7 Implementing PPPs

This chapter discusses some key activities related to implementing PPPs. The discussion focuses on the bid package, the contract, the procurement evaluation and process, and the award and negotiation. Not every stage of the procurement process is described in detail; highlights are discussed and more information is available through the resource materials listed in chapter 10. The PPP Project Sequence is outlined in Figure 2 (see page 15). Note that not all steps are strictly sequential, but have a degree of overlap.

7.1 Collecting Feedback from Potential Bidders

Once PPP has been structured and the preparatory work is underway, the transaction manager, responsible for ensuring that the process runs smoothly, transparently, and timely, should be in place.

During the transaction stages, it is important to have more formal interaction with potential bidders on the specifics of the transaction as designed. During these interactions, the government needs to guard against potential manipulation of the PPP design and process by the bidder to its advantage. Likewise, bidders should not enjoy any advantage (e.g., additional information) in the bidding process through such consultations. Discussions must avoid any bias toward a particular bidder and should be broadly held with sector stakeholders as well. The government may find it useful to be supported by PPP advisors in its interactions with potential bidders.

Two specific points of interaction with the potential bidders are:

Bid conference. During the bid conference, the government presents an outline of the project and bidders are invited to react and question. However, in a formal setting surrounded by competitors, some bidders may withhold concerns, be unwilling to share good ideas, or may collude with other bidders to push for a particular change.

Bid document consultation. Alternatively (or in addition to a bid conference), bidders may be invited to individually comment on the draft bidding documents, including the draft contract. This approach allows the government to identify issues of concern across the range of bidders. Government should send each bidder a full set of the responses to all questions raised, thus avoiding any semblance of favoritism.

A bidder will expect to have a clear understanding of the time line, the sequence of activities, the decision points, and the decision makers. This information should be given to bidders in writing and should be regularly reviewed and reconfirmed. This clarity is necessary to provide bidders with a sense of confidence in the transparency and reliability of the process.

7.2 Notification and Prequalification

The bid package, contracts, and any marketing documents as well as protocols for communicating with the public and potential bidders need to be developed. The starting point in the actual procurement process is the public notification of the opportunity and the prequalification of bidders. As seen in section 7.3, different procurement methods entail different activities, but a prequalification process is common to many PPPs.

Under this process, an official notification is placed in local and international print and electronic media, advising the public of an opportunity to participate in the project. The content of the advertisement depends on applicable procurement rules. Companies are invited to request a prequalification package and seek access to further information.

An important aspect of information dissemination is the establishment of a data room (see Box 14 for a sample index). Prequalified bidders are invited to use this centralized repository of all information related to the PPP project, which is to be available to potential bidders. The information should be organized according to topics and as detailed, and granted equally and fairly to bidders. During a transaction, the room will be staffed by an attendant and bidders must sign and submit to data room rules (e.g., regarding access times, making photocopies, using other technical equipment, etc.). The amount of time and effort required to populate a data room should not be underestimated. Although the accuracy and completeness of the data in the data room are normally not guaranteed, the process organizers and the government nevertheless need to ensure that the data are not false or misleading. Bidders typically apply a degree of skepticism to the veracity of the data; nevertheless, they will question the seriousness of the process if very little data are available.

Prequalification ensures that only bidders with the minimum required expertise and financial strength are able to bid for the opportunity. This saves the government from the need to eliminate more rigorously from an overly large pool of bidders later in the process. It also encourages bidders that they will be included among a smaller number of equally capable competitors.

The prequalification documents usually contain:

- project information, such as the key characteristics of the project and the operating context (such as an information memorandum);
- instructions to bidders outlining the anticipated bid process and evaluation criteria; and
- a list of the documents required of the prospective bidders to demonstrate their suitability for the project.

Box 14: Sample Data Room Index

General

I.1 Economic Data (time series)
- I.1.a Gross domestic product (per capita)
- I.1.b Inflation index
- I.1.c Wholesale price index
- I.1.d Real and nominal interest rates
- I.1.e Census or population data and growth Rates

I.2 Institutional
- I.2.a Annual reports (time series)
- I.2.b Donor and consultants' reports

I.3 Geographical
- I.3.a Map of country
- I.3.b Maps of service areas

Legislation and Regulations

II.1 National
- II.1.a Constitution
- II.1.b Civil Law
- II.1.c Public Health Ordinance
- II.1.d Food and Drug Act
- II.1.e Planning Act
- II.1.f Lands Act

II.2 Resources Management
- II.2.a Environmental Protection Act
- II.2.b Others

II.3 Corporate/Commercial
- II.3.a Companies Act
- II.3.b Income Tax Act

II.4 Infrastructure Specific

Commercial Contracts

III.1 Outsourcing Agreements

Human Resources

IV.1 Staff Breakdown Chart by Region and Function
IV.2 Current Staff Salary Levels
IV.3 Collective Bargaining Agreements

Engineering and Technical Documents

V.1 Operations and Maintenance
V.2 Investment Programs
V.3 Demand
V.4 Fixed Assets & Technical Audits
V.5 System Files and Drawings
V.6 Others

Financial

VI.1 Financial Statements
VI.2 Budgets
VI.3 Debt
- VI.3.a Profile of loans/grants
- VI.3.b Loan disbursements, repayments, and interest

VI.4 Commercial
- VI.4.a Billings
- VI.4.b Collections
- VI.4.c Breakdown of consumers by category

Tariffs

VII.1 Approved Tariff Structure
VII.2. Tariff Adjustment Proposals

Special Matters

VIII Subsidies, Community Service Obligations, etc.

Source: Kathleen Booth and Heather Skilling. 2007.

In response, the prospective bidders submit information including:

- legal status of bidding entity;
- experience on comparable projects (including any relevant subcategories in terms of size of project, region, particular expertise);
- financial status/resources of bidder;
- ability to raise financing; and
- staff and resources to be directed toward the project.

A predetermined scoring matrix should facilitate assessment of the prequalification applications. The matrix sets out each criterion to be scored, the score assigned to each, and the respective weighting. The matrix can include special criteria such as expertise in servicing low-income customers or may prioritize local bidders if desired. It is important to be realistic about the potential pool of bidders and set the threshold sufficiently high to discourage nonserious or unqualified bidders, while maintaining a pool of bidders large enough for effective competition. The prequalification results in a short list of bidders invited to respond to the bidding package. Generally, a short list of between 3 and 5 companies is a manageable and competitive size.

7.3 Defining the Procurement Process

Some initial decisions need to be made regarding the procurement and the bid evaluation process. The choice of procurement method will depend on the government's budget, capacity, desire to encourage innovation, need for high-level inputs, vulnerability to corruption, and objectives of the PPP project. Three main options, distinguished by the level of competition they create, are available: (i) unsolicited proposals or direct negotiations ("sole sourcing"), (ii) competitive negotiations, and (iii) competitive bidding.

7.3.1 Unsolicited Proposals or Direct Negotiations

When confronted with an unsolicited proposal, the government has three options:

- direct negotiations to the offeror;
- purchase the project concept then competitively tender among a range of bidders; or
- offer original proponent a predefined advantage in recognition of the value of the original proposal (bonus system) and open-up bidding.

Entering into a sole-source process can save government time and money and may alert government to an unrealized opportunity for PPP. However, sole sourcing can encourage corruption through lack of transparency, and the cost benefits to competitive bidding are lost. Government has to be confident of its negotiation skills and its information to ensure that a sole-source deal is advantageous.

The government needs to ascertain that procurement laws and/or rules permit it to award such a contract based on direct negotiations. There is also an elevated risk that the fairness of the contract award will be challenged at a later stage, e.g., by disappointed potential bidders or by the political opposition. As such, a strategy of direct negotiations could be considered politically risky. Box 15 shows the strategy for dealing with unsolicited proposals in the Philippines.

Box 15: Unsolicited Proposals

Under the Philippines' Build–Operate–Transfer (BOT) Law, national or local authorities were able to accept unsolicited proposals for BOT projects on a negotiated basis if:

- The project involves a new concept or technology and is not already listed in the roster of priority projects identified by the government.
- No direct government guarantee, subsidy, or equity is required.
- The project is submitted to a price test or "Swiss challenge" from competitors.

The price test works as follows: the agency awarding the project must invite comparative proposals to any unsolicited proposal it has received. The invitation to tender must be published in a newspaper of general circulation for at least 3 weeks. The published invitation must inform potential bidders where to obtain tender documents; however, proprietary information contained in the original proposal is confidential and may not be disclosed in the tender documents. Competitors have 60 days to submit competitive proposals. If a lower-priced proposal is received, the original proponent has 30 days to match it and win the contract. Otherwise, the award goes to the lower bidder. This challenge has been used, for example, in the case of a New Zealand developer who submitted a proposal to the National Power Corporation to rehabilitate and maintain a 350-megawatt hydro plant, challenging an unsolicited proposal by an Argentine company.

Source: Republic of the Philippines. 1994.

7.3.2 Competitive Negotiations

Competitive negotiations entail inviting a small group of bidders to a structured negotiation. The bidders are aware of the presence of other bidders and there is pressure to obtain the best price. This arrangement is quicker and less expensive than full competitive process and can yield good prices. The selection of bidders to participate can be nontransparent and may not yield the best bidder pool. There is also an elevated risk of corruption. A time-consuming procurement process may be seen as an opportunity cost to the private sector. This needs to be weighed against the degree of and value to transparency.

7.3.3 Competitive Bidding

Most governments have rules requiring some form of competitive bidding for procuring any private sector good or service. In addition, most international lending institutions and assistance organizations require the use of competitive bidding procedures as a condition of any associated loan or technical assistance. Competition is expected to provide transparency in the process and avoid corruption, and provide a mechanism for selecting the best-value proposal based on criteria set.

Of course, the advantages of competition are seen only if there is sufficient interest to generate multiple bidders. A failed auction is highly visible and an embarrassment to the government—another reason careful preparation is important.

The typical competitive bid process has the following activities:

- Public notification of tender
- Contacting/marketing to potential bidders
  - preliminary information memorandum
  - road show
  - pre-bid conference
  - bid document consultation
- Preselection
- Shortlisting or Prequalification
- Tendering
  - selection of bid and evaluation process
  - distribution of bid documents and draft contract
  - interactions with bidders
  - evaluation and selection
  - negotiations and award
- Transition
  - transition/handover strategy
  - worker rights and payments.

The competitive bid process can either be one stage or two stages. In the single-stage process, technical and financial bids are submitted simultaneously in response to a request for proposals. In the two-stage process, a technical response is submitted first and comments are provided. In the second stage, a revised technical bid is submitted together with a financial bid.

Communication between the public and private sectors may be strictly limited or a degree of open (although structured) communication may be important to the success of a large-scale PPP.

Competitive bidding for basic operation, maintenance, and service contracts can be relatively straightforward as the scope of services is readily defined and often quantifiable. More complex PPPs like BOTs, concessions, and joint ventures are more challenging procurement processes because both the starting information and the result are often unclear. The typical information gaps, the length of time over which the contract is implemented, and the range of externalities all conspire to make it difficult to set finite targets and predict outcomes.

An example of a competitive bidding was the construction of Sydney's Orbital Motorway, see Box 16.

Box 16: M7 Sydney Orbital Motorway (Australia)

The M7 Motorway is a 40-kilometer (km) toll road that circulates western Sydney and interconnects a number of other motorways and major roads. As a public–private partnership (PPP), its development involved three tiers of government (federal, state, and local), together with extensive community consultation and a competitive bid process against specified design criteria. A specific agency, the Roads and Traffic Authority, managed the PPP process.

The road was constructed and is operated on a 34-year concession by a consortium which includes Transurban, Macquarie Infrastructure Group, and Leightons Holdings. Following the concession period, the motorway reverts ownership to the Government. The $2.3-billion project was delivered 8 months ahead of schedule and incorporates full electronic tolling technology. A parallel 40-km pedestrian and cycling facility was also constructed as part of the development. The motorway project included full environmental impact assessment as well as defined criteria for safety and maintenace performance.

Source: www.infrastructure.org.au.

7.4 Defining the Bid Evaluation Process

7.4.1 Initial Decisions

The evaluation process and criteria should be transparent. Transparency is achieved by supplying as much information about the process as possible, and by drawing up procedures that explicitly ensure that all parties are treated equally. Nevertheless, confidentiality during a bid process is also needed so as not to compromise the legitimate commercial interests of the parties.

Bids are typically evaluated in two broad categories: technical and financial. The relative importance of each should reflect the importance in achieving the specified objectives. The project objectives, project design, information in the bid documents, and evaluation criteria should also be consistent.

A first decision point is whether the technical evaluation will be on a pass–fail basis (with the deciding evaluation reserved for the financial) or whether both the technical and financial information will be evaluated and assigned weighted scores:

- Decision 1: Weighted technical and financial or pass/fail technical?
  - If weighted, what will the weights be?
  - If pass/fail, what will the minimum qualifying technical score be?
- Decision 2: How to divide points between technical categories and subcategories.

The technical and financial responses are presented in separate envelopes to ensure a discrete evaluation of each component. There are four variations on how the technical response might be presented:

- Option 1: Contains legal certification and bid bond. These are confirmed, financial envelopes are opened, and contract awarded to lowest price bid.
- Option 2: Contains technical and financial information used to substitute prequalification. Financial envelopes of surviving bidders are opened, and contract awarded to lowest price bid.
- Option 3: Contains technical proposal, which is scored as pass or fail. Passing bidders' financial envelopes are opened and contract awarded to lowest price bid.
- Option 4: Contains technical proposal, which is numerically scored. Contract awarded to best weighted average technical/financial score.

Likewise, there are four typical variations on the possible presentation of the financial response:

- Option 1: Bids based on price of shares or assets being sold;
- Option 2: Bids based on up-front payment combined with future concession fees;
- Option 3: Bids based on future tariff; and
- Option 4: Bids are for service fee—with or without incentive component.

7.4.2 Technical and Financial Evaluation

Evaluation criteria should be stated up-front on the bid data sheet. The technical evaluation typically takes into account:

- Quality of the work plan
  - services to be provided
  - methodology and approach
  - meeting performance standards and optimizing incentive compensation
  - innovations and improvements
  - training
- Quality of staffing plan
  - detail of staffing plan
  - appropriate experience reflecting required services in staffing plan
  - professional qualifications and experience of key staff as shown in curricula vitae.

The financial evaluation is based on:

- Bid prices as readout (currencies, amounts, and modifications or comments)
- Corrections for:
  - computational errors
  - provisional sums
- Corrected bid price
- Exchange of bids to single currency
- Formula for scoring bids if weighted technical/financial evaluation.

7.5 Bid Package

Depending on the type of contract and the local requirements, a bid package can range from several volumes of material to a concise document. The elements listed below are the basic components of a generic bid package:

- **Invitation for bids**: This is a short (one to two pages) document that provides an overview of the opportunity, specifies the deadline for bids to be submitted, and provides information for bidders to use in obtaining the full-bid package. An invitation for bids is typically published in relevant national and international journals. The invitation for bids will be reprinted as part of the bid package.

- **Instruction to bidders**: This provides general instructions to bidders regarding the opportunity, the content of the bidding documents, preparation and submission of bids, bid opening and evaluation, the bidder's conference or pre-bid meeting, and award of contract.

- **Bid data sheet**: The bid data sheet expands on the information provided in the instruction to bidders, indicating any special circumstances or conditions that the bidders must keep in mind. The data sheet also provides the bidders with specific details on where to submit bids, request clarifications, and who to contact regarding negotiations; the number of copies of the bid to be submitted; any special instructions regarding certifications or powers of attorney; the amount of bid security; and the evaluation criteria.

- **Draft form of contract**: The bid package includes a copy of the draft contract to provide the bidders an opportunity to comment on or mark up the contract. Such a process reduces the amount of time required for contract negotiations by ensuring that bidders agree to the form of contract prior to contract award.

- **Sample forms and procedures**: The package includes standard forms, which may include but shall not be limited to bid forms and price schedules, a bid security form, form of contract agreement, performance security forms, and bank guarantee forms.

In addition to the contents above, and depending on the requirements of any donors involved in a project, the package may include information on restrictions governing eligibility to bid on the opportunity and governing procurement using donor funds.

7.6 The Contract

Regardless of the option selected, the essential elements to be included in a contract are:

- The parties to the agreement;
- Interpretation: Sets forth the definitions of important terms and providing guidance on the interpretation of the contract's provisions;
- The scope, territorial jurisdiction, and duration of the agreement;
- The objective of the contract;
- Circumstances of commencement, completion, modification, and termination of contract;
- The rights and obligations of the contractor;
- The rights and obligations of the government;
- The requirement for performance bonds to provide security for government if the construction and/or the service delivery falls below standards;
- Insurance requirements to provide security for the insurable matters;
- Government warranties;
- Private sector warranties;
- Consequences to a change in law;
- Service quality, and performance and maintenance targets and schedules;
- The identification of regulatory authorities, if any, and the extent of their roles and authority;
- The responsibilities of the contractor and the government with regard to capital expenditures;
- The form of remuneration of the contractor and how it will be covered, whether from fixed fee, fixed fee plus incentives, or another arrangement;
- How key risks will be allocated and managed;
- The contractor's rights and responsibilities with regard to passing through or entering public or private property;
- Reporting requirements;
- Procedures for measuring, monitoring, and enforcing performance;
- Procedures for coordinating investment planning;
- Responsibility for environmental liabilities;
- Procedures for resolving disputes;
- Delay provisions describing what is and is not an excuse for a delay in construction or operations;
- Force majeure conditions and reactions;

- Procedures to be followed when either party to the PPP contract wishes to change any material portion (variation) of the contract;
- Indemnification circumstances;
- The rights of each party to any intellectual property brought to the project or created during the project, including the steps to be taken to protect the intellectual property of third parties, such as information technology software manufacturers;
- Conflict of interests and dispute resolution;
- Description of the conditions under which either party may terminate the contract, the processes to be undertaken in that regard, and the consequences to each party of a termination;
- The circumstances that may permit either the government or any financial institution to "step in" to the contract to protect its rights under the PPP contract;
- Consequences of a change in the ownership or key personnel of the private partner;
- Mechanisms whereby the parties to the PPP contract will interact with each other going forward;
- Requirement that each party comply with all laws pertaining to the project, including obtaining environmental, zoning, planning, and other permits;
- Conditions by which public sector employees are employed by the private sector contractor, including any restrictions on terminations or redundancies for operational reasons; and
- Conditions precedent: Describes any conditions precedent to be fulfilled by either party before the contract takes effect.

This list is illustrative and does not capture every clause required in a contract. The final content of the contract will depend on the project scope, local legal requirements and precedent, and advice of legal advisors.

7.7 Negotiations and Contract Start

Ideally, the bulk of issues should be sorted out during the bid process. However, negotiations present the last opportunity to work through contractual issues and both sides may have saved issues to be dealt with at this last stage. The government side is often the less experienced of the parties at the negotiation table and it is vital that it be supported by appropriate advisory expertise, a clear negotiating strategy, and a fallback plan (which may be the second-place bidder).

Only critical personnel should attend negotiations and minutes of the issues covered must be kept. Negotiations have to be scheduled with sufficient time for preparation, and conducting negotiations in several rounds may be necessary.

Negotiations should not reopen items previously dealt with or should not undermine the integrity of the bidding process by deviating from the original proposal.

Part of the negotiations will focus on conditions precedent, i.e., the conditions to be met by both sides to declare the contract operational. The timetable and process for transition should also be discussed. These discussions will cover:

- Registration actions such as the legal incorporation or registration of any joint ventures or project specific companies,
- Payment of bonds and guarantees, and
- Worker transitions
  - terminal benefits
  - collective bargaining agreements
  - transfer of terms of service
  - redundancies.

7.8 Key Implementation Issues

Moving into implementation, several key considerations for the project partners will help ensure success:

- **Stakeholder management during implementation**. The need for effective communication with stakeholders does not end with contract award. Instead, the early stages of a project are a critical time for the winning bidder to establish the trust of the communities facing development. As the PPP moves into implementation, the selected bidder should have a well-detailed plan for ongoing communication with the community, including an appointed liaison.

- **Ensure the right people on both sides of the relationship are in place**. The key staff should have the right technical and managerial skills and an established protocol for working together. Both parties should be well familiar with the details of the contract and both should strive for an atmosphere of mutual respect.

- **Ability to manage variations**. The management of PPP contracts requires some flexibility on both sides and a means to adapt the terms of the contract to reflect inevitable changes in the operating environment that could not have been anticipated or dealt with in the contract. Contracts should be capable of change (terms, requirements, scope, etc.) and the relationship should be strong and flexible enough to facilitate it. Good contract management is not reactive, but aims to proactively anticipate and respond to the business needs of the future.