure that such benefits accrue.
- Tourism PPPs provide the opportunity for black people and black enterprises to be in the mainstream of tourism activity without having to buy land at the outset. This considerably lowers the financial barrier to entry.
- The long-term nature of most PPPs provides an opportune instrument, not only to grow black equity, community trust equity, black management, and skills over time, but also to create permanent jobs and sustainable downstream enterprises.
- The formation of private consortia in the form of special purpose vehicles (SPVs) for PPPs facilitates long-term beneficial partnerships between new black enterprises, community trusts, and experienced, resourced tourism investors and operators – both as equity partners and in project management.
- PPPs have far-reaching, broad-based BEE potential: through sub-contracting and procurement mechanisms they can involve a full spectrum of large, medium and small enterprises, bringing tangible, local, economic development benefits to targeted groups of people through project cash flows early in the project term.
- The PPP opportunities envisaged in this Toolkit range from very small enterprises (requiring low capital investment and limited enterprise experience) to large-scale developments (involving higher risk and significant operator experience), providing entrepreneurial avenues for a full spectrum of black enterprises.
- PPPs provide a valuable vehicle for co-ordinating government’s various small, medium and micro enterprise (SMME) support efforts, galvanising and committing these at the feasibility study phase, and focusing the inputs where they are needed, especially in private party financing, legal and business advice, and skills development.

### **Challenges for BEE in tourism PPPs**

Lessons from South Africa’s early tourism PPP projects also point to some significant obstacles to achieving sustainable BEE in tourism PPPs. A number of these obstacles are listed below.

- Access to debt financing for tourism enterprises generally (including PPPs) is usually limited to approximately 50 per cent of the venture’s financing

requirements, placing a heavy burden on shareholders to raise high levels of equity. This reflects the general volatility of the tourism market and is a serious constraint to achieving black ownership.

- Black enterprises' access to reasonably priced capital for buying equity is also a constraining factor. Historically, black people have not accumulated capital. Sources of BEE funding are generally expensive and, in the tourism sector, usually also require own matching funds (or grant equivalents). This reflects lenders' assessment of the risks – not only those risks associated with new enterprises whose balance sheets may be relatively small, or whose tourism experience may be relatively limited, but the risks associated with tourism enterprises generally.
- Established companies in bidding consortia often become obliged to provide sponsor security for committed BEE capital or to guarantee performance by black partners. This contributes to the already uneven playing field for consortium members.
- The cost of independent financial and legal advice to black enterprises and community trusts is another inhibiting factor in the preparation of bids during contract negotiation and during start-up. They often leave black partners and community interests in a consortium vulnerable to entering into disadvantageous arrangements.
- South African black enterprises' strength, skill and experience in the tourism industry are generally limited: there are few sizeable black investors or operators able to compete with the long-established tourism companies.
- Community trusts (in towns, villages and settlements within the vicinity of the state property identified for a tourism PPP) usually have little to no commercial experience and limited knowledge of the tourism market. They depend on advisors from non-governmental organisations (NGOs) and government, which may have limited entrepreneurial ability or experience.
- The education and skills base, as well as entrepreneurial initiative, in rural South Africa is known to be limited, reflecting a long legacy of apartheid deprivation and neglect.
- Government's various support measures for tourism SMMEs are not easily co-ordinated at the project level to achieve optimal results.

### **Policy focus for BEE in tourism PPPs**

The tourism PPP environment is full of opportunities and challenges. In this context, the Toolkit has the following policy focus for guiding institutions and private parties to achieve optimal BEE in tourism PPPs:

- Institutions procuring tourism PPPs must make a concerted effort to galvanise the support resources of relevant state institutions, donors and NGOs. This is to ensure co-ordinated delivery of their various services in financing,

training, legal and business advice to black enterprises (and, where applicable, community trusts) participating as private party owners, employees and providers of goods and services. Memoranda of understanding (MoU) with these organisations are key to motivating that a value-for-money outcome can be achieved. That is why these MoUs are required components of the institution's feasibility study and, without them, regulatory approval for the feasibility study should not be granted.

- Poor communities within the vicinity of the PPP site (local areas) must receive tangible short- and long-term benefits. This will be primarily through project-specific combinations of: ownership, employment, preferential procurement, and corporate social investments.
- This local community focus must be appropriately balanced for each project. Targeted ownership, strategic representation, employment equity, skills development, preferential procurement, and enterprise development must benefit black people and black women, even those who do not necessarily reside in the local area.

The following are the indicators for BEE in tourism PPPs:

- **Ownership.** Dividends are the long-term rewards of an equity investment (ownership) in the private party, but expectations should not be created that these will be quick or necessarily rich pickings. Volatility in the tourism market and the typical return on equity profiles of tourism businesses can yield good results for shareholders, but seldom consistently, and never early in the project term. Nevertheless, ownership is an important element of BEE, bringing upside benefits to black people, black participation in business risk management, and building local commitment to private party success. Two sub-elements of ownership are targeted for tourism PPPs: ownership by black people and, where appropriate, by local community trusts. In keeping with the *Tourism BEE Charter and Scorecard, 2005* private parties to PPP agreements with a turnover of less than R5 million per annum are exempt from the ownership requirement.
- **Strategic representation** by black people, black women and local people in the private party can be proactively built over time. Community trusts are not well placed to play day-to-day executive management roles. This means that the focus should rather be on increasing the number and skills of black managers (preferably including those with ownership stakes), whether they are local or not.
- **Employment** yields the greatest flow of funds to poor households in the most immediate way; more than dividend flows and more than local trade in goods and services. The number of jobs for local people is therefore an important indicator in tourism PPPs. Indicators of measurement for local employment impact have accordingly been included in the scorecard.

- **Skills development** is a high priority in tourism PPPs, focused at all levels – shareholders, management, employees, and suppliers of goods and services. While this is an obligation of the private party, the institution must ensure during the feasibility study phase that suitable programmes are made directly available to the private party to support its efforts, and that specialist NGO and state SMME support programmes are accessible.
- **Procurement.** A single project’s ability to stimulate the local supply of goods and services is limited. Procurement of goods (such as food and materials) from local SMMEs to tourism PPPs has generally been low. Procurement of services (such as laundry or field guides) is usually easier. Targets for these elements (both to BEE compliant companies not necessarily from the local area, and to local BEE compliant companies) must be tailored accordingly. They must be based on the institution’s feasibility study phase assessment of local entrepreneurial activity and the quality of available skills development programmes to support its growth.
- **Enterprise development** will be most viable for large cap projects and targets for small cap projects in this indicator should be tailored appropriately.
- **Corporate social investment** by the private party should be committed to local community benefit (for example, in clinics, schools, roads, HIV-Aids work and the like) and must dovetail with municipal integrated development plans. Bidders will be requested to propose corporate social investment projects and the private party will be contractually committed to deliver. Realistic expectations must be tailored to business turnover.

## BEE scorecards for tourism PPPs

### Take note

The scorecards are as presented in the *Tourism BEE Charter and Scorecard, 2005* with the addition of local indicators. They also show the option of a local community trust taking an additional percentage of ownership in the private party to the PPP agreement as may be specified by the institution in the bid documentation, but this may not always be the case.

BEE scorecard for tourism PPPs (2009)				
Indicator	2009 Weightings		2009 Milestones	2009 Target
	Weighting	Sub-weighting	Indicator to measure BEE achievement	Target
	A	B		C
Ownership	15.00%	15.00%	Percentage share of economic benefits as reflected by direct shareholding by black people <i>Note: Direct shareholding includes employee stock ownership plans and other employee share schemes</i>	*21.00%
		<i>Specified by the institution</i>	Community trust ownership (optional)	Additional 10%
Strategic representation	14.00%	3.00%	Black people as a percentage of board of directors	30.00%
		3.00%	Black women as a percentage of board of directors	15.00%
		2.00%	Local people as a percentage of board of directors	15.00%
		3.00%	Black people as a percentage of executive management	30.00%
		3.00%	Black women as a percentage of executive management	15.00%
Employment equity	14.00%	1.50%	Black people as a percentage of management	35.00%
		1.50%	Black women as a percentage of management	18.00%
		1.50%	Local people as a percentage of management	15.00%
		1.50%	Black people as a percentage of supervisors, junior and skilled employees	45.00%
		1.50%	Black women as a percentage of supervisors, junior and skilled employees	23.00%
		1.50%	Local people as a percentage of supervisors, junior and skilled employees	35.00%
		1.50%	Black people as a percentage of total staff	53.00%
		1.50%	Black women as a percentage of total staff	28.00%
		2.00%	Local people as a percentage of total staff	50.00%

\* *Proviso: private parties to tourism PPP agreements with an expected turnover of less than R5 million per annum are exempt from the ownership indicator, as provided in the Tourism BEE Charter and Scorecard, 2005.*

**BEE scorecard for tourism PPPs (2009) (cont.)**

Indicator	2009 Weightings		2009 Milestones	2009 Target
	Weighting	Sub-weighting	Indicator to measure BEE achievement	Target
	A	B		C
Skills development	20.00%	5.00%	Percentage of payroll spend on skills development (including skills development levy) on all accredited training	3.00%
		5.00%	Percentage of skills development spend on all black employees	75.00%
		5.00%	Number of learnerships as a percentage of total employees	2.00%
		5.00%	Number of black learners as a percentage of total learners	80.00%
Preferential procurement	15.00%	10.00%	Spend on BEE-compliant companies as a percentage of total procurement spend	40.00%
		5.00%	Spend on local BEE-compliant companies as a percentage of total procurement spend	20.00%
Enterprise development	14.00%	14.00%	The sum of percentage spend of post-tax profits on enterprise development and percentage employee time contributed to enterprise development over total management time	1.00%
			Enhanced revenue and/or cost savings and/or twinning initiatives facilitated for black-owned SMMEs, as a percentage of revenue of the company measured	1.00%
Social development and industry specific	8.00%	3.00%	Percentage of corporate social investment spend of post-tax profits on education, community programmes, job creation, training, health, conservation, community tourism and marketing activities to develop local black tourists market (or percentage management time over total employee time)	1.00%
		2.00%	Percentage of new recruits with no prior work experience	10.00%
		3.00%	Status of TOMSA levy collector	Yes
<b>Total</b>	<b>100.00%</b>	<b>100.00%</b>		

BEE scorecard for tourism PPPs (2014)				
Indicator	2014 Weightings		2014 Milestones	2014 Target
	Weighting	Sub-weighting	Indicator to measure BEE achievement	Target
	A	B		C
Ownership	20.00%	20.00%	Percentage share of economic benefits as reflected by direct shareholding by black people <i>Note: Direct shareholding includes employee stock ownership plans and other employee share schemes</i>	*30.00%
		<i>Specified by the institution</i>	Community trust ownership (optional)	Additional 10%
Strategic representation	12.00%	2.00%	Black people as a percentage of board of directors	50.00%
		2.00%	Black women as a percentage of board of directors	25.00%
		3.00%	Local people as a percentage of board of directors	25.00%
		2.50%	Black people as a percentage of executive management	50.00%
		2.50%	Black women as a percentage of executive management	25.00%
Employment equity	12.00%	1.00%	Black people as a percentage of management	50.00%
		1.00%	Black women as a percentage of management	25.00%
		2.00%	Local people as a percentage of management	25.00%
		1.00%	Black people as a percentage of supervisors, junior and skilled employees	65.00%
		1.00%	Black women as a percentage of supervisors, junior and skilled employees	35.00%
		2.00%	Local people as a percentage of supervisors, junior and skilled employees	50.00%
		1.00%	Black people as a percentage of total staff	75.00%
		1.00%	Black women as a percentage of total staff	40.00%
		2.00%	Local people as a percentage of total staff	60.00%

\* Proviso: private parties to tourism PPP agreements with an expected turnover of less than R5 million per annum are exempt from the ownership indicator, as provided in the Tourism BEE Charter and Scorecard, 2005.

**BEE scorecard for tourism PPPs (2014) (cont.)**

BEE scorecard for tourism PPPs (2014) (cont.)				
Indicator	2014 Weightings		2014 Milestones	2014 Target
	Weighting	Sub-weighting	Indicator to measure BEE achievement	Target
	A	B		C
Skills development	18.00%	4.50%	Percentage of payroll spend on skills development (including skills development levy) on all accredited training	3.00%
		4.50%	Percentage of skills development spend on all black employees	75.00%
		4.50%	Number of learnerships as a percentage of total employees	2.00%
		4.50%	Number of black learners as a percentage of total learners	80.00%
Preferential procurement	18.00%	10.00%	Spend on BEE-compliant companies as a percentage of total procurement spend	50.00%
		8.00%	Spend on local BEE-compliant companies as a percentage of total procurement spend	20.00%
Enterprise development	10.00%	10.00%	The sum of percentage spend of post-tax profits on enterprise development and percentage employee time contributed to enterprise development over total management time	1.00%
			Enhanced revenue and/or cost savings and/or twinning initiatives facilitated for black-owned SMMEs, as a percentage of revenue of the company measured.	1.00%
Social development and industry specific	10.00%	6.00%	Percentage of corporate social investment spend of post-tax profits on education, community programmes, job creation, training, health, conservation, community tourism and marketing activities to develop local black tourist market (or percentage management time over total employee time)	1.00%
		1.00%	Percentage of new recruits with no prior work experience	10.00%
		3.00%	Status of TOMSA levy collector	Yes
<b>Total</b>	<b>100.00%</b>	<b>100.00%</b>		

### Three key BEE policy concepts relevant to tourism PPPs

Three key policy concepts relevant to tourism PPPs need to be clarified to properly effect BEE as envisaged in the Toolkit:

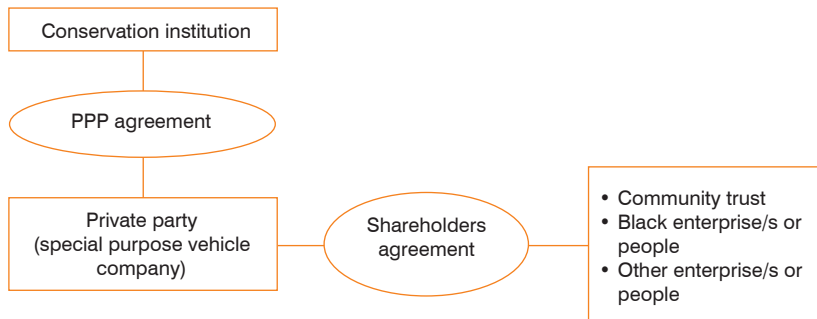
- The option of community trust ownership in private parties to tourism PPP agreements.
- Black people, black ownership and community trusts.
- Unsolicited proposals from community structures.

#### 1. The option of community trust ownership in private parties to tourism PPP agreements

Community trust ownership referred to in the Toolkit is equity in the private party which has been set aside by the institution to be acquired by a named, organised and registered non-profit community trust which has been formed to benefit communities ordinarily resident in villages, towns or settlements **adjacent to or within a certain radius of** the state property identified for the PPP project. Where this is appropriate, the private party to the PPP agreement may be obliged (in a manner specified in the request for proposals) to accept the designated community trust as an equity partner.



The contractual relationships can be depicted as follows:



This arrangement will not be viable or desirable in every tourism PPP. It must be assessed by the institution during the pre-feasibility study and feasibility study phases of the PPP project cycle on a project-by-project basis. However, where it is desirable, the community trusts will be identified and consulted by the institutions during these phases. Specifications for their beneficial involvement in the PPP will then be reflected in the BEE scorecard for the project, and included in the PPP procurement documentation.

A number of key considerations drawn from experience need to be taken into account when structuring such arrangements.

- Community ownership is not easy to achieve. A basic starting point is that community interests must be constituted in a suitable legal entity, with suitable governance structures. Unstructured mechanisms and structures that confuse profit-making purposes with non-profit purposes have proven to be unmanageable when forming contractual relationships aimed at achieving communal benefits, and they are also prone to disputes and corruption. Community trusts are suitable vehicles and communal property associations<sup>9</sup> which have been established for the purposes of communal land ownership may also be appropriate.
- The search for finance for the purchase of community ownership in the private party must begin before the procurement phase starts. It must be clearly addressed in the institution's memoranda of understanding (MoUs) with the development finance institutions (DFIs), other financing institutions and support organisations, and possibly other donors. This kind of financing will often comprise a mix of soft loans, grants and own contributions, sometimes combined with shareholding donated by the other equity holders in the private party. The agreed sources and terms of the community trust's financing must be conveyed clearly to bidders in the request for proposals (RFP).
- Community trusts require independent technical, financial and legal advice for any PPP involvement. To date PPPs that have successfully involved community partners have mostly resulted from proactive facilitation from a donor or NGO. Institutions initiating this kind of PPP must therefore take deliberate steps to ensure that independent advice is secured from appropriate support organisations at the feasibility study phase. They also need to ensure that this advice is maintained appropriately throughout the procurement phase and into the early years of implementing the PPP agreement.
- Institutions must guard against conflict of interest in their facilitation of community involvement in the private party to a PPP agreement.

---

9. Established in terms of the Communal Property Association Act, 1996.

- Government institutions (public entities, municipalities, departments) may not become shareholders in the private party to a PPP agreement.
- Local black enterprises or black entrepreneurs wanting to participate in the PPP must do so through normal business mechanisms: either as black equity partners in bidding consortia or in black management roles in the private party or as subcontractors to the private party or as suppliers of goods and services or as private party employees. They may also need specific support from DFIs and/or other SMME or BEE support institutions.
- The institution must specify in the RFP the rules of engagement between the named community trust and bidder. Approaches to the community trust by different bidders during the procurement phase can lead to complications. At the same time, bidders do need to know something about the community trust, its strengths, organisational capacity and priorities. It is thus recommended that the community trust make a presentation to a bidders' forum soon after the RFP has been issued.

## **2. Black people, black ownership and community trusts**

Black people and black ownership are not interchangeable with communities and community ownership. They are different and distinct indicators in the BEE scorecard. Community trust ownership, if applied, will be an additional requirement and will not dilute the scorecard's targets for ownership by black people. Black people also do not have to be local people.

## **3. Unsolicited proposals from community structures**

From time to time, institutions are approached by community organisations wanting to gain access to state land to develop a community tourism facility of one kind or another. These approaches, in essence, are unsolicited proposals and should be treated by the institution as such. Proponents should therefore be requested to complete the 'Unsolicited PPP proposal form' as provided in Template 2.

If the proposal has merit, the institution will follow the PPP project cycle as regulated. There is no basis in law to not follow the PPP project cycle or to ignore the legal requirement for an open and competitive procurement process. Indeed, it is in the best interests of both the institution and the community making the proposal for the necessary feasibility study to be done properly by the institution. There is, however, no restriction on setting high targets for community trust ownership in the private party (if the level of local interest and/or capacity is strong), or on setting high targets for local beneficial impact on various elements of the BEE scorecard.

## COMMUNAL AND PRIVATE LAND

The definition of a PPP in Treasury Regulation 16 specifies, inter alia, that a PPP involves the commercial use of **state** property. Land which is registered in ownership to a private individual, a private company, a private or community trust, as being communal land, or which is held in trust for a community by the state, or which is owned by a community entity, or land which is transferred to a community entity in the settlement of a land claim, is **not** state property.

The Toolkit is designed for institutions seeking to offer private parties rights to operate tourism businesses on state-owned land.

**The properties on which tourism PPPs take place in terms of the PFMA and which are the focus of the Toolkit do not include:**

- communal land administered in terms of the Communal Land Rights Act, 2004, including all land held in trust by the state on behalf of tribes or communities, and Ingonyama Trust land<sup>10</sup>.
- land registered in the Deeds Office as owned by communal property associations (created in terms of the Communal Property Association Act, 1996) or community trusts
- land transferred in ownership through government's land redistribution programme
- private or communal land declared to be a special nature reserve, nature reserve or protected area in terms of the National Environmental Management: Protected Areas Act, 2003 and which may or may not be incorporated into a protected area owned by the state
- land transferred in ownership in terms of the Restitution of Land Rights Act, 1994, including such land protected in terms of the land claims settlement agreements in perpetuity for conservation, and managed by agreement with state conservation institutions.

### Land transferred through restitution

Where land under a restitution claim has particular biodiversity value, the outcome of the land claims negotiations with stakeholders has often been agreement that the land will be transferred in ownership to the legitimate claimants (along with monetary compensation), it will not be settled upon by the claimants, but it will continue to be held in perpetuity for conservation purposes, managed by the relevant state conservation institution. The state conservation institutions in these arrangements are sometimes also granted commercial rights on this land, to be implemented under their relevant statutory powers. These conditions are typically attached to the title deeds. The state conservation institution, in turn, seeks to supplement its costs of conserving the land by seeking private investors who will pay a concession fee to the conservation institution

10. Some of this land has been proclaimed for conservation and is managed by conservation institutions. In such cases, the guidance in this section applies.

for the rights to invest in and operate tourism facilities on the land. This land does not belong to the state. It is privately owned by the communities and is registered in the Deeds Office, usually in the name of a community trust or a communal property association which seeks to reap the benefits of land ownership.

### **The application of Treasury Regulation 16 in respect of communal and other private land**

Where an institution, having the statutory function to operate commercial activities in protected areas, has acquired rights and obligations to develop and manage commercial activities on private or communal land by virtue of a land claim settlement agreement or by virtue of the incorporation or proclamation of private or communal land into a protected area, the granting of such rights to a third party private investor/operator constitutes a PPP by virtue of commercial activities being 'an institutional function', even though the land is not state property.

However, this application of the PPP definition must be interpreted in the context of land rights enshrined in the Constitution of the Republic of South Africa, 1996, and in the context of specific land rights legislation. South African law seeks to restore land rights where these were taken away under apartheid, to protect land ownership, and to empower people to receive the economic benefits of land rights and land ownership.

Furthermore, National Treasury recognises that any private investment in communal or private land does not constitute the enhancement of a state asset but the enhancement of a private asset, even if that asset is managed for conservation purposes by a state institution. In so far as the state institution is granted the authority to facilitate the enhancement of that asset under its custodianship it should do so, therefore, in a manner consistent with land rights legislation and in a manner that also meets the conservation objectives to which both the landowner and the conservation institution subscribe.

In keeping with the good governance principles of the PFMA, National Treasury does not support the formation of joint venture companies between state institutions and communal/private landowners for purposes of procuring private investors/operators or for purposes of operating commercial enterprises. Public entities should also not be created if the institution's roles, resources and relationships can be managed within existing institutional structures and in terms of regular arm's-length contractual relations. Risk must not become blurred between parties, and remedies for an aggrieved party upon non-delivery by another party must be clear.

National Treasury, therefore, will exempt an institution from the application of Treasury Regulation 16 in circumstances involving third party private tourism investment on private or communal land over which the institution has been granted conservation obligations and commercial rights in terms of a co-management agreement (CMA), if the institution can show that it has put one of the following two contractual mechanisms in place:

- a co-management agreement back-to-back with a community-private party agreement; or
- a co-management agreement back-to-back with a community-public private partnership agreement.

## Co-management agreement back-to-back with a community-private party agreement

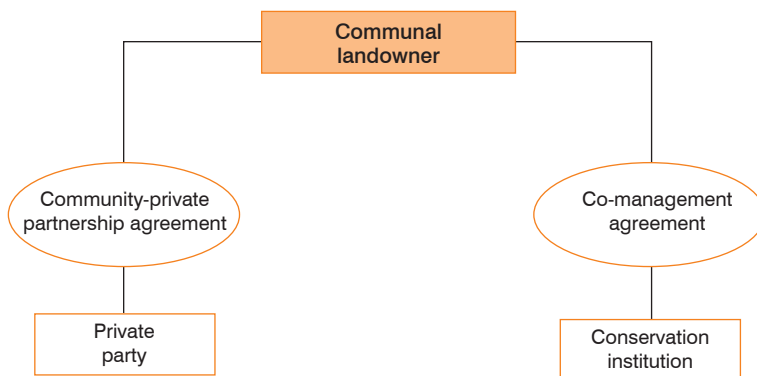
In this mechanism, the landowner (community trust or communal property association) enters into a CMA with the relevant conservation institution (the conservation manager) and enters into a separate community-private party agreement (CPP) with a private investor/operator. The CMA must, in these circumstances, be secured before a landowner seeks a private investor. The CMA between the landowner and the conservation manager becomes a back-to-back agreement with the subsequent CPP. This enables risks to be managed by the appropriate parties, and remedies for non-delivery to be effected accordingly.

The CMA should be concluded on four principal points:

1. **The quality and quantum of conservation management to be provided** by the conservation manager, the costs involved, and the consequences of failure to perform to the agreed standards.
2. **The risks that the landowner will assume and manage**, the costs involved, and the consequences of failure to perform to the agreed standards.
3. **How the revenues from tourism or other uses of the land are to be shared** between the landowner and the conservation manager.
4. **How the necessary feasibility studies for, procurement and management of contractual relationships with third party private sector investors and operators** will be collaboratively handled in support of both parties' rights and obligations.

The CPP must clearly assign risk and reward, and the landowner would be advised to use PPP best practice as a benchmark. In many cases, however, the landowner may also take an equity stake in the private party, thus taking on some commercial risk.

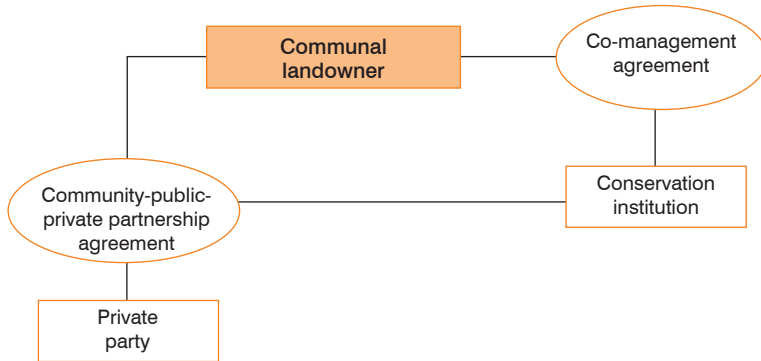
The contractual relationships in this mechanism may be depicted as follows:



## Co-management agreement back-to-back with a community-public-private partnership agreement

This mechanism will achieve the same effect as in the mechanism above. However, it is contractually more complex, and should be pursued only if the contractual arrangement outlined above cannot achieve what the landowner and the institution require. The CMA must be concluded first, on the same principal points outlined above. Signatories to the community-public-private partnership agreement (CPPP) would be the landowner, the institution, and the private party. *Inter alia*, the CPPP must clearly set out each party's rights and obligations, events that constitute defaults by each party, and the explicit consequences of such defaults. Risks and rewards must be clearly and appropriately assigned, using PPP best practice as a benchmark.

The contractual relationships in this mechanism may be depicted as follows:



Such CMAs, CPPs and CPPPs obviously require detailed and consistent approaches, preferably with standardised forms of contractual relationships. These should reflect both the land claims settlement agreements (where applicable) and the relevant conservation legislation.

The relevant government institutions should find appropriate ways to give transaction and management support to communal landowners when they engage with private investors and conservation institutions. Communal landowners also need support in managing their responsibilities in these agreements.

**Similar principles and mechanisms should be applied to private land (other than communal land) that has been incorporated into a protected area and over which a conservation institution has acquired conservation obligations and commercial rights.**

## Take note

### A PPP on private/communal land within a protected area?

Three crucial questions need to be asked to determine whether an institution granting commercial rights to a private party on land not owned by the state is, by legal definition, a PPP:

- Does the private/communal land form part of a protected area managed by the institution?
- Does the institution have statutory rights or obligations to provide tourism amenities and/or to commercially develop the protected area?
- Does the institution have a contractual right from the landowner to commercially develop the land?

If the answer is 'yes' to all three questions, it is possible that the commercial development of the land would constitute a PPP by virtue of a private party 'performing an institutional function' (that is, commercial activities that would otherwise be performed by the institution) 'on behalf of the institution'. In this scenario, it is recommended that an institution apply to the relevant treasury for an exemption from Treasury Regulation 16, and allow the terms of a CMA to take precedence. The CMA should, nevertheless, attempt to follow best practice set by the Toolkit, as applicable.

## UNSOLICITED PROPOSALS

Institutions receive unsolicited proposals from private parties looking to make use of state property for commercial purposes, where the institution has not issued a request for proposals.

However, unsolicited proposals are usually incomplete, fraught with governance complications, and their value for money cannot be tested without competition. To accept such proposals without the proper feasibility study and procurement processes being followed would not only be in breach of Treasury Regulation 16, but would be in breach of Constitutional provisions for fair, transparent and competitive procurement. But ideas and feedback from the private sector that help institutions identify potential commercial opportunities should not be discouraged.

When an institution receives an unsolicited proposal it should take the following steps:

- The official responsible for developing commercial opportunities must acknowledge that he or she has received the proposal. A template letter for this is provided in ‘Template 1: Acknowledgement letter: Unsolicited tourism PPP proposal’.
- As part of the letter, the institution should request that the unsolicited proposer complete a standard business proposal form so that the institution can assess the merits of the case. A template form is provided in ‘Template 2: Outline business case: Unsolicited tourism PPP proposal’.

By corresponding in this way over an unsolicited proposal the institution is not accepting any obligations. The unsolicited proposer must be informed that, if the institution decides that the proposal has merit, it will follow the provisions of the Toolkit in preparing for and procuring a partner for the PPP. If the proposal, in the institution’s opinion, has no merit, the proposer will be informed that the institution will not take up the proposed project.

If the proposal contains intellectual property rights the institution will not acquire these rights. Although the possibility of such rights being part of an unsolicited proposal is slight, the institution should seek legal advice where necessary.

If the institution’s advertising of PPP opportunities is regular and standardised it is likely that unsolicited proposals can be quickly and appropriately channelled into the institution’s normal PPP feasibility and procurement processes. Regular annual or biannual advertising of tourism PPP opportunities – especially those targeted at SMMEs – should be standard practice once institutions have established the necessary capacity and systems.

## ENVIRONMENT AND HERITAGE

### Environmental issues

The Environment Conservation Act, 1989 (ECA) identifies activities that may have a substantial detrimental effect on the environment. No-one may undertake an ‘identified activity’ or cause such an activity to be undertaken except by written authorisation – a record of decision (RoD) – issued by the Minister of Environmental Affairs and Tourism or by a competent or local authority. The competent authority is the relevant provincial authority except in specified circumstances, in which case it is the minister. The competent authority will only issue authorisation to an applicant after it has considered an environmental impact report following an environmental impact assessment (EIA). Regulations to the ECA cite the ‘applicant’ as any person who applies for an authorisation to undertake an activity or to cause such activity to be undertaken. Depending on the project circumstances, the applicant may therefore either be the institution initiating the PPP or the private party to a PPP agreement. The applicant must appoint an independent consultant, which must comply with the regulations on behalf of the applicant.

Poor environmental planning by institutions causes delays in obtaining RoDs and adds to project costs for all parties. It is common cause that uncertainty adds risk, that risk is managed by mitigation measures that cost, and that cost impacts not only on private party cash flow, but, ultimately, on the PPP fee that the institution can obtain from the private party when operations begin. That is why it is important for the institution to be aware, very early in the PPP cycle, of the environmental impact that a PPP may have. It also needs to do as much preparation as possible to make sure that required RoDs are obtained or refused timeously.

While typically, environmental risks, including the regulatory EIA risks, rest with the private party when the PPP agreement is signed, the institution must try to limit these in the project preparation phases. This begins with the institution consulting early – in the inception and pre-feasibility phases of the PPP project cycle – with the competent authority, and agreeing on what EIA steps are appropriate for which party to take, and at what stage, in order to expedite the project. If the project is a ‘no go’ for environmental reasons, this must be established by the institution early on – before it proceeds further in the feasibility study.

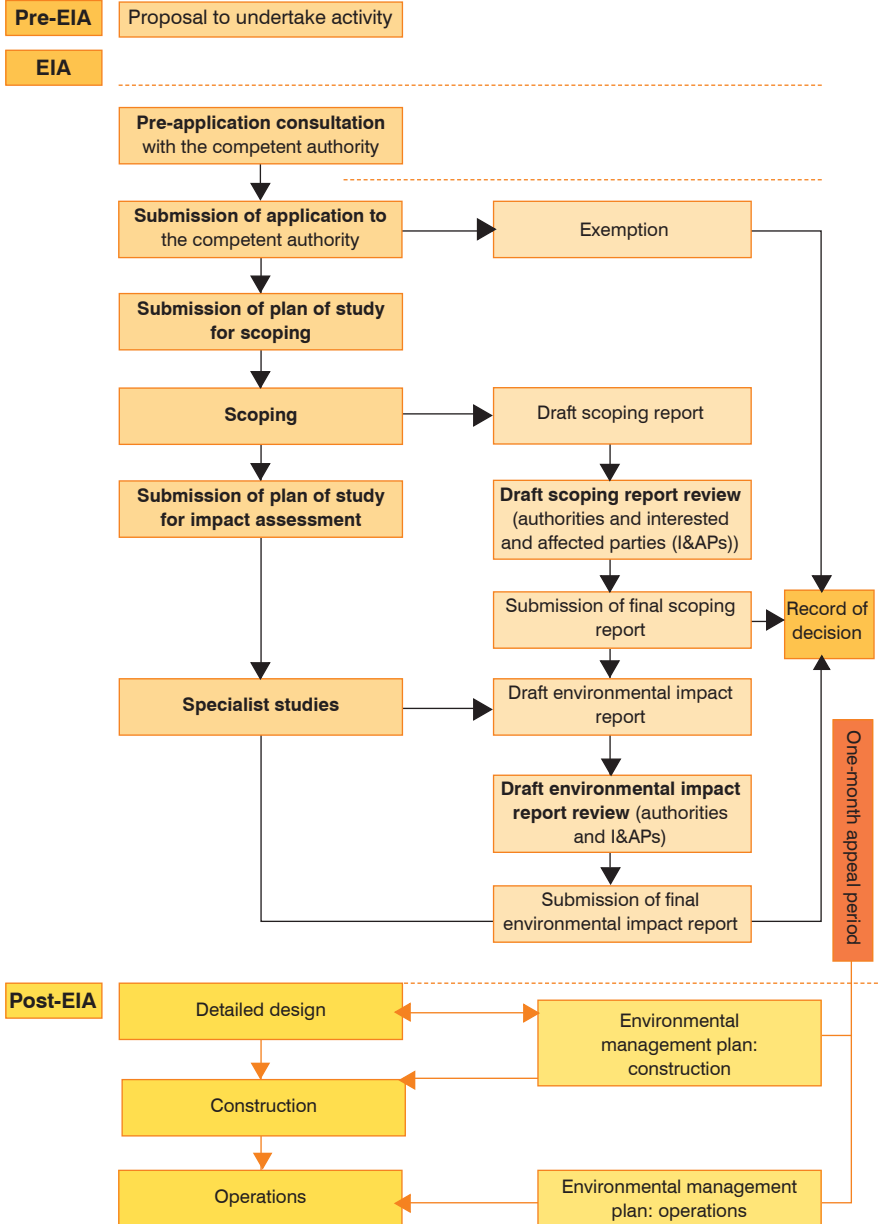
Each PPP project will be unique, and some will be far more environmentally sensitive than others. For some (particularly SMME projects where a development footprint already exists), it may be possible for the institution (as the applicant) to obtain an exemption from an EIA as early as the PPP

feasibility study phase. For others, an RoD may be obtained by the institution (as the applicant) on the basis of a scoping report conducted by the institution's independent consultant during the PPP feasibility study phase. The RoD would set out the environmental parameters and conditions for the project and can be included in the RFP. This would give bidders an equal opportunity to bid within the environmental constraints of the project. Other projects may be so sensitive and the development designs so unique to the private parties that win the bids that plans of study for scoping and subsequent EIAs can only be undertaken by the private parties as the applicant once the PPP agreements have been signed.

Assessing what is possible for each project early in the PPP project cycle is key to expediting the process.

A diagrammatic summary of the EIA process is given on the next page. Guidance is given in the remainder of the Toolkit on the environmental steps that the institution should be considering at each PPP phase. However, institutions are advised to hire experienced environmental consultants when required to ensure that environmental regulations are properly, appropriately, and thoroughly followed for each PPP.

## The regulated environmental impact assessment process



## Heritage issues

If the proposed project falls within the categories of 'development' specified in the National Heritage Resources Act, 1999, the institution must, at the PPP inception phase, notify the responsible heritage resources authority. It also needs to provide details about the location, nature and extent of the proposed development.

If there is reason to believe that heritage resources will be affected by the proposed development, the responsible heritage resources authority may require the institution to submit an impact assessment report. This must be done during the PPP feasibility study phase.

If the proposed project will impact on a heritage resource, in particular if the project requires a heritage resource to be altered or demolished, a permit must be obtained from the relevant heritage resource authority. The permit should be obtained during the PPP feasibility study phase so that bidders know the heritage parameters for making their proposals, and to avoid costly delays later.

## TEMPLATES

### TEMPLATE 1

#### Acknowledgement letter: Unsolicited tourism PPP proposal

This is a template letter for institutions to acknowledge that they have received an unsolicited proposal by a private party for a PPP project. The letter requests the private PPP party to develop the proposal further by completing 'Template 2: Outline business case: Unsolicited tourism PPP proposal'.

### TEMPLATE 2

#### Outline business case: Unsolicited tourism PPP proposal

This template requests the private party proponent to give details of its tourism PPP proposal in relation to: the concept of the project; commercial rationale; environmental matters; BEE; operations and management; and financial viability.

### Templates

Each template for this module, can be downloaded, in Microsoft Word, from the CD accompanying the Toolkit and from the PPP Unit's website, [www.ppp.gov.za](http://www.ppp.gov.za).