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The challenge of using standard contracts in public-private partnerships

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THE CHALLENGE OF USING STANDARD CONTRACTS IN PUBLIC-PRIVATE PARTNERSHIPS

Abstract

A call for an increased use of standard contracts in public-private partnerships (PPPs) for infrastructure development is noticeable in practice. These contracts are expected to simplify and improve procurement since they create opportunities for learning, lower transaction costs, and better competition. This paper delineates standard contracts in PPP as a new venue for research and unfolds the potential impact of the standardization of public-private contracts. Here lies an important challenge since the benefits of standardization are not as straightforward as they look at first sight, particularly when taking into account the tension between the powerful, control-oriented role of contracting authorities and the need for contingent, informal contracting.

Keywords

Public-private partnerships, standard contracts, governance

INTRODUCTION

A severe lack of agreement on the financial and operational performance of public-private partnerships (PPPs) has not discouraged governments from formulating and implementing a large number of PPP policies and projects (Hodge and Greve 2007). PPP is an act of cooperation between a public party and a private party which is aimed at the development of infrastructure and involves substantial risk sharing between these two partners, and it is a well-known and regularly-used procurement method for infrastructure development nowadays. Be that as it may, governments continue to struggle with all kinds of managerial

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2
3 and operational PPP issues. This struggle is reflected in a large number of programs and
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5 projects that fail to proceed swiftly and deliver sufficiently. In this paper, we shed light on one
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7 particular challenge involved in PPP, namely that of contracting, which is often burdened with
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9 high transaction costs and poor competition (Yescombe 2007, Akintoye and Beck 2009).
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11
12 Whereas contracting is already a complex activity by nature as it is aimed at aligning
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14 the opposing interests of different actors and making these actors sign a long-term agreement
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16 which is packed with demanding mutual commitments, PPP is inextricably linked with major
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18 complexities and uncertainties which add to the challenge. In comparison with public-public
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20 and private-private contracting (which can also involve long-term infrastructure investments),
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22 public-private contracting brings in several additional complicating elements. For instance,
23
24 there is the integration of different stages of an infrastructure asset's lifecycle into a one-
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26 covering contract, the private financing of public projects, considerable risk transfer, and an
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28 advanced redistribution of public and private responsibilities. Recent examinations have
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30 confirmed the persistent problems of PPP contracting caused by these elements (Van
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32 Marrewijk et al. 2008, Gransberg et al. 2013, Sanderson 2012, Cruz and Marques 2013). In
33
34 order to simplify such difficult ventures as public-private contracting, governments and
35
36 international organizations have put efforts in developing guidance documents and tools (see
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38 e.g. European Commission 2003, UNECE 2008). A particularly interesting development has
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40 been the global promotion and emergence of *standardized contracts* (or standard (form)
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42 contracts or template contracts). These are believed to contribute to the distribution of best
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44 practices and the development of a common and consistent understanding of risks—i.e. they
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facilitate learning. Moreover, using standard contracts is said to lower transaction costs and enhance competition during tenders.¹

The subject of standardizing contracts has been addressed by quite a number of scholars, yet the lion's share of these contributions focuses on either private or public sector contracting (see e.g. Timmermans and Berg 1997, Petsoulas et al. 2011, Beck and Walgenbach 2005, Haack, Schoeneborn, and Wickert 2012). In fact, none of them discusses the standardization of PPP contracts in particular, which is striking since public-private contracting is different from either private or public sector contracting, and since the complex and specific world of PPP is in great need of a simplification of projects and a facilitation of learning. In addition, public-private procurement is here to stay, if not increase in importance: uncomfortable financial-budgetary conditions and the rise of grand societal challenges (e.g. climate change) do not leave governments much of a choice but to cooperate intensively with private actors. Thus while the practical relevance of standard contracts in PPP has increased over time—and will increase in the foreseeable future—the academic literature is lagging behind and leaves many aspects to be explored. It remains to be seen whether these contracts actually fulfil their promises or not, and in this paper we address this literature gap. The objective is to delineate the field of standard contracts in PPP, to elucidate the assumptions underpinning the increasing use of these contracts, and to challenge the alleged contributions by discussing the potential limitations and dysfunctions of using standard contracts. This

¹ In addition to these motivations, standard contracts are used to strike a balance between consistent national policy and local flexibilities and to point towards specific contract drafting techniques or tools that can be pulled off the shelf for use in individual contracts (Timmermans and Berg 1997). However, in this paper we discuss the three motivations we consider to be the most important ones in the field of PPP—that is, creating a common understanding, lowering transaction costs, and improving competition. Although this focus limits the comprehensiveness of our contribution, it allows to discuss in detail the three motivations we picked.

endeavor is guided by two questions: (1) Why are standard contracts increasingly being used in PPP? (2) How to explain the impact of standard contracts on PPP? This study complements the literature by addressing an understudied topic in the field of PPP and formulating an agenda for theoretical and empirical research. Moreover, it reveals the practical relevance of understanding how standard contracts affect PPP, which is useful to both policymakers and private contractors who are active on the public-private continuum.

The paper takes off with a discussion of the nebulous concept of PPP and its convoluted character which urges actors to use complex forms of contracting. Then, we bring in our general understanding of standards and address the increasing use of standard contracts in PPP. We integrate various branches of the academic literature as we discuss economic and socio-legal views on contracting. The remaining sections unravel the motivations to use standard contracts and the asserted practical advantages on the one hand, and the potential limitations and the disrupting role of standard contracts on the other. The article concludes with a discussion of research implications which are raised by the increasing use of standard contracts in PPP.

THE COMPLEX NATURE OF PUBLIC-PRIVATE PARTNERSHIPS

Public-private cooperation for the provision of public infrastructure has been around for many centuries, in many forms, and on many different locations (Dewulf, Blanken, and Bult-Spiering 2012). Given the variations of the PPP concept in use, an authoritative or unambiguous definition is not logically possible (Weihe 2008). In this paper, we use Hodge and Greve's interpretation of PPP as a *long-term infrastructure contract* (2010) and amend it slightly on the basis of the definition provided by the European PPP Expertise Centre (EPEC 2011). As a result, our understanding of PPP shows a resemblance with the concept of Design-Build-Finance-Maintain (DBFM) contracts. The first element of a PPP is the

relatively enduring cooperation between the public partner and the private partner as it encompasses the *lifecycle* of an infrastructure asset. A signed contract lasts for at least ten to twenty years, and often for a longer period. Secondly, in a PPP the design, construction, financing, and maintenance (and operation) 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 (e.g. construction risk and commercial risk). Fourth, both public and private actors contribute financially to the project; PPP thus includes *private financing*. Fifth, as soon as a project has entered the operational stage, the public partner pays *periodically-recurring fees* to the private partner which reflect the degree of service delivery.

In the academic literature, PPP is seen both as a governance tool and a political phenomenon (Hodge and Greve 2007). Many motivations have appeared over time and have primarily emphasized the advantages of incorporating private sector skills, e.g. equitable risk sharing (i.e. reduced public sector risk), better on-time and on-budget delivery, and improved service delivery (Greve and Hodge 2013). However, empirical research has questioned whether the actual merits of PPP correspond with the promises made. PPP is inconstant in achieving value for money and often makes an insufficient contribution to innovation, flexibility, and competition (Akintoye et al. 2003). Moreover, PPP involves high financing and transaction costs, and demanding negotiations (Yescombe 2007, Akintoye and Beck 2009).

The ambiguous performance of PPP is related to the complexities inherent to PPP governance. *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 are not based solely on the authority and sanctions of government (Reeves 2013). Since this activity involves interaction between a multitude of

actors, PPPs can be understood as *governance arrangements*: patterns of social relations among mutually dependent actors. These arrangements come up around projects that are formed, maintained, and changed through series of processes (cf. Edelenbos, Klijn, and Steijn 2011, Williamson 1979, Aoki, Gustafsson, and Williamson 1990). The implication of PPPs being governance arrangements is that multiple actors, objectives, discourses, and disciplines are involved. This multi-actor complexity makes PPP governance a challenging task (Conteh 2013, Verhoest, Voets, and Van Gestel 2012).

In addition to multi-actor complexity, infrastructure projects are confronted with uncertainties, ambiguities, and risks of political and financial-technical origin (Van Marrewijk et al. 2008, Salet, Bertolini, and Giezen 2013). PPP is often full of political salience and epitomizes the divergent, yet usually short term-oriented ambitions and interests of political decision makers. As for financial-technical complexity, the technical characteristics of a PPP—e.g. construction and financing requirements and the fact that it is about the delivery of a service rather than a good²—compromise the progress of procurement. All in all, if in PPP governance one fails to deal adequately with imminent or potential complexities, project failure is looming.

LONG-TERM INFRASTRUCTURE CONTRACTS AS GOVERNANCE TOOLS

While steering infrastructure projects towards the achievement of objectives, governments can use a mix of tools which are based upon fundamentally different governance mechanisms: hierarchies, markets, and networks (Thompson et al. 1991, Bouckaert, Peters, and Verhoest

² As Macneil states, ‘services are inherently relational, and inherently less subject to exact prior planning’ (1974, 763), hence Vincent-Jones claims that ‘contracting for services is inherently more difficult than contracting for goods’ (1994, 379).

2010). In the world of infrastructure development, we have seen a shift from hierarchy to market as the leading governance mechanism. This move is reflected in an increasing use of long-term infrastructure contracts between public authorities and private actors (Cooper 2003, Verhoest et al. 2004). Since infrastructure projects generally involve large sunk investments which do not come on a frequent basis and often exhibit high degrees of asset specificity and uncertainty, both public and private actors involved tend to show opportunistic, rent-seeking behavior (Williamson 1979). By drafting a contract, parties can be mutually protected against acts of opportunism. A contract specifies each party's obligations in an exchange, delineates what is and what is not allowed, and inflicts penalties for inappropriate behavior, thereby fulfilling a safeguarding role (Ring and Van de Ven 1992, Vincent-Jones 1994). Contracts also serve the purpose of relationship coordination in that they assign roles and responsibilities and regulate monitoring (Schepker et al. 2014, Brown, Potoski, and Van Slyke 2010). Furthermore, by specifying contingency plans contracts allow actors to adapt to changing conditions (Luo 2002). By laying down these kinds of rules in contracts, exchanges between public and private actors for long-term investments can be encouraged (Weber and Mayer 2011, Williamson 1985). Van der Veen and Korthals Altes (2012) add that a contract ideally reduces the inherent complexities and uncertainties of infrastructure projects (see also Friedman 1965).

The act of drafting long-term infrastructure contracts is particularly delicate since it is aimed at achieving *presentation*: making a present decision about all, including future, aspects of the contractual relationship (Macneil 1980, 1983). Should actors think and act completely rational and have full information on what could possibly happen in the future—as assumed by classical contract law which is merely based upon economic theory—they would write a 'contingent contract specifying exactly which good is to be delivered in each state', i.e. a complete contract which would achieve the goal of presentation indeed (Hart and

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3 Moore 1999, 115). However, this ‘extreme caricature of contract in its purest form has no real
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5 world counterpart’ (Goldberg 1976) as it glosses over aspects of contractual complexity. In
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7 the wake of real-life complexity and uncertainty, actors do not have full and verifiable
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9 information about what could possibly happen in the future (Williamson 1985). Moreover,
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11 full presentation would be too expensive (Dye 1985), and therefore it is ‘a quite illusory goal’
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13 (Campbell and Harris 1993, 169). Actors have no choice but to write incomplete contracts, i.e.
14
15 contracts which ‘do not deal explicitly with all possible contingencies and leave many
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17 decisions and transactions to be determined later’ (Bolton and Dewatripont 2005, 36).
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20
21 In addition to the fact that actors are not as rationally gifted as classical contract law
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23 suggests, contracting is not nearly an exclusively economic activity which can be studied
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25 using *ceteris paribus* and without considering relational elements (Macneil 2000, 889).
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27 Instead, contracting is a relational phenomenon *par excellence* hence contracting research
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29 ought to go beyond the sphere of economics into the world of actual behavior, particularly in
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31 the fields of public administration and social policy (Vincent-Jones 2006, Macneil 1980). As
32
33 Campbell and Harris put it, individual utility maximizing behavior is not a tenable
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35 explanation of contractual relations since ‘long-term contractual behavior must be understood
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37 as consciously cooperative’ (1993, 167) and is embedded in social relationships (Granovetter
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39 1985).³ The implication of this is that there is no such thing as a truly discrete transaction.
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44 Qualifying contracting as a relational activity does not necessarily imply that long-
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46 term contracts predominantly include soft or informal clauses. The form and content of a
47
48 contract will vary depending on the transaction type and the prevailing economic conditions
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52 ³ See also Macneil (1983, 348): ‘Man is both an entirely selfish creature and an entirely social creature, in that
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54 man puts the interests of his fellows ahead of his own interests at the same time that he puts his own interests
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56 first.’
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(Vincent-Jones 1994, 374). In some cases, the most appropriate contract will incorporate a significant number of formal, discrete clauses, thus achieve a relatively high score on presentation. For instance, the more specific, complex, and uncertain an infrastructure project, the greater the likelihood of opportunism and rent seeking, hence actors are inclined to aim for completeness in order to decrease the number of unexpected and undesired situations. Other cases of contracting may require more looseness in terms of the character of the contract that is used, hence the incorporation of rather informal, relational norms. As an example, a number of scholars argue that when the complexity of a contractual exchange increases, actors tend to supplement or even replace formal contractual clauses with informal mechanisms—e.g. relational management, mutual trust, and commitment (Faems et al. 2008). By leaving out a strict application of contractual clauses in favor of a pragmatic approach, actors can pay more attention to context and history (Gulati 1995). This informal way of contracting is highly efficient since trust reduces transaction costs by ‘replacing contracts with handshakes’ (Adler 2001, 219); there is less need to engage in detailed and expensive legal discussions. Poppo and Zenger (2002) argue that formal and informal contracting function as complements. Whereas the formal elements of a contract promote cooperative, long-term, trusting relationships by narrowing the domain and severity of risks, in reverse direction informal elements provide opportunities of using trust and cooperation as a safeguard against hazards poorly protected by the contract.

In PPP, actors often rely heavily on formal contractual elements. As PPP transactions are not made very often, trust between contractual actors is generally lacking which instigates difficult processes of contracting and higher transaction costs—the costs associated with organizing competitive tendering as well as writing, monitoring, and enforcing contracts

(Rahman and Kumaraswamy 2002).⁴ It is here that one of the main motivations of using standard contracts comes into play: the aspiration to settle agreements more quickly and at lower cost.

STANDARDIZATION

In Brunsson and Jacobsson's seminal work *A World of Standards* (2000), a standard is defined as a form of regulation, i.e. a specific type of rule, which is formed on the basis of a degree of common understanding among standard-setting actors. It comprises a set of solutions to actual or potential problems and is meant for common and repeated use (Brunsson, Rasche, and Seidl 2012). Standards are usually laid down in a document which is approved by a recognized body. They provide rules, guidelines or characteristics for activities (process-oriented) or results (output-oriented), thereby coordinating interaction (Botzem and Dobusch 2012)—Timmermans and Berg metaphorically speak of standards as "carrier[s] of prescriptions for good practice" (1997, 296). Daily-life examples are easy to find and include statistical standards for measuring a country's GDP, etiquette, and the international currency of the Euro. The subject matter of standards originated from the fields of economics and has strong ties with globalization, which is reflected in the worldwide creation and use of standards for the sake of improved product compatibility (Farrell and Saloner 1985), information and communication technology (David and Greenstein 1990), international trade (Swann, Temple, and Shurmer 1996), product and service quality (Beck and Walgenbach 2005), and corporate responsibility (Haack, Schoeneborn, and Wickert 2012).

⁴ Ironically, this is at odds with the common understanding of partnership (Reeves 2008, Cruz and Marques 2013, Edelenbos and Teisman 2008).

As of today, we also see a development of standards in the world of PPP. In order to improve the manageability of PPP procurement, in a number of countries efforts have been put in developing tools and practices which are alleged to simplify (and eventually improve) PPP governance. Standard contracts have received considerable attention in this respect. In these modularly structured documents, 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, Potoski, and Van Slyke 2006). According to Bajari and Tadelis, ‘[t]here is a surprising amount of standardization in the contracts used in building construction’ (2001, 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.

The United Kingdom has been one the first countries in which guidance on project agreements was issued (UK Ministry of Defence 2001, NHS Executive 1999, UK Treasury Taskforce 1999). In similar vein, other countries have come up with handbooks for standard contracts, for instance Belgium (Van Garsse et al. 2009) and the Netherlands (Rijkswaterstaat 2012). The use of a standardized approach to infrastructure projects is clearly increasing and signifies its practical relevance. Interestingly, the literature on PPP is lagging behind, with the exception of a few academic accounts. Farrugia et al. (2008) argue that the success of standards in PPP depends on the volume, size, and specificity of PPP deals, the political environment, and government objectives and priorities. Jooste et al. (2011) also point to contextual factors as explicit determinants of the success or failure of PPP standards, as their findings indicate that a one-size-fits-all approach to PPP is deemed to collide with real-world complexity and uncertainty. Finally, Börzel and Risse (2002) overtly question some presumed

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3 advantages of the large-scale use of PPP standards. They hypothesize standards to impede
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5 problem-solving capacity, and their empirical findings confirm that the impact of standards on
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7 PPP governance varies. Although these contributions evidently place in dispute the use of
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9 standards and emphasize the topic's relevance, a literature gap remains in that they apply
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11 merely a pragmatic approach to describing and explaining standards in PPP.
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14 15 16 **STANDARD CONTRACTS IN PPP: A DELINEATION**

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18 The rise of standard contracts in PPP fits the background of what is increasingly a 'world of
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20 standards' as presented by Brunsson and Jacobsson in 2000. However, standards can differ
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22 very much in terms of type and form, and therefore in how they are created and used. Hence
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24 standard contracts cannot just be compared with any other standards. Before we explain the
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26 specific promises and potential disadvantages of standard PPP contracts, we discuss these
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28 differences and the affiliated implications.
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32 The most common standards are those which refer to quality requirements or other
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34 parameters and which we define as product standards, e.g. ISO standards. Standard contracts
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36 in PPP are not quite the same as product standards. Serving as guidelines, they typically form
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38 a preferred model or a prescribed template. The parties are required to adopt this model or
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40 template, but this does not necessarily have any implications for the quality of the product or
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42 service that is about to be delivered.⁵ However, it does imply that standard contracts are
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44 created and used in a different way compared to product standards, and therefore different
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46 issues are likely to come up. First of all, when it comes to creation, product standards are
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52 ⁵ Although product standards may be included in a standard contract and a meta-relationship between the two
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54 types of standards is imaginable, we leave this aspect outside the scope of this paper because the core objective
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56 is to delineate and discuss issues of standard contracts *per se*.
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often of a private sector nature. This is reflected in the remarkably large number of industry and business standards that have been drafted over time (Krislov 1997, Tamm Hallström 2004, Brunsson and Jacobsson 2000, Timmermans and Epstein 2010). Standard contracts for PPP are usually drafted by public sector bodies with law firms' assistance, and they are to serve as a guideline for the negotiations between the public sector partner on the one hand and the private sector partner on the other. The implications for the content of these standard contracts are evident: if a governmental authority acts as the main standard setter (i.e. top-down standardization), the guiding standard contract is likely to fulfil the public sector partner's needs rather than the needs of the private sector partner (Cargill and Bolin 2007).

Second, and related to the previous discussion, is the difference between product standards and standard contracts in terms of how they are used. As for product standards, isomorphic pressures such as the strive for competitiveness and reasons of legitimacy often push businesses towards aligning their product with established standards—although the use of standards remains voluntary (Botzem and Dobusch 2012). The standardization of PPP contracts usually occurs through a top-down process; as the contracts are hierarchically set, the contractual negotiations on an infrastructure contract will happen in a principal-agent constellation with the public sector on the principal's side and the private sector on the agent's side. Given that PPP comprises high degrees of complexity and uncertainty, and given that the public sector partner (i.e. the principal) wants to minimize the likelihood of opportunistic behavior of the private sector partner, the principal will be inclined to formulate and use the standard contract as a hierarchical arrangement aimed at maintaining control over the situation. As Deakin and Walsh put it, the principal is 'placed in the paradoxical position of creating a market that works like an organization' (1996, 38). In these situations, the standard contract will no longer be a guidance tool aimed at facilitating learning, lowering transaction costs, and enhancing competition. It will rather be a control tool which helps the principal to

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3 protect his own goals, which will be reflected in a significant number of mandatory and non-
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5 variable clauses and discrete norms which are likely to overrule relational norms (see
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7 Vincent-Jones 2006, Petsoulas et al. 2011 on the cumulative imposition of government policy
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9 through contract structures). On the basis of these assumptions (see Table 1 for an overview),
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11 we discuss the potential benefits and costs of using standard contracts in PPP in the remainder
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13 of this paper.
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18 Insert Table 1 about here.
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21 22 23 **STANDARD CONTRACTS AND LEARNING: IDEAL TYPE VERSUS REALITY**

24 Governments have emphasized the simplification of PPP governance by learning as one of the
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26 promising consequences of using standard contracts. The initial intention has been that
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28 standards provide guidance so that actors involved—particularly on the side of the contracting
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30 authority—know better what to deal with during negotiations and the operational phase of a
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32 PPP. Iossa et al. (2007, 9-10) state in a World Bank report that ‘mistakes at the contract
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34 drafting stage have often arisen simply because of lack of experience of public
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36 administrations on the writing of PPP contracts.’ According to the UK Treasury (2003),
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38 standard contracts help spread best practice and promote a common understanding of the main
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40 risks encountered in PPP. Iossa et al. confirm this promise: ‘[t]o the extent that experience
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42 with PPP in a specific sector accumulates, the public authorities could standardize parts of the
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44 contracts for that specific sector as a means to reduce the likelihood of contract and output
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46 misspecification’ (2007, 10). By institutionalizing in PPP practice, standard contracts
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48 contribute to a normalization of procurement activities. Habituation becomes evident, routines
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50 arise, and public actors can effort to depend less on external support from private
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52 companies—although a certain degree of external support from law firms and consultancies
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will always be necessary in order to close infrastructure deals. These promises correspond with research findings on contracting and learning effects in the management literature (Argyres and Mayer 2007, Wright, Sturdy, and Wylie 2012).

One of the core tensions in standardization is that of ‘transforming work practices while simultaneously being grounded in those practices’ (Timmermans and Berg 1997, 297-298). Past experiences with infrastructures, procedures, and practices, whether good or bad, form the basis of the standards that are made today. Both public and private actors have to get used to the prescriptions provided by standard form contracts and go through a process of learning. Standard contracts themselves are also constantly in flux as they are adapted to changing conditions over time. Moreover, they need to be dynamic with regard to their application across different countries or sectors. We refer to Timmermans and Berg’s *local universality* here. According to them, a standard contract cannot be considered universal *tout court* as that would imply highly improbable and undesirable *ceteris paribus* conditions. Local universality is about ‘being in several locales at the same time, yet being always also located as a product of contingent negotiations and pre-existing institutional and material relations’ (Timmermans and Berg 1997, 297). Standard contracts which are tailored to one country or sector often serve as an inspiration for the creation of standard contracts in other countries or sectors. Although this cross-border transmission of standard documents initially contributes to the learning process, caution is advised when it comes to the actual application of these ‘external standards’. Since there can be major differences between infrastructure sectors, parts of standard contracts have to be adapted in order to be appropriate for procurement. For instance, a contract for road infrastructure is expected to comprise stricter price mechanisms, availability requirements, and penalty clauses than a contract for a sports hall, simply because the risks involved in the former are severe compared to the latter. Furthermore, even within a certain infrastructure sector there can be significant differences between projects in terms of

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3 risk. As an example, within the sports infrastructure sector, the construction of an artificial
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5 football pitch is hardly comparable with the construction of a multifunctional sports center. In
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7 other words, learning does not only concern the accumulation of knowledge over time; it also
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9 includes the development of the capacity to understand different cultures or practices across
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11 countries or sectors and to tailor standard contracts.
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14 Given the dynamics of standard contracts over time and across borders, Iossa et al.
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16 (2007) champion a process of standardization which is guided by general guidelines on how
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18 to write contracts—thereby facilitating learning—rather than creating and using standard
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20 contracts which trigger rigidity and inertia. Faems et al. (2008) prescribe a similar degree of
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22 looseness in using standard contracts so as to enable learning: a flexible application of
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24 contracts, in combination with high levels of trust and relational governance, is likely to
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26 induce free knowledge exchange and shared value creation. Finally, Timmermans and Berg
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28 (1997) state that the ongoing subordination and (re)articulation of a standard is a *sine qua non*
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30 for the functioning of the standard in the first place.
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34 All in all, the literature clearly sketches an ideal type of using standard contracts for
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36 the benefit of learning. However, based upon our assumption that standard contracts for PPP
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38 may very well be used as control tools, it can be expected that learning over time and across
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40 boundaries will not nearly be obvious. If they do not cater for learning, or if they are not used
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42 with the purpose of learning, standard contracts are more likely to jeopardize than benefit the
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44 improvement of PPP (Van der Veen and Korthals Altes 2012).
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49 50 **STANDARDIZED CONTRACTS, LOWER TRANSACTION COSTS?**

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52 The second main promise of standard contracts lies in their alleged capacity to trigger shorter
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54 decision-making and negotiation procedures, thereby lowering transaction costs. Akintoye et
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56 al. (2003, 469) notice a call for standards in PPP among public and private sector
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professionals in the UK, exactly on the basis of this promise: '[P]ublic sector respondents believe that the PFI process has to be standardized further, in order to reduce time delays and professional fees. [...] [P]rivate companies anticipate that a more harmonized approach will avoid inefficient time and resource allocation.' Preparatory costs for both public and private actors are presumed to drop drastically since areas for negotiation are expected to become less extensive. If certain issues are simply swept off the table, this will reduce the time and effort put in negotiations.

However, unlike the promise of areas for negotiation becoming less extensive, standardization does not imply that negotiations happen in a more harmonious manner, let alone that procurement times decrease. By providing guidance, 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, and the relationship between public and private partners retains its transactional nature (see also Hughes et al. 2011, Petsoulas et al. 2011). 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, 45).

In addition to the previous reservation, we emphasize once more the key role of the behavior of the public sector partner. The progress of contractual negotiations is most likely to benefit from a constructive attitude of both the public and private actors at the table. However, a negative atmosphere can be expected when it comes to negotiating over standard contracts since the point of departure will be a template which favors the public side of the table, and the public sector partner will not be particularly eager to give up or deviate from the standard contractual clauses. The term *boilerplate* comes into play here. Boilerplate provisions are

standard clauses of language in a legal document (Gilo and Porat 2006). The purpose of these provisions is to save negotiators time and money with commonly used and understood language. Cooper (2003) says that many (standardized) public contracts contain a great deal of boilerplate provisions. In order to satisfy policy requirements or reduce risks, governments have inserted them in basic (i.e. standard) contracts. Negotiators on the public side of the table are expected to defend the public interest as they will be held accountable if the final contract insufficiently fulfils collective interests. 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—i.e. they use the contract as a control tool. In these cases of legal coordination, opportunities for partnering will be hampered, the interference of lawyers will grow, and an increase in transaction costs can be expected.

STANDARD CONTRACTS, COMPETITION, AND EXCESS INERTIA

The third and final main promise of standard contracts is that they enhance competition. Competition is an important factor of PPP performance, as contestability in the procurement phase allows the public sector to harness efficiency. For the public actor who organizes the tender, better competition leads to lower prices, more available options, and eventually better quality bids and projects.⁶ By standardizing contracts, the competition among bidders for PPP

⁶ There is also criticism on the role of competition in PPP. For instance, Vincent-Jones (1994) argues that increasing competition impedes the development of long-term relations. The larger the pool of private competitors, the more difficult it becomes for a public sector partner to build up a trust-based relationship since actor constellations are changed in every project (Dubois and Gadde 2000). However, a high degree of competition is always better than a negligible degree of competition. As Petsoulas et al. (2011) state, limited competition incurs such a high degree of mutual dependence between the public and private sector partners that

is expected to increase. Blind (2004) states that standards help to remove entry barriers in markets and reduce the unequal starting position for new market entrants: since the required standards already exist, the clarity of a bidding procedure increases, and companies no longer have to invest in capital facilities and research and development to arrive at the same level of competition as others. Information asymmetry between bidders reduces considerably, allowing even small firms to enter the bidding arena without paying too much effort and money. Hence the claim that using standard contracts engenders the potential number of and diversity between bidders, a promise which is particularly to public sector partners given their struggle with limited competition in PPP procurement.

The use of standard contracts is also said to enhance competition by creating opportunities for economies of scale which are attractive for private sector partners. PPP is often considered too costly to be an option for small projects; potential private sector partners ‘will not be forthcoming until there is a large and sustained volume of projects requiring the involvement of the private sector’ (Flyvbjerg, Bruzelius, and Rothengatter 2003, 104-105). Governments have sought solutions to this problem by combining small-scale infrastructure projects, i.e. by bundling procurement: a number of small and similar projects at lower government levels are jointly procured and tendered to a single private sector partner. This act of bundling is said to contribute to the dispersion of transaction costs across a number of projects—thereby minimizing the net transaction costs per project and inducing economies of scale. This would not be possible without using a standard contract; a potential private sector partner 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

they will be locked into a relationship where non-cooperation is not an option. Under these circumstances, the private sector partner is in a powerful position.

each contracting authority involved. By reducing the variety between these projects, the production and service requirements are deduced to a certain range of characteristics such as size, quality, and other technical specifications. Bundled procurement predominantly benefits the private sector partner while public sector partners suffer from a utility loss as their degrees of freedom decrease and the discrepancy between the demand posed (by themselves) and the supply offered (by the private sector partner) increases.

A major concern with regard to bundled procurement is the phenomenon of *excess inertia* (Farrell and Saloner 1985, Choi 1996). The larger the number of projects brought together in a bundle, the more capital intensive production technologies are needed, which in turn diminishes the pool of eligible private sector partners. As small and potentially innovative firms are excluded from market entrance, only large and resourceful firms remain. Not only does this undermine competition, it also puts innovation and technical change at stake: a collective switch from using a common, yet suboptimal technology standard to using a better standard can be impeded by an existing balance of power. A famous example is the worldwide institutionalization of 'Qwerty' keyboards. Many keyboard types other than 'Qwerty' would have done a better job if they could have afforded to seriously compete with the advocates and producers of 'Qwerty' (David 1985). The example shows that some firms have superior resources which allow them to control or at least influence the market better than others (Tassey 2000), and that regulation through standardization protects existing producers from competing technologies (Kahn 1988). Following these thoughts, a combination of standard contracts and bundled procurement is bound to instigate unequal competition in PPP procurement. Surprisingly, empirical accounts on this topic are particularly rare and have never been laid down in the academic literature.

CONCLUSION

This paper addresses important theoretical shortcomings. It approaches the realm of PPP and standard contracts by discussing relevant historical, conceptual, and theoretical backgrounds. Based upon these accounts, it argues that although standard contracts play an increasingly important role in PPP practice and are generally seen as PPP-simplifying governance tools, profound scholarly efforts on this topic have been scarce. It remains to be seen whether standard contracts actually fulfil their promises or not, and questions arise as to who wins and who loses while the standardization game is being played. Without an in-depth investigation of the creation and use of standard contracts in PPP, an analysis of their impact will remain incomplete. Therefore, several avenues for research require attention. We set a research agenda by discussing the potential advantages and disadvantages of using standard contracts and posing several topics to be considered for further research (see Table 2 for an overview).

There are multiple answers to the question why standard contracts are used in PPP. The creation and use of standard contracts in PPP are proclaimed for their positive influence on PPP procurement. That is, standard contracts offer opportunities for lowering transaction costs and fostering competition, and they are said to render learning. Although these are the three primordial motivations, they do not exclude the possibility that contracting authorities use them for other reasons. A lot depends on whether public sector partners consider standard contracts as guiding documents or control tools. PPP-related complexity, uncertainty, and asset specificity are key to the standard setter's attitude on how a contract should be used.

By studying literature on contracting, PPP, and (product) standardization we disentangled a number of assumptions with respect to the impact of standard contracts on PPP procurement. The first assumption we addressed is the promising role of standard contracts as promoters of best practices and a common understanding. Contrary to the alleged contribution to learning of the use of standard contracts, learning over time and across boundaries (i.e. local universality) are not quite easy to achieve when standard contracts are used as control

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3 tools. The successful use of standard contracts comes with public sector partners which are
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5 both eager and able to learn—a condition which is not always present. Further investigation
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7 and refinements are required here, particularly on the balancing act between formal, discrete
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9 contractual clauses and informal, relational contractual clauses. It would be interesting to
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11 scrutinize differentiation in creating standard contracts and changes in standard contractual
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13 designs over time and across national and sectorial borders. It would also be useful to address
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15 the perceptions of standard contracts among public and private actors, particularly because
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17 private actors are not always adequately involved in the creation of standard contracts. This
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19 relates to the tendency of public actors to pursue their own goals—e.g. policy requirements
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21 and risk reduction—while drafting template contracts.
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25 The presumed capacity of standard contracts to help restrain transaction costs makes
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27 them a particularly welcome tool in the world of PPP as these costs form a serious burden for
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29 both public and private sector partners. Unlike the assumption that standard contracts will
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31 cause certain issues to be swept off the negotiation table and create a better atmosphere for
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33 contractual negotiations, these advantages cannot be guaranteed—neither if the standard
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35 contracts is used as a guidance instrument, nor if it is used as a control tool. Using it as a
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37 guidance instrument will not lead to a decrease in the intrinsic complexity of a PPP, and
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39 applying it as a control tool will result in boilerplate provisions which obstruct negotiations.
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41 Formal contracting often characterizes negotiations for PPP, and this cannot be expected to
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43 change with the use of standard contracts. In order to test this assumption, we advocate
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45 research which focuses upon the actual processes of negotiation in order to unveil whether
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47 standard clauses are applied rigidly or flexibly by contracting authorities, and how this
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49 application affects the progress of procurement.
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53 Finally, an important promise of standard contracts has been that they encourage
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55 competition by enlarging the field of potential bidders. Moreover, they are vital to the joint
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procurement of PPP projects aimed at achieving economies of scale. In the latter case, however, the net effect of using standard contracts on competition can actually be negative as only a few resourceful and powerful bidders will survive the cut of a tender procedure. We raise a number of research implications with respect to bundling projects. It would be interesting to see whether potential private sector partners are interested in bundled PPP in the first place, as it implies severe complexities. It is likely that even large firms are not interested in closing this kind of deals since they prefer to avoid the risk of losing efficiency while dealing with a high degree of uncertainty. In these cases there would be a further decrease of the pool of competitive bidders that are willing to partner. Bundled procurement could also be less attractive to public actors than is often assumed: the use of variety-reducing standard contracts has a negative impact on the local specificity of the infrastructure asset that is to be constructed. In other words, the producer's right is protected rather than the consumer's right.

On the whole, we expect to see a volatile contribution of standard contracts to the proliferation of PPP. A tension emerges between the general tendency of PPP to be dealt with through common contractual frameworks on the one hand, and the importance of tailoring contractual arrangements on the other. As a matter of fact, a paradox is laid bare here: whereas one would expect learning to occur, transaction costs to decrease, and competition to prosper, these alleged advantages are not likely to appear in practice very often due to the fact that public sector partners will be inclined to use standard contracts as control tools. The real challenge lies in balancing the opposite forces of guidance and control and using them as complements. Thus, if the aim is to improve PPP, we are not even close to simplifying the governance of PPP. The standardization of contracts is no equivalent of reducing complexity.

Insert Table 2 about here.

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	Most common origin / creation	Reasons of use	Examples
Product standards	Private sector	Voluntary, isomorphic pressures	ISO standards, accreditation requirements
Standard contracts in PPP	Public sector (top-down with private sector assistance)	Mandatory, contracts are already used during bid preparation	Model contracts applied by UK's Ministry of Defence and National Health Service
Implications for PPP	Standards are inclined to benefit actor who created them, i.e. contract drafter (public actor)	Standard contracts are likely to be used as control tool instead of guidance instrument	Contract includes significant number of mandatory and non-variable clauses and discrete norms

Table 1: distinction between product standards and standard contracts for PPP

PPP concerns	Promises	Reservations	Research agenda
Poor expertise; lack of common and consistent understanding of risk	Promotion of best practices and common and consistent understanding of risk	Learning processes are not necessarily triggered by standard contracts; public sector actors might see standard contracts as control tools	<ul style="list-style-type: none">- Changes in standard contracts over time and across national and sectorial borders- Public and private actors' perceptions of standard contracts- Involvement of private actors in creation of standard contracts
Lengthy negotiations; high transaction costs	Concise negotiations, lower transaction costs	Complexity of PPP remains; boilerplate instigates juridification	<ul style="list-style-type: none">- Attitude of public actor towards tinkering with standard clauses during negotiations- Progress of procurement when contracts are standardized
Limited competition	Better competition	Variety-reducing standard contracts can hamper competition (excess inertia)	<ul style="list-style-type: none">- Private actors' position and behavior towards bundled procurement- Public actors' opinion on bundled procurement given loss of local specificity of projects

Table 2: Theoretical assumptions regarding the creation and use of standard contracts in PPP and implications for further research