PPP Project Cycle and Procurement

Anthony Smith
Chairman PPP Experts
Head of Legal Dept. Altra Capital
Lead Specialist United Nations PPP Team of Specialists
Former Head of United Nations PPP Readiness Task Force
Anthony.lawsmith@gmail.com

Nay Pyi Taw, Myanmar
26-27 December 2014

Overview

- PPPs differ from traditional procurement:
  - Significantly longer contractual term
  - Significantly more complicated
  - Significantly greater value
  - Significant risk transfer to the private sector
  - Significant shift in public sector duties and responsibilities
  - Significant shift in private sector market
Overview

• Due to these differences, it is important that the project is very carefully prepared before going to the market.
• Also, the continuing relationship means that the public sector must be vigilant throughout the process to ensure that it is getting what it needs (not necessarily what it wants!)

PPP Projects
Lifecycle Stage Framework

Investment Decision
Procurement Decision; PPP or conventional

Strategic Assessment | Options Analysis | Business Case | Procurement Strategy | Competitive Tendering | Design & Build | Operations & Upkeep | Asset Handback
Concept & Feasibility | Validation & Planning | Implementation Design, Build Operate
Project Inception

• What is the procuring authorities objectives?
  • To implement socially important projects;
  • To increase the involvement of private investments into the economy;
  • To provide effective use of public sector assets;
  • To improve the quality of goods, works and services provided to the public.

Project Inception

• Identify the need:
  – Social and/or economic benefit;
  – Not politically motivated

• Can it be afforded?

• How should it be procured?
  – Traditional procurement
  – PPP
Project Inception

• Is the legal and Regulatory framework enabling?
  – PPP Readiness Assessment
  – PPP Law?
  – Regulation amendments

• Is the institutional framework there to enable successful PPPs?

Project Inception

• Does the procuring authority have the capacity to deliver?:
  – Internal Team
  – Transaction advisors:
    • Legal
    • Technical
    • Financial
Pre-Feasibility Analysis:

the depth of study needed to enable the decision to be made as to whether to Proceed further

- Needs and options analysis
- Legal feasibility
- Technical feasibility
- Scoping social/environment safeguards analysis
- Preliminary financial viability including expectations of required Government financial support
- Institutional capability analysis
- Identification of next steps required
Identification of next steps required

- Assessing the resources required to complete the project preparation process;

- Identifying parties responsible for completing next steps;

- Determining the roles and responsibilities of involved parties;

- Determining the time frame required for completing project preparation;

Stage 1: Feasibility
Feasibility Stage Considerations

- The Technical Feasibility of the Design, Construction, Operation and Maintenance of the Project needs to be established. This will include Cost Estimates for each stage of the lifecycle and the modelling of cost of Risk Scenarios.
- A Project Delivery Strategy and Supply Market Soundings that demonstrate deliverability and market interest need to be undertaken.
- It is important that realistic estimates of Demand and Revenue are established that fully take into account regional and global development scenarios.
- The Socio-Economic Benefits of the project need to be quantified and modelled to allow a Project Business Case to be produced that demonstrated an acceptable Cost/Benefit Ratio.
- A Shadow Financial Model need to be developed that clearly demonstrates the Project’s Value-for-Money

Feasibility

- Needs Analysis
- Options Analysis
- Due Diligence on the Project
- Value for Money Assessment:
  - PSC
- Economic Valuation
- Building the team
- Procurement Plan
Needs Analysis

**Assessment**

- The existing level of service – does current service fall short of requirements, and if so where are the shortfalls?

**Examples**

- Unserved demand (under capacity), for example, roads sector a highly congested route resulting in long waits and trip times.
- High operating costs (operating inefficiency).
- Poor standards of service (sometimes related to under capacity), for example roads sector unsafe road due to poor design or poor maintenance.

**Assessment**

- Desired level of service

**Examples**

- level of demand to be met (units of service to be provided or handled), service standards to be achieved
Options Analysis

<table>
<thead>
<tr>
<th>Option for meeting the service need</th>
<th>Related PPP modes and examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use a non-asset solution – Focus on management practices or demand management to meet or reduce the need.</td>
<td>Consider management contract</td>
</tr>
<tr>
<td>Improve existing assets – Upgrade or refurbish existing assets</td>
<td>add additional lanes to an existing road.</td>
</tr>
<tr>
<td>Use new assets – Develop new infrastructure to meet the service need, where existing assets or non-asset solutions are not possible or insufficient.</td>
<td>New asset solutions are the most complex option, and will typically require the greatest commitment of resources. For example, BOT.</td>
</tr>
</tbody>
</table>

Legal Viability

- The legal enabling environment for a PPP project has to be right. It is:
  - The whole system of laws, regulations and law enforcement of that country and/or region that may be relevant to, or have an impact on, a PPP project and on how the project is implemented and enforced

- Examples of areas to be checked:
  - Procurement Law:
  - Planning Law
  - Property Law
  - Employment Law
  - Company Law
  - Tax Law
  - Competition Law
  - Foreign investment law
  - Budget Law
Technical Viability

• The engineering and technical aspects of the project;

• The manageability of the operational aspects of the project;

• Preliminary assessment of all likely technical and operational risks.

Economic Viability

• The cost recovery/income generation assumptions of the project;

• Likely private sector interest in the project;

• The overall project cost (capital + operations + maintenance costs);

• Possible financial risks;

• Identification of likely economic benefits generated by the project;
Financial Viability

• An assessment of the level of user charges or other payment needed to make the project attractive to the private sector;

• An initial test of whether and how much government support is likely to be needed (for example, through VGF funding);

• ‘What-if?’ tests of different project designs and alternative project outcomes.

Institutional Capacity Analysis

• Are roles and responsibilities within Government clear and not overlapping?

• Does the Procuring Authority have the necessary experience and expertise to deal with a PPP project?

• Are there sufficient documentation and guidance to assist the procuring authority?

• Is government sufficiently ‘joined up’?

• Is there sufficient access to external expertise?
Stage 1: Pre-Procurement

- **Planning:** It is essential effective planning is carried out prior to a procurement. This planning should include:
  - consultation with stakeholders about what is needed and the budget that is available to fulfil the need
  - engagement with the market to understand the solutions that may be available and to get feedback on how the requirement may be best met
  - establishment of effective governance arrangements and resourcing plans
  - if necessary because the department does not have the necessary expertise, appointing advisers to help ensure novel or difficult projects are established on a sound footing

- **Developing Specifications**
  - It is important to provide sufficient detail to allow the market to respond to requirements, whilst leaving room for innovation where appropriate.

- **Project and Programme Management (PPM)**
  - Must be led by senior official with access to appropriate skills;

- **Investment Appraisal:** business case must justify the procurement process
Stage 1: Pre-Procurement

- **Market Engagement**
  - It is always useful to involve the market in the early processes around establishing requirements, procurement strategy and approach;

- **Procurement Strategy**
  - The procurement strategy should contain options analysis and recommendations around important issues, e.g. the number and nature of the suppliers required the length and type of contract; contract and supplier management issues.

Stage 2: Procurement
Procurement: Underlying Principles

- No discrimination between economic operators (tenderers);
- Transparency and openness;
- Confidentiality of information provided by economic operators;
- All public procurement to be undertaken by public contract.

Stage 2: Simple Procurement Stages
Stage 2: Procurement

e.g. Competitive Dialogue

Competitive Dialogue

- A process of discussion and review leading to a refinement of the tendered solution and the requirement;
- Carried out between the individual tenderer and the authorised representatives of the Contracting Authority;
- Information gathered from tenderers is confidential and cannot be divulged to other tenderers;
- Process covers broad package and is not solely price based, but price is a key indicator and comparator to the contracting authority’s own benchmark;
- When the Competitive Dialogue procedure ends, tenderers re-submit their final proposal taking account of redefined solutions emerging from the dialogue.
CD: Award Criteria

- Most economically advantageous offer according to a number of criteria, e.g.:
  - Quality of proposal
  - Skills, capability and experience of contractors
  - Overall price
  - Understanding of business needs
  - Use of technology
  - Off-site support
  - Quality plan
  - Consideration given to health and safety issues
  - Risks and contingency arrangements

CD: Pre-Qualification

- Issue of Contract Notice, Information Memorandum and Pre-Qualification Questionnaire (PQQ).
- Expressions of Interest will be evaluated against the pre-qualification criteria.
- These criteria represent tests of good standing (probity), technical competence and financial strength or capability.
- Once the evaluation of the responses is completed, the applicants should be notified as to whether their candidacy is to be taken forward or not.
- If number of successful candidates exceeds (5), a further round of selection will be required.
CD: Short Listing and Preparation of ITT

- Requires short listed bidders to focus on the particular project and make a further submission to prove their specific resolve, commitment and approach to the project.
- This will not involve a costed submission though high level costings are normally requested.
- Responses should be evaluated on their particular merits taking account of this submission. For practical purposes, the number of bidders to whom an ITT is issued should not exceed 3.
- Before issuing the ITT, the original benchmark costings should be updated.

CD: Tenders

- Tenderers are normally allowed a period of 2 to 4 months to submit their responses.
- Meetings may be held to clarify any grey areas in the ITT document.
- Competitive Dialogue will be held separately with bidders upon receipt of submissions.
- Once the dialogue phase is concluded, bidders will be given time to revise and re-submit their tenders as best and final offers. (BAFOs).
CD: BAFO Evaluation

- BAFOs should be ranked according to which is the most economically advantageous offer.
- This requires that tests be carried out to ensure that the BAFOs are affordable and offer value for money.
- If the preferred BAFO passes the tests of affordability and value for money, the bidder submitting it should be appointed the preferred bidder.
- Bidders whose BAFOs are rejected should be notified accordingly and reasons given why they were not chosen.

CD: Preferred Bidder

- At this stage, the competitive process ends and both parties should work to proceed towards contract signature by settling any minor outstanding contractual details.
- This stage should not take longer than 2-3 months and contract signature should lead directly to the commencement of works.
- It should be made clear to the preferred bidder that no further discussions of commercial substance are anticipated at this stage.
Financial Close

• The stage where all matters between the Procuring Authority and the Preferred Bidder have been settled and the documentation is agreed.
• Documentation signed by all parties and the Construction/Development phase commences

Development/Construction Phase

• The period from financial close to completion of construction;
• Usually 1 to 3 years;
• Public Sector role moves from analysing and negotiating to Management and Monitoring
• Construction of infrastructure should be managed to ensure that there is no significant risk transfer back to the Procuring Authority
Operation Phase

• Commences after completion of construction and issue of completion certificate by the Independent Engineer
• May be snagging or ‘punch list’ of construction items remaining

Operation Phase

• Involves:
  – Partnership management is concerned with structures of accountability and how the procuring authority and the private party relate to each other;
  – Service delivery management, e.g. the systems and procedures designed to manage risk and performance;
  – PPP agreement administration; the administrative processes required to ensure that all the procedures contained in the PPP agreement and all the documentation relating to the PPP agreement are effectively managed.
Handback Phase

- On Expiry of the term of the PPP Agreement, the infrastructure is usually handed back to the Procuring Authority;
- Handback Condition;
- Condition Surveys.

Thank You

Any Questions?

Anthony Smith
Chairman PPP Experts
Head of Legal Dept. Altra Capital
Lead Specialist United Nations PPP Team of Specialists
Former Head of United Nations PPP Readiness Task Force
Anthony.lawsmith@gmail.com

Nay Pyi Taw, Myanmar
26-27 December 2014