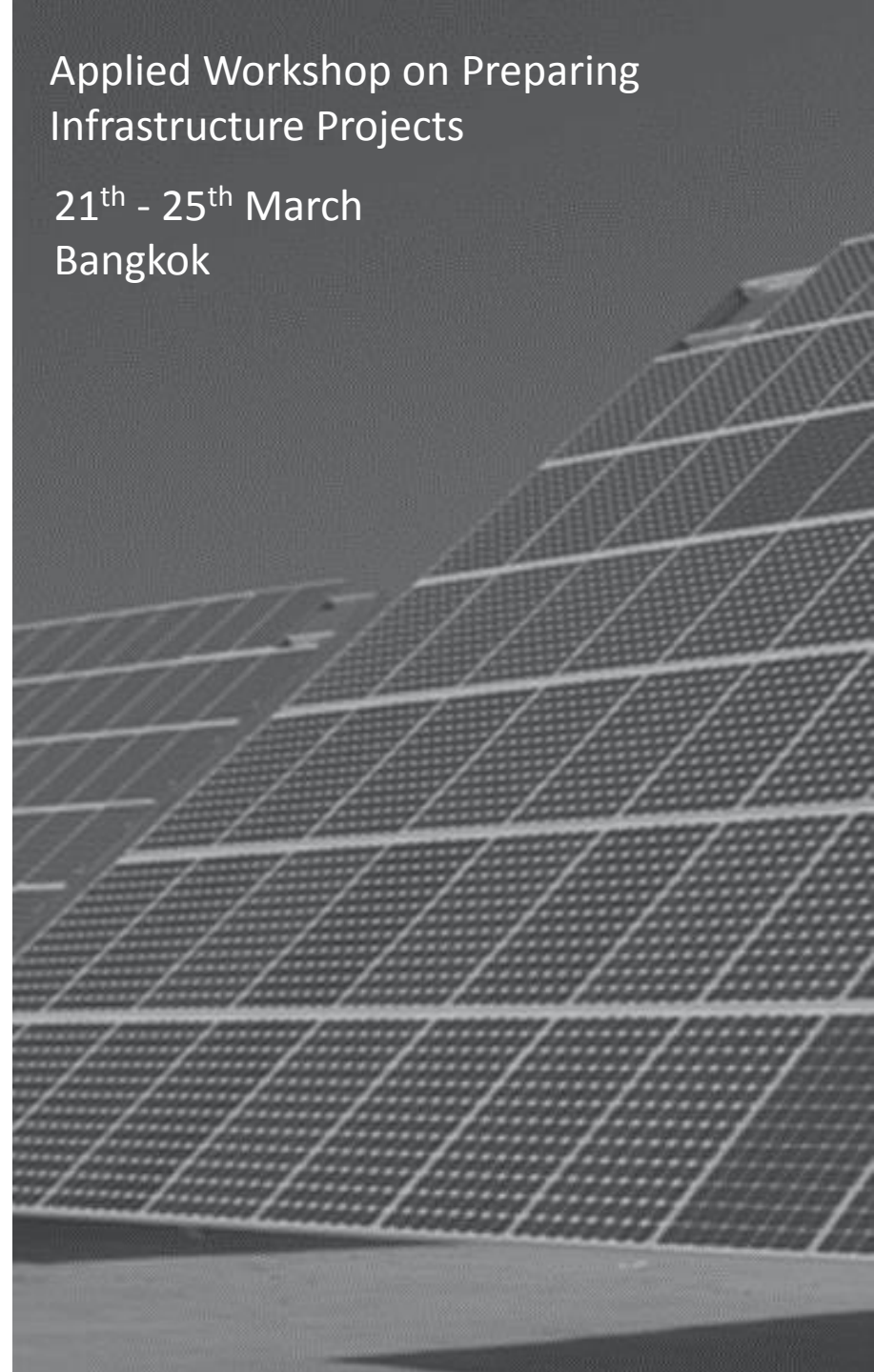


## Applied Workshop on Preparing Infrastructure Projects

21<sup>th</sup> - 25<sup>th</sup> March  
Bangkok

**DAY 4**





## Recap of Days 2 and 3



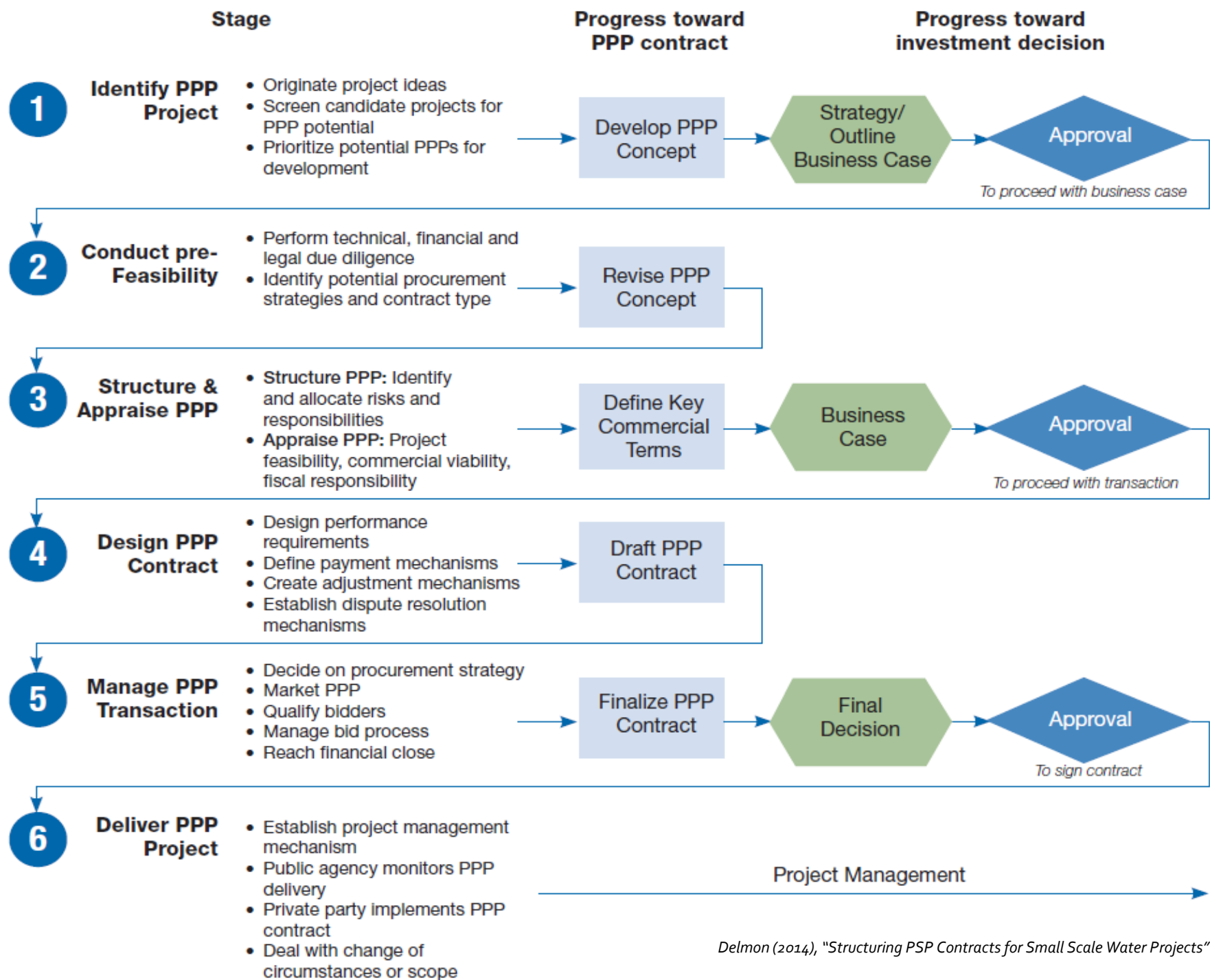


## Session 6 PPP Contract



# The PPP Contract

- Binding legal document that defines the roles & responsibilities, rights & liabilities of the public & the private partner during the implementation of the PPP project
- Must be designed in conformity with applicable laws of the host country (*but should also conform to international best practices!*)
- Clarity (*modern and plain language; "hereinafter mentioned"*)
- Good structure (*a PPP Contract flows like a story; tightly-knit provisions*)





URBAN MASS RAIL SYSTEM CONCESSION AGREEMENT	
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# Key Contents

1. Project Milestones;
2. Obligations of each Party during various stages of the PPP Project based on the risk allocation matrix;
3. Financial structure / payment mechanism;
4. Remedies structure;
5. Procedures for: (a) appointment of an independent consultant, (b) dispute resolution, and (c) termination; and
6. Contract monitoring and management





# Project Milestones

Section Reference	Milestone	Responsibility	Deadline
7.2	Delivery of Construction Performance Security in an amount of [REDACTED]	Concessionaire	Before the Signing Date
31.2	Appointment of Project Dispute Resolution Board	Both Parties	No later than thirty (30) days after the Signing Date
20.1	Appointment of Steering Group	Both Parties	No later than thirty (30) days after the Signing Date
5.2.f	Delivery of updated Project Execution Plan	Concessionaire	No later than sixty (60) days after the Signing Date
18.2.b	Appointment of the Independent Consultant	Grantor	No later than one hundred twenty (120) days after the Signing Date
10.1.a	Submission of Detailed Design to the Independent Consultant	Concessionaire	Within one hundred twenty (120) days from Signing Date
15.8	Submission of Draft Commercial Development Plan	Concessionaire	Within one hundred twenty (120) days from Signing Date
1.1 and 5.4	Achievement of Construction Start Date and Required Construction Start Date	Both Parties	No later than (8) months Signing Date extended in accordance with the Concession Agreement
8.2.a	Execution of Finance Documents and satisfaction or waiver of conditions precedent to draw down of funds	Concessionaire	No later than (8) months after the Signing Date

Section Reference	Milestone	Responsibility	Deadline
	thereunder		
23.1.a	Effecting required insurance	Concessionaire	From the Construction Start Date until the date of issuance of the Final Acceptance Certificate
15.11	Delivery of O&M Manual	Concessionaire	
15.12	Delivery of Terminal Schedule	Concessionaire	
Schedule 14	Completion of Application for Operating Franchise	Concessionaire	
15.7	Development of ESMS	Concessionaire	
1.1	Required Completion Date	Concessionaire	
7.3.a/7.3.c	Delivery of Operation Performance Security in an amount of [REDACTED]	Concessionaire	Construction Completion Date
15.1.b	Operation of the [REDACTED]	Concessionaire	Upon the earlier of the date of issuance of the Provisional Acceptance Certificate or Final Acceptance

Section Reference	Milestone	Responsibility	Deadline
7.3.d	Reduction of Operation Performance Security to [REDACTED]	Concessionaire	Certificate
7.3.e	Increase Operation Performance Security to Forty [REDACTED]	Concessionaire	Fifth (5th) Anniversary of Construction Completion Date
7.4.a	Delivery of Warranty Security [REDACTED]	Concessionaire	Five (5) Years before the Transfer Date
29.1.a	Transfer of Project and Project Assets to Grantor	Concessionaire	On or before the Transfer Date or Termination Date
	this Concession Agreement.	Concessionaire	Thirty fifth (35th) anniversary of the Construction Start Date





# Obligations of the Parties

- Examples:
  - Design:
    - Concessionaire shall prepare the Detailed Engineering Design (DED) based on its Preliminary Engineering Design and in accordance with Output Specifications;
    - Concessionaire shall develop an environmental and social management system based on its environmental and social impact assessment;
    - GIA shall review (together with the Independent Consultant/IC) and approve/reject the proposed DED;
    - GIA to commence the process of applying for the Environmental Compliance Certificate, while Concessionaire is expected to pursue/continue the application and acquire the Certificate;
  - Construction:
    - GIA to deliver the project site free from any encumbrances or legal dispute;
    - Concessionaire to obtain all the relevant approvals before commencement of construction;
    - Concessionaire to construct the required infrastructure in accordance with the approved DED, Output Specifications, Milestones, and all relevant rules and procedures and environmental and social requirements;
    - GIA, together with the IC, to regularly conduct monitoring and inspection activities during construction;



# Obligations of the Parties

- Commissioning and Acceptance:
  - Concessionaire to carry out the final Commissioning and Acceptance tests and submit a Commissioning and Acceptance Plan to the GIA;
  - GIA, upon proper determination together with the IC, to fully accept the Facility and issue a Final Acceptance Certificate;
- Operation & Maintenance:
  - Concessionaire to operate the Facility in accordance with Key Performance Indicators (KPIs);
  - Concessionaire to prepare and submit to the GIA the O&M manuals for the Facility;
  - Concessionaire to employ or engage a sufficient number of personnel having the required qualifications, expertise and experience most appropriate to perform the required services;
- Handback
  - Concessionaire to transfer the Facility, free from any lien or encumbrance, to the GIA in the condition required under the Transfer Requirements;
  - Concessionaire to transfer to the GIA all of its proprietary information, patents, and licenses related to the Project.



## Payment Mechanism

- Who pays who?
- One time payment vs. annual vs. conditional
- Set off?
- Use of Blocked Account
- Tariff Rate Adjustment (*use of parametric formula*)



# Remedies Structure

Events	Remedies
Default	Liquidated Damages
Delay	Performance Securities (construction, operation, handback warranty, etc)
Force Majeure	Extension of Concession Period
Material Adverse Government Action (MAGA)	Step-In Rights
Third Party Liabilities	Termination
	Indemnification



## Hiring of an Independent Consultant

- Independent Consultant (IC): third-party experts who will assist the GIA assess the private partner's DED and assist in construction supervision and approval/commissioning
- PPP Contract to specify procedures to be followed in hiring the IC
- Cost of hiring the Independent Consultant is recommended to be shared



## Dispute Resolution

- Is not equivalent to arbitration per se; in fact, arbitration should be the last resort
- Mutual discussion between the parties ➡ Expert panel ➡ Arbitration
- Enforcement of expert panel decisions or arbitral awards must be cognizable and enforceable by the courts of the host country



## Termination

- Termination procedures and ancillary remedies may vary depending on the: (1) ground for termination, and (2) the claimant
- Often a remedy based on two grounds: (1) default and (2) force majeure
- In any termination event, it should be endeavored that the lenders are made whole
- Enforcement of expert panel decisions or arbitral awards must be cognizable and enforceable by the courts of the host country





# Mapping out the PPP Contract

BOT Agreement Reference	Subject	Summary	Comments
<b>NOA TO SIGNING DATE OF BOT CONTRACT</b>			
3.1	Scope of Project		
3.2	Project Implementation		
3.4	Term of the Agreement		
5.1	Conditions Precedent ("CPs") to Stage 1 Construction Start Date		
5.2	CPs to Stage 2 Construction Start Date		
5.3	CPs to Stage 3(a) Construction Start Date		
5.4	CPs to Stage 3(b) Construction Start Date		
5.5	CPs to Stage 3(c) Construction Start Date		
5.6	Notice to Proceed		
5.7	Delay in Complying with CPs		
5.8	Failure to Satisfy CPs		
5.9	Termination for Non-Occurrence of Required Construction Start Date		
6.1	Land Rights and Right-of-Way		
6.2	Possession of Site and Facilities		
7.2	Construction Performance Security		
7.3	Operation Performance Security		
7.4	Warranty Security		
8	Financing		
8.4	Permitted Security Interest		
10.5	Certificate of Completion		
15.1	Tariff Rate		
15.2	Tariff Adjustment		
15.3	Monthly Charge		
16.1	Concession Fee		
16.2	PGB Upfront Fee and Revenue Share		
17	Blocked Account		
18	Independent Consultant ("IC")		
19	Contract Management, Monitoring and Evaluation		
22	Insurance		
25.4	Delay Events		
25.5	Consequences of Proponent Delay Event		
25.7	Consequences of GIA Delay Event, Force Majeure Delay Event or MAGA Delay Event		
26	GIA Compensation		
28	Grounds for Termination		
28.4	Termination Payments		



## Case Work

- Discuss your project
- Identify key project milestones (build the story), and indicate who the responsible party is for each milestone
- Indicate, to the extent possible, the obligations and responsibilities of each party during each stage of project implementation
- Prepare a short report for the plenary



## Session 7 Contract Management



## Contract Management Plan:

- Primary tool of **government** to achieve the ff:
  - Continuous satisfactory service delivery;
  - Maintenance of a healthy partnership-based relationship with private partner;
  - Proper knowledge management and succession planning mechanisms are in place;
  - Disputes are resolved at the appropriate level; and
  - Anticipation of developments and changes in the project.



## Case Work

- Draft a management/implementation plan based on your own project
- Try to consider:
  - what tasks and responsibilities need to be undertaken by the GIA, what the deadlines are;
  - What resources are required to fulfill this task/responsibility (do not just be limited by financial resources... also consider manpower!)



## Session 8 Procurement Plan

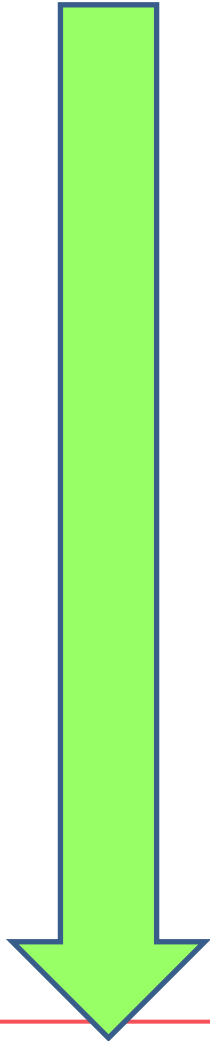
# Procurement

- Public sector takes the lead (solicited procurement)
- Two stage procurement process recommended – why? Should there be exceptions?



# PPP Procurement Stages

Page 23



- **Market development**
  - Soft market consultations
  - Promotion
  - Investor conferences
- **Stage 1. Shortlisting**
  - Project description
  - Qualification criteria
  - Due diligence
  - Selection of shortlisted firms
- **Stage 2: Proposal**
  - Issue bidding documents:
    - Request for Proposal
    - Project Information Memorandum
    - Data Room
    - Draft Contract
  - Technical and Financial Bids (usually 2 envelope)
  - Bid evaluation
- **Award and contract close**

## Stage 1: Pre-Qualification

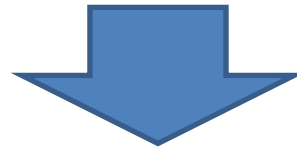
Issue Request for  
Expression of  
Interest (EoI)



Receive EoIs



Evaluate and Select  
Shortlist



## Stage 2: Proposal

Issue Request  
for Proposals  
(RfP) incl.  
Draft PPP  
Contract



Clarifications  
and Final RfP  
and Draft  
PPP Contract



Submission  
of Proposals  
(Technical  
and  
Financial)



Evaluation  
and Selection  
of Preferred  
Bidder



Contract  
Award

# Evaluation Criteria for Value for Money

Compliance	Pass / Fail	Score
<b>Technical Proposal</b>		
Technical solution	Score x Weighting	Weighted score
Performance Specifications	Score x Weighting	Weighted score
Design	Score x Weighting	Weighted score
Management Plan	Score x Weighting	Weighted score
Construction Plan	Score x Weighting	Weighted score
Operation and Maintenance Plan	Score x Weighting	Weighted score
Investment Schedule	Score x Weighting	Weighted score
Implementation Plan	Score x Weighting	Weighted score
Acceptance of Risk Allocation	Score x Weighting	Weighted score
Legal, including draft Project Agreement mark-ups	Score x Weighting	Weighted score
Etc.		
Technical Score		Total Technical Score
<b>Financial Proposal</b>	Price Converted to Score OR Price Formula	Total Financial Score
<b>Total Economic Advantage / Value for Money</b>	Total Technical Score x Weighting + Total Financial Score x Weighting	Total Score for Econ Adv / VfM



## Case Work

- What kinds of consortiums/firms would be appropriate partners? What selection criteria for pre-qualification?
- How can the project be marketed to attract these kinds of consortiums/firms?
- What could be the main bidding variables?
- Making a procurement plan



## Final Project Case Presentations



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