

# The APMG Public-Private Partnership (PPP) Certification Guide



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The APMG PPP Certification Guide, referred to here as the PPP Guide, is the Book of Knowledge (BoK) detailing all relevant aspects of creating and implementing efficient, sustainable public-private partnerships (PPPs). It is intended for use by PPP professionals, governments, advisors, investors, and others with an interest in PPPs. The PPP Guide is part of the family of CP3P credentials that, once obtained, allow individuals to use the title “Certified PPP Professional,” a designation created under the auspices of the APMG PPP Certification Program. The APMG PPP Certification Program, referred to here as the Certification Program, is a product of the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB), the Islamic Development Bank (IsDB), and the World Bank Group (WBG) part-funded by the Public-Private Infrastructure Advisory Facility (PPIAF).

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# Chapter 2: Establishing a PPP Framework

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# 1 Establish the PPP Framework

## Introduction and Purpose

A PPP framework is best understood as **the established procedures, rules and institutional responsibilities that determine how the government selects, implements and manages PPP projects**. By setting procedures and rules, good PPP practice can be established within the government. This has the effect of limiting and managing government risk and ensuring consistency. By defining institutional responsibilities, a PPP framework makes institutions accountable for their role in the PPP process. A good PPP framework lets the market know how PPP projects will be developed, and how bids will be assessed. This can lead to more competitive procurement and better value for the public.

PPPs can be implemented on a one-off basis without any specific PPP framework. However, PPPs are technically complex, involving numerous stakeholders, each with conflicting objectives. PPP frameworks are important in ensuring that the objectives of the public and private sector are aligned. They establish rules that avoid impropriety and promote the public interest in getting quality projects done efficiently.

This chapter explains how to create a new PPP framework or, where an existing framework is in place, what to look for to ensure that it is effective. The learning objectives are outlined in box 2.1.

### ***BOX 2.1: Learning Objectives***

After studying this chapter, the reader will understand the following: -

- The value of having a PPP framework;
- What a PPP framework should include;
- How to set the objectives and scope of a PPP framework;
- Ways to establish a PPP framework in different jurisdictions, taking account of existing legal and administrative traditions;
- The stages of a typical PPP process, and how the framework guides each stage;
- How roles and responsibilities for PPPs can be allocated effectively between various government agencies;
- Principles and techniques that facilitate responsible public financial management of PPPs; and
- Ways to ensure appropriate oversight and transparency of PPP programs.

## Summary of Contents

Section 1.1 summarizes the advantages of having a well-developed PPP framework. Section 1.2 then sets out the elements that typically comprise such a framework.

Every jurisdiction's PPP framework is unique. Its design needs to take into account what the government is trying to achieve and the jurisdiction's legal and administrative traditions. Sections 1.3 and 1.4 set out the need to identify the objectives and scope for the framework. Section 1.5 addresses how legal and administrative traditions will influence how the framework is constructed.

Every PPP needs to be developed through a number of steps, including identification of the project, structuring as a PPP, contracting, operation of the project, contract management, and hand-back. Section 1.6 summarizes a typical PPP process, procedures, and decision criteria that a good framework would typically require for each step in the process.

Section 1.7 then sets out how to allocate institutional responsibilities for developing and procuring PPPs. Section 1.8 deals with managing fiscal commitments in PPPs. Finally, section 1.9 describes the desirability of effective oversight of a PPP program and options to achieve this.

## 1.1 Why have a PPP Framework?

A good PPP framework aims to ensure that the right projects are selected as PPPs, and that they are developed, delivered and managed in a structured, transparent and efficient way. Equally, a good framework minimizes the risks that a PPP project will not deliver Value for Money.

PPPs involve multiple conflicting interests. If risks are not allocated appropriately, the public sector may incur costs that it cannot control. If the procurement process fails to consider market conditions, the tender process may not be competitive. If contingent liabilities are not monitored, there may be unexpected fiscal obligations incurred by the government. See box 2.2.

### ***BOX 2.2: Conflicting Objectives and Risks in PPPs***

In a PPP, key stakeholders will have conflicting objectives. For example, private parties seek to maximize profits while minimizing risk, whereas the government pursues the public interest. Within the government, sector agencies seek to maximize service delivery. This may conflict with ministries of finance that seek to prudently manage financial obligations and risks.

The best way to address this conflict is to define the objectives of the PPP program and each PPP project clearly and up front. This includes the relative priorities, so that conflicts can be identified and resolved early.

As highlighted in chapter 1.8.2 of the PPP Guide, there are a number of risk factors related to not having a framework. PPP frameworks address those risks and increase the likelihood that PPPs will succeed.

- **Increasing the capability of government agencies to deliver PPPs:** PPP projects may be developed by various agencies across the government. Each of these agencies may be an expert in its own sector – for example, in highway development, or water service provision. However, most agencies will not be experts in PPPs. If each agency has to learn how to do PPPs on its own, learning costs will be high, as will the risk of mistakes. Codifying standard practices in a framework reduces learning costs and the risk of mistakes. Codification and standardization makes it easier for skills developed on one project to be transferred to another project in another sector;
- **Providing a structured way of reconciling disparate objectives:** Delivering a PPP project typically requires co-operation between numerous government agencies and private firms, all with competing objectives. A PPP framework helps in managing expectations, training, and skills development. This not only helps to establish a common



objective between stakeholders, but also improves the longevity of the PPP program (in particular by establishing new mindsets);

- **Making sure that whole-of-government risk is limited:** Sector agencies developing PPPs will focus on delivering a project that will work well for the sector. However, they may be less alert to other risks which are more important at a whole-of-government level. These risks include government reputation and fiscal risks. A good framework will build in processes and responsibilities for identifying and mitigating such risks;
- **Generating market interest:** A key factor for a successful PPP is a competitive procurement process. Competition helps drive down price and promote innovation. A good PPP framework can be an effective way of communicating the quality of the PPP program to the market, as well as the government's commitment to potential investors. Thus, a PPP framework can make PPP projects more attractive by increasing competition. PPP frameworks can also reduce investors' perception of risk, making it more likely that projects can be privately financed. PPP projects delivered by governments with transparent PPP processes and effective oversight will be perceived as less risky; and
- **Facilitating probity and oversight of the PPP program:** As with any important government program, independent oversight and evaluation are desirable. Having clear processes, decision making criteria, and allocation of responsibilities makes such oversight more effective. Clarity about what officials should do makes it easier to assess if they did what they were supposed to do. Clarity about objectives makes it easier to assess if those objectives are being achieved. If things are going wrong, a clear and well documented framework makes it easier to learn lessons from the experience. Evaluators of the program can distinguish between whether the officials are following the framework and the framework needs to be improved, or whether the problem is that officials did not follow the framework. If the problem seems to be with the framework itself, having a well-documented framework can make it easy to see which particular parts of it need to be changed (see section 1.9 for more on oversight of PPPs).

Many PPP projects developed in the absence of a PPP framework have gone wrong. The Dabhol Plant in Maharashtra, described in box 2.3, is a case study in which the inexperience of an agency and the lack of a PPP framework contributed to the inappropriate delivery of a PPP project. There were a number of issues with this project: the PPP project was identified without a plan in place, the private party to deliver the project was selected in an uncompetitive process, and the contractual negotiations were largely driven by the private investor. Under an effective PPP framework, it is unlikely such a project would have proceeded. Without a PPP framework, officials are at risk of making poor decisions, such as not procuring a project competitively, or taking a project to market before it is properly developed.

**BOX 2.3: A PPP project without a Framework**

The Dabhol Plant in Maharashtra project ended unsuccessfully for both the government and the private promoter because decisions were unstructured and poorly governed, leading to an outcome that was not in the public interest.

Enron led the project, and the contractual terms included the creation of a corporate vehicle, the Dabhol Power Corporation (DPC). The DPC was to construct the power plant in two phases and sell power to the Maharashtra State Electricity Board (MSEB) under a 20 year take-or-pay contract. The contract was backed by both a state government guarantee and a counter-guarantee by the federal government.

In 2001, after the first phase was completed, the MSEB did not meet its financial obligations given the high energy purchase price under the Power Purchase Agreement (PPA). The DPC attempted to call in its guarantees, but the federal government refused to make such payment on the basis of alleged technical breaches. It was not until 2004 that settlements were made.

It is unlikely this project would have proceeded if the approach to identification, procurement, appraisal and negotiation were good practice, as shown in table 2.1.

Step	Dabhol	Better approach
Identification of a project	By a private party on its own initiative.	From an integrated sector plan that shows the most economic set of investments to achieve sector objectives.
Selection of a private party	By negotiation with a single proponent.	Through competitive processes to discover which firm is the best party by scoring against a set of defined and rational criteria.
Appraisal	Advice by the World Bank that the project was unaffordable was disregarded.	Projects that are not affordable will not proceed.
Contractual agreement	Negotiation based on a draft prepared by the private party.	Contract developed by the government based on an optimal allocation of risks between parties.

TABLE 2.1 – Dabhol Plant Framework Approach

Source: Paterson, C. (2006) *Investor-to-State Dispute Settlement in Infrastructure Projects*. OECD Working Papers on International Investment, 2006/02, OECD Publishing.

It is desirable to initially establish general principles and then provide the detail of the framework in parallel with the development and delivery of the first projects. While it might seem that the framework should be established first before undertaking projects, this is not generally the best approach. By developing the framework in isolation of real world projects, processes may become over standardized, which may create delays or lock-in unworkable procedures or approvals. Moreover, political and bureaucratic priorities tend to favor initiatives that are clearly linked to tangible results. A PPP framework advanced as part of delivering tangible projects may therefore be given higher priority than one that is not so linked.

In addition, by developing general principles first, then using projects to refine that process, the framework will be suited to meet the particular needs of the jurisdiction.<sup>1</sup> For example, in British Columbia, the PPP framework is nonspecific. As a result, it has been able to adopt a number of innovations, particularly in the area of financial structuring that might not have been possible under a more detailed framework. This flexibility has supported the large number of PPPs in Canada.

## 1.2 What is in a PPP Framework?

A PPP framework should guide governments and private partners through each step in developing a PPP, ensuring that projects are well structured and delivered in line with expectations. The PPP framework will achieve this by outlining procedures and decision rules for various institutions, and by ensuring effective public financial management and oversight.

A PPP framework should articulate its **objectives**. These make explicit what the government wants the PPP framework to achieve. They also provide a basis for subsequent evaluation of the framework. The objectives of the PPP framework are discussed in detail in section 1.3.

A good framework will also set out its **scope**, that is, the types of projects to which it applies. The framework may be most effective for certain kinds of projects within certain sectors. For example, it may not be sensible to have PPPs of a low value follow the same rigorous procedures as those that apply

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<sup>1</sup> Deloitte and Touche USA LLP have developed a PPP Market Maturity Curve that shows how jurisdictions generally work up to the full operation of the PPP Program, starting with a simple framework and a small number of projects. Refer to UNECE (2008) *Guidebook on Promoting good governance in PPPs* for more information.

to high value PPPs. The scope of the PPP framework is discussed in section 1.4.

The PPP framework will need to be developed taking into account the legislative and administrative contexts. The PPP framework will often be embodied in **PPP specific policy documents or legislation**. The legal and administrative instruments that can be used in PPP frameworks are outlined in chapter 1.9.

PPP frameworks typically define:

- **Procedures:** What things need to be done, by whom, in what order, to allow the right decision to be made and the right actions to be taken? For example, the Appraisal Phase could set out how a specified agency in government will gather and process information to assess whether the project would be best done as a PPP. The kinds of procedures that should be contained in a PPP framework are explored in section 1.6;
- **Decision criteria:** How will decisions be made at each step? Again, at the Appraisal Phase, one criterion should be “whether the public interest will be better served by doing this as a PPP or as a conventional public sector project”. The types of decision criteria that should be contained within the framework are also explored in section 1.6; and
- **Institutional responsibilities:** Which entities are responsible for which tasks and objectives? For example, a specialist PPP unit may be responsible for assessing whether a project is best done as a PPP or not; the cabinet may be responsible for making a decision as to whether a project should proceed as a PPP; the ministry of finance may have a responsibility to advise on fiscal commitments made to a PPP project. How the PPP framework should identify and assign responsibilities among institutions is set out in section 1.7.

The PPP framework should set also out how fiscal commitments are managed (section 1.8) as well as how proper oversight for the program is established (section 1.9).

### 1.3 Objectives of the PPP Framework

As introduced in chapter 1.9, governments should adopt a structured and programmatic approach if they want to rely significantly on the PPP model for new infrastructure development. This is a way to attract stronger and more consistent interest from the private sector. In this sense, a PPP program may be defined as the ways in which the government plans to use PPPs to achieve improved infrastructure service provision. This goes beyond the PPP pipeline to include plans to develop additional and, as yet, not identified

projects. It may include indications of priority sectors in which PPPs are expected to be used, and the relevant extent to which the government plans to use PPPs (as opposed to other service delivery mechanisms) in general or in any particular sector.

The PPP framework should aim to promote the effective, efficient and sustainable delivery of the PPP program in the jurisdiction. A PPP framework is not an end in itself but a means to an end. It would not make sense for a jurisdiction to develop an elaborate PPP framework if it only planned to do one PPP project<sup>2</sup>. Equally, a government that is doing PPPs to finance a rapid build out of urgently needed infrastructure may design a framework focused on speed and attracting capital. A government using PPPs to improve efficiency and accountability in an already well financed sector would probably develop a different framework.

As such, it is important that governments define PPP program objectives as a first step in developing the PPP framework. These objectives will give designers of the framework the direction needed to formulate appropriate processes, decision criteria, and institutional responsibilities.

The choice of objectives depends on the government's policies and priorities. They can include the following:-

- Enabling more investment in infrastructure by increasing project financing options;
- Achieving Value for Money in the provision of infrastructure and public services;
- Improving accountability in the provision of infrastructure and public services;
- Harnessing private sector innovation and efficiency;
- Ensuring that the long-term delivery and management of PPPs is sustainable, especially when stakeholders change over time (political actors, champions, representatives in ministries or PPP units); and
- Stimulating growth and development in the country.

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<sup>2</sup> The government would still want to follow good practice in doing the one PPP, but it would not need to codify general approaches and capacitate multiple agencies. Developing good practice for a single project is a lot easier than developing processes and rules that will work well for all projects, so investing in a framework is worthwhile only when it is expected that it will be applied to multiple projects.

Table 2.2 provides examples of clear statements of PPP program objectives drawn from the relevant country's PPP policy statement or law.

<b>TABLE 2.2: Examples PPP Policy Objectives</b>	
<b>Country</b>	<b>PPP Objectives</b>
Australia	Describes the aim of PPPs as being “to deliver improved services and better Value for Money, primarily through appropriate risk transfer, encouraging innovation, greater asset utilization and an integrated whole-of-life management, underpinned by private financing”. <sup>3</sup>
Bulgaria	The Public-Private Partnership Act (SG, No. 45 of 2012) has the following objectives. <ul style="list-style-type: none"> <li>• Ensure the development of high quality and accessible services of general interest by means of obtaining better Value for Money from invested public funds.</li> <li>• Create prerequisites for the promotion of private investments in the construction, maintenance, and management of physical and social infrastructure facilities, and the carrying out of activities of general interest.</li> <li>• Create guarantees for protection of public assets and for effective management of public funds upon the implementation of PPP. <ul style="list-style-type: none"> <li>▪ Ensure the principles of transparency, free and fair competition, non-discrimination, equality and proportionality.<sup>4</sup></li> </ul> </li> </ul>
India	The draft National PPP Policy sets several objectives for PPPs. <ul style="list-style-type: none"> <li>• Harnessing private sector efficiencies in asset creation, maintenance, and service delivery.</li> <li>• Providing focus on a lifecycle approach for development of a project, involving asset creation and maintenance over its lifecycle.</li> <li>• Creating opportunities to attract innovation and technological improvements.</li> <li>• Facilitating affordable and improved services to the users in a responsible and sustainable manner.<sup>5</sup></li> </ul>

<sup>3</sup> Government of Australia (2008) National PPP Guidelines-PPP Policy Framework, p3.

<sup>4</sup> Ministry of Finance of the Republic of Bulgaria (n.d.) *Public Private Partnership*. [Online] Available at <http://www.minfin.bg/en/page/750>

<sup>5</sup> Government of India (2011) *National Public Private Partnership Policy-Draft*, p8.

**TABLE 2.2: Examples PPP Policy Objectives**

Country	PPP Objectives
Indonesia	<p>The purpose of “co-operation of government and the private sector” (through PPPs) is set out as follows.</p> <ul style="list-style-type: none"> <li>• To fulfill sustainable funding requirements in the supply of infrastructure through mobilization of private sector funds .</li> <li>• To improve the quantity, quality, and efficiency of services through healthy competition.</li> <li>• To improve the quality of management and maintenance in the supply of infrastructure.</li> <li>• To encourage the use of the principle whereby users pay for services received, or in certain cases the paying ability of the users shall be taken into consideration.<sup>6</sup></li> </ul>
São Paulo (Brazil)	<p>It states that the objective of the PPP program is to “promote, coordinate, regulate, and audit the activities of the private sector agents who, as collaborators, participate in the implementation of public policies aimed at the development of the state and the collective wellbeing”.<sup>7</sup></p>
México	<p>It states that the objective of the PPP program is to increase social wellbeing, and investment levels in the country.<sup>8</sup></p>
United Kingdom	<p>The Private Finance Initiative (PFI) was introduced in 1992 as a means of harnessing the private sector’s management skills and commercial expertise, and to bring discipline to the delivery of public infrastructure. The overall aim of the policy was to achieve better Value for Money for the taxpayer by ensuring that infrastructure projects were delivered on time and to cost, and that assets were well maintained.<sup>9</sup></p>

The PPP framework should reduce the risk that PPPs are used for the wrong reasons. Some governments have used PPPs to reduce reported levels of government expenditure and borrowing, even when the long-term fiscal implications of the PPP projects were similar to those of a publically financed

<sup>6</sup> Government of Indonesia (2005) *Presidential Regulation No. 67 concerning Government Cooperation with Business Entities in the Supply of Infrastructure*, as amended by Government of Indonesia (2011) *Presidential Regulation No. 56, chapter 2, article 3*.

<sup>7</sup> Legislative Assembly of the State of São Paulo, Brazil (2004) *Law 11688 (“PPP Law”)*. São Paulo, Article 1.

<sup>8</sup> General Congress of the United States of Mexico, 2012. *Ley de Asociaciones Publico Privadas (PPP Law)*, Article 1.

<sup>9</sup> HM Treasury (2012) *A new approach to public private partnerships*. Crown, London, p 15

project. A good PPP framework should ensure that PPPs are used to achieve substantial benefits, and not to manipulate accounting results.

## **1.4 Scope of the PPP Framework**

The scope of the PPP framework indicates the types of projects for which the framework will apply. Scopes are generally defined by jurisdiction, sector, size, and contract type. It is good practice for designers of a framework to consider each of these dimensions, and to be explicit in the framework about its scope. These aspects are explored in the remainder of this section.

### **Jurisdiction**

The scope of any PPP framework will be limited by the jurisdiction of the government that promulgates it. It is natural to think of national governments that set PPP policies for their country, but what about different levels of government?

In federal systems, any PPP framework promulgated by the federal government can only extend to PPPs that fall within the government's competence as set out in the constitution. These competencies differ from country to country, but are often quite limited. For example, in the United States (US), PPP frameworks are developed by the states; the federal government is responsible for relatively little infrastructure. In India, while states can develop their own PPP frameworks, the Union Government, through the PPP cell in the Department of Economic Affairs, leads the development of the PPP framework. In Canada, PPP frameworks are developed at the provincial level (the Canadian Government also has its own PPP program, for other national projects). Box 2.5 in section 1.5.4 provides more detail on sub-national PPPs.

In non-federal systems, there may be sub-national governments at a second level of government with competence in certain infrastructure and services that develop PPP frameworks. For example, in Spain the central government retains the powers to promote "national interest infrastructures", while the regional governments (Comunidades Autónomas) have the competence to procure linear transport infrastructure (as long as the infrastructure is entirely within its territory). They also have the exclusive competence to procure social infrastructure (courts, schools and hospitals).

The extent to which national governments control the PPP projects and frameworks of local governments is an even more complex question – and one that in federal systems can vary from state to state. For example, in South Africa, the National Treasury must review and comment four times during the development of PPPs at the municipal level to ensure that government procedures are followed and contingent liabilities are controlled. Technically, the reviews are advisory only, but in fact serve as *de facto*



approvals, without which the development process cannot proceed.<sup>10</sup> In Canada, PPP Canada (a federal agency) has a funding mechanism that allows it to fund PPP projects at the provincial and municipal level. This funding comes with requirements related to how projects are structured and managed, which contributes to the track record of the Canadian market. This is especially helpful for jurisdictions which have only one or two potential PPP projects and so will not develop their own framework or practices.

### **Sector**

When governments intend to focus PPPs on just a few sectors, the framework may be designed with these sectors in mind. Further, the application may be explicitly limited to those sectors. South Africa created a PPP framework explicitly for highways (as well as a separate, more tailored framework for other PPPs). The Philippines created a special regime for privately-financed power plants.

Other PPP programs and their governing frameworks may cover multiple sectors, but still set limits. As an example, the framers of Singapore's PPP policy (2004) limited its scope to those sectors "in which other similar countries have had proven success with PPP", including sports facilities, incineration plants, water and sewage treatment works, major information technology (IT) infrastructure, education facilities, hospitals and polyclinics, expressways, and government office buildings.

### **Size**

Many governments define a minimum size (or value) for PPP projects implemented under the PPP framework. The relatively high transaction costs of implementing a PPP can make PPPs below a certain size unviable. A size limit may mean PPP type contracts cannot be used for smaller projects. For example, Singapore's PPP policy (2004) states that, initially, PPPs will be pursued only if they have an estimated capital value of over US\$50 million. Brazil's PPP law (Law 11079 2004) sets a minimum size of 20 million reals (US\$11.7 million equivalent) for individual projects.

In some jurisdictions, small projects are bundled as a way of economizing transaction costs. For example, the Pennsylvania Bridges Project bundles the rehabilitation of 558 bridges spread across several counties across the state into one large project. The concessionaire is required to complete construction by the end of 2017 (within three years of signing the contract)

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<sup>10</sup> South Africa National Treasury PPP Unit, 2007. *Municipal Service Delivery and PPP Guidelines*.

and will be responsible for the majority of design, financing, and maintenance risks over the 28 year term of the concession.

PPP size limits may change over time as the government gains a better understanding of the size of projects that are suited to a PPP. British Columbia, Canada, is instigating a policy in which projects that are worth over \$100 million will be screened as PPPs. Initially, the policy stipulated that projects over \$20 million were to be screened; this was raised to \$50 million and is now in the process of being raised to \$100 million. This was partially because experience shows that PPP projects under \$100 million are typically not viable, but also in response to pressure from the local construction industry that is uncompetitive in internationally procured PPPs.<sup>11</sup>

### **Contract Type**

The scope can also define specific aspects of the contracts that will be considered. Chapter 1 describes the range of contract types within the PPP family.<sup>12</sup> Many frameworks are explicitly limited to a particular subset of this range, while others attempt to allow and control PPPs of almost any type within a single framework. For example, India's draft National PPP Policy (2011) describes the types of contracts that are considered as PPPs, types of contract that will not be used (those involving private ownership of assets), and those that are not covered by the PPP policy (Engineering-Procurement-Construction (EPC) contracts, and divestiture of assets). Brazil's PPP law (Law 11079 2004) and Chile's Concessions Law (Law 20410, 2010) both define limits on the contract duration: in Brazil, it is a minimum of five years, and in Chile, it is a maximum of 50 years.

Typically, the legal traditions of the country will influence the type of contract for which the PPP framework will apply to. This is discussed in detail in section 1.5. In summary, the two main categories of contracts are:

- Government-pays contracts: The government agrees to pay the private party on the basis of the availability and, in some instances, the performance of the service over a period of time. For example, to ensure that school or medical facilities are provided free of cost to the user, the government may contract with private firms to provide the facilities and pay for them from the government budget. The scope of the UK's Private Finance Initiative (PFI) program has been predominantly 'government-pays' contracts, with minimal 'user-pays' elements; and

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<sup>11</sup> Refer to [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2008FIN0019-001677.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2008FIN0019-001677.htm)

<sup>12</sup> Refer to sections 0.2 and 0.3.

- ‘User-pays’ or concession contracts: These contracts are designed to allow the private sector to lease a government asset, to deliver public services, and to generate an income from supplying the service. The French PPP framework was originally framed around concession contracts.<sup>13</sup>

### Summary Examples of Scope Definitions

Table 2.2 Provides details on how various countries have defined the scope of their PPP frameworks and programs.

<b>Country</b>	<b>PPP Policy Scope</b>
Australia	<b>Project size:</b> Value for Money considerations mean PPPs will likely only be applicable for projects over US\$50 million. <sup>14</sup>
Brazil	<b>Contract types:</b> Only two types of contracts will be considered PPPs in Brazil: (i) sponsored concessions – returns for the private party come from user fees and government transfers:- and (ii) administrative concessions – all of the returns to the private party come from government transfers. Concessions not requiring government transfers are not considered PPPs in Brazil. The law also states that the concession must be at least five years long to be considered a PPP. <b>Project Size:</b> PPPs will only be used for project over 20 million Reals (US\$11.7 million equivalent). <sup>15</sup>
Chile	<b>Contract types:</b> The law specifies a maximum duration for concession contracts of 50 years. <b>Sector:</b> The law does not specify the sectors. However, it states that PPPs are to exploit public works and services, and the use of “national goods” are used to develop necessary services. <sup>16</sup>

<sup>13</sup> The scope for the PPP Framework in France has expanded. In 2004 the French government created a new framework for government-pays PPPs under the *contrat de partenariat* (partnership contract)

<sup>14</sup> Government of Australia (2008) *National PPP Guidelines-PPP Policy Framework*, section 3.1.3, p6.

<sup>15</sup> National Congress of Brazil (2004) *Law 11079 ("Federal PPP Law")*. Article 2, p4.

<sup>16</sup> National Congress of Chile (2010) *Law 20410 ("Concessions Law")*.

<b>TABLE 2.1: Example Definitions of PPP Framework Scope</b>	
<b>Country</b>	<b>PPP Policy Scope</b>
Colombia	<p><b>Contract types:</b> PPP contracts must always make the private investor responsible for operations and maintenance, and must be for less than 30 years (if the project is longer, it will require approval from the National Council on Economic and Social Policy).<sup>17</sup></p> <p><b>Project size:</b> Total investment in the project must be above 6,000 Salario Mínimo Mensual Legal Vigente (SMMLV) (Minimum Legal Monthly Wage), which is equivalent to \$2.1 million.<sup>18</sup></p>
India	<p><b>Contract types:</b> The policy lists preferred PPP contract types, as well as exclusions. The policy states that the government does not intend to use contracts involving private ownership of assets. It also clarifies that Engineering-Procurement-Construction (EPC) contracts and divestiture of assets, are not covered by the PPP policy.<sup>19</sup></p>
Mauritius	<p><b>Sectors:</b> In the early stage of the PPP program, the government plans to focus on certain key areas: transport, public utilities, solid and liquid waste management, health, education and vocational training, and information and communications technology (ICT).<sup>20</sup></p>
Mexico	<p><b>Contract types:</b> Defines PPPs as long-term contractual relationships between public and private entities, to provide services to the public sector or the general public, where the infrastructure is provided, to increase social wellbeing and investment levels in the country. Contracts must not exceed 40 years in duration (including extensions) – contracts that are longer than 40 years must be approved by law.<sup>21</sup></p>

<sup>17</sup> Congress of Colombia (2011) *Law 1508 ("PPP Law")*, Article 3 and 6.

<sup>18</sup> Salario 2015 = 644.336 equivalente a 350 dólares. Source: <http://www.salariominimo2015.com/>

<sup>19</sup> Government of India (2011) *National Public Private Partnership Policy-Draft*, p6. Note that this policy was under revision during the time of drafting this PPP Guide (July, 2015).

<sup>20</sup> Government of Mauritius, 2003. *Public Private Partnership Policy Statement*, Section 5, p4.

<sup>21</sup> General Congress of the United States of Mexico, 2012. *Ley de Asociaciones Publico Privadas (PPP Law)*.

**TABLE 2.1: Example Definitions of PPP Framework Scope**

<b>Country</b>	<b>PPP Policy Scope</b>
Puerto Rico	<b>Sector:</b> Defines ten eligible sectors: sanitary landfills, reservoirs and dams; electricity generation plants; transport systems; educational, health, security, correctional and rehabilitation facilities; affordable housing; sports; recreations; tourist, and cultural attractions; communication networks; high-tech, informatics and automation systems; and any other sector that has been identified as a priority through legislation. <sup>22</sup>
Singapore	<b>Sectors:</b> Limited to those in which there are successful PPP examples in other countries, including sports facilities, incineration plants, water and sewage treatment works, major IT infrastructure, education facilities, hospitals and polyclinics, expressways, and government office buildings <b>Project size:</b> PPPs will be used only for projects over US\$50 million. <sup>23</sup>

### Unified Frameworks

In countries with established PPP programs, PPP frameworks are often applied across all sectors and, in some cases, across multiple jurisdictions within a country (federal, state and local). An example of such a framework is Australia's National PPP policy framework; it applies to all significant public infrastructure (both economic and social infrastructure and their related services) procured by commonwealth, state and territory governments.

A unified framework can simplify things for agencies interested in developing a PPP as well as for prospective investors. Unified rules and processes result in greater efficiency for the private sector, and hence greater bidder interest. Investors often view governments as monolithic, thus expecting that governments will adopt consistent practices across sectors. Moreover, many PPP issues are the same regardless of the sector or jurisdiction, so a single set of well-designed rules may serve a governments well.

However, there are also disadvantages in trying to create unified frameworks across sectors and jurisdictions.

- **Difficult to develop and inflexible to change:** The greater the scope of the PPP framework, the more difficult and time consuming it will be to develop and change. The most challenging task in developing a

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<sup>22</sup> Commonwealth of Puerto Rico, 2009. *PPP Act No. 29*, Section 3.

<sup>23</sup> Government of Singapore, 2004. *Public-Private Partnership Handbook*, Section 1.4.2, p8.

framework is gaining endorsement from stakeholders. The wider the scope, the more likely there is to be conflicting interests. However, a PPP framework designed for a targeted problem is relatively easy to establish and can be easily adapted. It will limit the stakeholders involved and the legislative or policy frameworks that need to be addressed.

- For example, the first Philippines PPP framework was the Build-Operate Transfer (BOT) Law passed in 1990. However, it was soon apparent that the procurement processes under the first BOT laws were too slow and restrictive to allow the government to procure privately financed power generators (independent power projects - IPPs) as quickly as was needed. Between 1992 and 1993, the country suffered a power crisis, with brownouts lasting between 8 to 16 hours a day. In response, a new legal framework for the IPP program was created by the *Electric Power Crisis Act of 1993*. This framework enabled crisis mitigation and by 1994 there were no brownouts.<sup>24</sup> Then, when Manila faced a water crisis in 1994, a legal framework was created to facilitate water PPPs. The National Water Crisis Act (NWCA) was passed in 1995 to provide a legal basis for concession agreements.
- **Unable to address unique infrastructure challenges:** Specific laws that enable the development of PPPs in one sector or jurisdiction may not work in another. For example, in South Africa, in effect two PPP frameworks exist – one for highways and one for non-highways. The South Africa National Roads Authority developed a clear PPP framework in 1997.<sup>25</sup> A "non-highway" PPP framework was later developed in 1999 when the treasury became concerned that PPPs were increasingly used by other agencies as a means of off-balance sheet financing. The National Roads Authority was not brought under the new general framework, as the existing highway framework had already proven its effectiveness.

A number of 'parallel' PPP frameworks may exist within a single jurisdiction. If carefully designed, they may be effective in delivering PPP programs that target specific objectives. However, if there is any overlap or conflict with existing frameworks, laws, and/or policies, new 'parallel' PPP frameworks may be unclear. For example, in Romania, Law No. 178/2010 which provided the general PPP framework was never used because it overlapped with the

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<sup>24</sup> Dumol (2000) *The Manila Water Concession: A Key Government Official's Diary of the World's Largest Water Privatization*. World Bank

<sup>25</sup> Republic of South Africa National Treasury Department (n.d.) *About the PPP Unit*. [Online] Available at <http://www.ppp.gov.za/Pages/About.aspx>

existing concession framework regulated by the Government Emergency Ordinance no. 34/2006.<sup>26</sup>

As an alternative, an ‘umbrella’ policy can be developed, which then has sector specific versions or detail. For example, in the UK, ‘umbrella’ policies have been developed by HM Treasury, which are then applied by PPP units that operate in central government departments such as defense and health.

## **1.5 Choice of Legal and Administrative Instruments to Create PPP Framework**

To be effective, PPP frameworks need to be documented. They also have to have some enforcement mechanisms. Governments need to make the following decisions.

- How will the PPP framework be made binding on government officials?
- How will the PPP framework be communicated to all stakeholders? and
- What will give legal force to PPP agreements?

How frameworks are documented and given force varies widely between jurisdictions. In some cases, PPP frameworks are enacted as laws. In others, they are put in policy documents and manuals which the government commits to follow. Just as importantly, PPP frameworks do not stand alone: they build on, and incorporate, many pre-existing public sector management frameworks. These typically include public procurement and financial management frameworks.

Some historical context is provided below to understand the choices that different jurisdictions make regarding the laws or other documents governing PPPs. This is followed by a discussion of how governments embody their PPP frameworks in laws and administrative documents. A description follows as to how these frameworks inevitably incorporate and build on existing public sector management frameworks.

### **1.5.1 How Varying Legal Traditions Interact with Different PPP Types**

Countries vary widely in how they document and give force to PPP frameworks. Countries with “common law”<sup>27</sup> legal systems tend to rely on

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<sup>26</sup> Romanian Department for Foreign Investments and Public-Private Partnership. *The New Law on Public-Private Partnership*. [Online] Available at [http://dpiis.gov.ro/new\\_dpiis/en/public-private-partnersip/department-attributions/](http://dpiis.gov.ro/new_dpiis/en/public-private-partnersip/department-attributions/)

policy documents and administrative guidance materials. Countries with “civil law”<sup>28</sup> legal systems are more likely to enact the PPP framework in statute law, and spell it out in detailed rules and regulations with legal force.

The different legal traditions interact with different types of PPPs – see table 2.3. Civil law countries have used concession contracts and similar arrangements for the private provision of public services for over 200 years. In contrast, most common law countries do not have a tradition of concession contracts, instead using fully private (“investor-owned”) companies to provide infrastructure services, generally under government regulation.

**TABLE 2.2: Legal Traditions and PPP Types in Civil and Common Law Countries**

Legal Tradition PPP Types	Civil Law	Common Law
User-pays PPPs (Concessions and similar contracts)	Historically France, Spain, and other civil law jurisdictions	Later development of the framework
Government-pays PPPs (PFI-style contracts)	Later development of the framework	Historically UK and Australia

**Concession contracts have a long history in civil law countries**

In France and other civil law countries, concessions and related contracts have been used for more than 200 years. A concession for water supply in part of Paris was let in 1782 (then later revoked following the French Revolution).<sup>29</sup> The municipal concession for water supply became an important mode of water service provision from 1850 to 1910. While

<sup>27</sup> Common law is generally uncodified. This means that there is no comprehensive compilation of legal rules and statutes. Although common law does rely on some scattered statutes, which are legislative decisions, it is largely based on precedent, meaning the judicial decisions that have already been made in similar cases (University of California at Berkeley).

<sup>28</sup> Also referred as the civil code. Civil code or civil law is codified. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty. In a civil law system, the judge’s role is to establish the facts of the case and to apply the provisions of the applicable code. Much civil law originates from “Code Napoleon”. (University of California at Berkeley)

<sup>29</sup> McCarthy, S. and Perry, J. (1989) *BOT Contracts for Water Supply*. London: World Water.



municipally financed and operated systems became more common from 1910 to 1970, lease (or *affermage*<sup>30</sup>) contracts for operations of publicly financed systems became increasingly important from 1970.<sup>31</sup>

Belgium, Germany, Italy and Spain, all used concessions for municipal water supply from around 1885. In Istanbul, the French company **Generale des Eaux** (now **Veolia**) was granted a water supply concession in 1881. Concessions were also granted to operate railways, tramways, ports, gas, electricity, and waterworks.<sup>32</sup> The Suez Canal was developed by French interests under a concession granted in 1854 by the Turkish Viceroy of Egypt.<sup>33</sup>

The civil law tradition of concessions was also followed in Latin America. Private investment in infrastructure was generally not a policy priority from the 1950s to the 1970s. However, from the 1990s a number of Latin American countries enacted legal reforms to once again encourage private investment in infrastructure. Chile was a pioneer in this regard, passing a Concession Law in 1991, which, with various amendments, still provides the framework in use today.

#### **In common law jurisdictions, investor-owned utilities provided user-pays infrastructure services**

In contrast, in Britain and its former colonies, concessions were not generally used. Rather private companies raised capital and built infrastructure, which they then operated and charged people to use. The right to operate and manage the infrastructure did not need to be 'delegated' by the state (as was done in civil law countries). These private utilities and railway companies were generally granted licenses to operate, and they were regulated (meaning that in economic substance they were quite similar to concessions). However, the legal framework was different, and such operations were considered to be fully private, and not PPPs.

Investor ownership of infrastructure was curtailed in Britain after World War II. The Labor government nationalized electricity, gas, and inland transport (including railways, road haulage and canals). However, this tendency was reversed in the 1980s when the Conservative government, led by Margaret Thatcher, privatized state-owned enterprises in telecommunications, gas,

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<sup>30</sup> Refer to Section 0.4. for an introduction of terms used that may refer to a PPP transaction.

<sup>31</sup> Pezon, C. (2011) How the Compagnie Ge'ne'rale des Eaux survived the end of concession contracts in France 100 years ago. *Water Policy, Volume 13*, pp. 178-186.

<sup>32</sup> Eldem, E. (2005) Ottoman financial integration with Europe: foreign loans, the Ottoman Bank and the Ottoman public debt. *European Review*, 13(03), pp. 431-445.

<sup>33</sup> McCarthy, S. and Perry, J. (1989) *BOT Contracts for Water Supply*. London: World Water.

electricity, water, railways, buses, ports, and airports. These sales were termed “privatizations” not Public-Private Partnerships.<sup>34</sup>

In the United States, many of the early highways, canals, railways, transit systems, water supplies, and electricity utilities were financed and operated by private companies. Federal government involvement in financing infrastructure started to increase under the “New Deal” Administration of Franklin D Roosevelt from 1933. Following this, local and state governments mostly funded infrastructure with bonds sold by special purpose corporate entities that operated like private companies, but were in fact government-owned (known as public authorities, special districts, and so on.). Examples include the Port Authority of New York and New Jersey, and the Washington Metropolitan Area Transit Authority.<sup>35</sup> Interest in Public-Private Partnerships, both as a way to privatize existing infrastructure and to attract private finance for new infrastructure, started to increase in the 1990s. The State of Virginia was among the pioneers, passing a PPP law for transport assets in 1995 after a lengthy process. Prior to 1995 most infrastructure assets were financed through tax-exempt bonds.

#### **Common law countries then developed the “government-pays” PPP model**

In the early 1990s, with most of the user-pays infrastructure having been privatized, the Conservative government in Britain looked for ways to bring private finance and operations into the services which were publicly funded. Health and education were the most important of these. Prisons, national defense, and social housing were others. The model chosen was to have private companies construct and maintain the capital intensive facilities such as school and hospital buildings.<sup>36</sup> It was termed the “Private Finance Initiative” (PFI).

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<sup>34</sup> There were exceptions. Passenger rail services were loss making and needed government subsidies, so these were structured under contractual franchises that could properly be described as public-private partnerships. A similar approach was followed with the franchising of tram and train services in the State of Victoria, Australia in 1999.

<sup>35</sup> The Port Authority of New York and New Jersey. *History of the Port Authority* (n.d.). [Online] Available at <http://www.panynj.gov/about/history-port-authority.html>; Washington Metropolitan Area Transit Authority (2015) *About Metro*. [Online] Available at [http://www.wmata.com/about\\_metro/](http://www.wmata.com/about_metro/)

<sup>36</sup> In principle it would have been possible to pay private providers to provide the full educational and medical services. Privately-owned schools could have taught children at no cost to the families, to established national standards, and been paid by the government to do it. In fact, since 2000 in the health sector, the UK has adopted such an approach under the rubric Independent Sector Treatment Centers. These centers perform routine operations under contract to the publicly funded National Health Service. However, in the 1990s when the PFI program was established, fears of union and popular opposition to “privatization” of services in these ways meant the focus was on private provision of facilities, not the full service, and it is this focus that has been most widely imitated internationally.

This new kind of “government-pays” PPP was enthusiastically embraced by the new Labor administration led by Tony Blair, which came to power in 1997. By 2001, £100 billion (US\$ 150 billion equivalent) had been committed by the UK government and 400 PFI contracts were in force.<sup>37</sup> Similar initiatives were developed in Australia and Canada. The State of Victoria in Australia developed the “Partnerships Victoria” program, for example. Since 2002-03, Partnerships Victoria projects have accounted for approximately 10 per cent of annual public asset investment commitments.<sup>38</sup> Canada uses government-pays models of PPPs across a variety of sectors, including transportation, transit, social housing, corrections, health care facilities, and utility services such as water treatment plants.

### **Civil law countries develop frameworks for government-pays PPPs**

Following the lead provided by the UK and other Commonwealth<sup>39</sup> countries, many civil law countries have introduced legal frameworks to allow and control the use of “government-pays” PPPs. This has been done using different approaches: creating specific laws for government-pays PPPs (and retaining the existing laws and the traditional form of concession for user-pays PPPs), creating a new law that governs any kind of PPP (user-pays, government-pays, and hybrids), or expanding the application of (and sometimes amending) the existing procurement legislation.

In 2004, France introduced the *contrat de partenariat* (partnership contract) and set the basis for a central PPP unit (the *Mission d’appui aux partenariats public-privé* or “MAPPP”). The PPP laws were designed to fill the gap between using traditional works contracts (*marchés publics*) and “user-pay” concession arrangements (*délégations de service public*).<sup>40</sup>

Spain also created a framework for “government-pays” PPPs. Unlike France, this was not done through a stand-alone statute. Concession provisions in the government procurement law were used for government-pays PPPs when they began in the early 2000s. In 2011, the government procurement law was extended to allow a new type of contract designed for PFI-type projects. These contracts are named CPP (Collaboration Private-Public). The CPP

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<sup>37</sup> Hodge, G. A. & Greve, C. (2005) *The Challenge of Public-private Partnerships: Learning from International Experience*. Northampton: Edward Elgar Publishing.

<sup>38</sup> State Government of Victoria (2013) *About Partnerships Victoria*. [Online] Available at: <http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/About-Partnerships-Victoria>

<sup>39</sup> The Commonwealth is a voluntary association of 53 independent and equal sovereign states. Its origins go back to the British Empire when some countries were ruled directly or indirectly by Britain. Membership today is based on free and equal voluntary co-operation; no historical ties to the British Empire are required.

<sup>40</sup> European PPP Expertise Centre (2012) France: *PPP Units and Related Institutional Framework*.

allows more flexibility in risk allocation and other contract features. However, it has been used only for projects that are very technically complex. Most government-pays PPPs are still done under the provisions in the procurement law dealing with concession contracts.

In Latin America, Chile also extended its Concession Law to include government-pays PPPs.

Conversely, other Latin American countries — including Colombia, Mexico, and Peru<sup>41</sup> — have created specific statutes for PPPs (generally referred to as *Alianza Publico Privada (APP)* once they started to use government-pays PPP structures. These statutes cover both categories of PPPs.

Poland also passed a specific law to govern PPPs. It defines PPPs in a narrow way so as to include only projects where there are government payments (although there are doctrinal and legal controversies as to whether that law applies also to pure user-pays projects). Brazil introduced the PPP figure (*Parceiras Publico Privadas*) under a specific law to refer to government-pays PPPs, including any PPP with public payments.

Where legal requirements differ between government-pays PPPs and user-pays PPPs, the need arises to define which PPPs are which. This is not as easy as it sounds since many user-pays PPPs have some level of government payment. For example, the government may make a contribution to up-front capital costs, or it may pay a subsidy to keep charges to certain groups below cost. A common approach is to define a PPP as government-pays if more than half the funding comes from government.

### **1.5.2 Legal and Administrative Approaches to Establishing PPP Frameworks**

The diversity of legal traditions and PPP types shows there is no single best way to document and give force to a PPP framework. Rather, the right way to establish a PPP depends on the administrative and legal traditions in the country, and the government's objectives. This section looks at the various approaches that common law and civil law jurisdictions take to establish PPP frameworks in law and policy generally. It then considers how specific matters such as enforcement, limits on contracts, and adjudication are dealt with in different systems.

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<sup>41</sup> The first government-pays PPPs in Mexico were called *proyectos de prestación de servicios* or service provision projects (PPS) and had to rely on two regulations: the concession regulations to grant the title to operate economically the asset, and the leasing law (*Arrendamientos*), as the concession contract as established did not contemplate the service payments as a revenue or compensation form to the private partner. APP legislation (both at Federal government and state level) has solved this issue.

### **Common law countries often use policy documents, not laws, to establish PPP frameworks**

Common law countries do not generally need laws to establish PPP frameworks. In many common law countries, policy statements and administrative documents are the best approach. Australia and Britain – two of the world’s most experienced PPP jurisdictions – do not have PPP laws. Doing PPPs under a policy framework, rather than a law, also works in emerging market and developing economy (EMDE) countries such as Jamaica.

In Britain, the HM Treasury has the responsibility for setting PPP policy for England; this responsibility is devolved in Scotland, Wales and Northern Ireland. The treasury publishes key policy, guidance, and statistics on PPPs/PFIs and provides advice to departments wishing to undertake PPP/PFI projects. Each government department is responsible for the implementation of PPP policy, and they must take into consideration any legislation regarding procurement. The HM Treasury’s focus is on ensuring that public sector asset and service investment programs maintain momentum, provide Value for Money, sustain market confidence, and deliver improved operational performance of projects.<sup>42</sup>

In Australia, the National PPP Policy sets the direction for the PPP program. This policy, and detailed guidelines that complement the policy, have been agreed to and endorsed by the Council of Australian Governments (consisting of the Federal government and each state and territory government). Departures from the policy and guidelines are possible, but must be approved by the relevant PPP authority (usually treasury or finance).<sup>43</sup>

In addition, various laws that are not specific to PPPs complement the framework. For example, in New South Wales, procurement must comply with relevant provisions of the *Public Works and Procurement Act 1912* and the *Public Finance and Audit Act 1983*.

Like Australia, Jamaica’s legal system is inherited from England. Jamaica developed a PPP framework as it revised its divestment (privatization) policy. In Jamaica, the policy was adopted by the cabinet, and then published.<sup>44</sup> The Development Bank of Jamaica (DBJ) – a government-owned financial institution – was mandated with managing the implementation of the policy,

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<sup>42</sup> HM Treasury (2013) *Public Private Partnerships*. [Online] Available at: [http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.hm-treasury.gov.uk/infrastructure\\_public\\_private\\_partnerships.htm](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.hm-treasury.gov.uk/infrastructure_public_private_partnerships.htm)

<sup>43</sup> Infrastructure Australia (2008) *National Public Private Partnership Guidelines Overview*. Commonwealth of Australia.

<sup>44</sup> Development Bank of Jamaica Limited (2012) *Shaping New Partnerships For National Development*.

serving as a PPP unit in conjunction with its established role as a privatization agency. The processes to be followed are set out in a manual which guide the staff developing PPPs. Staff in the DBJ and the sectoral agencies follow the policy and the manual because of administrative requirement.

Other common law jurisdictions, including New Zealand and the Canadian provinces such as Alberta, British Columbia, and Ontario among others, also embody their PPP frameworks in policies, manuals, and other non-legally binding documents. In common law jurisdictions such as these, the government has the powers of a natural person or corporation. Thus, it does not need legislation to enable it to enter contracts of any sort, including Public-Private Partnership contracts.

Moreover, these jurisdictions often have Westminster system<sup>45</sup> styles of government. Under the Westminster system there is a closer alignment between the legislature and executive than there is in the presidential systems adopted by many civil law countries<sup>46</sup> (note that some common law countries, including the US and Nigeria, have presidential rather than Westminster systems of government). In a Westminster system the executive branch typically feels confident controlling its own actions, and it does not need laws to either empower or control it. The executive is accountable to the public through general elections, and this is what gives government policy statements their force. Governments expect to be judged on whether they have adopted good policies and whether they have followed the policies to which they have committed themselves.

In Westminster system jurisdictions, policies written about how the government will implement PPPs not only communicate the framework, but also become the instrument by which the framework is made binding on government officials. By constitutional convention or civil service law (depending on the jurisdiction), civil servants are required to follow government policies.

The PPP contracts themselves are almost always normal private law contracts, given their force through ordinary contract law. Adjudication and enforcement of the contracts are also a matter of private law, handled through the regular courts (or by arbitration, if the parties opt into arbitration through the contract).

### **Some common law jurisdictions pass PPP laws, for a variety of reasons**

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<sup>45</sup> In the Westminster system, the leader of the executive branch (the Prime Minister) is the leader of the party able to command a majority in the legislature. Cabinet members are appointed by the Prime Minister from among members of the legislature. Although this is often said to imply legislative control of the executive, in reality it tends to create a legislature that follows the lead of the executive.

<sup>46</sup> Koopmans, T. (2003) *Courts and Political Institutions*. Cambridge University Press, p180-182.

Some common law jurisdictions do create PPP laws. This is often to override existing laws that would otherwise restrict or delay PPP projects. Another reason for putting the framework into a statute is to provide greater force, stability, transparency, and accountability.

In the US, states that want to develop PPPs pass PPP laws. For example, in Virginia, the *Public-Private Transportation Act* (PPTA) of 1995, and the *Public-Private Education Facilities and Infrastructure Act* (PPEA) of 2002 provide the legislative framework that allows the state to qualify local governments and certain government entities to enter into agreements with private firms to construct, improve, maintain, and operate transportation, education and other facilities.<sup>47</sup> Similarly, in California, The Senate Bill Second Extraordinary Session 4 (SBX2 4) was passed in 2009 to allow regional transportation agencies and the Californian transportation agency (Caltrans) to enter into an unlimited number of Public-Private Partnerships.<sup>48</sup>

To an observer accustomed to the Australian and British models, the approach taken by US states seems a bit odd at first sight. The states' executives, after all, have the inherent power to enter contracts of all sorts. Therefore why do state legislatures need to pass laws empowering them to enter into PPP contracts? One important reason is to create exceptions to other state laws already on the books that *prevent* PPP contracts. In particular, public procurement laws in many states are prescriptive, and as a result they effectively outlaw PPPs.

Another reason is that the greater separation of powers in the American state governments (compared to the Westminster system) makes it more common for legislatures to control the exercise of executive power through laws. Moreover, since the US system allows the legislature and the executive to be controlled by different parties with opposing agendas, it is desirable for the stability of a PPP program if the legislature explicitly authorizes the executive to engage in PPPs.

Many EMDE countries with common law systems have passed specific PPP laws. Among them are India and Kenya. In India, individual states have passed legislation to promote private sector participation in infrastructure projects across sectors. States such as Andhra Pradesh, Gujarat and Punjab

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<sup>47</sup> Reese., B. (2008) *Virginia's Public-Private Partnership Program*. Commonwealth of Virginia: Office of the Secretary of Transportation, U.S.A.

<sup>48</sup> California Department of Transportation: Official Website. [Online] Available at: [http://www.dot.ca.gov/hq/innovfinance/public-private-partnerships/PPP\\_main.html](http://www.dot.ca.gov/hq/innovfinance/public-private-partnerships/PPP_main.html)

have developed specific laws and institutions for PPP projects.<sup>49</sup> Kenya has also recently instated a *Public Private Partnership (PPP) Act, 2013*.<sup>50</sup>

Although in most cases such PPP laws are not strictly necessary, there are several possible advantages to having a special PPP law: increased accountability and transparency of the program, greater policy stability (since laws take longer to change than policies), and a signal to investors and funding agencies which may perceive a law as a stronger commitment than a policy statement. Against these advantages must be weighed some disadvantages, including the longer time it takes to pass a law, the loss of flexibility in updating the framework in response to new situations and lessons learned, and the difficulty of coordination between the legislature and the executive (which may create inconsistencies or bottlenecks in the framework).

In common law jurisdictions that pass PPP laws, the legal instrument that governs the PPP is still a private law contract, adjudicated and enforced through the courts or contractual arbitration.

### **Civil law jurisdictions generally embody their PPP frameworks in laws**

Civil law countries tend to embody their PPP frameworks in laws. This follows from the civil law tradition that government agencies may only do what they are explicitly authorized to do, as well as the tradition of limiting government discretion with tightly defined rules. However, as we have seen, the types of law used differ from jurisdiction to jurisdiction. Spain and a number of other civil law countries empower and control PPPs through the public procurement law. Chile controls all PPPs through its concession law.

The Philippines (a predominantly civil law country) created a special BOT Law which then evolved into a PPP law. The BOT Law is prescriptive detailing how PPPs are to be undertaken, including the government bodies that can enter into contract with a private company for a PPP project, eligible projects, approval processes, how negotiations are to be undertaken, repayment schemes, and similar matters.<sup>51</sup>

France, despite being the well-spring of much modern civil law (through the Code Napoleon) developed a legal framework for concessions which is similar to common law in important ways. Government agencies, including local governments, were taken to have an inherent power to enter into contracts that delegate the provision of public services. The award and enforcement of

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<sup>49</sup> Energy and Infrastructure Unit and Finance and Private Sector Development Unit (2006) *India – Building Capacities for Public-Private Partnerships*. South Asia Region. The World Bank.

<sup>50</sup> Government of Kenya (n.d.). *Legal and Regulatory Framework*. [Online] Available at: <http://pppunit.go.ke/index.php/legal-regulatory-framework>

<sup>51</sup> Republic of the Philippines (2012) *The Philippine Amended BOT Law R.A.7718*.



these contracts was subject to a special administrative court (the *Conseil d'Etat*) which built a legal framework for such contracts from case by case decisions over more than 200 years<sup>52,53</sup> “Government-pays” PPP contracts on the other hand were recently authorized and controlled by a specific statute.<sup>54</sup>

As in France, concession contracts in Spain are not private law contracts, but are subject to special administrative law provisions. This is not the case in all civil law countries, however. In the Philippines, Power Purchase Agreements (PPAs) and the Manila Water Concessions are treated as private law contracts.

### **The PPP framework can be used to reduce the need for court action**

The PPP framework should be explicit about mechanisms that are used to reduce the need for court action. In many countries, it can take years for disputes to be resolved through the courts. Court processes can also be expensive. They rely on judges who are typically not familiar with the complex and technical matters involved in PPP contracts. For this reason, it is often a good idea to include alternative dispute resolution mechanisms in contracts. Mediation and arbitration provisions are often included (options to solve disputes and the role of “dispute resolution processes” are explained further in chapter 5.8). Enforcement mechanisms that reduce the need for court action, such as escrow accounts and performance bonds, can also be useful tools.

### **1.5.3 How PPP frameworks Build on and Incorporate Pre-Existing Government Frameworks**

Regardless of the tradition within which a PPP framework is constructed, it is not constructed in isolation. Rather, it builds on, incorporates, and modifies the pre-existing frameworks for contracting, procurement, and financial management in government. It makes sense to use as much of the existing frameworks as possible and to ensure that whatever is added that is specific to PPPs dovetails with existing systems. Among these pre-existing systems, the following are typically found:-

- **Administrative law:** In many civil law countries, government agencies are governed by administrative laws that control their functions and decision-making process;

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<sup>52</sup> Koopmans, T. (2003) *Courts and Political Institutions*. Cambridge University Press, pp. 135-147.

<sup>53</sup> Shugart, Chris. (1998) *Regulation-by-Contract and Municipal Services: The Problem of Contractual Incompleteness*. Ph.D. thesis, Harvard University.

<sup>54</sup> European PPP Expertise Centre (2012) France: *PPP Units and Related Institutional Framework*.

- **Procurement law:** The transaction process for a PPP must typically comply with public procurement law and regulations, unless PPPs are specifically exempt;
- **Public financial management law:** Institutional responsibilities, processes, and rules established in public financial management laws and regulations can contribute to the PPP framework. For example, this could include project approval requirements, fiscal limits, budgeting processes, and reporting requirements (see section 1.7.4 for PPP public financial management responsibilities);
- **Sector laws and regulatory frameworks:** PPPs are often implemented in sectors that are already governed by sector-level law and regulatory frameworks. These may constrain the government's ability to contract with the private sector, or provide rules for doing so. PPPs for regulated industries such as electricity distribution or water supply will need to consider tariffs and service regulation, the role of regulatory agencies, and how these interact with the terms of the PPP contract.<sup>55</sup>; and
- **Other rules affecting the operation of private firms:** These also apply to PPP companies, and they should be taken into consideration when defining PPP projects and processes:-
  - Environmental law and regulations;
  - Laws and regulations governing land acquisition and ownership;
  - Licensing requirements, particularly for international firms;
  - Tax rules;
  - Employment law;
  - Accounting standards;

It is good practice to review the legislative and administrative context to ensure that it is not incompatible with key elements of the objectives of the PPP framework. For example, in both Brazil and India there are taxation rules which discriminate against private sector subcontracting of operations and maintenance in PPPs (see box 2.4). Similarly, discrimination against foreign investors (for example, convertibility, confiscatory taxes on repatriation of

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<sup>55</sup> Groom, E., Halpern, J. and Erhardt, D. (2006) *Explanatory Notes on Key Topics in the Regulation of Water and Sanitation Services*. World Bank Group, Bank Netherlands Water Partnership, Public Private Infrastructure Advisory Facility.

equity) should be reviewed in order to attract the participation of international/global investors and developers.

**BOX 2.4: Distortionary Taxes of Operations and Maintenance (O&M) Contracts**

The tax treatment of the project company, commonly referred as a SPV (discussed in chapter 5.3.) established by project consortiums to deliver a PPP project, favors one type of contracting structure which may not be the most efficient. Such is the case in Brazil and India.

- **Brazil:** Under the turnover tax system in Brazil, the operating cost of the Curitiba Metro in the state of Parana increases by an estimated 6 percent per year in cases in which there is a separate O&M contractor through a PPP. This compares with the fiscally neutral position in which the O&M is carried out by the Concessionaire
- **India:** The subcontracting of O&M services attracts services tax (currently at 12.36 percent, and set to increase to 14 percent), while the same service of O&M if performed by the concessionaire directly does not attract the services tax. This means that subcontracting becomes a burden on the PPP project, affecting its financial viability. Instead of subcontracting to specialists to mitigate risk and improve the quality of project delivery, the concessionaire is instead incentivized to undertake the works.

Source: KEOLIS South Africa

Sector regulation may also constrain how the government may develop and manage PPP contracts. For example, concessions for utility services may be governed by public utility regulation. Essential infrastructure may be subject to open access rules under competition law.

**1.5.4 Framework for Sub-National PPPs**

Thus far the discussion has assumed that a government is creating a framework to guide its own actions. However, where there are multiple levels of government, and there may be instances when one level may wish to empower, influence, or control a lower level of government. In federal systems, national governments may wish to affect the legal framework for

states.<sup>56</sup> National and state governments may also wish to enable or control local government entering into PPPs.

In federal systems, constitutions normally specify which matters are the preserves of states, and which of the federal government. PPP frameworks at the state level therefore apply to PPPs that are within state competencies. Federal rules apply to PPP projects that are federal competencies and executed by the federal government. Federal governments are generally limited by the constitution as to how much they can intrude on how state governments discharge matters that are within the state's competence.

When it comes to local governments, it is generally the case that state or national governments can legislate the behavior of local governments within their jurisdictions. In Australia and Canada, the national PPP policy does not apply to local government. PPPs are rare at the local level due to the small size of projects developed at this level.<sup>57</sup> In France, local governments' procedures for entering into PPP contracts are governed by national laws and the jurisprudence of the *Conseil d'Etat*. In Spain, PPPs done by local authorities have to respect the national general procurement legislation, as well as a specific law regulating municipal service procurement.

When governments cannot, or do not want to, control the behavior of a lower level of government by law, they can often incentivize the desired behavior through various kinds of inter-governmental fiscal transfer. In the United States, the Transportation Infrastructure Finance and Innovation Act TIFIA provides state governments with incentives to do transport PPPs by offering concessional finance for the projects. This comes in the form of direct loans, loan guarantees, and standby lines of credit.<sup>58</sup> In Canada, PPP funding of provincial and municipal PPPs comes with requirements as to how projects are structured and managed.

However, such incentives are not always seen as efficient. In Britain, national government departments were previously given an allocation of "PFI credits" in their budgets. These could be paid to local authorities as grants to support local PPP projects, and they were useful in standardizing contracts and creating more consistent and higher quality provisions for risk allocation. For example, the Department of Transportation could use credits to support local government transportation projects, while the Department of Environment and Climate Change would support local government waste management projects. However, PFI credits were criticized as they gave additional

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<sup>56</sup> "State" is used as a generic term that includes provinces (for example, in Canada or China) or any other second tier of government within a federal system.

<sup>57</sup> The Department of Infrastructure and Regional Development (2013) *Local Government infrastructure*. [Online] Available at: [http://www.regional.gov.au/local/publications/reports/2002\\_2003/C4.aspx](http://www.regional.gov.au/local/publications/reports/2002_2003/C4.aspx)

<sup>58</sup> U.S. Department of Transportation Federal Highway Administration (n.d.) *TIFIA*. [Online] Available at: <http://www.fhwa.dot.gov/ipd/tifia/>

spending power to central departments wishing to deliver PFI projects through local authorities. In 2010 they were abolished, with the aim of making central government funding neutral between PFI and non-PFI forms of project delivery at the local level.<sup>59</sup>

Investors in many countries consider local governments to be less reliable counterparts than national governments, either because of lower credit ratings or limited availability of resources. This can create a role for national governments to provide financial or technical support to local governments. As a national government provides support to local governments, it may feel the need to control what local governments do.

Further examples of how national government can influence sub-national PPPs are outlined in box 2.5.

#### **BOX 2.5: The Role of Sub-National PPPs**

- **Australia:** Most large-scale development infrastructure in Australia is a state responsibility. The states of New South Wales and Victoria led the PPP agenda, developing state-based PPP frameworks in the early 2000s. These approaches were instrumental in the development of a national PPP policy framework. The national policy was prepared and endorsed by all state, territory, and commonwealth governments as an agreed framework for the delivery of all PPP projects. It recognized that a consistent national approach to PPP delivery across all governments was beneficial to all.<sup>60</sup>
- **Canada:** Most infrastructure development is the responsibility of the provincial governments, therefore PPP frameworks are developed at the provincial level, without federal oversight. The federal government can however influence the delivery of provincial PPP programs by financing local and municipal PPP projects through the P3 Canada Fund.<sup>61</sup>
- **India:** India's Union Government, through the PPP cell in the Department of Economic Affairs, leads the development of the PPP framework. The PPP cell is responsible for all PPP matters, including policy, schemes, programs, and capacity building. Apart from the Union Government, state governments also have the right to enact their own PPP legislation under the constitution. Several states including Andhra Pradesh, Gujarat, and

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<sup>59</sup> HM Treasury (2012) *A New Approach to Public-Private Partnerships*. Crown.

<sup>60</sup> *Infrastructure Australia (2008) National Public Private Partnership Guidelines Overview*. Commonwealth of Australia.

<sup>61</sup> PPP Canada (n.d.). *The P3 Canada Fund: How to Apply*. [Online] Available at <http://www.p3canada.ca/en/apply-for-funding/>

Karnataka have created their own PPP frameworks and have successfully developed their PPP projects.

- **US:** The national government is responsible for very little infrastructure. Even the national highway system ('the Interstate') is actually owned and operated by the states. Most of the funding comes from the federal gasoline tax, which is allocated to the states using a formula. For this reason, PPP frameworks are created by state governments. There is no federal level PPP framework in the US.<sup>62</sup>.

## 1.6 Defining the PPP Process

The framework should provide guidance on each stage of developing and implementing a PPP project from initially identifying candidate projects, to managing PPP contracts throughout the project lifecycle.

Governments need to ensure that only 'good' PPP projects are developed. These are PPPs that, amongst other things, are cost-benefit justified, provide better Value for Money than traditional public procurement, financially viable and fiscally responsible, and will attract market interest. Whether a project meets all these criteria cannot be fully assessed until the PPP is fully designed and structured. This creates a paradoxical situation the government does not want to incur the considerable costs of designing and appraising a project unless it knows the project meets the criteria. However it cannot tell if it meets the criteria until the project has been designed and appraised.

Successful PPP programs tackle this problem through progressively more rigorous screening at successive stages of project development. Once a project has been identified as potentially worthwhile, it is screened using simple indicators to see if it is likely to be a good PPP project. If it passes this first screen, it may be further developed or appraised through additional stages before being submitted to decision-makers for approval to take to tender.

This section introduces the key decision criteria, procedures, and institutional responsibilities that should be considered across the PPP process. This section focuses simply on the features of the process that need to be considered when putting together a PPP framework. Details on the specific tasks at each step are provided in the remaining chapters of this PPP Guide and an overview of the process has been provided in chapter 1.

It is important to note that these are simply guidelines. There are many subtleties in the PPP process and what works well in one culture or public

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<sup>62</sup> The Department of Defence runs a large PPP Program for services on buses.

administrative system may not work as well in others. Therefore, the local circumstances and how the public sector works be understood before adopting practices from elsewhere. See table 2.4

***TABLE 2.3: Summary of Decision Criteria, Procedures and Institutional Responsibilities across the PPP Process***

	<b>Key Decision Criteria</b>	<b>Procedures</b>
<b>Identify projects and screening</b>	<ul style="list-style-type: none"> <li>• Does the project fit in with a broader plan for the sector?</li> <li>• Is the project economically feasible and fiscally responsible?</li> <li>• Does the project meet PPP program objectives?</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare pre-feasibility or initial scoping study.</li> <li>• Seek confirmation that the project contributes to a broader sector plan.</li> <li>• Seek confirmation that the project is economically feasible and fiscally responsible.</li> <li>• Submit project documentation for approval.</li> </ul>
<b>Appraise the project</b>	<ul style="list-style-type: none"> <li>• Is the project economically, technically, environmentally, and legally feasible?</li> <li>• Is the project affordable?</li> <li>• Is the project suitable as a PPP? (Commercially feasible and bankable, and likely to deliver Value for Money as a PPP?)</li> <li>• Is there an appropriate procurement strategy?</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare a comprehensive appraisal which provides evidence of the project's economic, commercial, technical, environmental, and legal feasibility, as well as its affordability.</li> <li>• Conduct a Value for Money assessment of the suitability of the project as a PPP.</li> <li>• Prepare procurement strategy.</li> <li>• Submit project documentation for approval by relevant agencies.</li> </ul>
<b>Structure the procurement process and project contract</b>	<ul style="list-style-type: none"> <li>• Does tender documentation reflect the procurement strategy?</li> <li>• Have risks been identified and allocated to the most appropriate party?</li> <li>• Are management plans in place for risks allocated to the government?</li> <li>• Have contracts been drafted to reflect the risk matrix?</li> </ul>	<ul style="list-style-type: none"> <li>• Prepare tender documentation, including qualification criteria, evaluation criteria, and proposal requirements.</li> <li>• Prepare risk matrix and allocate risks.</li> <li>• Develop risk management plans.</li> <li>• Draft contracts.</li> <li>• Seek approval for contracts.</li> <li>• Refine and finalize procurement strategy.</li> <li>• Obtain approvals.</li> </ul>



**TABLE 2.3: Summary of Decision Criteria, Procedures and Institutional Responsibilities across the PPP Process**

	<b>Key Decision Criteria</b>	<b>Procedures</b>
<b>Tender award and</b>	<ul style="list-style-type: none"> <li>• Has the procurement process been competitive?</li> <li>○ Have qualified private partners been informed about the PPP?</li> <li>○ Have qualified private partners been given ample opportunity to express their interest and develop proposals?</li> <li>• Has the selection criteria ensured a Value for Money private partner is selected?</li> </ul>	<ul style="list-style-type: none"> <li>• Market the PPP.</li> <li>• Undertake qualification/prequalification.</li> <li>• Qualify (and, if necessary, shortlist) qualified firms.</li> <li>• Issue Request for Proposals (RFP) and receive bids.</li> <li>• Evaluate bids.</li> <li>• Select the proposal that offers the greatest Value for Money.</li> <li>• Sign the contract and reach financial close.</li> </ul>
<b>Manage the contract – construction, service delivery and hand back</b>	<ul style="list-style-type: none"> <li>• Are there issues with project delivery that need attention?</li> <li>• Should the contract be terminated or altered?</li> </ul>	<ul style="list-style-type: none"> <li>• Manage the contract, including the delivery of the service against the agreed performance metrics/key performance indicators (KPIs).</li> <li>• Communicate issues to central agencies if risk status escalates.</li> </ul>

Neither this chapter nor the remainder of the PPP Guide discuss in detail general project governance frameworks or project management techniques. Instead this PPP Guide simply draws attention to this where they are relevant. For example, stakeholder identification and management is paramount, as for any government project. Specific reminders of this are included in this chapter as a part of the overall process framework (such as in box 2.10). Similarly, chapter 3 includes both a description of matters to be considered when planning the management of the PPP process for a project (see chapter 3.11), and stakeholder management and communication matters (chapter 3.12).

### **1.6.1 Identification of Projects and Screening**

The process starts with project origination, typically following the same or using a similar process as for originating public sector investment projects, while screening projects for their potential suitability as PPPs. Screening at this stage is usually indicative, limited to the information available at relatively low cost.

#### **Decision criteria**

The framework should ensure that only projects that meet the following criteria proceed:-

- The project **fits in with a broader plan** for the sector. Sector plans will consider the needs of the sector and identify the best approaches to address problems. The projects that are most likely to demonstrate Value for Money are those that align with this sector plan;
- The project **meets PPP program objectives**. PPP program objectives should clearly specify the types of projects that should be considered for development. This allows projects unsuitable to be developed as a PPP to be easily screened out; and
- The project is **economically viable and fiscally responsible**. *Projects should not proceed unless they are economically sound*. PPPs should not be used unless either the revenues from the project are sufficient to cover its costs, or the government has adequate resources to pay for or subsidize the service. The government must also have the ability to absorb any direct or contingent liabilities. Those projects that may impose costs or incur liabilities that are beyond the financial capability of the government should be avoided.

#### **Procedures and institutional responsibility**

The PPP framework will need to identify the following:-

- **Who proposes PPP projects?** Can only government entities with investment programs submit a proposal? Or can private proponents also put forward proposals for PPP projects? The advantages and disadvantages of acting on PPP ideas proposed by private firms are discussed further in section 1.6.6;

- **Who approves further development of PPP projects?** Successful PPP projects typically require the support of the line agency,<sup>63</sup> that is, the department initiating the project, the finance ministry and other central authorities; and
- **What project documentation is needed for approval?** The framework will need to indicate the level of documentation required for relevant stakeholders to be able to approve the project's procedure.

Refer to chapters 3 and 4 for details on approvals regarding the preparatory stages of the PPP process.

### **1.6.2 Appraise the Project**

Candidate projects that survive the “screening” are then developed and **appraised**. Again, this is an iterative, or multi-stage, process. The appraisal report, often called a “Business Case”, is typically the basis for approval to proceed with the PPP transaction.

In describing the framework in this Body of Knowledge, project and procurement decisions are considered as part of the same process. A two-stage process, however, is not always practical, as outlined in BOX 2.6.

#### ***BOX 2.6: Investment Decision versus a PPP Decision***

It is desirable for governments to separate the investment decision from the procurement decision.

- **Investment decision:** Is it a good project? Is the government willing and able to provide the required funding?
- **Procurement decision:** What is the best way of buying the project? Does the PPP procurement offer better Value for Money than the best practicable public sector delivery model?

This two-stage process has a number of benefits, including:

- All potential projects (regardless of procurement method) compete for the same finite funds, thus ensuring that projects are appropriately prioritized in terms of strategic importance.

<sup>63</sup> “Line agencies” are responsible for policy development, planning, and the delivery of specific services. This is in contrast to “central agencies” which have whole-of-government policy responsibilities.

- The choice of procurement method is not prejudiced by the perceived budget impact, that is, the government dispels the common misconception that PPPs are an alternative to government borrowing.
- If Value for Money is not achieved through a PPP tender process, the investment can go ahead under a different procurement methodology.

However, in reality many governments do not develop comprehensive strategic planning processes in each sector, nor do they undertake systematic cost benefit and technical analysis of all projects. Therefore, a jurisdiction that does not routinely do such analysis can do one of two things.

- **Establish requirements for the systematic appraisal of all projects:** While this is ideal, it requires wide-scale government support. Therefore it may not be achievable without a mandate or within a short period of time.
- **Under the mandate of the PPP framework, establish a requirement for the appraisal of PPP projects:** In this way, all PPP projects would have to be appraised to determine whether or not they are good projects (before being implemented as PPPs). A disadvantage of this approach is that PPP projects are made subject to stricter scrutiny than non-PPP projects. The main advantage of this approach is that it ensures that only worthwhile projects are implemented under the PPP program. However, it does not subject the PPP program to the kind of complexity and delays likely in trying to introduce proper project appraisals for all public sector projects. A further advantage is that project appraisal techniques that are shown to work for PPP projects could later be extended to other, non-PPP, projects.

#### **Decision criteria**

At this stage, the framework should ensure that only those projects which are 'good projects' and 'suitable for PPPs' proceed to development. Good projects can be defined as follows.

- **Economically, technically, environmentally and legally feasible:** This feasibility assessment is not unique to PPPs. All government projects, regardless of the procurement method, should demonstrate that they are 'good' projects. Specialist skills are required to undertake such an appraisal, so when such skills are not available in-house, advisors should be appointed;
- **Affordable:** Affordability needs to be assessed from both the government and user perspectives. The government should only proceed when government liabilities, both direct and contingent, are within budgetary constraints. In addition, the services provided by the PPP need to be affordable to the users. False expectations of user willingness to pay may lead to underutilized infrastructure and financial trouble for the project;

Projects that are suitable for PPPs are those that can demonstrate the following.

- **Commercial viability (and bankability):** PPPs require the participation of the private sector. If the project can not provide financial returns for the level of risk incurred by the private sector, then it will not be commercially viable. This means the project must be able to generate returns to the investor and enable investors to raise debt from lenders, while also meeting the requirement of affordability to the public sector;
- **Value for Money:** PPPs are just one form of procurement. A PPP is considered Value for Money if the project is expected to deliver higher net economic benefits if done as a PPP.

There are many ways of assessing Value for Money. The traditional approach developed in the UK and used in many Australian jurisdictions as well is to determine whether a PPP will have a lower (risk-adjusted) cost to the government than a conventional procurement. The assumption in this approach is that the private company can be incentivized to manage risks better than the public sector, thereby improving overall economic outcomes.

Another approach is to see which delivery option will maximize benefits for a given budget. In New Zealand, the test is which approach is likely to deliver greater net economic benefits.

Value for Money is usually assessed in a qualitative way during an initial screening stage under what are sometimes called “PPP suitability tests” (see chapter 3.10), and it is then quantified if the project moves on to a full appraisal.

It is important to recognize the limitations of quantitative Value for Money analyses. They are necessarily based on assumptions and forecasts, so they will only *indicate* whether the chosen procurement method will deliver higher net economic benefits. Because of this, in Canada the outcomes of quantitative Value for Money analysis are treated as an estimate only and in some cases are used amongst other qualitative indicators to select a procurement option;

- The ability to be **ring-fenced**: The project needs to be sufficiently separated from other government systems to ensure that accountability can be provided and interface risks<sup>64</sup> are limited.;

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<sup>64</sup> The relationship with other contracts or activities of the government, or dependencies of the government, on the successful performance of the PPP contract.

- **Definable outputs:** Clear, specific, and measurable outputs are essential in a PPP, so that the contract can be monitored and enforced. Designing the contract around outputs also has the benefit of giving the private party the freedom to design more efficient and innovative ways of delivering a service. This compares to more traditional contracts in which designs and inputs are specified; and
- Sufficient information to be able to assess **costs and risks:** For the potential bidders to be willing to dedicate resources to developing a bid, they need to be able to calculate what the potential liability of the PPP might be. This is only possible if the risks of the project can be identified and then allocated to either party.

An appropriate procurement strategy should also be developed during this phase. A sound procurement strategy is needed to attract suitable private partners, and to make them compete to offer the government the best deal. The procurement strategy should engage potential bidders early in the process. In this way, the government can ensure the opportunity is one that suitable private firms will bid on. It will also allow their ideas to be incorporated in the contract design.

### **Procedures and institutional responsibility**

The framework should create a principled, predictable way of selecting PPP projects. To do this, the PPP framework will need to specify the following:-

- The required content of the **PPP appraisal:** This includes the studies that need to be done (for example, demand forecasts) and the questions that need to be answered to determine if a project is economically, financially, technically, environmentally, and legally feasible (the PPP appraisal is also called a business case or feasibility study); and
- Who approves the **PPP appraisal:** As outlined in the previous section, any PPP project will require the support of numerous stakeholders to be successful. The PPP framework will need to identify the approval process needed for proceeding to the next phase. Many jurisdictions require a decision by the cabinet in favor of proceeding. Others delegate the decision to a government agency, perhaps with the assent of one or more central agencies or a PPP unit.

An example of PPP appraisal criteria is presented in BOX 2.7. Refer to chapter 4 for details as to how to undertake the project appraisal stage.

### ***BOX 2.7: PPP Appraisal Criteria in Indonesia***

The Indonesia Infrastructure Guarantee Fund (IIGF) assesses PPPs using the following appraisal criteria.

- The project is viable, that is, it is technically, economically, and financially viable as well as environmentally and socially desirable.
- Project risks are identified, allocated properly with effective mitigation plans.
- The procurement process is sound as shown in the procurement plan.
- The procuring authority has the capacity to manage the contract and risks.
- IIGF approval, based on these criteria, is required for projects that need government guarantee in any way.

*Source: Indonesia Infrastructure Guarantee Fund (2012) Infrastructure Guarantee Provision Guidelines.*

### **1.6.3 Structure the Procurement Process and the Project Contract**

Before the PPP transaction can be implemented, the tender documents and the draft PPP contract need to be prepared. To prepare the tender documents, the evaluation criteria and proposal requirements must be developed. To prepare a contract, the outputs, responsibilities, and risk allocation need to be fully defined and expressed in appropriate legal language.

#### **Decision criteria**

The procurement process, the tender documents, and the contract need to achieve government objectives while minimizing expected costs. In addition, the contract must be one that the government is capable of managing. The contract must be attractive to potential private partners, and stakeholders must be convinced it is in the public interest. PPP frameworks should therefore be designed to ensure that the following:-

- All significant **risks can be identified and allocated** to the most appropriate party – the success of a PPP lies in how well risks have been allocated. If risks are not allocated appropriately, the project will cost more than necessary; and
- Appropriate **risk management plans** can be developed. For those risks allocated to the public sector, appropriate plans need to be in place that both minimize the likelihood of the risk occurring and the impact in case the risk does occur.

## Procedures and institutional responsibility

To ensure that developing the tender documents and contracts is as efficient as possible, the framework needs to indicate the following.

- **Approaches to risk allocation**, risk management plans and draft contracts. Some governments have standardized rules about risk allocation, others look at each project on a case-by-case basis. Drafting contracts requires the expertise of experienced PPP lawyers. Agencies without this experience in-house will need to secure it by using outside counsel;

For example, when the Canadian British Columbia PPP market was in its infancy, it brought in lawyers and technical advisors from Australia and UK, jurisdictions with established PPP framework. . They not only helped to develop the PPP contracts, but also built the capacity of the Canadian public sector and private sector advisors who have since become in-country PPP experts.

- Guidelines for **procurement**: The PPP framework should clearly indicate to line agencies and the private sector what the standard PPP procurement process will be. This will signal to prospective partners how they can be involved. Clear procurement guidelines will also reduce the likelihood of disputes about the award decision. “Model” and “Standard” contracts can ensure consistency in the design of PPP contracts, while sending clear messages to the market. However, they also have disadvantages since they may make it harder to tailor contracts to the needs and objectives of each case (see BOX 2.8).

### ***BOX 2.8: Model and/or Precedent Contracts***

A model contract is one that embodies good practice and is available for agencies to use. In contrast, a standard contract is one that public agencies are required to use (or at least required to document and justify any deviations from it). Also, standard contracts may not be a full set of all provisions in the contract, but rather a set of recommendations (including alternative approaches for some issues) in the form of guidelines.

Done well, model or standard contracts have a number of advantages as listed below.

- Reducing risk to the government because the chance of the contract



being wrong (for example, poorly drafted or with an inappropriate risk allocation) is reduced;

- Saving time and money for the bidders by reducing the time required to understand each project contract;
- Enabling the project team to focus their work on developing and tailoring existing processes and legal documentation, rather than drafting contracts from scratch; and
- Reducing the time required for case-by-case negotiations as both parties have an expectation of what is acceptable.

Standard contracts in particular have risks. It is hard to write one contract that will apply to a wide range of different deals. Therefore, requirements to use standard contracts can actually reduce the quality of contracts below what they would be if specially developed by experienced advisors for each case.

Each jurisdiction will have to strike the right balance between standardization and customization. If most of the projects will be fairly similar (for example, all government-pays contracts for social infrastructure) then a single standard contract may make sense. If there are various categories of projects envisaged, standard contracts for each category may be warranted.

If a wide range of heterogeneous deals are expected, it may be that one or two model contracts, coupled with some standard for contract drafting, would be best. Standards for contract drafting could include preferred risks allocations, a list of topics that should be addressed in all contracts, and sample provisions for some topics that are likely to be similar across multiple contract types (such as extraordinary adjustments, force majeure, dispute resolution, and termination provisions).

Some international institutions such as the World Bank or United Nations (the United Nations Economic Commission for Europe – UNECE) are also working to provide precedents for materials and recommendations (for example, see PPP Infrastructure Resource Center <http://ppp.worldbank.org/public-private-partnership>) or standard provisions (such as the PPP standards under development by the UNECE<sup>65</sup>).

- How to **gain approval** for tender: As with the previous two phases, the PPP framework will need to identify the approval process for proceeding to the next phase.

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<sup>65</sup> According to the UNECE, “PPP models and procedures can contribute to achieving the Sustainable Development Goals across a wide spectrum of different sectors like water and sanitation, health and renewable energy”. With this aim, the UNECE, through its International PPP Center of Excellence, is developing a number of international PPP sets of standards (<http://www.unece.org/ceci/ppp.html>). To learn more about the SDGs, see <http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>.

Refer to chapter 5 for key elements of PPP contract structuring and procurement.

#### **1.6.4 Tender and Award**

A well designed and implemented procurement is central to achieving Value for Money from the PPP. Procurement processes can include marketing the PPP, checking the qualifications of bidders, inviting and evaluating proposals, interacting with bidders during the process, selecting the preferred bidder, and concluding the contract. Stakeholder engagement is essential to this and all other stages, as outlined in box 2.9.

##### **BOX 2.9: Engagement and Communication with Stakeholders**

Without giving due consideration to stakeholders and their ability to influence the project, the viability of a PPP project may be compromised.

- If the contract is designed in a way that is not acceptable to the private sector and its lenders, the private sector may not participate in the procurement process;
- In absence of limited and continued public support, a project may be cancelled by the next elected government. For example, in 2015 a proposed toll road in Melbourne, Australia was cancelled when a new state government was elected, costing the government \$250 million in fees for planning, preliminary works and other fees;<sup>66</sup> and
- If there are public demonstrations, labor union action, or public boycotts, projects may suffer from delayed implementation or reduced profitability.

In order to reduce the likelihood of such risks occurring, the PPP framework can include a policy on stakeholder engagement. This should address the following concepts and principles.

- **Stakeholder Identification and Analysis:** How to determine who PPP project stakeholders are, and their key groupings and sub-groupings;
- **Information Disclosure:** How information should be made accessible to interested and affected parties in a manner that is understandable;
- **Stakeholder Consultation:** How a two-way process of dialogue between the project and its stakeholders should be undertaken in order to initiate

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<sup>66</sup> *East West Link: Taxpayers hit with \$339 million bill as Government strikes deal to scrap East West Link* (15 April, 2015). ABC News. Accessed online July 2015 at <http://www.abc.net.au/news/2015-04-15/victorian-government-to-pay-339-million-east-west-link-contracts/6393536>

and sustain constructive external relationships over time;

- **Negotiation and Partnerships:** How the government will reach agreement on a specific issue or set of issues;
- **Grievance Management:** How to respond when grievances surface. For projects with environmental and social impacts, grievances will not be avoidable, but how they are managed can have significant implications on the project's performance;
- **Stakeholder Involvement in Project Monitoring:** How and when to engage project affected stakeholders in monitoring the implementation of mitigation measures or other environmental and social programs;
- **Reporting to Stakeholders:** How to report on the stakeholder suggestions that have been taken on board, what risk or impact mitigation measures will be put in place to address their concerns, and how project impacts are being monitored; and
- **Management Functions:** How stakeholder engagement can become systematic and integrated into the PPP process, including how to identify critical points in the life of the PPP process where stakeholder engagement will be needed and who will deliver these actions.

*Source: International Finance Corporation (2007) Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets.*

At the end of the transaction, after bids are received and the contract agreed, the government will finally know the cost of the PPP project and other terms. At this point it may be checked once more to ensure it still meets the PPP criteria. Cancelling a project, however, at the end of procurement is undesirable and can damage the market reputation of the jurisdiction. There are significant costs involved in preparing a bid, so unless the market has confidence that the project will proceed, the private sector will be unlikely to participate. To make sure that projects are not cancelled at the end of the procurement process, the PPP framework should set out the circumstances under which a project will not proceed. For example, in some jurisdictions (such as Canada's British Columbia), "affordability ceilings" are revealed to ensure the market knows the maximum that the public sector is willing to pay.

### Decision criteria

To test if the procurement was appropriate, the following criteria are helpful.

- Was the procurement **competitive**? For example, have most qualified private partners heard about the opportunity? The competition will only be as good as those competing. Have qualified private partners been given ample opportunity to express their interest and develop

proposals? If timelines are too short, or processes too onerous, private partners will avoid becoming involved; and

- Has the process been **transparent and conducted with integrity and fairness**? The way that the award process is administered should be clearly communicated and responsibilities clearly allocated. The criteria for award should be transparent, with a well-defined objective, qualification criteria, technical specifications, and bidding requirements. The tender process should ensure that all bidders are treated fairly.

### **Procedures and institutional responsibility**

The framework should highlight the following procedures and institutional responsibilities.

- **PPP marketing**, evaluation of **qualifications** (and, if there is **short listing** of qualified consortia, the short-listing process), and **applying the evaluation criteria to select the proposal** that offers the best Value for Money. The framework should not be overly prescriptive with these tasks. Rather, it should provide guidance on how to ensure the process is smoothly delivered and that common pitfalls are avoided. The framework states who evaluates, who makes the selection decision, and who approves the contract;
- Reaching **commercial close**. The framework should give guidance as to the extent of negotiations that will occur to reach commercial close. For example, in British Columbia and most Canadian jurisdictions, the final proposal submitted by the competing teams is based on a final version of the project agreement. Beyond this point, no changes to the key commercial terms of the agreement are permitted; and
- Reaching **financial close**. After the contract has been agreed, the financiers (in particular debt providers) need to agree to provide the funding. Often the financiers of the project company want to change some of the conditions that were agreed at commercial close. The framework should address this risk, containing processes to reduce delays and contractual changes in getting to financial close. It should also make it clear who is responsible (on the government side) for this process, and what approvals are needed if it seems necessary to agree to changes to the contract in order to reach financial close.

Refer to chapter 6 for details on how to tender and award a PPP contract.

### **1.6.5 Manage the Contract – Construction Phase, Service Delivery and Hand-Back**

Finally, having executed the contract, the PPP enters the final and longest “stage” – managing the contract throughout its operational phase. The challenge is to ensure the PPP provides Value for Money throughout the contract, not just at the Construction Phase. This typically requires ongoing management of the PPP.

#### **Decision criteria**

The PPP framework should ensure that the project is managed in such a way that if there are any issues with the project, they are communicated by the concessionaire to the implementing agency, and, if required, to relevant central government agencies. A strong operations team and governance mechanisms for reviewing performance and escalating issues (such as contract management frameworks, monitoring requirements, and risk management processes) will better equip the government to manage the PPP and make hard decisions, such as contract renegotiation or termination if needed. Governance mechanisms can also help the government agency to be a good working partner which private parties can have confidence.

A robust PPP framework and process should help to ensure that PPP contract agreements are designed to withstand unexpected events after contract execution, without a need for contract renegotiation. Sometimes, however, renegotiation rather than termination or abandonment may be preferable to preserve some of the benefits of the PPP. In these cases, the renegotiation process needs to be carefully managed by the government, with proper resources and a proper governance structure. The objective of renegotiation should be to secure an outcome that meets the objectives of the public sector better than would adherence to the original contract terms.

Contracts are sometimes renegotiated in order to prevent operators walking away. When a project is underway, it may become clear that the original terms and risk allocation are not always fully appropriate. When risk allocation can be adjusted while still achieving a net benefit when compared to the alternative of cancellation, renegotiation should be considered. Advisors may need to be re-engaged at this stage (an example of such a renegotiation is in Victoria, Australia, described in box 2.10).

#### ***BOX 2.10: Renegotiation of a Public Transport PPP in Victoria, Australia***

In 1999, the state government of Victoria awarded five franchises for the operation of trams and commuter rail in Melbourne, and regional trains in the state of Victoria. These were user-pays operation and maintenance

contracts coupled with an infrastructure lease and viability gap subsidy payments. The financial viability of the bids relied on significant growth in patronage and reduction in costs.

However, the growth and cost reductions were not fully realized. As a result, the operators started to lose money. The emerging problems were evident from regular reports filed with the government. The government did not take action on receiving the reports. It was only when the operators threatened to walk away that the government responded to the problem.

The total equity invested by the contractor was low relative to the expected losses, so the operators preferred to abandon the franchises, rather than endure the losses involved in trying to improve them. The government was faced with the possibility of having to take operations back into the public sector, which it did not want to do.

The government decided to renegotiate the contracts with the existing operators to enable them to continue to operate in the same way. The government originally expected total savings of A\$1.8 billion (US \$ 1.2 billion equivalent) over the life of the contract. While renegotiating the contract would increase the cost of the project, the overall net public benefit of the project was still positive.

*Source: Ehrhardt and Irwin (2004) Avoiding Customer and Taxpayer Bailouts in Private Infrastructure Projects: Policy towards Leverage, Risk Allocation, and Bankruptcy World Bank Policy Research Working Paper 3274, April 2004.*

## **Procedures and Institutional Responsibility**

PPP contracts are typically managed by the relevant line agency. Central agencies will also need to be informed of emerging issues and risks. The PPP framework should set out how the line agency and relevant central agencies should communicate.

The framework will also need to specify how contracts should be completed or terminated. Refer to chapters 7 and 8 for details on managing the contract.

### **1.6.6 Privately-Initiated Projects**

As an alternative approach to originating and developing PPP project ideas, some governments accept **unsolicited or privately-initiated PPP projects**. By welcoming “privately-initiated” projects, governments can harness information and ideas that private firms have about how to provide services people need. At the same time, allowing firms to promote their own project ideas is tricky. If the idea is then put out to competitive tender, firms may feel there is no point in volunteering good ideas since they cannot benefit from doing so. On the other hand, not putting the idea out to competitive tender could allow a firm to charge more than the cost for a service, leading to allegations of favoritism. The challenge for a PPP framework is to steer a middle course so that private firms are encouraged to offer good ideas and

still retain their intellectual property, while also including some competitive element to keep costs down and ensure a sense of fair play.

The PPP framework needs to strike the right balance between several factors: providing incentives to private proponents to submit high-quality project ideas, deterring poor quality proposals, ensuring competitive tension, and demonstrating transparency.

### **Benefits and Pitfalls of Privately-Initiated projects**

Accepting privately-initiated projects allows governments to benefit from the knowledge and ideas of the private sector. This can be a significant advantage where limited government capacity means the private sector is better able to identify infrastructure bottlenecks and innovative solutions. It also provides the government with information about where commercial opportunities and market interest lie. Box 2.11 provides an example of a PPP project originated by a private company that provided an innovative solution to a transport infrastructure problem that the public sector had been struggling to solve.

#### ***BOX 2.11: Benefits of innovation – High Occupancy Toll Lanes in Virginia***

A portion of the I-495 highway (the “beltway” around the Washington, DC metro area) and the major I-95 North-South corridor needed repair and expansion to alleviate congestion since the early 1990s. The state of Virginia Department of Transportation (VDOT) had developed a plan to rehabilitate and expand the highway at a cost of \$3 billion. However, lack of funding and public opposition over the proposed displacement of over 300 businesses and homes had stalled the project.

In 2002, Fluor, an engineering and construction company, submitted an unsolicited proposal to develop High Occupancy Toll (HOT) lanes on Interstate 495 as an alternative way to accommodate traffic volume. HOT lanes are an innovative technology that allows drivers to pay to avoid traffic. The tolled lanes run alongside freeway lanes, and are designed to be free of congestion. To regulate demand for the lanes, tolls for the HOT lanes change depending on traffic conditions; when traffic increases, tolls go up. Cars with more than 3 passengers, and buses, are allowed to use the HOT lanes free of charge. The Fluor proposal reduced the number of businesses and homes displaced from 300 to 6, a major factor in garnering public support for the project. The proposal also minimized project costs by reducing lane widths.

In 2005, VDOT awarded the PPP agreement to construct the HOT lanes. The total cost of the project was around \$2 billion, compared to the estimated \$3 billion under initial plans developed by the government. The state of Virginia contributed \$400 million of this cost. The HOT lanes project reached financial close in 2007, and new lanes opened for business in 2012.

Source: Virginia HOT Lanes website (<http://www.virginiahotlanes.com>); Gary Groat (2004) *Loosening the Belt Roads and Bridges* Vol. 42 No. 4 April 2004; Virginia Department of Transportation (2008) *Virginia HOT Lanes Fact Sheet* Commonwealth of Virginia; The Public Private Partnerships Reference Guide V 2.0 (World Bank 2014).

At the same time, the government has to devote administrative resources to assessing and procuring unsolicited proposals. There is always a question of whether government resources would have been better allocated to projects that are known to be in line with government plans and priorities.

In addition, negotiating with a project proponent on the basis of an unsolicited proposal – in the absence of a transparent or competitive procurement process – can create problems. It could result in poor Value for Money from the PPP project, given a lack of competitive tension. It could also provide opportunities for corruption and give rise to complaints about the fairness of the process, especially if a company is seen to benefit from a PPP without opening the opportunity to competitors. For these reasons, some countries prohibit the use of unsolicited proposals for PPPs.

Box 2.12 provides an example of a power project in Tanzania that was directly negotiated following an unsolicited approach by the private investor. Subsequent disputes led to an arbitration in which the contractor was found to have charged more than was reasonable.

#### ***BOX 2.12: Costs of Direct Negotiation – Independent Power Tanzania***

The government of Tanzania and the Tanzania Electricity Supply Company entered into contractual agreements with Independent Power Tanzania Limited (IPTL) of Malaysia for the supply of 100 megawatts of power over a 20 year period. This transaction was directly negotiated following an approach by the private investors during a power crisis.

After the contract was signed, objections were raised that the project was not least cost and that it was not procured on a transparent and competitive basis. Before the plant started operations, the government submitted the project to international arbitration. The arbitrators found that the private company had inflated the costs of the project, and they ordered the amount that could be recovered to be reduced by about 18 percent. In the arbitration hearings the government alleged that the contract award had been corrupt, but failed to produce evidence to satisfy the Tribunal. The government has not subsequently pursued the corruption investigation. However, legal disputes between the IPTL and the government continued to the date of writing (2015).

Source: World Bank/Energy, Transport and Water Department, and Finance, Economics and Urban Department (2009) [Deterring Corruption and Improving Governance in the Electricity Sector](#) World Bank; Eberhard and Gratwick [IPPs in Sub-Saharan Africa: Determinants of Success](#) World Bank.



## Creating competitive tension

Although some jurisdictions simply discourage privately initiated projects, many have developed mechanisms to take advantage of market initiatives, while also introducing competitive tension. There is no international consensus on the best way to subject unsolicited proposals to competition, but the following approaches can be applied.<sup>67</sup>

- **Swiss challenge** – following an unsolicited approach, an open bidding process is conducted. If the proponent does not win, it has the option to match the winning bid and win the contract. This approach is used in the Philippines and several states in India;<sup>68</sup>
- **Inclusion in best and final offer round** – a two-stage bid process in which the highest ranked bidders from the first stage (such as an expression of interest) are invited to submit final proposals in a second stage. The proponent of the market-initiated project is automatically included in the second stage. This approach (as well as the developer's fee approach, below) is used in the **South Africa roads sector**;<sup>69</sup>
- **Developer's fee** – the firm that made the original offer is paid a fee by the government or the winning bidder. The fee can simply reimburse some project development costs, or be set to provide a return on developing the project concept and proposal. This is one option for dealing with unsolicited proposals permitted in **Indonesia** under the presidential regulations governing PPPs;<sup>70</sup> and
- **Bid bonus** – the proponent receives a scoring advantage typically defined as an additional percentage added to its evaluation score in an open bidding process. This approach is used in **Chile** where the bid bonus can be between 3 and 9 percent of the financial evaluation score (in addition, the proponent is reimbursed for the cost of detailed studies).<sup>71</sup>

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<sup>67</sup> As set out in Hodges and Dellacha (2007) *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*.

<sup>68</sup> As described further in Reddy & Kalyanapu (undated) *Unsolicited Proposal-New Path to Public-Private Partnership: Indian Perspective*.

<sup>69</sup> South Africa National Roads Authority (1999) *Policy of the South African National Roads Agency in Respect of Unsolicited Proposals*.

<sup>70</sup> Government of Indonesia (2005) Presidential Regulation No. 67 concerning Government Cooperation with Business Entities in the Supply of Infrastructure, as amended by Government of Indonesia (2011) Presidential Regulation No. 56.

<sup>71</sup> Government of Chile (2010) Regulation No. 956 of Public Works Concessions (*Reglamento de Concesiones de Obras Publicas*).

Table 2.5 provides further examples and references. These alternatives have not all proved equally effective at enabling competition.<sup>72</sup> In Chile, for example, of 12 concessions awarded from unsolicited proposals as of March 2006, 10 attracted competing bids and only 5 were awarded to the original proponent. On the other hand, in the Philippines under the Swiss Challenge approach, all 11 PPP contracts awarded from unsolicited proposals by 2006 went to the original proponent.

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<sup>72</sup> Hodges & Dellacha (2007) reviewed several countries' experience with unsolicited proposals in Appendix B of *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*.

<b>TABLE 2.5: Examples of Procurement Strategies for Unsolicited Proposals</b>	
<b>Jurisdiction</b>	<b>Key Features</b>
Chile	<ul style="list-style-type: none"> <li>• Two-stage process for accepting unsolicited proposals initial proposals are screened; if accepted, the private party must conduct detailed studies and prepare a detailed proposal. The government then prepares bidding documents based on the detailed proposal and puts the project out for competitive tender.</li> <li>• Costs of carrying out studies are reimbursed (paid by the winning bidder or the government if project never proceeds to the bid stage). Costs agreed at the initial project approval stage.</li> <li>• The proponent receives a <b>bid bonus</b> of a pre-defined percentage (between 3 and 8 percent depending on the project) added to a financial evaluation score.<sup>73</sup></li> </ul>
Indonesia	<ul style="list-style-type: none"> <li>• Unsolicited proposals welcomed for projects not already on the priority list.</li> <li>• Accepted proposals are put through a normal competitive process. Proponents may either be awarded a <b>bid bonus</b>, of up to 10 percent, or paid a <b>developer's fee</b> for the proposal. The approach is set by the procuring authority, based on an independent appraisal.<sup>74</sup></li> </ul>

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<sup>73</sup> Government of Chile (2010) Regulation No. 956 of Public Works Concessions (Reglamento de Concesiones de Obras Publicas), Title II: Bids Submitted by Private Parties.

<sup>74</sup> Government of Indonesia (2005) Presidential Regulation No. 67 concerning Government Cooperation with Business Entities in the Supply of Infrastructure, as amended by Government of Indonesia (2011) Presidential Regulation No. 56, Chapter IV.

<b>TABLE 2.5: Examples of Procurement Strategies for Unsolicited Proposals</b>	
<b>Jurisdiction</b>	<b>Key Features</b>
Italy	<ul style="list-style-type: none"> <li>Contracting authorities publish three year plans on an annual basis; private companies are invited to make proposals for infrastructure listed in these plans (following clear content requirements including detailed studies and timeline). Proposals are evaluated by the procuring authority.</li> <li>A type of <b>Swiss Challenge</b> process is used to procure the project. A first stage is used to identify two competing bidders who, together with the proponent, enter into a negotiated procurement procedure. If a competing proposal is preferred, the proponent is given the right to match that proposal, in which case the proponent is awarded the concession.<sup>75</sup></li> </ul>
Republic of Korea	<ul style="list-style-type: none"> <li>Unsolicited proposals must be evaluated by the procuring authority and the PPP unit (the Private Infrastructure Investment Management Centre, PIMAC).</li> <li>The opportunity is published and alternate proposals are requested, due within a 90 day time limit.</li> <li>The proponent receives a <b>bid bonus</b> of up to 10 percent, added to the overall bid evaluation scores. The proponent may modify its original proposal at the bidding stage, but its bonus is reduced to a maximum of 5 percent. Bonuses are disclosed in the request for alternate proposals.</li> <li>Losing bidders are compensated in part for proposal costs to encourage competition.<sup>76</sup></li> </ul>

<sup>75</sup> President of the Republic of Italy (2006) Legislative Decree 163: Code for Public Contracts for Works, Services and Supplies in the Implementation of Directives 2004/17/CE e 2004/18/CE, Articles 156-155.

<sup>76</sup> Kim, Kim, Shin and Lee (2011) Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea, Volume 1: Institutional Arrangements and Performance, pp. 67-69.

<b>TABLE 2.5: Examples of Procurement Strategies for Unsolicited Proposals</b>	
<b>Jurisdiction</b>	<b>Key Features</b>
Philippines	<ul style="list-style-type: none"> <li>• Unsolicited proposals are welcomed for projects not already on the priority list.</li> <li>• The procuring authority must advertise the opportunity for at least three weeks and invite competing proposals within a 60 day time limit.</li> <li>• If competing proposals are received, a <b>Swiss Challenge</b> process is followed if the proponent is not the winning bidder, it is given the opportunity to match the winning bid and win the contract.</li> <li>• If no competing proposal is received, the authority may negotiate with the proponent.<sup>77</sup></li> </ul>
South Africa (roads sector)	<ul style="list-style-type: none"> <li>• Unsolicited proposals must comply with clear content requirements, and they are evaluated by the agency.</li> <li>• If the proposal is accepted, the agency and the developer enter into a “scheme development agreement”, under which the private party is responsible for detailed development of the PPP, including developing tender documentation. The agreement includes a <b>developer’s fee</b> payable by the winning bidder to the proponent.</li> <li>• The project is put out to competitive tender in a two-stage <b>best and final offer</b> process. The top two bidders from the first round are invited to resubmit best and final offers; the proponent is also invited, if not already in the top two contenders.<sup>78</sup></li> </ul>
State of Virginia, United States (highways sector)	<ul style="list-style-type: none"> <li>• Proposals are welcome that comply with the detailed requirements set out and are evaluated in the same way as government-originated projects.</li> <li>• Proposals for PPPs requiring no government oversight or support are advertised for 90 days (or 120 days for PPPs requiring government support). If no competing proposal is received, the government may negotiate directly with the proponent.<sup>79</sup></li> </ul>

<sup>77</sup> Philippines BOT Center (1993) The Philippine BOT Law (Republic Act No. 7718) and its Implementing Rules & Regulations, Rule 10.

<sup>78</sup> South Africa National Roads Authority (1999) Policy of the South African National Roads Agency in Respect of Unsolicited Proposals.

<sup>79</sup> The Commonwealth of Virginia (2005) Public-Private Transportation Act of 1995 (as Amended) Implementation Guidelines.

## Dealing with intellectual property

To encourage market-initiated proposals, the government needs to commit to protecting intellectual property. Without such protection, there is little incentive for the private party to invest in any new or innovative ideas. There are various approaches to dealing with intellectual property in an unsolicited proposal.<sup>80</sup>

- Where possible, the government can competitively tender the project by specifying required outputs, and not the required technology to deliver those outputs. This approach is consistent with good practice in defining output-based performance requirements for PPPs; and
- In cases where the intellectual property is crucial to the project, such that it could not be implemented otherwise, direct negotiation may be warranted, along with procedures to benchmark project costs.

The government of **New South Wales** in Australia provides guidance for practitioners on handling intellectual property,<sup>81</sup> and it allows direct negotiation of the PPP in certain circumstances. Proponents agree that they must identify any intellectual property they wish to protect (subject to agreement with the government). The project is then tendered based on output specifications without revealing technology information if possible. If the intellectual property is “crucial to the existence of the service need”, the government negotiates with the proponent to obtain the rights to the necessary intellectual property before procuring the project competitively. In contrast, in some civil law countries the approach to intellectual property is codified in law, and so not subject to negotiation.

## Defining Clear Processes

Clear processes for handling unsolicited proposals are important for transparency and achieving Value for Money. Clear processes not only assist the government in managing such a proposal, but they can also help incentivize private developers to invest resources in developing good quality project proposals, and encourage potential competitors to engage in the bidding process. A well-defined process to assess, approve, and bid on a project originating in an unsolicited proposal is illustrated in figure 2.1.<sup>82</sup> First, a private company submits an

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<sup>80</sup> As described in UNCITRAL (2001) *Legislative Guide for Privately-Financed Infrastructure Projects* section on unsolicited proposals pp. 91-97.

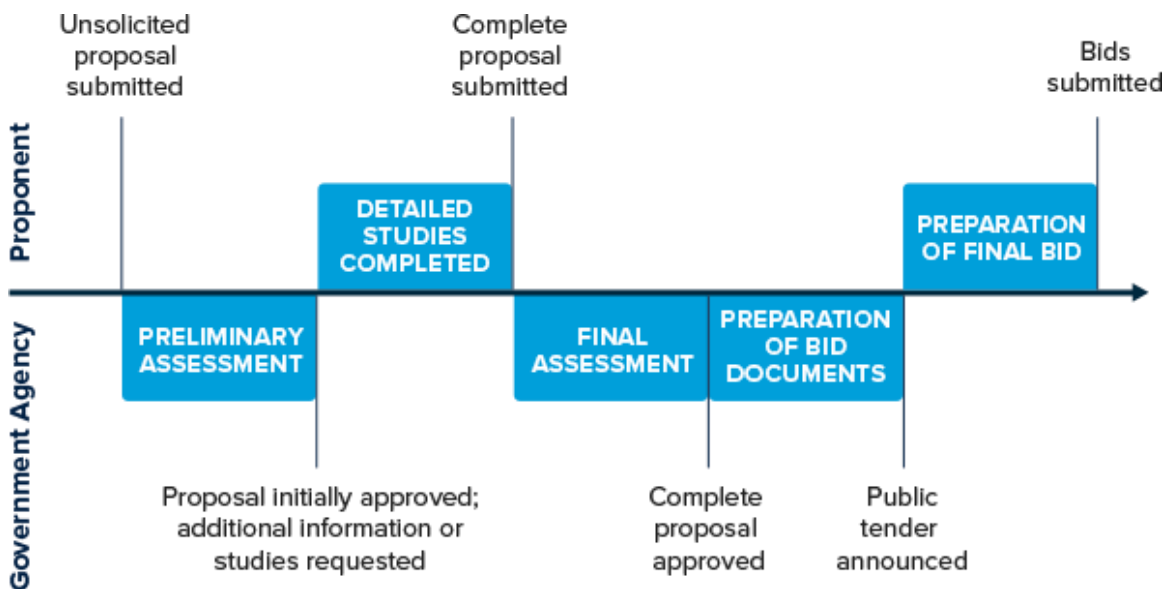
<sup>81</sup> New South Wales Treasury (undated) *Intellectual Property Guidelines for Unsolicited Private Sector Proposals Submitted Under Working with Government*.

<sup>82</sup> Hodges and Dellacha (2007) *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*.

unsolicited proposal, following clear content and presentation requirements. This proposal is screened, often following a similar approach to that described in section 1.6.1. If the proposal passes the initial screening, the proponent is invited to complete any necessary studies before the proposal is assessed against the standard PPP criteria. If approved, any developer's fee or bonus that will apply is often agreed at this stage.

The responsible government agency then prepares the bid documents, based on the final proposal, and conducts a tender process. Proponents may or may not have an opportunity to respond to the bid documents and submit a final bid. For example, in **Korea** the proponent may modify its original proposal and bid, but in doing so forfeits some of its bid bonus.<sup>83</sup>

**FIGURE 2.1: Process for Assessing, Approving and Bidding an Unsolicited Proposal**



Source: Based on Hodges and Dellacha (2007) *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*.

It is worth considering specifying time periods within which each of these steps will be taken.<sup>84</sup> On the one hand, specific deadlines within which the government

<sup>83</sup> As described in Kim, Kim, Shin and Lee (2011) *Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea, Volume 1: Institutional Arrangements and Performance*.

<sup>84</sup> Hodges and Dellacha (2007) describe the benefits and risks of doing so in *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*.

will deal with proposals can be helpful to provide assurance to the private sector that their proposal will not languish in the process. On the other hand, some countries introduce tight limits on the time allowed for competing proposals, which can deter competition. For example, in the **Philippines**, the BOT Law of 1993 requires authorities to advertise an opportunity for three weeks and allow 60 days for competitors to respond. This is unlikely to allow competitors enough time to carry out the due diligence necessary to prepare a high-quality strong proposal.<sup>85</sup>

## 1.7 Institutional Responsibilities

Institutional responsibilities for PPPs, that is, which entity will play what role at each step of the process will need to be defined in the framework.

Institutional arrangements differ widely from place to place. This depends on the particular needs of the PPP program and the pre-existing institutional roles and capacities.

### General principles for effective design of institutional arrangement for PPPs

General principles to guide institutional arrangements for PPPs include the following:-

- Build on existing institutional responsibilities and processes;
- Design the institutional architecture appropriate to the likely scale of the task;
- Develop policies and architectures in parallel with the first projects;
- Assign responsibilities to agencies that have the incentives, information, and competence to discharge the responsibilities and clearly define any institutional relationships; and
- Avoid creating overlaps and additional coordination needs.

The point about building on existing responsibilities and processes is particularly important. There will already be sector agencies with responsibility for planning and developing projects. They these should generally continue in their existing role, while adding PPPs as a new delivery and financing option. Similarly, existing public sector procurement rules and public financial management rules

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<sup>85</sup> Philippines BOT Center (1993) The Philippine BOT Law (Republic Act No. 7718) and its Implementing Rules & Regulations.



will provide the background framework which will then needs to be tailored to allow and support the development of PPPs.

### **1.7.1 Typical Responsibilities**

In developing a PPP framework, it is useful to consider the main responsibilities and identify an existing institution, if available, that is suitable for each one. The main responsibilities include the following.

- **Identifying and procuring projects:** Driving forward the PPP project: identifying potential projects, appraising, structuring, drafting the contract, bidding on it, and finally managing the contract after it is signed (this is explored in detail in section 1.7.2);
- **Ensuring coordination and best practice approaches:** Ensuring that the correct processes are followed, that analysis of a proposed PPP is complete, that all the agencies that need to comment or give their go ahead do so, and that the body with approval authority receives all the information it needs to make a sound decision (this is explored in detail in section 1.7.3);
- **Public financial management:** Making sure that there is sufficient fiscal space to fund direct liabilities and also deal with situations where risks allocated to the public sector do crystallize into fiscal expenditures (section 1.7.4 discusses this concept); and
- **Approving projects:** Giving the go ahead for the project to proceed. As shown in section 1.6, approvals may be needed at several stages of project development (this is discussed in Section 1.7.5).

Where existing institutional infrastructure and skills are insufficient, the establishment of a **PPP unit** may be helpful (see section 1.7.6). **External advisors** may be needed to support the skills available in-house.

### **1.7.2 Identifying and Championing Projects**

Projects can be identified and championed by the procuring authority or central authorities. The **procuring authority** is the public party to the PPP contract. The procuring authority is responsible for conducting the PPP deal and managing the PPP contract. This role typically falls to the entity with responsibility for ensuring the relevant asset or service is provided.

The PPP law or policy may specify which government entity is allowed to enter into PPP contracts, and the authorities that are responsible for PPP implementation. It is common for agencies with existing responsibilities for

infrastructure such as a department of transportation or local authority – to be the procuring authority and to champion the project.

In some jurisdictions, a central PPP, infrastructure, or planning authority will take the lead in identifying and championing projects that are suitable to be developed as PPPs. Such agencies may also run the procurement on behalf of the sector or local authority. Country examples are presented in box 2.13..

**BOX 2.13: Responsibilities for Championing Projects in Various Jurisdictions**

- In the **Philippines, the BOT Law** (1993) delegates responsibility for developing and implementing PPPs to eligible government agencies, units, or authorities. These include Government-Owned or Controlled Corporations, Government Financial Institutions), State Universities and Colleges, and Local Government Units. These agencies are required to create a prequalification Bids and Awards Committee that will oversee the PPP process for each PPP project.<sup>86</sup>
- Under **Tanzania’s PPP law** (2010), the procuring authority can be any eligible party within the government. The procuring authority is responsible for facilitating project development, including project identification, a feasibility study, environmental impact assessment, and design and implementation of the PPP contract.<sup>87</sup>
- Under the **Manual for PPP procedures in Colombia** (2010), procuring authorities (ministries or other sector-specific, local, and regional institutions) are in charge of conducting eligibility and Value for Money analyses, and submitting the results to the PPP unit – the UPAPP<sup>88</sup>. The implementing agencies also manage the procurement process.<sup>89</sup>

**1.7.3 Ensuring Coordination and Best Practice**

Sector agencies may lack some of the skills needed to identify and develop PPP projects successfully. Particularly at the early stages of a PPP program, sector agencies may have little experience in engaging with the private sector on

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<sup>86</sup> Philippines BOT Center (1993) The Philippine BOT Law (Republic Act No. 7718) and its Implementing Rules & Regulations.

<sup>87</sup>The United Republic of Tanzania (2010) *Public Private Partnership Act 2010*.

<sup>88</sup> Unidad de Proyectos de Asociación Público-Privada.

<sup>89</sup> Government of Colombia (2010) Manual de Procesos y Procedimientos para la ejecución de Asociaciones Publico Privadas (Process and Procedures Manual for PPP Projects), Chapter 4.2, p 34.

privately financed projects. Sector agencies may also lack expertise in rigorous project analysis, or they may have an inadequate focus on achieving Value for Money for the government as a whole. Moreover, coordination across the government is needed, something that sector agencies cannot provide. For this reason, other entities are often also involved, including those listed below;

- **Specialized PPP units.** These units are a repository of skill and experience in developing PPPs. They support contracting authorities in implementing PPP projects. They are often an extension of one of the central agencies such as the ministry of finance. Section 1.7.6 provides several more examples of PPP units and the extent of their roles in implementing PPPs;
- **External PPP transaction advisors.** Even governments with long PPP experience do not have all of the in-house expertise and skills needed to develop PPP projects. All engage external specialist advisors for detailed, technical tasks, such as conducting feasibility studies and drafting PPP contracts. The extent and nature of external advisory support needed will change as the program evolves. For example, in the Netherlands, initially external advisors constituted about 75 percent of the personnel engaged on any given PPP. This slowly changed in favor of internal staff as they became more familiar and better qualified to prepare and procure PPP deals. Moreover, the Dutch government initially used UK advisors as they were more experienced with PPPs. Over time these were replaced by local Dutch advisors who had demonstrated their skills in this area;<sup>90</sup>
  - It is important to highlight that some commercial skills are required in-house in order to appoint and manage appropriate advisors. If the wrong advisers are appointed or the advisers are not managed appropriately, the project will not start out well.
- **Inter-departmental committees to oversee each PPP transaction.** These committees often include representatives from the sector ministry as well as ministries of finance and planning, and legal representatives. Of course, ways need to be found to make the processes of such committees streamlined and efficient. Without this, there is a risk that they become bureaucratic bottlenecks. One country which does this is Jamaica which forms “enterprise teams” for all privatizations and PPPs. Such teams can ensure coordination between agencies, and they bring in senior skilled practitioners to guide the transaction. Similarly, in British Columbia, Canada, each project has a “steering committee” established before procurement begins. This committee has representatives from the

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<sup>90</sup> As described in Castalia (2009) *Benchmarking Indonesia’s PPP Program* report to the World Bank, p. 21.

ministries of finance and infrastructure, as well as the procuring authority. The steering committee remains in place through the Design and Construction Phase;

- **Specialist entities in different implementing roles.** This is done in Perú where the procurement agency is responsible for implementing the PPP transaction, and sector regulatory agencies are responsible for monitoring the private parties' compliance with the PPP contract;<sup>91</sup> and
- **Central Agencies.** Central agencies are those with “whole of government” (rather than purely sectoral) functions. They typically include the ministry of finance, the body responsible for economic planning and coordination (where this is separate from the ministry of finance), and the body responsible for legal compliance across government (such as an attorney general's department). It is usual for these central agencies to be involved in commenting on all major policies initiatives and projects involving expenditure, economics or legal matters. The central agencies are generally involved in the creation of the PPP framework. The framework then generally requires that the advice from the central agencies be sought at particular points in the PPP project development process.

Since the central agencies are involved in all PPP projects, their input can ensure consistency, coordination, and best practice. For example, the ministry of finance might demand that cost benefit analysis and Value for Money analysis are done for all projects, in consistent ways. The attorney general might demand that certain legal templates be used, and that the government always avoid certain legal risks. Typical central agency roles include the following.

- **Ministry of finance roles:** The finance ministry is often central to the controlling function for PPPs. Finance ministry involvement helps ensure that the PPP program is focused on achieving Value for Money and that fiscal risks are managed. Examples of finance ministry control processes are shown in box 2.14.

#### ***BOX 2.14: Examples of the Finance Ministry's Role In PPPs***

- **Portugal** operates a typical “gateway” process. At several stages, the finance ministry must check and may stop a PPP from proceeding if it believes it is not affordable, or that the proposed PPP structure will not offer Value for Money.<sup>92</sup>

<sup>91</sup> Zevallos Ugarte's book (2011) *Concesiones en el Peru: Lecciones Aprendidas (Concessions in Peru: Lessons Learned)*, s.l.: Fondo Editorial de la USMP provides further details on the institutional framework for implementing PPPs.

<sup>92</sup> Monteiro (2007) *PPP and Fiscal Risks: Experiences from Portugal*, pp. 6-8.

- The Australian **state of Victoria's** policy document "Partnerships Victoria Requirements" sets out a control process for all major investment projects involving an independent panel of experts. All "high value" or "high risk" projects including PPPs go through a "gateway approval" process, established by the Department of Treasury and Finance. A panel of experts that are not directly involved in the project carries out reviews at key stages (called "gates") in developing and implementing the project. For PPPs, there are five gates: strategic assessment, business case, readiness for market, readiness for service, and benefits evaluation.<sup>93</sup>

- **Planning agency roles:** In countries where national planning agencies perform a strong coordination function in infrastructure or economic policy generally, they may also be given the role of regulating the PPP process. Where a planning agency is involved in a control function, the program generally works best when there is also a mechanism for effective coordination with the finance ministry. Box 2.15 provides some examples.

#### **BOX 14: Examples of the Planning Agencies' Role In PPPs**

- In the **Philippines** under the BOT Law (2004), PPPs must be approved by the National Economic Development Authority (NEDA) Board, a central planning authority. Projects are recommended to the NEDA board by the Investment Co-ordinating Committee (ICC), which is a subset of the members of the NEDA board. The ICC's recommendation is in turn informed by a review provided by NEDA's technical staff. The staff checks that the project submission is complete and demonstrates that the project complies with requirements for financial, economic, social, and environmental impacts.<sup>94</sup> To maintain coordination with the Ministry of Finance, the Secretary of Finance is on both the ICC and the NEDA Board.<sup>95</sup>
- In **Chile**, Ministry of Planning approval of project economic and social analysis is defined as a prerequisite for the Ministry of Finance to approve a PPP.<sup>96</sup>
  - **Attorney general's role:** In many countries, the attorney general's signoff is required for major contracts, including PPPs. The PPP law of Tanzania (2010) requires that the implementing agency submit the

<sup>93</sup> State Government of Victoria (2013) *About Partnerships Victoria*. [Online] Available at <http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/About-Partnerships-Victoria>

<sup>94</sup> Philippines National Economic and Development Authority (2004) *ICC Project Evaluation Procedures and Guidelines*.

<sup>95</sup> Philippines National Economic and Development Authority (2004) *ICC Project Evaluation Procedures and Guidelines*.

<sup>96</sup> National Congress of Chile (2010) *Law 20410 ("Concessions Law")* Article 8.

final draft PPP contract for approval by the attorney general, before the contract is executed.<sup>97</sup> This is also required in Jamaica.

However, this is not universally required. Australian state governments tend to engage leading private law firms to advise the government on PPPs. Australian governments recognize that private law firms have greater expertise in fields such as construction and project finance than their attorney-general's departments (which tend to have more expertise in administrative law).

#### **1.7.4 Public Financial Management**

PPP programs create direct and contingent liabilities. The government will need to ensure that there is sufficient fiscal space to fund direct liabilities, as well as to deal with situations where contingent liabilities translate into fiscal expenditures. The financial management of PPPs is normally the responsibility of the procuring authority under the oversight of a finance ministry or treasury.

#### **1.7.5 Approvals**

Most governments have rules for approving capital investment projects that is, defining who can give approval at various points in the life of the project for the project to proceed to the next phase. Because PPPs often do not require capital investment by the government, they may not automatically be subject to these approval rules. Many governments therefore define similar approval requirements for PPPs.

Often, several decision points are created, allowing weak projects to be stopped before they consume too many resources or develop a momentum of their own. At a minimum, approval is typically needed to enter into a PPP transaction. Because the final cost of a project is not known until procurement is concluded, final approval may be needed before the contract is signed.

Jurisdictions vary as to which entity can approve a PPP. A few countries require legislative approval of projects. More often, approval may come from the cabinet or a cabinet level committee, the finance ministry, or a combination of agencies and authorities. Approval responsibilities may depend on the size of the project, as is typically the case for other capital investments.<sup>98</sup>

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<sup>97</sup> The United Republic of Tanzania (2010) *Public Private Partnership Act. 2010*, pp. 15-16.

<sup>98</sup> As described in Irwin (2007) *Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects*.

Table 2.6 provides examples of approval requirements set out in national PPP frameworks.

<b>TABLE 2.6: Example PPP Approval Requirements</b>	
<b>Country</b>	<b>Approval requirements</b>
New South Wales, Australia	<p>In New South Wales, capital and recurrent funding for the project needs to be approved by the Budget Committee of the Cabinet, the Expenditure Review Committee (ERC) of the Cabinet, and if there are joint financing arrangements, the PPP also needs to be approved by the Treasurer. The ERC's funding approval decision takes into account decisions about the relative need for the project made by a separate committee, the Cabinet Infrastructure Committee (CIC) which looks at the project's business case. Approval requirements are defined at each stage of the PPP process.</p> <ol style="list-style-type: none"> <li><b>1. PPP Project Planning and Definition</b> – ERC approval is required to proceed with release of Expression of Interest (EOI) tender documentation.</li> <li><b>2. Expression of Interest</b> – Agencies should consult New South Wales Treasury to determine if ERC approval is required.</li> <li><b>3. Request for Detailed Proposals</b> – ERC approval is required before entering into contract negotiations or pre-selection negotiations based on prescribed “negotiation parameters” with preferred bidder(s).</li> <li><b>4. Negotiations and Contract Finalization</b> – ERC approval is required prior to the Portfolio Minister (or delegate) signing any contract if significant variations arise in negotiations. The Treasurer's approval is also needed under the Public Authorities Financial Arrangements (<i>PAFA</i>) Act for agencies to enter into a joint financing arrangement. This will be a condition precedent for any PPP contract to become effective.<sup>99</sup></li> </ol>
Chile	<p>Final approval of a PPP – through a signing of the decree that formalizes the concession – rests with the President and the Ministry of Finance together. Contracts cannot be bid out unless the Ministry of Finance has approved the bidding documents. The Ministry of Finance must also approve any changes to economic aspects of the bidding documents, as well as certain changes during implementation.<sup>100</sup></p>
Colombia	<p>PPPs must be approved by the following.</p> <ul style="list-style-type: none"> <li>• <b>CONFIS</b> – the National Fiscal Council (CONFIS), which leads the national fiscal policy and co-ordinates the budgetary system, approves</li> </ul>

<sup>99</sup> New South Wales Government (2012) NSW Public Private Partnership Guidelines.

<sup>100</sup> National Congress of Chile (2010) Law 20410 ("Concessions Law") Article 7, 20 and 28.

	<p>the future appropriations (<i>vigencias futuras</i>) for PPP projects. CONFIS is comprised of the Ministry of Finance, the Director of the Administrative Department of the National Planning Agency, the Chief Economic Advisors of the Presidency, the Vice-Minister of Finance, and the directors of the National Treasury, Public Credit, and Tax and Customs Authority. Before reaching the CONFIS, the project must have the approval of the sector ministry and the National Planning Department.<sup>101</sup></p> <ul style="list-style-type: none"> <li>• <b>CONPES</b> – the National Council for Economic and Social Policy (CONPES) is the highest planning authority in Colombia, and it advises the government in all aspects related to the economic and social development of the country. CONPES certifies the strategic importance of the project. Such certification is required for the project to be eligible to receive future appropriations. CONPES comprises the President, the Vice President, the Cabinet, the Director of the Administrative Department of the Presidency, the Director of the National Planning Department, and the Director of Colciencias.<sup>102,103</sup></li> </ul>
Philippines	All national projects and projects over PHP200 million (\$4.6 million) require approval from the Investment Coordination Committee under the National Economic and Development Authority (NEDA) Board. Build-Own-Operate projects require approval from both the NEDA Board and the President. The members of the NEDA Board are Cabinet members responsible for the major infrastructure, economic, and finance departments. <sup>104</sup>
South Africa	There are four stages of PPP approvals made by the Cabinet on recommendations by the Treasury. Projects are submitted for approval after: (1) the feasibility study has been completed, (2) the bid documents have been prepared, (3) bids have been received and evaluated, and (4) negotiations have concluded and the PPP contract is in its final form. <sup>105</sup>

### 1.7.6 The Roles and Benefits of PPP Units

Many governments with successful PPP programs have created a dedicated unit (either as a separate entity, or within an existing department) tasked with implementing, facilitating, or advising on PPPs. (see box 2.16 for example) These are referred to as PPP units. Their roles often include the following;<sup>106</sup>

<sup>101</sup> The United Republic of Tanzania (2010) Public Private Partnership Act. 2010, Section 3.2.3.

<sup>102</sup> The Department for Science, Technology and Innovation.

<sup>103</sup> Congress of Colombia (2011) *Law 1508 ("PPP Law")*.

<sup>104</sup> Congress of the Philippines (1993) The Philippine BOT Law Republic Act No. 7718, Rule 2, pp16-19.

<sup>105</sup> Government of South Africa (2004) *PPP Manual*.

<sup>106</sup> As described in Public Private Infrastructure Advisory Facility (2007) *Public Private Partnership Units: Lessons for their Design and Use in Infrastructure*. World Bank.



- **Control and oversight of the PPP process:** As described in section 1.6, this includes ensuring that the right steps are taken in developing a PPP, so that the required analysis shows the project is consistent with appraisal criteria, and that all required approvals have been obtained. The PPP unit may also act as an approving body, as is the case in a number of European countries. For example, Croatia's PPP unit approves the eligibility of projects and any contract renegotiations. France's PPP unit approves the eligibility of projects and any final contracts;<sup>107</sup>
- **Development of the PPP framework:** Management of evolution (but not creation) of the PPP framework, including developing and keeping updated the process guidelines;
- **Promoting PPPs within the government:** For example, reminding implementing agencies that it may be desirable to do large new projects as PPPs;
- **Advising and supporting agencies to implement PPPs:** Offering experience and specialist skills acquired because of their focus on PPPs and involvement in numerous projects, as described in section 1.7.2;
- **Acting as a knowledge center:** Collating and disseminating knowledge and information about PPPs, thus ensuring that knowledge is shared across procuring authorities and made available to the public;
- **Providing communication channels to investors:** Helping bidders and financiers, who may otherwise be unsure who to ask, with information about the program and upcoming opportunities; and
- **Monitoring and support after financial close:** Assisting the procuring authority with contract management, and ensuring critical information is communicated to relevant central agencies that need to be aware of changes in the PPP's risk status in order to monitor the project's contingent liabilities.

***BOX 2.15: The Evolution of the UK's PPP and Infrastructure Units***

The United Kingdom's Treasury Taskforce (TTF) was established in 1997 within HM Treasury as a central coordination unit for the rollout of the Private Finance Initiative (PFI). It was designed to assist public sector bodies to improve the

<sup>107</sup> The European PPP Expertise Centre (EPEC) (2014) Establishing and Reforming PPP Units: Analysis of EPEC Member PPP Units and Lessons Learnt.

delivery of PPPs. It standardized the procurement process and trained staff, particularly those in private finance units of government departments, in the PFI process. It contained independent projects and policy sections. The projects section undertook the day-to-day implementation of the PFI and any variations.

In 2000, the TTF evolved into Partnerships UK (PUK), a 49 percent public and 51 percent private entity charged with the further development and delivery of the PFI program. This has led to around 750 signed contracts in various sectors (including health, education, housing, prisons, transport, and waste management), for an accumulated value of more than £68 billion (US\$ 10 billion equivalent).

In 2009, Her Majesty's Treasury established Infrastructure UK (IUK) by bringing together the program and project delivery capability of PUK, the lending capability of the Treasury Infrastructure Funding Unit (TIFU), and the policy development capability of the Treasury PPP policy team. IUK advises the UK government on the long-term infrastructure needs of the UK, provides commercial expertise to support major projects and programs, and identifies and addresses cross-cutting issues. IUK is the government's primary strategic resource for the long-term planning, prioritization, financing, and delivery of infrastructure in the UK, including sectors such as social infrastructure, energy and waste, water, telecommunications, and transport. IUK is not just a PPP unit; it is the UK's infrastructure unit.

Source: HM Treasury (2013). *Public Private Partnerships*. Available at: [http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.hm-treasury.gov.uk/infrastructure\\_public\\_private\\_partnerships.htm](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.hm-treasury.gov.uk/infrastructure_public_private_partnerships.htm)

The design of a PPP unit should reflect its functions.<sup>108</sup> For instance, units that focus on regulating and controlling the PPP process should generally be located in **finance ministries** or **planning agencies**. If a PPP unit is undertaking multiple functions, it needs to be designed to avoid potential conflicts of interest. If a unit is guiding, advising, and approving PPPs, then it needs to ensure there are internal firewalls, that it involves other entities involved in approvals, or that it brings in additional scrutiny by audit or other oversight agencies.<sup>109</sup>

Typical choices in the creation of a PPP unit will include the following;

- **Unit location:** Does it sit within an existing department or is it independent of other government agencies? PPP units may be allocated in a line ministry or department, a central agency such as the ministry of finance

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<sup>108</sup> Public Private Infrastructure Advisory Facility (2007) *Public Private Partnership Units: Lessons for their Design and Use in Infrastructure*. World Bank.

<sup>109</sup> Dutz, Harris, Dhingra & Shugart (2006) *Public Private Partnership Units: What Are They, and What Do They Do?* World Bank Public Policy for the Private Sector.

(or within a national financial agency or national development bank), the ministry of planning, or the prime minister's office. More than one PPP unit may coexist, each with different roles and scope of responsibilities (see table 1.7);

- **Functions to be undertaken:** As outlined at the start of this section, does it undertake regulation, control and oversight, promotion, advice, communication channels, and/or monitoring and support roles?
- **Resourcing:** How will it attract and retain the right talent to a public sector organization? Specifically, how can it attract legal and financial skills when equivalent positions in the private sector can be significantly better paid? Staffing PPP units may in turn have an impact on how they are structured and governed; and
- **Funding mechanism:** How can it promote the right incentives and behaviors? How is the PPP unit funded to enable it to meet its operating costs? Does it receive a budget allocation, or does it charge procuring authorities for its services? This choice affects the incentives and behaviors of both the procuring authorities (if they have to pay, they might be less willing to involve the PPP unit) and the PPP unit (if it relies on procuring authorities for its revenue, it may be more proactive in trying to get involved, but may have a conflict of interest in exercising its control and oversight functions).

The role of the PPP unit will need to change as the PPP program matures and government agencies build up expertise and start developing their own PPP units. At the outset of a program the PPP unit will likely carry out multiple roles, but over time it may move towards the regulatory and supervision role.

The location of PPP units, and their mix of functions performed is a matter of design, history, and local context, as illustrated in table 2.7.

<b>TABLE 2.7: PPP unit Examples</b>	
<b>Parent Entity</b>	<b>Examples and Functions</b>
Finance Ministry or Treasury	<ul style="list-style-type: none"> <li>• In the <b>UK</b>, the Treasury Taskforce (100 percent public PPP policy unit), Partnerships UK (a 51 percent private and 49 percent public PPP delivery unit), and Infrastructure UK (a 100 percent public infrastructure policy, planning and delivery unit) have been essential to the success of the UK's PPP program. They were connected to HM Treasury. For more information see box 2.16.</li> <li>• The PPP units <b>Victoria and New South Wales</b> (Australia) have played an important role in promoting PPPs as an implementation method. These units were attached to the state departments of treasury and finance.</li> <li>• In <b>South Africa</b>, the PPP unit moved from the Treasury Budget Office to the Treasury's Government Technical Advisory Centre in 2014. This represented a shift in focus from controlling the process of developing PPP projects and contingent government liabilities resulting from fiscally risky PPPs, to advisory and project management support, particularly around the funding and management of feasibility studies for PPPs.<sup>110</sup> Responsibility for regulating the process of developing PPPs and guarding against contingent liabilities remained behind in the Budget Office.<sup>111</sup></li> <li>• In 2009, <b>New Zealand</b> created a unit in the Treasury, naming it the National Infrastructure Unit in recognition of its function of promoting more effective investment in infrastructure. Its focus is therefore on promoting the best options for infrastructure investment, rather than just PPPs.</li> </ul>
Planning Agency	<ul style="list-style-type: none"> <li>• <b>Colombia</b> has a PPP unit within the National Planning Department<sup>112</sup>. This unit is responsible for developing and implementing PPP related policies and coordinating the PPP procurement process and project transactions, such as managing transaction advisors.<sup>113</sup></li> </ul>
Investment Promotion Agency	<ul style="list-style-type: none"> <li>• In <b>Uruguay</b> under Law 18786 (2011), the CND – a state owned investment promotion agency, acts as a PPP unit in many respects. It helps structure projects, gives advice and produces guidance materials for implementing agencies. The procuring authority and CND may sometimes agree to have the CND implement the PPP project. A separate <b>PPP unit</b> in the Ministry of Finance approves financial and budgetary aspects of projects, and monitors implementation of the PPP. The PPP unit is also responsible for approving any contract adjustments during implementation.<sup>114</sup></li> </ul>

<sup>110</sup> Market players interpreted this move as a response to the fact that the heavy regulation of PPP development had virtually shut down the pipeline of projects. PPPs at the municipal level stopped completely. (Personal communication with James Leigland, Technical Assistance Facility (TAF), Private Infrastructure Development Group (PIDG), South Africa).

<sup>111</sup> South Africa National Treasury PPP Unit (2007) *Municipal Service Delivery and PPP Guidelines*.

<sup>112</sup> Colombia also has two other PPP Units. One is located in the Ministry of Finance and is responsible for the fiscal aspects of PPP projects. The other unit is housed in the Ministry of Transport, which is responsible for PPP projects related to highways and roads.

<sup>113</sup> Congress of Colombia (2011) *Law 1508 ("PPP Law")*.

<sup>114</sup> Parliament of Uruguay (2011) *Law 18786 ("PPP Law")*, Articles 9-13, 23, 38.

	<ul style="list-style-type: none"> <li>• Similarly in <b>Peru</b>, Legislative Decree No. 1012 (2008) enables PROINVERSION (the investment promotion agency) to select the type of PPP, design it, and draft the contract. Ministry of Finance approval is needed if the project requires subsidies.<sup>115</sup></li> <li>• In the <b>State of São Paulo, Brazil</b>, Centro do Professorado Paulista (CPP) was established in 2004 as an investment promotion agency that helps to develop and structure PPPs. CPP also manages a trust fund that provides guarantees to PPP projects.<sup>116</sup></li> </ul>
Development Bank	<ul style="list-style-type: none"> <li>• In <b>Jamaica</b>, the National Investment Bank of Jamaica, and its successor the Development Bank of Jamaica, have long functioned as the government's privatization and PPP agency. In recognition of the fiscal risk Jamaica took on in many of its previous PPPs, the government created a new PPP framework in 2011 with a stronger role for the Ministry of Finance, but it has retained the Development Bank as lead PPP agency.<sup>117</sup></li> <li>• <b>Puerto Rico's</b> PPP law (2009) created an effective PPP unit within its Development Bank.<sup>118</sup></li> <li>• In <b>Mexico</b>, FONADIN, part of the national development bank Banobras, functions like a PPP unit for some PPPs. FONADIN's Rules of Operation (2011) assign responsibilities to various secretariats (finance, communications and transport, tourism)<sup>119</sup> and to different units within FONADIN (a technical committee, business units, an evaluation sub-committee, and monitoring unit) for developing and approving PPPs.<sup>120</sup></li> </ul>
Prime Minister's Office	<ul style="list-style-type: none"> <li>• In <b>Bangladesh</b>, the PPP office was established as a separate, autonomous office under the Prime Minister's Office. Its purpose is to support sector line ministries to facilitate identification, development, and tendering of PPP projects to international standards. This office is in addition to the PPP unit that sits within the Ministry of Finance to control the fiscal responsibility and sustainability in PPP projects.<sup>121</sup></li> <li>• <b>Malaysia's</b> PPP unit was established under the Prime Minister's Department in April 2009. This unit is the central agency tasked with the responsibility to plan, evaluate, co-ordinate, negotiate, and monitor the implementation of PPP projects. This unit also manages and evaluates projects that require funding from the Facilitation Fund, a fund specially</li> </ul>

<sup>115</sup>President of Peru (2008) *Legislative Decree No. 1012*, Article 9.

<sup>116</sup>Legislative Assembly of the State of Sao Paulo, Brazil (2004) *Law 11688 ("PPP Law")*. Article 12-18.

<sup>117</sup> Government of Jamaica (2011) *Government of Jamaica Policy Framework and Procedures Manual for Privatization of Government Assets – Draft*.

<sup>118</sup> Legislative Assembly of the State of Sao Paulo, Brazil (2004) *Law 11688 ("PPP Law")* pp.1.

<sup>119</sup>BANOBRAS (2000) *FONADIN Reglas de Operacion (Rules of Operations)* Title One, Chapter IV, Rule 5.13, Title Two, Chapter II, Rule 8.6, Title Three, Chapter IV Rule 18).

<sup>120</sup> BANOBRAS (2000) *FONADIN Reglas de Operacion (Rules of Operations)* Title One, Chapter IV, Rule 5.13, Title Two, Chapter II, Rule 8.6, Title Seven, Chapters I-VI, Rules 37-56.

<sup>121</sup> Public Private Partnership Office Bangladesh: Prime Minister's Office (2015). *Welcome to PPP Bangladesh*. Available at <http://www.pppo.gov.bd/>

established to stimulate private sector investment and bridge the viability gap of projects that have strategic impact. <sup>122</sup>
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PPP units may bring risks and pitfalls to the project and program management if they are not properly designed. Firstly, if there is a lack of clarity in the unit's role, it may end up as another entity worsening, not improving, coordination. Similarly, the unit may become a bottleneck for approvals if it has insufficient resources to undertake appraisals. Finally, when various entities want to control the PPP unit, it may lead to conflict in its design, leading in turn to delays in the creation of the PPP framework and delivery of the PPP program.

Also, PPP units cannot perform miracles. PPP units will probably not help much where high-level political commitment to a quality PPP program is lacking. PPP units also need to be integrated into the mainstream project approval and budgeting process in the government if they are to be successful. For example, the fact that the BOT Center in the Philippines did not have strong institutional links to either the Department of Finance or the Planning Agency posed limitations in project preparation for many years.

Although PPP units are not always required, and will not always succeed in creating successful PPP programs<sup>123</sup>, well structured PPP units have worked well in many countries, as the above examples show.

## 1.8 Public Financial Management of PPPs

Public financial management of PPPs relates to how fiscal commitments under PPPs are controlled, reported, and budgeted. Public financial management aims to reduce the risk of PPPs costing the government more than expected or placing undue burden on future generations.

PPP contracts commit governments to substantial payments years into the future. This can create challenges for public financial management which is generally geared to annual appropriations for expenditure. For this reason, PPP-specific approaches to public financial management have been developed.

Strong public financial management is desirable because poor financial management of PPPs can have wide reaching economic impacts. Rating agencies will examine the overall financial health of governments including the

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<sup>122</sup> Official Portal of Public Private Partnership Unit (2015). *Message From Director General*. Available at <http://www.ukas.gov.my/en/perutusan-ketua-pengarah>

<sup>123</sup> Public Private Infrastructure Advisory Facility (2007) *Public-Private Partnership Units: Lessons for their Design and Use in Infrastructure*. World Bank.

implications of PPP fiscal commitments when assigning a rating to government debt. If a government is not managing the financial commitments of their PPP contracts, the government bonds may be seen as a risky investment, increasing the overall government cost of debt.

This section first describes common types of fiscal commitments (section 1.8.1) and how those commitments can be quantified (section 1.8.2). It then outlines how to decide on making fiscal commitments (section 1.8.3), and how budgeting for PPPs should be done (section 1.8.4). Finally, it shows how the effectiveness of commitments can be maximized (section 1.8.4) and how to account for and control PPP exposure (section 1.8.5 and section 1.8.6 respectively).

### **1.8.1 Types of Fiscal Commitment to PPPs**

Fiscal commitments to PPPs can be payments for services, capital contributions, or subsidies to reduce costs for users, or a means to share risk. The wide range of fiscal commitments can usefully be divided into the following categories.

- **Direct liabilities:** known payments that must be made if the PPP proceeds (although there may be some uncertainty regarding the value). Direct liabilities arising from PPP contracts can include:
  - Upfront "viability gap" payments – an up-front capital subsidy (often paid out as construction progresses);
  - Availability payments – a regular payment over the life of the project, usually conditional on the availability of the service or asset at a contractually specified quality. The payment may be adjusted with bonuses or penalties related to performance; and
  - Shadow tolls or output-based payments – a payment or subsidy per unit or user of a service. For example, per vehicle kilometer driven on a PPP highway. See box 2.17.
- **Contingent liabilities:** payment commitments whose occurrence, timing and magnitude depend on some uncertain future event, outside the control of government. Contingent liabilities under PPP contracts can include:
  - Guarantees on particular risk variables – an agreement to compensate the private party for loss in revenues should a particular risk variable deviate from a contractually specified level. The associated risk is thereby shared between the government and the private party. For example, this could include guarantees on demand remaining above a specified level (as in a take-or-pay contract), or on exchange rates remaining within a certain range;

- Compensation clauses – for example, a commitment to compensate the private party for damage or loss due to certain, specified, uninsurable force majeure events;
  - Termination payment commitments – a commitment to pay an agreed amount should the contract expire or is terminated due to default by the public or private party. The amount may depend on the circumstances of default; and
  - Debt guarantees or other credit enhancements – a commitment to repay part or all of the debt used to finance a project in the event that the private borrower does not repay it. The guarantee could cover a specific risk or event. Guarantees are used to provide security to a lender that the loan will be repaid.
- **Liabilities of government owned off-takers:** if a commercial but government owned entity (such as a power or water utility) contracts with a private generator or bulk water supplier, there are two levels of liability.
    - The liability of the government-owned entity. This must be recorded by the entity in question and may be consolidated into whole-of-government financial reporting in some cases; and
    - Central government liabilities to make good if the government-owned off-taker defaults (this may be an explicit or implicit contingent obligations).

***Box 2.17: Fiscal Risk in Minimum Traffic Guarantees***

Minimum traffic guarantees are sometimes agreed to by governments to limit the downside traffic risk for investors. Such guarantees compensate the concessionaire if traffic or revenue falls below a specified minimum level.

There are a number of different forms the guarantee can take.

- Cash compensation if revenue falls below the minimum level.
- An extension of the concession term in the event traffic falls below minimum levels.
- Cash compensation and a maximum traffic ceiling above which all revenues are transferred to the government.
- Standby government loans to support traffic and revenue risk.

It is not unusual for such guarantees to be called on. If users are sensitive to price fluctuations, and there are a high number of free alternative routes, economic downturns can be reasonably expected to affect road traffic. For



example, during the 2008 Global Financial Crisis, Iberia's (Spain) toll traffic volumes in 2013 were 30-35 percent lower than 2007 levels.

Source: Fisher and Babbar (n.d.) *Private Financing of Toll Roads*. World Bank; Infrastructure Journal.

### **1.8.2 Identifying and Quantifying Fiscal Commitments to a PPP Project**

A government's fiscal commitments – both direct and contingent – will be established by the PPP contracts. The value of direct liabilities will be relatively simple to quantify. In many cases its value will be explicitly expressed in the contract. Valuing contingent liabilities is more complicated and requires a good understanding of both the size of the potential liability and the likelihood of its occurring.

#### **Direct liabilities**

During the appraisal stage, the value of the direct fiscal commitments required can be estimated from the project financial model (described further in chapter 4). The value of these direct payment commitments is driven by the project costs and any non-government revenues. The value of the direct fiscal contribution required is usually the difference between the cost of the project (including a commercial return on capital invested) and the revenue the project can expect to earn from non-government sources such as user fees.

The fiscal cost can be measured in different ways.

- **Estimated payments in each year:** The amount that the government expects to have to pay in each year of the contract, given the most likely project outcomes. This is the most useful measure when considering the budget impact of the project;
- **Net present value of payments:** If the government is committed to a stream of payments over the lifetime of the contract such as availability payments it is often helpful to calculate the net present value of that payment stream. This measure captures the government's total financial commitment to the project, and it is often used if incorporating the PPP in financial reporting and analysis (such as debt sustainability analysis). Calculating the net present value requires choosing an appropriate discount rate – the choice of discount rate to apply when assessing PPP projects has been a subject of much debate;<sup>124</sup>

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<sup>124</sup> Harrison (2010) *Valuing the Future: The Social Discount Rate in Cost-Benefit Analysis*. Australian Government Productivity Commission.

It is generally helpful to estimate how the payments might vary. For example, payments may be linked to demand, inflation, or they may be denominated in a foreign currency (and therefore be subject to exchange rate changes). The effect on payment obligations of changes in these variables should be assessed.

### **Contingent liabilities**

Assessing the cost of contingent liabilities is more difficult than for direct liabilities, since the need for, timing and value of such payments are uncertain. Broadly speaking, there are two possible approaches.<sup>125</sup>

- **Scenario analysis:** Scenario analysis involves making assumptions about the outcome of any events or variables that affect the value of the contingent liability, and calculating the cost given those assumptions. For example, this could include working out the cost to the government in a “worst case” scenario, such as default by the private party at various points in the contract. It could also include calculating the cost of a guarantee on a particular variable, for instance demand – for different levels of demand outturns; and
- **Probabilistic analysis:** An alternative approach is to use a formula to define how the variables that affect the value of the contingent liability will behave. A combination of mathematics and computer modeling is then used to calculate the resultant costs. This enables analysts to estimate the distribution of possible costs, and then calculate measures such as the median (most likely) cost, the mean (average) cost, and various percentiles (for example, the range of values within which the cost is 90 percent of the time). To be useful, probabilistic models need reliable data from which to estimate the probability distributions of the underlying risk variables.

Box 2.18 provides examples of approaches to assessing contingent liabilities across jurisdictions.

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<sup>125</sup> As described in the Infrastructure Australia Guidance Note (2008) National Public-Private Partnership Guidelines Volume 4: Public Sector Comparator Guidance.

### **BOX 2.16: Approaches to Assessing Contingent Liabilities**

- **Colombia's** Ministry of Finance has defined its approach to (i) assessing the financial and economic implications of contingent liabilities, (ii) accounting, budgeting, and assessing the fiscal implications of contingent liabilities, and (iii) identifying, classifying, quantifying, and managing contingent liabilities. This approach is set out in a presentation on "management of contingent liabilities".<sup>126</sup>
- In **Chile**, the Ministry of Finance has developed a sophisticated model for valuing minimum revenue and exchange rate guarantees to PPPs. This valuation is updated on an ongoing basis for all PPP projects, and it is reported in an annual report on contingent liabilities<sup>127</sup>. The report includes a brief description of the techniques used in Chile to analyze and value guarantees extended to PPP projects. Irwin and Mokdad's paper on managing contingent liabilities from PPP projects also describes the Chilean methodology in more detail.<sup>128</sup>
- **Peru's** Finance Ministry has also published a methodology for valuing contingent liabilities under PPPs. The consultancy report that defined the methodology has been published, and it includes a description of methodological alternatives and the PPP related contingent liabilities in Peru. Both documents are available on the Ministry's website section on managing contingent liabilities.<sup>129</sup>

### **1.8.3 Ensuring Fiscal Commitments are Affordable**

Affordability means the "ability to be accommodated within the inter-temporal budget constraint of the government".<sup>130</sup> Due to the long-term and contingent nature of PPP costs, it is not easy to decide whether they are affordable. In practice, affordability is assessed by considering the medium-term (typically three years or longer) expenditure framework, and then the annual budget constraint.

- **What is the medium-term expenditure framework?** Make conservative assumptions as to how overall budget limits will evolve, and consider whether the estimated annual payments for a PPP (under a reasonable range of scenarios) could be accommodated within those limits;

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<sup>126</sup> Ministerio de Hacienda y Credito Publico (2005) Pasivos Contingentes - Colombia (Contingent Liabilities).

<sup>127</sup> Dipres (2010) *Informe de Pasivos Contingentes*. Government of Chile.

<sup>128</sup> Irwin and Mokdad (2010) Managing Contingent Liabilities in Public-Private Partnerships: Practice in Australia, Chile, and South Africa. World Bank/Public Private Infrastructure Advisory Facility.

<sup>129</sup> Peru Ministerio de Economia y Finanzas.

<sup>130</sup> OECD (2008) *Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money*.

- Budget limits are set in a number of different ways.<sup>131</sup> In Brazil, project studies must include a fiscal analysis for the next ten years. In the UK, procuring authorities must demonstrate the affordability of a PPP project based on agreed departmental spending figures for the years available, and on cautious assumptions of departmental spending envelopes thereafter. In France, the affordability of a PPP is demonstrated by reference to a “ministerial program” a multi-year indicative budgeting exercise. South Africa’s approach (2004) to affordability also describes a similar approach; and
- **What is the annual budget constraint?** Introduce budget rules to ensure that PPP commitments are considered in the annual budget process. Again, this can be done in a number of different ways. In the state of Victoria, Australia, once a project is approved for PPP delivery, the government will reflect it in the expected PPP capital cash flows for that project as an estimated finance lease liability in the budget, along with any capital contribution expected to be made by the state. Colombia’s law on contingent liabilities (1998) requires implementing agencies to make a cash transfer to a contingency fund when a PPP project is signed. The cash transfer is set equal to the expected value of payments under any revenue guarantees provided (these payments may be phased over several years). This means the decision to accept a contingent liability has an immediate budget impact that must be considered.<sup>132</sup>

See chapter 4.11 for further discussion in fiscal limits and affordability.

#### **1.8.4 Budgeting for Fiscal Commitments**

Budgeting for PPPs involves making sure that money is appropriated and available to pay for whatever cost the government has agreed to bear under its PPP projects. Because such costs may be contingent or occur in the future, PPP budgeting can be hard to manage in traditional annual budget cycles. Nevertheless, credible and practical budgeting approaches are needed for good public financial management, and to assure private partners that they will be paid.

#### **Budgeting for direct commitments to PPPs**

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<sup>131</sup> As highlighted by OECD (2008) *Public Private Partnerships: In Pursuit of Risk Sharing and Value for Money*.

<sup>132</sup> Congress of Colombia (1998) Law 448 (on managing contingent liabilities of government entities), Article 6.

Direct commitments to PPPs include upfront payments (payments during construction usually built as grants), as well as ongoing payments such as shadow tolls or availability payments in government-pays PPPs or hybrid projects.

When governments provide **upfront or grant payments** to PPPs, the payments required are similar to those for traditionally government procured projects. Because these payments are typically made within the first few years of a project, they can be relatively easily built into annual budgets and medium-term expenditure frameworks. Nonetheless, some governments have introduced funds (known as Viability Gap Funds) from which such payments will be made. One example of such a fund is in India, as described in box 2.19.

**BOX 2.17: Viability Gap Fund in India**

In July 2005, the Cabinet Committee on Economic Affairs established India's Viability Gap Fund program through its approval of the *Scheme for Financial Support to Public Private Partnerships in Infrastructure*.

The program has been successful. Twenty-three PPP projects with a total investment of \$3.5 billion have received subsidies or Viability Gap Funding (VGF). An additional 43 projects are under review or have received in principle approval.

The primary objective of India's VGF program is to attract more private investment in infrastructure by making PPP projects financially viable. Dissecting this primary objective reveals three underlying objectives.

- Attracting more private investment to mobilize additional finance and more rapidly meet India's infrastructure needs.
- Prioritizing PPP projects to improve efficiencies, control timing and cost, and attract private sector expertise.
- Developing projects through an "inclusive" approach that does not neglect geographically or economically disadvantaged regions.

Critically, knowing that the funding is available encourages firms to bid on India's PPP projects. The resulting keen competition has meant that many projects that the government thought might need a subsidy have in fact been fully privately financed without the necessity of a VGF contribution.

How are funds appropriated in the budget?

An appropriation from the state budget of about \$335 million was used to capitalize India's VGF program.<sup>133</sup> Rather than being disbursed in that year, the appropriation was set aside as a dedicated fund to be managed by the Ministry of Finance. It is expected that additional funds will be allocated to the VGF program through further annual appropriations once the initial capital is spent.

VGF for projects in India's National Highway Development Program is appropriated separately. Starting in 2006, a portion of road user tax revenue in the Central Road Fund has been earmarked for Viability Gap Funding. The amount of funds earmarked for VGF is determined annually by the Planning Commission with input from the Ministry of Finance and the Ministry of Shipping, Road Transport, and Highways.

*Source: Castalia (2011) Report to the World Bank Institute Subsidy Funding Mechanisms for Public Private Partnerships in Latin America.*

Budgeting for **long-term direct commitments**, such as availability payments, is more challenging. The mismatch between the annual budget appropriation cycle and the multi-year payment commitments exposes the private party to the risk that payments may not be appropriated when due. This problem is not unique to PPPs. Indeed many other types of contractual payment commitments may extend beyond the budget year.<sup>134</sup> In many jurisdictions, governments do not introduce any particular budgeting approach for direct, long-term PPP commitments. This is done on the assumption that a responsible legislature will always approve appropriations to meet the government's legally binding payment commitments.

Where appropriations risk is high typically in systems with a true separation of powers between the legislature and executive mechanisms to reduce this risk may be warranted. In **Brazil** at the federal level, Law No. 101 of 2000 requires subsidy payments to PPPs to be treated in the same way as debt service payments, that is, they are automatically appropriated.<sup>135</sup> This means that once the subsidy is approved, the appropriations needed are not subject to further legislative approval.

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<sup>133</sup> Ministry of Finance (2006) *Economic Survey, 2005-06*. Government of India.

<sup>134</sup> Leases for government buildings are an obvious example.

<sup>135</sup> *Lei Complementar No. 101* (2000) Articles 29, 30, and 32.

## Budgeting for contingent liabilities in PPPs

Budgeting for contingent liabilities can be particularly challenging because payments may become due unexpectedly. If savings cannot be found within the existing appropriations, the government may need to go back to the legislature to request a supplementary appropriation, often a difficult and contentious affair.

To overcome these difficulties, governments may introduce particular mechanisms for budgeting for contingent liabilities under PPP projects. There are two ways to do this.

- The first option is to **create additional budget flexibility**.<sup>136</sup> This can include creating a contingency line in the budget from which unexpected payments can be made. A contingency line could be specific to a particular liability – for example, those that are considered relatively higher risk, or cover a range of contingent liabilities. Alternatively, some countries allow spending in excess of the budget without need for additional approval in certain defined circumstances; and
- The second option is to **create a contingent liability fund**.<sup>137</sup> A contingent liability fund (or guarantee fund) is an account (which may be within or external to the government's accounts) to which transfers are made in advance, and from which payments for realized contingent liabilities will be made when due.

If designed appropriately, creating a fund can help control the government's fiscal commitments to PPPs as well as provide a clear budgeting mechanism, thereby improving credibility. In Indonesia, the intention is that the government will no longer bear any contingent liabilities under its PPP projects. These will be borne by the Indonesia Infrastructure Guarantee Fund (IIGF). Contingent liabilities will only be assumed following a careful assessment of the risk by IIGF's management. In the state of São Paulo in Brazil, the contingent liabilities under PPP projects have been borne by the São Paulo Partnerships Corporation (Companhia Paulista de Parcerias – CPP) since the PPP law 11688 was passed in 2004.

An advantage of contingent liability funds is that they can avoid the timing issues that arise if funds must be appropriated through the budget process in order to meet a contingent liability. A need for additional appropriations can significantly delay payment, resulting in liquidity issues for the private sector. Contingent liability funds can reduce risk for bidders, which in turn

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<sup>136</sup> As described in Cebotari (2008) *Contingent Liabilities: Issues and Practice*.

<sup>137</sup> *Ibid.*

reduces costs for the public sector. Box 2.20 describes these examples of contingent liability funds.

**BOX 2.18: Contingent Liability Funds for PPPs**

- **Colombia:** To manage contingent liabilities arising from guarantees offered to toll road concessionaires, Colombia assesses the fiscal impact of guarantees before these are granted and sets aside funds to cover the expected payments from the guarantees<sup>138</sup>. A Government Entities Contingent Liabilities Fund, established in 1998, has a special account that is managed by *La Previsora*, a trust company. The fund receives contributions from the government entities, the national budget, and the returns generated with its resources. The government entities carry out the contingent liabilities valuation which is then approved by the Public Credit Divisions of the Ministry of Finance. Once the PPP is approved and implemented, the division carries out ongoing assessments of the value of the associated contingent liabilities.<sup>139</sup>
- **São Paulo, Brazil:** In the State of São Paulo, the São Paulo Partnerships Corporation (Companhia Paulista de Parcerias – *CPP*) was established in 2004 using resources from the sale of the government’s stake in State Owned Enterprises [#17, Articles 12-23]. Among its other roles, the CPP provides fiduciary guarantees to PPP projects.<sup>140</sup> The CPP is managed by a Directorate of up to three members selected by the Governor of the State, a Management Council comprised of up to five members selected by the Governor of the State, and a fiscal council. The CPP is an independent legal entity. A Castalia and World Bank Institution (WBI) review of **Subsidy Funds for PPPs in Latin America and Caribbean (LAC)**<sup>141</sup> provides more background about the CPP.
- **Indonesia:** The Indonesia Infrastructure Guarantee Fund, or the IIGF, is a state owned enterprise established by government regulation and the Ministry of Finance Decree in 2009. As one of the fiscal tools of the government, the IIGF is supervised by the Ministry of Finance. The IIGF’s mandate is to provide guarantees for infrastructure projects under PPP schemes. The fund operates as a single window for appraising, structuring, and providing

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<sup>138</sup> Castalia (2009) Benchmarking Indonesia's PPP Program.

<sup>139</sup> Congress of Colombia (1998) Law 448 (on managing contingent liabilities of government entities), Articles 3-8.

<sup>140</sup> Governor of the State of Sao Paulo (2004) *State Decree 48.867*, Article 15.

<sup>141</sup> Castalia & WBI (2011) Subsidy Funding Mechanisms for Public Private Partnerships in Latin America.



guarantees for PPP infrastructure projects. The single window provides certainty because it ensures a consistent policy for appraising guarantees, as well as a single process for claims. This introduces transparency and consistency in the process, which is critical for market confidence. The IIGF provides guarantees against specific risks in a variety of sectors, including power, water, toll roads, railways, bridges, and ports.<sup>142</sup>

### **1.8.5 Accounting for, and Reporting on, Fiscal Commitments**

Governments need to account for and report on their financial commitments, including those under PPP contracts. Fiscal reporting on PPPs needs to be consistent with fiscal reporting generally. There are three main types of fiscal reporting.

- **Government finance statistics:** These are summary statistics on the state of a government's finances, which are intended to be internationally comparable. These statistics may follow regional or international standards, such as those set by **Eurostat** for European Union countries, or the **International Monetary Fund (IMF) publication Government Finance Statistics Manual (GFSM)** published in 2001;<sup>143</sup>
- **Government financial statements:** Most governments publish audited financial statements. There are internationally recognized standards on what should be in those financial statements, although in practice few governments meet those standards. The **International Public Sector Accounting Standards (IPSAS)** is a modified version of the International Financial Reporting Standards (IFRS). IPSAS is designed for use in the public sector, and IFRS applies to companies. Some governments use simplified versions of the IPSAS standards (for further information see <https://www.ifac.org/public-sector/about-ipsasb>); and
- **Budget documentation and reporting:** Most governments prepare reports on financial performance as part of budget preparation and reporting. These are not subject to any international standards, although there are international guidance materials that promote transparency. For example, the **IMF's Manual on Fiscal Transparency (2007)** and the **Organization for Economic Co-Operation and Development's (OECD) Best Practices for Budget Transparency (2002)**.<sup>144,145</sup>

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<sup>142</sup> More information about the IIGF is available on its website: <http://www.iigf.co.id/Website/Home.aspx>

<sup>143</sup> International Monetary Fund (IMF) (2001) *Government Finance Statistics Manual*.

<sup>144</sup> International Monetary Fund (IMF) (2007) *Manual on Fiscal Transparency*.

<sup>145</sup> OECD (2002) *Best Practices in Budget Transparency*.

In general, the standards referred to above set rules or guidelines for whether and how various kinds of liabilities and expenditures should be recognized or disclosed.

### **Recognizing PPP liabilities in government accounts**

Governments need to decide whether and when PPP commitments should be recognized, that is, formally recorded in financial statements as a liability or expense. This is important because limits or targets are often set on the government's overall liabilities and expenditures, and depending on how PPPs are reported and incorporated in national accounts, this may create a dangerous bias in favor of the PPP tool (see chapter 1.5.1). The extent to which PPP commitments are recognized as government capital expenditure or liabilities can therefore influence a government's decision to pursue PPPs, including how to structure them.<sup>146</sup>

The financial standards vary in their treatment of PPP fiscal commitments. Two standards specifically address when and how **direct liabilities and assets** of PPP projects should be recognized by the contracting governments in its accounts.

- **IPSAS Standard 32:** Introduced in 2011, IPSAS 32 defines when PPP assets and liabilities should be recognized, assuming a government is following IPSAS accrual accounting standards. Under IPSAS 32, the asset will be regarded as belonging to the government's. Therefore, PPP assets and liabilities should be included in the government's balance sheet if (i) the government controls or regulates what services the operator must provide with the PPP asset, to whom, and at what price; and (ii) the government controls any significant residual interest in the asset at the end of the contract. Under this definition, government-pays PPPs would appear on the government's balance sheet; the treatment of user-pays PPPs is less clear, and may depend on the details of the contract;<sup>147,148</sup> and
- **Eurostat guideline:** Before the introduction of IPSAS 32, the only standard specifically addressing PPPs was a Eurostat ruling. This ruling requires European governments to recognize PPP liabilities in debt

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<sup>146</sup> In addition to potentially favoring PPPs when there are restrictions on debt or the budget, when PPP accounting depends on risk transfer (for example ESA 2010) this may influence the PPP structure by incentivizing the government to transfer more risk than the optimum, therefore destroying the VfM of the PPP.

<sup>147</sup> As of January 2012, no government has fully adopted IPSAS standard 32, so it remains to be seen how it will be interpreted in practice.

<sup>148</sup> International Public Sector Accounting Standards Board (2011) *IPSAS 32 Service Concession Agreements: Grantor*.

statistics where the government does not transfer to the private sector “the majority of risks”, including construction risks and either demand or availability risk. Chapter 4.12 provides more detail on Eurostat criteria.<sup>149</sup>

Most accounting and reporting standards do not require governments to recognize **contingent liabilities**, including those arising from PPP contracts. There is one exception: IPSAS standards for governments implementing accrual accounting require contingent liabilities to be recognized if it is likely that the underlying event will occur and the amount of the obligation can be measured with sufficient reliability.<sup>150</sup> In this case, the net present value of the expected cost of the contingent liability should be recognized as a liability (a provision) and as an expense when the contract is signed.

As part of the appraisal exercises, the respective country may require a specific analysis to determine whether the asset (and associated liabilities) should be recorded on the public balance sheet or on “off government accounts”. This will influence whether the government proceeds with the PPP route (or with the project in any form) depending on the regulatory or policy limits that may be in place for government debt and deficit. This analysis is further explained in chapter 4.12.

When governments have IMF or other international donor agreements, the accounting and reporting standard may differ from IPSAS and Eurostat. In this case, the debt limits and reporting guidelines will be set by the donors.

### **Disclosing PPP liabilities**

Most international reporting and statistical standards agree that even when PPP commitments are not recognized as liabilities, they should be disclosed in notes to the accounts and reports.

Disclosing useful information on contingent liabilities is complicated. In principle, it would be useful to disclose the expected value of payments. The expected value of a contingent liability is difficult to predict. It is also useful if the magnitude and the likelihood of a liability being incurred are disclosed. Such disclosure could usefully be substantiated by a report with additional information. Examples of this are provided in box 2.21.

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<sup>149</sup>Schwartz, Corbacho and Funke (2007) *Public Investment and Public-Private Partnerships*. International Monetary Fund.

<sup>150</sup> Cebotari (2008) *Contingent Liabilities: Issues and Practice*.

### **BOX 2.19: Examples of PPP Liability Disclosure**

**Cebotari's paper on Government Contingent Liabilities** describes international guidelines for how contingent liability exposure should be disclosed including those under PPP programs and provides examples from several countries.

Cebotari's paper also describes how some countries have interpreted these standards in practice. For example, Australia and New Zealand disclose contingent liabilities including to PPPs in notes to financial statements available online.<sup>151</sup> Since 2007, Chile's Budget Directorate<sup>152</sup> of the Ministry of Finance has published an **annual contingent liabilities report** which initially presented information on contingent liabilities from revenue and exchange rate guarantees to PPPs. This report has since been expanded to cover other types of government contingent liability.

*Source:* Cebotari (2008) *Contingent Liabilities: Issues and Practice*.

### **1.8.6 Controlling Aggregate Fiscal Exposure to PPPs**

In addition to considering fiscal exposure on a project-by-project basis, some governments introduce targets or rules limiting aggregate exposure. Given the difficulties in deciding whether a particular PPP commitment is affordable, limits on aggregate exposure can be a helpful way to ensure the government's total exposure to PPP costs and risks remain within manageable limits. Examples of PPP fiscal limits are presented in box 2.22.

### **BOX 2.20: PPP fiscal limits**

- **Peru's Legislative Decree No. 1012 (2008)**<sup>153</sup> states that the present value of the total fiscal commitments to PPPs firm commitments and measurable contingent liabilities shall not exceed 7 percent of gross domestic product (GDP). However, every three years, the President may, with the endorsement of the Ministry of the Economy and Finance, issue a decree increasing or decreasing this limit, depending on the infrastructure needs of

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<sup>151</sup> For New Zealand, see <http://www.treasury.govt.nz/government/financialstatements>; for Australia, see <http://www.finance.gov.au/publications/commonwealth-consolidated-financial-statements/>.

<sup>152</sup> Dipres (2010) Dirección Presupuestaria from the Ministerio de Hacienda of Chile.

<sup>153</sup> President of Peru (2008) *Legislative Decree No. 1012*.

the country.

- In **Hungary**, the **public finance law** limits the total nominal value of multi-year commitments in PPPs to 3 percent of government revenue (Act 38 of 1992, Article 12, as quoted in Irwin paper).<sup>154</sup>
- **Brazil's Federal PPP law** (Law 11079, 2004) limits the total financial commitments undertaken in PPP contracts to a maximum of 1 percent of annual net revenue.<sup>155</sup> Hemming notes that accounting rules for PPPs are being defined, including the valuation of guarantees and their treatment in relation to this limit.

However, creating PPP specific limits distinct from other limits on public expenditure can simply create incentives for agencies to choose public procurement over PPP even when PPP would provide better Value for Money.

An alternative, therefore, is to **incorporate limits on PPP commitments within other fiscal targets**. For example, some governments introduce targets or limits on public debt. Some types of PPP commitment may be included within measurements of public debt, following international norms or national rules. In such cases, an appropriate approach could be to establish a limit on “debt plus PPP commitments”. In any control on total PPP exposure, a difficult issue will be whether to include contingent liabilities, and if so, how to value them.

When aggregate exposure is limited, each PPP will have to be tested against such overall limits, under the respective appraisal exercises as part of the approval process (see chapter 4.11).

### **1.9 Oversight of PPP Programs and Projects**

PPP projects are usually implemented by the Executive branch of government. The processes and responsibilities described in section 1.7 aim to create checks and balances *within* the executive branch as to how those decisions are made. This section describes the broader governance of the PPP program how other entities and the general public participate in the PPP process, and how they hold the executive accountable for its decisions and actions. Box 2.3 provides an example of how this is undertaken for the UK's PFI.

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<sup>154</sup> Irwin and Mokdad (2010) Managing Contingent Liabilities in Public-Private Partnerships: Practice in Australia, Chile, and South Africa. World Bank/Public Private Infrastructure Advisory Facility.

<sup>155</sup> Brazil, Presidency of the Republic (2004) *Law 11079 ("Federal PPP Law")*.

### ***BOX 2.21: Private Finance Initiative (PFI) Calls for Evidence***

- In 2011, the UK government decided that a fundamental reassessment of the PFI model was needed. In part because during a period of fiscal austerity, stakeholder groups and the public had become concerned that PPP payments could not be cut, thereby forcing greater reductions in other parts of the budget. As dissatisfaction mounted, many questioned whether the PPP contracts had in fact provided Value for Money.
- To provide an opportunity for all interested parties to bring forward proposals on how best to reform the PFI model, the government launched a call for evidence. In response:
  - 136 submissions were received from a range of organizations, including advisors, investors, contractors, service providers, academics, and the public sector
  - 3 responses were received from MPs
  - 16 responses were received from individuals.
- In light of the call for evidence, the government decided to reform the PFI model and develop a new approach, PF2, for involving private finance in the delivery of public infrastructure and services. The PF2 model seeks to improve the Value for Money of financing projects, increase the transparency of the liabilities created by long term projects, increase the equity returns achieved by investors, speed up and reduce the cost of the procurement process, and to provide greater flexibility in the provision of services.

*Source:* HM Treasury (2012) A New Approach to Public-Private Partnerships.

The entities and groups outside the executive with a role to play in ensuring good governance of the PPP program can include:

- **The legislature:** The legislative branch of government often defines the PPP framework by passing PPP legislation. In some cases, the legislature may be directly involved in the PPP process, approving PPP projects. Legislators also exercise ex-post oversight, scrutinizing reports on the government's PPP commitments. The role of the legislature is explored in section 1.9.1;
- **Auditing entities:** Many jurisdictions have independent audit entities. These entities may consider PPP commitments as part of their regular audit responsibilities for example, in auditing government financial statements. They may also review PPP project performance, investigate particular points of concern, or review the Value for Money of the program as a whole. In turn, these reviews enable the legislature and the public to

check on PPP program performance. The role of auditing entities is explored in section 1.9.2;

- **The public:** The public can directly participate in PPP project design. This can be done through consultation processes and in monitoring service quality, if provided with channels for feedback. The transparency of the PPP process as a whole, and an active media, can inform public opinion and if the issues are serious enough influence elections. The role of the public is explored further in section 1.9.3; and
- **Other mechanisms:** There are some additional mechanisms that can be used to ensure good governance of the PPP process. Probity advisors can be engaged at each stage to identify and minimize any real or perceived conflicts of interest. Public procurement watchdogs can monitor the procurement process. Such mechanisms are explored in section 1.9.4.

### **1.9.1 Role of the Legislature**

The legislative branch of government, that is, the elected, law-making parliament or assembly may control the PPP process in several ways.

- **Defining the PPP legal framework and policy:** The PPP framework is often established in specific PPP legislation. As described earlier in this chapter, one rationale for introducing a PPP law is to enable the legislative branch of government to set rules for how PPPs will be developed and implemented, against which those responsible can be held accountable;
- **Defining limits on PPP commitments:** The legislature may limit total PPP fiscal commitments (as highlighted in section 1.8.6), the amount taken on in a year, or otherwise govern the risk and inter-generational equity issues that PPPs can create;
- **Approving PPP projects:** PPP projects may require parliamentary approval, as described in section 1.7.5. This requirement can be limited to PPP projects above a certain size. For example, the Hungarian PPP Act (1992) states that the government must seek Parliament's approval before signing a contract creating multi-year payment obligations with a present value of more than \$230 million.<sup>156</sup> In Guatemala, all PPP contracts require approval from Congress<sup>157</sup>. Requirements for parliamentary

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<sup>156</sup> Irwin (2007) *Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects*. World Bank.

<sup>157</sup> Congress of the Republic of Guatemala (2010) *Ley de Alianzas para el Desarrollo de Infraestructura Económica (Law of Partnerships for the Management of Economic Infrastructure)*.

approval create a risk that a tender process will be conducted and a preferred bidder will be selected, but parliament will not give the necessary approval for the government to enter into the contract. This risk may decrease investor appetite to bid for PPPs in the country; and

- **Program oversight:** Many governments include information on the PPP program in budget documents and other financial reports. Some Australian states table project or contract summaries in parliament within a specified time after financial close. This gives parliament the opportunity to scrutinize the government's commitments to PPPs and hold the decision-makers responsible after the event. Parliament may also commission and receive auditors' reports on the PPP program. Examples of legislative oversight are provided in box 2.24.

#### **BOX 2.22: Legislative Oversight of PPP Programs**

- In 2005, the Parliament (House of Commons) of the UK published a performance audit of the **30 year PPP for the London Underground Urban Mass Transit System**. The report assessed the government's justification for the maintenance and upgrade contract with the private sector, the Value for Money analysis, and overall structure of the PPP. The report provided conclusions and offered recommendations for future changes, which the UK Treasury then addressed to Parliament.<sup>158</sup>
- The **Public Accounts and Estimate Committee** in the Parliament of Victoria, Australia reviewed Partnerships Victoria, the PPP program, in the context of governance, risk allocation, accountability, protecting the public interest, economic benefits and Value for Money, and international accounting standards for PPPs. Recommendations were then made to improve PPP policies and strengthen governance of the projects.<sup>159</sup>

### **1.9.2 Audit Entities and Ex-Post Evaluation**

Audit entities are an important link in the chain of accountability for public expenditure decisions, providing independent reviews of government finances and performance to parliaments and to the public. The International Organization

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<sup>158</sup> Committee of Public Accounts (2005) *London Underground Public Private Partnerships: 17th Report of Session 2004-2005*.

<sup>159</sup> Public Accounts and Estimates Committee, Parliament of Victoria (2006) *Report on Private Investment in Public Infrastructure, Seventy First Report to the Parliament*.



of Supreme Audit Institutions (INTOSAI) provides an online list of its member audit entities.<sup>160</sup>

The mandate of supreme audit entities varies by jurisdiction, but should generally include two levels of audit. The first is **regularity audits** which can include auditing the financial statements of government entities and of the government as a whole, and auditing decision-making processes for compliance and probity. The second is **performance or Value for Money audits**, reviewing the government's effectiveness and efficiency.<sup>161</sup> Value for Money audits can be conducted at the PPP program or project level.

While the remits of supreme audit entities vary, they typically extend only to government agencies and entities wholly or majority owned by the government. Supreme audit entities, therefore, typically do not have the right or responsibility to audit PPP companies. Nonetheless, the private company often holds a lot of relevant information. Attempts by an audit entity to access information held by the private party can cause conflict.

To overcome this, the PPP contract can include requirements that the PPP Company provide audited accounts and any other relevant data the government may require. The audit entity also needs to be clear about its rights to access information belonging to the PPP Company. INTOSAI has published guidelines for auditing PPP projects (2007).<sup>162</sup>

### **Regularity auditing for PPPs**

When carrying out regularity audits of contracting authorities, audit entities will typically check that PPP commitments are appropriately reflected in the accounts, and that PPP processes have been followed. Audits can occur at any stage of the PPP process, including during project preparation or after procurement.

### **Performance auditing of PPP projects and PPP programs**

Auditing agencies may carry out performance or Value for Money audits of particular PPP projects or broader PPP programs when there is concern over

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<sup>160</sup> See <http://www.intosai.org/about-us/organisation/membership-list.html>

<sup>161</sup> INTOSAI's International Standards of Supreme Audit Institutions (ISSAI) 100 sets out basic principles in government auditing. Paragraphs 34-44 describe the mandates of audit institutions, and define regularity and performance audits.

<sup>162</sup> INTOSAI (2007) Guidelines on Best Practice for the Audit of Public/Private Finance and Concessions (revised).

whether processes have been appropriately followed, or whether the project is providing Value for Money.

INTOSAI recommends that performance audits of PPP projects should be conducted soon after procurement, and further reviews should be carried out over the project lifetime covering the following information;

- All major aspects of the deal that have a bearing on Value for Money, such as required actions, outputs, and timing of delivery;
- How the PPP was identified;
- How the transaction process was managed;
- The tender process that was adopted;
- How the contract was finalized; and
- Ongoing management of the PPP contract.<sup>163</sup>

Examples of a PPP project performance audit in two states in Australia are outlined in box 2.25.

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<sup>163</sup> *ibid.*

### **BOX 2.23: Project Performance Audits**

- In the state of New South Wales, Australia, the auditor-general audited the **Cross City Tunnel**, a PPP project that provides a highway underneath Sydney’s central business district. The 2006 report included an analysis of the process in which the PPP contract was awarded, how the contract was eventually amended, and whether the costs of the project to citizens were justified. The project audit noted its high tolls, lower than expected levels of traffic, implications of the upfront fees paid by the concessionaire, and a lack of transparency in the amendment of the initial contract. The Auditor-General provided opinions on each of these issues based on the analysis.
- The state of Victoria, Australia, awarded concession contracts (called “franchises”) for the **tram and train system in the city of Melbourne**. When these operators ran into financial difficulties, the government decided to renegotiate with the existing private contractors, rather than retender. This raised some concerns for the resulting Value for Money. The government carried out an ex post Value for Money audit of the concessions and renegotiations. The report, published in 2005, focused on the effectiveness of the responsible agency, transparency of the process, proper risk allocation of the project, the development of public sector benchmarks, and adequate monitoring systems.<sup>164</sup>

It may be useful for the PPP program as a whole to be audited after it has been working for some time. Program-based audits should focus on providing recommendations for improving the program. Box 2.26 provides an example.

### **BOX 2.24: Legislative Audits and Reviews of PPP Programs**

In 2011, the UK National Audit Office (NAO) published a **review of the PFI program** and other large procurement projects, and provided key lessons from the UK’s experience. The NAO assessed various aspects of the program, including Value for Money, project preparation and implementation, and accountability. Based on this analysis, the NAO offered recommendations for future improvements to the PFI program.

*Source: Controller and Auditor General (2011) Lessons from PFI and Other Projects National Audit Office.*

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<sup>164</sup> Auditor General Victoria (2005) *Franchising Melbourne’s Train and Tram System* Victorian Government Printer. Available at: [http://download.audit.vic.gov.au/files/ptfranchising\\_report.pdf](http://download.audit.vic.gov.au/files/ptfranchising_report.pdf).

### **1.9.3 Role of the Public**

PPPs are meant to provide value to the public. Getting the right level of public involvement in the PPP process and program can make or break the legitimacy of a PPP program, and directly contribute to good governance. Direct public participation at various points in the PPP process can improve project design. Equally important, making PPP projects and processes transparent enables PPP performance to be a factor in the public policy debate and public opinion on regarding government's overall performance.

#### **Public participation in the PPP process**

Public participation can be introduced into the PPP process at three stages.

- **PPP program development** – engaging the public from the onset by involving them in the development of the PPP policy framework and continuing to seek feedback as the program is developed;
- **PPP project development** – introducing stakeholder consultation in the PPP development process, so that public concerns can be taken into consideration when structuring and implementing PPPs; and
- **PPP contract monitoring** – building mechanisms for user feedback and grievance resolution into contract agreements and management frameworks. Chapter 8 provide guidance and examples regarding how the public can play a role in monitoring contractor performance.

#### **Promoting transparency of the PPP program**

Many governments make information about the PPP program publicly available. This enables the media to report on the program, and allows the public to develop informed opinions on the government's performance in implementing PPPs.

As described in section 1.8.5, international standards require disclosure of financial commitments to PPPs in national accounts. Performance audits and reports are also commonly publicly available (refer to chapter 2.9.2). It is possible to also require disclosure of key contract clauses, or entire PPP contracts. Typically, any commercially sensitive elements of the contract are excluded from the published version. For example, the state of Victoria (Australia) has a policy of publishing all PPP contracts on the Victorian Government Purchasing Board website ([www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au)). In addition, a project summary is required,

providing information on the key project features and commercial terms of the project.<sup>165</sup>

While many governments withhold key commercial terms from publications, complete transparency can increase public trust in the program, so it should be considered. In the Australian state of New South Wales, the Freedom of Information Act requires information on PPPs to be made available to the public. In British Columbia, and most other jurisdictions in Canada, requests for quotes and proposals are disclosed during the procurement process, and the project agreement (redacted) and a project summary report are disclosed as soon as possible after financial close. A Freedom of Information and Protection of Privacy Act (FOIPPA) governs the information that must be released (and withheld) if in Canada.

The World Bank Group has recently published guidelines on best practice frameworks for disclosure. These guidelines provide a suggested framework and additional resources for policy makers interested in developing a policy for PPP disclosure for their countries. Recommended aspects of frameworks for disclosure are outlined in box 2.27BOX 2.25.

***BOX 2.25: Disclosure Frameworks: Institutionalizing PPP Information Disclosure and Transparency***

Managing the disclosure of information for PPPs is paramount for better management of PPP projects and programs. Many aspects of a sound and reliable framework are related to information disclosure management: accounting and reporting for PPP liabilities is in essence an information disclosure exercise regarding liabilities and fiscal implications (this has been discussed in section 1.8). In addition, transparency is a key principle of any public procurement process, and the private sector will only be interested (on a significant scale rather than opportunistically) in PPP programs if the procurement rules provide and protect transparency and fairness in selection, as well as access to meaningful information and studies on the projects to enable potential bidders to assess the opportunity in an efficient manner.

Governments must be accountable for their decisions (PPP procurement), which implies that information must be available to be audited, including information related to the fairness of the process itself and the performance of the PPP project. Such audits are of interest to the political community, the general public, and potential investors. This is discussed in section 1.9.

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<sup>165</sup> Partnerships Victoria (2001) *Practitioners' Guide*. State of Victoria.

Information disclosure can be proactive and reactive, and it can refer to the pre-procurement phase and the post procurement phase. According to the World Bank, the types of disclosure are as follows.

- Reactive disclosure (also known as responsive disclosure) occurs in response to a request for information, usually under a Freedom of Information or Right to Information Act. Proactive disclosure includes all information that is disclosed by governments either voluntarily or under a mandate provided by legislation or policy.
- Pre-procurement disclosure pertains to disclosure prior to the signing of the contract. Post-procurement disclosure pertains to disclosure after the signing of the agreement.

Information disclosure is so important that it becomes highly desirable to institutionalize it through a specific framework which overlaps with other elements of the PPP framework. The main challenge is in developing proactive disclosure practices: reactive disclosure is more common in existing frameworks.

The benefits of information disclosure are very significant and may include increased appetite from the private investor community, increased public confidence in how tax payers' money is being spent and whether the government is achieving Value for Money, and above all (and interrelated with all those objectives) a proper disclosure approach will be extraordinarily helpful to tackle corruption.

A number of countries have developed structured and institutionalized approaches to PPP information disclosure, including developed and EMDE countries.

A paramount factor that promotes disclosure is the existence of Freedom of Information Act (FOI) legislation, or equivalent requirements, that mandates proactive disclosure and that applies to PPPs. The other most significant factor is the "imperative and pressure to create new infrastructure" which links to the objective of increasing private sector involvement and, consequently, with the larger objective of reducing corruption. This may be the most relevant factor that explains why practices relating to PPP disclosure have developed more rapidly in some emerging countries, Colombia in particular.

There are many challenges to effective PPP information disclosure. These include the reluctance of public bodies to share information in the absence of a clear mandate or framework for proactive disclosure, the lack of clarity on disclosure specific to PPPs, and the confidentiality issues with respect to contracts and the interest of the private partner.

A framework for proactive PPP disclosure is similar to any general proactive disclosure policy in terms of the broad elements (that is, what should be disclosed, when and in what form, what should not be disclosed and the

responsibilities for disclosure). However, the special circumstances and sensitivities associated with PPP projects (for example, the long contract period, complex structure, provision of public services by the private party, multiplicity of stakeholders and their sensitivities, and so on.) require a PPP disclosure policy to go beyond a general disclosure policy in terms of the level of detail.

In this sense, Freedom of Information Acts, preferably with requirements for proactive disclosure, along with PPP specific legislation/guidance, guidance on confidential information, provision of standard contract clauses, and templates for disclosing information from the full suite of instruments that can enable sound disclosure and induce better disclosure practices.

*Source:* Adapted from “A guide to disclosure in public-private partnership projects” (WBG and PPIAF).<sup>166</sup>

#### **1.9.4 Promoting Procurement and Good Governance, and Reducing Corruption**

High value transactions attract the risk of corruption. Private players may attempt to improperly influence transactions and public officials may attempt to extract private profit from public office. Corruption in PPPs can be minimized using the mechanisms outlined above clear processes and criteria, clear assignment of responsibilities, oversight of the legislature and Supreme Audit Bodies, and transparency of information and public involvement.

Probity advisors and auditors, as well as government procurement agencies, can be used as additional mechanisms to further strengthen anti-corruption efforts.

##### **Probity advisors and auditors**

Probity advisors and auditors can be used to ensure that organizations act with integrity and impartiality, that suppliers are treated equally, that there are consistent and transparent processes, that intellectual property remains confidential, that conflicts of interest are resolved, and that procurement processes are aligned with capability. For example, the Victorian government in

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<sup>166</sup> The new World Bank Group guidelines on disclosure of information (“*Guide to Disclosure in Public-Private Partnership Projects*”) is based on the former report *Disclosure of Project and Contract Information in Public-Private Partnerships* with further analysis, widening the scope to include both pre and post-procurement information disclosure. It includes an analysis of reasons, benefits, and challenges as well as specific intelligence on handling confidentiality issues and detailed guidelines to develop a disclosure framework (including standard clauses and templates). These guidelines are complemented by a detailed study on a list of jurisdictions and an analysis of case studies.

Australia, requires independent probity advice “where the complexity of the procurement activity warrants independent process oversight”.<sup>167</sup>

In British Columbia and most of the other jurisdictions in Canada, fairness advisors are used on every PPP project to provide an independent assurance of fairness for both the public and market participants. The role of the fairness advisor is described in procurement documents. In British Columbia, there is also a Conflict of Interest Advisor who provides opinions on issues of conflict of interest that may arise with the bidding teams.

### **Government procurement agencies**

Government procurement agencies can be responsible for checking that procurement processes have been followed. This is a role played by the Contractor General in Jamaica (see box 28). In Romania, there are several governmental agencies responsible for checking the procurement process from different angles. The Unit for Coordination and Checking of Public Acquisitions is responsible for checking the public procurement process in relation to public acquisitions (including PPPs). The National Authority for Regulating and Monitoring the Public Acquisitions is the entity currently in charge of promoting and implementing public acquisitions policies in Romania. There are currently discussions at the governmental level to unify the two entities under the government General Office authority.

#### ***BOX 2.26: Public Role in Procurement Process Audits***

In Jamaica, the contractor general undertook a detailed investigation of the procurement process for a proposed Natural Gas Regasification project. This was prompted by a letter from a “concerned citizen” noting that the project had been the subject of direct negotiations. The 2011 report reviewed the entire process of the procurement process, examining each of the actors and highlighting potential conflicts of interest.

Source: Office of the Contractor General of Jamaica (2011) Special Report of Investigation: Allegations Regarding the Proposal for the Financing, Development, Ownership, and Operation of a FSRU LNG Re-Gasification Terminal and Natural Gas Transportation System available online at [http://www.japarliament.gov.jm/attachments/628\\_OCG%20LNG %20Special %20Investigation %20Report%20Part%201.pdf](http://www.japarliament.gov.jm/attachments/628_OCG%20LNG%20Special%20Investigation%20Report%20Part%201.pdf).

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<sup>167</sup>State of Victoria (2014) *Managing Probity – Procurement Guide*. [Online] Available at [www.procurement.vic.gov.au](http://www.procurement.vic.gov.au)





## References

The table below lists some of the most useful PPP guidance documents, including those published by governments with successful PPP programs.

2 PPP Framework		
1	Infrastructure Australia (2011) <a href="#">National PPP Guidelines, Volume 2: Practitioners' Guide</a> , Commonwealth of Australia	Detailed guidance material for implementing agencies on how to implement PPP projects under the national PPP policy. This includes project identification, appraisal, PPP structuring, the tender process, and contract management. There is detailed guidance in the annexes on technical subjects.
2	Government of Colombia (2014) <a href="#">Guía de Asociaciones Público Privadas, Departamento Nacional de Planeación (Guidance for PPP Development)</a> Departamento Nacional de Planeación <b>and</b> Government of Colombia (2010) <a href="#">Manual de Procesos y Procedimientos para la ejecución de Asociación Público Asociaciones Público –Privadas (Process and Procedures Manual for PPP Projects)</a> Ministerio de Hacienda y Credito Publico – Subdireccion de Banca de Inversion	Guides for civil servants from national, regional, and local governments. It sets out in detail the processes and requirements for identifying, assessing, preparing, tendering, and implementing PPP contracts.
3	Ministry of Finance, Government of India (2011) <a href="#">PPP Toolkit for Improving PPP Decision-Making Processes</a> Department of Economic Affairs, Ministry of Finance, Government of India	Online toolkit describing the PPP process and providing sector specific guidance and tools for practitioners on all stages of managing a PPP.
4	Government of Rio de Janeiro (2008) <a href="#">Manual De Parcerias Públicoprivadas - PPPs</a> (PPP Manual)	A guide for civil servants of the state of Rio de Janeiro on developing and implementing PPPs. It defines PPPs and provides guidance on drafting a preliminary proposal, carrying out detailed technical studies, managing the tender, and managing the contract.
5	National Treasury, PPP Unit (2004) <a href="#">Public Private Partnership Manual</a> Government of South Africa	Manual for implementing agencies. It sets out, in detail, the process and requirements for developing and implementing PPPs in

		accordance with the national PPP regulation. Includes modules on PPP inception, the PPP feasibility study, PPP procurement, and managing the PPP agreement. The annexes have tools and templates used at each stage.
6	Kerf, Gray, Irwin, Levesque, and Taylor, under the direction of Michael Klein (1998) <a href="#">Concessions for Infrastructure: A Guide to their Design and Award</a> World Bank Technical Paper No. 399, World Bank and the Inter-American Development Bank	Describes and provides examples on several of the important steps in developing and implementing PPPs – focusing on user-pays PPPs, or concessions. Includes sections on detailed design, the tender process, and the institutional (regulatory) structure for contract management.
7	Farquharson, Torres de Mästle, and Yescombe, with Encinas (2011) <a href="#">How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets</a> PPIAF, World Bank	Describes and provides guidance on the whole PPP process, highlighting the experience of EMDE countries. Briefly covers project selection; the focus is on preparing and bringing the project to market and engaging with the private sector.
8	PPIAF (2009) <a href="#">Online Toolkit for Public Private Partnerships in Roads and Highways</a> , World Bank	Module 5: Implementation and Monitoring provides guidance and links to further material on project identification, feasibility studies and analysis, procurement, contract award, and contract management.
9	World Bank and PPIAF (2006) <a href="#">Approaches to Private Participation in Water Services: A Toolkit</a>	Provides guidance on the PPP process, from planning and upstream policy, to the detail of structuring a PPP and implementing a transaction. Focus is on user-pays PPPs in the water sector.
10	World Bank and PPIAF (2007) <a href="#">Port Reform Toolkit Second Edition</a>	Provides guidance on several aspects of PPPs in the port sector including guidance on risk identification, financial analysis, contract structuring, and contract management approaches.
11	HM Treasury, UK (2015) <a href="#">The Green Book: Appraisal and Evaluation in Central Government</a>	HM Treasury guidance for public sector bodies on how to prepare, appraise, and evaluate proposals before committing funds to a policy, program or project.
12	Construction Industry Council (1998) <a href="#">Constructors' Key Guide to PFI</a>	Highlights the benefits of PPPs to businesses engaged in construction. Discusses pertinent topics to those buying from the PPP market as well as those supplying it, including the corporate risk of over reliance on PPP concessions.
<b>Dealing with Privately-Initiated Projects (unsolicited proposals)</b>		
	<b>Reference</b>	<b>Description</b>

1	PPIAF (2009) <a href="#"><u>Online Toolkit for Public-Private Partnerships in Roads and Highways</u></a> , World Bank	Module 5: Implementation and Monitoring, Stage 3: Procurement includes a section on unsolicited proposals which describes their benefits and challenges, and provides examples of both successful and unsuccessful PPPs from unsolicited proposals.
2	World Bank PPP in Infrastructure Resource Center, online at: <a href="http://ppp.worldbank.org/pppirc"><u>http://ppp.worldbank.org/pppirc</u></a>	Section on “procurement processes and standardized bidding documents” briefly describes the World Bank’s view on unsolicited proposals, and provides examples from and links to some countries’ relevant law and policies.
3	Reddy and Kalyanapu (undated) <a href="#"><u>Unsolicited Proposal – New Path to Public-Private Partnership: Indian Perspective</u></a> , Technische Universiteit Eindhoven	Describes the approach to dealing with unsolicited proposals in several Indian states which have adopted a Swiss Challenge process, and draws lessons from India’s experience.
4	Hodges and Dellacha (2007) <a href="#"><u>Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency</u></a> , PPIAF Working Paper No. 1, 2007	Describes commonly used rationales for advocating direct negotiation on the basis of unsolicited proposals, and describes the systems and policies that some countries have instead introduced to promote competitive tension. Appendices describe the approach and experience with unsolicited proposals in several countries in Africa, the Americas and Asia, and includes links to the relevant laws and regulations.
5	Hodges (2003) <a href="#"><u>Unsolicited Proposals: The Issues for Private Infrastructure Projects</u></a> , World Bank Public Policy for the Private Sector Note Number 257	Provides an overview of important issues governments face when dealing with unsolicited proposals including when and how they should be accepted, and why and how competition should be introduced into the process.
6	Hodges (2003) <a href="#"><u>Unsolicited Proposals: Competitive Solutions for Private Infrastructure Projects</u></a> , World Bank Public Policy for the Private Sector Note Number 258	Describes the experience of four countries dealing with unsolicited proposals: Chile, the Republic of Korea, the Philippines, and South Africa.
7	UNCITRAL (2001) <a href="#"><u>Legislative Guide on Privately Financed Infrastructure Projects</u></a> , United Nations	Section E provides guidance on both policies and procedures for dealing with unsolicited proposals. Distinguishes between proposals that do or do not require proprietary technology.

8	PPIAF (2014) <a href="#"><u>Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned</u></a> , World Bank	This study discusses a series of global trends related to USP processes, including lessons learned from the management of such proposals, and some key implications for further considerations.
<b>Institutional Responsibilities</b>		
1	Castalia (2009) Benchmarking Indonesia's PPP program Report to the World Bank Institute	Report examining the progress of Indonesia's PPP program and offering recommendations for growth based on comparisons with programs in Colombia , Netherlands and South Africa.
2	Akitoby, Hemming, and Schwartz (2007) <a href="#"><u>Public Investment and Public-Private Partnerships</u></a> , IMF Economic Issues No. 40	A short booklet describing the implications of PPPs for public investment, including how PPP commitments should be managed and controlled.
3	World Bank Sustainable Development Department in East Asia and Pacific (2007) <a href="#"><u>Public-Private Partnership Units: Lessons for their Design and Use in Infrastructure</u></a> , World Bank, PPIAF	This report provides a comprehensive assessment of the effectiveness of PPP units in developed and developing countries. The report offers lessons in the context in which PPP units have been most effective.
4	Sanghi, Sundakov, and Hankinson (2007) <a href="#"><u>Designing and Using Public-Private Partnership Units in Infrastructure: Lessons from Case Studies Around the World</u></a> , Gridlines Note No. 27, Sept 2007	Summary of lessons from source #3 above.
5	Dutz, Harris, Dhingra, and Shugart (2006) <a href="#"><u>Public-Private Partnership Units: What Are They, and What Do They Do?</u></a> World Bank Public Policy for the Private Sector Note 311	A short note reviewing several country experiences with PPP units. It provides high-level recommendations to improve governance and their effectiveness.
6	Energy and Infrastructure Unit and Finance and Private Sector Development Unit, South Asia Region (2006) <a href="#"><u>India: Building Capacities for Public-Private Partnerships</u></a> , World Bank	More details on case studies presented in source #5 above, including their applicability to India.

7	Farrugia, Reynolds, and Orr (August 2008) <a href="#"><u>Public-Private Partnership Agencies: A Global Perspective</u></a> . Stanford University Collaboratory for Research on Global Projects, Working Paper #39	A review of PPP units with a focus on experiences of developed countries. The report includes case studies and reviews the key aspects of eight different agencies.
8	OECD (2010) <i>Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structure</i> OECD [ISBN: 9789264006515]	Provides an overview of dedicated PPP units in OECD countries, including case studies of the experiences of five jurisdictions (state of Victoria, Australia, Germany, Korea, South Africa and the United Kingdom).
9	Burger (2006) <a href="#"><u>The Dedicated PPP Unit of the South African Treasury</u></a> Paper presented at the OECD Symposium on Agencies and PPPs	This paper provides a review of the PPP program in South Africa and its dedicated PPP unit.
10	M Muller, R Simpson and M van Ginneken (2008) <i>Ways to improve water services by making utilities more accountable to their users: a review</i> . World bank /BNWP Note 15 May 2008	Case studies on user participation in PPPs.
11	State Secretariat for Economic Affairs SECO Economic Cooperation and Development (2005) <a href="#"><u>Public-Private Partnerships for Water Supply and Sanitation</u></a>	Addresses the challenges in the proper definition of governance structures for all actors. How roles and responsibilities must be assigned. How regulatory mechanisms must be established from the outset. In addition, it examines how the involvement of civil society can be ensured.
<b>Public financial management of PPPs</b>		
1	Irwin (2003) <a href="#"><u>Public Money for Private Infrastructure: Deciding When to Offer Guarantees, Output-Based Subsidies, and Other Fiscal Support</u></a> , World Bank Working Paper No. 10	Describes different payment mechanisms for subsidies to infrastructure projects – including output-based payments and upfront capital subsidies and how the government can decide which is most appropriate.
2	Irwin (2007) <a href="#"><u>Government Guarantees Allocating and Valuing Risk in Privately Financed Infrastructure Projects</u></a> World Bank	Chapter 3 describes “lessons from history” of government guarantees to private infrastructure projects, with cautionary tales of governments that experienced significant fiscal exposure. Chapter 4 describes why governments can make bad decisions on providing guarantees.

3	Castalia and WBI (2011) <i>Subsidy Funding Mechanisms for Public Private Partnerships in Latin America</i>	The report provides a framework for why subsidies are sometimes needed for PPPs. The report has case studies of PPP subsidy programs in Brazil, Colombia, India and Mexico.
4	Schwartz, Corbacho, and Funke (eds.) (2007) <i>Public Investment and Public-Private Partnerships</i> , IMF [available from Palgrave in hard back, ISBN-13 978-0-230-20133-0]	A collection of papers on managing the fiscal impact of PPPs, drawing from an IMF conference held in Budapest in 2007. Part Two: Fiscal Risks from PPPs, and Part Four: PPP Accounting, Reporting, and Auditing are particularly relevant to public financial management for PPPs.
5	OECD (2008) <i>Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money</i> Organization for Economic Cooperation and Development [ISBN-9789264042797]	The book identifies best practices for maximizing Value for Money for PPP projects, including accounting for fiscal impacts and affordability. The book also covers issues with regulatory reform, governance, and developing institutional capacity.
6	Cebotari (2008) <a href="#">Contingent Liabilities: Issues and Practice</a> , IMF Working Paper WP/08/245	A seminal paper on managing contingent liabilities, including for PPP projects. It includes case studies to illustrate management challenges and practices from different countries and issues. These case studies also highlight best practices.
7	Akitoby, Hemming, and Schwartz (2007) <a href="#">Public Investment and Public-Private Partnerships</a> , IMF Economic Issues No. 40	A short booklet describing the implications of PPPs for public investment, including how PPP commitments should be managed and controlled.
<b>Oversight of PPP Programs</b>		
1	Machado <i>PPP Audits in Portugal</i> , and Bager <i>Hungary's Audit Experience with PPPs</i> Both in Schwartz, Corbacho, and Funke (eds.) (2007) <a href="#">Public Investment and Public-Private Partnerships</a> , IMF [available from Palgrave in hard back, ISBN-13 978-0-230-20133-0]	A collection of papers on managing the fiscal impact of PPPs, drawing from an IMF conference held in Budapest in 2007. Part Four: PPP Accounting, Reporting, and Auditing examines the role of different institutions to ensure accountability.
2	INTOSAI (2007) <a href="#">Guidelines on Best Practice for the Audit of Public/Private Finance and Concessions (revised)</a>	Provides guidelines on best practices for evaluating PPP projects throughout the entire lifecycle.
3	United Nations Economic Commission for Europe (2008), <a href="#">Guidebook on Promoting Good Governance in PPPs</a>	This guidebook does two things: 1. Demonstrates how governments and the private sector can improve governance in PPPs. 2. Creates a basis for the elaboration of training modules for PPPs.

