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STANDARDIZING CONTRACTS, ADVANCING PUBLIC-PRIVATE PARTNERSHIPS? EVIDENCE FROM FLEMISH SPORTS INFRASTRUCTURE

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ABSTRACT

As public-private partnerships (PPPs) for infrastructure development continue to puzzle governments due to their complex nature, effort is put in developing tools which contribute to the simplification of PPP procurement. One of the respective initiatives that have been launched in the public sector comprises the creation and use of standardized contracts. These modularly structured documents provide standard terms for PPP and are advocated for their alleged capacity to reduce transaction costs by limiting the room for contractual negotiations and creating a common contractual understanding among actors involved. In order to get a better understanding of how they affect PPP procurement, we investigate the use of standard contracts in the Flemish Sports Infrastructure Program. On the one hand, the case study demonstrates a successful application of standard contracts in technically simple projects. On the other hand, we find that standard contracts were used inappropriately in technically more demanding projects. Unsuccessful cases were characterized by an interference of local governments' interests, a questioned origin of the contract, and a persistently rigid attitude of public actors at the negotiation table. In sum, the contribution of standard contracts has been mixed, and we recommend to seek ways of improving their use.³

KEYWORDS

Public-private partnerships; governance; standard contracts; sports infrastructure

INTRODUCTION

Public-private partnership (PPP) for infrastructure development has been gaining foothold in Flanders (the northern part of Belgium) since an official policy strategy was established in the early 2000s. PPP is an act of cooperation between a public partner and a private partner which is aimed at the development of infrastructure and involves substantial risk sharing between these two partners. Despite the fact that the Flemish public sector has been building up PPP expertise for more than a decade, dissimilar results remain. PPP in Flanders has been confronted with and characterized by a myriad of complexities of political, multi-actor, and technical nature, and doubts have been raised on the appropriateness of the governance approach applied (Van den Hurk & Verhoest, 2014; Van Gestel et al., 2012).

PPP procurement comprises particularly difficult endeavors as it involves large sunk investments with a long-term timeframe. The achievement of contractual agreements between

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public and private actor usually takes considerable time and effort, resulting in high transaction costs (Akintoye & Beck, 2009; Yescombe, 2007). Governments and international organizations have invested in the development of tools which should simplify PPP procurement and limit transaction costs (see e.g. European Commission, 2003; UNECE, 2008). In this paper, we focus upon the emergence of standardized contracts. Although the use of this governance tool is promoted globally, it remains unclear whether it actually fulfils its promises or not; the contribution of standard contracts has yet to be subjected to systematic analysis. The objective of this paper is to examine the use of standard contracts and its impact on PPP procurement. We seek to answer the following two questions both theoretically and empirically: (1) Why are standard contracts used in PPP? (2) What is the impact of the use of standard contracts on PPP? In this respect, we investigate the Flemish Sports Infrastructure Program (hereafter abbreviated as FSIP).

The FSIP was launched in 2008 by the Flemish Government with the objective of solving the severe shortage of sports infrastructure in Flanders. It offers an interesting case: despite the fact that it covers diverging types of sports infrastructure, similar standard contracts were used as points of departure for the procurement processes at hand. We expect to see different degrees of success in terms of using these contracts, and by unveiling a practical understanding of how they affect PPP this paper is useful to both policymakers and private contractors. Furthermore, the relevance of the FSIP exceeds the borders of the Flemish Region. With a total value of 225 million euro, it is a European social PPP of considerable size. Finally, this paper fills two literature gaps in particular. First, by discussing at length the motivation and impact of using standardized contracts we illuminate an issue which hitherto has rarely been addressed in the academic literature. Our second theoretical contribution is that we fill an interesting lacuna in sports infrastructure studies. Scholarly work on sports infrastructure development has mainly dealt with investments affiliated to mega sports events (e.g. Cabral & Silva Jr., 2013; Searle, 2002) and sports leagues (e.g. Crompton et al., 2003; Long, 2005, 2013), or the legacy of these endeavors in regard to urban regeneration and sociocultural dynamics (Garcia Ramon & Albet, 2000; Jones, 2001; Misener et al., 2013). Less sizable developments have received much less academic attention, yet these are the kinds of projects average local governments deal with regularly.

This paper has been organized in the following way. It begins by discussing the governance and performance of PPP and linking these with the theoretical backgrounds of standardized contracting. Secondly, it outlines the case study strategy and the methods used to scrutinize the role of standard contracts in the FSIP. Next, we elaborate on the findings of the empirical analysis. We close the article with a section devoted to summarizing our argument and proposing avenues for further research.

THEORETICAL FRAMEWORK

Despite the fact that it is often presented as a fashionable and contemporary phenomenon, PPP is not new to the landscape of procurement. It has been around for many centuries, in many forms, and on many different locations across the globe (Dewulf et al., 2012; Wettenhall, 2010). As Weihe (2008) and Donahue and Zeckhauser (2011) put it, varied conceptions of PPP are in use, which makes it impossible to come up with an unambiguous definition. Hodge and Greve (2010) identify five families of PPP arrangements in their attempt to solve this conceptual confusion: (1) institutional cooperation for joint production and risk sharing; (2) long-term infrastructure

contracts which emphasize tight specifications of outputs in long-term legal contracts; (3) public policy networks in which loose stakeholder relationships are emphasized; (4) civil society and community development; and (5) urban renewal and downtown economic development. In this paper, we interpret PPP as a *long-term infrastructure contract*, and we complement it with insights from the European PPP Expertise Centre (EPEC, 2011). Here, five elements of PPP become evident. The first element is the relatively enduring cooperation between the public partner and the private partner as it encompasses the *lifecycle* of an infrastructure asset. Secondly, the design, build, finance, and maintenance (and operation) stages of an infrastructure project are integrated in a *one-covering contract*. A third element is *risk transfer*: some of the risks that are usually borne by the public actor in conventional projects are transferred to the private actor. Fourth, both public and private actors are to make a financial contribution, hence *private financing* is required. Fifth and finally, as soon as a project has entered the operational stage, *periodically-recurring fees* are to be paid to the private partner which reflect the degree of service delivery. All in all, our understanding of PPP corresponds to the concept of Design-Build-Finance-Maintain(-Operate) (DBFM(O)) contracts—often considered as contractual PPP (Edelenbos & Klijn, 2009).

The Complex Nature Of PPP

The use of PPP to develop infrastructure has been motivated by the alleged advantages of incorporating private sector skills, e.g. equitable risk sharing, better on-time and on-budget delivery, and improved service delivery (Hodge & Greve, 2012). However, the interference of complexities is inherent to PPP governance and forces scholars to be particularly prudent about the actual merits of PPP. *PPP governance* is the activity of steering and coordinating PPP by setting up organizational structures, running decision-making procedures, and using instruments such as contracts and agreements that do not rest solely on the authority and sanctions of government (Reeves, 2013). Since a multitude of actors is involved in PPP, managers are required to deal with diverging objectives, discourses, and disciplines which constitute multi-actor complexity (Conteh, 2013; Edelenbos et al., 2011). Second, infrastructure projects are confronted with uncertainties and ambiguities of political nature due to their political salience and the imminent presence of opportunistically acting decision makers (Salet et al., 2013; Van Marrewijk et al., 2008). Third, PPP is complicated in terms of financing and technicalities: large sunk investments often come with high asset specificity and financial risks. Given these three types of complexity, adequately governing PPP is easier said than done. Procurement processes are burdened with high transaction costs and demanding negotiations (Akintoye & Beck, 2009; Yescombe, 2007), and there is a continuous endeavor to curb PPP complexity and improve PPP governance.

Drafting Contracts And The Call For Standards

When it comes to the governance approach used by governments to both reduce complexity and adequately manage PPP, contracts are key instruments (Van der Veen & Korthals Altes, 2012). By drafting a contract, parties can be mutually protected against opportunistic, rent-seeking behavior, especially in cases of large sunk investments and long-term exposure to asset specificity, complexity, and uncertainty. A contract specifies what is and what is not allowed and inflicts penalties for inappropriate behavior (Brown et al., 2010). Schepker et al. (2014) add that contracts also serve the purpose of relationship coordination, e.g. by assigning roles and

responsibilities and providing for monitoring. Furthermore, by specifying contingency plans contracts allow actors to adapt to changing conditions.

Contract drafting is a delicate activity as it is aimed at taking into account future developments without actors having full and verifiable information on what could possibly happen in the future (Hart & Moore, 1999; Williamson, 1985). Consequently, contract drafters can only write incomplete contracts which “do not deal explicitly with all possible contingencies and leave many decisions and transactions to be determined later” (Bolton & Dewatripont, 2005, p. 36). According to a relational perspective on contracting, actors supplement formal contractual clauses with more informal mechanisms—e.g. relational management, mutual trust, and commitment when project complexity (Cooper, 2003; Faems et al., 2008). The efficiency of relational contracting lies in the fact that contracts are replaced with handshakes, thereby reducing the need to engage in expensive legal discussions and lowering transaction costs (Adler, 2001).⁴ On the other hand, a rather formal perspective on contracting addresses the largely transactional nature of the relationship between contractual partners. Negotiations are strongly juridified procedures in which actors aim for completeness in order to decrease the number of unexpected situations. Marques and Berg (2011) notice a tendency to overwrite contracts, which is at odds with the common understanding of partnership (cf. Cruz & Marques, 2013). Poppo and Zenger (2002) propose a third way and claim that formal and relational contracting function as complements. By narrowing the domain and severity of risks, formal contracting may actually contribute to cooperative, long-term, and trusting relationships between public and private partners. Reversely, relational contracting may actually serve as a safeguard against hazards poorly protected by the contract, simply by providing opportunities to use trust and cooperation. Regardless of the debate on which approach should be pursued under which conditions, there is no doubt that PPP procurement is dominated by tough contractual negotiations and high transaction costs (Vining & Boardman, 2008).

Governments have developed tools and practices in order to simplify the governance of PPP. Particular attention has been paid to standard contracts: modularly structured documents in which standard terms are provided for those elements of PPP that are common to all procurement processes—making them well understood in the industry—while ideally maintaining flexibility for an individual project to set its needs and requirements (Brown et al., 2006). Bajari and Tadelis notice “a surprising amount of standardization in the contracts used in building construction” (2001, p. 390), typically covering a set of documents on bidding, general conditions, specifications, drawings, and investigative reports. Recurring themes are definitions, core obligations of actors involved, contract duration, output specifications, payment mechanism, sanctioning, guarantees, termination, conflict resolution, and insurance. Standard contracts provide rules, guidelines or characteristics for activities (process-oriented) or results (output-oriented) and are meant for common and repeated use (cf. Brunsson et al., 2012).⁵

The United Kingdom has been one the first countries in which guidance on contractual agreements was issued (NHS Executive, 1999; UK Ministry of Defence, 2001; UK Treasury Taskforce, 1999) and has served as an example for Belgium (Van Garsse et al., 2009) and the Netherlands (Rijkswaterstaat, 2012). The use of a standardized approach to infrastructure

⁴ Transaction costs are the costs associated with organizing competitive tendering as well as writing, monitoring, and enforcing contracts (Rahman & Kumaraswamy, 2002).

⁵ The development of standards is a worldwide and cross-sectorial trend as is reflected in the increasingly global use of standards, e.g. for the sake of better information and communication technology (David & Greenstein, 1990), product and service quality (Beck & Walgenbach, 2005), and corporate responsibility (Haack et al., 2012).

projects is increasing. Nevertheless, if we dig into the actual contribution of standard contracts to the proliferation of PPP, we find that empirical proof is lacking. Academic research on this subject has been scarce, and the scholarly work that has been done evidently places the use of standard contracts in dispute by pointing to the risk of a collision between a one-size-fits-all approach and contextual or asset specificity (Börzel & Risse, 2002; Jooste et al., 2011).

Implications Of Drafting And Using Standard Contracts

Standards comprehend rules, hence state legislators or governmental authorities are particularly well-equipped to draft standard contracts given their hierarchically-based power—although they will often need law firms’ assistance. Standard contracts for PPP usually are products of a cooperation between public and private actors in a principal-agent constellation. The implications are evident: if a public authority acts as the main standard setter, while drafting a standard contract it is likely to act upon its own needs rather than upon the needs of private sector partners, e.g. contractors (Cargill & Bolin, 2007). Moreover, standard contracts being hierarchically-set and of a mandatory character, they make it tempting for governments to utilize standard contracts as control tools rather than guidance tools. All in all, the creation and use of standard contracts put governments and other contracting authorities in a particularly powerful position. The question arises which merits of standard contracts remain when market influences are diminished during the process of standardization. In the remainder of this section, we discuss the main promise of standard contracts and offset it against potential drawbacks.

The most important promise of standard contracts lies in their capacity to bring about shorter decision-making and negotiation procedures, thereby lowering transaction costs (Akintoye et al., 2003, p. 469).⁶ Ideally, standard contracts provide guidance so that actors involved—particularly on the public side—know better what to deal with during a procurement phase and are less dependent on external and expensive support from private companies like law and consultancy firms. The UK Treasury (2003) adds that standard contracts help spread best practice and promote a common understanding of the main risks encountered in PPP. In doing so, the likelihood of contract and output misspecification can be reduced, and unforeseen costs can be reduced to a minimum (Iossa et al., 2007). Finally, the transaction costs for both public and private actors are presumed to drop since areas for negotiation become less extensive, which will lead to more concise and cost-efficient negotiations.

However, using standard contracts does not nearly guarantee that the most delicate issues of contractual negotiations will be swept off the table. Being a guidance instrument, a standard contract only offers negotiators the opportunity to recognize or admit more quickly the need to include certain clauses (e.g. concerning guarantees or contract termination); the actual project-related complexities, uncertainties, and risks remain. Moreover, the progress of a procurement process largely depends on the role of those who negotiate and sign the contract. The professional backgrounds, positions, and interests of these actors determine to a great extent the progress made during the procurement phase by influencing the attitudes actors assume. As an example, a contracting authority can take up a rigid attitude and thereby limit the possibility for

⁶ A second promise of standard contracts relates to competition since they help to remove entry barriers in markets and reduce the unequal starting position for new market entrants. E.g., once a standard bidding procedure exists, the clarity of this procedure is increased so that small firms no longer have to invest in capital facilities and research and development to be competitive (Blind, 2004). In this paper, this promise is excluded from the analysis. This narrows the scope of the study, but it simultaneously enables a more detailed focus on the interplay between standard contracts and transaction costs.

local or specific information to be inserted in the standard contract (Iossa, et al., 2007). As Rahman and Kumaraswamy explain, “an appropriate contracting method coupled with clear and equitable contract documents do not by themselves ensure project success where people work together in the face of uncertainty and complexity with diverse interests and conflicting agendas” (2002, p. 45).

Given the importance of attitudes of actors on either side of the negotiation table, the question is to what extent one is willing to deviate from the standard contractual clauses. We introduce the term *boilerplate* here. Boilerplate provisions are standard clauses of commonly used and understood language in a legal document and have the purpose of saving negotiators time and money (Gilo & Porat, 2006). In order to satisfy policy requirements or reduce risks, governments have inserted a great deal of these provisions in basic (i.e. standard) contracts (Cooper, 2003). The implication of using boilerplate provisions is that negotiators on the public side of the table are less willing to give up their standard clauses for reasons of policy and risk. This is exactly the case when a contracting authority prefers to use a standard contract as a compulsory document, leaving little or no room for project-specific complexities. Lenferink et al. (2013) show how strict legal coordination may divert attention from required interaction with these complexities, which in turn might lead to an over-presence of legal experts. This process of juridification hampers opportunities for partnering and ironically triggers an increase in transaction costs when standard contracts are used (cf. Korthals Altes & Taşan-Kok, 2010).

In sum, despite the alleged capacity of standard contracts to contribute to simplifying procurement and lowering transaction costs, a number of situations can be hypothesized in which the governance burden of PPP procurement is actually aggravated instead of alleviated due to the use of standard contracts. We assume that the likelihood of this happening increases with the degree of complexity of the infrastructure at hand and the extent to which a contracting authority sticks to standard clauses for the sake of control (i.e. public interests).

METHODS

This study was conducted in Belgium in 2013 and involved a case study explaining the creation, use, and influence of standard contracts in the FSIP through extensive, in-depth description at multiple levels of analysis (Eisenhardt, 1989; Flyvbjerg, 2006). This “thick description” is a pervasive form of presenting empirical findings which enables to take account of causal complexity, to consider contextual factors in detail, and to put findings in perspective (George & Bennett, 2005). The case study has been hypothesis-generating in that we took off with “a more or less vague notion of possible hypotheses” (Lijphart, 1971, p. 692) which we sought to redefine by entering the academically unbeaten track of standard contracts in PPP and gathering rich, qualitative data.

We selected the FSIP for three reasons. First of all, we were looking for a Flemish PPP program given the background of the overarching research (see footnote 3). Second, the FSIP comprises branches of different complexity within the sports infrastructure sector, ranging from artificial pitches to multifunctional sports centers. Hence it was expected to demonstrate differences regarding the use and effects of standard contracts, which would assist in providing a deeper theoretical understanding and generalizing our theory and concepts (Eisenhardt & Graebner, 2007). Third, since the FSIP is a relatively matured program, it allows to consider cases that have entered the operational stage. These cases are usually less sensitive, thus more suitable for a comprehensive and replicable analysis.

Two data collection methods have been used in this study: desk research and semi-structured interviews. As for desk research, the data-gathering process was aimed at a combination of sources at national and subnational level, covering the period between 2003 and mid-2013.⁷ These included publicly available, official central government documents⁸ and project-specific documents at either central, provincial, or local government level. We subjected over 150 documents to qualitative content analysis in order to reconstruct the case, which resulted in a timeframe of events and partial explanations for the courses of action undertaken by different actors. In order to verify and enrich these preliminary explanations, we conducted 20 semi-structured interviews with 22 experts. Respondents were selected on the basis of their key involvement in the FSIP. Furthermore, they were to have divergent backgrounds: government authorities and agencies on the one hand (n = 15)⁹ and private sector partners on the other (n = 7).¹⁰ Finally, the respondents were to represent entities at central, provincial, or local level so that they would cover all government layers involved in the FSIP. Confidentiality requirements preclude the publication of the names of informants, but the Appendix gives an indication of their profiles. The semi-structured interviews were conducted on the basis of a topic guide. In addition, respondents were allowed to bring in personal experiences and discussion topics (Liamputtong & Ezzy, 2005).

The interviews were digitally recorded and fully transcribed. After familiarizing ourselves with the data by thoroughly reading the transcripts, we started a systematic coding process using QSR NVivo 10, which is a qualitative coding software program aimed at arranging large amounts of data (Bazeley, 2007). While coding, we particularly focused on the respondents' perceptions of the three main topics of this paper: the creation of standard contracts, the use of standard contracts, and the impact of both on the transaction costs involved in the FSIP. Furthermore, the data was coded both deductively—i.e. theory-driven—and inductively—i.e. data-driven. A thematic analysis allowed to produce themes and interpret the data on the basis of the (co-)occurrences of these themes (Boyatzis, 1998). Our interpretations of each interview were fed back to the informants to ensure empirical accuracy.

In our endeavor to unfold the assumed relationship between standard contracts and PPP procurement, we distinguish between the creation and use of standard contracts on the one hand (independent variables) and the transaction costs attached to the procurement phase on the other (dependent variable)—see also Figure 1. As for operationalization, the independent variables will be measured on the basis of extensive descriptions which focus upon answering typical

⁷ The oldest documents that are relevant to this study date back to 2003 since the official Flemish PPP policy strategy was initiated in that year.

⁸ The documents were obtained through a search query in the online database of the Flemish Parliament. The keyword “Sportinfrastructuurplan” (Sports Infrastructure Program) was used as search term and led to more than 120 hits between 2003 and mid-2013.

⁹ Six respondents from public actors that participate in Sportfacilitator, eight respondents from contracting authorities and one respondent from the Flemish Institute for Sports Management and Leisure Policy (ISB). We did not conduct interviews with public officials at every single public partner involved in the FSIP, since this would take too much time and lead to an oversaturation of information.

¹⁰ Five respondents from private sector partners and two respondents from law or consultancy firms. Due to the partly bundled character of the FSIP, the 35 artificial pitches and nine sports halls delivered to date have been realized by only two overarching SPVs. Consequently, the pool of private sector partners was significantly smaller than the pool of contracting authorities.

‘how’ and ‘why’ questions.¹¹ With regard to the dependent variable, we resort to non-monetary transaction costs for reasons of confidentiality. These are indicated by the time taken to arrive at specific decisions. First, in procurement there usually is a pre-tender period in which contracts and other documents required for tender are drafted—we speak of a ‘gap’ between announcing a project and actually launching a tender procedure. The bigger this gap, the more sound the indication of high transaction costs here. Secondly, a short tender procedure (duration in months, from tender call to contractual close) is considered a low cost compared to a lengthy procedure. Furthermore, tough negotiations often play a significant role in the postponement of tenders and lead to an increase in transaction costs. Therefore, the duration of negotiations with bidders (from start of negotiations to contractual close) is a third indicator of transaction costs. Fourth and finally, the duration of preparatory works (from contractual close to start of works) serves as a proxy indicator for any transaction costs made between the contractual close and the start of the works. A lengthy preparatory period could indicate issues related to a building permit or, more importantly, the financial close of a project.¹²

Insert Figure 1 about here.

THE FLEMISH SPORTS INFRASTRUCTURE PROGRAM

Flanders had been struggling with a severe shortage of sports infrastructure for many years when a political initiative was launched in the early 2000s to start a program of refurbishment and renewal on the basis of public-private procurement (Flemish Parliament, 2006). The FSIP was officially accepted by the Flemish Parliament and the Flemish Government in 2008. Given its total value of 225 million euro, it was an unseen investment in Flemish sports infrastructure. The Flemish central government served as the coordinator of the Program. Within the central government, a taskforce named ‘Sportfacilitator’ was set up in order to take the lead in facilitating the respective sports infrastructure projects.¹³ Two other types of actors involved in the FSIP were contracting authorities—i.e. local governments—and private sector partners. The contracting authorities were active on the demand side of the policy arena: by submitting project proposals for sports infrastructure they applied for participation in the Program. Once a project proposal was selected for construction, the demanding local government mandated Sportfacilitator to try and find a private sector partner which could actually develop the sports infrastructure. As soon as this private partner had been found and was granted the assignment, a

¹¹ E.g. who was involved in drafting the standard contract? Where did the standard contract find its origin? What attitude did the public actor assume during the negotiation phase? Did the standard contract fit the sector in which it was used? Which contractual changes were applied during the procurement phase?

¹² The character of a procurement procedure is important as well: how intense have negotiations been? How many meetings between negotiators were required in order to arrive at a consensus? Although not mentioned explicitly in our conceptualization of transaction costs, we will refer to these issues if the analysis proves it to be relevant.

¹³ Five public actors participated and cooperated in Sportfacilitator and constituted the core of the executive branch of the FSIP on behalf of the public interest: (1) PMV, a publicly-owned, yet independent investment company which was responsible for the project management; (2) the Flemish Department of Culture, Youth, Sports, and Media, which acted as the advisory branch of the Ministry of Finance, Budgeting, Labor, Spatial Planning and Sports; (3) the Cabinet of Sports, which belonged to the overarching Cabinet of the Minister of Finance, Budgeting, Labor, Spatial Planning and Sports; (4) the Flemish PPP Knowledge Center, a supporter of the Flemish PPP policy; and (5) Bloso, an autonomous agency promoting sports in Flanders and which has achieved technical experience in the construction and maintenance of sports infrastructure.

Special Purpose Vehicle (SPV) was established which was in charge of designing, building, financing, and maintaining (and operating) the infrastructure. Arrangements were laid down in DBFM(O) agreements between the SPV and each contracting authority. In return for the delivery of the DBFM(O) services, the contracting authority paid a periodically recurring availability fee to the private partner during the operational phase of the PPP lifecycle. A maximum share of 30 per cent of the availability fee was subsidized by the Flemish Government (Flemish Parliament, 2006). If necessary, additional funding of SPVs could be rendered through an investment fund connected to the FSIP (Invespo).

In terms of governance instruments, typical to the FSIP was the bundled procurement of projects: the joint procurement of a number of similar projects which were then granted to a single private partner. In order to respect the versatility of the sports sector, four domains were distinguished: (1) artificial pitches, (2) sports halls, (3) swimming pools, and (4) multifunctional sports centers.¹⁴ Projects belonging to the first and second domains were procured in a bundled manner. Once the private partner for a specific bundle was selected, an SPV was established in order to close DBFM agreements with each single contracting authority involved. Projects concerning swimming pools and multifunctional sports centers were excluded from the bundled approach and were developed on an individual basis. Figure 2 summarizes schematically the organizational structure of the FSIP. At the time of the analysis (mid-2013), the FSIP had delivered the following infrastructure: 35 artificial pitches (bundle of 29 pitches and a bundle of 6 pitches), 9 sports halls (all in one bundle), and one multifunctional sports center. A second multifunctional sports center had just entered the construction phase and was included in the analysis.

Insert Figure 2 about here.

RESULTS

In this section, we explain how and to what extent the creation and use of standard contracts had an impact on the advancement of the FSIP and the transaction costs. We do so by discussing the process of contract drafting and shedding separate lights on each of the three domains selected for analysis. We argue that the contribution of standard contracts has been mixed. They worked very well in the domain of artificial pitches, but burdened both public and private actors involved in the other two domains. At the end of this section, our findings are summarized in Table 2.

Why And How A Standard Contract Was Drafted

The first Flemish PPP projects that were launched after the official policy strategy came into effect in 2003 were primarily approached on a tailored basis. As a consequence, PPP in Flanders used to be signified by lengthy decision-making procedures and tenders, a high public sector's need for external assistance, and strongly juridified, tough contract negotiations. With the adoption of the FSIP in 2008 came the plan to draft a model contract that would serve as a basis

¹⁴ For two reasons, we have decided not to discuss further the domain of swimming pools. First, artificial pitches, sports halls, and multifunctional sports centers already cover the continuum between low complexity and high complexity. Second, as only one swimming pool was under construction when data was collected, it was unlikely that valuable information on several swimming pool projects would be accessible—respondents would not have been ready (or allowed) to reveal project-specific sensitivities.

for all projects that were to be developed within this Program. First, it was said that a standard contract would enable swifter negotiations. According to respondent F, “one PPP is not necessarily different from the other. [...] The contract, or the contractual clauses, can be similar to a great extent.” A standard contract was expected to allow for swiftness in terms of decision making. Second, a standard contract would create opportunities for achieving a common understanding regarding PPP procurement both among public and private actors. As for the local governments involved, they would not be burdened with the difficult task of drafting long-term infrastructure contracts entirely by themselves. Hence they particularly welcomed the support provided by Sportfacilitator to take up this task and help them to get familiar with the largely unknown PPP phenomenon, as was indicated by respondents C, G, and S. With regard to the private actors involved, it was assumed that “if they know well what to expect of a contract, they would be inclined to wield lower risk premiums and include less contingencies” (respondent F).

The two previous arguments that speak for the use of standard contracts agree with those put forward in the theoretical section. Yet, there is a third and final argument which was not discussed earlier in this paper, namely the fact that using a standard contract was a pure necessity for projects to be procured in a bundled manner. A private actor would never enter a bidding procedure for a large number of similar small-scale projects if it was expected to sign contracts which are entirely customized to the interests of each contracting authority involved—the transaction costs would be too high to allow for an efficient venture. Variety-reducing standard contracts were required to make feasible the bundled procurement of small-scale projects, “otherwise we would have ended up in considerably confusing situations for the private sector partner,” said respondent A. Respondent B confirmed this statement by drawing a parallel with a Flemish PPP program which involved a bundled procurement strategy towards the construction of 170 schools: “It would be totally unacceptable to have 170 different DBFM contracts with different terms, grace periods, or penalties. That would be unmanageable”—respondents I and S expressed their agreement on this. Bundling procurement maximizes the benefit for private sector partners while making contracting authorities suffer from a utility loss due to a decrease in their degrees of freedom and an increasing discrepancy between the demand posed by themselves and the supply offered by private sector partners.

As soon as the FSIP was given the green light and local governments were encouraged to apply for participation in the Program, the process of drafting a standard contract was initiated. Within Sportfacilitator, a working group was established consisting of representatives of the organizations mentioned in footnote 11 and a number of external advisors from major law firms. It decided to take off with creating a model DBFM contract aimed at the domain of artificial pitches. “In order not to reinvent hot water,” as respondent B put it, the team looked took existent contracts from outside the sports infrastructure sector as the point of departure. DBFM contracts for large road infrastructure projects in Flanders served as the basis for developing a model contract for artificial pitches to be constructed under the umbrella of the FSIP. In turn, this contract for artificial pitches paved the way for standard contracts in the domains of sports halls and multifunctional sports centers. Respondents E and F argued that “contractual amendments or changes from one project to another are only minimally required. If business cases are mostly identical, the contract should be mostly identical as well.” A look into the standard contracts and the comments of respondents (A, B, and V) who were able to compare projects indeed learns that there are many similarities across the domains. Most elaboration was required in the domain of multifunctional sports centers, since in this field the standard DBFM contract had to be expanded with an Operation component, making it a standard DBFMO contract.

Informants who were directly involved in the contract-drafting process stated that it took considerable time and effort to arrive at acceptable model contracts. Additionally, interviewees based at local governments whose project proposals were selected for construction complained that there was a significant time gap between the announcement of their proposal being selected and the next steps of the procedure, i.e. mandating Sportfacilitator and launching the tender procedure (see Table 1). After their proposals for artificial pitch infrastructure had been selected for the Program, local governments had to wait six months before the tender call for artificial pitches actually came out. Moreover, as the first bundle of artificial pitches was considered a pilot case, other FSIP projects were put on hold indefinitely. For instance, in the domain of sports halls the gap between proposal acceptance and the next procedural step was 21 months. According to respondents A and R, these periods of standstill were partly due to the fact that it took more time than expected to create standard contracts and other documents which were required to start the tender procedure (e.g. a mandate agreement and tender guidelines). Informant R admitted that “the period between the moment of informing local governments of their selection and the moment of signing the mandate agreement and launching the tender call was far too extensive.” Respondents G, H, M, N, and V also referred to the fact that documents required for mandating, tendering, and contracting were not ready in time to ensure a swift procedure. As we quote respondent V, “it would have been better if the entire procedure, including those documents, had been elaborated before local governments were asked to come up with project proposals.”

How Standard Contracts Were Used

As we look at the non-monetary transaction costs involved in the FSIP (see Table 1) it becomes clear that the Program has been characterized by procurement times of severe length, which could indicate that the contractual negotiations went not as smooth as one would have expected given the promise of using standard contracts. Decision-making procedures were delayed, and tough negotiations required partly unexpected efforts on both sides of the negotiation table. Respondents E and F affirmed that “when it comes to the issue of contracting, it took considerable effort to come to a solution. We had been searching for a long time before finally arriving at the contracts we use now.” This message was reinforced by respondent J who emphasized that “the administrative follow-up of the Program has cost more than initially foreseen,” both in terms of time and money. As standard contracts have been used widely and systematically in the FSIP, the actual contribution of the use of these contracts to simplifying procurement can be questioned. We discuss this issue by addressing the domains of artificial pitches, sports halls, and multifunctional sports centers in the respective order.

Insert Table 1 about here.

Artificial Pitches: Successfully Utilizing Simplicity

Unsurprisingly, all interviewees emphasized the relative simplicity of artificial pitches when it comes to constructing them. Based upon the experiences with the 35 artificial pitches that have been developed within the FSIP, there was agreement on their suitability to be procured in a standardized and bundled fashion. The general success of projects in this domain was acknowledged, especially when compared to the other domains. Respondent J even referred to domain of artificial pitches as “the only domain in which we have been able to deliver a responsible output.” What has been the role of standard contracts in this domain?

Given both the low asset specificity of artificial pitches and the involvement of 29 local governments mostly with limited PPP expertise, Sportfacilitator aimed to develop a relatively simple standard contract as starting point for the negotiation phase regarding the first bundle. As an example, respondent F mentioned that availability requirements were not included in the model DBFM agreement—instead, performance requirements were incorporated. Respondent K, who was involved in the negotiations on behalf of the private sector partner, stated that the contractual documents provided by Sportfacilitator were sufficiently clear and thorough to make a proper bid. This clarity instigated by standard documents certainly benefited the simplification of the procurement process, but it is likely that another element has made an equally significant contribution here, namely the fact that the preferred bidder was able to finance the entire bundle of 29 artificial pitches with its own means, i.e. without the interference of a bank. This condition allowed negotiators on both sides of the table to be flexible, as respondent B indicated. Once the negotiation phase was finished, it was up to the private sector partner to sign a DBFM agreement with each local government involved. Respondent K explained how the private sector partner dealt with this contract signing process: “We more or less established our own express mail service, since public sector partners all over Flanders had to sign the contracts and send them back to our company.” This requested time and effort, but there was no alternative given the approach of mandating and bundling taken by the Flemish government.

It took much less time to procure the second bundle of artificial pitches which included six projects. According to respondents E and F, this was mainly due to two reasons. First of all, there were no negotiations involved at all, since a different procurement method was applied, being a request for quotations. Second, potential bidders knew what they were dealing with when the tender call came out. Sportfacilitator used the same standardized contracts and other documents as before, hence no misunderstandings occurred among market players. All in all, even though it took no less than 23 months to run the procurement of the first bundle of artificial pitches from start to finish (and even 34 months in the case of the second bundle if we include the gap between proposal acceptance and tender call), there have neither been controversies, nor public-private collisions in this domain. The necessity of drafting and using standard contracts was acknowledged quickly by all partners involved, but other aspects certainly contributed significantly to the progress as well, being the technical simplicity of artificial pitches and the ability of the preferred bidder to finance the project with its own means.

Sports Halls: Bringing Local Interests In And Losing The Benefits Of A Standard Contract

In the domain of sports halls, there was disagreement among the interviewees with regard to the use of standard contracts. Some explained that contracts for sports halls are not fit for standardization due to the widely diverging interests of local governments which are likely to overrule the standard format (e.g. respondents J and S). Others advocated the use of standard contracts with the proviso of a sufficient degree of rigidity involved so that the voices of local governments are muted (e.g. respondents D and H). We elaborate on this debate by explaining a delicate issue of the FSIP, being the imminent tension between the use of mandate agreements and standard contracts on the one hand and local governments’ interests on the other.

In each FSIP project, Sportfacilitator was mandated to lead the entire decision-making procedure from the moment that local governments signed a so-called *mandate agreement*. As long as the preferred bidder would set its price offer below the mandate price set, local governments would be obligated to proceed with the project of concern. In case the preferred bidder failed to set its price offer below the mandate price, local governments would have the

opportunity to no longer participate and exit the procedure free of charge. Initially, Sportfacilitator allowed local governments to choose from three standardized types of sports halls (small, medium, and large size), each type having a specific mandate price attached to it. Representatives of Sportfacilitator negotiated with the preferred bidder, and it was only after these lengthy and laborious negotiations that local governments first saw the concrete plans for their sports halls. Then, it appeared that the differences in requirements of local governments stretched further than just the size of a sports hall. Sportfacilitator responded to this situation by giving local governments more room to determine the technical specifications and conditions. It loosened the format of three standardized types of sports halls, and started to consider each hall as a case of its own. Respondent D commented on this with a metaphor, saying that the domain of sports halls moved from “off-the-peg clothing to custom-made suits,” and respondent H aptly articulated that “due to this lack of standardization, the initial promise of attractive pricing could not be kept.”

Sportfacilitator lost track of the initial technical specifications and conditions of the three standardized sports hall types, and by allowing local governments to push through their interests it extended the room for negotiations instead of curbing it. Consequently, the standard contract lost its impact and was not able to keep its cost-saving promise. “There is no point in standardizing contracts if you refuse to standardize the specifications and conditions,” said respondent O. Several respondents argued that the lengthy procurement phase could have been avoided if Sportfacilitator had taken a much more rigid attitude towards local governments from the very beginning—by simply not offering them the opportunity to interfere.

Multifunctional Sports Centers: Standard Clauses Versus Asset Specificity

The interviewees unanimously considered the domain of multifunctional sports centers as the most controversial branch of the FSIP. At the time of the analysis, only one sports center was operational, the other eight being either under construction or in procurement phase, which hints at the difficulties involved in procuring these projects with significant asset specificity. As opposed to the domain of sports halls, standard contracts played a key (and much disputed) role in the two cases of multifunctional sports centers we examined. As we will argue below, the origin of the standard contract used and the affiliated attitude of Sportfacilitator at the negotiation table induced lengthy and costly decision making (see Table 1).

First of all, the origin of the standard DBFM(O) agreement for projects within this domain has been criticized by the informants since it gave rise to tough negotiations. As we mentioned earlier in this paper, the standard contractual documents used in the FSIP originated from the road infrastructure sector. According to respondent C, “a multifunctional sports center is not nearly the same as a bridge or tunnel,” thereby hinting at the relative simplicity in both technical and financial terms of sports infrastructure compared to road infrastructure. However, as the negotiations took off with a relatively complicated model contract, tensions between public and private negotiators arose very soon. Respondent I, who was directly involved as private actor in the negotiations concerning multifunctional sports center B, emphatically said that the origin of the standard contract has been one of the major stumbling stones: “The initial document was packed with requirements and guarantees that would be primordial to such economically important projects as roads, bridges, and locks, but not to sports infrastructure projects.” For example, the model agreement comprised strict penalty clauses that were deemed inappropriate in the sports sector. Respondent I was clear on the implications of this:

If a highway is closed for a day, it will have severe economic effects, so there is no doubt that heavy penalty clauses are required in the contract. Should a swimming pool be closed for a day, that would be inconvenient, but not an economic disaster. If you intend to attach heavy penalties to the temporary closure of a swimming pool, you are likely to end up with an unnecessarily expensive project since we [the private sector partner] will calculate the risks incurred by these strict clauses.¹⁵

Respondent N strongly agreed with the points made above. He stated that due to the high initial amount of risks to be transferred to the private sector partner—as indicated in the standard contract—it was not possible to speak of a well-balanced contractual agreement at the start of the negotiation phase. Several public sector respondents backed this argument. For instance, respondent M explained that “a number of contractual clauses had to be modified during the negotiations in order to deliver a workable contract.” Eventually, the penalty clauses and the affiliated system of reduced availability fees in case of underperformance were loosened as there was a high probability of “the preferred bidder throwing the towel and exiting the negotiation table” (respondent S).

In the theoretical section, we explained that standard contract may best be considered as guidance documents and not as control instruments. However, based upon the interview findings we have reasons to believe that in the domain of multifunctional sports centers model contracts were set up as control instruments in order to defend the interests of the public sector. As respondent S commented, “we have experienced that the standard contract was nearly unalterable. We gave much effort formulating comments with regard to amending the standard contract, only to find out that in most cases Sportfacilitator stuck to the standard clauses.” A typical example of the rigid attitude of Sportfacilitator can be drawn from a major topic which arose during negotiations, namely a conflict concerning the inclusion of public guarantees in the contract. The negotiations took off with a standard contract which prohibited the inclusion of public guarantees. Respondent F, who was one of the negotiators concerning multifunctional sports center B on behalf of the public sector, mentioned that “the project was explicitly required not to burden the public budget, meaning that a full governmental guarantee was out of the question.” Nevertheless, this highly rigid financial clause was anything but feasible due to the deplorable state of the financial market and the high risk profile of multifunctional sports centers.¹⁶ Sportfacilitator did not immediately acknowledge the severity of this weakness and refused to step away from its starting point for a long time, trying to defend the public sector’s interests as much as possible. However, as time passed and negotiations failed to make any progress, Sportfacilitator had no choice but to assume a more flexible attitude and permit governmental guarantees in the DBFMO agreement. As respondent M stated, “it took some effort to convince Sportfacilitator,” a statement which was supported by respondent I.

Given the issues discussed above, what we have noticed in the domain of multifunctional sports centers are the perverse and undesirable effects of using standard contracts as discussed in the theoretical section of this article. The strict penalty clauses and the prohibition of governmental guarantees can be considered as typical boilerplate provisions, and Sportfacilitator was not keen to give up on these very quickly. As the preferred bidder soon condemned the

¹⁵ Respondent P, who was involved in the field of sports halls, also addressed this issue by pointing to the high degree of “copying and pasting” clauses from one contractual document to the other: “As a result, the contract includes elements which are actually not applicable.”

¹⁶ This type of sports infrastructure includes swimming pools. Informant S indicated that “in the banking world, swimming pool facilities are qualified as infrastructure of the highest possible risk,” mainly due to their asset specificity: a swimming pool can only be used for leisure, and not for any other type of use.

inclusion of these clauses, the negotiations quickly took a legal twist and gradually changed into a lawyers' playground: "Juridical aspects started to prevail at the cost of sports aspects" (respondent C), and the technical complexity of the contractual agreement started to increase. The result has been that highly complex contracts are now being used which "only lawyers can read and understand," as respondent S clearly stated. In this specific domain of the FSIP, we can speak of an irony indeed, since standard contracts triggered an increase in transaction costs.

Insert Table 2 about here.

CONCLUSION

In this paper, we have explained the impact of the creation and use of standard contracts on PPP procurement by discussing at length a Flemish PPP program. Our findings can be summarized in theoretical and practical terms. Theoretically, the study can be seen as a starting point for more elaborate research on the nexus between standards and PPP. Although the relevance and importance of standard contracts in the PPP realm have been increasing for more than a decade, in-depth analyses have been particularly scarce. Our argument has shown that ways of creating and using standard contracts diverge across domains and can either positively or negatively affect the procurement phase. Whereas in bundled procurement of relatively easy infrastructure standard contracts were deemed necessary and therefore generally accepted and successfully applied, problems arose in riskier and more specific projects. We have seen how the interference of local governments' interests neutralized the impact of a standard contract. Furthermore, in cases of high asset specificity the origin of the standard contracts used was questioned, as was the persistently rigid attitude of public actors defending governmental interests at the negotiation table. Given this inconclusive impact of standard contracts on PPP procurement, it is recommended to scrutinize further the assumptions made in the theoretical section concerning the lack of fit of standard approaches to complex projects and the quest for control exercised by governmental actors. Moreover, it would be insightful to examine further the consequences of using standard contracts in geographic locations other than Belgium, in other fields of infrastructure, and in an internationally comparative way. We also encourage scholars to do similar types of analyses regarding the creation of standard contracts, focusing upon the interplay between representatives of government and industry. All in all, this paper has set the stage for interesting venues for research.

As for the practical implications of this paper, the results raise the significant point that drafting and using standard contracts do not serve as a guarantee for simplified procurement. Despite being heavily standardized, the model contracts used in the FSIP could not be linked explicitly with shorter procurement times—or lower transaction costs, for that matter. These findings are crucial for the development of policies on further standardizing contractual agreements for PPP: as many actors and interests are at stake in PPP arenas, there are just as many different reasons for (not) using standard contracts. The more empirical accounts on standardized contracting, the more we can do to improve its goodness of fit in different settings so that both public and private actors are more likely to experience the benefits rather than the drawbacks.

Finally, in order to optimize existing and future standardized arrangements, successful procurement requires a match between asset specificity and contractual structure. This linkage was insufficiently accounted for in the case of the FSIP. As for complex infrastructures, we

advocate a standardization of contracts which is guided by general guidelines, leaving much room for sector-specific and project-specific interpretation. When following this approach, less rigidity and inertia can be expected in the procurement phase. Since there is no one-size-fits-all solution to complicated projects, standard contracts always need to be modified to meet unique circumstances. There are also circumstances in which we advise governments to assume a rather rigid attitude. We refer particularly to the case of bundled procurement; here it is important to stick to standards as much as possible in order to overcome or avoid the interference of local political interests and affiliated delays.

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APPENDIX: LIST OF INTERVIEWS

1. Respondent A: member of Sportfacilitator, 27 May, 2013.
2. Respondent B: legal counsel at law firm, 19 June, 2013.
3. Respondent C: managing director of ISB, 4 July, 2013.
4. Respondent D: consultant at consultancy firm, 8 July, 2013.
5. Respondent E: member of Sportfacilitator, 9 July, 2013.
6. Respondent F: member of Sportfacilitator, 9 July, 2013.
7. Respondent G: project coordinator at contracting authority A, 18 July, 2013.
8. Respondent H: member of Sportfacilitator, 22 July, 2013.
9. Respondent I: commercial manager at private sector partner A, 25 July, 2013.
10. Respondent J: member of Sportfacilitator, 26 July, 2013.
11. Respondent K: manager at private sector partner B, 30 July, 2013.

12. Respondent L: sports advisor at contracting authority B, 31 July, 2013.
13. Respondent M: project coordinator at contracting authority C, 2 August, 2013.
14. Respondent N: general manager at private sector partner C, 12 August, 2013.
15. Respondent O: commercial director at private sector partner D, 21 August, 2013.
16. Respondent P: DBFM manager at private sector partner D, 21 August, 2013.
17. Respondent Q: project coordinator at contracting authority D, 23 August, 2013.
18. Respondent R: member of Sportfacilitator, 26 August, 2013.
19. Respondent S: project coordinator at contracting authority E, 18 September, 2013.
20. Respondent T: former alderman at contracting authority A, 19 September, 2013.
21. Respondent U: project coordinator at contracting authority F, 23 September, 2013.
22. Respondent V: project coordinator at contracting authority G, 10 October, 2013.

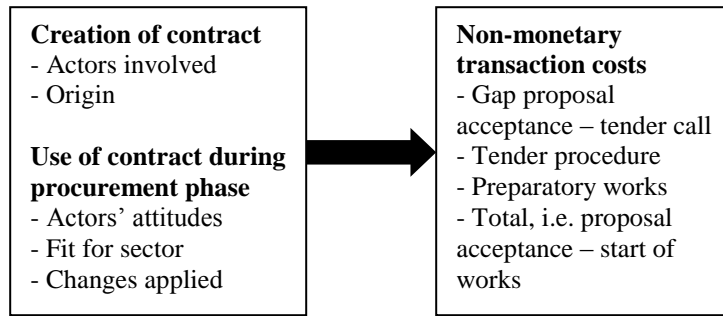


Figure 1: variables examined in this study. The topic guide for the interviews was based upon the list of independent variables on the left.

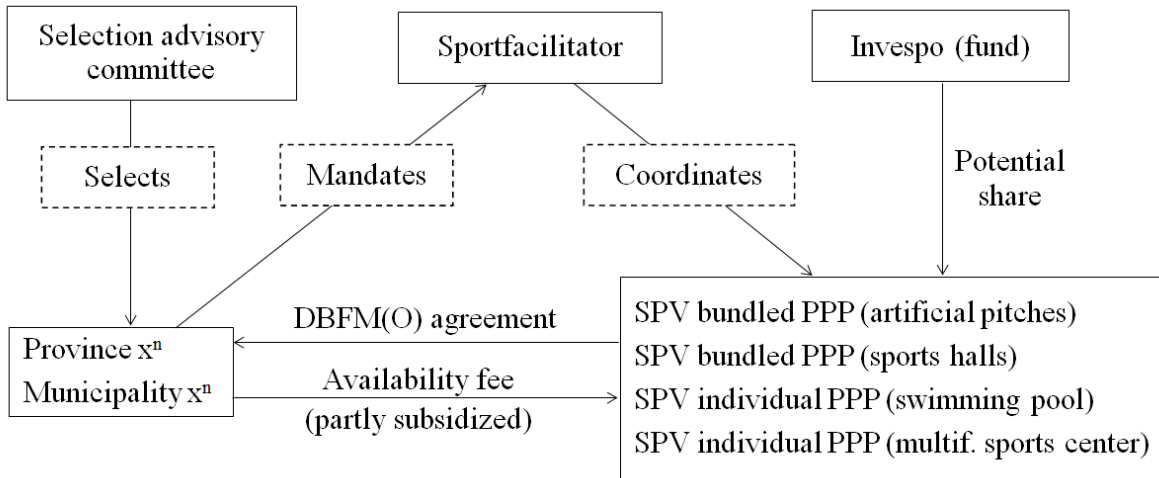


Figure 2: organizational structure of the Flemish Sports Infrastructure Program.

Variable	Indicators	Artificial pitches		Sports halls	Multif. sports center A	Multif. sports center B
		Bundle 1 (29)	Bundle 2 (6)	Bundle 1 (9)		
Non-monetary transaction costs	Gap between proposal acceptance and tender call	6 months	26 months	21 months	13 months	14 months
	Tender procedure, from tender call to contractual close / of which concerned negotiations	17 months / 6 months	9 months / n/a ¹⁷	23 months / 8 months	25 months / 8 months	39 months / 11 months
	Preparatory works, from contractual close to start of works	2 months	1 month	4 months	2 months	7 months
	Total, from proposal acceptance to start of works ¹⁸	23 months	34 months	46 months	38 months	58 months

Table 1: non-monetary transaction costs of the FSIP, shown as number of months.

¹⁷ There were no negotiations in this process, since a different procurement method was applied (request for quotations).

¹⁸ As for the previous three indicators, numbers were leveled up as months were only counted as a whole. With regard to the total non-monetary transaction costs, possible double months were filtered out, hence the numbers do not add up.

FSIP domain	Type of procurement	Creation of standard contract	Use of standard contract	Impact of standard contract on procurement
Artificial pitches	Bundled	<ul style="list-style-type: none"> - Standard contracts were primarily created in order to simplify procurement, curb transaction costs, and facilitate bundled procurement - Contractual basis was found in road infrastructure sector - Process of contract drafting required considerable time and money - Standard contracts were characterized by completeness and strict penalty clauses 	<ul style="list-style-type: none"> - Standard contracts necessary given large number of similar and simple projects to be constructed - Reduced sensitivity of negotiations due to financing ability of preferred bidder 	Positive: partly created solid possibility to tender many projects at one time; positive experiences reported, aside from false start of FSIP
Sports halls	Bundled		<ul style="list-style-type: none"> - Use of mandate agreements and standard contracts vs. local governments' interests - Sportfacilitator reverted to customizing projects, thereby diminishing role of standard contracts 	Neither positive nor negative, and mostly limited in light of interfering local governments' interests
Multif. sports centers	Individual		<ul style="list-style-type: none"> - Lack of fit between standard contract and asset specificity of projects to be constructed - Rigid attitude of Sportfacilitator trying to retain original standard contract 	Negative: boilerplate provisions induced juridification, difficult negotiations, and lengthy and costly tender procedure

Table 2: overview of the creation and use of standard contracts in the FSIP.