European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre

# A Guide to Guidance

## Sourcebook for PPPs

epec
European PPP Expertise Centre

# A Guide to Guidance

## Sourcebook for PPPs

Version 2, February 2011

European PPP Expertise Centre

## Terms of Use of this Publication

## A Guide to Guidance: Contents


**Introduction** **1**

*Objective and background* ........ *1*

*How to use this Guide* ........ *2*

*Readership of the Guide* ........ *3*

*Structure of the Guide* ........ *4*

**1 Project identification** **6**

*1.1 Project selection* ........ *6*

*1.2 Assessment of PPP option* ........ *7*

**2 Detailed preparation** **14**

*2.1 Getting organised* ........ *15*

*2.2 Before launching the tender* ........ *20*

**3 Procurement** **33**

*3.1 Bidding process* ........ *33*

*3.2 PPP contract and financial close* ........ *40*

**4 Project implementation** **47**

*4.1 Contract management* ........ *48*

*4.2 Ex-post evaluation* ........ *61*

**Annex 1: Project finance** **64**

**Annex 2: A note on legal frameworks for PPPs** **70**

**Guidance details** **73**

**TABLES**

Table 1. PPP project cycle and structure of the Guideand steps .......... 4

Table 2. Accounting treatment of a PPP according to ESA95 rules.... 12

Table 3. A comparison of EU procurement procedures ...................... 27

**BOXES**

Box 1: PPP advice during procurement ............................................ 18

Box 2: Combining Cohesion and Structural Funds with PPPs ............ 21

Box 3: Traffic revenue risk allocation ................................................ 25

Box 4: Payment mechanism ............................................................. 30

Box 5: Insurance................................................................................ 44

Box 6: Sharing gains from refinancing .............................................. 52

**CHARTS**

Chart 1. Detailed preparation............................................................ 14

Chart 2. Organisation steps .............................................................. 15

Chart 3. Pre-tender steps ................................................................. 20

Chart 4. Procurement ....................................................................... 33

Chart 5. Bidding steps ...................................................................... 34

Chart 6. PPP contract and financial close steps ................................ 40

Chart 7. Project implementation ....................................................... 47

Chart 8. Contract management steps ............................................... 48

Chart 9. Ex-post evaluation steps ..................................................... 61

# Introduction

## Objective and background

A *public private partnership* ("PPP") arrangement differs from conventional public procurement in several respects. In a PPP arrangement the public and private sectors collaborate to deliver public infrastructure projects – such as roads, railways, airports – which typically share the following features:

- A long-term PPP contract between a public contracting authority (the "Authority") and a private sector PPP company based on the procurement of services, not of assets;
- The transfer of certain project risks to the private sector, notably in the areas of design, build, operations and finance;
- A focus on the specification of project outputs rather than project inputs, taking account of the *whole life cycle* implications for the project;
- The application of private financing (often *project finance*[1]) to underpin the risks transferred to the private sector;
- Payments to the private sector which reflect the services delivered. The PPP company may be paid either by users (e.g. toll motorway), by the Authority (e.g. availability payments, shadow tolls) or by a combination of both (e.g. low user charges together with operating public subsidies).

The rationale for using a PPP arrangement instead of conventional public procurement rests on the proposition that optimal risk sharing with the private partner delivers better *Value for Money*[2] for the public sector.

PPP arrangements are, however, more complex than conventional public procurement. They require detailed project preparation and planning, proper management of the procurement phase to incentivise competition among bidders. They also require careful contract design to set service standards, allocate risks and reach an acceptable balance between commercial risks and returns. These features require skills in the public sector which are not typically called for in conventional procurement.

This *Guide to Guidance* (the "Guide") seeks to identify the *best of breed* guidance currently available from PPP guidelines worldwide and selected professional publications. By providing a sourcebook of good PPP practice, it is designed to assist public officials responsible in launching and implementing PPP projects and to facilitate their understanding of the key issues and procedures involved in the procurement of PPP arrangements.

---

1 See Annex 1 for an overview of the principles of *project finance*.

2 Paragraph 1.2 discusses the concept of Value for Money.

The need for well-structured PPPs has never been greater. EU Member States and the European Commission have placed emphasis on the need to accelerate investments in infrastructure, by mobilising public and private sector finance through PPP arrangements as part of a strategy to address the economic downturn.[3]

## How to use this Guide

This Guide can be used in a number of ways. For example:

- As a broad guide to procurement and implementation issues in PPPs;
- As an introduction to the information to be requested from PPP advisers;
- As a starting point to learn more about specific aspects of PPP design.

Because it has been designed as a good practice sourcebook, the value of the Guide ultimately depends on the value of the information sources provided in it. These sources are indicated in the *Guidance* at the end of the Guide. They contain the title of the publication, its author(s), date of publication and a brief paragraph explaining the topics covered in the publication.

All sources of guidance have a reference number to guide the reader to further information about the issue discussed in the text. This is done by using the symbol "➤Guidance" next to the relevant reference number.

Most sources relate to existing PPP guidelines or public policy material which can be accessed via the internet. In those cases, the references include the internet link address. For publications, such as printed books or other published material that cannot be accessed via the internet, the source description includes the ISBN details.

### Caveats

- In a rapidly changing environment, such as that characterised by infrastructure PPPs worldwide, new practices develop quickly making existing ones obsolete. In preparing the Guide, an effort has been made to review and recommend the most up to date PPP guidelines and documentation currently available.
- The Guide is written in English. Most of the PPP guidance currently available comes from countries such as Australia or the United Kingdom, for example – which have an extensive PPP experience – or from international organisations, such as the World Bank, whose institutional mandate includes the gathering of best practice worldwide. In the case of the latter, although the language of the guidance is English, the content

---

[3] See Commission Communication: COM(2009) 615 of 19 November 2009, *Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships* http://www.eib.org/epec/resources/commission-communication-on-ppp-en.pdf

draws on experience from non-English speaking countries and therefore such sources are applicable to a wider audience.

- The Guide also includes references to available PPP guidance material in non-English speaking European countries such as France, Germany, and Greece. This Guide, however, only references the original language guidance source.
- The legal framework in place in a specific country needs to be taken when designing a PPP arrangement. Annex 2 of the Guide discusses basic principles of PPP legal frameworks.
- This Guide does not replace, to any extent or measure, the need for an Authority to take professional advice from its legal, technical, financial, environmental and other advisers. The Guide should, however, assist users in having a more productive dialogue with their advisers.

## Readership of the Guide

The Guide is primarily intended for public sector officials from EU Member States who are in charge of PPP projects and have knowledge and experience in conventional public procurement but who are not familiar with PPP arrangements. Users may find themselves at different stages of decision-making in the PPP project cycle. To illustrate this point, consider the following scenarios:

- **Scenario 1** – A project proposal has been identified and initial pre-feasibility studies completed. The Authority is considering whether to follow a PPP route and needs to compare PPP against other available procurement strategies to be able to select a preferred procurement option. The Guide suggests a number of sources of information to help the Authorities to do the necessary analysis to evaluate if PPP is the preferred procurement option.
- **Scenario 2** – An Authority is committed to develop a project with a PPP arrangement but the public officials in charge of defining the project strategy have not been previously involved, or have little experience, with PPP procurement methods. They need to understand, among other things, what to expect in terms of how to seek expert advice, the steps required in the PPP project cycle, and how to engage with the private sector. The Guide provides a *road map* of all the steps that need to be taken in the procurement phase of the PPP project cycle.
- **Scenario 3** - A PPP project is already under implementation and the PPP company proposes changes to the PPP contract, which may impact its financial balance and the Value for Money rationale of the existing PPP arrangement. The public sector officials in charge need to understand the impact of the proposed changes and what information to request from their advisers to be able to negotiate with the PPP company with a view to preserve Value for Money in the contract. The Guide covers the key issues that the Authority needs to consider when renegotiating a PPP contract.

## Structure of the Guide

As shown in Table 1 below, the structure of the Guide follows the four key phases of the PPP project cycle.

**Table 1. PPP project cycle and structure of the Guide: phases, stages and steps**

| Phases | Stages | Steps |
|---|---|---|
| *Chapter 1:* **Project identification** | 1.1 - Project selection | - Identification<br>- Output specifications |
| | 1.2 - Assessment of PPP option | - Affordability<br>- Risk allocation<br>- Eurostat treatment<br>- Bankability<br>- Value for Money |
| *Chapter 2:* **Detailed preparation** | 2.1 - Getting organised | - Project team<br>- Advisory team<br>- Plan and timetable |
| | 2.2 - Before launching the tender | - Further studies<br>- Detailed PPP design<br>- Procurement method<br>- Bid evaluation criteria<br>- Draft PPP contract |
| *Chapter 3:* **Procurement** | 3.1 - Bidding process | - Notice and prequalification<br>- Invitation to tender<br>- Interaction with bidders<br>- Contract award |
| | 3.2 - PPP contract and financial close | - Final PPP contract<br>- Financial agreements<br>- Financial close |
| *Chapter 4:* **Project implementation** | 4.1 - Contract management | - Management responsibilities<br>- Monitoring service outputs<br>- Adjustments in the contract<br>- Changes to the contract<br>- Dispute resolution<br>- Asset maintenance<br>- Contract termination |
| | 4.2 - Ex-post evaluation | - Institutional framework<br>- Analytical framework |

Each *chapter* of the Guide deals with a phase of the PPP project cycle and is broken down into two *stages*. For each stage, the Guide identifies the key *steps* which the Authority and its advisers need to take before moving to the next stage. The discussion of the key steps includes the rationale for the step, the key tasks involved and references to ➤Guidance sources to understand those tasks further.

In addition:

- Specific issues, for example traffic risks and payment mechanisms, or combining EU grants with private finance, are developed in more detail with *text boxes* because of their fundamental role in the design of the PPP arrangements;
- *Checklists* are included at the end of each stage to remind the reader of the key tasks that have to be fulfilled before moving to the next stage;

Two *annexes* complete the Guide. Annex 1 covers the basics of *project finance* which are relevant to PPP projects in general. Annex 2 is a note on the legal frameworks for PPPs.

# 1 Project identification

This Chapter 1 provides a brief summary of the main issues of the project identification phase, which takes place before the preparation and procurement phases. The project identification phase is important because it determines whether the selected project can (and whether it should) be delivered as a PPP instead of using conventional public procurement. ➤Guidance 1

## 1.1 Project selection

The ultimate objective of a project selection process is to ensure that it represents *Value for Money*. Value for Money refers to the best available outcome for society taking account of all benefits, costs, and risks over the whole life of the project.➤Guidance 2 A necessary condition for a project to represent Value for Money, irrespective of the procurement option chosen to deliver it, is that the benefits to be derived from the project outweigh the costs. This is normally tested by undertaking a cost-benefit analysis of the project and its requirements.

A distinctive feature of PPP projects is that their requirements are defined in terms of *outputs* rather than *inputs*. Conventional project procurement has usually focused on inputs. In this regard, PPPs involve fundamental changes in the way projects are prepared and in the information that the Authority needs to provide to private sector sponsors. While the typical set of feasibility studies used in the public procurement of projects focus on inputs, PPP projects demand a clear set of output requirements and service quality standards which are reflected in the PPP contract (see 2.2.5 *Prepare draft PPP contract*). As a result of the output nature of PPPs, the bulk of the technical design[4] activities for a project will be carried out by the private partner.➤Guidance 3

In the project selection step, the Authority and its advisers will review alternative project definitions in the context of a PPP policy, sometimes following guidelines that the public sector will use to assess all PPP projects. These guidelines normally specify who approves what and when throughout the process of project selection, preparation and procurement.

Once a project specification is selected, the Authority and its advisers will undertake feasibility analyses and project preparation, including supply or demand analysis, cost analysis and a preliminary environmental assessment of the potential impacts of the project.

In order to consider the PPP procurement option, the Authority and its advisers need to answer a set of key questions:

---

[4] The term “design” is used in several ways throughout the Guide. To avoid confusion, the expression “technical design” refers to the plans or sketches used for the construction of a project.

- Is the project *affordable*? Will users or the government[5], or both, pay for the project? How will they pay? (e.g. user charges, operating subsidies, public sector or EU grants)
- What are the key *sources of risk* in the proposed project? What is the optimal risk allocation and risk management strategy?
- What are the *financing sources* for the proposed project? Will the project be *bankable* (i.e. capable of raising debt finance)? Will it attract investors? Will it comply with the requisites for EU or national public funding?
- Even if the project is affordable and bankable, does the project represent *Value for Money*?
- For many countries, the issue of the *balance sheet treatment* of the project (i.e. will it score as a public sector investment for the purposes of national debt and deficit under the *Excessive Deficit Procedure* of the Maastricht Treaty) is also important.

## 1.2 Assessment of PPP option

Stage 1.2 identifies a list of issues and considerations for the attention of the Authority and its advisers when considering the PPP option. It does not however offer a comprehensive catalogue of recommendations, as the assessment of the PPP choice will be dependent on the specific situation of each country, notably in terms of legal and institutional context.

### Affordability

Affordability relates to the capacity to pay for building, operating and maintaining the project, be it the capacity to pay of the users of the services or that of the government that has identified the need for the asset to be built.

An affordability assessment requires a careful analysis of the expected operating and maintenance costs of the project, together with the levels of cash flow required to repay the loans and provide a return to investors of the PPP company. The financial and technical advisers will develop a financial model to assess alternatives in terms of a range of capital, operating and maintenance cost estimates, appropriate cost escalation indexes, assumed financing structure and preliminary PPP contract terms. At the pre-feasibility stage, the financial model is developed at a fairly high level. It is later on, at the feasibility stage and when the PPP arrangement is designed in detail, that

[5] In this Guide, the term “government” refers to the public authorities, whether central, regional or local.

the financial model is further developed and refined (see 2.2.2 *Prepare the detailed design of the PPP arrangement*).

The assessment of costs translates into an estimate of the required revenues to meet those costs:

- In PPPs where users pay directly for the service (the so-called "revenue-based PPPs"), the Authority and its advisers need to examine the capacity and willingness of users to pay, especially if tariffs need to be increased from current levels to meet revenue cash-flow targets. In many PPPs, the public sector will need to subsidise the service in order to make it affordable. The use of public subsidies can impact the Value for Money of a PPP arrangement requiring that the net life-cycle efficiency savings from the PPP option be large enough to compensate for the use of public funds;
- In PPPs where the Authority makes the payments ("availability-based PPPs"), assessment of affordability is a key consideration in the design of the transaction. The Authority will enter into payment obligations over the life of the PPP contract (the so-called "service fee"), which represents long-term commitments and can influence the design of the transaction and its Value for Money proposition. Sometimes, options that combine direct charges to users with service fees may need to be examined.

Thus, affordability relates not only to the financial balance of the PPP arrangement, but also to public expenditure items in general. A PPP project is considered to be affordable if the public expenditure associated with it can be accommodated within the inter-temporal budget limit of the public sector.

### Risk allocation

Achieving the Value for Money that justifies the PPP option also depends on the ability to identify, analyse and allocate project risks adequately. Failure to do so translates into financial costs. Thus, at the project identification stage, in addition to assessing the sources of revenue linked with the affordability of the project, the Authority and its advisers need to establish a broad assessment of the risks that arise from the project requirements in order to manage them. Risk management is an on-going process which continues throughout the life of a PPP project. It takes place in five stages:➤Guidance 4, 5

- **Risk identification**. The process of identifying all the risks relevant to the project;
- **Risk assessment**. Determining the likelihood of identified risks materialising and the magnitude of their consequences if they do materialise;
- **Risk allocation**. Allocating responsibility for dealing with the consequences of each risk to one of the parties to the contract, or agreeing to deal with the risk through a specified mechanism which may involve sharing the risk;
- **Risk mitigation**. Attempting to reduce the likelihood of the risk occurring and the degree of its consequences for the risk-taker;

- **Monitoring and review**. Monitoring and reviewing identified risks and new risks as the PPP project develops and its environment changes, with new risks to be assessed, allocated, mitigated and monitored. This process continues during the life of the PPP contract.

Broadly speaking, PPP project risks can be divided into commercial risk and legal and political risks:➤Guidance 6

- **Commercial risk** can be divided into supply and demand risks. Supply risk concerns mainly the ability of the PPP company to deliver. Supply risk can be sub-divided into construction risk and supply-side operation risk (where construction and operation constitute the two phases of the project). Construction and supply-side operation risks include financial market risk due to, for example, changes in the cost of capital or changes in exchange rates and inflation. Demand risk relates to insufficient user volumes compared to base case assumptions;

- **Legal and political risks** relate to, among other factors, the legal framework, dispute resolution, the regulatory framework, government policy, taxation, expropriation and nationalisation.

In general, the private sector is better placed to assume commercial risk while the public sector is better placed to assume legal and political risk.

If public guarantees are envisaged, the Authority and its advisers need to assess the impact of the risk allocation on the cost of the guarantee and its future implications on public finances before granting the guarantee. ➤Guidance 7

### Bankability

A PPP project is considered bankable if lenders are willing to finance it (generally on a *project finance* basis).➤Guidance 8

The majority of third-party funding for PPP projects consists of long-term debt finance, which typically varies from 70% to as much as 90% of the total funding requirement (for example, in an availability-based PPP), depending on the perceived risks of the project. Debt is a cheaper source of funding than equity, as it carries relatively less risk. Lending to PPP projects (usually referred to as project financing or limited-recourse financing) looks to the cash flow of the project as the principal source of security (see Annex 1 for an introduction to project finance issues as they apply to PPP projects).

The Authority and its advisers need to assess financial risks thoroughly. The financial risks experienced by PPP projects tend to be related to some or all of the following factors:➤Guidance 9

- Reliance on optimistic revenue assumptions and on levels of demand from a poorly chosen “baseline” case;

- Lack of attention to financing needs in the project feasibility, which leads to larger amounts of debt in projects;

- Long-term PPP projects that are financed with short-term debt, coupled with a sometimes unjustified assumption that the short-term debt can be rolled over at the same or even better refinancing conditions;

- Floating rate debt that creates interest rate risk;
- Governments that do not consider the allocation of risks properly and ignore the incentives the PPP company may have to renegotiate the contractual arrangements in its favour; or
- Refinancing can also create unforeseen benefits for the PPP company, in which the government might not share if the contract does not explicitly provide for this possibility. (see Box 6 *Sharing the gains from refinancing*).

### Value for Money analysis

A PPP project yields Value for Money if it results in a net positive gain to society which is greater than that which could be achieved through any alternative procurement route. It is good practice to carry out a Value for Money analysis – essentially a cost-benefit analysis – as part of the initial preparation of a project, regardless of whether it is procured conventionally or as a PPP.

In some countries like the UK, which have extensive PPP programmes, a PPP project is said to achieve Value for Money if it costs less than the best realistic public sector project alternative (often a hypothetical project) which would deliver the same (or very similar) services.➤Guidance 10 This public sector alternative is often referred to as the *public sector comparator* ("PSC").

Carrying out a PSC exercise is part of building the business case for a PPP project. It is a legal requirement in many PPP programmes worldwide. Advisers need to make various cost adjustments to be able to do a detailed quantitative comparison between the PPP project and the PSC. These cost adjustments include differences in tax regime, for example.

It is generally assumed that the PPP option will be more efficient in investment, operating and maintenance costs than the PSC. So the key question in assessing Value for Money is usually whether the greater efficiency of the PPP project is likely to outweigh factors that might make the PPP more costly – the main ones being *transaction and contract oversight costs* (i.e. additional bidding, contracting and monitoring costs in a PPP setting) and *financing costs* (i.e. possible added costs due to private sector financing, especially equity financing).➤Guidance 11,12,13

Experience suggests that the likelihood that a PPP provides Value for Money is higher when all or most of the following exist:➤Guidance 2

- There is a major investment programme, requiring effective management of risks associated with construction and delivery; this may be a single major project or a series of replicable smaller projects;
- The private sector has the expertise to design and implement the project;
- The public sector is able to define its service needs as outputs, which can be written in the PPP contract ensuring effective and accountable delivery of services in the long run;

- Risk allocation between the public and private sectors can be clearly identified and implemented;
- It is possible to estimate the long-term costs on a whole-of-life basis of providing the assets and services involved;
- The value of the project is sufficiently large to ensure that procurement costs are not disproportionate; or
- The technological aspects of the project are reasonably stable and not susceptible to short term and sudden changes.

The project identification phase therefore involves an early assessment of what payment structure is feasible, what the government or the users can afford to pay (and when), the impact on the project scope, service level, structure and the associated risks the private sector might be prepared to accept. This exercise should help the Authority to identify and manage any long-term fiscal obligations – implicit and explicit – that may result from the PPP project.

## Debt and deficit treatment of PPPs by Eurostat

In challenging times for public finances, the national debt and deficit treatment of a PPP is always likely to be a critical issue from the perspectives of the Authority and government in general. The reason for this is that, given the economic convergence criteria in the *Stability and Growth Pact*[6] and the mandatory requirements of the *Excessive Deficit Procedure*, EU governments are concerned that they may be prevented from going ahead with an economically worthwhile PPP because of its ‘debt and deficit’ treatment.

Eurostat requires that the debt and deficit treatment follows the requirements of the European System of Accounts (“ESA95”), which is mandated by a Council Regulation.➤Guidance 14

Eurostat has issued several interpretations of ESA95, including a *Manual on Government Deficit and Debt*.➤Guidance 15

For the purposes of recording PPPs, ESA 95 requires national statisticians to look at the balance of risk and reward in the underlying PPP arrangement. Such balance is judged by analysing the allocation of two key risk categories: construction risks and market risks (i.e. availability and demand) between government and the PPP company:

- **Construction risk** covers events related to the construction and completion of the PPP assets. In practice, it is related to events such as late delivery, non-compliance with specified standards, significant additional costs, technical deficiency and external negative effects (including environmental risk) which trigger compensation payments to third parties;

---

[6] A criterion is that the ratio of government deficit to gross domestic product must not exceed 3% and the ratio of government debt to gross domestic product must not exceed 60%. See http://europa.eu/scadplus/glossary/convergence_criteria_en.htm.

- **Availability risk** covers situations where, during the PPP operational phase, an underperformance linked to the state of the PPP assets results in services being partial or wholly unavailable, or where these services fail to meet the quality standards specified in the PPP contract;
- **Demand risk** relates to the variability of demand (higher or lower than expected when the PPP contract was signed) irrespective of the performance of the PPP company. Such a change in demand should be the consequence of factors such as the business cycle, new market trends, a change in final users' preferences or technological obsolescence. This is part of the usual *economic risk* borne by private businesses in a market economy (for an example, see Box 3 *Traffic revenue risk allocation*).

Table 2 illustrates the combinations of risk allocation between government and private sector (i.e. the PPP company) which result in the PPP being classified "on" or "off" the government's balance sheet.

**Table 2. Accounting treatment of a PPP according to ESA95 rules**

| | RISK TYPE | | | "ON" or "OFF" Government Balance Sheet |
|---|---|---|---|---|
| | Construction risk | Demand risk | Availability | |
| Who bears the risk? | Government | Government | Government | ON |
| | | | Private | ON |
| | | Private | Government | ON |
| | | | Private | ON |
| | Private | Government | Government | ON |
| | | | Private | OFF |
| | | Private | Government | OFF |
| | | | Private | OFF |

The conclusions from Table 2 are that:

- If the government bears the construction risk, the PPP will always be on the government's balance sheet irrespective of the allocation of the demand and availability risks;

## 1. Project identification

- If the private partner bears the construction risk, the PPP will be classified off the government's balance sheet unless the government bears both demand *and* availability risk.

It is important for the Authority and its advisers to be aware that the risk allocation which they agree to in the PPP contract can have a direct influence on the treatment of the PPP arrangement on the national debt and deficit.

In addition to the key risks in Table 2, Eurostat also takes into consideration other ways through which governments get involved in PPP arrangements. Again, where such ways influence risk allocation, they may affect the debt and deficit treatment of the PPP. Ways in which government may become involved in PPP arrangements include: government financing, government guarantees and PPP contract termination clauses which involve financial compensation by the government. The impact on the treatment of PPPs of such government financial involvement depends on a careful interpretation of several features including the transfer of risks and rewards that takes place and the degree of government control over the underlying PPP asset. ➤Guidance 16

In case of doubts regarding the appropriate statistical treatment for a PPP arrangement, a Member State statistical authority can request advice from Eurostat on a past (ex post) or future (ex ante) PPP project. Eurostat has established specific administrative rules for the provision of ex-ante advice.

# 2 Detailed preparation

The project procurement phase in the PPP cycle begins after the project has received approval by the relevant public authority based on a detailed feasibility report or business case. Such approval would support the development of the project as a PPP. Approval of the main project features is important as a prerequisite of the start of the procurement phase since detailed project preparation is a resource-intensive undertaking.

Before the formal procurement phase starts, preparation work is necessary at two levels. We refer to these as (i) getting organised and (ii) finalising all preparations before launching the tender. Chart 1 summarises these stages and their key steps, which are described in detail in this chapter.

**Chart 1**

**Phase 2: Detailed preparation**

**Stage 2.1: Getting organised**

| Steps | Key tasks |
|---|---|
| Set up project team and governance | - Set up the project management team<br>- Implement the PPP's project governance structure |
| Engage a team of advisors | - Identify the expertise needs of the team<br>- Select the necessary advisors to cover those needs |
| Develop a project plan and timetable | - Identify the several project activities and the critical paths<br>- Develop a detailed project plan and timetable |

**Stage 2.2: Before launching the tender**

| Steps | Key tasks |
|---|---|
| Carry out further studies, as needed | - Detailed business case<br>- Detailed assessment of the risks of implementing the PPP |
| Prepare detailed design of PPP arrangement | - Outline principal commercial terms<br>- Build detailed risk register<br>- Undertake detailed commercial and financial analysis |
| Select procurement method | - Define the scope for interaction with the private sector and consider the legal alternatives<br>- Select the procurement method |
| Select bid evaluation criteria | - Set up evaluation committee<br>- Select the criteria for scoring alternative bids |
| Prepare draft PPP contract | - Prescribe the required service standards, risk allocation and payment mechanism in detail<br>- Finalise draft PPP contract |

## 2.1 Getting organised

Chart 2


### 2.1.1 Set up the project team and governance structure

The complexity and scale of most PPP projects will usually justify a team-based management approach to ensure that all the required skills are effectively applied.

A common way of implementing effective project governance for PPP project development is by a system of boards or committees. Different systems can be considered, but they normally include: ➤Guidance 17

- A project board, or *steering committee*, comprising the main public sector stakeholders and led by a senior officer within the Authority that is responsible for delivering the project; and
- A *project management team*, responsible for managing the PPP project (including managing advisers) and reporting to the steering committee. Appointing a *project director* is of particular importance. During the intense procurement phase, this will be a full-time job. The skill set should include familiarity with private business as well as an understanding of how government administration works.

### 2.1.2 Engage a team of advisers

The importance of having in place a strong group of expert advisers cannot be overstated. The engagement of PPP advisers requires that sufficient resources are budgeted for that purpose early in the project cycle. The PPP project management team will require different types of advisers for different phases of the PPP project preparation process. Consultants would almost certainly have been used to prepare the various feasibility reports. They may have been hired separately and in a more ad-hoc manner. It is when the procurement phase begins that a comprehensive plan needs to be developed for how advisers will be used:

- The core team of advisers for the procurement phase will usually consist of a financial adviser, a technical adviser and a legal adviser (each of these composed of more than one individual). Other consultants will be required for specific inputs (e.g. separate consultants for environmental, social impact, regulatory risk and insurance matters). The exact nature of the broad advisory team will depend on the project and the in-house resources available. (see Box 1 *PPP advice during procurement)*;
- An Authority with considerable experience in PPP procurement can engage the advisers on separate mandates rather than a consortium mandate, with the project director, normally a public official, managing the entire process. It may be advisable, however, to hire a consortium of consultants, under one contract, led by one of them (often the financial adviser);➤Guidance 18,19
- Even if a single consortium of consultants is engaged, it is useful for the project director to be able to discuss issues with each member of the advisory group separately to ensure that any differences of opinion on difficult issues are brought out and solutions are identified.➤Guidance 20, 21

Public authorities should pay careful attention to the incentives created by different ways of engaging advisers and remunerating them. For example, if the consultants hired to carry out the feasibility work are fairly certain that they will be kept on board to advise on the transaction, they may have a disincentive to disclose major problems with the project for fear that preparation will not continue. Alternatively if the transaction advisers are paid a success fee in full when the PPP contract is signed, they may have an incentive to deliver a project that is not yet bankable and that takes many months (or years) to reach financial close. It may therefore be useful at the outset of the process for the Authority to hire an initial high-level consultant to assist in the planning of all the technical assistance that will be needed during the process, prepare terms of reference, etc.

### 2.1.3 Develop a plan and timetable for project preparation and procurement

A key initial task for the project management team or teams (in fact, probably an initial task for the advisers) is to develop a detailed project plan, including a timetable for project preparation and procurement. The plan needs to take into account all the key steps in the process including:➤Guidance 22

- Document development;
- Stakeholder consultation;
- Bidding process and private sector interface; and
- Government approval process.

PPP preparation is a complex undertaking with parallel activities feeding into critical paths. It is important that activities that are on the critical paths be initiated at the planned time and monitored closely to ensure that they proceed as planned and do not cause delays to other activities. It is helpful to use project-planning software to create the timeline in the form of a Gantt chart. The chart can then be easily updated from time to time (the project director should require the project management team to do this).

**CHECKLIST*: Getting organised***

The project management team, working in the Authority and its group of advisers, will have to address a set of questions regarding organisation before proceeding to the next stage. For example:

- Are all relevant project approvals in place?
- Is a credible and well-resourced team in place to manage project preparations and procurement?
- Are sufficient financial resources available to the Authority to cover the costs of the preparation and procurement phase?
- Are project governance structures and processes established to ensure effective decision making?
- Are credible and experienced advisers appointed?
- Have all relevant stakeholders been identified and consulted to check their commitment to the project?
- Is a realistic procurement timetable in place for the procurement phase?
- Has appropriate care been taken to deal with the impact of specific issues, such as coordinating approval processes in the case of a multi-jurisdiction project?

### Box 1: PPP advice during procurement

Advisers are normally involved at every stage of the PPP project cycle, including the initial feasibility assessment, project preparations, project procurement and project implementation. A non-exhaustive list of examples of the legal, financial, technical and environmental assistance typically provided by PPP advisers, in particular during the procurement phase, will include the following:➤Guidance 23,24

***Legal adviser***

- Advise the public sector on the issue of the legal powers (or *vires*) necessary to enter into the project contracts and on the legal feasibility of the project
- Assist in the assessment of the legal feasibility of the project (for example, where appropriate, relating to cross jurisdiction issues)
- Advise on the appropriate procurement route
- Advise on, or draft, the initial contract notice
- Advise on, or draft, procurement documentation such as pre-qualification questionnaires, invitation to tender and evaluation criteria
- Develop the PPP contract and bid documentation for the project
- Ensure that bids meet the legal and contractual requirements for submission
- Evaluate and advise on all processes and legal and contractual solutions throughout the procurement phase, including contract negotiation
- Provide support in the clarification and fine-tuning of legal aspects

***Technical adviser***

- Draft the output requirements and specifications of the PPP project
- Develop payment mechanisms in the PPP contract (with the financial advisers)
- Evaluate and advise on all technical solutions during the procurement phase
- Undertake technical due diligence on bidders' solutions
- Carry out any site condition, planning and technical design work

***Financial adviser***

- Support the development of all financial aspects of the project
- Advise on how to secure the public funding for the project (if any) →

## 2. Detailed preparation

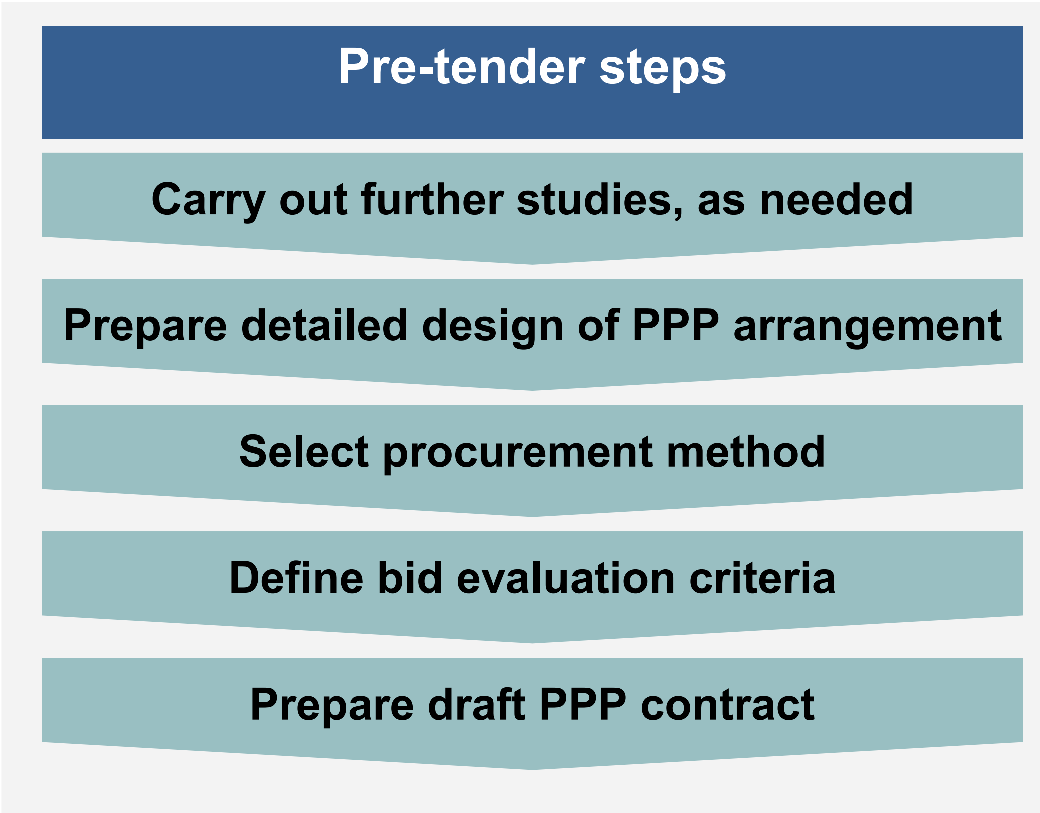
- Advise on the applicability of specific sources of funding, and how these can be optimised in the funding structure
- Ensure that all financial aspects of the bidders' solutions meet the requirements for submitting a financial bid
- Optimise, scrutinise and possibly audit the financial models submitted by bidders
- Evaluate and advise on financial proposals throughout the procurement phase
- Advise on the bankability issues raised by the PPP contract
- Undertake financial due diligence on bids submitted
- Assist in the negotiations with the lenders
- Assist in the strategy and completion of the interest rate hedging at financial close

***Environmental adviser***

- Examine the potential environmental impact of the project
- Assist in environmental due diligence, including required permits and certifications
- Identify potential environmental risks and how submitted bids address them
- Consider the mitigation of such risks and the impact on the scope and technical design of the project

## 2.2 Before launching the tender

**Chart 3**




Stage 2.2 has two main goals:

- Further develop all aspects of the PPP design (responsibilities, risk allocation, payment mechanism, etc.) in a progressive and iterative manner, concluding with a full draft PPP contract; and
- Select the tendering method, decide on bid evaluation criteria and prepare the complete tender documents.

At the end of Stage 2.2, the project management team will be ready to prequalify consortia interested in bidding for the project and issue the invitation to tender. It is useful to end Stage 2.2 at that point because in some jurisdictions a high-level clearance will be required before publishing the procurement notice and proceeding with the invitation to tender. The end of Stage 2.2 is therefore an important milestone in the project delivery phase of the PPP cycle.

Some steps of the PPP cycle may not proceed in the rigid chronological order as Chart 3 implies as there are often overlaps. For example, the final tasks of detailed PPP design preparation may continue during the later prequalification exercise. This will often be the most efficient way for the advisers to proceed.

### 2.2.1 Carry out further studies, as needed

Even though the core technical, financial and economic studies will have been carried out during the feasibility phase, there may be a need for further, more focused studies during the procurement phase.➤Guidance 25

- Preparing the business case and appraising the project may have brought to light aspects where more detailed work is needed.
- The studies during the feasibility phase will have been oriented most of all to helping the Authority or other authorities take a yes/no decision and select among major project alternatives, not necessarily to refine the PPP design in preparation for contract drafting.
- As the PPP design advances, decisions about risk allocation may require additional studies. For example, in some projects (e.g. involving tunnels) it may be useful for the Authority to carry out an initial study of ground conditions and make these available to bidders.
- The Authority and its team of advisers should take great care to ensure a clear delineation of the extent to which the private sector can rely on the results of information given by the Authority. Unintentional warranties given by the public sector can undermine risk transfer. Legal advice should always be sought on potential legal responsibility or liability arising out of the provision of information by the public sector to the private sector. As a general principle, the private sector should be required to do its own due diligence investigations rather than rely on information provided to it.

**Box 2: Combining Cohesion and Structural Funds with PPPs**

A revenue-based PPP can be self-supporting if investment costs are funded entirely by private financing and project revenues derive solely from user charges. In many cases, however, full cost recovery through user charges may not be feasible – e.g. because of limited willingness to pay or affordability constraints. In these cases – where the public sector has to provide financial support to make the PPP financially feasible either at the start or on a recurrent basis – EU grants may be available for PPP projects to cover part of the funding gap.

Public authorities pursuing PPPs should be aware of the terms and conditions of EU grant funding to be able to benefit from them to the fullest extent. The European Commission has issued guidance on the legal and methodological issues involved in combining EU funds with PPPs, in particular in the framework of the JASPERS initiative , in order to facilitate and increase the uptake of PPPs in Structural Fund projects.➤Guidance 26 The main issues addressed in this guidance include the following:

→

A) Understanding EU grant eligibility requirements relating to PPPs and how to determine the maximum permitted amount of EU grant funding for a specific PPP➤Guidance 27

- The EU grant can cover up to 85% of eligible expenditures. Co-financing by the government (at least 15%) is always required.
- If the PPP will generate some revenue from user charges, the "eligible expenditure" for purposes of determining the amount of the EU grant is reduced by the net contribution (i.e. after covering operating and maintenance costs) that such user-charge revenue makes to capital expenditures (determined on a discounted basis). This is known as the "funding gap" approach.
- The direct beneficiary of the grant must be the public authority responsible for the PPP, generally the Authority. This makes the procedures somewhat more complicated than if the PPP company could receive the grant funds directly, but it has been found to be workable.

B) Understanding the procedures (including timing) for the submission of documents and the approval of funding

- Approval of funding before bidding for the PPP takes place. In many ways, this is the preferred solution. The grant arrangements can be thoroughly vetted, planned and specified in advance, and bidders will be asked to bid on that basis. This requires detailed structuring of the PPP project before going to the market, but (as noted elsewhere in this Guide) this is the best approach regardless of the presence of any grant funding
- Approval of funding after the preferred bidder has been selected. In this approach, although it is well understood at an earlier stage how an EU grant can be incorporated into the PPP and the contract and bidding are well structured to take this into consideration, the approval of the grant is not obtained until after the preferred bidder has been selected. This approach is advantageous where the results of the PPP bidding process need to be clarified in order to enable key elements of the grant application to be filled in (e.g. if there would be significant uncertainty about the size of grant required).

C) Structuring a PPP that includes EU grant funding in a way that does not weaken incentives and reduce Value for Money

→

## 2. Detailed preparation

- For example, EU grants should not incentivise the private partner to allocate too much of the costs to capital expenditures rather than operation and maintenance expenditures – thus removing one of the benefits of PPPs, namely optimal whole-life costing. Good practice can be maintained by careful structuring of the PPP contract and the bidding process. This should not be difficult if competent advisers are engaged. It will also be less of a problem where the grant funding is modest and there remains a significant amount of private funding.

D) Determining the way (or ways) that EU grant funds can be applied to the PPP. ➤Guidance 28,29,30,31,32,33

- Parallel co-financing of capital expenditure (capital grant). In this method, a distinct component of capital expenditure is financed by the private sector and another by the EU grant and government funds.
- Blended co-financing of capital expenditure (capital expenditure subsidy, capital grant). This is the most common model. The EU grant and State funds are used jointly with the financing mobilised by the private partner to make payments during the construction period under a single prime construction contract.
- DBO (design build operate) contract. This is an extreme form of the approach above in which private financing has been entirely replaced with EU grant and State budgetary funds, but there is just one prime contract covering both the construction and operating phases.
- Partial grant funding of service fee (payment subsidy). Grant funds could be used during the operating period as full or partial payment of availability payments, that is, time-based payments which would otherwise be made solely by the Authority, as opposed to user charges (N.B. the feasibility of this model, in particular the application of EU funds to cover availability payments which would be incurred after the December 2015 deadline for EU funds expenditure in the current financial perspective, is not yet clear.

In all cases, it is essential for the user of this Guide to seek proper advice and discuss the project with the relevant EU authority (e.g. national management authority, DG REGIO), maintaining a dialogue during project development and procurement, to ensure that the PPP is being designed and procured in a way that will give the greatest assurances that the applicable EU grant will be forthcoming and to avoid later procedural complications.

Finally, there are other considerations to be taken into account when incorporating EU grants into a PPP, for example: choice of the right tender evaluation criteria; ensuring that the grant will not be considered to be illegal State aid; minimising the risk – through careful contract design – that a "significant modification" might result in a required repayment of the EU grant; or the extent to which a failure to complete the project would result in the obligation to repay the grant.

### 2.2.2 Prepare the detailed design of the PPP arrangement

➤Guidance 34,35

All aspects of the PPP arrangement (e.g. responsibilities, risk allocation, payment mechanism) need to be developed in further detail, with the ultimate goal of producing the draft PPP contract. It is advisable to deal with this in smaller sub-steps rather than to try to draft a full PPP contract right away. This simplifies the internal review process: it is better to focus the initial internal discussion and approval on the broad commercial aspects of project design rather than on detailed legal terms.

- The first sub-step might be to prepare a document outlining the principal commercial terms (*heads of terms*). Once the heads of terms have been internally approved, the Authority should progressively develop and refine the different topics.➤Guidance 36 Certain aspects (e.g. payment mechanism) might first require the preparation by the advisers of discussion notes presenting and assessing various alternatives.
- The risk allocation of the PPP arrangement will be further developed with the help of advisers and the results checked against prevailing market conditions. Preliminary risk matrices or registers will have been used in the feasibility phase. They will be further refined in this phase.➤Guidance 37
- The assessment of demand risks is essential in PPP projects. The allocation of demand risk is effected through the payment mechanism in the PPP contract, which may seek to transfer some, all or none of the demand risk to the private sector (see an example of this in Box 3 *Traffic revenue risk allocation* and Box 4 *Payment Mechanism*).
- The financial model of the expected PPP[7] (sometimes called a "shadow bid" model) is prepared initially by the Authority and its advisers for use in the feasibility analysis. In this phase, the shadow bid model should be further developed and refined and it should be used to examine alternative risk allocations and payment mechanisms.

---

[7] Note that this model is not the same financial model that a bidder will prepare and submit with its proposal.

**Box 3: Traffic revenue risk allocation**

Forecasting traffic demand is crucial in all transport PPPs since traffic influences both project costs (through capital and maintenance expenditures) and project revenues, especially if direct user charges, such as tolls, are the main source of cash flow for the PPP company. An accurate estimation of the future level and composition of traffic volumes is, however, a difficult task:

- Traffic forecasts tend to overestimate actual traffic levels (the so-called “optimism bias”);➤Guidance 38
- Inflated traffic forecasts may be linked to traffic modelling flaws but also to strategic decisions of PPP consortia when they bid. Traffic forecasts commissioned by the lending banks, for example, are less prone to traffic optimism bias.

Given such uncertainty, the allocation of traffic revenue risk is a key decision in the design of a transport PPP contract and it is linked to the choice of payment mechanism (see Box 4 *Payment Mechanism)*. There are several options for allocating traffic revenue risk.➤Guidance 39 Consider motorway PPPs:

- At one end is the conventional toll road where revenues derive from toll payments and, thus, the PPP company (and its lenders) are exposed to full traffic revenue risk;
- At the other end lies the “availability-based” option where the PPP company receives fixed periodic payments from the public budget as long as the road is available for use. In this case, the PPP company bears little or no traffic revenue risk;
- In between there are several options designed to share the traffic revenue risk, such as:

    *a) Revenue sharing bands*: lower and upper thresholds to share traffic revenue risk between the PPP company and the public sector if traffic is outside the thresholds;

    *b) Flexible-term contracts*: the PPP contract will end when the PPP company has received a certain amount of revenues from users (e.g. the “Least Present Value of Revenue” approach, implemented mostly in Chile);➤Guidance 40

    *c) Financial re-balancing:* provisions to change the economic balance of the contract if traffic is much lower/higher than planned or at set regular intervals.

Recent practice in transport projects has seen the use of a mixed payment mechanism consisting of an availability payment (intended to cover operating expenses and debt service) and a direct user charge (e.g. toll) that provides the equity return.➤Guidance 41

### 2.2.3 Select procurement method

Before engaging in the formal bidding process, the Authority's team will need to select a competitive procurement procedure. Several procedures are permitted under EU legislation. These procedures are not designed specifically for PPPs: they apply to all goods, works or services contracts. ➤Guidance 42,43

Complexity of PPPs

The complexity of a PPP combined with the lack of specific EU legislation in respect of PPPs means that it is essential for the Authority to have a sound knowledge of the EU public procurement legal framework in advance of launching a tender. The Authority's team should include a procurement specialist who should work closely with the legal advisers to ensure compliance with the procurement legislation at EU and national level. In addition, it is advisable for the senior management team to have a working knowledge of the relevant EU procurement legislation.➤Guidance 44

Works and services concessions

Works and services concessions are arrangements under which the right of exploitation of the works or services rests with a *concessionaire.* Concessions must adhere to the basic principles of the EC Treaty (i.e. transparency, equal treatment, proportionality and mutual recognition).➤Guidance 45

Institutionalised PPPs

Institutionalised Public Private Partnerships refer to a specific type of PPPs where public and private parties establish an entity with mixed capital in which the private party takes part actively in the operation of contracts awarded to the partnership. The European Commission has released a specific Interpretative Communication to address the application of EU procurement law in this instance.➤Guidance 46

Four procedures

EU legislation allows four procurement procedures: open, restricted (these two are also sometimes referred to as "standard procedures"), negotiated (an exceptional procedure) and competitive dialogue (the use of which is subject to conditions).➤Guidance 47,48,49,50,51,52,53,54 The choices may be more limited under national laws and specific legal advice is required for each jurisdiction. Table 3 below compares a few key features across the four EU procurement procedures which can be used for procuring PPPs. The Authority should always take legal advice before selecting the procurement procedure.

**Table 3. A comparison of EU procurement procedures**

| | Open Procedure | Restricted Procedure | Negotiated Procedure | Competitive Dialogue |
|---|---|---|---|---|
| **Possibility to limit number of bidders** | No prequalification or pre-selection is permitted. Any interested company may submit a bid. | The number of bidders may be limited to no less than five in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). | The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). | The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). |
| **Discussions during process** | The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted. | The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted. | Negotiations permitted throughout process. Successive stages can be used to reduce the number of bidders (further short-listing). | Dialogue with bidders permitted on all aspects (similar to negotiated procedure, including further short-listing). When dialogue is concluded, final complete bids must be requested based on the solution(s) presented during the dialogue phase. |
| **Discussions after final bid is submitted** | No scope for negotiations with a bidder after bids are submitted. | No scope for negotiations with a bidder after bids are submitted. | Not relevant because the negotiations can continue until the contract is agreed. There need be no "final bid" per se. | Only permitted to clarify, fine tune or specify a bid. No changes permitted to basic features. |
| **Basis for award** | Lowest price or most economically advantageous tender | Lowest price or most economically advantageous tender | Lowest price or most economically advantageous tender | Most economically advantageous tender |

### 2.2.4 Define bid evaluation criteria

Either at this stage or, at the latest, at the beginning of the procurement phase, a tender *evaluation committee* should be established. The composition of the committee will often be prescribed by national law. The role of the evaluation committee is to oversee the procurement process and take (or recommend) key decisions, such as decisions about the shortlist and the preferred bidder. The tender evaluation committee will generally be advised and supported by experienced and specialised consultants (often the transaction team of advisers).

The EU procurement regime allows some flexibility regarding the criteria that can be used to evaluate bids and select the preferred bidder. The broad aim is to select the "most economically advantageous tender".

The choice of criteria for scoring and ranking alternative competing bids is a key decision in procuring a PPP. The objective is to tailor the PPP contract award criteria to the particular project and contract terms to achieve the best possible results (Value for Money).➤Guidance 55

Failure to apply award criteria properly can be a source of challenge to the procurement outcome. The public contracting authorities should, therefore, always take appropriate advice before the bid evaluation criteria are finalised.

As a rule, award criteria (and the weighting to be applied to each criterion) should be specified in advance. This may be problematic in the case of a competitive dialogue procedure where detailed award criteria are rarely known in advance. In this instance, EU law allows that the criteria be listed in decreasing order of their importance. In either case, the award criteria must appear in the contract notice or the descriptive document and may not be changed during the award procedure.

Some examples of criteria include:

- The lowest tariffs, service fee or level of grant or subsidy;
- The largest payments to the Authority (up-front or periodic);
- The shortest duration of the PPP (before handing the assets over to the Authority); or
- The best promised performance, expressed as key objective indicators year by year.

There are a number of examples of imaginative use of award criteria to achieve particular objectives. For example, Chile uses the Least Present Value of Revenue criterion in toll motorways. In this case, the concession ends once the PPP company has received cumulative revenue whose net present value equals the value it has bid. This is a way of combining a criterion based on the lowest remuneration with a mechanism for allocating traffic risk to the public sector.➤Guidance 56

### 2.2.5 Prepare the draft PPP contract

➤Guidance 57,58

A full draft PPP contract should be attached to the invitation to tender. It should cover the following topics at a minimum:

- Rights and obligations of the parties;
- Risk allocation (this is usually achieved through setting out events which give the PPP company a right to some compensation);
- Service performance standards and targets, which need to be objective and measurable;
- Procedure for permitted modifications, as well as their scope and nature;
- Payment mechanisms (e.g. tariffs, subsidy, grants) and adjustments to payments in response to various contingencies (see Box 4 *Payment Mechanism)*;
- Penalties (and possibly bonuses) which have financial consequences or give rise to warning notifications (eventually leading to termination of the PPP contract);
- Security and performance bonds, insurance;
- Term of the PPP contract;
- Conditions for termination (categorised by party and by type of event) and compensation upon termination (for each type);
- Step-in rights (both for lenders and, in emergency situations, the public sector);
- Definition and impact of force majeure and change in law; and
- Dispute resolution procedures.

In the past, practice was often limited to including a summary of the main commercial terms with the invitation to tender. Nowadays, it is considered better practice to prepare and issue a full draft PPP contract with the invitation to tender. This is unavoidable in both the restricted and competitive dialogue procedures as there is no room for negotiations post final bids. Legal advisers should be involved in preparing the full draft PPP contract.

**Box 4: Payment mechanism**

➤Guidance 59,60,61

The payment mechanism lies at the heart of the PPP contract. The primary purpose of the payment mechanism is to remunerate the PPP company sufficiently for it to be willing to enter into the PPP contract and provide the service. The payment mechanism is the principal means for allocating risks and providing incentives in the PPP contract.

A useful way to approach the design of the payment mechanism is to start with a basic / ideal structure for the Authority. *Ideally*, the Authority will want to pay the PPP company, in arrears, a fixed price for (and only for) each unit of service which has been provided and has met the service quality requirements. This would comply with the key PPP principles that payments should be made only if the service is available and these should not be based on the PPP company's actual costs (a PPP contract is not a "cost-plus" contract). This basic / ideal mechanism would give the PPP company strong incentives to perform but would require the PPP company to bear excessive risks. "Excessive" in this context could mean that the premium required by the PPP company to bear the risks would not be worth the gain obtained from increased efficiencies. It could also mean that the PPP company would be too likely to make excess profits or face high losses, which would threaten the viability of the PPP arrangement. The detailed design of the payment mechanism can then be derived moving away from the basic / ideal mechanism ensuring a balanced risk-reward for the PPP company. In particular, it is important to make sure that the risks which are largely beyond the control of the PPP company are not allocated to the PPP company.

Further adjustments to the basic / ideal mechanism should be considered:

- The payments to the PPP company usually need to be *indexed* to compensate for cost increases due to inflation (the indexation should be based on an agreed set of published indicators);
- Cost items which are beyond the control of the PPP company can be handled on a *pass-through* basis (i.e. the Authority reimburses the costs actually incurred by the PPP company). Where this technique is contemplated, the Authority should ensure that the cost items subject to the pass- through are limited and defined in detail;
- The deductions made to the service fee for poor performance should be linked to the *degree* of deficiency in the service quality. The service quality measurement needs to be verifiable and objective. Generally, the deduction amounts should be consistent with the losses that the Authority or the users would incur as a result of the service shortfall;
- *Demand* risk is often considered as at least partially beyond the control of the PPP company. A variety of mechanisms is available to shift some or all of the demand risk away from the PPP company. For example, the service fee / user charge can be gradually increased as demand falls. Also, a minimum payment guarantee (i.e. the PPP company is paid a certain amount even if actual demand falls below an agreed minimum) can be implemented. →

When designing the payment mechanism, the Authority and its advisers should pay attention to features which could give the PPP company perverse incentives or which are complicated or ambiguous (as these may later on give rise to disputes). The payment mechanisms of comparable projects / sectors (where available) may also be a useful benchmark.
The Authority's advisers should use the "shadow bid" financial model to test alternative payment mechanisms. A scenario analysis should be run to *calibrate* the parameters of the payment mechanism to ensure that it performs satisfactorily under a set of likely performance scenarios. Although poor performance should have a material impact on the equity return of the PPP company, it would be counterproductive for it to jeopardises debt service payments too easily (as this could result in the bankruptcy of the PPP company or make the PPP contract difficult to finance).

**CHECKLIST*****: Before launching the tender***

Before launching the tender, the Authority needs to feel satisfied its has addressed a series of key questions, many of which result from the work undertaken or overviewed by the advisers. For example:

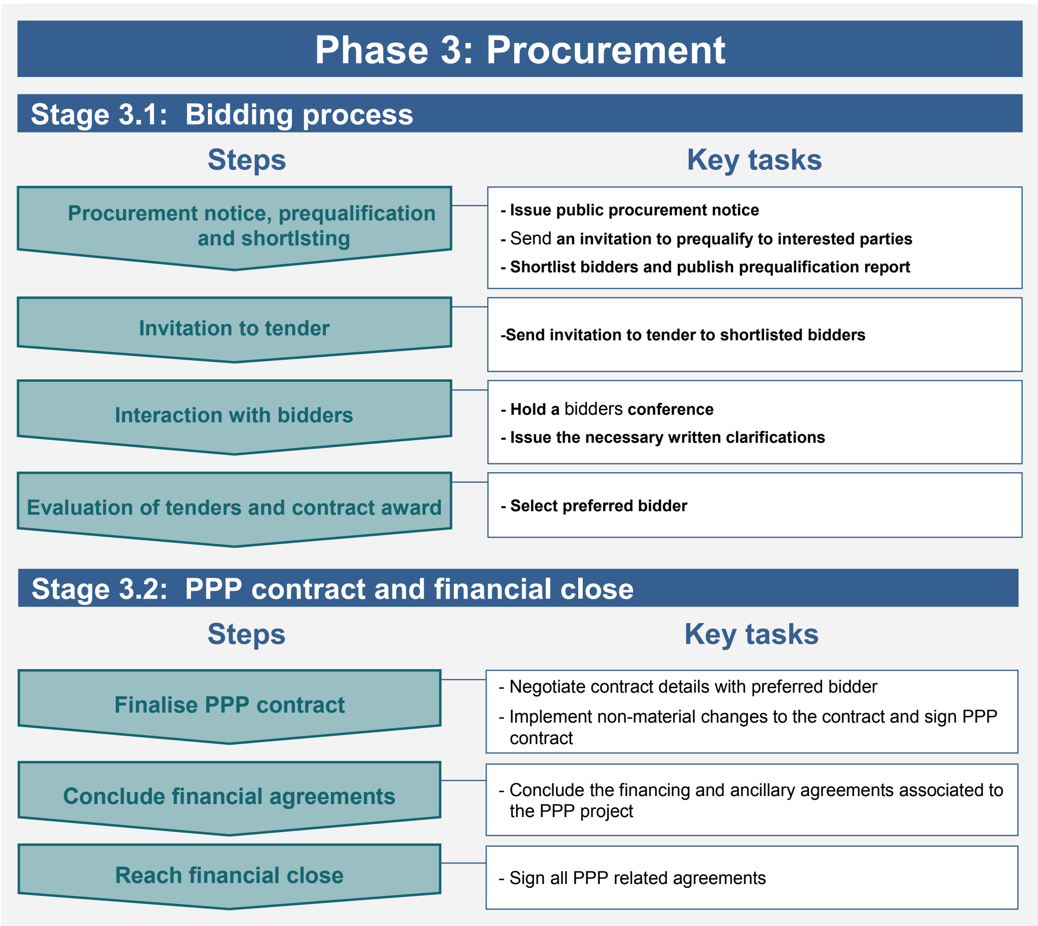
- Are the requirements and scope of the PPP project clear and fixed?
- Have all the environmental and planning approvals been identified and obtained?
- Are there any unresolved issues regarding site and land acquisition?
- Does the Authority have the powers to award the PPP contract and enter into a long term contractual arrangement?
- Has a Value for Money assessment of the proposed PPP investment been carried out?
- Is the scope of the PPP project affordable from the point of view of the public sector periodic payments required (availability-based PPP) or are tariff levels realistic and affordable for the users (revenue-based PPP)?
- With availability-based PPPs, have budgets and government or parliamentary approvals been obtained for any public sector payment obligations?
- Is there enough evidence of sufficient commercial interest from contractors, operators, lenders and investors to justify launching the tender?
- Have project risks been identified and a potential risk allocation been assessed?
- Have plans to publicise the launch of the project been agreed and finalised?
- Has a project information memorandum been prepared?
- Have the bidder qualification and bid evaluation criteria been developed?
- Has the draft PPP contract been prepared including the project specifications, service standards, payment mechanism and proposed risk allocation?

## 2. Detailed preparation

# 3 Procurement

The procurement phase, as the term is used in this Guide, begins with the publication of the procurement notice and ends with financial close, the point at which project activities (beginning with construction) can start. It has been broken down for convenience into two stages: (i) the bidding process and (ii) the period from the award of the PPP contract to financial close. Chart 4 outlines the stages and steps in the procurement phase.

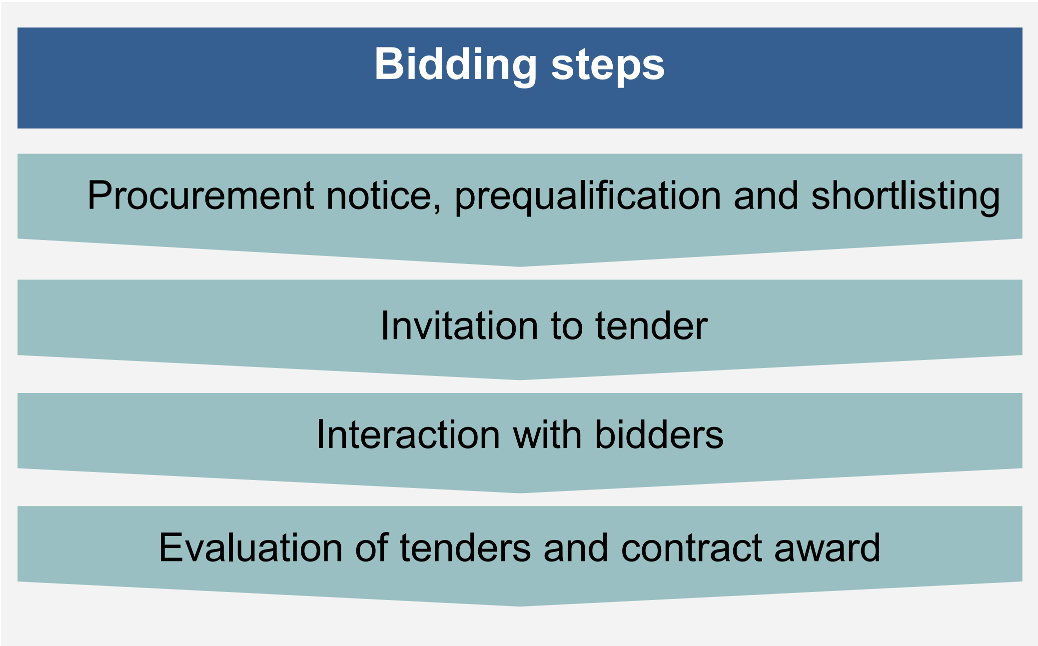
Chart 4




## 3.1 Bidding process

The PPP bidding process involves a series of steps summarised in Chart 5 below. The goal of the bidding process is to maximise Value for Money by creating appropriate incentives through a competitive process for the award of the long-term PPP contract.

**Chart 5**




During the bidding process, sufficient attention should be placed on the key good procurement principles of *transparency* and *equal treatment*, which will help bolster the legitimacy of the PPP and its acceptance by stakeholders.

These good procurement principles must be respected from the time the formal tendering process begins. Informal discussions with companies may take place before the process formally begins – and this is particularly important in respect of large projects. For example, while keeping in mind that achieving a level playing field amongst potential bidders is the eventual goal, the Authority may organise info days, technical briefings, early public release of technical documents, etc. As soon as the procurement notice is published, all potential bidders must be given *equal treatment* and a careful audit trail of all contacts with potential bidders must be kept.

This section of the Guide focuses primarily on *commercial principles of procurement* having general applicability and not on the detailed requirements of EU legislation transposed into national law (although certain EU requirements will be noted in some instances). The goal is to convey to readers the logic and rationale behind the various steps and considerations, rather than to present them simply as procedures prescribed by law (e.g. required time periods are not discussed).

Readers of this Guide are encouraged to seek advice on how to conform the procurement activities described here to the requirements of national law.

### 3.1.1 Procurement notice, prequalification and shortlisting

➤Guidance 62,63,64,65

Publishing the public procurement notice marks the start of the formal procurement process. The Authority must comply with all requirements related to the publication of notices in the Official Journal of the European Union (OJEU). This is followed by a questionnaire to allow interested companies to demonstrate their qualifications (also known as the submission of an “expression of interest”).

- The purpose of prequalification is to include only those bidders that appear to be capable of carrying out the PPP in an adequate manner.
- The wording of the brief project description contained in the OJEU notice should be broad enough so that it will not need to be subsequently changed – which might then require the notice process to start over again.

Typically, interested parties that respond to an initial notice are sent a short statement of information about the project and instructions or a questionnaire. These form the basis of a qualification submission that such parties must make to demonstrate their capacity to implement the project.

The invitation to prequalify (or prequalification questionnaire, as it may be called) should contain at least the following:

- The broader context of the project;
- An overview of the project, including the intended allocation of major risks and envisaged responsibilities of each party;
- A list and summary of the major studies that will be made available to bidders concerning the project;
- The intended procurement process;
- The qualifications that companies can put forward (e.g. parent or subsidiary companies’ qualifications);
- The criteria and tests that will be used to evaluate the prequalification statement (but not necessarily the precise details to be used in any scoring or ranking since that could lead to some manipulation by the candidates); and
- A timetable.

It is standard practice for the Authority’s legal advisers to draft both the PPP procurement notice and the prequalification questionnaire.

*Shortlisting*

The purpose of shortlisting is to reduce the number of bidders to generally three to five. Bidding for a PPP, especially a complex PPP, is a costly undertaking for a bidder. The aim is to maximise competition, not the number of bidders. The presence of too many bidders on the shortlist may reduce the interest of some in participating and may cause good bidders to drop out.

In some cases, the public sector has sought to encourage candidacy by agreeing in advance to make a payment to each losing bidder that would partially reimburse it for the costs of bid preparation. Such payment could be made from money that the Authority would receive from the winning bidder (once again, specified in advance). The size of the payment has to be calibrated to discourage frivolous bids. Practice varies widely between countries. The Authority should ask their advisers about current market practice in the relevant sector and jurisdiction.

In evaluating the qualification submission, the Authority will focus on the *technical capability, business capability* and *financial position* of the potential bidders. In line with EU public procurement legislation, these capacities must be, in principle, demonstrated jointly, rather than individually, by the members of a consortium.

The prequalification submission will usually be required to describe the following:

- Business activities of the consortium (e.g. how many projects of a similar nature, suitably defined, the consortium has implemented over a specified number of past years);
- Financial information (e.g. thresholds involving turnover and net worth);
- Legal information about the PPP consortium, including any relevant litigation involving the companies; and
- Quality of personnel available to be involved in the project.

The first step of the prequalification and shortlisting process is often to determine which consortia have passed the thresholds on all the relevant dimensions (i.e. pass/fail tests). Most of the criteria (e.g. company revenue) are expressed in terms of clear and objective thresholds. If that determination gives a number of consortia that exceeds the maximum number pre-specified for the shortlist, then a systematic and predetermined process for scoring or ranking should be used to narrow down the list to arrive at a shortlist.

Sometimes shortlisting is done partly on the basis of responses that are submitted to a set of open-ended questions about how the companies would address certain key issues if they were to win the PPP contract. For example, in the competitive dialogue procedure, initial shortlisting can be based partly on an assessment of the outline or indicative solutions given by the candidates.

At the end of the process, a well-substantiated prequalification report should be prepared to have a good audit trail. Unsuccessful candidates should be debriefed.

### 3.1.2 Invitation to tender

➤Guidance 66,67

Preparation of the tender documents will usually have begun during the last steps of the project preparation phase but to be time efficient, finalisation often takes place during the prequalification period.

- The invitation to tender documentation should contain all the information that bidders will need to bid. It is important that advisers devote sufficient time and effort to develop the documentation in enough detail to ensure comparability of the bids and to reduce the need for debate and clarification before signing the PPP contract.

- The tender documentation, which is usually extensive in detail and volume, will normally include (but not be limited to) information such as the following:➤Guidance 68,69
  - Detailed information memorandum about the project;
  - Summary of the key commercial principles, including the obligations of each party and risk allocation;
  - Detailed output specifications and minimal required technical design and technical features;
  - Full draft PPP contract (which, in some countries, would be based on mandatory standard contract terms or on required guidelines of some kind);
  - Instructions to bidders concerning all the information they must submit and the detailed procedures for submission;
  - Evaluation criteria; and
  - Requirements for bid bonds or equivalent security.

### 3.1.3 Interaction with bidders

➤Guidance 70

Under EU procurement law, the nature and level of communication permissible with bidders will be determined by the procurement procedure chosen (see 2.2.3 *Select procurement method*).

In order to maximise the benefits of PPPs and obtain maximum Value for Money, it is critical to manage the bid process well.

- Shortly after issuing the invitation to tender it is usual to hold a bidders' conference to explain issues and take questions from the bidders. Written clarifications should be provided to all bidders.
- It is also typical to provide for a *data room* open to bidders where they can access detailed documents concerning all aspects of the project. ➤Guidance 71

The complexity of large PPP projects will normally require a high degree of interaction between the Authority's project management team and the bidders.➤Guidance 72

The terms and conditions for an interactive process, including the procedures, protocols and rules should be included in the broader set of conditions, rights and obligations to which bidders consent. The objective of developing this iterative process is to improve the quality of the proposals by:

- Fostering innovative solutions from different bidders;
- Clarifying any technical, financial, and commercial issues; and

- Providing direct and specific feedback to bidders on key aspects of their bids.

The Authority's project management team has to take particular care to protect each bidder's commercial in-confidence material and intellectual property. More generally, the project management team will have to consider probity principles and rules as part of the implementation of the interactive process.

### 3.1.4 Evaluation of tenders and selection of preferred bidder

➤Guidance 73,74,75,76,77,78,79

Once the tenders are submitted, they must be evaluated to arrive at the selection of the preferred bidder.

Bids will generally be first assessed on a number of pass/fail criteria before deciding on the single preferred bidder:

- For example, even if the evaluation score is not based on a technical evaluation, a determination must be made that the technical solution proposed by a bidder is feasible, deliverable and robust, that it is based on reliable technologies, that it meets all minimal technical requirements set and that the costs and financial structure are consistent with the technical solution;
- It is important to look at the proposed project management also: the bidding consortium must come across as a cohesive entity rather than just a collection of companies put together for bidding purposes.

A key issue is the choice of the criteria for the evaluation and scoring of alternative bids (see 2.2.4 *Define bid evaluation criteria*).

Occasionally, only one bidder will submit a tender despite the Authority having issued the invitation to tender to several shortlisted candidates. In good procurement practice, the question of how to proceed should be considered case by case:➤Guidance 80

- If it appears that bidder interest was low because of deficiencies in the tender documents (including the project specifications or the draft PPP contract) and these can realistically be remedied, then the best solution might be to repeat the tender procedure, this time on a better footing;
- If it appears that the bid was made in the bidder's belief that there would be good competition (and this should be supported by the Authority's advisers carrying out benchmarking of costs and in some cases by insisting on actual market testing of the costs of the major subcontracts), then the best solution might be to continue with the procurement and consider the sole bidder to be the winner, provided that the tender is fully compliant and meets all pass/fail evaluation criteria.

An important issue relating to the PPP contract award concerns the new EU Remedies Directive (2007/66/EC), which was required to be transposed into national law by 20 December 2009.➤Guidance 81 The two most noteworthy elements of this Directive are the following:

- A minimum *standstill period* of 10 days is required between the contract award decision and the actual conclusion of the contract to allow rejected bidders time to conduct their review and decide whether they want to challenge the award. (Note that such a standstill period had already emerged in case law; the purpose of the new Directive provision is to standardise the terms across Member States); and
- More importantly, an aggrieved bidder can bring an action to have the contract rendered ineffective if the Authority contravened EU procurement rules in a serious way. Previously, the sole remedy was to award monetary compensation to the aggrieved bidder, but now the contract would come to an end. How the various rights and obligations of the parties will be sorted out in this case is left to national law.

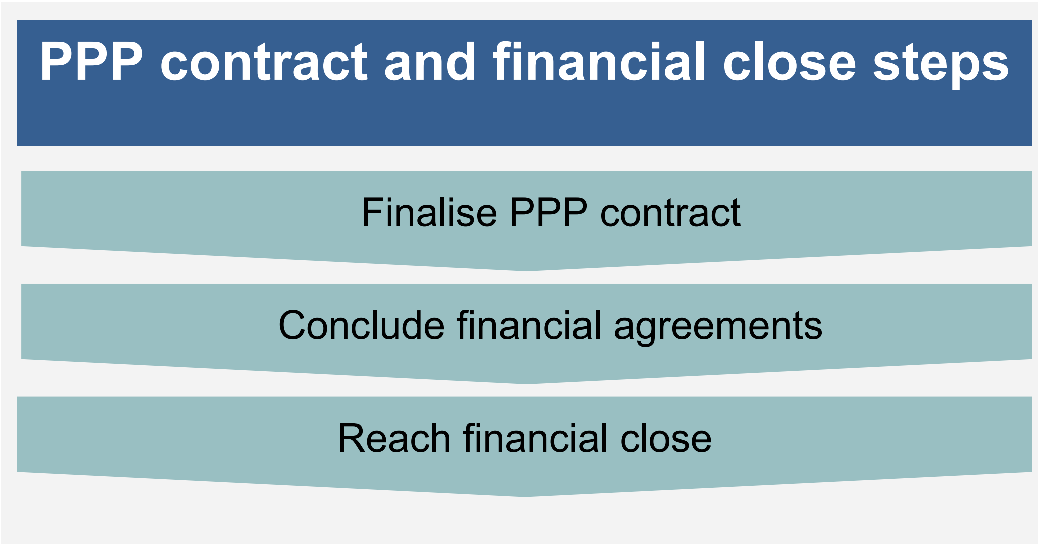
**CHECKLIST*: Bidding process***

To carry out a successful bidding process, the Authority and its team of advisers need to ensure that all key questions related to the bidding process have been adequately addressed. For example:

- Is the institution responsible for awarding and managing the bidding process clearly identified?
- Does the format of the pre-qualification documents allow bidders to present information about themselves and clearly sets out the evaluation criteria and processes applicable in pre-qualification complying with the openness and transparency required by EU legislation?
- Do the pre-qualification evaluation criteria include all relevant features related to the quality and strength of the bidders in terms of their capacity to deliver and their awareness of the PPP project?
- Does the invitation to tender document include a draft PPP contract, which should set out, among other things, the payment mechanism and penalty regime? Does it include the output requirements of the Authority?
- Does the invitation to tender document contain all essential components of the PPP project, especially the minimum technical, environmental, legal and financial requirements to be provided by bidders which constitute a compliant bid?
- Have adequate provisions ensuring that the Authority offers no information warranties and setting rules of access to the data room been included in the invitation to tender document?
- Have all critical processes necessary to manage the interaction with bidders during the bidding process (including a code of conduct, communication with bidders, audit trails and meetings, consortia changes and bidders' due diligence) been considered and implemented?
- Have the evaluation criteria and processes been established and evaluation teams and committees appointed before bids are submitted?

## 3.2 PPP contract and financial close

**Chart 6**




The finalisation of the PPP arrangements, leading to commercial and financial close, involves a series of steps summarised in Chart 6. The activities involved in these steps often deal with detailed and fine-tuning matters. Close interaction between the Authority, the private partner and its financiers is essential. This stage, in particular, requires thorough organisation and management for it to proceed efficiently. It should be planned carefully, generally making use of experienced advisers. Many PPP projects have experienced lasting difficulties as a result of a lack of adequate planning or expert advice.

### 3.2.1 Finalise the PPP contract

As noted in 2.2.3 *Select procurement method*, the different procurement procedures imply varying forms / intensity of discussions once the preferred bidder has been selected.➤Guidance 82,83 For example, under the EU restricted or competitive dialogue procedures, once the final tenders have been received and a preferred bidder has been selected, the final adjustments to the PPP contract should be limited to clarifications and confirmation of commitments.

Irrespective of specific EU considerations, a basic principle of good procurement is that any change to the PPP contract agreed with the preferred bidder during final negotiations must not be *material* to the procurement (i.e. another bidder could have been selected if the amended term had been proposed in the tender documents). For example, changing a fundamental aspect of the risk allocation would clearly go beyond what is permitted under good procurement practice and under EU law.

The final discussions with the preferred bidder are often referred to as “final negotiations” (even if they are not strictly *negotiations* under some procurement regimes). At the start of this phase, the Authority's negotiating team and the preferred bidder will need to agree on a framework for final discussions / negotiations. This framework will typically include issues such as:

- The discussion timetable;
- The definition of the remaining issues; and
- The recording of agreed matters.

### 3.2.2 Conclude financing agreements

PPPs are normally financed in whole or part through *project finance* arrangements (see Annex 1). To the extent possible, the Authority should require bidders to secure fully committed financing packages along with their bids. This will ensure that the finalisation of the financing agreements can take place simultaneously or shortly after the signing of the PPP contract.

In difficult financial market conditions (e.g. reduced liquidity), fully committed financing packages may be difficult to obtain at the time of bidding. This may mean that the financing agreements will not be concluded immediately once the PPP contract is signed.

Prior to the 2009 credit crisis, PPP financings for major transactions were usually provided through *syndication* arrangements, whereby a small number of banks underwrite the financing of the project and "re-sell" it to a syndicate of banks after financial close. With the crisis, most PPP projects are funded through *club deals*: each bank assumes it will hold its stake of project debt to maturity. In some cases, these club arrangements can only be concluded after the appointment of the preferred bidder (the so-called "post preferred bidder book-building" explained below).

The strength of the financiers' commitment to fund the PPP project at bid stage will depend on the particular project and market. The Authority should at least require that bidders evidence a reasonably deliverable financing plan in their proposals. Bidders should demonstrate that the debt, the equity and, where applicable, the grant providers have reviewed and accepted the broad design of the PPP and the major contractual provisions (e.g. the proposed risk allocation). A funding commitment from the lenders will often be conditional since they will generally not be in a position to complete their *detailed due diligence* and approval process until a few weeks before financial close.

Once the lenders have carried out their detailed review of the project documentation and their detailed due diligence, they will sometimes require changes to the PPP contract. The Authority's ability to accept the lenders' requests will be limited as changes to the PPP contract will go against good procurement principles. Before signing the financing agreements, the lenders will also need to review and be satisfied with the full set of project contracts the PPP company will enter into (e.g. construction contract and operating & maintenance contract).

In large PPPs, in particular in the UK, it is not unusual to see the Authority taking an active role in securing competitive financing terms by imposing a *debt funding competition.* A debt funding competition requires the preferred bidder to carry out a competition amongst potential lenders in order to obtain the best financing terms possible. The Authority picks up part or all of the benefits gained through any improvement in the financing terms. The Authority needs to oversee the competition process, which means that it often has to involve experienced financial advisers. Debt funding competitions may not be suitable for projects or in markets where financial innovation is expected to play a significant role in the competitive position of bidders. Moreover, it may not be suitable in conditions of limited financial liquidity. ➤Guidance 84 In these circumstances, the private sector may need to engage in post preferred bidder "book-building" under which the full lending group is assembled using lenders which may have supported unsuccessful bidders. ➤Guidance 85

A large number of financing agreements are needed for a project financed PPP. These agreements have three basic purposes:

- They are designed to protect the interests of senior lenders *vis-à-vis* other providers of finance (e.g. equity investors) and sub-contractors of the PPP company. In particular, the senior lenders will wish to ensure that the risks borne by their borrower (i.e. the PPP company) are satisfactorily mitigated. In practice, this means that, to the greatest extent possible, the risks borne by the PPP company under the PPP contract are 'passed through' to the sub-contractors;
- The agreements need to clearly establish that the servicing of the senior of debt takes priority over the remuneration of all other forms of finance (this is what *senior* debt means); and
- The suite of financing agreements is designed to ensure that, should the project go wrong and endanger the servicing of the debt, the lenders have the powers to take the actions they deem necessary to protect their loan.

This last point is crucial as it goes to the heart of the benefits that a PPP can deliver for an Authority. A well designed PPP aligns the interests of the lenders with those of the Authority as both parties aim at a successful project. The lenders are incentivised and empowered to ensure that potential project problems are addressed in a timely manner and that their loan is safe. For this reason, the Authority should be able to rely on the incentives the lenders have to deal effectively with problems (both during construction and operation) which would threaten the project's performance. This reliance on the lenders is a major source of risk transfer from the public to the private (see Annex 1).➤Guidance 86

The typical financing agreements to be prepared and concluded comprise:

- Senior loan agreements: agreements between the lenders and the PPP company setting out the rights and obligations of each party regarding the senior debt);
- Common terms agreement: an agreement among the financing parties and the PPP company which sets out the terms that are common to all the financing instruments and the relation between them (including definitions, conditions, order of drawdowns, project accounts, voting

powers for waivers and amendments). A common terms agreement greatly clarifies and simplifies the multi-sourcing of finance for a PPP;

- Subordinated loan agreements (where subordinated or mezzanine debt is used in the financing structure). These loans are provided by the project sponsors and/or by third party investors;
- Shareholders' agreement (as part of the constitutive documents of the PPP company);
- Direct agreement between the lenders and the Authority: this allows the senior lenders to take over the project (to "step in") under certain circumstances specified in the PPP contract;
- Accounts agreement: this involves a bank which will control the cash flowing to and from the PPP company in accordance with the rules set out in the agreement;
- Intercreditor agreement: an agreement between the creditors of the PPP company. It spells out aspects of their relationship to each other and to the PPP company so that, in the event a problem emerges, ground rules will be in place;
- Hedging agreement: an agreement which enables the PPP company to fix the interest rate on part or all of its debt;
- Security agreements (e.g. share pledge, charge over accounts, movables pledge, receivables pledge);
- Parent company guarantees and other forms of credit enhancement where the sponsors of the PPP company or its sub-contractors do not offer sufficient financial strength; and
- Legal opinions from the lender's legal advisers on the enforceability of the contracts. Enforceability of contracts is a key issue the lenders will tackle in their due diligence. This will include the review of the powers of Authority to enter into transactions (the so-called *vires* issue).

The financing agreements often contain many cross-references and will have to be prepared as a coherent package. ➤Guidance 87

**Box 5: Insurance**

➤Guidance 88,89,90

Adequate insurance coverage for a wide range of events is important for a PPP project because the single-purpose and thinly capitalised nature of the PPP company make it unlikely that it will be able to self-insure to any meaningful extent.

The interests of the Authority and of the senior lenders are largely aligned on insurance matters. The Authority can rely on the lenders to impose suitable insurance requirements on the PPP company. Nevertheless, it is a prudent safeguard for the Authority to require the inclusion of certain minimum insurance requirements in the PPP contract (although these should not go beyond what the lenders are likely to need). The insurance requirements should be developed and negotiated with the support of professional insurance advisers since project finance-related insurance is a highly specialised area.

The main categories of insurance coverage that the Authority would normally require comprise:

- During the construction phase:
  - Contractors' "all risks" insurance (covering the physical loss or damage to all the works and equipment on the construction site);
  - Third party liability insurance; and
  - Possibly, "Delay in start-up" insurance (covering the loss of revenue or profit due to a delay in project completion).
- During the operation phase:
  - "All risks" property insurance;
  - Third party liability insurance; and
  - Business interruption insurance.

Specific environmental insurance may also be required for some projects.

For each kind of insurance coverage, the PPP contract should set out the basic features of the policy, the minimum level of coverage, the principal exclusions and the maximum deductibles (i.e. thresholds below which the insurance company will not pay).

The PPP contract will need to deal with other important insurance matters, such as:

- It may be in the Authority's interest to agree to indemnify the PPP company if a risk becomes "uninsurable" (or insurable at a prohibitive cost);
- The Authority (and the lenders) will require that the insurance policy are concluded with insurance companies of a minimum financial standing.

## 3. Procurement

### 3.2.3 Reach financial close

Financial close occurs when all the project and financing agreements have been signed and all the required conditions contained in them have been met. Financial close enables funds (e.g. loans, equity, grants) to start flowing so that the project implementation can truly start.

Any remaining *conditions precedent* of the financing agreements need to be fulfilled before funds can be disbursed. Typically:➤Guidance 91,92

- Permitting and planning approvals have been secured;
- Key land acquisition steps have been achieved;
- Clarification of the remaining technical design issues;
- Finalising and signing of any remaining key project and financing document; and
- All funding approvals are in place (e.g. all the remaining issues needed to secure release of grant funding from a donor are solved).

The Authority will need to confirm that the requirements of all internal approvals have been met. These could include:

- Confirmation of legality of the procurement;
- Approval for the derogation from any standard contracting terms;
- Value for Money check; and
- Affordability check.

The PPP company and the Authority often need to carry out a considerable amount of detailed work to reach financial close. The effort needed should not be underestimated. The Authority will need to manage its tasks effectively and should seek the support of its advisers.

**CHECKLIST*: PPP contract and financial close***

To negotiate the PPP contract and reach financial close, the Authority and its team of advisers need to ensure that key questions related to the PPP contract, financing and ancillary agreements have been adequately addressed. For example:

- Has a negotiating team been assembled and empowered to take decisions on most issues pertaining to the PPP contract?
- Have the Authority and the negotiating team agreed a negotiating strategy, including (i) an assessment of the position of the Authority on key issues and (ii) a risk management strategy?
- Have the legal advisers evaluated the marked-up draft PPP contract proposed by the bidders, assessing it against its risk allocation and Value for Money implications?
- Have the financial advisers assessed affordability, project costs, sources and costs of funding and project *bankability* (including private consortium composition, structure, risk distribution and funding plan)?
- Have the negotiations resulted in terms and conditions that vary substantially and materially from the bid offer and therefore could be open to challenge because they are less favourable or could have resulted in the selection of a different bidder?
- Have all the legal and administrative requirements of contract award been complied with?
- Is the final PPP contract still affordable and does it represent Value for Money?

# 4 Project implementation

This chapter deals with the period during which the PPP project is being implemented (i.e. from financial close to the expiry of the PPP contract). It addresses the most common issues which officials at the Authority may have to face during the life of the project. A PPP project implies a regular monitoring of the performance and taking appropriate actions in accordance with the terms of the PPP contract. In some circumstances, a project may require changes to the contract (e.g. modifying the service specifications or the scope of the project). Chart 7 summarises the main stages and steps involved in the project implementation phase of a PPP.

**Chart 7**

**Phase 4: Project implementation**

**Stage 4.1: Contract management**

| Steps | Key tasks |
|---|---|
| Attribute management responsabilities | - Contract management team in place<br>- Contract administration manual approved |
| Monitor and manage project delivery and service outputs | - Timeline and responsibilities for all tasks and subtasks<br>- Monitor PPPs operational and financial activity |
| Managing changes provided in the contract | - Implement routine changes to the contract |
| Managing changes not provided in the contract | - Accept / reject extraordinary changes to the contract<br>- Implement protocols related to contingency plans |
| Dispute resolution | - Choice of the appropriate forum<br>- Dispute resolution solution/decision |
| When the contract ends | - Monitor the residual value of the assets at critical stages<br>- Replacement of non-performing parties<br>- Carry out compensation payments |

**Stage 4.2: Ex-post evaluation**

| Steps | Key tasks |
|---|---|
| Define institutional framework | - Reviewing body in place<br>- Formalise the evaluation objectives |
| Develop analytical framework | - Define evaluation criteria<br>- Undertake evaluation report |

It is important to stress that the Authority's responsibilities for project management and contract management may differ considerably during the project's construction phase and operation phase.

## 4.1 Contract management

**Chart 8**


The contract management stage involves a series of steps summarised in Chart 8. During the implementation of the PPP project, the Authority should ensure the following:

- Separation of project management and contract management responsibilities so that a team other than the project management team deals with issues that may occur after the signing of the PPP contract and ancillary agreements;
- Provision of the contract management team with clearly defined responsibilities and sufficient resources; and
- Establishment of management rules to deal with the PPP contract monitoring, adjustment to the contract and dispute resolution to maintain the contract integrity.

Although good preparation and procurement of a PPP project are important, the manner in which the PPP contract is overseen and managed during implementation is critical to its success or failure and to its actual Value for Money.

### 4.1.1 Attribute management responsibilities

After PPP contract signing, the responsibility for contract management will normally be transferred to a contract management team, established by the Authority. If a roads agency, for example, has more than one PPP contract, it makes sense for efficiency reasons that a single contract management team manages all on-going PPP contracts.

A contract management team, reporting to a contract director, will carry out many day-to-day contract management activities. It is desirable to include the proposed contract director in the Authority's project management team at an early stage of the procurement process, or at least to allow him/her to follow the procurement process and have access to procurement team members. A good understanding of the project and its inherent risks will enable him/her to devise an adequate contract management strategy.

Before this transfer of responsibilities occurs, the Authority will need to ensure that:➤Guidance 93

- There is a clear definition of responsibilities, by appointing a team responsible for contract management and which team is distinct from the project management team;
- The provisions for handling contract changes and managing the PPP company's failure are in place;
- A system of on-going contract management review is in place; and
- There are sufficient budget and staff resources to undertake the contract management responsibilities.

It is important that the Authority sets, prior to choosing the preferred bidder, the basic framework under which the contract management team will operate. This will reduce the bidders' cost and obligation uncertainties. Indeed, bidders will need to incorporate monitoring and contract compliance costs into their bids. They should therefore be provided with a clear indication of the type and frequency of information required from them.

At the start of the contract, the contract management team will need to develop management tools and processes, including contingency plans. This will be set out in a contract administration manual.➤Guidance 94

### 4.1.2 Monitor and manage project delivery and service outputs

The contract should have clearly stated the obligations of the PPP company and defined the expected service characteristics, outputs and quality standards.

- Effective contract management depends, in the first place, on getting the PPP contract right. This implies setting out the procedures that guarantee a close monitoring of the PPP company's performance and general compliance with the agreed contract.
- The contract management team will normally start by agreeing with the PPP company all the tasks and sub-tasks that each party needs to undertake and the appropriate timeframes for their completion. These operational details need to be set out in a contract administration manual (consistent with the contracts) at the start of the project implementation phase.➤Guidance 95
- An effective contract management will help identify and monitor the PPP company's construction and operation performance. It will enable the Authority to manage the project risks over the life of the contract.

*Regular monitoring*

In order to effectively monitor the project implementation, the PPP company will need to provide the contract management team with operational and financial data on an on-going basis. The PPP contract should have set out the basic information requirements and frequency. Often, more detailed requirements are specified at the start of the implementation phase. The contract management team should limit its information request to the data necessary for an effective monitoring and an ex-post evaluation of the project. Excessive data collection imposes unnecessary burdens on the PPP company and on the Authority.➤Guidance 96

The contract management team will, for example, need: to➤Guidance 97,98

- Monitor the achievement of key performance indicators;
- Review quality control and quality assurance procedures to ensure that these systems are in place and effective;
- Establish and manage the day-to-day relationship with the PPP company; and
- Report regularly to the stakeholders.

*Risk management*

The risks that the contract management team will need to manage can be classified as follows:➤Guidance 99

- Project risks contractually allocated between the parties;
- Intrinsic risks borne by the Authority;
- Project risks not contractually allocated; and
- Risks associated with changes to the contract.

It is essential that the contract management team has a clear understanding of the requirements of the contract and the rationale for those requirements. The role of the team will be different depending on whether or not these risks have been identified in the contract and contingency plans have been established.

Potential problems should be identified early and acted upon. If the problem appears to be persistent, and if the PPP company's first point of contact cannot deal with it, the issue should be dealt with at a more senior level. Such procedures will typically be specified in the contract administration manual.

### 4.1.3 Managing changes permitted in the PPP contract

The PPP contract will set out the triggers and methodologies for agreeing and implementing changes to the PPP contract.➤Guidance 100 However, it may not comprehensively specify all the logistical or administrative steps necessary to be undertaken to agree or implement permitted changes.

The contract administration manual should specify logistical and administrative details such as:

- The person to whom a request for a change must be sent;
- The person who will assess the impact of the proposed change;
- The persons who are authorised to agree a change on behalf of the Authority and on behalf of the PPP company; and
- By who the implementation of the change will be overseen and verified.

Changes permitted under the PPP contract are often complex and need to be decided upon at senior level. They typically include material changes in output specifications, refinancings or the consequences of a change in law. Many PPP contracts contain provisions governing the potential refinancing of the project and in particular the sharing of gains from such refinancing (see Box 6 *Sharing gains from refinancing*). It should be noted that the consent of the lenders of the PPP company may be required before implementing certain changes to the PPP contract following the occurrence of extraordinary events.

For unplanned or unexpected events which threaten the regular provision of services, a set of rules consistent with the responsibilities set out in the PPP contract can cover scenarios such as:➤Guidance 101

- business continuity and disaster recovery planning;
- public sector step-in planning; and
- default planning.

In all of the above cases, the Authority must respect the terms of the PPP contract, taking advice as appropriate.➤Guidance 102,103

**Box 6: Sharing gains from refinancing** ➤Guidance 104

The sharing of gains arising out of a refinancing is an important issue for the design and implementation of the PPP contract. The issue has gained relevance in the past decade. Refinancing is understood as the replacement or renegotiation of the original bank debt (or equity) of the PPP company on more favourable terms. Refinancings are attractive where the interest rate drops (to the extent the PPP company can benefit from such drop under its hedging policy) or where the risk profile of the PPP company has improved. Refinancings can take different forms, for example:

- Reduction in interest margins;
- Extension of the debt maturity;
- Increase in the *gearing* (i.e. the amount of debt relative to the equity). This is possible when the lenders are prepared to drop some of their contractual protections as the perceived project risks are reduced;
- Lighter reserve account requirements; or
- Release of guarantees which have been provided by the PPP company shareholders or sponsors or by third parties.

Refinancings will often result in financial gains for the shareholders of the PPP company. Part of the gains may be justified by the good performance of the PPP company, but part may also arise from macroeconomic factors or greater confidence that lenders have in a specific PPP market (i.e. factors which are not attributable to the PPP company). In this case, financial gains to the shareholders may appear undeserved and create political difficulties. As a result, sharing the financial gains from a refinancing between the PPP company shareholders and the Authority is often considered appropriate.

Current practice is to include detailed provisions in the PPP contract setting out a mechanical method for determining and sharing the gains from future refinancing – rather than to rely on broad principles and unconstrained renegotiations of the contract when a refinancing takes place. The UK started the trend in 2002 with its standardised contract provisions for refinancing. Other countries have followed a similar approach.

Refinancing mechanisms are complex and their assessment requires the support of financial and legal advisers. The PPP contract provisions require specific drafting which needs to address several steps: ➤Guidance 105,106

- Calculate the expected refinancing gain to the PPP company shareholders (e.g. using net present value techniques);
- Determine the portion of the gain which should be allocated to each party (e.g. 50:50 split, the Authority's share which increases upon the meeting of defined tests as in the UK where the marginal rate reaches 70%); and
- Decide how the sharing should take place (e.g. lump sum payment to the Authority, reduction in the service fee payable to the PPP company).

→

## 4. Project implementation

> Many details (e.g. discount and interest rates to be used in the calculations, treatment of the possible impact of a refinancing on the termination payment that the Authority might have to make in the future) need to be addressed in the PPP contract to avoid later discussion and disagreements. As with many other aspects in PPPs, it is important to anticipate the issues as much as possible and to set out detailed provisions in the PPP contract.

### 4.1.4 Managing changes not permitted in the PPP contract

Given the long life of PPP contracts, unforeseen changes in contractual specifications (during construction or operation) are not unusual. The contract management team needs to address these issues and strike a satisfactory balance between:

- Encouraging the PPP company to manage its risks; and
- Preventing the poor performance of the PPP company to endanger the viability of the PPP contract.

While contract renegotiations triggered by changes that are not permitted in the PPP contract may be a common feature of PPPs in some countries➤Guidance 107, the risks attached to these should be acknowledged and mitigated. Contracts can be designed to minimise major renegotiations at a later stage. Contract renegotiations require a careful analysis and a dialogue between the parties before contract changes are agreed and implemented. The use of an experienced, trusted and neutral facilitator can be beneficial. While some renegotiations are efficient, many are opportunistic and should be deterred.

Renegotiations of significant aspects of the contract have considerable implications for the parties and are in principle forbidden under EU law. They are generally regarded as undesirable because:

- Competitive bidding may be distorted: the most likely winner is not the most efficient company but the most skilled in renegotiation;
- As renegotiations are carried out bilaterally, the positive effects of competitive pressure are lost;
- Renegotiations often reduce the overall economic benefits of PPP arrangements and might have a negative impact.

It should be noted that lenders will often have contractual rights to prevent changes to the PPP contract which would, in their opinion, alter the credit status or risk profile of the PPP company (i.e. their borrower).➤Guidance 108

### 4.1.5 Dispute resolution

Contractual disputes are common in PPPs for a number of reasons, for example:

- The PPP contract is long term and unexpected circumstances are bound to emerge;
- PPP arrangements tend to complex.

The mechanisms available to resolve disputes and conflicts are a major part of the assessment of contract risks by private investors in PPP projects. The typical dispute resolution mechanisms are:➤Guidance 109,110

- The national court system (litigation);
- Arbitration (national or international);
- Expert determination of some kind. This is often used for specific issues (e.g. a technical or financial matter) or to give an interim decision which can then be appealed in litigation or arbitration;
- Mediation or conciliation (where the third party does not give a binding decision but enables the parties to reach an agreement);
- A decision by a specialised regulatory body.

The first three mechanisms generally involve a decision strictly based on the PPP contract. The last one (decision by a regulatory body) could be based on the PPP contract but regulators tend to depart from the contract and apply their own mandate. The regulator may exercise discretion in its judgment. This would be a considerable risk for investors if they do not have confidence in the stability of the regulatory framework or the decisions of the regulator.

Effective relationship management in a PPP project facilitates the easy resolution of disputes in the future. Likewise, if a party resorts to an inappropriate dispute resolution process, the process can damage the relationship.➤Guidance 111,112

It is therefore fundamental that an appropriate dispute resolution process is set out in the PPP contract. This should be done with the support of experienced legal advisers.

### 4.1.6 When the contract ends

A PPP contract should include detailed provisions dealing with its termination. The main issues to be addressed are:

- The circumstances in which the contract may be terminated by a party ahead of its scheduled expiry;
- The payment (if any) that must be made by the Authority to the PPP company upon termination (depending on the circumstances); and
- The condition of the assets when they are "handed over" to the Authority following termination.

### *a) Grounds for termination*

The typical grounds for termination are:

- Expiry of the PPP contract term;
- Default of the PPP company;
- Default of the Authority;
- Voluntary decision by the Authority; and
- Termination in case of prolonged force majeure.

The PPP contract should describe in detail the circumstances which allow a party to terminate the contract, in particular where the other party has defaulted on its obligations. For it to lead to termination, a contractual breach has to be fundamental in nature and should (where possible) be subject to cure periods. For example, the Authority would normally be entitled to terminate the PPP contract in case of insolvency or bankruptcy of the PPP company or of a serious deficiency in the service provisions (e.g. where health or safety is threatened) which is not promptly remedied. A detailed list of all the breaches that entitle termination should be set out in the PPP contract.

Particular attention should be given to the issue of *persistent breaches* (i.e. the accumulation of several breaches, each of which would not be enough to trigger termination but all of which together constitute a fundamental non-performance). The criterion to assess the existence of a persistent breach should be as objective as possible. This can be achieved by reference to the accumulation of penalties, deductions, performance points or warning notices over a specified period of time. Beyond a certain threshold, the Authority should have the right to terminate the PPP contract.

The typical example of default of the Authority is the non-payment of the sums owed to the PPP company (e.g. the service fee). These include cases in which the Authority has not adequately adjusted the PPP company's remuneration in accordance with the terms of the contract.

### *b) Termination payments*

PPP contracts usually require the Authority to make payments to the PPP company if and when the contract is terminated. These provisions are generally complex and need to be carefully drafted with the assistance of advisers taking into account a number of factors, such as:

- Fairness;
- Incentives for the PPP company and its lenders; and
- Bankability.

Specifying termination payments can be important even if the contract is never terminated. For example, if the parties are renegotiating the contract, the Authority should not accept a less favourable outcome than simply terminating and making the required payment. The termination payment can act as reference price in the renegotiations.

The following summarises the approaches used for calculating the termination payment in the various termination cases➤Guidance 113,114,115

***Contract expiry***

PPPs are usually structured so that the Authority makes no payment to the PPP company when the PPP contract expires at the end of its scheduled term. Termination payments are however envisaged upon contract expiry in certain circumstances. A typical case is that of new assets constructed at some stage during the PPP contract life as a result of an extraordinary event (this may involve a lump-sum termination payment from the Authority). Similarly, where PPP assets have a particularly long life compared to the term of the PPP contract, the payment of a residual asset value upon expiry can be contemplated.

***Termination for default by the PPP company***

Termination for PPP company default is the final stage of a process which starts when a project is failing to perform to the requirements set out in the PPP contract. The PPP contract should set out the various circumstances which could trigger such termination. These will typically include the failure to complete construction, persistent failures to meet performance standards and the insolvency of the PPP company. It should be noted that the PPP contract will also set out the circumstances in which a failure to perform can not be used to trigger termination (the so-called “relief events”).

Where the default of the PPP company is provoked by a failure of one of its sub-contractors (e.g. insolvency, poor performance, corruption), the PPP company should have the contractual ability (in its sub-contracts) to replace the non-performing sub-contractor and seek termination damages from it. These damages should be backed (at least in part) by performance bonds or guarantees and set at a level which would allow the PPP company to meet any additional costs associated with the replacement of the sub-contractor.

The insolvency of the PPP company is an important cause of default. This can occur when the PPP company is no longer able to service its debt in line with the agreed schedule. In this case, lenders could choose to “accelerate” their debt (i.e. make the entire debt due and immediately payable). This would force the PPP company into insolvency.

In case of PPP company default, the lenders should be allowed to step-in to rescue the PPP project and protect their loan. The Authority should permit (and rely on) the lenders to take control of the PPP project in such circumstances. The lenders’ right to step-in is typically foreseen in a direct agreement entered into between the Authority, the PPP company and the lenders (amongst others).

The PPP contract will be terminated only if lenders choose not to step in, fail in the step-in or choose to step out of the non-performing project. In these cases, it is reasonable to assume that the PPP company’s equity should be lost and no compensation should therefore be payable. A compensation would however normally be owed to the lenders of the PPP company (whether directly or through the PPP company). This is justified by the fact that the PPP project assets (or the rights over these) are transferred back to the public sector upon termination. This compensation is foreseen either in the provisions of the PPP contract or in the applicable legal code or in other agreements (e.g. where the public sector has agreed to guarantee the project's debt).

Termination payments for PPP company defaults are a key issue in PPP contracts as they are fundamental to their bankability. Several methods can be used to determine the compensation payment that the Authority is obliged to make to the PPP company / its lenders, including:

- Repayment of all or a pre-specified part of the outstanding debt (to the extent that it has been properly used for financing the project assets);
- Depreciated book value of project assets (there are several variants of this general approach);
- Net present value of the expected future net cash outflow which would have been payable by the Authority if termination had not occurred (i.e. the expected service fee less the costs that the Authority will have to incur as a result of the termination); and
- Open-market sale (i.e. the Authority re-tenders the PPP contract, selects a new PPP company which will continue with the contract and then pays to the original PPP company / its lenders the proceeds it receives from the sale).

Each of these methods has pros and cons. For example, it is often argued that the lenders should not be guaranteed of a full debt recovery upon termination as this would remove their incentives to conduct a thorough due diligence and a careful project monitoring. Also, the open-market sale method will not work well if there is no liquid market for PPP contracts. Finally, the net present value approach may be conceptually appealing, but forecasting future revenues and costs can be difficult and lead to disputes. This explains why the parties often adopt solutions relying on simplicity and certainty of the outcome.

As a general principle, it is important to ensure that the public sector should not be financially incentivised to seek early termination. Equally, lenders should not expect to avoid financial losses at the undue expense of the public sector. The UK is a good example of arrangements which achieve a balanced outcome:

- Where there is a liquid market for similar PPP project contracts, upon termination due to a PPP company default, the Authority can opt to "sell" the remaining period of the PPP contract. The sum paid by the best bidder for such "sale" will be used to pay the compensation to the lenders of the original PPP company. This is known as the "*market-value compensation*";
- Where there is no liquid market for similar PPP project contracts, the compensation owed to the lenders will typically be determined through the net present value of the future cash flows of the PPP contract over its remaining life (to which "rectification costs" are deducted). This is the so-called "*fair-value compensation*".

***Termination for default of the Authority / voluntary termination***

To promote fairness, incentive for the private sector and bankability, the PPP contract should ensure that the PPP company is not financially harmed if termination occurs as a result of a Authority default or will. In these circumstances, both the lenders and the equity investors should be fully compensated. If the calculation of the compensation due to the lenders is relatively easy (e.g. debt outstanding, unpaid interests and fees and breakage costs due to close the hedging agreement), defining the compensation owed to the equity investors can be complex. The following mechanisms are used:

- The net present value of what the future remuneration to the equity investors would have been if termination had not occurred. This calculation therefore looks at the predicted cash flows to the investors from the date of termination to the expiry date originally envisaged in the PPP contract. Although the most conceptually correct method, the uncertainties surrounding the forecast make its implementation rather complex;
- Same as above, except that the calculation is made considering the cash flows originally projected at the date of financial close. This method offers greater certainty than the one above;
- A payment which gives the equity investors the internal rate of return (IRR) they expected at financial close, based on all cash flows received by the investors from the beginning of the contract up to (and including) termination.

***Termination for prolonged force majeure***

PPP contracts normally foresee the possibility for either party to terminate where a force majeure event prevents the performance of the obligations for a prolonged period of time. In this case, the general principle adopted is that since neither party is at fault, the burden of termination should be shared. The compensation payable by the Authority will therefore normally be (i) higher than that owed in case of PPP company default but (ii) lower than that due on Authority default. The compensation would normally cover the outstanding debt (and the hedging breakage costs). It may sometimes also cover the value of the equity injected into the project (but exclude any return on that equity).

***Other matters***

When defining compensation payments on termination, the PPP contract will have to tackle a number of other issues, such as:

- The treatment of sub-contractors' costs and lost profits as a result of termination;
- The treatment of mezzanine or other subordinated debt (i.e. should these be dealt with as senior debt or as equity?);
- The treatment of cash standing on reserve accounts;
- The treatment of insurance proceeds; and

## 4. Project implementation

- The choice of a discount rate for the present value calculation (e.g. nominal or real? pre-tax or post-tax? weighted average cost of capital or else?).

### *c) Asset condition at expiry of the PPP contract*

The PPP contract should contain provisions to ensure that the assets are "handed back"[8] to the Authority in good conditions. For example, the contract could include:➤Guidance 114,116

- Indicators of the condition the assets must be in at contract expiry (e.g. expected useful life left for each type of assets, ability to meet certain performance tests);
- A third party assessment of the asset conditions and of the works to be completed to meet the required standards (such assessment should be carried out by an independent expert sufficiently in advance of the expiry date);
- Retentions made from the service fee over a defined period prior to expiry (the proceeds being held as guarantee in a reserve account);
- Verification by an independent expert that the works required to meet the hand-back conditions have been completed satisfactorily (this could also trigger the release of the retention sums to the PPP company).

---

8 Where the legal ownership of the assets stays with the public sector throughout the life of the PPP contract, only the rights to use the assets are handed back.

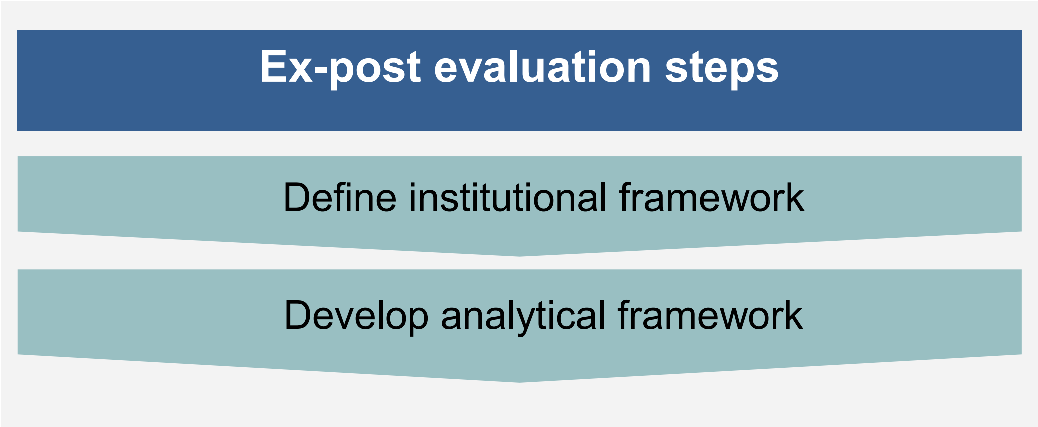
**CHECKLIST*: Contract management***

During the operational phase of a PPP project, the focus of the Authority is to manage the contract while maintaining operational performance. To achieve this, the Authority and its team of advisers need to consider the items in the following checklist:

- Has the possibility of engaging the same advisers employed in the procurement phase been considered (availability, potential engagement, required budget and conflict of interest)?
- Have experienced advisers been consulted to help the contract management team address sensitive changes to the contract, including refinancing?
- Has a contract administration manual been developed to help coordinate information on contract terms with contract management procedures, including allocation of responsibilities and timetables?
- Have guidelines been developed for users of the contract administration manual to help monitor contract performance in case this is envisaged?
- In availability-based PPPs, are payments to the PPP company processed properly and in accordance with the PPP contract?
- Have all necessary steps been taken to ensure continuing review and monitoring of project risks using, for example, the risk register developed during the detailed preparation phase?
- In the event of changes to the PPP contract, what steps are envisaged to keep monitoring efforts on operational performance and not just on managing changes to the contract? In particular, what mechanism has been developed to ensure that Value for Money is maintained after the changes if risks are transferred from the PPP company back to the Authority?
- Have criteria and procedures been agreed to monitor the residual value of the asset so that the asset management and maintenance practices support the PPP project objectives and maximise Value for Money?
- Has a communication strategy been developed to deal with the PPP company, users and other relevant stakeholders with regular reviews and updates?

## 4.2 Ex-post evaluation

**Chart 9**




The ex-post evaluation of PPPs involves the two steps summarised in Chart 9. A sound evaluation of a PPP project requires the public sector to:

- Identify the public body that will undertake the review of a particular PPP project;
- Ensure the independence of that body *vis-à-vis* the teams responsible for implementing and managing the PPP contract; and
- Define the questions that need to be answered in the evaluation exercise.

The rest of this section describes these aspects and their rationale in more detail and suggests relevant examples of ex-post evaluations for further reading.

### 4.2.1 Define the institutional framework

Ex-post evaluation of PPP projects facilitates learning lessons from the experience of implemented projects, including successes and failures. These lessons can improve future decisions on whether to use the PPP route or how to design PPP contracts and ultimately how best to prepare and implement PPP projects.

It is important that the information needs for ex-post evaluation are thought through carefully and specified in the PPP contract. This ensures that the right information is gathered during the course of the project with the support of the Authority and the project team.

The timing for evaluating a PPP is an open question. A balance is needed between getting useful information quickly to inform current processes and getting meaningful data on performance. Evaluation around 12–18 months after the commencement of operations will provide information on the bidding process, the delivery of the project asset and initial performance. Subsequent evaluations will provide better information on operational performance. ➤Guidance 117

The purpose of an ex-post evaluation is twofold:➤Guidance 118

- Evaluate the merits of PPPs associated with a particular type of project; and
- Identify potential issues related to the implementation or management of specific PPP contracts (e.g. availability-based PPPs).

Evaluation requires the establishment of relevant criteria and methods and the capacity within the Authority to carry out the process. In order for this process to be successful it is important that the public authorities:

- Define the set of questions they would like to see answered; and
- Decide on who is best placed to answer those questions.

The type of body most suitable for the ex-post evaluation exercise depends on the objectives of the PPP ex-post evaluation. It is not unusual, for example, that national audit units undertake such studies.➤Guidance 119 In some instances, ex-post evaluation can be contracted out to a consulting firm, especially when in-house expertise is not available within a public body.

But whatever the nature, the Authority will have to ensure that the body undertaking the evaluation is independent from the teams responsible for delivering and implementing the PPP project subject to evaluation.➤Guidance 120

### 4.2.2 Develop an analytical framework

Once responsibilities have been attributed and the aim of the ex-post evaluation study has been defined, it will be necessary to decide which analytical framework is most adequate to achieve the aims of the study. ➤Guidance 121 This implies defining:

- The evaluation criteria and expected outcomes of the project; and
- The appropriate alternative (i.e. what would have happened if the project had not been implemented as a PPP?)

A well-designed PPP contract should have provided for sufficient information, collected during the monitoring phase, to support this evaluation exercise.

PPP projects will normally be defined in terms of Value for Money. This implies identifying both the benefits derived from project outputs and the costs to deliver those outputs (benefits and costs being both monetary and in terms of timing). However, more qualitative benefits and costs, such as service quality, contract design and risk allocation, need also to be considered in the evaluation.

In addition to examining the benefits and costs, the evaluation will need to identify which alternatives should have been looked at. These can be alternative procurement models to PPP or different project delivery and implementation procedures. It is common to use the public sector comparator as a relevant alternative. However, depending on the objectives of the study, other comparators can also be considered, such as the expected Value for Money at the start of the project.➤Guidance 122,123

**CHECKLIST*: Ex-post evaluation***

An ex-post evaluation of a PPP project can focus on many aspects including, for example, the design and performance of a PPP contract or an audit of the procurement process. Examples of the type of questions to address when designing and undertaking an ex-post evaluation are:

- Has agreement been reached on the primary focus of the ex-post evaluation? Is it the behaviour and effectiveness of the Authority; the effectiveness of the procurement method chosen (including negotiations and contract award); the effectiveness in the performance and management of the PPP contract; or all of the above?
- Have the information needs for ex-post evaluation been identified and included in the PPP contract to allow the gathering of adequate information during the performance phase?
- Have the necessary instructions been given, resources made available and high level support obtained to motivate both the contract management team and the Authority to get the necessary information for an ex-post evaluation assessment?
- Has a timetable for ex-post evaluation been developed and approved balancing the need of getting useful information quickly to inform current processes and getting meaningful data on performance?

# Annex 1: Project finance

*Introduction*

This annex introduces some basic concepts of project finance and how they relate to the financial structure of PPP projects. It is not meant to cover all the issues relevant to the PPP financing structure, which are many and complex. The project management team should rely on the expertise of financial and legal advisers to understand the relevant trade-offs in project finance issues.

PPP projects are generally financed using *project finance* arrangements. In project finance, lenders and investors rely either exclusively ("*non-recourse"* financing) or mainly ("*limited recourse"* financing) on the cash flow generated by the project to repay their loans and earn a return on their investments. This is in contrast to corporate lending where lenders rely on the strength of the borrower's balance sheet for their loans.

It is important to stress that the project finance structure should be designed to optimise the costs of finance for the project. It should also underpin the allocation of risks between the public and private sectors as agreed in the PPP contract. In particular, the project financing should ensure that financial and other risks are well managed within and between the PPP company's shareholders, sponsors and its financiers. This should give comfort to the Authority that the private partner, and particularly its funders, are both incentivised and empowered to deal in a timely manner with problems that may occur in the project. Indeed, to a very large extent, the project finance structure should ensure that the interests of the main lenders to the project are aligned with those of the Authority – that is, that both need the project to succeed in order to meet their objectives. Where this is the case, the Authority can be confident that the lenders will take on much of the burden of the assuring the on-going performance of the project. This is a key element of the transfer of risk from public to the private sector in PPPs.

*Project finance principles*

In a project finance transaction, a PPP company would usually be set up by the sponsors solely for the purpose of the implementation of the PPP project. It will act as borrower under the underlying financing agreements and will be a party to a number of other project-related agreements. ➤Guidance 124

The top-tier funding provided by lenders or capital market investors, usually referred to as "senior debt", typically forms the largest but not the sole source of funding for the PPP company. The rest of the required financing will be provided by the sponsors in the form of equity or junior debt. Grants, often in effect a form of public sector unremunerated equity, may also make up the financing package.

Since senior lenders do not have access to the sponsors' balance sheets in project financed transactions, they need to ensure that the project produces sufficient cash flow to service the debt. They also need to ensure that the legal structuring of the project is such that senior lenders have priority over more junior creditors in access to this cash. In addition, lenders will usually seek additional credit support from the sponsors and/or third parties to hedge themselves against the risk of the project's failing to generate sufficient cash flow. Finally, lenders will wish to ensure that where a project suffers shortfalls in cash as a result of poor performance by one or more of the PPP company's sub-contractors, these shortfalls are flowed through to the sub-contractor, leaving the ability of the PPP company to service the debt unimpaired.

Even though the responsibility for arranging the financing of a PPP is left with the private sector (the PPP company is the borrower), it is important for public sector officials and their advisers to understand the financing arrangements and their consequences, as:

- When the Authority evaluates a bidder's proposal, it must be able to assess whether the proposed PPP contract is *bankable* and whether the proposed financing is *deliverable*. Awarding the PPP contract to a company that ends up being unable to finance the project is a waste of time and resources;
- The allocation of risks in the PPP contract can affect the feasibility of different financing packages and the overall cost of the financing;
- The financing can have an impact on the long-term robustness of the PPP arrangement. For example, the higher the debt-to-equity ratio, the more likely that in bad times the PPP company will run the risk of a loan default, possibly terminating the project. Conversely, the more debt in a project, the more lenders are incentivised to ensure that project problems are addressed in order to protect their investment;
- If the PPP includes State guarantees or public grants, the Authority will play a direct role in some part of the financing package;
- The amounts and details of the financing can directly affect contingent obligations of the Authority (e.g. the payments the public sector would have to make if the contract were terminated for various reasons);
- The Authority's financial advisers should have a thorough understanding of what will be needed to make the PPP project bankable, given market conditions and practices prevalent at the time. Carrying out market sounding exercises at different points during the project preparation stages will greatly assist in developing a good understanding of investor and lender attitudes. It will save a great deal of time if any credit enhancement is to be provided by the public sector.➤Guidance 125,126

*Financing structure*

As outlined above, the financing of a PPP consists principally of senior debt and equity (which may sometimes be in the form of junior shareholder loans). The financial structure may also include other forms of junior debt (such as *mezzanine* debt which ranks between senior debt and pure equity) and in some cases up-front grant funding.

PPP projects should seek to achieve optimum (as opposed to maximum) risk transfer between the public and private sector. But the allocation of risks amongst the private sector parties is also crucial. Financial structuring of the project relies on a careful assessment of construction, operating and revenue risks and seeks to achieve optimum risk allocation between the private partners to the transaction. In practice, this means limiting risks to senior lenders and allocating this to equity investors, sub-contractors, guarantors and other parties through contractual arrangements of one kind or another.

As a general principle, the higher the gearing of a project, the more affordable it is likely to be to the public sector.[9] This is because senior debt is less expensive than the other forms of financing (except for grants). Other things being equal, project gearing (i.e. the level of debt senior lenders will provide relative to the level of equity) will be determined by the variability of project's cash flows. The greater the degree of riskiness in the cash flows, the greater the "cushion" lenders will need in the forecast of available cash flow beyond what will be needed for debt service. This is necessary to give comfort that the debt can be repaid even in a bad-case scenario. Lenders will specify their requirement in terms of forward-looking (i.e. predicted) *annual debt service cover ratio* (ADSCR)[10] above a specified minimum level. The value of required ADSCR will depend in large part on project risk, and therefore variability of cash flows.[11]

For a given gearing (or volume of debt in the project), the target ADSCR will determine the level of the service fee to be paid by the Authority. Alternatively, for a given level of service fee (perhaps the affordability limit), the target ADSCR will determine the project's gearing. In other words, the lower a project gearing (the more equity relative to debt), the higher the cover ratio from a given service fee.

The Authority's financial advisers need to understand lender requirements in this regard. It will greatly facilitate financing if the project developed and taken to the market is structured in such a way that the cover ratios lenders expect to use for the particular sector and type of project are justified when the lender carries out a risk analysis. This will also facilitate achieving the best possible cost for the financing and will thus have direct implications for the public sector as the public sector is usually the ultimate payer for a PPP.

One of the fundamental trade-offs in designing PPPs is therefore to strive for the right balance between risk allocation between the public and private sector, the risk allocation with the private sector consortium and cost of funding for the PPP company.

### *Debt*

Senior debt enjoys priority in terms of repayment to all other financing. Mezzanine debt is subordinated in terms of repayment to senior debt but ranks above equity both for distributions of free cash in the so-called "cash waterfall" (i.e. priority of each cash inflow and outflow in a project) and on a liquidation of the PPP company. Since mezzanine debt's repayment can be

---

9 In a typical PPP project, up to 70%–80% of financing would be procured in the form of senior debt while the share of equity would not normally exceed 20%–30%.

10 The ADSCR is defined as the ratio of free cash (i.e. cash left to the project after payment of operating and essential capital costs) available to meet annual interest and principal payments on debt.

11 For example, if the payment mechanism is designed so that the PPP company does not take demand risk, lenders might be satisfied with a projected annual debt service cover ratio (ADSCR) of 1.3x. But if a PPP company bears substantial traffic risk, then lenders may insist on a minimum ADSCR as high as 2.0x. Lenders use detailed forward-looking financial models to estimate future cash flows and cover ratios.

affected by poor performance of the PPP company and bearing in mind the priority in repayment of senior debt, return on mezzanine debt is typically higher than on senior debt.

Debt to a PPP project is normally priced on the basis of the underlying cost of funds to the lender plus a fixed component (or *margin*) expressed as a number of basis points to cover default risk and the lender's other costs (operating costs, the opportunity cost of capital allocations, profit, etc.).

It is important to bear in mind that the underlying cost of funds is typically determined on the basis of floating interest rates (i.e. rates that fluctuate with market movements). These are normally based on interbank lending rates such as EURIBOR in the Euro market or LIBOR in the Sterling market. In contrast to these floating rate funds, the revenues received by the PPP company do not generally change along with the interest rates. This mismatch is typically remedied by the use of an interest-rate swap, through which the PPP company ends up paying a *fixed* interest rate (this is referred to as the *hedging*). Incorporating these instruments into the financing structure should be left to the responsibility of the PPP company, as it is the PPP company who has the right incentives to take appropriate actions. However, the cost of these swaps is relevant to the public sector as they may result in costs in certain termination situations. For this reason, they should be analysed by the Authority's financial adviser.

Debt for major PPP projects may be provided by either commercial banks, international financial institutions (such as the European Investment Bank) or directly from the capital markets. In this latter case, project companies issue bonds which are taken up by financial institutions such as pension or insurance companies which are looking for long term investments. More information on capital market funding for PPP investments can be found in the references below.➤Guidance 127

Financial advisers will be able to advise on the likely sources of funding for a given project. They would also be expected to make an assessment of the anticipated costs and benefits of funding options. This will include an assessment of the debt tenors (the length of time to maturity, or repayment, of debt) likely to be available from various sources. This is particularly important if long term funding is not available for the project and where the public sector may be drawn into risks associated with the need to refinance short term loans (so-called "mini-perm" structures).➤Guidance 127

### *Equity*

Equity is usually provided by the project sponsors and can also be provided by contractors who will build and operate the project as well as financial institutions. A large part of the *equity* (often referred to as *quasi-equity*) may actually be in the form of shareholder subordinated debt, because of tax and accounting benefits. Since equity holders bear primary risks under a PPP project, they will seek higher return on the funding provided by them.

### *Credit enhancement*

*Credit support from sponsors and sub-contractors.* Senior lenders will often require sponsors to put in place certain credit-enhancement measures that take some of the risk away from those senior lenders (and in some cases, equity holders). These can take a variety of forms, including the following:

- *Guarantees* by the sponsors and third parties relating to the performance of the PPP company's[12] or other participants'[13] obligations under the project documentation;
- *Financing facilities* that provide temporary liquidity to deal with specific risks (e.g. a large depreciation of the local currency);
- *Insurance* against certain project related risks (e.g. construction risks, loss of revenue, third party liability, environmental liability).

*Public sector support.* Public sector support instruments may also be deployed, for example:

- *Direct funding* support by way of public sector capital contributions. These may come from community, national, regional or specific funds. They may be designed to make a project bankable or affordable;➤Guidance 128
- *Contingent support or guarantees* by the public sector to the PPP company or other private sector participants for certain types of risks which can not otherwise be effectively managed or mitigated by the PPP company or other private sector participants (e.g. minimum revenue guarantee for a toll road).➤Guidance 129

*Loan Guarantee for TEN-Transport (LGTT):* LGTT is a unique credit enhancement instrument which is specific to TEN-T projects in which the private sector takes traffic risk (visit EPEC and TEN-T EA)➤Guidance 130

### *Security structure*

As noted above, project finance lenders exclusively or mainly rely on project cash flows. Lenders' security arrangements reflect this and consist mainly of:

- Secured interests over all the project assets (including and especially all contracts) to enable the lender to *step in* if the project has failed and temporarily play the role of the PPP company and see to the appointment of a replacement;
- Controls over all cash flows going into and coming from the PPP company. As noted above, loan contracts and other project documents will establish the waterfall for the use of cash coming into the PPP company. This will ensure that senior debt service always has priority. In addition, it will define the circumstances in which senior lenders are able to prevent equity distributions ("lock up"). This will usually be defined in

---

[12] For example, standby or guarantee letters of credit used to protect against the PPP company's failures to meet its payment and other obligations due by it under the project agreements.

[13] For example, performance bonds callable in case of the contractor's failure to perform the terms of the construction contract. Parent company guarantees will also often be required from construction and other service sub-contractors.

terms of the performance of project financial ratios such as ADSCR and the *loan life cover ratio* (LLCR);[14]

- Cash flow controls in the form of reserve funds (debt service reserve account, maintenance reserve account).

[14] The LLCR is defined as the ratio of the net present value of cash flow available for debt service for the outstanding life of the debt to the outstanding debt amount.

# Annex 2: A note on legal frameworks for PPPs

The term "public-private partnership" is not defined in the EU legislation on public contracts. In general, it refers to forms of co-operation between public authorities and the private sector which aim at ensuring the funding, construction, renovation, management and maintenance of infrastructure associated with the provision of a service.[15]

A legal and regulatory framework that supports PPPs is meant to facilitate investments in complex and long-term PPP arrangements, reduce transaction costs, ensure appropriate regulatory controls, and provide legal and economic mechanisms to enable the resolution of contract disputes.

The design of PPP legal frameworks varies across EU countries depending on legal tradition and existing laws. A PPP legal framework should include:[16]

- *Provisions that make a PPP project possible and facilitate its functioning* (e.g. the legal right to establish a PPP company, the terms and conditions under which public assets may be transferred to non-public entities, the power of the PPP company to choose sub-contractors on its own terms); and
- *Provisions that enable governments to provide financing, where relevant* (for example, to provide subsidies or to make long-term commitments of public expenditure for the life of the PPP contract).

A PPP legal framework is typically identified in laws and regulations, but also in policy documents, guidance notes and in the design of PPP contracts. The exact nature of the legal and regulatory framework applicable to a particular PPP transaction also depends, among others, on the financing mechanisms contemplated and the scope of responsibilities transferred to the PPP company. These are issues on which the public sector should always secure advice from suitably qualified advisers.

### *Country legal traditions*

Most countries in Europe have a legal tradition based on civil law. Their law derives from a set of written rules or a civil code. By contrast, in common law jurisdictions such as England and Wales, Ireland and Gibraltar, it is the common law (meaning case law and precedents rather than a civil code) which forms the fundamental basis of all commercial transactions and from which the principles underpinning the allocation of risk have developed.

---

[15] Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM(2004)327 Final, European Commission (2004), Brussels. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0327:FIN:EN:PDF

[16] See chapter 10 of *Transport Infrastructure Investments: Options for Efficiency,* OECD (2008). ISBN 978-92-821-01551-1

PPP arrangements in many civil law countries are governed by administrative law. Administrative law sets out fundamental principles which, in many cases, cannot be derogated from or overridden by agreement of the parties. As such, it provides the framework within which PPP contracts must be negotiated[17].

Common law and civil law jurisdictions have distinct approaches to many issues relevant to PPPs. Differences also exist among civil law countries. It is not possible to explore here all European jurisdictions and we will instead highlight only some of the main aspects that could be particularly important.

In many civil law countries, a number of rights implied by law are relevant to PPPs. A public authority may often be unable to renounce a right conferred upon it by the administrative laws and regulations that govern it. This can be perceived by the private party as a limitation to negotiations of bespoke PPP contracts. These rights may include the right of a contracting authority unilaterally to cancel a contract early, the right of an operator to compensation following an unexpected rise in the cost of operations, or the right of an authority to make unilateral changes to the contract if they are in the public interest. Some civil law jurisdictions also contain mandatory notice periods which must be observed before termination for breach of contract (by either party) can be invoked. In certain civil law jurisdictions, direct agreements with lenders or step-in rights are not possible or if they are, they are limited in scope and reach by the existing administrative laws and regulations[18].

Different approaches are also adopted towards security and insolvency in civil and common law jurisdictions. In insolvency situations, the emphasis in common law jurisdictions is on rescue and reorganisation. In contrast in civil law jurisdictions, the insolvency process focuses on winding companies up. In relation to security, which generally forms an important part of PPP arrangements, the concept of trusts in common law jurisdictions allows a security trustee to hold security on behalf of lenders. This avoids the civil law practice of granting security separately to all lenders, and re-registering it if they change, which can be costly and impractical.

A further practical issue in some civil law jurisdictions is that concessions are not allowed to be transferred to a replacement concessionaire without going through the whole re-tendering process. This is the case for example in Slovakia, and causes major issues for any project lenders who may need step-in and cure rights, which is a fundamental principle of project finance. This issue can be partially addressed by allowing for the transfer of the shares in the PPP company, but with the disadvantage that any transfer of shares carries with it the liabilities of the PPP company and the asset of the concession.

---

[17] See the "Legal Framework Assessment" guide to civil law jurisdictions produced by the PPP in Infrastructure Resource Center for Contracts, Laws and Regulation (PPPIRC) at: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTINFRANDLAW/0,,contentMDK:21734392~menuPK:64860402~pagePK:4710368~piPK:64860384~theSitePK:4817374~isCURL:Y,00.html

[18] A number of these concepts are explained more fully in this Guide and in the annex.

In general, common law jurisdictions will have a less prescriptive approach to the structuring of PPPs than civil law jurisdictions. One has to ensure that both in substance and in terms of formalities public bodies exercise powers to enter into PPP contracts within the scope of their powers, particularly in the case of authorities which are not departments of State (that is, part of central government). In addition, regard must be had to administrative (rather than legal requirements) imposed by Finance Ministries and to standard form documentation.

### *Specific PPP laws*

Often in civil law countries, concession laws are introduced to enable PPP projects and to define the type of services that could be procured under PPPs. Specific PPP laws have been introduced in Belgium, Italy, Poland, Portugal and Spain, among others. These laws may focus on a specific sector (e.g. motorways) or may apply to PPP arrangements across sectors. When a country enacts a PPP law, it normally requires changes and references to other binding legislation and regulations.

A specific PPP law is not a necessary condition for PPP development. The legal framework can also be provided by changing existing legal provisions which may have an impact on the PPP project. For example, the UK has developed its pioneer PFI model with no PPP law, although specific legislation to confirm powers to enter into PPP contracts was introduced in the UK in respect of health service bodies and local authorities to address concerns expressed principally on behalf of funders. Nevertheless, PPP laws can establish fundamental principles that PPP arrangements should adhere to (for example, the need to assess Value for Money) and to ensure transparency and accountability in the provision of infrastructure.

### *EU legislation*

Under EU law, there is no specific system governing PPPs. There is, however, EU legislation which is relevant to certain aspects of PPPs. For example, PPPs represent one method of public sector procurement. The EU has two procurement directives: (i) the *Public Sector Directive* (2004/18/EC), which prescribes the procedures for the award of works contracts, public supply contracts and public service contracts and (ii) the *Utilities Directive* (2004/17/EC), which prescribes procurement procedures for entities operating in the water, energy, transport and postal sectors. Furthermore, all contracts in which a public body awards work involving an economic activity to a third party, whether PPPs or not, must be examined in the light of the rules and principles of the EC Treaty, including, in particular, the principles of transparency, equal treatment, proportionality and mutual recognition.[19]

---

[19] *Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions* European Commission Communication COM(2005) 569 final (November 2005) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0569:FIN:EN:PDF

# Guidance details

Note: Guidance numbers preceded by an asterisk indicate publications with a higher than average degree of complexity.

## Guidance 1

***Attracting Investors to African Public-Private Partnerships, A Project Preparation Guide***

The World Bank/ICA/PPIAF (2009), ISBN 978-0-8213-7730-7

EPEC comment: Excellent PPP Guide prepared by Partnerships UK for the World Bank. Chapter 4 covers project selection, scope and requirements.

## Guidance 2

***An Introductory Guide to Public Private Partnerships (PPPs)***

Government of Hong Kong SAR, 2nd edition (March 2008)

EPEC comment: Chapter 1 (pages 5-17) explains what circumstances are most suitable for a PPP arrangement and Annex D provides an outline of how to construct a *public sector comparator*.

http://www.eu.gov.hk/english/psi/psi_guides/psi_guides_ppgpop/psi_guides_ppgpop.html#3

## Guidance 3

***Client Guide, Achieving Well Designed Schools Through PFI***

Commission for Architecture and Built Environment (CABE) (August 2002)

EPEC comment: Sections 2, 3 and 4 stress the importance of setting sound output specifications and discuss the role of the public sector regarding the early design work for a project.

http://www.cabe.org.uk/publications/achieving-well-designed-schools-through-pfi

## Guidance 4

***Le Guide Opérationnel des PPP***

François Bergère & al.

Le Moniteur, Third Edition (2010) ISBN 978-2-281-12718-8

EPEC comment: Annex 5 (pages 239-249 and page 399) provides a detailed description of the analysis and distribution of risk in a PPP contract (risk identification, risk quantification and probability, generally using a Monte Carlo simulation, risk allocation). Pages 261-264 cover the accounting and statistical treatment of PPPs in French national accounts and Eurostat criteria.

**Guidance 5**
***Partnership Victoria Guidance Material: Risk Allocation Guide***
Infrastructure Australia (December 2008)
EPEC comment: Part 1 (pages 1-38), deals with risk allocation principles.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 6**
***Public-Private Partnerships - In Pursuit of Risk Sharing and Value for Money***
OECD (2008), ISBN 978-92-64-04279-7
EPEC comment: Chapter 3 reviews affordability, risk allocation and Value for Money in PPPs while chapter 4 discusses how PPPs are treated in the public sector budget and accounts.

*__Guidance 7__
***Government Guarantees Allocating and Valuing Risks in privately Financed Infrastructure Projects***
Timothy Irwin, The World Bank, Washington DC, ISBN-10: 0-8213-6859-1 (electronic)
EPEC comment: Comprehensive discussion on the use of government guarantees and the allocation of key project risks in public infrastructure projects with private financing.
http://siteresources.worldbank.org/INTSDNETWORK/Resources/Government_Guarantees.pdf

**Guidance 8**
***Project Finance: A Legal Guide***
Graham Vinter, Sweet and Maxwell Ltd. Third Edition (2006) ISBN: 0421-909501
EPEC comment: Chapter 6 presents a discussion of what lenders require for a project to be considered "bankable".

**Guidance 9**
***Public-Private Partnerships in Transport***
A. Estache, E. Juan and L. Trujillo, *Policy Research Working Paper 4436*, The World Bank, Washington DC. (2007)
EPEC comment: Provides a good review of PPP experience in transport with a particular focus on financial and other risks.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1072402 (signing up is required)

**Guidance 10**
***Value for Money Assessment Guidance***
HM Treasury (November 2006)
EPEC comment: Describes current UK approach for assessing Value for Money in PFI projects.
http://www.hm-treasury.gov.uk/d/vfm_assessmentguidance061006opt.pdf

## Guidance details

*Guidance 11
***Public Sector Comparator: Technical Note***
Department of Treasury and Finance, Victoria, Australia (Partnerships Victoria, June 2001)
EPEC comment: Detailed instructions for preparing the PSC analysis. See also the Supplementary Technical Note published in July 2003.
http://www.partnerships.vic.gov.au/CA25708500035EB6/0/E4C501A76F826D77CA2570C0001B45EA?OpenDocument

Guidance 12
***Frequently Asked Questions and Common Problems in Public Sector Comparator (PSC) Development***
Department of Treasury and Finance, Victoria, Australia. (Partnerships Victoria, February 2009)
EPEC comment: Useful 6-page document, especially the one-page list of typical problems. Some parts deal specifically with issues in Victoria but most material is applicable broadly.
http://www.partnerships.vic.gov.au/CA25708500035EB6/WebObj/A6PSC-FAQs/$File/A6%20PSC%20-%20FAQs.pdf

Guidance 13
***Guidelines for Successful Public Private Partnerships***
European Commission, Directorate General Regional Policy (March 2003)
EPEC comment: Part 3 (pages 50-59) provides an overview of the economic and financial implications of PPP risks and Value for Money assessment of PPPs.
http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

Guidance 14
***The European system of national and regional accounts in the Community***
Council Regulation (EC) No 2223/96 of 25 June 1996
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2223:EN:HTML
ESA95 is available from the Eurostat website under:
http://circa.europa.eu/irc/dsis/nfaccount/info/data/esa95/esa95-new.htm

Guidance 15
***Manual on government deficit and debt, implementation of ESA95***
European Communities (2010 edition)
EPEC comment: Part IV (Leases, licenses and concessions) covers the treatment of long term contracts between government units and non-government partners.
http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-09-017/EN/KS-RA-09-017-EN.PDF

**Guidance 16**

***Accounting and Statistical Treatment of Public-Private: Partnerships Purposes, Methodology, and Recent Trends***

European PPP Expertise Centre (2010)

EPEC comment: Thorough review of all aspects and trade-offs related to the statistical and accounting treatment of PPPs including Eurostat rules and national accounting issues in EU Member States.

http://www.eib.org/epec/resources/epec-eurostat-statistical-treatment-of-ppps.pdf

**Guidance 17**

***National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide***

Infrastructure Australia (December 2008)

EPEC comment: Section 8 sets out the standard management team structure for a PPP, including a steering committee, the project director and the project team.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 18**

***Toolkit on Hiring and Managing Advisers for Private Participation in Infrastructure***

PPIAF-World Bank (2001)

EPEC comment: An extensive document giving guidance on all aspects of engaging and managing PPP project advisers. Pages 51-53 contain a discussion of whether to hire a lead adviser.

http://rru.worldbank.org/Toolkits/HiringManagingAdvisors/

**Guidance 19**

***Le Guide Opérationnel des PPP***

François Bergère & al., Le Moniteur, Third Edition (2010) ISBN 978-2-281-12718-8

EPEC comment: Pages 78-86 provide a brief introduction to how and why the Authority should use external advisers to help through the procurement process.

**Guidance 20**

***Toolkit for Public-Private Partnerships in Roads and Highways***

PPIAF-World Bank, Module 5 (version March 2009)

EPEC comment: Highlights key information about the use of advisers, including typical costs and types of advisory skills needed.

http://www.ppiaf.org/documents/toolkits/highwaystoolkit/5/5-8.html

*Guidance 21
***How to Appoint and Manage Advisers to PFI Projects***
Technical Note No. 3; HM Treasury Taskforce (undated)
EPEC comment: A useful guide to the engagement of legal, technical, financial and project management advisers, the appointment process, checklists and forms.
http://www.hm-treasury.gov.uk/d/PPP_TTF_Technote3.pdf

Guidance 22
***National Public Private Partnership Guidelines, Volume 2: Practitioners' guide***
Australian Government – Infrastructure Australia (December 2008)
EPEC comment: A short section on developing a project plan and timetable (pages 6-7).
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

Guidance 23
***Attracting Investors to African Public-Private Partnerships, A Project Preparation Guide***
The World Bank/ICA/PPIAF (2009), ISBN 978-0-8213-7730-7
EPEC comment: Excellent PPP guide prepared by Partnerships UK for the World Bank. Chapter 6 covers the role and scope of PPP advisers. Even though the guide contains examples of PPP projects in Africa, most of the guideline material is generic and applicable worldwide.

Guidance 24
**Sample Terms of Reference**
PPP in Infrastructure Resource Center (PPPIRC)
EPEC comment: Provides guidance (and samples) on the *terms of reference* for transaction advisers.
http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTINFRANDLAW/0,,contentMDK:21759232~menuPK:5672950~pagePK:4710368~piPK:64860384~theSitePK:4817374,00.html

Guidance 25
***Toolkit for Public-Private Partnerships in Roads and Highways***
PPIAF-World Bank (version March 2009)
EPEC comment: Module 5, section 3, describes the detailed due diligence and feasibility studies that are required to fully understand the project features which will feed into the tender documents and the PPP contract.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/5/5-3.html

**Guidance 26**

***Mobilising Private and Public Investment for Recovery and Long Term Structural Change: Developing Public Private Partnerships***

Commission Communication: COM(2009) 615 (19 November 2009)

EPEC comment: Communication explaining the European Commission's objective of promoting private sector participation in the field of infrastructure and research via PPPs.

http://www.eib.org/epec/resources/commission-communication-on-ppp-en.pdf

**Guidance 27**

***Guide to Cost Benefit Analysis of Investment Projects***

European Commission, Directorate General Regional Policy (July 2008)

EPEC comment: Annex I (page 242) explains the basic formulae for EU grant determination.

http://ec.europa.eu/regional_policy/sources/docgener/guides/cost/guide2008_en.pdf

**Guidance 28**

***Guidelines for Successful Public Private Partnerships***

European Commission, Directorate General Regional Policy (March 2003)

EPEC comment: Part 4 (pages 63-72) discusses the integration of grant financing with PPPs.

http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

**Guidance 29**

***Hybrid PPPs: Leveraging EU Funds and Private Capital***

PricewaterhouseCoopers (January 2006)

EPEC comment: The most thorough discussion of the basic issues publicly available at present.

http://www.irfnet.ch/files-upload/knowledges/PWC_HybridPPPs_2006.pdf

**Guidance 30**

***Combining PPP with EU Grants***

Hugh Goldsmith, International Seminar "Strengthening Public Investment and Managing Fiscal Risks from PPPs", Budapest, 8 March 2007

EPEC comment: Overview of the key issues and models being considered by the EIB.

http://www.imf.org/external/np/seminars/eng/2007/ppp/pdf/hg.pdf

**Guidance 31**

***Combining EU Grant Funding with Public Private Partnership***

Joachim Schneider, Presentation, 9 October 2008

EPEC comment: Listing of key issues and models and outline of the topics of a forthcoming study commissioned by JASPERS.

http://ec.europa.eu/regional_policy/conferences/od2008/doc/presentation/09C50_SCHNEIDER.ppt

**Guidance 32**

***Combining EU Grant Funding with PPP for Infrastructure: Guidelines for the use of DBO to procure Infrastructure projects using EU Structural Funds***

JASPERS, (December 2010)

EPEC comment: This working paper addresses the procurement of Design-Build-Operate contracts and the use of EU Structural Funds.

http://www.jaspers-europa-info.org/attachments/129_JASPERS%20DBO-Grant%20Funding%20Working%20Paper%20Dec%202010.pdf

**Guidance 33**

***Combining EU Grant Funding with PPP for Infrastructure: Conceptual Models and Case Examples***

JASPERS, (December 2010)

EPEC comment: This working paper provides an overview and analysis of different possible models for PPP-grant blending, as well as a review of past projects following these models.

http://www.jaspers-europa-info.org/attachments/129_JASPERS%20PPP-Grant%20Blending%20-%20Models%20and%20Cases%20-%20Working%20Paper%20Dec%202010.pdf

**Guidance 34**

***Guidelines for Successful Public Private Partnerships***

European Commission, Directorate General Regional Policy (March 2003)

EPEC comment: Section 2, part 3 (pages 50-55) contains a brief description of the main sources of risk in a PPP project and its financial implications. Section 5 (pages 82-89) provides a brief overview of PPP project design issues from the EC perspective.

http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

**Guidance 35**

***Guide for the Implementation of Public-Private Partnerships in Greece***

Special Secretariat for Public-Private Partnerships, Ministry of Economy and Finance (Athens, 2006)

EPEC comment: Pages 6-8 provide a summary of the minimum content of a PPP contract.

http://www.sdit.mnec.gr/export/sites/sdit/en/infopoint/implementation/ppp_guide_en_final.pdf

### Guidance 36

***An Introductory Guide to Public Private Partnerships (PPPs)***

Government of Hong Kong SAR, 2nd edition (March 2008)

EPEC comment: Annex F contains a 5-page outline of heads of terms for a generic PPP contract.

http://www.eu.gov.hk/english/psi/psi_guides/psi_guides_ppgpop/psi_guides_ppgpop.html#3

### Guidance 37

***National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide***

Infrastructure Australia (December, 2008)

EPEC comment: Annex B (pages 50-58 and 77-91) discusses risk allocation and gives an example of a generic PPP risk table.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

### Guidance 38

***Toll Road Traffic and Revenue Forecasts***

Robert Bain, Robert Bain Publisher (2009), ISBN-10: 0956152716

EPEC comment: Chapter 3 surveys empirical evidence on traffic risk and lists common sources of forecasting errors. It is written for a non-specialist audience.

### Guidance 39

***Toolkit for Public-Private Partnerships in Roads and Highways***

PPIAF-World Bank (Version March 2009)

EPEC comment: Module 2 contains information on payment mechanisms and implications for risk allocation.

http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/toolkit_files/index.html

### Guidance 40

***Traffic Risk Mitigation in Highway Concession Projects: the Experience of Chile***

J.M Vassallo, Journal of Transport Economics and Policy, Vol. 40 (3) (2006), pages 359-381.

EPEC comment: Describes pioneering Chilean experience with highway concessions.

### *Guidance 41

***Public-Private Partnerships: Principles of Policy and Finance***

E. R. Yescombe, (2007). Elsevier Publisher, ISBN: 978-0-7506-8054-7

EPEC comment: Chapter 13 presents a detailed discussion of payment structures in PPP contracts.

## Guidance details

## Guidance 42

***Interpretative Communication of the European Commission on Concessions under Community Law***

European Commission (2000/C 121/02)

EPEC comment: A concise description of EU policy on the procurement of concessions.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:121:0002:0013:EN:PDF

## Guidance 43

***The Use of Restricted Procedure to Procure PPP/PFIs in Selected European Countries***

Ernst & Young (August 2009)

EPEC comment: Gives capsule summaries of the common methods used in different countries. Concludes that, with the exception of Greece, the restricted procedure is not actively used for the procurement of PPPs in Europe.

http://www.ey.com/Publication/vwLUAssets/Infrastructure_Advisory_08_2009_-_Use_of_Restricted_Procedure_to_procure_PPP_PFIs_in_selected_European_countries/$FILE/EY_IA_08_2009_-_Restricted_Procedure.pdf

## Guidance 44

**European Commission: Directorate General for Internal Markets and Services - Public procurement website**

EPEC comment: A primary source for all EU procurement legislation and related explanatory notes, public consultations, communications and guidance.

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

## Guidance 45

***Communication on Public-Private Partnerships and Community Law on Public Procurement and Concessions***

European Commission Communication COM(2005) 569 final (November 2005)

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0569:FIN:EN:PDF

## Guidance 46

***Interpretative Communication of the European on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships***

http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/comm_2007_6661_en.pdf

**Guidance 47**
***Competitive Dialogue Procedure in the UK PFI Sector***
David Lee & al., Allen & Overy (Feb. 2007)
EPEC comment: Sets out the key procedural steps and issues involved in PFI competitive dialogue procedure in the UK.
http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=33566&prefLangID=410

***Guidance 48**
***Competitive Dialogue in 2008: OGC/HMT Joint Guidance on Using the Procedure***
UK Office of Government Commerce (2008)
EPEC comment: Detailed guidance on how to use the competitive dialogue procedure.
http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf

**Guidance 49**
***A Formula for Success: Procurement Effectiveness in Major Project Delivery***
UK Office of Government Commerce (March 2009)
EPEC comment: A concise 12-page booklet outlining a few basic principles for the effective procurement of complex projects.
http://www.ogc.gov.uk/documents/A_Formula_for_Success.pdf

**Guidance 50**
***Les Contrats de Partenariat. Principes et Méthodes***
Ministère de l'Économie, de l'Industrie et de l'Emploi (May 2005)
EPEC comment: Chapter 3 discusses the selection of the procurement option in the context of current French legislation.
http://www.ppp.bercy.gouv.fr/guide_contrat_partenariat.pdf

**Guidance 51**
***Le Guide Opérationnel des PPP***
François Bergère & al., Le Moniteur, Third Edition (2010) ISBN 978-2-281-12718-8
EPEC comment: Pages 169-185 cover procurement methods available for PPP procurement with a helpful box on how to properly conduct competitive dialogue (page 182).

***Guidance 52**
***European PPP Report 2009***
DLA Piper (with the contribution of EPEC)
EPEC comment: Some country descriptions in Section 2 of the report briefly mention the procurement methods followed.
Available upon request at www.dlapiper.com

## Guidance details

**Guidance 53**
***Explanatory note - Competitive Dialogue - Classic Directive***
European Commission.
http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf

**Guidance 54**
***Public-Private Partnerships (PPP) - A Decision Maker's Guide***
Michael Burnett, Institut Européen d'Administration Publique (2007) ISBN 978-92-9203-001-8
EPEC comment: Chapter 4 *The Legal Framework* contains an interesting discussion on the use of competitive dialogue.

**Guidance 55**
***National Public Private Partnership Guidelines*, *Volume 2: Practitioners' Guide***
Infrastructure Australia (December 2008)
EPEC comment: Part Two (Detailed Technical and Process Issues) discusses bid evaluation criteria from commercial, technical and quality of delivery points of view.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 56**
***A New Approach to Private Roads***
Eduardo Engel, Ronald Fischer and Alexander Galetovic, Regulation (Fall 2002), pages 18-22
EPEC comment: Describes the "Least-Present-Value-of-Revenue" criterion used to award concessions pioneered in Chile's toll road PPP programme.
http://www.cato.org/pubs/regulation/regv25n3/v25n3-6.pdf

**Guidance 57**
***Public Private Partnerships in Central and Eastern Europe: Structuring Concession Agreements***
Christopher Clement-Davies, Law in Transition 2007 (EBRD, London)
EPEC comment: Discusses the structuring of concessions agreements focusing on the principal issues that may determine success or failure.
http://www.ebrd.com/downloads/research/law/lit071.pdf

*__Guidance 58__
***Toolkit for Public-Private Partnerships in Roads and Highways***
PPIAF–World Bank (version March 2009)
EPEC comment: Module 4 (section 3) contains a detailed description of the most relevant contract clauses and other agreements, bonds, guarantees, specific and "boiler plate" provisions.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/4/4-3.html

**Guidance 59**

***Public-Private Partnerships: Principles of Policy and Finance***

E. R. Yescombe, Elsevier (2007), ISBN: 978-0-7506-8054-7

EPEC comment: Chapter 13 is devoted to a description and discussion of the payment mechanism.

**Guidance 60**

***Briefing Note 1: Payment Mechanisms in Operational PPP Projects***

Financial Partnerships Unit, Finance Directorate, Scottish Government (Nov. 2007)

EPEC comment: Discussion of key issues in designing a payment mechanism.
http://www.scotland.gov.uk/Resource/Doc/923/0054674.doc

**Guidance 61**

***Standardisation of PFI Contracts***

HM Treasury (UK), Version 4 (March 2007)

EPEC comment: Chapter 7 presents a thorough overview of the major principles and issues and gives some drafting suggestions.
http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm

**Guidance 62**

***Toolkit for Public-Private Partnerships in Roads and Highways***

World Bank and PPIAF (Version March 2009)

EPEC comment: Module 5 (pages 91-97) contains a section summarising the main steps involved in obtaining expressions of interest and in carrying out prequalification and shortlisting.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/5/5-8.html

**Guidance 63**

***National Public Private Partnership Guidelines*, *Volume 2: Practitioners' Guide***

Infrastructure Australia

EPEC comment: Pages 11-16 and 59-61 summarise the main steps involved in obtaining expressions of interest and in carrying out prequalification and shortlisting.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 64**

***Working with Government: Guidelines for Privately Financed Projects***

New South Wales Government (December 2006)

EPEC comment: Pages 27-30 summarise the main steps involved in obtaining expressions of interest and in carrying out prequalification and shortlisting.
http://www.treasury.nsw.gov.au/wwg/working_with_government_wwg_guidelines_for_privately_financed_projects

**Guidance 65**

***Practitioners Guide***

Partnerships Victoria (June 2001)

EPEC comment: Pages 29-33 summarise the main steps involved in obtaining expressions of interest and in carrying out prequalification and shortlisting.

http://www.partnerships.vic.gov.au/CA25708500035EB6/0/6223D96175BAEF08CA2570C0001966C3?OpenDocument

**Guidance 66**

***Toolkit for Public-Private Partnerships in Roads and Highways***

World Bank and PPIAF (Version March 2009)

EPEC comment: Module 5 (pages 98-102) provides a brief summary of the bidding process and the contents of bidding documents.

http://www.ppiaf.org/documents/toolkits/highwaystoolkit/5/5-8.html

**Guidance 67**

***Working with Government: Guidelines for Privately Financed Projects***

New South Wales Government (December 2006)

EPEC comment: Very brief summary in pages 30-32 of process and contents of Expressions of Interest.

http://www.treasury.nsw.gov.au/wwg/working_with_government_wwg_guidelines_for_privately_financed_projects

**Guidance 68**

***Scottish Capital Investment Manual, PPP Guide***

Scottish Government (April 2009)

EPEC comment: Section 2 (From OJEU to Contract Award, pages 41-48) outlines the contents of the Invitation to Participate in Dialogue.

http://www.scim.scot.nhs.uk/PDFs/Manuals/PPP/Part1/PPP_Guide1_Full.pdf

***Guidance 69**

***Guidelines for PPP: Request for Proposal***

Planning Commission, Government of India ($2^{nd}$ edition, July 2009)

EPEC comment: Useful as a guide to the contents of the invitation to tender; it includes a relatively complete model of "request for proposal". Publication details accessible at:

http://www.dkagencies.com/doc/from/1063/to/1123/bkId/DK735233217146168469173925371/details.html

### Guidance 70

***National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide***
Infrastructure Australia (December 2008)
EPEC comment: A discussion about the interaction with bidders is found at pages 23-24.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

### Guidance 71

***Public Private Partnership Handbook***
Asian Development Bank (2008)
EPEC comment: A short outline of the type of documentation to be placed in the data room is found on page 71.
http://www.adb.org/Documents/Handbooks/Public-Private-Partnership/default.asp

### Guidance 72

***Competitive Dialogue in 2008: OGC/HMT Joint Guidance on Using the Procedure***
UK Office of Government Commerce (2008)
EPEC comment: A discussion of the dialogue process from the UK perspective is contained in pages 22-29.
http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf

### Guidance 73

***Toolkit for Public-Private Partnerships in Roads and Highways***
World Bank and PPIAF (Version March 2009)
EPEC comment: Module 5, pages 102-106.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/5/5-8.html

### Guidance 74

***Scottish Capital Investment Manual, PPP Guide***
Scottish Government (April 2009)
EPEC comment: Section 2 (From OJEU to Contract Award), pages 28-35.
http://www.scim.scot.nhs.uk/PDFs/Manuals/PPP/Part1/PPP_Guide1_Full.pdf

### Guidance 75

***Procurement Guidelines for PPP Projects***
IPDF, Ministry of Finance, Pakistan, (September 2007)
EPEC comment: An indication of how the evaluation would be carried out by the project team in pages 23-26.
http://www.ipdf.gov.pk/Procurment_draft_guideline.pdf

**Guidance 76**
***Concessions for Infrastructure: A Guide to Their Design and Award***
Michael Kerf et al., World Bank (1998)
EPEC comment: A brief discussion of methods used to evaluate tenders in pages 75-79.
http://rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf

**Guidance 77**
***National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide***
Infrastructure Australia (December, 2008)
EPEC comment: Pages 61-64 discuss the bid evaluation process.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 78**
***Procurement Processes and Standardized Bidding Documents***
PPP in Infrastructure Resource Center, World Bank
EPEC comment: Links to standardized guidelines and bidding documents issued by various countries.
http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTINFRANDLAW/0,,contentMDK:21759171~menuPK:5117613~pagePK:4710368~piPK:64860384~theSitePK:4817374,00.html

**Guidance 79**
***Technical Note 4: How to appoint and work with a preferred bidder***
UK Treasury Taskforce, February 2007
http://www.hm-treasury.gov.uk/d/ACFBEE.pdf

**Guidance 80**
***Competitive Dialogue in 2008: OGC/HMT Joint Guidance on Using the Procedure***
UK Office of Government Commerce (2008)
EPEC comment: A box on page 27 gives guidance on what to do if there is only a single (or no) bidder.
http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf

**Guidance 81**
***Revision of the Public Procurement Remedies Directive***
European Commission (2007)
EPEC comment: Brief description of the new Remedies Directive and links to FAQs, public consultation documents, etc.
http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm

**Guidance 82**
***Practitioners Guide***
Partnerships Victoria (June 2001)
EPEC comment: Chapter 12 (pages 46-48) describes the steps taken in final negotiations of the PPP contract.
http://www.partnerships.vic.gov.au/CA25708500035EB6/0/6223D96175BAEF08CA2570C0001966C3?OpenDocument

**Guidance 83**
***Public-Private Partnerships: Principles of Policy and Finance***
E. R. Yescombe, Elsevier (2007), ISBN: 978-0-7506-8054-7
EPEC comment: Section 6.3.8 offers a concise discussion about the risks of post-bid negotiations (as opposed to clarifications and fine tuning) after the preferred bidder has been selected.

*__Guidance 84__
***Preferred Bidder Debt Funding Competitions***
HM Treasury (Aug. 2006)
http://www.hm-treasury.gov.uk/d/ppp_pbdfcguide100806.pdf

**Guidance 85**
***The financial crisis and the PPP market. Potential Remedial Actions***
European PPP Expertise Centre - EPEC (Abridged version, August, 2009)
EPEC comment: Abridged version of a study providing a framework for analysing some potential responses to the financial crisis (as it affects PPPs market across the EU) and identifying a list of issues and considerations for the attention of the public sector.
http://www.eib.org/epec/resources/epec-credit-crisis-paper-abridged.pdf

**Guidance 86**
**E. R. Yescombe, *Public-Private Partnerships: Principles of Policy and Finance***
Elsevier (2007), ISBN: 978-0-7506-8054-7
EPEC comment: Chapter 8 provides a good summary of what project finance is and why it is often used for PPPs.

*__Guidance 87__
***Project Finance: A Legal Guide***
Graham Vinter, Sweet and Maxwell Ltd. Third Edition (2006), ISBN: 0421-909501
EPEC comment: Chapter 7 covers how to negotiate a credit loan agreement. Chapter 8 discusses credit security and related issues.

## Guidance 88

***Public-Private Partnerships: Principles of Policy and Finance***
E. R. Yescombe, Elsevier (2007), ISBN: 978-0-7506-8054-7
EPEC comment: Section 12.4 (pages 211-18) provides a summary of the major issues and concerns for the Authority.

## Guidance 89

***Project Finance: A Legal Guide***
Graham Vinter, Sweet and Maxwell Ltd. Third Edition (2006), ISBN: 0421-909501
EPEC comment: Chapter 6 discusses certain insurance issues from a more legal viewpoint.

## Guidance 90

***Standardisation of PFI Contracts***
HM Treasury (UK), Version 4 (March 2007)
EPEC comment: Chapter 25 discusses the detailed treatment of a wide range of insurance issues, along with suggested and required (in the UK) contract clauses.
http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm

## Guidance 91

***The Law and Business of International Project Finance***
Scott L. Hoffman, Cambridge University Press, 3rd edition (2008), ISBN: 978-0-521-70878-4
EPEC comment: Chapter 24 (pages 328-335) describes 27 typical categories of conditions precedent to financial close for a generic project finance deal.

## Guidance 92

***Principles of Project Finance***
E. R. Yescombe, Academic Press (2002), ISBN: 12-0-770851-0
EPEC comment: Brief summary of what financial close entails, including a list of typical requirements (pages 312-314).

## Guidance 93

***Partnership Victoria Guidance Material: Contract Management Guide***
Infrastructure Australia (December 2008)
EPEC comment: Section 1 (pages 3-6) and section 4 (pages 23-25) identify the main steps to develop a contract management strategy.
http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 94**

***Main PPP Guidelines October 2006: Guidelines for the Provision of Infrastructure and Capital Investments through Public Private Partnerships: Procedures for the Assessment, Approval, Audit and Procurement of Projects***

Irish Government (July 2006)

EPEC comment: Discusses the establishment of a project management structure in the context of PPPs in Ireland (page 21).

http://ppp.gov.ie/key-documents/guidance/central-guidance

**Guidance 95**

***Partnership Victoria Guidance Material: Contract Management Guide***

Infrastructure Australia (December 2008)

EPEC comment: Section 7 (pages 7-12; pages 46-55), section 6 (pages 28-40), and section 13 (page 104-106) discuss the main issues regarding the contract administration manual (with an example), a description of the reporting requirements in contract monitoring and a description of the information management process required by on-going reviews.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 96**

***An Introductory Guide to Public Private Partnerships (PPPs)***

Government of Hong Kong SAR, 2nd edition (March 2008)

EPEC comment: Section 8 (pages 61-65) highlights the main issues arising from performance monitoring.

http://www.eu.gov.hk/english/psi/psi_guides/psi_guides_ppgpop/psi_guides_ppgpop.html#3

**Guidance 97**

***Guidelines for Successful Public Private Partnerships***

European Commission, Directorate General Regional Policy (March 2003)

EPEC comment: Section 6 (pages 90-92) provides a brief overview of the contract monitoring activity from the EC perspective, with some additional examples.

http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

**Guidance 98**

***Toolkit for Public-Private Partnerships in Roads and Highways***

PPIAF-World Bank (version March 2009)

EPEC comment: Module 5, section 5 (pages 122-127) identifies the relevant issues addressed by contract managers and contains an example of the indicators usually monitored in toll roads projects.

http://www.ppiaf.org/documents/toolkits/highwaystoolkit/4/4-3.html

## Guidance 99

***National Public Private Partnership Guidelines, Volume 2: Practitioners' Guide***

Infrastructure Australia (December 2008)

EPEC comment: Appendix H.2 (pages 124-128) identifies main project risks and their relationship with contract management.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

## Guidance 100

***An Introductory Guide to Public Private Partnerships (PPPs)***

Government of Hong Kong SAR, 2nd edition (March 2008)

EPEC comment: Section 8 (pages 68-71) discusses some of the implications of adjustments to contract terms.

http://www.eu.gov.hk/english/psi/psi_guides/psi_guides_ppgpop/psi_guides_ppgpop.html#3

## Guidance 101

***Partnership Victoria Guidance Material: Contract Management Guide,***

Infrastructure Australia (December 2008)

EPEC comment: Section 12 (pages 96-102) discusses contract change scenarios.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

## Guidance 102

***Standardisation of PFI Contracts***

HM Treasury UK (version 4, March 2007)

EPEC comment: Several chapters discuss in detail different kinds of contractual adjustment mechanisms designed to deal with supervening events, e.g. compensation, relief and force majeure events (chapter 5), change in service (chapter 13), change in law (chapter 14) and price variations (chapter 15).

http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm

## Guidance 103

***Sample Clauses***

PPP in Infrastructure Resource Center, World Bank

EPEC comment: Outlines a number of clauses dealing with areas that can give rise to confusion in infrastructure projects if not carefully considered (e.g. change in law, dispute resolution, force majeure, insurance clauses).

http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTINFRANDLAW/0,,contentMDK:21759221~menuPK:4704603~pagePK:4710368~piPK:64860384~theSitePK:4817374~isCURL:Y,00.html

**Guidance 104**

***Public-Private Partnerships: Principles of Policy and Finance***

E. R. Yescombe, Elsevier (2007), ISBN: 978-0-7506-8054-7

EPEC comment: Chapter 16 gives an in-depth summary of the major issues involved in the refinancing of PPP projects.

**Guidance 105**

***Guidance Note: Calculation of the Authority's Share of a Refinancing Gain***

UK Office of Government Commerce (2005)

EPEC comment: This document gives a detailed explanation of the basic method used in the UK.

http://www.hm-treasury.gov.uk/d/pfi_refinancingguidance21307.pdf

**Guidance 106**

***Standardisation of PFI Contracts***

HM Treasury (UK), Version 4 (March 2007)

EPEC comment: The model contract clause governing the sharing of refinancing gains can be found in section 34.8.

http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm

***Guidance 107**

**J. L Guasch, *Granting and Renegotiating Infrastructure Concessions-Doing It Right***

The World Bank Institute (2004), ISBN: 0-8213-3792-0

EPEC comment: Chapter 7 contains lessons for optimal concession design with a view to avoiding opportunistic renegotiations, based on experience from hundreds of renegotiations of infrastructure concessions in Latin America.

**Guidance 108**

***Main PPP Guidelines October 2006: Guidelines for the Provision of Infrastructure and Capital Investments through Public Private Partnerships: Procedures for the Assessment, Approval, Audit and Procurement of Projects***

Government of Ireland (July 2006)

EPEC comment: Pages 31-32 contain a discussion of the implications of changes to the contract associated with refinancing in the context of PPPs in Ireland.

http://ppp.gov.ie/key-documents/guidance/central-guidance/

**Guidance 109**

***Toolkit for Public-Private Partnerships in Roads and Highways***

PPIAF–Word Bank (version March 2009)

EPEC comment: Module 5, section 5 (pages 139-140) identifies some dispute resolution procedures.

http://www.ppiaf.org/documents/toolkits/highwaystoolkit/4/4-3.html

**Guidance 110**

***Standardisation of PFI Contracts,***

HM Treasury UK (version 4, March 2007)

EPEC comment: Section 5 (pages 233-235) discusses alternative dispute resolution procedures in the context of the UK.

http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm

**Guidance 111**

***Guidelines for Successful Public Private Partnerships***

European Commission, Directorate General Regional Policy (March 2003)

EPEC comment: Section 6 (pages 93-94) discusses relationship management issues.

http://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

**Guidance 112**

***Partnership Victoria Guidance Material: Contract Management Guide***

Infrastructure Australia (December 2008)

EPEC comment: Section 8 (pages 58-67) offers a discussion of the importance of maintaining good communication channels in the context of dispute resolution.

http://www.infrastructureaustralia.gov.au/public_private_partnership_policy_guidelines.aspx

**Guidance 113**

***Public-Private Partnerships: Principles of Policy and Finance***

E. R. Yescombe, Elsevier (2007). ISBN: 978-0-7506-8054-7

EPEC comment: Chapter 15 provides an extensive discussion of the major issues in determining the approach and calculating the termination payment for different types of termination.

**Guidance 114**

***Updated Standard Commercial Principles***

Partnerships Victoria, Guidance Material (April 2008)

EPEC comment: Section 29 presents a concise set of principles governing the termination payments to be made under a PPP contract.

http://www.partnerships.vic.gov.au/CA25708500035EB6/0/39517301B59F9F16CA25742700229DC3?OpenDocument

**Guidance 115**

***Standardisation of PFI Contracts***

HM Treasury, Version 4 (March 2007)

EPEC comment: Section 21 gives extensive and detailed drafting instructions for PPP contract provisions governing types of termination and termination payments, along with a discussion of the reasoning behind the various provisions.

http://www.hm-treasury.gov.uk/d/pfi_sopc4pu101_210307.pdf

**Guidance 116**
***Toolkit for Public-Private Partnerships in Roads and Highways,***
PPIAF-World Bank (version March 2009)
EPEC comment: Module 5, section 5 (pages 126-132) provides a discussion of the requirements of asset hand-over and the importance of ensuring the maintenance of assets' residual value.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/4/4-3.html

**Guidance 117**
***Benchmarking Period – Sample Wording***
PPP in Infrastructure Resource Center (PPPIRC)
EPEC comment: Considers the problem of inaccuracies in the assumptions for financial modelling and performance standards, and provides sample wording for an initial benchmarking period at the beginning of a contract.
http://siteresources.worldbank.org/INTINFANDLAW/Resources/benchmarkingperiod.pdf

**Guidance 118**
***Main PPP Guidelines October 2006: Guidelines for the Provision of Infrastructure and Capital Investments through Public Private Partnerships: Procedures for the Assessment, Approval, Audit and Procurement of Projects***
The Government of Ireland (July 2006)
EPEC comment: A discussion of the different purposes of ex-post evaluation is in pages 30-31.
http://ppp.gov.ie/key-documents/guidance/central-guidance/

***Guidance 119**
**Various reports**
UK National Audit Office (NAO)
EPEC comment: The NAO has played an important role in looking at the PFI/PPP experience in the UK. Their report on the Fazakerley PFI prison contract, for example, revealed the need to share the gains from refinancing PFI/PPP contracts to protect Value for Money for the taxpayer. Over the years NAO reports have audited many transport PPP projects drawing lessons that are relevant to PPP projects. Examples are the first four Design-Build-Finance-Operate highway projects in the UK, the Channel Tunnel rail link and the London Underground PPP contracts.
http://www.nao.org.uk/publications.aspx

**Guidance 120**
***Highway Public Private Partnerships, More Rigorous Up-Front Analysis Could Better Secure Potential Benefits and Protect Public Interest***
US Government Accounting Office (February 2008)
EPEC comment: The report is an example of a PPP review by the US Audit Public Body.
www.gao.gov/cgi-bin/getrpt?GAO-08-44

### Guidance 121
***Public-Private Partnerships (PPP) – A Decision Maker's Guide***
Michael Burnett, Institut Européen d'Administration Publique (2007), ISBN - 978-92-9203-001-8
EPEC comment: Chapter 6 (pages 150-165) develops a detailed operational approach to PPP audits.

### Guidance 122
***Resource Book on PPP Case Studies***
Directorate-General of Regional Policy, European Commission (June 2004)
EPEC comment: Example of PPP review in the EU using case studies.
http://ec.europa.eu/regional_policy/sources/docgener/guides/pppguide.htm

### Guidance 123
***Case Studies of Transportation Public-Private-Partnerships in the United States***
US Department of Transportation (July 2007)
EPEC comment: An example of PPP review in the transport sector using case studies in the US and other countries.
http://www.fhwa.dot.gov/ipd/pdfs/us_ppp_case_studies_final_report_7-7-07.pdf

### Guidance 124
***Public-Private Partnerships: Principles of Policy and Finance***
E. R. Yescombe Elsevier. (2007), ISBN: 978-0-7506-8054-7
EPEC comment: Chapter 8 provides a summary of what project finance is and why it is often used for PPPs.

### *Guidance 125
***Toolkit for Public-Private Partnerships in Roads and Highways***
World Bank - PPIAF (Version March 2009)
EPEC comment: Module 6 contains graphical and numerical financial models based on a highway PPP project which illustrate the trade offs inherent in alternative funding structures with model simulations.
http://www.ppiaf.org/documents/toolkits/highwaystoolkit/6/financial_models/index.html

### *Guidance 126
***Public-Private Partnerships: Principles of Policy and Finance***
E. R. Yescombe, Elsevier (2007), ISBN: 978-0-7506-8054-7
EPEC comment: Chapter 10 provides a comprehensive introduction on how bidders and their lenders structure the financing of a PPP.

*Guidance 127

***Capital Markets in PPP Financing – Where Were We and Where Are We Going?***

European PPP Expertise Centre - EPEC (February 2010)

EPEC comment: Abridged version of a study providing background information on the role of capital markets in PPP financing and setting out the reasons why the capital markets have now largely withdrawn from it, while suggesting possible solutions and identifying valuable roles EPEC might play.

http://www.eib.org/epec/resources/epec-capital-markets.pdf

Guidance 128

***Hybrid PPPs: Levering EU Funds and Private Capital***

PPIAF & PriceWaterhouseCoopers (January 2006)

EPEC comment: Analysis of a small sample of "hybrid" PPPs with mixed success regarding financial closure where EU grants are involved. Projects are located in Ireland, Portugal, Spain and Greece (Cohesion and Structural Funds), or in the accession countries (ISPA).

http://www.irfnet.ch/files-upload/knowledges/PWC_HybridPPPs_2006.pdf

*Guidance 129

***Review of Risk Mitigation Instruments for Infrastructure Financing and Recent Trends and Developments***

Odo Matsukawa, World Bank. Trends and Policy Options, No. 4 (2007)

http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/Trends%20Policy%20Options-4-Review%20of%20Risk%20Mitigation%20Instrument%20-%20TMatsukawa%20OHabeck.pdf

Guidance 130

***Issues Paper on facilitating additional TEN-T investment***

European Commission, European Investment Bank (October 2009)

EPEC comment: Identifies potential measures for consideration by EU and national policy makers that could deepen and diversify access to sources of finance as well as financial instruments capable of facilitating additional investment in the development of the TEN-T Infrastructure.

http://www.eib.org/projects/documents/issues-paper-on-facilitating-additional-ten-t-investment.htm?lang=-en

European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre • European PPP Expertise Centre


**For information:**

**EPEC Secretariat**

(+352) 43 79 - 85434
(+352) 43 79 - 65499
epec@eib.org

98-100, boulevard Konrad Adenauer
L-2950 Luxembourg
(+352) 43 79 - 1
(+352) 43 77 04
www.eib.org/epec