

Presentation to the UN (OHRLLS) – 11th - 12th October 2021

Training Workshop for Developing successful Public- Private Partnerships (PPPs) for increased transport connectivity in Botswana

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Procurement & Management of PPP Projects

Objective:

To engage participants in the structuring of the procurement process and management of PPP Transport Infrastructure Projects.

Before the PPP transaction can be implemented, the tender documents and the draft PPP contract needs to be prepared.

Structuring the Procurement Process

Tender Documents: Should include the evaluation criteria and proposal requirements (as well as information on the project.

Contract: Should fully define the outputs, responsibilities, and risk allocation.

Risks: All significant risks should be identified and allocated to the most appropriate party

- The success of a PPP lies in how well risks have been allocated; and
- If risks are not allocated appropriately, the project will cost more than necessary

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Structuring the Procurement Process

The framework should ensure that appropriate risk management plans can be developed:

- For those risks allocated to the public sector (example: ensuring the project site or right of way is available), appropriate plans need to be in place that both minimize the likelihood of the risk occurring and the impact in case the risk does occur.

The Framework should specify:

- Approaches to risk allocation, risk management plans and draft contracts
- Some governments have standardized rules about risk allocation, others look at each project on a case-by-case basis
- Drafting contracts requires the expertise of experienced PPP lawyers Agencies without this experience in-house will need to secure it by using outside counsel
- For example, British Columbia brought in lawyers and technical advisors from Australia and the UK, jurisdictions with established PPP frameworks.

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Structuring the Procurement Process

- Guidelines for procurement.
- Document the standard PPP procurement process;
- This will signal to prospective partners how they can be involved and reduce the likelihood of disputes; and
- “Model” and “Standard” contracts can ensure consistency in the design of PPP contracts, while sending clear messages to the market.
- How to gain approval for proceeding to the next phase (the tender process)..

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Structuring the Procurement Process

For Procurement process the following are the advantages and disadvantages when examining transport projects for Standard and Model contracts.

Standard Contract	Model Contract
<p>A contract that public agencies are required to use (or at least required to document and justify any deviations from it).</p> <p>May not be a full set of all provisions in the contract, but rather a set of recommendations (including alternative approaches for some issues) in the form of guidelines.</p>	<p>An example contract that embodies good practice and is available for agencies to use.</p>
Advantages	Disadvantages
<p>Reduce the risk of the contract being wrong (for example, poorly drafted or with an inappropriate risk allocation).</p> <p>Save time and money for the bidders by reducing the time required to understand each contract.</p> <p>Enable the project team to focus their work on developing and tailoring existing processes and legal documentation, rather than drafting contracts from scratch.</p> <p>Reducing the time required for case-by-case negotiations as both parties have an expectation of what is acceptable.</p>	<p>It is hard to write one contract that will apply to a wide range of different deals.</p> <p>Therefore, using standard contracts may reduce the quality of contracts compared to having experienced advisors develop a specific contract for each project.</p>

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PPP Contract Structuring:

Jurisdictions should strike the right balance between standardization and customization:

- If most of the projects will be fairly similar (for example, all government-pays contracts for social infrastructure) then a single standard contract may make sense;
 - If there are various categories of projects envisaged, standard contracts for each category may be warranted; and
 - If a wide range of different deals are expected, one or two model contracts, coupled with some standard for contract drafting, may be best.
- Standards for contract drafting could include preferred risks allocations, a list of topics that should be addressed in all contracts, and sample provisions for some topics that are likely to be similar across multiple contract types (such as extraordinary adjustments, force majeure, dispute resolution, and termination provisions).

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PPP Tendering and Award:

- A well designed and implemented procurement is central to achieving Value for Money from the PPP.
- The process will include (and the guidelines to be developed in a proper framework may cover these aspects):
 - marketing the PPP;
 - checking the qualifications of bidders;
 - inviting and evaluating proposals;
 - interacting with bidders during the process;
 - selecting the preferred bidder; and
 - concluding the contract.

Stakeholder engagement is essential to this and all other stages.

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PPP Tendering and Award-Stakeholder Engagement:

The PPP Framework can include a policy on stakeholder engagement, addressing concepts like:

- I. Stakeholder identification and analysis;
- II. Information disclosure;
- III. Stakeholder consultation;
- IV. Negotiation and partnerships;
- V. Grievance management;
- VI. Stakeholder involvement in project monitoring;
- VII. Reporting to stakeholders; and
- VIII. Management functions.

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PPP Tendering and Award-Stakeholder Engagement:

Risks of inadequate stakeholder consultation:

- The contract may not be acceptable to the private sector and its lenders, resulting in no bids;
- Lack of public support for the project may result in it being cancelled by the next elected government; and
- Public demonstrations, labour union action, or public boycotts may result in delayed implementation or reduced profitability.

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PPP Tendering and Award-Decision Criteria:

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

- Was the procurement competitive?
 - For example, have most qualified private partners heard about the opportunity? The competition will only be as good as those competing; and
 - Have qualified private partners been given ample opportunity to express their interest and develop proposals? If timelines are too short, or processes too onerous, private partners will avoid becoming involved.
- Has the process been transparent and conducted with integrity and fairness?
 - The way that the award process is administered should be clearly communicated and responsibilities clearly allocated;
 - The criteria for award should be transparent, with well-defined and objective, qualification criteria, technical specifications, and bidding requirements; and
 - The tender process should ensure that all bidders are treated fairly.

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PPP Tendering and Award-Procedures & Institutional Responsibilities:

: Procedures and Institutional Responsibilities

Process	Procedures	Institutional Responsibilities
<p>PPP marketing.</p> <p>Evaluation of qualifications (and short-listing if that occurs).</p> <p>Evaluation of proposals.</p>	<p>The framework should provide guidance on how to ensure the process is smoothly delivered and that common pitfalls are avoided, without being prescriptive.</p>	<p>The framework should state who evaluates, who makes the selection decision, and who approves the contract.</p>
<p>Reaching commercial close.</p>	<p>The framework should give guidance on the extent of negotiations permitted to reach commercial close.</p>	<p>As above, the framework should state who approves the contract.</p>
<p>Reaching financial close.</p>	<p>The framework should address the risk of delays and contractual changes in getting to financial close.</p>	<p>The framework should state:</p> <ul style="list-style-type: none"> •who manages this process for government; and •who approves any changes to the contract necessary to reach financial close.

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Managing PPP Projects

- This is the longest phase of the project; and
- The challenge is to ensure the PPP provides Value for Money throughout the contract, both construction and operations.

Manage the PPP Contract-Decision Criteria

- The PPP framework should:
 - Ensure that issues during construction and service delivery are communicated by the concessionaire to the implementing agency, and, if required, to relevant central government agencies;
 - Require appointment of a strong operations team and include governance mechanisms for reviewing performance and escalating issues to better equip the government to manage the PPP and make hard decisions; and
 - Include governance mechanisms to help the government agency to be a good working partner in which private parties can have confidence.

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Manage the PPP Contract-Decision Criteria

- The Framework should help to deal with unexpected events after contract execution, without a need for contract renegotiation.
- Sometimes renegotiation may be required.

Manage the Contract-Renegotiate

In circumstances where **renegotiation** may be required, the PPP framework should:

- Ensure the renegotiation process is carefully managed by the government, with proper resources and a proper governance structure. The objective of renegotiation should be to secure an outcome that meets the objectives of the public sector better than would adherence to the original contract terms;
- Allow for changes in the risk allocation if this is necessary and offers a net benefit when compared to alternatives such as cancellation of the contract; and
- Recognise that advisors may need to be re-engaged at this stage.

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Manage the PPP Contract.

Manage the Contract-Procedures and Institutional Responsibility

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

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Unsolicited Bids.

Some governments, including Botswana, accept unsolicited or privately-initiated PPP projects:

- Governments can harness information and ideas that private firms have about how to provide services, but allowing firms to promote their own project ideas is tricky
- If the idea is then put out to competitive tender, firms may not volunteer good ideas since they cannot benefit from doing so; and
- Not putting the idea out to competitive tender could allow a firm to charge more than the cost for a service, leading to allegations of favouritism.

PPP framework needs to strike the right balance between:

- providing incentives to private proponents to submit high-quality project ideas;
- deterring poor quality proposals;
- ensuring competitive tension, and
- demonstrating transparency.

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Unsolicited Bids.

Advantages and Disadvantages of Unsolicited Bids.

Advantages

- Allow governments to benefit from the knowledge and ideas of the private sector;
- A significant advantage where limited government capacity means the private sector is better able to identify infrastructure bottlenecks and innovative solutions; and
- Provides government with information about where commercial opportunities and market interest lie.

Disadvantages

- Government must devote resources to assessing and procuring unsolicited proposals;
- Resources might be better allocated to projects known to be in line with government plans and priorities;
- Negotiating on an unsolicited proposal –with no transparent or competitive procurement process –can create problems;

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Unsolicited Bids.

Advantages and Disadvantages of Unsolicited Bids.

Disadvantages

- May result in poor Value for Money, due to lack of competitive tension;
- May provide opportunities for corruption and give rise to complaints about the fairness of the process, especially if there is no competitive process; and
- For these reasons, some countries prohibit the use of unsolicited proposals for PPPs.

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Unsolicited Bids-Creating Competitive Tension

Some jurisdictions have developed mechanisms to take advantage of unsolicited proposals, while also introducing competitive tension.

Approaches include:

- **Swiss challenge** –an open bidding process is conducted. If the proponent does not win, it is invited to match the winning bid and win the contract;
- **Bid bonus**–the proponent receives a scoring advantage typically defined as an additional percentage added to its evaluation score in an open bidding process;
- Inclusion in **best and final offer round** –a two-stage bid process, with short-listing, is used. The proponent **of the unsolicited proposal is automatically included in the second stage;** and
- **Developer's fee** –the proponent is paid a fee by the government or the winning bidder. The fee may reimburse some project development costs, or provide a return on developing the project concept.

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Unsolicited Bids- Dealing with Intellectual Property

To encourage unsolicited proposals, the government needs to commit to protecting intellectual property:

- Otherwise, there is little incentive for the private party to invest in any new or innovative ideas
- Approaches:
 - Competitively tender the project by specifying required outputs, and not the required technology to deliver those outputs. This approach is consistent with good practice in defining output-based performance requirements for PPPs
 - If the intellectual property is crucial to the project, such that it could not be implemented otherwise, direct negotiation may be warranted, along with procedures to benchmark project costs

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Unsolicited Bids- Clear Process

- Clear processes for handling unsolicited proposals (USPs) are important for transparency and achieving Value for Money.
- Clear processes:
 - Assist the government in managing such a proposal;
 - Incentivize private developers to invest resources in developing good quality project proposals; and
 - Encourage competitors to engage in the bidding process.
- It is worth considering specifying time periods within which each step in the process will be taken:
 - Specific deadlines for government actions can provide assurance to the private sector that their proposal will not languish in the process; and
 - However tight limits on the time allowed for competing proposals can deter competition.

Case Study of Public Sector Funded Project

Dualization of the Beitbridge – Harare Road, Zimbabwe:

- The Beitbridge - Harare Road is the main route for trade between ports in South Africa and Zimbabwe, and countries north of Zimbabwe. It is located along the North - South Corridor and is an important trade route for the SADC region.
- The road serves as an international route for cargo and persons travelling between Tanzania, DRC, Zambia, Malawi, Mozambique and South Africa.
- The road was built over five decades ago and has long been due for rehabilitation and widening, In 2018, Zimbabwe recorded an increase in road traffic deaths from 1,828 in 2017 to 1,986 in 2018. Of the 1,986 deaths recorded in 2018, more than 600 perished along the Beitbridge - Harare highway.
- In 2019, Zimbabwe decided to develop the project using its own public funds instead of going for the Austrian unsolicited bid. According to the national newspaper, the Herald, the Zimbabwe National Road Administration (ZINARA) intends on channelling a large chunk of the funds it collects from toll gates into the rehabilitation of the Beitbridge – Harare road (The Herald, 2020). So far Zimbabwe has made progress and constructed a total of 132km out of 600km as of end of 2020.

Case Study of Public Sector Funded Project

Dualization of the Beitbridge – Harare Road, Zimbabwe:

Key Lessons :

- Creating a stable and enabling economic environment is important for infrastructure development. GoZ's previous attempts to develop the Beitbridge - Harare road were hampered by inflation and an unstable currency.
- Governments should look internally. When the GoZ decided to undertake the Beitbridge Harare Road project using its own funds (toll funds), not only did it make progress (a total of 132km has been completed as of end year 2020 (Ntali, 2020)) but it realised that it will require US\$650 million to undertake the project, implying savings of US\$1,3 billion from what other project developers had indicated it would take. It is possible for governments to fund their own projects and although it may take longer, they could save money in the long run as opposed to unbenchmarked unsolicited bids.
- By working with local contractors, the country has also been able to save foreign currency and according to the Ministry of Transport and Infrastructure Development in Zimbabwe, the foreign currency savings were about 60% (Sunday Mail, 2020).
- Using local companies and resources creates local employment and spurs local production and expertise.