



# Technical Assistance Consultant's Report

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Project Number: TA 4904 (THA)  
October 2007

## Thailand: Towards new PPP legislation (Financed by the Technical Assistance Funding Program)

Prepared by Hatasakdi Na Pombejra, Sudhisakdi Manibhandu  
Bangkok, Thailand

For Ministry of Finance  
Public Debt Management Office, Office of Transport and Traffic Policy and Planning

This consultant's report does not necessarily reflect the views of ADB or the Government concerned, and ADB and the Government cannot be held liable for its contents. (For project preparatory technical assistance: All the views expressed herein may not be incorporated into the proposed project's design.)

**Asian Development Bank**



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- I. TECHNICAL PAPER 1: THAILAND: A STUDY ON LEGAL FRAMEWORK FOR THE NEW PPP LEGISLATION AND THE AMENDMENTS OF THE PPSU ACT
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## FOREWORD

1. As part of the Technical Assistance to the Government of Thailand TA 4904 (THA): Infrastructure Advisory Assistance – Phase II, Asian Development Bank has provided technical input towards the drafting of new legislation on the management of government activities in infrastructure and public services, particularly with regard to the use of public private partnership (PPP) methods to implement such programmes and projects. The work responds to the government's request for assistance in the drafting of guidelines or mandates to government agencies on managing a PPP-delivered project through the project cycle, beginning with project preparation through to implementation and service delivery; and the structuring of the appropriate institutions and organizations. The specific tasks carried out can be grouped under three heads: for the new legislation, (a) to identify for inclusion the principles and guidelines for the supervision of PPP project implementation; (b) to research PPP legal and regulatory arrangements in international practice, studying the structures and contents of PPP laws to determine best practice models; and (c) to provide ad hoc technical advice on PPP issues to the new legislation drafting committee. This work is documented in two technical working papers which have been brought together in this report. One, the first in this volume, addresses an appropriate legal and institutional framework for PPP in the Thai context. The second technical paper has for its main purpose identification of principles and guidelines for the public sector management of PPP-implemented infrastructure and public services.

2. The work carried out has benefited from contributions from the following staff of the Public Debt Management Office:

1. Khun Sun Vithespongse, Deputy Director General, Public Debt Management Office
2. Khun Theeraj Athavanich, Director of Megaprojects Management Bureau
3. Khun Jindarat Viriyataveekul, Director of Fund Management Division
4. Khun Upama Jaihong, Fiscal Analyst 7
5. Khun Jarunee Lekdamrongsak, Fiscal Analyst 6
6. Khun Ajjima Karod, Economist 4
7. Khun Paktra Koonpratoom, Economist

Dr Jean-Pierre Verbiest (ADB Country Director) and Mr James P Lynch (Deputy Head of Mission) provided overall guidance to the assignment, supported by Dr Oranuch Jetwattana (Private Sector Economics Officer). The two named authors acknowledge sole responsibility for the contents of this report.



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## EXECUTIVE SUMMARY

1. While the developing of five priority lines mass rapid transit system for Bangkok Metropolitan has been in progress, there is a need to overhaul the current legislation on public private participation to create a new comprehensive in supervision of public infrastructure projects. In this regard, the Ministry of Finance has submitted the draft of the revision of the existing Act on Private Participation in State Undertaking B.E. 2535 (PPSU ACT 1992) for the urgent application to the mass rapid transit system extension. At the same time the MOF has also prepared new legislation on the Supervision of Large Public Investment in order to supervise and monitor public sector investment in large-scale and long-gestation projects. This new legislation has already been drafted and is planned to be submitted to the relevant authority for its review and approval in the near future.

2. To assist the MOF in drafting the said new legislation, research on UNCITRAL<sup>1</sup> guidelines for Privately Finances Infrastructure Development<sup>2</sup> as well as the Public Private Participation legislation in international practice was conducted together with the study on the experiences of PPP in selected countries, namely, UK, Korea, and Japan.

- In UK, there is no specific law regarding the PPP, however, there is a joint venture between public and private sectors called “Public Private Partnership UK” which offers the commercial expertise and experiences in the development and delivery of numerous Private Finance Initiatives and other Public Private Partnerships projects.
- In Korea, relevant legislation drafts have been developed since the Asian crisis; the final approved version consist of the Act on Private Participation in Infrastructure (PPI Act) and its Enforcement Decree.
- In Japan, a version of the British public finance initiative has developed under a law relating to the promotion of the realization of public facilities using private funds, and its fundamental principles and basic guidelines.

3. Comparison of the international legislative approaches and experience with the approach adopted in the Thai case is focused on the legal framework. To begin with, for most of the selected international cases, the legislation is applied only to the public private participation in infrastructure project, while on the contrary, the new draft of Thai legislation is focus on all of the large projects regardless of whether is infrastructure project or whether it is implemented through PPP or not. The advice for the Thai government is to make a separate chapter for the PPP projects and the public investment for the better understanding of the user.

4. Next concern for the legislation is the definition of ‘PPP’ and ‘Private’, the lack of the clear definition will affect the continuity of the PPP process. In order to avoid seeking of the interpretation from the competent authority from time to time, the new law should have a clear definition of these important words.

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<sup>1</sup> UNCITRAL: The United Nations Commission on International Trade Law was established by the General Assembly in 1966 in order to reduce or remove the obstacle of the flow of international trade which resulting from the disparities in national laws. Its mandate is to harmonize and unify the law of international trade.

<sup>2</sup> UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects version 2001 was considered to be prepared in 1996 in the light of a note by the Secretariat on Build- Operate- Transfer (BOT) project in order to assist in the establishment of a legislative framework favorable to privately financed infrastructure projects. This Legislative Guide was adopted by the resolution of UNCITRAL on 7 July 2000 subject to editorial modification of the Secretariat of BOT Project.

5. The final concern regard the general legislative framework relates to scope of authority for policy implementation. Unlike other countries where only one committee is authorized to impose policy, carry out selection of private sector candidates, and monitor and supervise PPP projects, Thailand has three committees, each with its separate duties. To better facilitate the development of private sector participation, there should be coordination or linkage among these three committees. Establishment of a special PPP Unit is the recommended international practice. The Thai government's approach to a PPP unit is acceptable; however the said unit should take a more active role than that of a research unit, and should take into account both public and private interest.

6. Risk Allocation and Government Support are the most important concepts in PPP schemes. Not all countries sampled have a provision governing risk allocation in their PPP law. In practice, this is prescribed in the concession or project agreement. To assist the government in negotiating with the private sector on risk sharing, the government should prepare standardization of concessions which includes a section on risk allocation and risk management. Regarding government support, the legislation of some selected countries, such as Korea, specifies that the government can grant the direct support to the private sector in certain circumstances. For the Thai government's case, to allow for changes in circumstances, there should be a general provision enabling certain types of government support which can later be specified in a subordinated law.

7. The Unsolicited Project is a new concept implemented in Korea. However, as there is no evidence of much success of this channel in other countries, this provision in new Thai draft law should be open for the further clarification and consideration.

8. The provision on term extension, termination and intervention by the government in a PPP project is also explored in this paper. Under the draft of new Thai PPP law, there is no such provision. To ensure the interest of the public especially in infrastructure projects, it is recommended that the law should authorize the government to extend the concession term or intervene or terminate under certain circumstances. However, if the private sector participant suffers any loss due to such intervention or termination, it shall be entitled to compensation as set out by the law or by subordinated law.

9. Regarding the Amendment to the PPSU Act 1992, the main issues which should be revised is prescribed as well as the list of the subordinated law which shall be prepared to the said Amendment. In this regards, the technical note and the advice on the draft of required Ministerial Regulation is also attached.

10. In dealing with private sector in PPP projects, apart from the Legal Framework, the Concession Model also assists the government in implementing PPP projects effectively. There are several models of concession; however, those models are derived from 2 basic models of Gross Cost and Net Cost.

11. Previous study has recommended that the Thai Government should apply the gross cost model for the Bangkok MRT extension. However, due to issues including (1) private sector stakeholders' stated willingness to accept ridership risk, and (2) the draft of Public Service Obligation Regulation which allows the government to subsidize a state owned enterprise which suffers losses resulting from implementation of the government's policy, the government appears reluctant to apply the gross cost concession and is considering use of the net cost model.

12. The recommendation for the government is to confirm the application of the gross cost model to the above circumstance because under net cost model, the government has minimal control of private sector and the PSO Regulation cannot be applied to this case because the grant of subsidy cannot be made directly from the government to a private sector entity which suffers loss in a PPP project, only to an SOE in the same situation.

## I. INTRODUCTION

13. One of main duties of any government is to provide the public services to the people throughout the country especially the public utilities and facilities as well as the information infrastructure. However, with the rapid of economic development and the limited budget from the public sector, the private participation is needed in developing infrastructure services. To facilitate and encourage private participation in public services, a supportive legal framework is required.

14. The purpose of this paper is to assist the government in drafting legislation on Private Participation in Public Project. The paper will address key issues to be considered by the drafting committees in balancing the public interests with fairness to the private sector. In addition, the comment will be provided on the first draft of The Supervision of Large Public Investment proposed by the sub-committees of drafting law.

15. The legislative principle addresses in this paper based upon the UNCITRAL Legislative Guide on Privately Financed Infrastructure Project which focuses on a legal framework for private investment in public infrastructure. In addition, the paper will cover the Korea's experience in its Private Participation in Infrastructure Policy (PPI) and its Act on Private Participation in Infrastructure as well as the relevant issues under Public Private Partnerships (PPP) of UK and the Private Finance Initiatives (PFI) Law of Japan.

### Background

16. Since the enactment of Thai Public Private Partnership law (PPP Law) which is known as the Act on Private Participation in State Undertaking B.E. 2535, (PPSU ACT 1992) there have been problems in related to the application of the law from time to time as follows;

- The lack of a clear definition of PPP brought many cases to the interpretation of the Council of State whether or not the certain project would have been processed under the PPP law.
- The existing law lacks of the concrete evaluation criteria for the assessment of PPP projects.
- The lack of PPP unit to promote the PPP and to assist the government in forming the PPP policy, to evaluate the PPP project, to coordinate with the private sector in preparing the feasibility study.
- The lack of provision for government intervention in the public interest in special circumstance.

17. To eliminate the avoidance of the application the PPP law in private participation projects and to make an efficient supervision of PPP, the government of Thailand has recently revised certain provisions of the existing PPP law as a matter of urgency for application to important projects in public transportation. However, eventually, the government intends to establish a new legislation in order to cope with the aforesaid problems of PPP and an organization with responsibility for supervision and monitoring of PPP projects.

18. The Draft of Thai Supervision of Large Public Investment shall include the supervision of investments in public services whether by the private sector, the government, local government, or other public bodies, State own enterprises, and SPVs. In addition, the draft authorizes the government to consider the public project which is initiated solely by the private sector (unsolicited project).

19. The draft Act provides for criteria for the appraisal of the public project and its approval process to be set and be applied not only to project with private participation but also the pure public sector investment. Moreover, to assist government in the efficient management of private participation projects, it provides for the establishment of institutional and organizational mechanisms for evaluation, implementation and supervision.

20. In order to assist the Thai government in drafting the new PPP law, the UNCITRAL Guidelines for Privately Finances Infrastructure Development is introduced. This guideline is recommended for both the central government and local government since it explains the method for implementing PFI from the government perspective and it contains the legislative recommendations and the useful note to such recommendations.

21. To make this draft new PPP law more practical for the public and private sectors, comparison with foreign experience, namely Public Private Partnership in UK, the Korean PPI Law, and the Japanese PFI framework is emphasized.

22. In the UK, the so-called "Partnerships UK" was set up in the year of 2000 as an offshoot of HM Treasury. It is a joint venture between public and private sectors with majority shareholding by the private sector. It offers the commercial expertise and experience in the development and delivery of numerous Private Finance Initiatives and other Public Private Partnerships projects

23. In Korea, after the Asian Crisis, the Korean government revises its Private Capital Inducement Act to increase utilization of private sector resource in infrastructure. The aim of the revision of the said Act is to attract foreign investment into the country's essential infrastructure. The result of the revision has been the promulgation of the new Act which is known as the Act on Private Participation in Infrastructure (PPI Act) and the Enforcement Decree.

24. Unlike Korean Law, which is designed to attract foreign investor involvement in basic infrastructure with some incentives, the Japan PFI law; "Law relating to promotion of realization of public facilities by using private funds" is designed to stimulate domestic investment. This law also states the principle of Japan's PFI Method. However, to make it easier for public and private sector to apply such principle in PFI project, the government later released the additional fundamental principle and basic guidelines.

## II. LEGAL FRAMEWORK ON THE NEW THAI LEGISLATION ON PPP

### A. General Legislative Framework

#### 1. Scope of law

25. From the past, legislation relating to Public and Private Participation (PPP) in public facilities or the ‘Private Financial Initiatives’ (PFI) mostly focuses on the Infrastructure Project. There have been many experiences to demonstrate that the private participation contributes not only the private’s funds but also the managerial and technical skills which consequently can develop quality and quantity of infrastructure services, while saving government budget. Recently, the infrastructure project has not been fixed to the construction work, it has been also involved the services which should be provided by the public, i.e. schools, hospitals. In this study, the discussion will draw the attention to the UNCITRAL Legislative Guide, the UK model of PPP/PFI, the Korean law and Japanese Law as well as the draft Thai PPP law. However, the Appendix 1 provides the Table for Comparison of the draft Thai PPP Law with the Korean and Japanese Law only.

#### UNCITRAL

26. Under UNCITRAL Legislative Guide, which type of infrastructure project is open to private participation depends on the consideration of Government in view of the national needs and an assessment of the most efficient way in which specific types of infrastructure facility should be developed and operated.

#### UK

27. Even though, the United Kingdom is considered the origin of the PFI, there is no specific legislation that wholly encompasses PFI. Instead Partnerships UK (PUK) was set up specifically to support and accelerate the delivery of infrastructure renewal, high quality of public services and efficient use of public assets through better and stronger partnerships between the public and private sectors.

#### Korea

28. The purpose of the Act on Private Participation in Infrastructure (PPI Act) is to contribute to the development of the national economy by encouraging creativity and efficiency in infrastructure facilities by promoting private sector investment in such facilities. (Art.1)

29. Under Article 2 the term of “Infrastructures” means fundamental facilities which are the foundation of production, increase the efficiency of such facilities, accommodate the convenience of the users and the public, and which fall under the wide range of 33 items; i.e. roads, railway, airport, waste disposal facilities, information and communication network, distribution complex, urban park, recycling facilities, Libraries, museum and art gallery, International conference facilities.

#### Japan

30. The focus of the Law relating to promotion of realization of public facilities through using private funds (PFI law) of Japan is aimed at inducing the private sector to engage in fundamental public works, hitherto the responsibility of public sector. The purpose of the law is

to realize social infrastructures efficiently and effectively by legally arranging means for promoting construction, maintenance, management and operation (including planning thereof) of Public Facilities through using private sector funds, and managerial as well as technical ability, thereby contributing to healthy development of the national economy. (Art. 1)

31. Under Article 2, "Public Facilities" means (1) public facilities like roads, railways, sewage works, etc. (2) facilities for public use such as public office buildings, etc. (3) publicly managed housing, educational and cultural facilities, hospital facilities, etc. (4) information and telecommunication facilities, energy supply facilities, etc. (5) any other facilities which are similar to the above list, or specifically defined under a government ordinance.

#### Thailand

32. The purpose of a new draft of Supervision of Large Public Investment is to govern all of large public projects whether it is a public private participation projects, or infrastructure facilities or otherwise.

33. Under the provision on definitions, neither of the terms "Infrastructure" or "Public Facilities" is defined. Instead there is a definition for "Project" which is divided into 2 categories; Project Type 1 and Project Type 2

34. "Project Type I" means a project in which the project agency<sup>3</sup> intends to invest for the purpose of economic and social development and such investment creates the public property, or an investment in infrastructure or public services, using the government budget or other sources of fund including funding from loans;

35. "Project Type II" means (1) a project in which the project agency intends to invest for the purpose of economic and social development and such investment creates the public property,, or an investment in infrastructure or public services involving the private participation and (2) the said project which is initiated by the private sector (Unsolicited Project

#### Comment

36. Unlike the other country's PPP laws, which mainly focus on the private participation in the infrastructure or public facilities, the scope of new Draft of Thai PPP law is extended to supervise the projects carried out solely by the public sector and in both infrastructure facilities and non- infrastructure facilities. However, the value of such public project has to meet the certain minimum amount as specifically prescribed by law. With this widened scope of law; the structure of the Thai PPP law is much more complicated than the others'.

37. To avoid the difficulty on the application of the law, there should be the clear definition on each type of project. It is recommended to categorize the project into 3 types,

- Project Type 1 is for the public project invested solely by the government (through the project agency) in both infrastructure and non infrastructure facilities with government budget or other source of funds regardless of the government guarantee. The value of the project which shall be governed by this PPP law has to be set in the law.

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<sup>3</sup> "Project Agency" means a Government agency, which is a Department, or equivalent, State enterprise, State agency, or local administration owning the project.

- Project Type 2 is for the public project operated by or with the investment participation of the private sector. The investment shall be in a wide range of infrastructure facilities, and public services. The value of the project has to be set in the law and the calculation of the project size shall be determined by the relevant authority and shall be notified as a regulation.
- Project Type 3 is an unsolicited project concerned with infrastructure facilities and public services, initiated by the private sector making use of new technology or high managerial skills.

38. As the procedure of submission and approval is different for each type of project, to make the new law easy to follow, there should be a separate chapter for each type of project, and in each Chapter, there shall be a section on submission, evaluation, approval, and supervision of the project.

## **2. Definition of PPP**

39. The determination of PPP is different from country to country. It depends on each country's experience and it cannot be prescribed to only one or two methods because the form of participation between the public and private sector has developed from time to time.

UK

40. Since there is no specific legislative on PPP in UK, there is no formal definition of PPP.

Korea

41. In pursuant to Article 4 of Act on Private Participation in Infrastructure, the private sector participation must be conducted using one of the following methods: (1) BTO (Build Transfer and Operate) (2) BOT (Build Operate and Transfer) (3) BOO (Build Own and Operate) (4) Other Method proposed by private sector under Article 9 (unsolicited project), or Other Method proposed by private sector under Article 12 (modification of the instruction for proposal), (5) Other Methods in the instruction for proposal for private participation in infrastructure projects proposed by the competent authority under Article 10.

Japan

42. Under Article 2 of PFI law, the characteristic of PFI is defined under the term of "Specified Undertaking" which means "business related to realization of public facilities (construction, maintenance, management or operation of public facilities or planning thereof), including redevelopment undertaking like city area redevelopment, land area adjustment etc) which shall be implemented effectively and efficiently by using private funds, managerial and technical ability.

Thailand

43. Under Article 5 of new draft of PPP Act, the determination of PPP is prescribed under the term "Participate" which means "jointly invest with a private individual by any means whatsoever or entrust a private individual to invest solely by means of licensing or granting concession or granting rights in any manner whatsoever".

## Comment

44. From the past experiences of Thai PPP, there have been many problems related to the interpretation of “Participation”, with its ambiguous definition, many of PPP projects have circumvented the application of the PPP law.

45. To encompass all PPP projects into this law, the definition of “Participation” should be specified clearly with the example PPP method, such as Build Operate Transfer (BOT), Build Transfer Operate (BTO), and Build Own Operate (BOO). However, the draft should not limit the form of PPP only to such examples, to less the burden in interpretation of PPP project, it shall have an open clause to include the other forms of PPP with the authorization of the relevant authority to issue a negative list of the project which is not regarded as PPP and which consequently does not fall under this PPP law.

46. The reason behind the issuing of negative list is to encompass all the activities which are not specified in the list to be governed by the PPP law. The recommendation is that such negative list of non PPP project be issued as a Ministerial Regulation which can be revised from time to time.

### **3. Definition of “Private”**

47. Normally, there is no definition of “Private” in other countries’ law. But in Thailand, the argument has always arisen, especially with a company whose shares are held proportionately between the public and private sector.

## Comment

48. To set a common interpretation of “Private”, there should be the definition of “Private” in Thai PPP law, in this regard, the Council of State of Thailand has ruled that “Private”<sup>4</sup> means person who is not under the controlling power or supervision power of the government, and including the person who is not under the controlling power or supervision power of the local administration agencies”. This definition should be used in the draft of Thai PPP law.

### **4. Scope of Authority**

49. As it is known that the PPP Project takes many steps from the beginning to the end, therefore, the setting up of scope of authority in dealing with each step of the project implementation is recommended.

## UNCITRAL

50. For the clarity purpose and transparency, the law should identify the authorized public authority that has a power to act as a contracting authority at the different stage of negotiation and that has a power to sign a project agreement or the concession.

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<sup>4</sup> See The Council of State Ruling No. 222/2550; case Krungthep Thanakom Co., Ltd. and Ruling No. 63/2537; case the Crown Property Bureau

## UK

51. PUK supports government in developing policy and monitoring compliance by using its market knowledge and support the investment in public services by co investing alongside government to enhance the private function in its delivery programs.

## Korea

52. Under PPI Act, the central government shall have a duty to propose the Annual Plan<sup>5</sup> for each PPI project. After that the relevant ministries and the local government will make the Basic Private Investment Plan for each project in which the content of the Basic Private Investment Plan shall include;

- the investment amount, duration, location, scale
- the proceeds of the concessionaire i.e. user fee
- the method (BOT BTO)
- the public assistance method
- information on the operation and management
- the eligibility requirements for the concessionaire
- Other necessary matter

53. Apart from the central government and the relevant ministries, under the PPI law, there shall be a committee called “*The Private Investment Project Committee*” which is set up under the jurisdiction of the Ministry of Planning and Budget. Its scope of work is to consider:

- Matters concerning the formulation of major policies concerning private sector investment in infrastructure projects
- Matters concerning the establishment and modification of the basic plan for private participation in infrastructure and matter concerning the designation of a solicited private investment project.
- Matters concerning the establishment and modification of the annual plan for private participation in infrastructure which meet the requirements as prescribed by the Presidential Decree.
- Designation of a concessionaire
- Cancellation of designation of Solicited Projects
- Other matters which the Minister of Planning and Budget proposes during a conference for the promotion of active private participation in infrastructure projects.

## Japan

54. Under PFI Law, the Prime Minister shall determine a Fundamental Policy with respect to the implementation of the Specified Undertaking. Upon the determination of the policy, the Prime Minister shall consult with the head of relevant administrative organs and have to submit to the PFI Promotion Commission for the consideration.

55. Once the Fundamental Policy is established, the Administrator of Public Facilities<sup>6</sup> shall establish a policy for implementation of the undertaking based on the Fundamental policy.

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<sup>5</sup> In the Annual Plan, the necessary contents of concession agreement are also given

<sup>6</sup> who can be one of the followings (1) the Minister who is in charge as administrator of public facilities or Minister who has statutory powers to control the Specified Undertakings (2) Heads of Local Autonomous Government who are legally Administrators of Public Facilities or who intend to implement the Specified Undertakings. (3) Chartered Corporation or other Public Corporation who shall realize Public Facilities.

56. Apart from the Administrator of Public Facilities, there shall be a *PFI Promotion Committee* established within the Prime Minister's office. Its duty is to investigate and consider matters including

- Status of the establishment of an implementation policy
- Selection of Specified Undertaking
- Objective Evaluation of Specified Undertaking
  - Status of realization of Public Facilities by State using private funds

Thailand

57. Unlike other jurisdictions, the organization structure for Thai PPP is mainly focused on the committee, as it is shown in the draft of Thai PPP law that there shall be the establishment of the specific committees for each PPP project, with responsibility for each stage of the PPP process. The stages are

(i) Stage 1: The Proposal of PPP Annual Plan

58. A Policy and Supervision Committees (PSC) shall be established, with its main power and responsibilities as follows;

- Propose annual and medium term of public investment plans to the Cabinet
- Advise the responsible ministry to issue ministerial regulations
- Set guidelines, regulations, conditions and methods as specified by certain provisions of the Act
- Review, conduct appraisals and give approval as specified under certain provisions
- Review and approve methods of selection of private sector participants or of non-bid method.

(ii) Stage 2: The Selection Process

59. A Selection Committee (SC) shall be established, with its main responsibilities as follows;

- Consider a draft RFP, project scope, contract conditions, other key conditions and determine bid and performance bonds;
- Review and select the private sector participant;
- Negotiate the terms of project agreement/concession which have been proposed by the project agency

(ii) Stage 3: The implementation and Supervision

60. A Contract Management Committee (CMC) shall be established, with its main responsibilities as follows;

- Monitor and supervise the performance of the PPP contract
- Review proposed changes to the contract
- Report operation results, progress, problems and methods of problem resolution
- Determine on the time extension or expansion of the contract scope

Comment

61. Under PPI law of Korea, there is only one committee which combines the responsibilities of setting up the major policy on private investment, selection of solicited project for private

participation and selection of the concessionaire. Similarly the Japan PFI Committee assumed all responsibilities, from the setting up of policy to supervision of PPP project. Unlike Korea and Japan, Thailand has three separate committees for policy, selection and supervision.

62. In consequence, interface with the private sector at each stage of the project process is by a different committee. This may cause delays to the work of each project stage, especially when there is a lack of coordination among the committees. To ensure the smooth continuation of the PPP process, there should be a representative from the central authority (which can be from the project agency or from the PPP unit) who knows the project well sitting in each committee.

63. In addition, to avoid the unnecessary delay in dealing with the private sector at each stage, guidelines on the step taken by the private investor when there is a dispute shall be provided as well as a list of which matters or clauses in the concession that can be handled by the Project Agencies and which have to be referred to a Committee.

## **B. The Establishment of PPP unit**

64. Many countries establish their own PPP unit in order to promote the PPP or to facilitate the government in management of PPP, or to help private sector in dealing with the public sector under the complicated process of approval of PPP. Some PPP units are autonomous, some under the government and some a partnership between the public and private.

### UNCITRAL

65. The setting up of Special Organization for Promotion is viewed as one form of non financial government support as the Organization will promote the development of PPI in the country while it will coordinate the negotiation and the sharing of knowledge and techniques among related government agencies. The aim of the organization should be to enhance the efficiency to the private participation.

### UK

66. There is a PUK which its role is benefit to public sector. It assists government in developing policy and monitoring the project by using its market knowledge to ensure that outputs are effective and practical. It also support individual projects before, during and after procurement by using its commercial experience and expertise to increase the chances of success.

### Korea

67. The Korea PPI Act set up the Private Infrastructure Investment Centre of Korea (PICKO) which is intended to perform the following tasks;

- to be a one stop service center of PPP
- support all administrative procedure in PPP which will be benefit both public and private sector
- assisting the relevant parties in various way, from providing investment consulting service to project proposal review,
- negotiating and concluding concession agreement

In addition, its role and functions of PICKO are includes

- providing support in formulating policies and plans related to private investment projects
- developing new private investment projects, including conducting feasibility studies on them
- providing support in formulating the instructions for private investment project proposals
- reviewing and evaluating project proposals such as feasibility studies
- providing administrative support in negotiations and concluding concession agreement
- providing consulting services for domestic and international investors
- sponsoring promotional activities
- operating educational programs for civil workers, financial institutions, related personnel from private sectors, etc.
- conducting studies to improve various policies related to private investments.

#### Japan

68. Presently, there is no special organization to promote investment under Japan's PFI's law. However, the law authorizes a PFI Promotion Committee to have a supervisory and coordination function. In practice, the PFI Promotion Committee only suggests the political direction regarding implementation of the infrastructure project and is not involved in the project details. During implementation of an infrastructure project, it may act as the mediator.

69. To assist the PFI Promotion Committee in its duties, there is a PFI Promotion Division in the Prime Minister's Office. Its responsibility is to supply the necessary information and suggestions to the Committee and acts as a supplementary organization to the Committee.

#### Thailand

70. The new draft provides for the establishment of a Large Public Investment Management Office (LPIMO) which has the followings functions:

- Gather information , study, analyze, prioritize projects and draw up an annual plan and evaluate the economic, fiscal and monetary and public debt impact for consideration of the PSC;
- Study and analyze the feasibility and carry out Value for Money assessment of PPP project for PSC consideration;
- Draft guideline, terms and conditions and method if implementation under PSC responsibility for PSC consideration;
- Carry out research and coordinate with private sector participants in projects;
- Request information from project agency and private participants for PSC deliberation;
- Collect PPP contracts for analytical purposes;
- Monitor and supervise contract performance and report to PSC;
- Carry out administrative work of PSC.

#### Comment

71. To enhance the efficiency of private participation in PPP project, the Large Public Investment Management Office (LPIMO) under Thai PPP law should have more of an initiating rather than a supportive role and the task of the LPIMO should be to benefit not only the public but also the private sector. In this regard, the LPIMO shall also acts as a promotion office which

also provides the consulting service regarding the preparation of the feasibility study to the private investor in order to shorten the PPP process and to less the burden of the project agency which might not have the expertise in dealing with the said study.

72. In addition, one of the problems of PPP not only in Thailand but throughout the world is the lack of coordination between government authorities involved in the PPP project. To improve this relation, the LPIMO should act as the coordinator for the PPP project among all related party; i.e. the authorized agency, related government agencies and ministries, the committees, and the private sectors. Moreover, LPIMO shall be a place where the private sectors can make their claim on the related government agencies during the implementation process especially when particular government agency does not perform its duty as set in the project agreement and such failing to perform causes the adverse effect or delay to the PPP project. .

73. In response to the above suggestion, under the certain article of new Thai PPP law which related to responsibility of LPIMO, there shall be an open clause stating that additional responsibilities of LPIMO shall be prescribed in the Ministerial Regulation.

### **C. Risk Allocation and Government Assistance**

#### **1. Risk Allocation**

74. One of the main benefits of Public and Private Participation Project is it would allow the government to transfer project risk from to the private sector, and, since it is known that appropriate risk allocation can reduce project cost, this is in the public interest . Allocation of project risk can be done contractually among related parties such as government, private sector project sponsor, financiers, etc.

#### **UNCITRAL**

75. UNCITRAL gives an overview of the main risks faced in privately financed infrastructure projects which can be solved through contractual risk allocation. The categories of the main project risk are classified as follows;

- (1) events outside the control of the parties such as a natural disaster (i.e. floods, storm, or earthquake), war, terrorist attack or unforeseen events that may cause a temporary interruption of project execution or loss of revenue;
- (2) political risk;
- (3) construction and operation risk, which is the main risk that may occur during the construction process and causes breach of the concession as the project can not be delivered on time;
- (4) commercial risk, meaning the risk that relates to the possibility that the project cannot generate the expected revenue because of change in market price or demand in services;
- (5) exchange rate and other financial risks

76. The recommendation for the government is that it may be useful for the implementation if the government provides some general guideline, for instance, the advisory principle on risk allocation to domestic contracting authorities

## Korea

77. There is no direct risk allocation stated in the PPI law. However, as the private sector is exposed to the various risk of the project, the PPI law then set up *the Infrastructure Credit Guarantee Fund* to mitigate the financial risk of the private sector. This fund shall guarantee the credit of a private sector or the concessionaire who intends to obtain a loan from a financial institution for private investment project by securing loan obligation, repaying of principle and interest.

78. As this fund is set by the government in order to attract private investment in public facilities by mitigating financial risk for the private sector, this type of Fund can also be regarded as one kind of government support

## Japan

79. There is no specific risk allocation under PFI law. To reduce the risk, Japan is in the process of revising its contracting system which has been traditionally rigid contract.

## Thailand

80. There is no direct provision prescribed on risk allocation, however, to secure public sector on private performance, there is a requirement for the performance bond from the private sector as per detail set by the Selection Committee during the selection process.

## Comment

81. The government should give the advice to the project agency on the importance of risk management. In addition, guideline on the risk allocation shall be provided for a better understanding of the project agency and the related authorities.

82. In such guideline, the government may identify possible risks in related to the project, assess the risk, and specify measurement to mitigate such risks, such as to require the performance bond to cover the performance risk, to require the hedging on foreign loan to cover the exchange rate risk or interest rate risk.

83. In addition, to allocate risk between government and private sector efficiently, the government should use contractual arrangement. In this regard, the government should prepare the standardization of the concession which includes a section on risk allocation and the measures for reducing or managing such risks.

## **2. Government Support**

84. To attract the private investment in infrastructure, the government support measure is needed. There are many forms of Government Supports in PPP project; generally, any measure taken by the government to enhance the investment is regarded as the government support.

## UNCITRAL

85. Under UNCITRAL, there are various forms of government supports as follows;

- Public loans and loan guarantees
- Equity participation

- Subsidies
- Sovereign guarantees
- Tax and customs benefits
- Protection from competition
- Ancillary revenue sources

Korea

86. Many forms of the government supports are prescribed in the PPI law, however some of which may be specified in the Annual Plan.

The forms of government supports which prescribed by law are as follows;

- The grant of a subsidy or long term loan by the state or local government to a concessionaire
- The establishment of the Infrastructure Credit Guarantee Fund
- The equity participation up to 50% of the total investment amount
- The purchase of the project by the state or local government in unavoidable circumstances
- A discount or an exemption of certain charges
- Reduction or exemption of the taxes
- Implementation of supplementary projects (jointly with the private investor)

Japan

87. Some of government supports are prescribed in PFI law but some are prescribed in the Fundamental Principle which is enacted by the Prime Minister. The forms of government supports which is prescribed by law are as follows

- Interest free loan from the government financial institutions
- Necessary tax measures

Thailand

88. There is no provision in the new draft which prescribed the government support. However, in practice, some supports might be provided in the concession agreement.

Comment

89. In the Thai context it may controversial to offer government support to private investors for investment in public projects. However, given that government support may be needed to attract private investors, to eliminate public doubt and to ensure the transparency, criteria for private investment to qualify for government support should be set and announced publicly.

90. The draft law should contain a general provision for government support to be provided as government deems appropriate. Regarding the form of the government support, it might be later specifically defined in the ministerial regulation or it can be set in the concession.

#### **D. Unsolicited Projects**

91. Some countries allow the private sector to initiate a proposal to government for the right to implement a project in infrastructure or public services. This type of proposal is called “unsolicited project”. However, there is a so- call “solicited project” in some country like Korea.

But there is no specific definition or scope of investment, in practice, the solicited project shall be listed by the government and published to the private investor.

#### UNCITRAL

92. UNCITRAL views the unsolicited project as a proposal which is submitted by a private company for the development of a project in respect of which no selection procedures have been opened. Because of unsolicited projects' potential lack of competition from other bidders, the government should consider the need for developing special procedures for handling unsolicited proposals.

93. UNCITRAL recommended that the unsolicited proposal should involve:

- the use of new concepts or technologies to address the contracting authority's infrastructure needs;
- or to address an infrastructure need which is not already identified by the contracting authority.

#### Korea

94. Under PPI law, an unsolicited project means an investment project proposed by the private sector *which is not included in the solicited project list*<sup>7</sup> the procedural detail of which shall be determined in Presidential decree. In pursuant to the Decree, a Project proposal shall contain of information such as total cost, finance procurement plan, determination of periods for free use, O&M, and the income and expenditure plan.

95. Once the proposal is submitted, the concerned authority shall send to PICKO to review the plan and PICKO shall give their opinion to the concerned authority and Ministry of Planning and Budget. After taking PICKO's opinion into consideration, if the authority decides to implement the plan, it shall announce details of proposal in the Official Gazette and newspapers so that a third party shall have a chance to submit a proposal.

96. If a third party submits the proposal, the authority shall review and assess it alongside the initial proposal but preferential consideration may be given to the initial one. If there is no other proposal within the given period, the initial proposal shall be designated as the potential concessionaire

#### Japan

97. There is no unsolicited project in Japan. However, the government is interested in this kind of project and it is currently studying the Korean experience.

#### Thailand

98. Under the new Thai PPP law, submission of an unsolicited project is permitted. It is defined as a project which is proposed to be undertaken by any person who is not a project agency and who intends to participate or invest in the list of investment as prescribed by the Policy and Supervision Committee (PSC).

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<sup>7</sup> See detail in Appendix 1 :clause 5: Solicited/ Unsolicited.

99. In accordance with the draft Thai PPP law, PSC shall be responsible for issuing guidelines on appraisal of unsolicited proposals and the Large Public Investment Management Office (LPIMO) shall be responsible for analyzing the feasibility and assessing the VfM of the project.

#### Comment

100. There should be identified in the Thai PPP law or the related ministerial regulation that the unsolicited project should involve innovation in technology or finance, or management that the public sectors cannot facilitate.

101. To carefully manage the unsolicited project, there should be a separate rules or regulation governing the special procedures for handling unsolicited project.

#### **E. Extension**

102. Normally, an extension clause is provided in the concession or project agreement; however, if the extension provision is stated in the domestic law, it shall be permitted only under the special circumstances.

#### UNCITRAL

103. Generally, upon expiry of the project agreement, if the contracting authority does not wish to operate the facility itself, it may select a new concessionaire, using the same procedures as the previous concessionaire. However, some countries require the exclusive concessionaire re-bid from time to time rather than freely extended by the parties in order to give the concessionaire strong performance incentives. In addition, some laws provide that the original concessionaire may be given the preference over other bidders in the award of subsequent concessions for the same task.

104. In the case that the original concessionaire does not win the re-bidding, it may have a right to compensation from the winning bidder such as for any property rights, or for the investment not yet recovered. This compensation is depended on the amortization of transferred asset and it might not be the case in public infrastructure project which all assets required to be built or acquired for the project should be fully amortized. In order to ensure an orderly transition between the previous concessionaire and the new concessionaire as well as continuity of the service, the law might be used in requiring the previous concessionaire to cooperate with the new concessionaire in transferring of asset and relevant materials.

#### Japan

105. There is no provision on extension in the PFI law.

#### Korea

106. There is no provision on extension in the PPI law.

## Thailand

107. There is no provision on the previous PPP law or the new draft of PPP law indicating the extension period. However, in practice, there is the extension clause in the project agreement or the concession with the right of first refusal of the existing contractor.

## Comment

108. As said earlier that this extension clause is prescribed in the project agreement or the concession with the right of first of refusal of the existing contractor and this has caused a difficulty to the government when it is not satisfied with the performance of the existing contractor and would like to open for the new contractor or bidder. To avoid such difficulty in renewing the contract and to minimize risk of the project agency in abusing of its power in granting the extension period to the existing contractor or concessionaire, the PPP law might indicate that the continuation or the extension project agreement or the concessionaire should be subjected to the terms and conditions as set forth in the Ministerial Regulation and subjected to the approval of the cabinet.

109. In granting the extension period, the cabinet should take into account of public interest rather than state interest. In case that the existing contractor or concessionaire fail to reach the terms and conditions set forth in the subordinated law, it might be given the opportunity in re bidding the project with other new bidders.

## **F. Termination & Intervention**

110. To protect the public interest, there should be a provision in the law that permits the government to exercise its state power in intervening the implementation of the PPP project either on temporary or permanent purpose or the government should be allowed to terminate the concession under the special circumstance. However, to ensure the fairness to the concessionaire, especially in the case of termination for reasons of public interest, the private investors should be compensated to certain limit.

## UNCITRAL

111. UNCITRAL advises that there should be provisions on the grounds for termination of the project agreement before the expiry of the concession term. It is also advisable for the parties to establish appropriate procedures whether there are valid grounds for terminating the project agreement. In most case, prior to the termination of the project agreement, the parties should require a final finding by the dispute settlement body provided in the agreement.

112. Generally, the termination by the contracting authority relates to three circumstances; (1) serious breach by the concessionaire, (2) insolvency of the concessionaire, (3) termination for reasons of public interest, while the termination by the concessionaire is usually limited to: (1) a serious breach by the contracting authority, (2) changes in conditions constituting an unforeseen occurrence and the parties have failed to agree on the revision of the project agreement to fit such changes of conditions.

113. However, some legal systems do not allow the concessionaire to terminate the project agreement unilaterally, but only a right to request the third party, such as a competent court, to declare the termination of the project agreement.

114. Some legal systems allow the termination by either party on the grounds that there is a permanent impossibility to perform the obligations under the project agreement. In some case, subject to the approval of a higher authority, the project agreement may be terminated by mutual consent.

#### Korea

115. There is a section regarding the disposition for public interest in the case of efficient operation is needed or the efficient implementation of the construction of infrastructure is required. And if the concessionaire suffers loss due to disposition, the competent authority shall make compensation for such loss. If the parties are unable to reach agreement with each other, they may request a ruling to the relevant appropriate committee under the conditions as prescribed by the Presidential Decree.

#### Japan

116. There is a government guideline which specifies on the allocation of liability between public and private sector in the event of project failure.

#### Thailand

117. There is no provision in the draft of Thai PPP law specified the causes for the early termination of the concession/or project agreement and there is no provision authorizing the relevant Committees or relevant authorities to exercise its right to early terminate the concession in the special circumstance.

118. However, in the case of any breach of the project agreement, the law allows the Policy and Supervision Committee (PSC) to inform the project agency in order to force the private investor to operate in accordance with the concession, if, within the specified period, the private sector fails to do so, PSC shall report the failure to the responsible ministry in order to take a necessary step as specified in the concession or in the project agreement.

#### Comment

119. To protect the public interest and for the national purpose, there should be a section in the draft of Thai PPP law to authorize the Thai government or the concerned authority to declare early termination. However, to ensure the fairness to the private sector who suffers loss due to the use of unilateral right of the government to terminate the concession for reason of public purpose, the private sector shall be entitled to certain compensation which shall cover items that should be taken into consideration when calculating the compensation in the case of termination for serious breach of the government. The said compensation shall be considered by one of the committees established in the draft law or an ad hoc committee. To eliminate the dispute on the appropriate amount of compensation, the law might indicate that the determination of the Committee will be the final. However, this final determination is only at the administrative level, in legal proceedings, the parties can bring the case to the competent court which is the Administrative Court.

120. In practice, the early termination and the compensation clause shall be prescribed in the project Agreement or concession and in case a dispute occurs in relation to those clauses or other clauses prescribed in the Project Agreement, the parties can choose the dispute resolution alternatives and the most selected alternative for dispute resolution is the Arbitration.

### **III. THE AMENDMENTS OF PPSU ACT AND ITS SUBORDINATED LAWS**

#### **A. The Draft Amendment of the PPSU Act B.E. 2535**

121. The issuance of the new legislation in Thailand takes some time. Beginning with the draft has to be prepared by the responsible ministry and has to be submitted to the cabinet for its approval. After that the draft will be submitted to the Council of State for its review and revise and will then be sent back to the cabinet for further submission to the Parliament. The draft will be submitted to the House of Representatives for the review and approval and will be proposed to the Senate for the last review and approval.

122. Due to the fact that the MRT Project has moved forward but the new legislation on the supervision of the large project has been on the beginning process. The Ministry of Finance then prepared the amendment to the existing of Private Participation in State Undertaking Act B.E. 2535 for the urgent application to the MRT project. Under the Amendment, the major concerns are on the following;

##### **1. The clarification of the word “Participation”.**

123. In pursuant to the existing PPSU Act, the meaning of “Participate” is quite general, to avoid the delay in PPP process in seeking the Council of State’s interpretation of the “Participate” activity on case by case basis, the Amendment allows the responsible ministry to issue the Ministerial Regulation to prescribe the type of private activity which shall be considered as Participation.

##### **2. The increase of the size of PPP Project.**

124. Under the existing PPSU ACT, the project which has its size of the project from 1 billion Baht shall be proceeding under PPSU Act. However, the Amendment increases the size of the project which shall be implemented under PPSU Act from 1 billion Baht to 3 billion Baht. In this regards, the assessment of the value of project shall be prescribed in the Ministerial Regulation.

##### **3. The Procedure for the project which the size of investment is less than 3 billion Baht.**

125. Previously, under the PPSU Act, there is no specific procedure for the project which the size of its investment is less than the amount set by the law. However, under the Amendment the specific procedure shall be set in the Ministerial Regulation for the project which its size is less than 3 billion Baht.

##### **4. The preparation of Value For Money Assessment (Vfm)**

126. In pursuant to the existing PPSU Act, the project agency or the consultant hired by the project agency has to prepare the Feasibility Study on the social and economy aspect. However, for the efficiency of implementing of the PPP project, the Amendment requires the project agency to prepare the Vfm assessment compared between the case that the project handled by private and the case that the same project handled by public sector. In this regard, the points for the comparison shall be set by the Ministry of Finance.

## **5. The qualification of the Consultant**

127. The Amendment requires that the Consultant who will be hired by the Project agency in preparing the feasibility study and the Vfm assessment has to have the certain qualification as set forth in Ministerial Regulation.

## **6. The setting up of a new committee.**

128. Under the Amendment, the Monitoring and Supervision Committee shall be established and it shall consist of the a representative of project agency (Chairman), a representative from Ministry of Finance, a representative of NESDB, a representative from an agency other than the project agency, a representative from project ministry, and no more than 4 representatives appointed by the project agency. Its main responsibilities are to monitor, supervise the performance of the PPP contract, to review the proposed change to the contract and to report the operation results, progress, problems and resolution to the responsible ministry, and in the event of contract expiry, and to submit opinion on how to approach continuation of the project.

## **B. The Subordinated Law to the Amendment of PPSU Act**

129. The type of subordinated law which is frequently referred in the Amendment is the Ministerial Regulation; however, the Ministry Notice might be appropriated in certain circumstance such as the publication of the list of the points for Vfm assessment compared between public investment and PPP.

130. Under the existing PPSU Act 1992, there are 2 responsible ministers who are in charge and control of the execution of this ACT, one is the Prime Minister and the other is the Minister of Finance. However, almost all of the subordinated law which shall be issued under the PPSU Act is under the Minister of Finance's authority.

131. To assist the government in preparing the subordinated law to the Amendment, the list of the required Ministerial Regulations are summarized as follows;

- The Ministerial Regulation on determining the type of Participation
- The Ministerial Regulation on the Assessment of the Value of the Project
- The Ministerial Regulation on the Qualification of the Consultant (Project Analysis)
- The Ministerial Regulation on the Special Procedures for the Project which its is less that the amount set by PPSU Act 1992

132. In drafting the above subordinated law, the government should take in to the account of the experience of previous PPP projects and the loophole which the private frequently uses to circumvent the application of the existing PPSU Act. In addition, the government should search on the Council of State Rulings in related to the PPP project and seek the advisory from the responsible officer.

133. The Technical Note on Ministerial Regulations regarding the Value for Money (VfM) is provided in [Appendix 2](#). Suggestion on Key Issues of the Ministerial Regulations is provided in [Appendix 3](#).

#### IV. AD HOC TECHNICAL ADVICES ON PPP ISSUES

134. During the process of reviewing the new Thai law relating to PPP (The Supervision of Large Public Investment) and the reviewing of the Amendment to the PPSU Act B.E. 2535, the ad hoc technical advice is provided to the drafting committee and the Ministry of Finance in order to support the completion of the legislation. The concerned issues of the PPP and the technical advice provided to the relevant government authority are summarized below.

##### A. Definition of “Private”

135. The Council of State The Council of State has ruled under the PPSU Act 2535 in the case of Krungthep Thanakom Co., Ltd. (KT) in April 2007 (No.222/2550) inquired by BMA, that “*Private*” means “*person who is not under the controlling power or supervision power of the government, and including the person who is not under the controlling power or supervision power of the local administration agencies*”.

136. This ruling cited the previous ruling No.63/2537 in the case of the Crown Property Bureau (CPB) that the “*Private*” means “*person who is not under the controlling power or supervision power of the government*”. The Council of State expanded the meaning in case of KT to include “*the person who is not under the controlling power or supervision power of the local administration*”.

137. Under the aforesaid Rulings, based upon the definition of “*Private*”, the Council of State ruled that CPB is “*private*” because it is independent from the controlling power of the government. In KT case, the Council of State ruled that KT is not the “*private*” because it is under the control and under the supervision of Bangkok Metropolitan Authority. It is considered as the “*Public Enterprise*”.

##### B. The Right of First Refusal

138. Under the existing concession, the terms and conditions of continuation or expansion of the contract or the project are provided with the right of first refusal. This has caused a problem to the government in selecting a new concessionaire when needed, especially when it is found that the existing concessionaire has not enough competencies or has no advance technology to apply to the continuation of providing the services.

139. In this regard, it is recommended that the State must take the public interest rather than the *state* interest into account regarding the continuation or expansion of the contract to the existing contractor and It will be easier if the existing concession provides only the right of the first refusal but the terms and conditions will be set accordingly by the State.

140. To solve this problem, in the new Thai PPP law shall have a provisional chapter which may be provided to the effect that in case of the continuation or expansion of the concession done before the enactment of this Act, the Policy and the Supervision Committee shall have the right to review, revise and fix the conditions for the same for the sake of the *public interest*.

##### C. Non – Compliance with the PPSU Act

141. From the past, a problem occurred with many projects which have been attempted to circumvent the application of the law. When these projects were brought up for the decision,

there were submitted to different authorities, subsequently, the judgment were not rendered on different ground.

142. In the case of the PWA /East Water /UU Group, the case was brought to the Rayong Administrative Court. The Court ruled that the result of non compliance with the PPSU Act caused the process for selection of the contractor and the contract be revoked.

143. In case of King Power, the Council of State ruled that the project should be subject to the PPSU Act 2535 but did not clearly say what to do. The case of King Power is the same as the case of PWA because it did not passed the PPSU Act from the beginning by avoiding the threshold of Baht 1 million. In the case like King Power, the Private can raise the issue that it gave all fact to the State, so the State should be the one who decided whether it should be subject to the PPSU Act or not.

144. In case of the recent mobile phone case, the Council of State ruled that the contract was done before the enactment of PPSU Act but the revision of the contract which was done after the enactment should be subject to the PPSU Act. In this case, the Council of State split the process from the contractual obligation. The Council of State threw the issue to the Cabinet for decision. This created the problem and doubt.

145. It should be noted that the above cases had the doubtful issues after done and the rulings were handed down by the Administrative Court and the Council of State. The issues in those cases were raised by the public to the Administrative Court or by the State agencies to the Council of State (as only the state agency can raise the issue to the Council of State).

146. To set the standard of the decision on the non-compliance case, the suggestion is that the case should be decided by the Administrative Court as it is deemed as the administrative dispute.

#### **D. Modified Net Cost**

147. The Government is thinking of an alternative in addition to gross cost concession, i.e. go back to the net cost concession with the open proposal for negative concession –modified net cost as the private sector prepares to take full risks, particularly the ridership and the government might have an authority to subsidize the project under the new Public Service Obligation B.E. 2550 (PSO Regulation).

148. The comments to this modified net cost or net cost with subsidy are as follows;

- (i) PSO Regulation is applied directly to State Enterprise and not a private sector or local government and their operator. Therefore, the PSO Regulation does not in effect apply to an MRT private concessionaire.
- (ii) The net cost approach with subsidy might not achieve in applying to the transportation project and might worse than current net cost because:
  - It is still net cost and almost unchangeable
  - Policy control or change will therefore likely only be gained with great difficulty and probably only with special payments (which will be very difficult to make in practice)
  - Network integration will suffer accordingly

- Compared to current net cost (and gross cost) value for money will be likely inferior
- (iii) However, the only good thing for net cost with subsidy (i.e. negative concession) is that it is a more realistic response to dealing with forecast cost recovery of future lines of the MRT project.
- (iv) Only a willingness by the contractors to accept patronage risk is not a sufficient reason to pursue a net cost contract because under any form of net cost model the government will have limited capacity to manage change in MRT in Bangkok and later the private might face a problem as
  - The private sector sees only upside in the future. In particular, they judge that patronage on their current lines will increase as a result of continuing economic growth, traffic congestion and as the government constructs additional lines. So they might think themselves better off taking advantage of the expected revenue growth to them rather than stepping into the unknown of a new form of contract.
  - They wish to indicate reluctance to change at this stage as a negotiating tool to get some later advantage.
  - They do not yet appear to have seen the substantial financial advantage to them from financial restructuring that would be possible with a gross cost contract. Or perhaps that they do see it, and their current response is a negotiating position.
- (v) The recommended gross cost form of concession included a component of the payment that is related to patronage. It is possible to vary this component. While it is recommended that the it (?) should be related to the degree to which a concessionaire can influence their patronage (which is modest), it could be a very large proportion of the payment (even, in theory, the whole payment). There are risks in making it too large a share, for example (a) it can make the concessionaire risk averse and could leave them with significant losses or super profits if patronage changes because of exogenous factors (such as new lines being built, rising traffic congestion, etc); and (b) if the government asked the concessionaire to operate a line extension, the concessionaire might not be able to generate sufficient revenue through incremental patronage to meet the cost of the extension (and so might prevaricate).
- (vi) Even if the gross cost contract had a large share of the payment related to patronage, it should still contain unit cost data that can be used to determine payments for a service variation.
- (vii) From public interest perspective, the comparison of the modified net cost against gross cost concession should be provided. In this regard, the Table of comparison is made *in PPP Management Technical Paper* on seven key public interest topics which are: -Ridership and fare revenue risk -Fare policy control - Fare integration -Policy control on competition/monopoly in urban public transport -Urban transport policy control -Financial cost -Value for money.<sup>8</sup> The conclusion is that the Gross Cost concession is a significantly superior public interest choice.

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<sup>8</sup> See detail on the *PPP Management Technical Paper*

149. Please see further discussion in Appendix 4 regarding the Concession Model and Concerned Issues with the Modified Net Cost.

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**APPENDIX 1**  
**TABLE: COMPARISON OF DRAFT THAILAND PPP LAWS WITH KOREA AND JAPAN**

<b>Subject</b>	<b>Korean Law</b>	<b>Japan Law</b>	<b>Draft of Thai PPP</b>	<b>Comment</b>
1. Name of the Act	Act on Private Participation in Infrastructure	Law relating to promotion of realization of public facilities by using private funds	Draft on Supervision of Large Public Interest	Thai PPP draft has a broader scope of application than normal PPP law in other countries. It covers 2 main areas 1) Public Sector Investment including the SOE and the local administration. 2) Public and Private Participation
2. Definition  2.1 Infrastructure/ public facilities/ Project	(Article 2)  “ <b>Infrastructure</b> ” means -fundamental facilities which are the foundation of production, - increase the efficiency of such facilities - accommodate the convenience of the users and the public, - and which fall under any of the following items: (a) Road (b) Railways (c) Urban Railways (d) Harbor and Port	(Article 2)  “ <b>Public Facilities</b> ” means (1) Public facilities like Road, Railway, Port, Airport, Park, Drinking, Sewage, Industrial Water system, etc.  (2) Facilities for public usage like public office buildings, apartments for public officers etc.  (3) Public managed housing, educational and cultural facilities, hospital facilities, etc.	(Article 5)  “ <b>Project Type I</b> ” means the project in which the project agency <sup>1</sup> intends to invest for economic and social development purpose creating the public property, or the investment in infrastructure or public services, using the government budget or other sources of fund including funding from loan  “ <b>Project Type II</b> ” means (1) the project in which the	1) There should be the clear definition on each type of project. It is recommended to categorize the project into 3 types,  (A) <b>Project Type I</b> (a) For the public project invested solely by the government in both infrastructure and non infrastructure facility (b) The project shall be invested in infrastructure facilities with government budget or other source of funds.

<sup>1</sup> “Project Agency” means a Government agency, which is a Department, or equivalent, State enterprise, State agency, or local administration owning the project.

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	Facilities (e) Airport Facilities (f) Multi Purpose Dam (g) Waterwork System (h) Sewage System (i) Facilities constructed near a River (j) Fishery Harbor (k) Waste disposal facilities (l) Telecommunication facilities (m) Electric source facilities (n) Gas supply facilities (o) Collective energy facilities (p) Information and communications network (q) Distribution complexes (r) Cargo terminals (s) Passenger terminals (t) deleted (u) Tourist resorts and resort complex (v) Non-road parking lot (w) Urban Parks (x) Waste water disposal facilities (y) Excreta treatment facilities (z) Recycling facilities (za) Public Sport facilities (zb) Youth Training facilities (zc) Libraries (zd) Museum and art	(4) Information and telecommunication facilities, energy supply facilities, new energy facilities, recycling facilities (except waste treatment facilities), tourist facilities and research facilities.  (5) Any other facilities which are similar to the above listed facilities, specifically defined under the government ordinance	project agency intends to invest for economic and social development purpose creating the public property, or the investment in infrastructure or public services involving the private participation and (2) the said Project which is initiated by the private sector (the unsolicited project)	(c) The value of the project which shall be governed by this PPP law has to be set in the law.  <b>(B) Project Type 2</b> (a) For the public project operated or participated by the private investment. (b) The investment shall be in wide range of infrastructure facilities (which should be included the public services i.e. hospital, school. (c) The value of the project has to be set in the law and the calculation of the project size shall be determined by the relevant authority and shall be noticed as the regulation.  <b>(C) Project Type 3</b> (a) An unsolicited project (b) The project should relate to the infrastructure facilities, and the public services. (c) Using of new technology or high managerial skill. (d) No ceiling for the size of the project.  2) Under the law, there

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	galleries (ze) International conference facilities (zf) Intelligent transport system (zg) Geographic information system (zh) Super high Speed information (zi) Science museum			should be separate chapter for each type of project with its own provision on the assessment, submission, implementation and supervision.  3) In addition, to determine whether the proposed project is suitable for solely public investment (project type 1) or requires private participation, (Project type 2), the project agency should apply the Vfm assessment in comparing the investment by solely public sector to the private participation. And this mechanism should be address in the law.
2.2 Public Private Participation	(Article 4) Method of conducting Private Investment Project  Private Investment Project shall be conducted in one of the following methods; (1) BTO (Build Transfer and Operate)	(Article 2) “Specified Undertaking” means  “business related to realization of public facilities (construction, maintenance, management or operation of public facilities or planning	(Article 5) “Participate” means  “jointly invest with a private individual by any means whatsoever or entrust a private individual to invest solely by means of licensing	(1) The definition of “Participation” should be emphasized on the transfer of the project ownership with the example of the method of PPP, such as Build Operate Transfer (BOT), Build Transfer Operate (BTO), Build Own

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>(2) BOT (Build Operate and Transfer)  (3) BOO (Build Own and Operate)  (4) Other Method proposed by private sector under Article 9 (unsolicited project), or Other Method proposed by private sector under Article 12 (modification of the instruction for proposal), (5) Other Methods in the instruction for proposal for private participation in infrastructure projects proposed by the competent authority under Article 10.</p>	<p>thereof), including redevelopment undertaking like city area redevelopment, land area adjustment etc) which shall be implemented effectively and efficiently by using private funds, managerial and technical ability.</p>	<p>or granting concession or granting rights in any manner whatsoever”.</p>	<p>Operate (BOO).   (2) The definition should also be opened to include the other forms of PPP in order to encompass all PPP work to be under supervision.   (3) There should be a clause that authorizes the relevant authority to issue a negative list of the project which is not regarded as PPP and which is consequently exempt from complying with this draft law.</p>
<p>2.3 Authorities/ Committees</p>	<p>(Article 5) 1 Committees</p> <p><b>Private Investment Project Committees</b></p> <p>a) <u>Composition</u> The Committee comprise of  - Minister of Planning and Budget  - Vice Ministers of administrative ministries in charge</p>	<p>(Article 21) 1 Committee</p> <p><b>PFI Promotion Committee</b></p> <p>a) <u>Composition</u> The members of the Committees are government officials from PFI policy related ministries.</p>	<p>(Article 9) 3 Committees</p> <p><b>3.1 The Policy and Supervision Committee</b></p> <p>a) <u>Composition</u> The Committee comprise of  - Minister of Finance (Chairman)  - Dep. Minister of Finance  - Representative officer from  * Permanent Secretary of</p>	<p>To ensure the continuation of the PPP process among the 3 separated committees, there should be a representative from the centered authority which can be either from the project agency or from the PPP unit who know well on each stage of the project sitting in each committee.</p>

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>- 8 or fewer members from private sector with knowledge and experience in private investment</p> <p>b) <u>Responsibilities</u> Their scope of work is to consider the following matters</p> <p>(a) Matters concerning the formulation of major policies concerning private sector investment in infrastructure projects</p> <p>(b) Matters concerning the establishment and modification of the basic plan for private participation in infrastructure and matter concerning the designation of a solicited private investment project.</p> <p>(c) Matters concerning the establishment and modification of the annual plan for private participation in infrastructure which meet the requirements as prescribed by the Presidential Decree.</p> <p>(d) Designation of a concessionaire</p> <p>(e) Cancellation of</p>	<p>b) <u>Responsibilities</u> The Committee shall investigate and consider matters which is under their responsibility include</p> <p>(1) Status of establishing Implementation policy</p> <p>(2) Selection of Specified Undertaking</p> <p>(3) Objective Evaluation of Specified Undertaking</p> <p>(4) Status of realization of Public Facilities by State using private funds</p> <p>- Its role includes Supervision and Coordination.</p>	<p>MOF</p> <ul style="list-style-type: none"> <li>* NESDB</li> <li>* BOT</li> <li>* Budget Bureau</li> <li>* Auditor General</li> <li>* Council of State</li> <li>* SEPO</li> <li>* PDMO</li> <li>* 5 qualified expert appointed by cabinet</li> <li>* Director of General Office</li> </ul> <p>b) <u>Responsibilities</u></p> <p>(a) Propose annual and medium term of public investment plans to the Cabinet</p> <p>(b) Advice responsible ministry to issue ministerial regulation</p> <p>(c) Set guidelines, regulations, conditions and methods which are specified by the certain provision of the Act</p> <p>(d) Review, conduct appraisal and give approval as specified under certain provision</p> <p>(e) Review and approve methods of selection of private sector participants or of non-bid method</p>	

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>designation of Solicited Projects  (f) Other matters which the Minister of Planning and Budget proposes during a conference for the promotion of active private participation in infrastructure projects.</p>		<p><b>3. 2 Selection Committee</b>  (Article 22)  a) <u>Composition</u>  comprise of</p> <ul style="list-style-type: none"> <li>- Representative of responsible ministry</li> <li>- Attorney General</li> <li>- Representative from <ul style="list-style-type: none"> <li>* NESDB</li> <li>* Budget Bureau</li> <li>* New Office</li> </ul> </li> <li>- 3 experts</li> </ul> <p>b) <u>Responsibilities</u></p> <p>(a) Consider draft RFP, project scope, contract conditions, other key conditions and determine bid and performance bonds;</p> <p>(b) Review and select the private sector participant</p> <p>(c) Negotiate terms of project agreement/ concession which proposed by project agency</p> <p><b>3.3 Contract Management Committee</b> (Article 30)  (a) <u>Composition</u></p>	

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
			<p>comprise of</p> <ul style="list-style-type: none"> <li>- Representative of project agency</li> <li>- Representatives from <ul style="list-style-type: none"> <li>* New Office</li> <li>* NESDB</li> <li>* an agency other than project agency</li> <li>* private sector participant</li> <li>* project ministry</li> <li>* 2 representative appointed by project agency <ul style="list-style-type: none"> <li>* 1 from project agency</li> </ul> </li> </ul> </li> </ul> <p>(b) Responsibilities</p> <ul style="list-style-type: none"> <li>a) Monitor, supervise the performance of the PPP contract</li> <li>b) Review proposed changes to the contract</li> <li>c) Report operation results, progress, problem and method of problem resolution</li> <li>d) Determine on the time extension or expansion of scope of contract</li> </ul>	
3. Establishment of PPP Unit	(Article 23) <b>the Private Infrastructure Investment Centre of Korea (PICKO)</b> is set in order to perform the	There is no specific PPP unit.  However, the <b>PFI Promotion Committee</b> and	(Article 36) <b>The Large Public Investment Management Office</b> is set to perform the following activities	(1) The Role of the Large Public Investment Management Office (LPIMO) should be more initiative, i.e. promote PPP.

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>following activities;</p> <ul style="list-style-type: none"> <li>• To be a one stop service center of PPP</li> <li>• support all administrative procedure in PPP which will be benefit both public and private sector by</li> <li>• assist to relevant parties from providing investment consulting service to project proposal review,</li> <li>• perform the negotiation and conclusion on the concession agreement</li> <li>• Providing support in formulating policies and plans related to private investment projects</li> <li>• Developing new private investment projects, including conducting feasibility studies on them</li> <li>• Providing support in formulating the instructions for private investment project proposals</li> <li>• Reviewing and evaluating project proposals such as feasibility studies</li> </ul>	<p>its secretariat, PFI Promotion Division which set in the Prime Minister Office. shall have responsibilities in supervisory and coordination function among the related parties to the PFI project.</p>	<ul style="list-style-type: none"> <li>• Gather information , study, analysis, prioritize projects and draw up an annual plan and evaluate the economic, fiscal and monetary and public debt impact for consideration of the PSC</li> <li>• Study and analyze the feasibility and carry out Vfm assessment of PPP project for PSC consideration</li> <li>• Draft Guideline, terms and conditions and Method if implementation under PSC responsibility for PSC consideration</li> <li>• Carry out research and coordinate with private sector participants in projects</li> <li>• Request information from project agency and private participants for PSC deliberation</li> <li>• Collect PPP contract for analytical purpose</li> <li>• Monitor and supervise contract performance and report to PSC</li> <li>• Carry out administrative work of PSC</li> </ul>	<p>(2) The task of the LPIMO should be benefit to both public sector and to private sector such as facilitating private investor in the process of preparation of the feasibility study and should act as the mediation centre for the related party to place their claims on the dispute related to the PPP project.</p>

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<ul style="list-style-type: none"> <li>• Providing administrative support in negotiations and concluding concession agreement</li> <li>• Providing consulting services for domestic and international investors</li> <li>• Sponsoring promotional activities</li> <li>• Operating educational programs for civil workers, financial institutions, related personnel from private sectors, etc.</li> <li>• Conducting studies to improve various policies related to private investments.</li> </ul>			
4. Government Support	<p>There are many forms of government support specified under PPI law</p> <ol style="list-style-type: none"> <li>1. The establishment of Infrastructure Credit Guarantee Fund, (Article 30) to guarantee the credit of the concessionaire who intends to obtain a loan from a financial institution for a private investment project.</li> <li>2. The grant of subsidy or</li> </ol>	<p>There are some forms of government support specifies under PFI law but some are prescribed in the guideline.</p> <ol style="list-style-type: none"> <li>1. Interest Free loan from the government finance Institution</li> <li>2. Necessary tax measures</li> </ol>	<p>There is no provision in the draft law which specifies the government support to the private investor.</p>	<p>(1) There should be a general provision in the draft law to authorize the government to issue the appropriate form of support to the private investor when needed.</p> <p>(2) The list of appropriate government support can be issued as a blanket through the Ministerial regulation or can be issued in the concession on case by case basis.</p>

<b>Subject</b>	<b>Korean Law</b>	<b>Japan Law</b>	<b>Draft of Thai PPP</b>	<b>Comment</b>
	<p>long term loan by the state or local government to concessionaire</p> <p>3. The establishment of the Infrastructure Credit Guarantee Fund</p> <p>4. The Equity participation up to 50% of the total investment amount</p> <p>5. The purchase of the project by the state or local government in case of inevitable circumstance</p> <p>6. A discount or an exemption of certain charges</p> <p>7. Reduction or exemption of the taxes</p> <p>8. Implementation of Supplementary projects (jointly with private investor)</p>			
<p>5. Solicited/Unsolicited</p> <p>5.1 Solicited Investment Project (Article 8-2)</p>	<p>1) the project which the competent authority intends to implement by</p>	<p>There is no framework on Solicited Project.</p>	<p>There is no specific definition of Solicited Project.</p>	

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>means of private investment which meets the following requirement</p> <ul style="list-style-type: none"> <li>- The project shall be a mid to long term plan for infrastructure and national investment priorities.</li> <li>- The project shall have such profitability as to stimulate private participation</li> </ul> <p>2) The scale of this infrastructure project shall be determined in Presidential Royal Decree and the competent authority shall analyze its feasibility study and shall be submit to the Committee for their deliberation prior to designate it as solicited projects</p> <p>3) Once it is designated as solicited project the competent shall publish the fact of such designation in the Official Gazette.</p>		<p>However, there is a list of investment project provided by the PSC.</p>	

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
<p>5.2 Unsolicited Project</p> <p>Unsolicited Proposal (Article 9)</p> <p>Unsolicited Procedures</p>	<p>(Article 9) The law states that the unsolicited project is the private investment project proposed by the private sector <i>which is not included in the solicited project list</i></p> <p>which the procedural detail of unsolicited project shall be determined in Presidential decree</p> <p>- A Project proposal shall contain the information such as total cost, finance procurement plan, determination of periods for free use, O&amp;M, and the income and expenditure plan.</p> <p>- Once the proposal is submitted, the concerned authority shall send to PICKO to review the plan and PICKO shall give their opinion to concerned authority and Ministry of Planning and Budget</p> <p>- after taking PICKO's opinion in to consideration, if the authority decide to</p>	<p>There is no framework on unsolicited project.</p>	<p>(Article 5) The unsolicited project is defined as the project which is initiated and offered to operate by person whom is not the project agency and whom intends to co-operate or invest in the list of investment as prescribed by the Policy and Supervision Committee.</p> <p>(Article 19) The PSC shall determine the type of business or the project which is permitted for the private initiative including the term and condition on the proposal, and related procedures for the submission of unsolicited project by the private investor.</p>	<p>(1) The procedures of consideration and submission of Unsolicited Project as well as the assessment and the implementation of the Unsolicited Project shall be carefully prescribed in the Ministerial Regulation.</p> <p>(2) The main characteristic of the Unsolicited Project which is allowed the private sector to initiate should involve high technology or skill and high investment cost and the outcome of the project has to increase the public benefit significantly.</p>

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>implement the plan, it shall announce the detail of proposal in the Official Gazette and newspapers so that the third party shall have a chance to propose the project's proposal</p> <ul style="list-style-type: none"> <li>- If the third party submits the proposal, the authority shall review and assess it alongside the initial proposal but preferential treatment may be given to the initial one. If there is no other proposal within the allotted period, the initial proposal shall be designated as the potential concessionaire.</li> </ul>			
6. Termination of the Project	<p>(Article 46-47) Disposition for Public Interest</p> <p>1. The competent authority shall have a right to dispose the project against the party who has obtained approval in the following</p>	<p>There is a government guideline which specifies on the allocation of liability between public and private sector in the event of project failure.</p>	<p>There is no provision in the draft of Thai PPP law specified the causes for the early termination of the concession/or project agreement and there is no provision authorizing the relevant Committees or</p>	<p>(1) To protect the public interest or national purpose, there should be a section in the draft of Thai PPP law to authorize the Thai government or the concerned authority to announce the early</p>

Subject	Korean Law	Japan Law	Draft of Thai PPP	Comment
	<p>cases.</p> <ul style="list-style-type: none"> <li>- For public interest such as efficient operation of the infrastructure, or change of circumstance</li> <li>- For efficient implementation of the construction of infrastructure</li> <li>- Because of Force Majeure such as war, natural disaster.</li> </ul> <p>2. Any concessionaire who suffers loss due to the disposition shall be entitled to the compensation.</p> <p>(Article 49) Measures concerning cancellation of Concessionaire Designation</p> <p>Upon the cancellation of the concessionaire, the competent authority may designate a new concessionaire (which is selected through the procedures stated by law) to continue the implementation of the project.</p>		<p>relevant authorities to exercise its right to early terminate the concession in the special circumstance</p>	<p>termination.</p> <p>However, the early termination clause and the consequence including the ownership of the asset, the allocation of risk can be specified in the concession.</p> <p>(2) To ensure the fairness to the private sector who suffers from the loss due to such early termination, the private sector shall be entitled to the compensation.</p> <p>(3) The draft law should establish the clear procedure for the case of early termination, i.e. the committee to be authorized to terminate the project, the dispute resolution body and the dispute resolution mechanism</p>

**APPENDIX 2**  
**TECHNICAL NOTE ON THE MINISTERIAL REGULATIONS**

**I. Regulations on Value for Money assessment**

**A. Background**

**1. The Value for Money (VfM) assessment and its purpose**

1. There are usually a number of options in project implementation through different combinations of the following base options: infrastructure delivery by a public sector entity, by a private sector organization, or part-sharing by both; and operation and maintenance by the either the public or the private sector. The choice made in the public interest is for the option offering the least (net) cost to the government and ultimately the public.

2. It is important to remember that decisions in implementing a project with a long asset life are necessarily made on cost and revenue streams stretching far into the future. This introduces uncertainty into the consequences of these decisions, in particular the risk that cost and revenue, and hence the return on the investment, will outturn differently to what was anticipated.

3. Experience has shown that in project implementation, the variance between the actual and forecast can be unfavorable to a substantial degree. Consequently, risk has to be taken into account in assessing different options in implementing a project.

4. Participation in a project usually implies being exposed to some element(s) of project risk with a calculable money amount, since participation means taking responsibility for some element of a project (i.e. for a share of the infrastructure delivery) and thus accepting the uncertain financial consequences of that responsibility. Risk is borne in the expectation of compensation, and the greater the risk the greater the expected compensation.

5. Different abilities to manage a risk (that means to mitigate, whether directly through better project management or indirectly through transferring it to eg an insurer, what can be mitigated, and to bear the residual, since risk can never be reduced to zero) imply that the risk allocation structures embedded in different options for implementing a project vary in terms of net project cost after accounting for risk. In this way different implementation options carry different risk allocation structures of varying efficiency.

6. A VfM assessment is carried out for a set of (ie at least two) project implementation options. The objective is to estimate the risk-accounted net cost of each option and, ranking the options accordingly, to find the candidate with the least cost.

7. The basic cost and revenue estimation for a project follows well established quantitative methods that are conceptually straightforward. The further work in reaching an understanding of the risk in a particular project implementation plan is more complicated. A quantitative

estimate of risk depends ultimately on reliable statistical analysis of outcomes in comparison with forecasts at time of decision for a population of historical projects.

8. Such statistical analyses do exist for a variety of project types. For example, in transport, a study has been made of the risk of project cost overruns and revenue shortfalls for a global sample of public sector implemented projects. Another study has been made of the UK experience in public sector implemented projects across a broad spectrum of public works, including transport infrastructure, buildings, and information technology systems. Quantitative studies exist of the operating cost of public and private sector managed bus service in different countries.

## **2. Importance of a VfM assessment to the decision whether or not to allow a public project to be implemented as a PPP**

9. Because government borrowing generally carries the country's lowest interest rate, a project that is financed by the public sector should bear a lower debt cost than one financed by the private sector. Add to this the need in private financing for equity capital as well as debt and the financing cost for a private sector implementation can be expected to be substantially higher than a public sector.

10. The picture is not so clear with a comparison in the total cost, with risk taken into account. For example, in areas where private sector organizations have a record of success in project management and operation and consequently the private sector implementation carries a lower risk (and in reality probably lower cost in a number of areas of project procurement because of the private sector's keen response to commercial opportunities and financial incentives), a VfM assessment can show that a PPP implementation incurs the least cost to government.

## **3. Need for a VfM assessment to be carried out by a sponsoring agency as part of the preparation of the project outline business case (OBC) to be submitted for review under the amended PPSU Act**

11. The sponsoring agency as project implementer is at the starting point of the government's process of arriving at an informed investment decision. Given the importance of the VfM assessment to choice of project implementation options the sponsoring agency should carry out the VfM assessment, which should be submitted to the OBC review provided under the amended Act. When approved to proceed to the tender and later to the contract stage, the sponsoring agency will need to update the VfM assessment with project information of a higher degree of accuracy becoming available.

**4. Need for standardization of the concepts and approach in carrying out a VfM assessment, and for adjustments to be made from time to time to the standardization in order to better achieve the key purpose and objectives of the VfM assessment**

12. There is a need for ongoing oversight, monitoring and regulating activities to ensure that the VfM assessment is being carried out using methods, data and due care in execution that continually serves the intended purpose of a VfM assessment. This may be most efficiently achieved by a dedicated specialist unit with responsibility to look into VfM assessment data quality and to update methods, and to study ways to upgrade the sponsoring agency's assessment capability and of the VfM assessment review capability. The output should be appropriate standardization of concepts and methodology, updated necessary, to be generally applied, and ways and means to improve VfM assessment capability at the sponsoring agency level.

13. This responsibility for research to uncover needs for capability improvement should extend to the body of professional advisors to whom technical aspects of the assessment are outsourced. The aim is to ensure, through monitoring of the work quality and the incentive structures and through necessary regulation, that the outsource advisors bring qualified resources to their assignments.

**B. Purpose of the VfM regulations**

14. To create the responsibilities for conducting and reviewing a VfM assessment of a public project outline business case being submitted under the amended PPSU Act

15. To create the responsibility for preparing and issuing a Guidance to the VfM Assessment for the use of sponsoring agencies and others involved in the OBC review process, for monitoring the practice of VfM assessment and drafting and issuing the required updated versions of the Guidance. The responsibility may be combined in one agency with other responsibilities created to achieve the objectives of the amended PPSU Act. That agency should be located within a ministry to ensure its appropriate, dedicated and continued resourcing.

16. To provide that parts of the Guidance as recommended by the responsible agency be made mandatory for those concerned with the VfM assessment of a public project (and to assign authority for making the mandatory requirement)

The objectives B.1-B.3 are self-evident given the explanation in A.1-A.4

## II. Regulation on Consultants' Qualifications

### A. Background

#### 1. Use of consulting services by government agencies: the current practice and experience

17. Consultants are used to provide technical resources in all major divisions of government activities to do with infrastructure—from policy and strategy formulation, regulation, investment program development and oversight, and program delivery. This outsourcing of technical work means that consultants are relied on to provide important support to government in the various areas of government activity relating to infrastructure.

18. There does not appear to be any review carried out in recent years on government agencies' experience and practice in the use and procurement of consulting services, although anecdotal evidence suggests that a review could be highly beneficial. It further suggests that such a review, which could be based on sampling, might be expected to support rather than refute the following description, drawn from impressions, of the current status.

- Project implementing agencies are substantial purchasers of consulting services relating to infrastructure.
- When classified according to the leading firm's professional qualifications, engineering consultants are found to receive a predominant share of public spending on consulting services.
- In program or single project development activities, particularly the project planning and the procurement of infrastructure construction and service operation, engineering consultants again predominate.
- Study and detailed design contracts make up a high percentage of annual public spending on consulting services, followed by project management or construction supervision, followed by master planning or feasibility study contracts.
- The focus of the consulting contracts is predominantly on finding the physical solutions to an infrastructure project. Less importance is placed on addressing the financing and organizational issues. The latter are in more than a few cases given perfunctory treatment, reflecting scant and in some cases evidently unqualified resources.
- In particular, there is serious weakness in the evaluation of PPP implementation options for infrastructure projects, with lack of resourcing of the required technical skills.
- Consulting contracts with a principal focus on non-physical issues (e.g. financing, commercial, organizational) in delivery of infrastructure are in an obvious minority.
- Practice is found whereby consulting services to prepare the outline business case to be submitted for approval (i.e. for a feasibility study) is being bundled into a single assignment with services needed at a post-approval stage (e.g. for detailed design or project management or construction supervision), the latter services being triggered

by the business case approval. This practice exposes the consultant to a potential conflict of interest because the prospects of the substantially larger consulting fees for the later work can create a strong incentive in favor seeing the project implemented. The practice needs to be regulated.

19. If supported by the review, this description of the current practice and experience would point to a need to improve the way the agencies procure consulting services, particularly in the design of the consultants' terms of reference and their incentive structure. The agencies would probably also need to improve their proficiency at making use of as well as purchasing consulting services, and besides capability building, ongoing guidance and a measure of regulation would be necessary.

#### **B. Purpose of the regulations on the use of consulting services**

20. To create the responsibility for monitoring and periodic review of, and for studying the ways and means to improve, the use and procurement of consultancy services by government agencies in relation to infrastructure in general and other public projects governed by the amended PPU act. This responsibility shall include drafting regulations on technical and other qualifications of consultants.

21. To create the responsibility for preparing, issuing and updating guidance material on the use of consultancy services for agencies with activities relating to infrastructure and public projects governed by the amended act. The responsibility may be combined in one agency with other responsibilities created to achieve the objectives of the amended PPSU Act. That agency should be located within a ministry to ensure its appropriate, dedicated and continued resourcing.

22. To provide that parts of the guidance as recommended by the responsible agency be made mandatory for all concerned (and to assign authority for making the mandatory requirement).

## APPENDIX 3 SUGGESTION ON KEY ISSUES OF MINISTERIAL REGULATIONS

### I. The Draft Ministerial Regulation on determining the type of Participation

1. The content of the draft of Ministerial Regulation on determining the type of Participation is based upon the precedent cases of PPP project in Thailand as well as the Council of State Ruling issuing in response to the project agency' inquiries regarding the PPP from time to time.
2. In pursuant to the Ministerial Regulation, the word "Participation" shall include but not limited to the following operations;
  - Built Transfer and Operate (BTO)
  - Built Operate and Transfer (BOT)
  - Built Own and Operate (BOO)
  - Built Own Operate and Transfer (BOOT)
  - Lease Contract
  - Joint Venture
3. The "Government" means Government Agency, Ministry or Sub Ministry, Department, State Enterprise, State Agency, local administration.
4. The Draft of the Ministerial Regulation on determining the type of Participation is proposed below.

#### ร่างกฎกระทรวง

#### ว่าด้วยการกำหนดรูปแบบวิธีการร่วมทุนกับเอกชนที่อยู่ภายใต้บังคับของ พ.ร.บ.ว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535

อาศัยอำนาจตามมาตรา           แห่งพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 คำว่า "ร่วมงานหรือดำเนินการ" ที่ทำให้โครงการต้องปฏิบัติตามพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 ให้หมายรวมถึงโครงการที่มีลักษณะต่อไปนี้

#### สาระสำคัญ

1. ลักษณะการ "ร่วมงานหรือดำเนินการ"  
การร่วมงานหรือดำเนินการระหว่างรัฐ กับเอกชน ให้หมายรวมถึง แต่ไม่จำกัดเพียง โครงการที่มีลักษณะดังนี้

- (1) การดำเนินงานแบบ BTO (Built Transfer and Operate) ซึ่งเอกชนเป็นผู้ระดมทุน ออกแบบ ก่อสร้างโครงการ โดยโอนกรรมสิทธิ์และความเป็นเจ้าของในทรัพย์สินต่างๆในโครงการให้กับรัฐเมื่อการก่อสร้างแล้วเสร็จ โดยที่เอกชนจะได้รับสิทธิหรือสัมปทานในการดำเนินงาน           บริหารจัดการโครงการของรัฐดังกล่าวต่อไปตามระยะเวลาที่กำหนด

- (2) การดำเนินงานแบบ BOT (Build Operate and Transfer) ซึ่งเอกชนเป็นผู้ระดมทุน ออกแบบ ก่อสร้าง โครงการ โดยได้รับสิทธิ หรือได้รับสัมปทานจากรัฐในการดำเนินโครงการในช่วงระยะเวลาหนึ่ง เมื่อสิ้นระยะเวลา ที่ตกลงไว้ กรรมสิทธิ์และความเป็นเจ้าของในโครงการดังกล่าวก็จะตกเป็นของรัฐ
- (3) การดำเนินงานแบบ BOO (Build Own and Operate) คือเอกชนเป็นผู้ลงทุน ออกแบบ ก่อสร้าง และเป็น เจ้าของโครงการนั้น รวมถึงเป็นผู้ดำเนินงานในโครงการซึ่งเป็นกิจการของรัฐ แต่เพียงผู้เดียว โดยที่รัฐ ไม่มีส่วน ร่วมรับผิดชอบในการดำเนินกิจการ หรือในผลกำไรขาดทุนของเอกชน และเมื่อเอกชนดำเนินการ หรือให้บริการ แล้ว รัฐจะรับซื้อผลผลิต หรือบริการนั้นจากเอกชนภายในระยะเวลาที่กำหนด หลังจากนั้นเอกชนก็ยังได้กรรมสิทธิ์ ในโครงการ
- (4) การดำเนินงานแบบ BOOT (Build Own Operate and Transfer) คือเอกชนลงทุน ออกแบบ ก่อสร้าง และเป็นเจ้าของโครงการ รวมถึงเป็นผู้ดำเนินงานในโครงการซึ่งเป็นกิจการของรัฐ/ รัฐวิสาหกิจแต่เพียงผู้เดียว โดยที่รัฐ รัฐวิสาหกิจ ไม่มีส่วนร่วมรับผิดชอบในการดำเนินกิจการ หรือในผลกำไรขาดทุนของเอกชน และเมื่อ เอกชนดำเนินการ หรือให้บริการแล้ว รัฐจะรับซื้อผลผลิต หรือบริการนั้นจากเอกชนภายในระยะเวลาที่กำหนด หลังจากนั้นเอกชน จะโอนกรรมสิทธิ์ในโครงการคืนให้แก่รัฐ
- (5) การทำสัญญาให้เอกชนเช่าดำเนินการ (Lease Contract) คือ การให้เอกชนเช่าสิทธิการใช้ เพื่อดำเนินการ โครงการที่เป็นกิจการของรัฐ โดยเอกชนเป็นผู้ลงทุน เป็นผู้ให้บริการ เป็นผู้รับภาระค่าใช้จ่าย และรับผิดชอบใน ผลกำไรขาดทุน โดยที่เอกชนต้องจ่ายค่าตอบแทนในการใช้ทรัพย์สิน หรือสิ่งอำนวยความสะดวกที่รัฐจัดให้ตาม สัญญา โดยรัฐยังเป็นผู้กำหนดอัตราค่าบริการ
- (6) การร่วมลงทุนกับภาคเอกชน (Joint Venture) โดยรัฐร่วมกับเอกชนจัดตั้งบริษัทขึ้นมาดำเนินโครงการ โดยที่ สัดส่วนการถือหุ้นของภาคเอกชนในบริษัทดังกล่าวเกินกว่ากึ่งหนึ่ง

## 2. คำจำกัดความ

“รัฐ” หมายถึง ส่วนราชการ กระทรวง ทบวง กรม รัฐวิสาหกิจ หน่วยงานอื่นของรัฐ หรือราชการส่วนท้องถิ่น

## II. The Draft Ministerial Regulation on the Assessment of the Value of the Project

5. The content of the draft of Ministerial Regulation on Assessment of the value of the Project is based upon the Council of State Ruling issuing in response to the project agency' inquiries regarding the PPP from time to time.

6. In pursuant to the draft of Ministerial Regulation, the assessment is divided into (i) the assessment of the value of the whole project and (ii) the assessment of the land and building.

7. (i) The value of the whole project shall be assessed as follows;

- shall be calculated from either the investment made by public sector or the investment made by private sector.
- the value of the project shall be calculated for the implementation throughout the project not the implementation for certain period of time.
- In the case of one project which shall be undertaken by many private investors, the value of the project is the accumulation of each private investment

8. (ii) The value of Land and Building shall be based upon the proportion of the land or building used in the project and the period of time for such usage.

9. The draft of Ministerial Regulation on Assessment of the value of the Project is proposed below:

### ร่างกฎกระทรวง

ว่าด้วยการประเมินมูลค่าโครงการที่จะให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐที่ต้องปฏิบัติตามพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการ

อาศัยอำนาจตามมาตรา 5/1 แห่งพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 ซึ่งกำหนดให้โครงการซึ่งมีมูลค่าตั้งแต่ สามพันล้านบาทขึ้นไปต้องอยู่ภายใต้บังคับของ แห่งพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 นั้น

การประเมินมูลค่าของโครงการ ให้เป็นไปตามที่กำหนดไว้ในประกาศนี้

### สาระสำคัญ

1) การคำนวณมูลค่าของโครงการ

1.1) ต้องพิจารณางบเงิน หรือมูลค่าการลงทุนทั้งในส่วนของภาครัฐ และในส่วนของเอกชนที่เข้ามาร่วมลงทุนดำเนินการในกิจการของรัฐ

ก) การลงทุนของภาครัฐ เช่น ค่าเช่าที่ดินที่ราชพัสดุ ค่าก่อสร้างอาคาร หรือสิ่งก่อสร้างอื่น มูลค่าทรัพย์สินของรัฐที่ใช้ในโครงการ หรือที่ให้เอกชนใช้ในการดำเนินโครงการ โดยคิดตามสัดส่วนที่ใช้เฉพาะในโครงการหนึ่งๆ เช่น ค่าก่อสร้างสถานีรถไฟ รางรถไฟ สัญญาณไฟ เฉพาะเส้นทางที่ให้เอกชนดำเนินการ

- ข) การลงทุนของภาคเอกชน เช่น ค่าพัฒนาที่ดินที่ราชพัสดุ ค่าก่อสร้าง ค่าตกแต่งสถานที่ ค่าเครื่องจักร อุปกรณ์ เครื่องใช้ต่างๆในโครงการ เงินลงทุนในระบบที่เกี่ยวข้องกับการดำเนินการที่ได้รับอนุญาต เงินลงทุนในการซื้อสินค้า
- 1.2) มูลค่าการลงทุนต้องเป็นมูลค่าการลงทุนที่แท้จริงทั้งหมดตลอดทั้งโครงการ มิใช่คำนวณมูลค่าการลงทุน ณ ช่วงระยะเวลาใดเวลาหนึ่ง และต้องเป็นการลงทุนที่พอเพียงที่จะทำให้โครงการบรรลุผล
- ก) หากมูลค่าการลงทุนที่แท้จริงที่เอกชนเสนอ (ในการประมูล) มีมูลค่ามากกว่าที่รัฐประมาณการ และเอกชนที่ยื่นประมูลได้รับคัดเลือกให้ดำเนินโครงการ ให้ถือว่าโครงการมีมูลค่าตามที่เอกชนเสนอ
- ข) หากเป็นกรณีที่เอกชนลงทุนซื้อสินค้าคลังเพื่อจำหน่ายตามโครงการ ให้คิดเป็นเงินลงทุน ณ วันเริ่มเปิดดำเนินการของโครงการ ซึ่งจะต้องเพียงพอ ที่จะทำให้โครงการทั้งโครงการบรรลุผล
- 1.3) ในกรณีที่ เป็นโครงการเดี่ยว แต่เปิดให้เอกชนหลายรายเข้าร่วมทุน ให้พิจารณามูลค่าการลงทุนรวมทั้งโครงการ มิใช่พิจารณาตามสัญญาของเอกชนแต่ละราย
- หากมีการอนุมัติโครงการหนึ่งโครงการใด ซึ่งเป็นโครงการที่มีหน่วยงานเจ้าของโครงการรับผิดชอบเพียงรายเดียว แต่ในการดำเนินการโครงการมีการแยกย่อยให้เอกชนหลายรายจัดทำตามส่วน โดยมีการแยกทำสัญญากับเอกชนแต่ละราย ให้คิดคำนวณมูลค่าการลงทุนเป็นรายโครงการ มิใช่คิดมูลค่าตามสัญญาที่ทำกับเอกชนแต่ละราย
- 2) การคำนวณมูลค่าของที่ดินและอาคาร
- 2.1) การคำนวณมูลค่าของที่ดินและอาคาร ให้คำนึงถึงสัดส่วนพื้นที่ที่ใช้ในโครงการ และระยะเวลาการดำเนินโครงการตามที่ระบุในสัญญา
- 2.2) ในการคำนวณมูลค่าของอาคาร ให้คิดเฉพาะส่วนที่เอกชนมีสิทธิเข้าไปดำเนินการ โดยไม่นำอาคารเสื่อมราคาของอาคารมาคำนวณด้วย

### III. The Draft Ministerial Regulation on the Qualification of the Consultant (Project Analysis)

10. The content of the draft of Ministerial Regulation on the Qualification of the Consultant is based upon the existing MOF Ministerial Regulation with the addition.
11. The Qualification of the Consultant shall be as follows;
  - (i) Form/Status
    - The Consultant shall be individual, group of person, or company but has to be Thai national
    - The exemption on the nationality of Consultant may be permitted in the case of lacking of expert in some field of practice.
  12. (ii) Capability and Experience
    - The Consultant shall have an experience in the related field no less than 3 year and shall have knowledge on Statistic or Finance which shall be applied to analyze of the project.
  13. (iii) Conflict of Interest
    - The Consultant shall have no conflict of interest.
  14. (iv) Deliverable
    - The Consultant shall submit the report which contains the information as required by NESDB.
  15. (v) Responsibility
    - The Consultant shall have an independent opinion and shall be responsible for his/her report.
16. The draft of Ministerial Regulation on the Qualification of the Consultant is proposed below:

**ร่างกฎกระทรวง**  
**ว่าด้วย การกำหนดคุณสมบัติของที่ปรึกษาโครงการ**  
**ที่จะให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ**

อาศัยอำนาจตามมาตรา 7 แห่งพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 ให้ที่ปรึกษาที่จะให้คำปรึกษาแก่หน่วยงานเจ้าของโครงการ ในการจัดทำรายงานความเป็นไปได้ของโครงการและการวิเคราะห์ความคุ้มค่าของโครงการ ตลอดจนรายงานที่เกี่ยวข้องอื่นๆ ต้องมีคุณสมบัติตามที่กำหนด

#### สาระสำคัญ

- 1) รูปแบบ

(1.1) ที่ปรึกษาจะเป็นบุคคล คณะบุคคล หรือนิติบุคคลก็ได้ ในกรณีที่ เป็นบุคคลต้องมีสัญชาติไทย ในกรณีที่ เป็นคณะบุคคลต้องมีที่ปรึกษาคนไทยเข้าร่วมด้วยไม่น้อยกว่าร้อยละ 50 ของจำนวนคน/เดือน ในกรณีที่ เป็นนิติบุคคล ต้องจดทะเบียนในประเทศไทย และมีสัดส่วนหุ้นของคนต่างด้าวไม่เกินกึ่งหนึ่ง

(1.2) ในกรณีที่ มีเหตุผลอันสมควร เช่น การขาดแคลนที่ปรึกษาที่มีความชำนาญในโครงการบางโครงการ หน่วยงานเจ้าของโครงการอาจขออนุญาตผ่อนผันเรื่องสัญชาติของที่ปรึกษาต่อกระทรวงการคลังได้

## 2) ความสามารถ และประสบการณ์

(2.1) ที่ปรึกษาต้องมีความรู้ ความสามารถ ในโครงการที่ตนให้คำปรึกษา โดยต้องมีประสบการณ์ และผลงาน ในเรื่องที่ให้คำปรึกษามาแล้วไม่ต่ำกว่า 3 ปี นอกจากนี้ยังต้องมีความรู้ในด้านสถิติ หรือการเงินที่เกี่ยวข้องเพื่อใช้ในการวิเคราะห์โครงการ

(2.2) ในกรณีที่ มีเหตุผลอันสมควร หน่วยงานเจ้าของโครงการอาจขอผ่อนผันต่อกระทรวงการคลัง ให้ลด ระยะเวลาของประสบการณ์ดังกล่าวได้

## 3) การมีส่วนได้เสีย

(3.1) ที่ปรึกษาต้องไม่มีส่วนเกี่ยวข้องกับเอกชนซึ่งยื่นข้อเสนอเข้าร่วมงานหรือดำเนินการทั้งทางตรง และ ทางอ้อม เช่น ไม่เป็นกรรมการ หรือที่ปรึกษาหรือไม่มีการลงทุนในบริษัทเอกชนที่มีการยื่นข้อเสนอเข้าร่วมงานหรือ ดำเนินการในโครงการของรัฐ

(3.2) ที่ปรึกษาจะต้องมีประวัติที่ดี ไม่เคยถูกร้องเรียนในผลงานการศึกษาวิเคราะห์วิจัยที่ผ่านมา

## 4) ผลงานของที่ปรึกษา

ปรึกษาต้องสามารถเสนอผลการศึกษาและการวิเคราะห์โครงการตามรายละเอียดที่สำนักงานคณะกรรมการพัฒนา เศรษฐกิจและสังคมแห่งชาติกำหนด ในรูปของรายงานที่เป็นเอกเทศ

## 5) ความรับผิดชอบในผลงาน

ที่ปรึกษาต้องมีความรับผิดชอบในการวิเคราะห์โครงการของเอกชน ว่าเป็นไปโดยอิสระ และถูกต้องตามหลัก วิชาการที่เกี่ยวข้อง พร้อมทั้งยินดีให้ความร่วมมือแก่หน่วยงานเจ้าของโครงการและรัฐในการให้คำอธิบายเพิ่มเติม สำหรับรายงานวิเคราะห์โครงการที่น่าเสนอนั้น

#### **IV. The Draft Ministerial Regulation on the Special Procedures for the Project which its value is less than the amount set by PPSU Act 1992**

17. In pursuant to the draft of Ministerial Regulation, the Project which its value is less than the amount set by PPSU Act 1992 shall not be governed by the PPSU ACT 1992, however, the said project shall be operated under the Special Procedures as set forth in the Ministerial Regulation on the Special Procedures for the Project which its value is less than the amount set by PPSU Act 1992.

18. The principle of this regulation is to request the Project agency who will handle the project which its value is less than the amount set by PPSU Act 1992 to do the self assessment of its project by preparing the Feasibility Study with the detail as set forth by MOF.

19. If the project agency views that its project is worth for investment, the project agency shall submit the said project to the responsible ministry for the approval.

20. Once the project is approved by the responsible ministry, the project agency shall inform the MOF of such approval and shall process the project under its own procurement rules and regulation.

21. The draft of Ministerial Regulation on the Special Procedures for the Project which its value is less than the amount set by PPSU Act 1992 is proposed below:

#### **ร่างกฎกระทรวง**

#### **ว่าด้วย หลักเกณฑ์ และวิธีการในการดำเนินการสำหรับโครงการที่มีมูลค่าต่ำกว่าเกณฑ์**

อาศัยอำนาจตามมาตรา 11 แห่งพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535

ให้โครงการที่มีมูลค่าต่ำกว่าเกณฑ์ที่กำหนดในพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 ต้องปฏิบัติตามขั้นตอนวิธีการดังต่อไปนี้

#### **สาระสำคัญ**

##### **1) คำนิยาม**

“โครงการที่มีมูลค่าต่ำกว่าเกณฑ์” หมายถึง โครงการของรัฐ หรือโครงการที่ลงทุนในกิจการของรัฐโดยมีการร่วมงานหรือดำเนินการของเอกชนที่มีมูลค่าต่ำกว่าเกณฑ์ที่กำหนดใน มาตรา 5/1

##### **2) หลักการทั่วไป**

2.1 สำหรับโครงการที่มีมูลค่าต่ำกว่าเกณฑ์ซึ่งไม่ต้องปฏิบัติตามเงื่อนไข และวิธีการที่กำหนดในพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535 นั้น ให้หน่วยงานเจ้าของโครงการ มีอำนาจพิจารณาความเหมาะสม และความคุ้มค่าของโครงการได้เอง (self assessment) โดยมีต้องว่าจ้างที่ปรึกษา และมีต้องยื่นให้ สศช. หรือ กระทรวงการคลังเป็นผู้พิจารณาเห็นชอบ

2.2 หลักเกณฑ์ในการพิจารณาความคุ้มค่าและความเหมาะสมของโครงการ

- (ก) ให้นำหน่วยงานเจ้าของโครงการทำผลการศึกษาและวิเคราะห์โครงการ (Feasibility) ด้านเศรษฐกิจและสังคมตามประเด็นหัวข้อที่สำนักงานคณะกรรมการพัฒนาการเศรษฐกิจและสังคมแห่งชาติกำหนดตาม มาตรา 6 ของพระราชบัญญัติว่าด้วยการให้เอกชนเข้าร่วมงานหรือดำเนินการในกิจการของรัฐ พ.ศ. 2535
- (ข) ให้นำหน่วยงานเจ้าของโครงการ วิเคราะห์ความคุ้มค่าของโครงการ ตามประเด็นหัวข้อที่กระทรวงการคลังกำหนด

### 3) แนวทางปฏิบัติ

- 3.1 ให้นำหน่วยงานเจ้าของโครงการ ประเมินความคุ้มค่าของโครงการได้เอง หากเห็นว่าโครงการมีความเหมาะสมและคุ้มค่าให้เสนอรัฐมนตรีกระทรวงเจ้าสังกัดพิจารณาเพื่อให้ความเห็นชอบ
- 3.2 เมื่อได้รับความเห็นชอบแล้วให้นำหน่วยงานเจ้าของโครงการ แจ้งให้ [กระทรวงการคลัง] ทราบ เพื่อเป็นข้อมูลและให้นำหน่วยงานเจ้าของโครงการ ดำเนินการจัดทำโครงการตามขั้นตอนจัดซื้อจัดจ้างต่อไป
- 3.3 การจัดซื้อจัดจ้างให้เป็นไปตามระเบียบพัสดุของราชการ หรือของหน่วยงานเจ้าของโครงการเอง
- 3.4 เมื่อมีการจัดซื้อจัดจ้างเรียบร้อยแล้ว ให้แจ้ง [กระทรวงการคลัง]. ทราบอีกครั้ง เพื่อรวบรวมข้อมูล และเพื่อประโยชน์ในการติดตามผล

**APPENDIX 4  
CONCESSION MODEL  
AND CONCERNED ISSUES WITH MODIFIED NET COST**

1. In operating of PPP project throughout the world, not only the legislative framework but also the concession or project agreement is important in facilitating the process of PPP implementation and ensuring the transparency and fairness of the project

**A. Concession Model**

2. There are several concession models used by the governments around the world, however, all are variants of two basic forms, namely Net Cost and Gross Cost concessions. There essential differences are illustrated in Table 3.1.

Table 1: Summary of Net Cost and Gross Cost Concession Models

	Net Cost	Gross Cost
Infrastructure	Government provides civil infrastructure. Concessionaire provided trains and finance also.	infrastructure and some other related assets, and possibly
Risk Sharing	Concessionaire assumes all patronage risk, and shares extra profits (if any) with the government	Risk is shared between the government and concessionaire. Optimum sharing of risk will minimize the concession cost
Revenue	Concessionaire keeps revenue	Fare revenue is given to the government
Services	Concessionaire determines services to be provided on the basis of profitability	Government sets service standards and the concessionaire determines services based on these standards
Payments	Concessionaire meets costs from its own revenue	Government pays the concessionaire for services provided according to rates set on the basis of competitive tendering and quantity/quality of service provided
Government Role	Government invites tenders & establishes a concession; has only a small role thereafter; difficult to vary contract conditions.	Government invites tenders and establishes a concession; has a continuing major role in managing the concession agreement; can vary conditions when needed.

*Source: Finance Consultant: excerpted from TA 4904-THA July 2007: Integrating Mass Rapid Transit in Bangkok Phase II: Final Report*

3. For the Thai public transportation project, after taking into consideration the relevant aspects, the conclusion is that a gross cost form of concession is appropriate and it is suitable

for the future needs of Mass Rapid Transit in Bangkok. In this regard, a concession template has been prepared<sup>1</sup>, this template having been developed in a form that could be adapted to either a net cost or gross cost form of concession depending on the Thai government's further determination

## **B. Concerned Issues with Modified Net Cost and Gross Cost**

4. The recent issue which has influenced on the government's decision from the gross cost model to net cost model is that it is a likely for the private operator in Transportation project to take the full risks, particularly the ridership. And the preparation of the new Prime Minister Regulation on Public Service Obligation (PSO Regulation) which allows the government to subsidize a state owned enterprise (SOE) which suffers losses resulting from implementing of the government's policy. This situation might cause the alternation from the gross cost concession to net cost concession with the open proposal for negative concession or which may be called "the modified net cost" model.

5. Under the modified net cost, the government might have to subsidize the loss to the private operator in the case that the ridership has not met the target set in the concession; however, after certain period, the ridership may be increased and have profit in the operation according to threshold set, the government would like to share this profit additionally by arranging the new percentage of revenue share. Thus, with this alternated model, in granting the concession, the bidder who takes most risk with the least subsidy will get the contract from the government.

6. After having considered the feature of different concession models and the PSO Regulation, as well as taken in to consideration of private sector's readiness in taken the full risk of ridership in transportation project, the same conclusion is reached that gross cost model is more appropriate for the Thai government with the following reasons;

- (i) Under the net cost model, government cedes control of the MRT lines and with it policy flexibility.
- (ii) In particular the critical need to manage transportation project like Mass Rapid Transit as an integrated system is lost under the modified net cost model.
- (iii) Under the PSO Regulation, the subsidy is only allowed to be paid by the government to an SOE, not (directly) by government to private operators as practiced in some countries i.e. Korea. It is quite difficult in drafting TOR for a modified net cost concession in a way that the public cannot see that the government is subsidizing the private sector.

7. If the government would like to grant the subsidy to the transportation project by applying its authorization in pursuant to the PSO regulation, it can still be done through the gross cost concession model. However, the said subsidy has to be granted indirectly to the private sector through the SOE.

8. As the Concession or the Project Agreement is signed between SOE (or the project agency) and the private sector, the agreement clearly sets out the risk sharing between SOE

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<sup>1</sup> See full Concession Template in Appendix A of Integrating Mass Rapid Transit in Bangkok Phase II: Final Report July 2007

and the private sector and the payment made by the Government. Under the gross cost basis, the revenue belongs to the government, which takes the demand or patronage risk, and government has a duty to pay the concessionaire for services provided according to rates set on the basis of competitive tendering and quantity or quality of service made available. In this regard, it can be prescribed in the concession that once the service is available, the private sector has to be paid for the availability regardless of the usage (number of passenger trips carried i.e. ridership). If the ridership is not as anticipated, the project agency (SOE) faces loss in its operation under government policy. And due to such loss, the PSO Regulation, then, shall be applied to SOE and the subsidy can be granted from the government to SOE to cover such loss.



# Technical Assistance Consultant's Report

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Project Number: TA 4904 (THA)  
October 2007

## PPP Management Framework Technical Paper

Prepared by Sudhisakdi Manibhandu  
Bangkok, Thailand

For Ministry of Finance  
Public Debt Management Office, Office of Transport and Traffic Policy and Planning

This consultant's report does not necessarily reflect the views of ADB or the Government concerned, and ADB and the Government cannot be held liable for its contents. (For project preparatory technical assistance: All the views expressed herein may not be incorporated into the proposed project's design.)

Asian Development Bank

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## I. INTRODUCTION

### A. Technical paper objectives and structure

1. As part of the Technical Assistance to the Government of Thailand TA 4904 (THA): Infrastructure Advisory Assistance – Phase II, Asian Development Bank has provided technical input towards the drafting of new legislation on the management of government activities in infrastructure and public services, particularly with regard to the use of public private partnership (PPP) methods to implement such programmes and projects. The work element responds to the government's request for assistance in the drafting of guidelines or mandates to government agencies on managing a PPP-delivered project through the project cycle, beginning with project preparation through to implementation and service delivery; and the structuring of the appropriate institutions and organizations. Specifically, the following tasks needed to be carried out: (a) to identify for inclusion in the new legislation the principles and guidelines for the supervision of PPP project implementation; (b) to research PPP legal and regulatory arrangements in international practice, studying the structures and contents of PPP laws to determine best practice models; and (c) to provide ad hoc technical advice on PPP issues to the new legislation drafting committee. This work is documented in two technical working papers. One, the first in this volume, addresses an appropriate legal and institutional framework for PPP in the Thai context. The present technical paper has for its main purpose identification of principles and guidelines for the public sector management of PPP-implemented infrastructure and public services.

2. This paper is organised into seven sections. In the balance of this Section I, the necessary conditions for an effective and efficient management of government activities in infrastructure and public services are described. Here, effective means being directed towards goals desirable to the community, which implies among other things that resources are allocated with the end object of achieving a desirable matrix of goals; while efficient means at least cost. Section II addresses an efficient and effective management framework for PPP, as a sub-section of the larger management framework for infrastructure however implemented. Sections III-VII identify the principles governing how activities in key areas are carried out in a PPP implementation of infrastructure and services so as to achieve effectiveness and efficiency goals.

### B. Management framework for public infrastructure and services

3. The functions performed by government in infrastructure and services<sup>1</sup> may be categorised as:

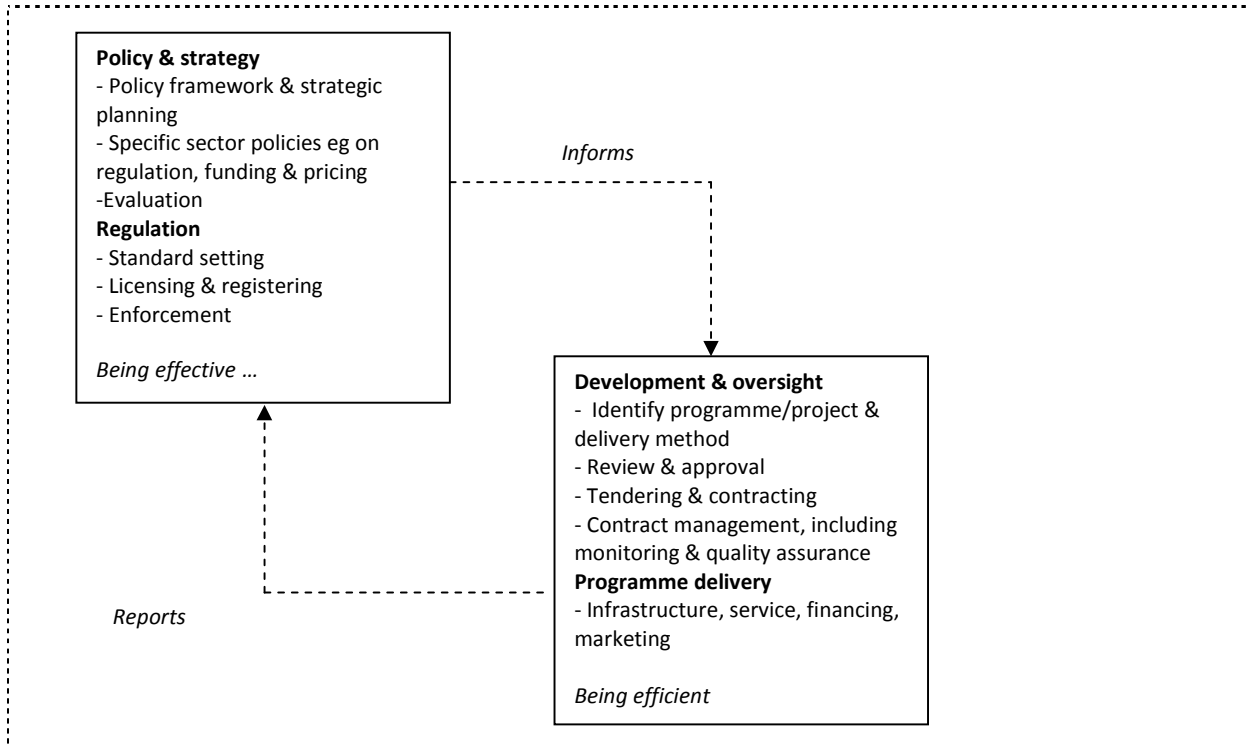
- policy and strategy, or identifying future directions and plans for achieving government objectives, including evaluating the outcome to reset strategies;
- regulating, or setting and applying standards for safety, security and environmental performance, and economic regulation needed in response to market failure;
- programme development and oversight, which involves translating the outcomes of policy, planning and regulatory activities into specific action—into programmes or projects and overseeing their delivery; and
- programme delivery, or delivering (or ensuring the delivery of) infrastructures and services.

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<sup>1</sup>The approach described in IB and Section II draws on and generalises a concept developed for transportation by P. Charles, D. Bray and P. Sayeg. See ADB 2006.

4. In examining a management framework for public infrastructure and services we are

Figure 1 Public infrastructure and services management framework



Source: concept developed in the transportation context by P. Charles, D. Bray and P. Sayeg

interested in knowing whether it directs activities of government agencies towards serving these broad objectives:

- effectiveness: that is, choices are intended to achieve the goals desirable for the community, and there are clear links from desired outcomes to outputs of government activities, ie the controls, services and other supporting outputs;
- efficiency: that is, least cost delivery of the controls, services and other outputs decided upon.

5. The fundamental objectives of effectiveness and efficiency point to a certain way the management of public infrastructure and services is to be structured. In particular, they point to the need for:

- clear policies and implementation strategies which those responsible for delivering the infrastructure and services can follow;
- a clear distinction of roles amongst planners, programme developers and those responsible for delivery, ensuring a productive tension;
- clear allocation of tasks to agencies to avoid ambiguity over respective responsibilities;
- performance management systems that are transparent and hold the managers accountable for delivering agreed outputs;
- a separation of conflicting functions, especially:

- regulatory from operational activities to avoid conflicts of interest;
- in general, decisions on effectiveness from those on efficiency, in order that each set of activities is carried out with a clear focus; and
- separating commercial activities from non-commercial activities so that the former can be carried out with a clear business drive.
- With respect to the private sector's potential involvement, the basic criteria are consistent with:
  - the private sector having a potential role in programme delivery, which can include delivery of infrastructure, services, marketing promotion and finance;
  - the private sector role being carried out within a clear framework, pre-established by the government alone, of policy and strategic guidelines, regulation and programme management;
  - the choice between use of a government agency or the private sector for programme delivery being made on grounds of least cost .

6. Deciding whether the private sector can offer a lower cost delivery has to be made using a value-for-money (VfM) assessment, which critically reviews

- differences in the capital cost, programme implementation and operating efficiency of the private sector compared with the government; and
- the extent to which the private sector can be assigned to manage risk and the resulting cost.

The differences needing to be observed in infrastructure and services between government and private sector are further discussed in Section III.

7. Figure 1 illustrates how government activities in infrastructure are required to be organised to meet effectiveness and efficiency objectives.

## **II. MANAGEMENT FRAMEWORK FOR PPP**

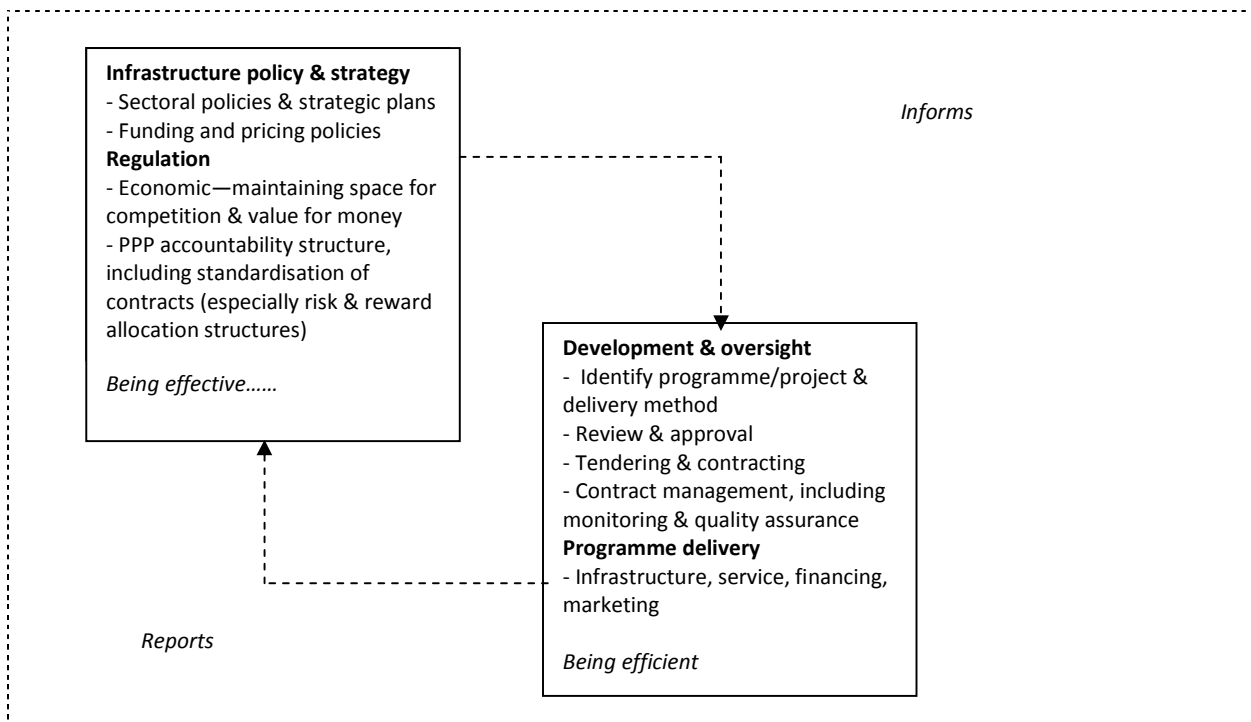
8. As a way to provide public infrastructure and services, and in order to achieve effectiveness and efficiency objectives, PPP needs to take place under a management framework with the general structure described in Section IB. Additionally, the effectiveness objective requires that certain policy and planning and regulating functions are in place. The whole management framework for PPP is best understood with the help of Figure 2. The left hand box indicates the key specific elements of the policy, strategy and regulatory framework required for PPP if it is to meet effectiveness goals. Thus the public sector role in PPP assumes that government has in place sector level strategic plans and policies and a regulatory framework. The following are some examples:

- a transport sector policy to develop integrated rail mass transit as part of a strategy for urban transport targeted at improving mobility in the city across income levels, supporting the achievement of national land use and other socio-economic goals and satisfying the global community's desires regarding greenhouse gas emission;
- a policy (and enforcement) to charge for road use (i.e. for private vehicle entry to reserved areas, including parking) as part of an urban transport strategy;
- to allow government planning control in integrating public transport, a mandatory MRT concessioning model which is friendly to ticketing and fare integration and is consistent with general effectiveness and efficiency objectives;
- a policy of encouraging private sector participation in financing and delivering the non-medical infrastructure and services in hospitals, reserving medical services to public sector provision, and development of a model approach on how such PPP

hospitals are operated, with appropriate standardisation of contract and performance monitoring.

9. Infrastructure is prone to natural monopoly, a form of market failure, which requires economic regulation. For this reason, the electricity transmission grid is normally reserved for public ownership and control as a matter of state policy, while the electricity generation can be delivered by PPP in the form of independent power producer (IPP) contracts. In urban transport, in circumstances of weak government regulation (in route permitting and service

Figure 2 PPP management framework



Source: concept developed in the transportation context by P. Charles, D. Bray and P. Sayeg

monitoring) private sector control of mainline bus routes can develop into a cartel providing limited service (eg no late evening buses), low cost operation and corner cutting reflected in lax driver and crew dress, unclean and old buses; in short the consumer is given poor quality service .

10. A PPP contract is the key instrument whereby the government and the private sector concessionaire each holds the other accountable for (a) desired outcomes and (b) assumption of risk that impact on desired outcomes, based on the contracted description and allocation of (a) and (b). For example, in a gross cost MRT concession, a level of patronage meeting expectations is a significant desired outcome for government but less so for the concessionaire who receives a substantial part (even all) of his revenue in payment for delivering a service availability; from the government's perspective the design of the mechanism for payment of the concessionaire is therefore critical. Given the complexity of the subject, to ensure that the accountability structure of a PPP contract directs towards effectiveness and efficiency objectives, governments experienced in PPP have understood the need for regulation in the form of

standardisation of PPP contracts. Regulating accountability structure in PPP takes into consideration principles of risk sharing between public and private sector and of payment mechanisms linked to service availability and quality standards carefully monitored, or an equivalent set of incentives through partial transfer of patronage risk. These issues are further discussed in Section IV.

11. In Figure 2, the box on the right indicates what public sector development and oversight activities are required. There is no change in the contents of this box from Figure 1: the same efficiency considerations apply, except in one particular respect. Programmes or projects indicated for PPP implementation need to pass a Value-for-Money assessment, which is carried out in the course of programme development. With the VfM assessment, governments experienced in PPP have found a need to standardise the methodology and monitor the quality of the data input to ensure the assessment serves its purpose of helping to identify least cost methods of implementation<sup>1</sup>. Section VI looks at the VfM assessment in detail.

12. Speaking generally, with PPP it may be easier to observe a clear distinction between the programme development and oversight role on one hand and the delivery role on the other because of similarities with the familiar purchaser and vendor roles of the government procurement agency and the private sector supplier of products or services. On the other hand, even with government infrastructure delivery units kept at a distance from oversight agencies (for instance by locating the delivery in a corporate structure with government shareholder control held in a ministry of finance), in practice, government supervision and monitoring agencies the world over have found it difficult to obtain desired performance levels from public sector delivery units. In an interesting development, the UK government for example is finding that performance (or service standards) specifications, developed originally for use in PPP contracting, has application as a tool for holding public sector operating units accountable<sup>2</sup>.

### III. PUBLIC AND PRIVATE SECTOR ROLES IN PPP

13. The fundamentally different roles of government and the private sector in PPP are summarised in Table 3.1.

Table 3.1 The appropriate public and private sector roles in PPP

Public sector	Private sector
<ul style="list-style-type: none"> <li>• Has a fundamental duty to act in the public interest—ie while being guided by effectiveness and efficiency objectives.</li> <li>• Must carry out these functions:               <ul style="list-style-type: none"> <li>- policy and strategy formulation;</li> <li>- regulation;</li> <li>- programme development and oversight.</li> </ul> </li> <li>• Engages in programme delivery where public sector implementation is VfM.</li> <li>• Regulating and overseeing bodies must each be distinct from an implementing body to avoid conflict of interest.</li> </ul>	<ul style="list-style-type: none"> <li>• Its strength lies in acting in pursuit of a financial incentive (ie an opportunity for profit of loss).</li> <li>• It is not charged with a duty of securing public interest.</li> <li>• Hence, its only possible role in regard to infrastructure and public services is programme delivery, ie any one or combination of infrastructure, service, financing or marketing,</li> <li>• but always subject to case by case confirmation by a VfM assessment.</li> </ul>

Source: based on conceptual development for transport by P. Charles, D. Bray and P. Sayeg

<sup>1</sup>Eg UK Treasury 2004, Partnerships Victoria 2001

<sup>2</sup>See for example Department of Health (UK) 2003

14. It is a fundamental duty of government to see to the provision of public infrastructure and services effectively and efficiently. This management duty means government has to engage in the activities of policy and strategy formulation, regulation and programme development and oversight. The first two categories are effectiveness activities and involve representing and reconciling community desires, which in a democratic system, involves parties and elections and parliament, in full view of the public and the media—in other words activities not suited to private sector modes of operation with their focus on financial incentives. Of the two remaining categories, which are driven by efficiency objectives, programme development and oversight activities must be carefully distanced from programme delivery to avoid interest conflicts. Thus, programme delivery is the only possible role for the private sector in infrastructure and services. The government in theory has a choice whether to employ a public sector delivery organisation or a private sector provider: that choice is made on efficiency grounds.

15. Given that infrastructure often involves a natural monopoly and/or external benefits or costs (including network characteristics—eg the consumer and community benefit of the whole network is greater than that of its separate pieces, as seen in urban transport and telecommunications), for a PPP programme delivery to serve effectiveness and efficiency objectives requires a public sector that plays its part well. This includes the following:

- understanding how the private sector is incentivised;
- being open to its positive tendencies (for example, its hardwired responsiveness to hard budget constraints, as seen in private sector construction programme management);
- regulating (or disincentivising) negative ones such as its anti-competitive and even predatory tendencies, and
- improving concessioning methods, which might be moving from net cost to gross cost contracts in order (a) to keep open the possibility of passing on network benefits in e.g. bus and MRT to the travelling public (through eg integrated fares) or the community at large (improved city average traffic speed, reduction of public transport subsidisation) and (b) to sharpen incentives to deliver service quality.

#### **IV. POLICY AND REGULATION IN PPP**

##### **A. Policy goal**

16. Typically, in a PPP-implemented programme the private sector has the potential to deliver any one of the first two elements together with any combination of other elements from the following list: infrastructure, service, finance. What distinguishes PPP from simple procurement from a (private sector) vendor is that the government transfers some risk to the private sector in the transaction.

17. Consider a contract between a government road agency with a private sector construction firm to build a tollway using government detailed design and bill-of-quantity specifications of the construction work, added to which is a 15-year term supplier financing package based on structured deferred payment of accounts, the finished tollway being operated and maintained by the public agency. The design and most of the construction risk remains with the government in that the builder is paid regardless of whether a) the toll traffic is as anticipated or b) through faulty design or poor specification of the construction works the tollway does not give government the use and economic life anticipated, and is high in maintenance cost. The firm's compensation for the work can be the same as with its normal work, (ie it is completely paid out at completion of the work) since it can securitise its road agency receivables,

adding on the financial charges of its construction financiers plus its cost of funds for providing the road agency with the 15-year financing (the risk on interest rates and other charges is passed through to the road agency), and discount the paper for cash. What could help to keep the cost down in the example would depend solely on any bidding competition, first, to provide construction services and, second, to provide the construction financing and the long-dated supplier finance (but if the firm selects the financing source then there is no incentive for it to minimise the cost).

18. The point about this example is that a Value-for-Money assessment is likely to have shown that a conventional public works approach with straight government debt financing would cost less. Let us suppose that the government however does not want (or does not have the fiscal room) to fund the tollway from government borrowing. In that case, a PPP, with the private firm taking design, construction, and maintenance risk over the same 15 year period may well (through the risk transfer) incentivise a lower life cycle cost compared to our example. This illustrates the difference between a PPP project and a conventional public works building project with long term supplier finance tagged on.

19. Risk transfer to the private sector does not in all circumstances achieve efficiency objectives. Suppose, for illustration, that the road agency in fact has the best skill and knowhow in designing and specifying the construction of the type of tollroad in question and the likelihood is that a conventional construction contract against road agency detailed design and specification would offer the best value for money. However, suppose again that government does not want to fund the construction by putting debt on the government books. A PPP design, construction and maintenance scheme is not the automatic answer—certainly not if the road agency can deliver a lower life-cycle cost for the structure than any private sector organisation. What may be a better solution is a scheme (which might even be considered a PPP to deliver financing) where a private sector participant subcontracts the design and construction specification to the road agency itself (based on a performance contract that leaves the road agency with the life cycle cost risk) and provides the financing as its main role. The PPP contracting will have to be with another arm of government which is not the road agency, to avoid conflict of interest.

20. The principle that is being illustrated here is that the true goal of a PPP policy is one of efficiency, nothing more—in particular, it is not in order to bypass a constrained public debt capacity to allow infrastructure to be built sooner, although this could be a by-product. Consequently, a VfM analysis needs to be made mandatory for all infrastructure programmes being proposed for PPP. Typically, PPP introduces the possibility of a choice between the sovereign borrower's low borrowing cost, but less efficient public sector project management and operation, against a private sector higher cost of borrowing but more efficient project implementation, operation and maintenance, when appropriately bundled. Assessing the value for money—key to making the right choice—is an important task. The knowhow and information to assess VfM become a critical requirement in government management of infrastructure and public services. See Section VI for details.

## **B. PPP regulation**

21. The principal concern in PPP regulation is the accountability structure, the key elements of which are as follows:

- reward (or desired outcomes) and risk (uncertain development impacting on a desired outcome) arrangements for each party, including payment mechanism

- conditioned on satisfying performance levels, and the risk embedded in such mechanisms;
- the term of the concession (or the duration for the enjoyment of/exposure to reward/risk);
- the contract termination conditions, including the consequences of termination, which define conditions for exit from a reward and risk structure that is no longer desirable.

22. **Risk allocation.** It is commonly said that in a PPP contract risk should be allocated to the party most capable of managing it. The iconic observation has often been misinterpreted and misapplied. For example, demand risk in infrastructure used to be included among risks designated ‘commercial risks’ that the private sector is commonly supposed to be more capable of managing than government. As a result, PPP contracts allocating demand risk to the concessionaire (ie net cost contracts) have been entered into which have become a burden on both government and the private sector. Risk in this context has two dimensions: a probability ratio for an occurrence and a measurable financial impact, positive or negative, of that occurrence. With the private sector, a risk is borne because its opportunity cost to the bearer is less than the cost of not bearing it. Thus if the financial impact is a positive one, then the risk is borne if not taking the risk loses a greater opportunity for gain than could be obtained by taking it. The opportunity cost of risk with a negative financial impact, say, may be different for different bearers because one bearer may have a greater ability to reduce the probability ratio or the size of the negative financial impact than another. The downside risk of demand in, for example, public transport is considered by the financial markets as generally a high risk, that is, it would be difficult for any operator to reduce the probability of the event occurring or the size of its negative impact. The financial structure for a rail transit project with significant demand risk—say 95 per cent of the project revenue is fare revenue—bears this out, when we look at the low leverage requirement (which means more costly equity capital is needed) and a higher interest risk premium. By comparison, a project with a lower demand risk—say, revenue is 15 per cent based on passenger carryings, the balance being government payment against well-defined service output specifications—will attract lenders who are prepared to offer higher

Table 4.1 PPP policy formulation and regulation

Funding/financing policy	Accountability regulation
<ul style="list-style-type: none"> <li>• Private sector involvement in infrastructure must pass the VfM test.               <ul style="list-style-type: none"> <li>- Where infrastructure is needed but government has fiscal constraint, PPP financing should not be an automatic conclusion, but should still be subject to a VfM test (e.g. an SOE with limited recourse borrowing may offer better VfM).</li> </ul> </li> <li>• Resource requirement:               <ul style="list-style-type: none"> <li>- knowhow and information to assess VfM.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Government sets (and revises) these key elements of an accountability structure:               <ul style="list-style-type: none"> <li>- risk &amp; reward arrangements for the concessionaire, including payment and cost conditions;</li> <li>- the term of the concession;</li> <li>- contract termination conditions, including the consequences of termination.</li> </ul> </li> <li>• The above is incorporated in the PPP contract standardisation.</li> <li>• Resource requirement:               <ul style="list-style-type: none"> <li>- understanding of risk management methods and how risk is priced in the private sector;</li> </ul> </li> </ul>

Source: consultant

leverage (ie. less costly equity capital will be required) and smaller interest risk premium. Since financing cost is a large element of the cost to government of a PPP contract, it is a matter for a

VfM assessment to decide if transferring demand risk to the private sector is efficient<sup>1</sup>.

23. **Concession term.** The key determinant of the concession term is minimisation of life-cycle cost of the infrastructure (ie a key asset) being delivered in the PPP contract. The ideal is that it should be long enough so that the PPP concessionaire is incentivised to invest in design, operation and maintenance effort to keep the total costs down. For this reason, a concession term matching the useful economic life of the infrastructure (eg buses in an public transport programme) is usually recommended. On the other hand, the concession term should not be so long that it negatively impacts the government's flexibility in the management of infrastructure and services. Thus, with public services where demand growth requires addition of more and more infrastructure (eg MRT) a cut-off point, such as after 0 years, will need to be adopted.

24. **Termination conditions.** The guiding principle is that clear contract conditions governing early termination and its consequences promote certainty (abates risk), reduces the PPP concessionaires financing cost and so improves value for money. Table 4.1 summarises the key issues concerned with PPP policy and regulation.

## V. PROGRAMME DEVELOPMENT AND OVERSIGHT IN PPP

25. The distinction of roles, organisation and knowledge resource requirement on the part of government in developing and overseeing PPP programmes are summarised in Table 5.1.

Table 5.1 Programme development and oversight in PPP

Activity type	Public sector body(s)	Resource requirement
Identify project and implementation method	Ministry & implementing agency	- Sectoral knowledge - Market sounding information - Project identification & implementation knowhow
Review & approval of outline business case (OBC)	Oversight body(s)	- Review capability
Project specification, tendering, selection & contracting	Oversight, implementing bodies. May involve a multi-agency ad hoc body to tender & select	- Sectoral knowledge - Market sounding information - Project tendering & contracting knowhow - Contract legal expertise
Review and final approval	Oversight and final approval bodies	- Review capability
Contract management, including monitoring and quality assurance	Ministry, oversight and implementing bodies	- Sectoral knowledge - Monitoring & QA knowhow & capability

Source: consultant

26. Apart from the title, Table 5.1 does not mention PPP at all. The intention is to show that, at a high level, the approach to programme development and oversight is the same whatever decision is taken later regarding how the programme is to be delivered. What this means is that

<sup>1</sup> Effectiveness grounds for preferring gross cost to net cost contracts in urban public transport—ease in integration of fares and ticketing and retention of public sector control over transport network planning—are not at issue in this discussion.

the respective responsible bodies have to consider PPP as one among several delivery options. They need to have an understanding of and access to knowhow on the use of PPP as a programme delivery method for each of the activity types (left most column) and for each of the following resource requirement categories (right most column):

- project identification and implementation knowhow;
- business case review capability (including VfM assessment);
- project specification, tendering and contracting knowhow;
- contract legal expertise;
- monitoring and quality assurance knowhow.

27. Governments that have actively engaged with PPP have generally found the building of capability and stable access to specialist knowhow in the use of PPP to be challenging. Institutionalising capability has generally meant vesting it in a central specialist unit, most often embedded in a ministry of finance. PPP specialist profession advisory services in eg project development, tendering and contracting, especially at the same calibre that is available to the private sector, comes at a cost. Here governments will need to apply a VfM assessment of the choice between high quality and costly advisory service, but reduced risk of making the wrong decisions in programme development and oversight, and limited advisory service but a higher programme development risk. Appendix 1 illustrates the issues being raised here, taking an MRT common ticketing project as an example.

## VI. VALUE FOR MONEY ASSESSMENT

28. The VfM assessment was introduced into the practice of PPP in the context of making an informed decision between a conventional public sector and a PPP implementation of an infrastructure project. However, once clearly understood its method can be seen to have broader application in choosing among many kinds of options involving different risk levels. The key objective is simple: to select from several project implementation options the most efficient, ie one incurring the lowest cost to the public. However, complications arise because of uncertainty in the cost and revenue/benefit of an infrastructure project, which has characteristically long gestation (usually more than 10 years). Additionally, in certain sectors such as transport, studies have found a tendency for pronounced negative variance between forecast and outturn. The objective then has to be restated as finding from among alternative modes of project delivery one that offers the least cost, after taking risk into account.

29. Risk impacts on expected net financial cost<sup>1</sup> of an infrastructure project through a combination of the following variance of outturn from what is anticipated at the time decision was made to implement the project:

- Capital cost overrun (eg due to actual cost and/or construction time exceeding plan);
- Operation and maintenance cost overrun;
- Revenue underperformance.

By establishing statistics of capital and O&M cost overruns and revenue shortfall, in a particular sector of infrastructure, on projects implemented by the conventional public sector method, it is therefore possible to take into account the risk of government implementation, in addition to the basic net financial cost of a project. For example a UK Treasury commissioned 2002 review of large British public sector implemented projects found that in its survey sample there was a tendency for capital cost and construction time (or 'work duration') overrun (sometimes called

<sup>1</sup>For example, in a tollway project the net financial cost is equal to the net present value over a predetermined number of years of its capital and operation and maintenance cost less toll revenue.

'optimism bias') averaging for each of the project types as shown in Table 6.1.

Table 6.1 Statistical optimism bias in UK Treasury 2002 review of large public projects

Project type	Works duration overrun	Capital cost overrun
Non-standard buildings	39%	51%
Standard buildings	4%	24%
Non-standard civil engineering	15%	66%
Standard civil engineering	34%	44%
Equipment/development	54%	214%

Source: HM Treasury 2002

30. These statistical findings can be used as a basis for making adjustment for risk of capital cost and time overrun in evaluation of the VfM of British public sector large projects. The Thai government does not yet have statistics of optimism bias in its public works projects but will

Table 6.2 Allowances for Optimism Bias (% difference from the Best Estimate)

	Government procurement			Concessionaire procurement		
	Net Cost concession	Gross Cost concession	Modified Gross Cost concession	Net Cost concession	Gross Cost concession	Modified Gross Cost concession
Costs						
Capital Cost – E&M	+45%	+45%	+45%	+15%	+15%	+15%
O&M Costs	+20%	+10%	+10%	+20%	+10%	+10%
Patronage						
Operating Year 1	-50%	-55%	-50%	-50%	-55%	-50%
Operating Year 3 & after	-30%	-33%	-30%	-30%	-33%	-30%

Source: based on international studies for implementation of rail projects.

Abbreviation: E&M – electrical and mechanical systems

need to address this as it begins to develop capability in PPP.

31. In the mean time, for certain sectors, broad-based international studies have established reliable measures of optimism bias which can form the basis for a VfM assessment. For example, for the MRT five lines extension programme, the government, with technical assistance from Asian Development Bank, provided the optimism bias factors of Table 6.2 for use in VfM assessment, as part of the MRT line agencies project studies mandated by the 1992 Private Participation in State Undertaking Act. The modified gross cost concession in Table 6.2 refers to a gross cost concession with partial demand risk transfer designed incentivise quality of MRT service.

32. Table 6.3 allows a cost comparison not only between a PPP and a public sector implementation option of the MRT project in the example, but also among implementation options under different concession types.

Table 6.3 Summary of Value for Money Assessment: Example from MRT

NPV Baht m

A. Item	PPP			Public sector implementation		
	NC	GC	MGC	NC	GC	MGC
Farebox and non-fare proceeds		(38,611)	(38,611)		(38,611)	(38,611)
Authority payment to concessionaire <sup>1</sup>	23,079	54,516	55,656	(6,900)	28,420	28,644
Authority loan debt service				7,903	7,903	7,903
Authority other funding of capex				9,246	9,246	9,246
Financing cost of other funding				5,123	5,123	5,123
Base cost	23,079	15,906	17,045	15,372	12,082	12,306
Adjustment for corporate tax	(5,920)	(3,576)	(3,906)	(1,530)	(456)	(524)
Base cost, adjusted for tax	17,159	12,330	13,140	13,841	11,625	11,782
Cost overrun, investment	2,666	2,666	2,666	7,999	7,999	7,999
Cost of risk--O&M and revenue	18,656	17,294	15,966	18,656	17,294	15,966
Total risk adjustment	21,323	19,960	18,633	26,655	25,293	23,965
Total cost to the public	38,482	32,290	31,773	40,497	36,918	35,747

Source: consultant

<sup>1</sup> Negative value means payment by concessionaire to authority

Abbreviations: NC - Net Cost, GC - Gross Cost, MGC - Modified Gross Cost Contract, NPV – net present value

## VII. PRIVATE SECTOR RISK MANAGEMENT IN PPP

33. It is important that government agencies involved in each of the four areas of management of infrastructure and services have an understanding of how the private sector manages project risk. For illustration, this section looks at a typical private sector approach to risk management in the delivery of a project characterised by a multi-year initial construction programme concluding with commission and testing and a long gestation period prior to initial project cost recovery. Figure 3 depicts the commercial structure that a private sector would typically put together to implement such an infrastructure project.

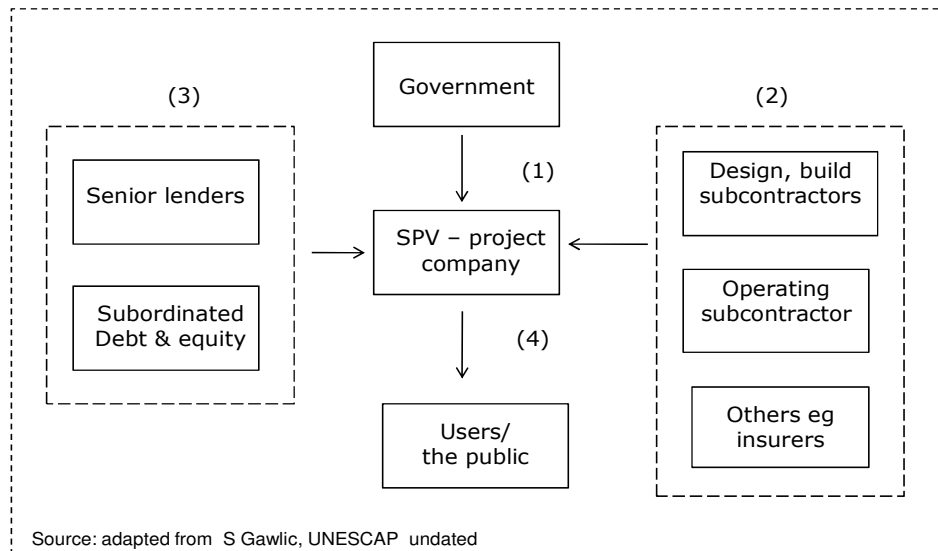
34. With reference to Figure 3, a concession agreement (1) identifies for each project task the party responsible and, since responsibility means carrying risk, an allocation of the project risk to the agreement parties. For an effective concession agreement, the government needs to engage technical advisors with experience in two areas:

- designing the service availability and performance standards for the particular infrastructure sector; and
- PPP legal contract drafting.

Typically, a PPP contract involves concessionaire responsibility to provide through its own financing a part or all of the infrastructure investment (eg buses only in a Bus Rapid Transit (BRT) project) as well as the operation. The concessionaire will put in place its own risk management structure, which involves a special purpose company (SPV) as the contracting party—the purpose is to exclude other risk beside project risk.

35. Under the structure, (2) system design, construction and operation and maintenance risk is transferred to subcontractors with expertise in the field, and (3) financing responsibility (and of course risk) will be allocated among senior lenders (normally the senior debt will be on limited recourse terms) and subordinated debt and equity funds providers. For financiers the project risk is greatest during the project construction phase and financing margins will be high in

Figure 3 Infrastructure project concession commercial structure



reflection of the high risk. This is why, when construction is finished, the concessionaire can often refinance, with these objectives:

- to increase the leverage (debt-equity ratio) to the extent allowed by the reduced project risk—this enables replacement of some high cost subordinated debt and equity with less costly senior debt;
- to reduce interest premiums; and
- to extend debt maturity, which will allow equity holders a chance to bring forward dividend distribution.

The upshot is that the financial cost of the project reduces substantially at this point and international best practice usually includes in concession contracts a sharing of the gains on refinancing between the government and the concessionaire.

36. The concessionaire is paid (4) for the service directly from user charges eg fares in a net cost BRT concession or payment from the contracting authority representing the government in a gross cost concession. In practice, the agreement with the lenders will usually specify an escrow account mechanism to distribute the concession payment to the financiers and the subcontractors in place of payment going into an SPV account.

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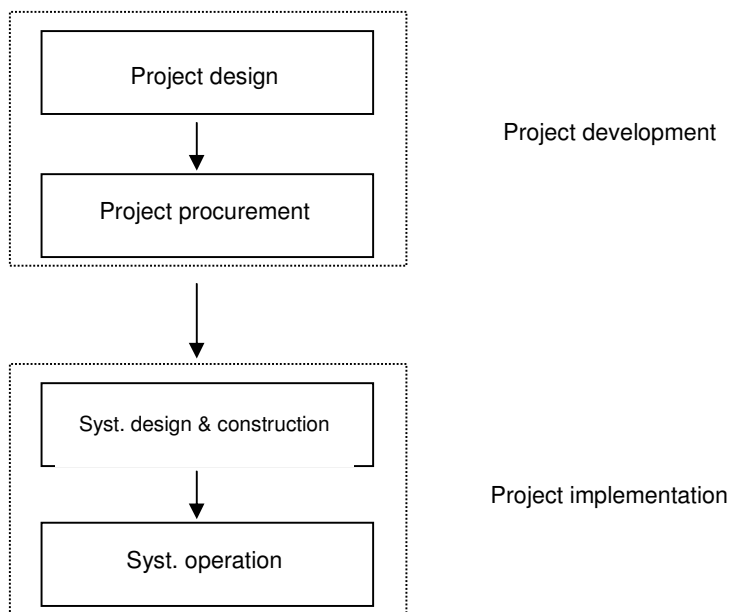
## APPENDIX 1 MRT TICKETING PROJECT DEVELOPMENT AND IMPLEMENTATION

1. How project development and implementation or delivery are carried out using technical advisory services is illustrated in this example, which relates to an MRT common ticketing system.

### A. The scope of the required technical advisory services

2. The activities to be undertaken in implementing a common ticketing project fall into a sequence as illustrated in Figure 1.

Figure 1 Ticketing project: activities structure



Source: consultant

3. In the project development, the project design activities include a key decision to be made on an informed basis by government, namely what financing and delivery option to adopt, which is based on a Value for Money assessment. It also includes activities in preparation for project procurement, and beyond that for project implementation, not forgetting the scoping and engagement of necessary specialist advisors. The project procurement activities in turn include the several key informed decisions leading to the selection of the concessionaire.

4. The project development puts all in place for the first part of project implementation, comprising the activities in system design and construction. For example, in a DBOM1 contract with public sector financing of the infrastructure, the government, having transferred the project design and construction risks to the contractor, reviews together with its specialist advisors, but is careful not to be seen to be approving any design or any technical specification, the system procurement and installation. When the system is operating, the

<sup>1</sup> The concessionaire or contractor is responsible and is at risk for design, construction and subsequently operation and maintenance of the ticketing system

government and the independent monitoring specialist monitor the ticketing service availability and performance against the contracted system output specifications. The project development activities are highlighted below.

5. **Project design.** In this first part of the project development, strategic choices are made that will shape the project. The tasks performed under project design include:

- scope definition (e.g. MRT lines to be covered, concession type i.e. Gross or Net Cost, scalability considerations);
- decide financing and delivery option (e.g. DBOM with government financing the capital cost of the system);
- define high level specifications (e.g. for DBOM, performance specifications );
- early cost estimates of capital investment and operation and maintenance;
- structure the procurement of, develop terms of reference and estimate cost and time schedules for, project consultancy services covering:
  - Project procurement
  - Management and supervision of design and construction
  - Monitoring of operation and maintenance

6. **Project procurement.** The aim of this second part of the project preparation is to procure the services which will deliver the ticketing infrastructure and operation, as envisaged under the project design. The tasks under project procurement include:

- Planning and preparation, which include these activities:
  - develop estimates for capital and operation and maintenance cost, which will be used as input for other procurement planning and preparation work;
  - develop schedules for project procurement and project implementation activities;
  - develop specifications and the payment mechanism;
  - develop a draft contract;
  - take market soundings of prospective bidders;
  - develop tender method (including evaluation) and procedure;
- Prepare a request for proposal (RFP) including a tender information package
- Tendering
- Negotiations
- Selection and contract execution.

7. The government is looking to use professional technical advisory services for the project development. The technical advice then might be provided through a single-contract consultancy services for project procurement and also project management and supervision in the design and construction phase of project implementation or the two parts can be engaged separately.

## **B. The roles of government and the technical advisor**

For the technical advice to have the desired outcome and impact, coordination between the government and the professional advisory team is needed, with each party playing its required role as highlighted in Table 1.

Table 1 Roles of Government and the professional advisory team

Task	Government role	Advisory team role		
<p><b>Project design</b></p> <ol style="list-style-type: none"> <li>1. Scope definition</li> <li>2. Decide financing and delivery option</li> <li>3. Define high level specifications</li> <li>4. Early cost estimates of capital investment and O&amp; M</li> <li>5. Structure the procurement of, develop terms of reference and estimate cost and time schedules for, project consultancy services covering:               <ol style="list-style-type: none"> <li>a. Project procurement</li> <li>b. Management and supervision of design &amp; construction</li> <li>c. Monitoring of operation and maintenance</li> </ol> </li> </ol>	<ul style="list-style-type: none"> <li>• Sets up an organization arrangement (e.g. a committee and secretariat— this could be the core project team of a future ticketing organisation) with key responsibilities to: i) review and obtain appropriate approval of technical output of the technical advisory team specialists and ii) obtain appropriate key government decisions</li> <li>• Establish/designate a ticketing organization together with the requisite legal, regulatory &amp; supervisory framework</li> <li>• Connect with stakeholders and the general public</li> <li>• Provide required co-ordination for the technical advisory team</li> </ul>	<ul style="list-style-type: none"> <li>• Provides i) knowledge resources to deliver the output of the project design and procurement tasks and ii) skills in project management and supervision of the design and construction activities in project implementation.</li> <li>• Co-ordinates its efforts with the government</li> </ul>		
<p><b>Project procurement:</b></p> <ol style="list-style-type: none"> <li>1. Planning &amp; preparation, including:               <ol style="list-style-type: none"> <li>a. Estimate costs</li> <li>b. Develop specifications &amp; payment mechanism</li> <li>c. Develop draft contract</li> <li>d. Take market soundings</li> <li>e. Develop tender method including evaluation</li> </ol> </li> <li>2. Prepare RFP</li> <li>3. Tendering</li> <li>4. Negotiations</li> <li>5. Selection and contract execution</li> </ol>				
<p><b>System design &amp; construction</b></p> <ol style="list-style-type: none"> <li>1. Management and supervision</li> </ol>				

Source: consultant

**APPENDIX 2**  
**COMMENT ON A NET COST CONCESSION FORM WITH FINANCIAL VIABILITY GAP SUPPORT**

1. The following commentary was provided on September 5, 2007 in response to an enquiry from Public Debt Management Office.

Table 1 Modified net cost<sup>1</sup> compared to gross cost concession from the public interest perspective

Key topic for comparison	Modified net cost concession	Gross cost (with some demand risk transfer)	Implications
Ridership and fare revenue risk	Borne by concessionaire	Borne by government	With Net Cost government transfers the risk to the concessionaire. But risk should be allocated in such a way that the public bears the least cost. The private sector demands a higher compensation for carrying a risk that is more difficult for the private sector to manage—see 'Financing cost' and 'Value for Money' below.
Fare policy control	Fare tariff set by contract, i.e. control and hence flexibility not with government.	Government retains control of fare tariff	-Gross cost is friendlier to fare policy flexibility. -More fare tariff flexibility should normally be in the public interest. -It may be though that this might open the door for fiscal abuse by populist politicians. But nothing can stop a populist government finding other, more direct, ways to waste public funds on populist spending to garner votes.
Fare integration: -across MRT concessions -across modes	Fare integration for MRT means one flag fall across concessions, but the fare tariff fixed by the concession contract does not allow this. This holds with greater force in the intermodal scenario.	Government retains ability to introduce fare integration for the full intermodal scenario.	- Gross cost is pro fare integration; net cost is not. - Fare integration perceived by the public to be fair but multiple flagfalls inconvenient is and unfair. It may be argued that the

Note: <sup>1</sup>With 'negative concession'-style bid for financial viability gap support). This assumes that the concessionaire is making a substantial investment e.g. in trains and related systems or the whole of the E&M.

			government will not have acted in the public interest if government concessions do not allow fares to be integrated.
Policy control on competition/ monopoly in public transport	Concessionaire has an interest in blocking any competition on its transport corridor, since it threatens its ridership and fare revenue (and could try to create in the contract some grounds to claim damage from competition). The Net Cost concessionaire has natural monopolistic tendencies.	Concessionaire revenue is not tied to ridership actual or potential on a particular corridor and would not have the Net Cost concessionaire's protective/anti-competitive outlook. How much competition there is in the transport market needs to be decided—in the public interest.	<ul style="list-style-type: none"> <li>- Gross cost leaves policy control with government.</li> <li>- Net cost concessions can create a powerful lobby for anti-competitive restraints in urban transport, which, if it significantly increases the cost of public transport, is against the public interest.</li> </ul>
Urban transport policy control	Government has complete flexibility only where a change in policy is to the benefit of all concessionaires. It has less flexibility on policy change which reduces trips demand on a concession corridor.	Government has full flexibility, even where the change affects the trips volume on particular corridors.	<ul style="list-style-type: none"> <li>- Gross cost concessions allow government complete policy flexibility.</li> <li>- With Net cost the government has to consult concessionaires.</li> </ul>
Financing cost	In a financial structure with limited recourse debt financing—which would be usual for a similar size of project—the Net Cost concession attracts a low leverage (debt to equity) ratio: typically 2-2.5 times and potentially a higher risk premium on interest. The reason is that there are many major influences on the demand for MRT, such as the state of the economy, urban transport policy, and urban land use policy, which are not within management control of the concessionaire. They are however under government control or are, like the economic climate, already under government responsibility to mitigate.	With Gross Cost, the concessionaire does not have to bear significant patronage risk. The debt to equity ratio is higher than the Net Cost case and international experience shows it can be as high as 6 times (e.g. Nottingham Express (NET) LRT). For the same reason the risk premium on the interest charge would be lower.	With a gross cost rather than a net cost concession financing cost is significantly lower.

Value for Money (VfM)	<p>For the Purple and Blue line extension projects (25 year concession), the TA consultant has estimated<sup>2</sup> the following costs to the public in Net Present Value of the modified Net Cost options:</p> <p><u>Purple Line</u>: Baht38.5b*  <u>Blue Line Extension</u>: Baht 55.2b**</p> <p>Notes: * includes Baht23b negative concession payment by government  **includes Baht 33b negative concession payment from government.</p>	<p>The TA consultant's estimated costs to the public of the same MRT projects implemented as Gross Cost are:  <u>Purple Line</u>: Baht 31.8b  <u>Blue Line (e)</u>: Baht 46.1b</p>	<p>Gross Cost delivers greater VfM compared to modified Net Cost.</p>
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Source: consultant

Note: <sup>2</sup>A note on Value for Money analysis for the Purple Line and Blue Line extension in the Five Lines network, provided to PDMO July 2007