

PPP PROCEDURES



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PPP
PROCEDURES
Ireland, Poland, Portugal, Turkey, UK

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In this procedure, the public entity is obliged to assure equal and non-discriminatory treatment of all interested parties, act in a transparent fashion and in accordance with the rules of fair competition.

- 2) Procedure according to the PPP Act: if the remuneration of private partner, above all, comes from the public entity.

In this case, the most appropriate procedure for selecting the private partner seems to be the competitive dialogue, which is set out in the Public Procurement Act (Art. 60a – 60e). The competitive dialogue procedure is in its nature flexible and adapted to the implementation of complex projects. In order to apply the competitive dialogue procedure, the two premises must be met jointly:

- When it is impossible to award the contract through the unlimited or limited tender procedure, as due to the particularly complex nature of the contract, the subject of the contract cannot be described (in PPP indeed we have a situation in which requirements cannot be determined objectively),
- The price is not the only selection criterion for the best bid.

New PPP regulations promise to be more flexible and liberal. On one hand, the Acts give the opportunity to perform variety of PPP projects in a flexible way but on the other hand, the Acts do not give the guidance for the interested parties how to do PPP projects.

That is why, Centrum PPP set up a special working group of experts on public-private partnership to develop PPP Project Realization Roadmap for Public Entities based on the PPP Act and the Act on Concessions for Construction Work or Services. The roadmap contains set of guidelines and will show public entities how to implement PPP projects step-by-step.

The Roadmap is enclosed below.

PPP Project Realization Roadmap for Public Entities based on the PPP Act and the Act on Concessions for Construction Work or Services

1. Identification of needs and possibilities to fulfil them by means of realizing a PPP project in a given field (estimated time: 2-4 months)
 - a. Appointing an implementation team responsible for project realization: dividing competences and duties, developing internal procedures, creating a preliminary agenda for the team.
 - b. Identifying purposes of project realization and collecting data crucial for future analyses.
 - c. Preliminary analysis of possibilities and methods of fulfilling needs; diagnosis of state of the public entity's assets and financial resources, which could be used to fulfil the needs identified. If the entity owns a piece of real estate proper for the project realization, the evaluation of the legislative status of this estate shall be conducted (e.g. if the zoning plan for the estate exists).

- d. Choosing an advisor who shall assist in performing some of the analyses, provided that, at the preliminary stage a public entity would not be able to perform the said analyses (optional).
 - e. Identifying external project partners, e.g. a city, commune, control and monitoring unit; defining the impact of project realization on particular organizational units, whose opinion or approval for the project realization will be required.
 - f. Evaluating project compliance with the strategy of the public entity.
 - g. Evaluating possibility to enlist a private partner's cooperation by the public entity.
 - h. Internal training for public participants of the project realization process.
 - i. If preliminary analyses indicate that the project can be realized within the PPP formula, a comparative preliminary analysis of the profitability of the project shall be carried out (whether the traditional path or PPP formula is more profitable).
 - j. Social consultations, preliminary evaluation of conditions concerning obtaining approval for the project realization.
 - k. Creating a schedule for the project preparation.
2. Choosing an advisor (estimated time: 1-3 months)
- a. Defining the scale of advisory needs: what kind of advisors do we need and what do we need them for? What should be expected from them? Advisors: technical, legal and financial.
 - b. Defining the method of choosing advisors – according to the Public Procurement Law.
 - c. Criteria for choosing legal, financial, technical and other advisors (according to the Public Procurement Law):
 - capability to realize the commission,
 - experience in realization of similar projects, including the given field,
 - declaration to abide by the Advisor's Code of Good Practice.
 - d. Running the process of choosing the advisor/advisors and signing an agreement with the advisor/advisors. If the price becomes the only evaluation criterion in the public procurement procedure, one shall define the conditions of participation in the procedure concerning advisor's experience and knowledge as well as persons able to realize the commission, and on such basis decide about the possibility to make a price quotation.
3. Performing analyses in order to choose the best possible form of project realization (estimated time: 2-6 months)
- a. Market research of prospective investors:
 - defining the initial interest of private entities,

- analysis concerning methods of realization and financing of similar investments in Poland and abroad,
 - initial contact with the chosen representatives from the private sector in order to evaluate their prospective interest in participation in the project,
 - initial contact with financial institutions in order to define prospective possibilities of financing the given project being realized by private entity.
- b. Defining boundary conditions for investor's participation.
- c. Defining the desired key efficiency indexes.
- d. Verifying initial project assumptions (market, financial, organizational, and legal).
- e. Preparing technical assumptions (estimation of capital costs, operational costs and preparation of the PPP project realization schedule, also including the traditional method).
- f. Comparative analysis of project realization methods: PPP vs. the traditional method. Public Sector Comparator. Research in the range of the following suggestions concerning comparative fields (economic-financial advisor conducts analyses basing on information prepared and submitted by public entity and technical advisor):
- expected schedules of both procedures,
 - evaluation of total costs planned (schedules, investment and exploitation costs),
 - identification, allocation and evaluation of risks concerning the proposed solutions (including e.g. defining tax implications),
 - impact of the defined and divided risks on financial costs of the project,
 - calculation of current net value of two analysed options,
 - evaluation of the impact of the given undertaking on the current and future budget situation of public entity,
 - evaluation of quality aspects (availability, service quality, surplus value – Value for Money),
 - complex evaluation of both solutions based on the above-mentioned elements.
- g. Choosing the legal form for project realization:
- institutionalized PPP – public-private cooperation within separate legal entity (SPV),
 - contractual PPP – cooperation based on contractual relations, as a commission being a public procurement or a concession, or other form of project realization,
 - other solutions.
- h. Defining reporting standards for the project (informational requirements).

- i. Defining informational policy assumptions for the project and the range of cooperation with stakeholders.
4. If economic analyses (point 3.e) and legal analyses (point 3.f) point PPP as the best form of project realization, the next step of choosing the private partner shall be taken.
 - a. Forms of choosing a private partner:
 - based on the Public Procurement Law – choosing the proper procedure (e.g. competitive dialogue described in details in point 5),
 - based on the Act on Concessions for Construction Work or Services as of 9th January 2009 (procedure described in details in point 5).
 - b. Basing on the chosen form of project realization, advisors prepare tender documentation and create criteria for choosing the private partner.
5. Choosing the private partner (estimated time depends on the procedure chosen: ca. 4-6 months)

EXAMPLE 1 - COMPETITIVE DIALOGUE

1. PREPARATION TO CARRY OUT COMPETITIVE DIALOGUE

- Appointing Tender Committee (of Competitive Dialogue);
- Preparing description of needs and requirements of functional-utility program;
- Collecting documentation crucial for carrying out dialogue and preparing proposals by private partners (including a proposal related to the real estate);
- Preparing a project risk allocation proposal;
- Preparing dialogue documents (i.e. dialogue regulations, draft PPP agreement);
- Preparing a commission announcement and its publication;
- Providing private partners with essential information about the project;
- Verifying fulfilment of dialogue participation conditions by the Tender Committee and choosing dialogue participants;
- Creating the list of dialogue participants.

2. COMPETITIVE DIALOGUE

- Sending an invitation to participate in the dialogue to private partners qualified for the dialogue;
- Carrying out the dialogue separately with all private partners: opening meeting, presenting general assumptions of the partnership in all its ranges by the private partner, i.e.: legal, financial and technical, visiting the area of planned investment, discussing general partnership assumptions, presenting

constructors of the preliminary general proposal by the private partner, discussing the preliminary general proposal of private partners, submitting possible reservations and suggestions by the commune, presenting the preliminary detailed proposal by the private partner, discussing the preliminary detailed proposal;

- Informing partners about dialogue completion, providing private partners with criteria of offer evaluation possibly changed during the dialogue.

3. SIGNING THE AGREEMENT

- Sending an invitation for submitting offers with SIWZ (terms of reference) to constructors;
- Choosing the most beneficial offer;
- Announcing the choice of private partners who submitted offers;
- Final settlement of possible disputes;
- Signing the agreement;
- Announcing granting the procurement.

EXAMPLE 2 - ACT ON CONCESSIONS FOR CONSTRUCTION WORK OR SERVICES

Rules and procedure of signing the concession agreement

- i. Concession provider (public entity) – initiates the procedure by publishing an announcement about the concession.
- ii. Interested private entity – submits a motion for signing the concession agreement (applying for participation).
- iii. Concession provider – invites the candidates who submitted motions in compliance with the requirements specified in the Act on Concessions for Construction Work or Services to participate in negotiations.
- iv. Negotiations may concern all aspects of the concession (technical, legal, and financial). The protocol of the course of negotiations is public.
- v. Concession provider invites candidates who participated in negotiations to submit their offers and provides them with a description of the concession conditions.
- vi. Concession provider chooses the most beneficial offer on the basis of criteria defined in the concession conditions. The criteria may include the following: period of concession, grade of co-financing, costs of using the subject of the concession, quality of works completed, technical value, aesthetic and functional properties, environmental aspects, profitability, date of completing the concession.
- vii. Concession provider informs bidding parties about the winning offer.

- viii. Concession provider signs the agreement with the chosen bidding party which becomes the concessionaire.
6. Project closing: financial and legal
 - a. Confirmation of the public party's financial commitments as to the agreement.
 - b. Signing agreements with financial institutions or other entities by the private entity in order to provide resources for project realization.
 - c. Up-date of the financial model (including verification of the acquired financing conditions).
 - d. Obtaining administrative decisions, essential for the project realization.
7. Project realization (executing the agreement) (estimated time depends on the content of the agreement)
 - a. Managing the agreement:
 - monitoring and control of the public entity over project realization: meeting deadlines, costs and quality of the works completed,
 - evaluation of project success measured according to efficiency indexes defined in the agreement,
 - formal acceptance of works/services,
 - payment monitoring – making payments for private partner by the public party (if applicable),
 - recurring verification of payment for the private partner in relation to the specified rules within the payment mechanism.
 - b. Managing changes.
 - c. Controlling the public entity in the exploitation phase of the undertaking: keeping set parameters, abiding by the set quality parameters for performing services, verifying the set financial and economic efficiency indexes.
 - d. Project promotion. Proper communication with stakeholders.
 - e. Possible renegotiation of the agreement in case of circumstances impossible to predict at the time of signing the agreement.
8. Completing the project stage of the undertaking.
 - a. Managing the results.
 - b. Clearance of the undertaking.

PPP PROCEDURES IN THE UK

There are various types of PPPs, established for different reasons, across a wide range of market segments, reflecting the different needs of governments for infrastructure services. Although the types vary, two broad categories of PPPs can be identified: the institutionalized kind that refers to all forms of joint ventures between public and private stakeholders; and contractual PPPs.

Concession Model PPPs

Concessions, which have the longest history of public-private financing, are most associated with PPPs. By bringing private sector management, private funding and private sector knowhow into the public sector, concessions have become the most established form of this kind of financing. They are contractual arrangements whereby a facility is given by the public to the private sector, which then operates the PPP for a certain period of time. Often at times, this also means building and designing the facility as well. The normal terminology for these contracts describes more or less the functions they cover. Contracts that concern the largest number of functions are "Concession" and "Design, Build, Finance and Operate" contracts, since they cover all the above-mentioned elements: namely finance, design, construction, management and maintenance. They are often financed by user fees (e.g. for drinking water, gas and electricity, public transport etc. but not for "social PPPs" e.g. health, prisons, courts, education, and urban roads, as well as defence).

Private Finance Initiative (PFI) Model PPPs

Another model is based on the UK Private Finance Initiative (PFI) which was developed in the UK in 1992. This has now been adopted by parts of Canada, France, the Netherlands, Portugal, Ireland, Norway, Finland, Australia, Japan, Malaysia, the United States and Singapore (amongst others) as part of a wider reform programme for the delivery of public services. In contrast to the concession model, financing schemes are structured differently.

Under PFI schemes, privately financed contracts for public facilities and public works cover the same elements but in general are paid, for practical reasons, by a public authority and not by private users (public lighting, hospitals, schools, roads with shadow tolls, i.e., payments based on traffic volume, paid by the government in lieu of tolls).

The capital element of the funding enabling the local authority to pay the private sector for these projects is given by central government in the form of what are known as PFI "credits".

PFI is not just a different way of borrowing money; the loans are paid back over the period of the PFI scheme by the service provider who is at risk if the service is not delivered to standard throughout. The local authority then procures a partner to carry out the scheme and transfers detailed control, and in theory the risk, in the project to the partner. The cost of this borrowing as a result is higher than normal government borrowing (but cheaper when better management of risks and efficiency of service delivery is taken into account). Currently, it does not always appear as borrowing in public accounts; although how it appears in public accounts may be changing as well.

Contract and Risk Transfer Based PPP Models

There are a range of PPP models that allocate responsibilities and risks between the public and private partners in different ways (see Diagram 4). The following terms are commonly used to describe typical partnership agreements:

Buy-Build-Operate (BBO): Transfer of a public asset to a private or quasi-public entity usually under contract that the assets are to be upgraded and operated for a specified period of time. Public control is exercised through the contract at the time of transfer.

Build-Own-Operate (BOO): The private sector finances, builds, owns and operates a facility or service in perpetuity. The public constraints are stated in the original agreement and through on-going regulatory authority.

Build-Own-Operate-Transfer (BOOT): A private entity receives a franchise to finance, design, build and operate a facility (and to charge user fees) for a specified period, after which ownership is transferred back to the public sector.

Build-Operate-Transfer (BOT): The private sector designs, finances and constructs a new facility under a long-term Concession contract, and operates the facility during the term of the Concession after which ownership is transferred back to the public sector if not already transferred upon completion of the facility. In fact, such a form covers BOOT and BLOT with the sole difference being the ownership of the facility.

Build-Lease-Operate-Transfer (BLOT): A private entity receives a franchise to finance, design, build and operate a leased facility (and to charge user fees) for the lease period, against payment of a rent.

Design-Build-Finance-Operate (DBFO): The private sector designs, finances and constructs a

new facility under a long-term lease, and operates the facility during the term of the lease. The private partner transfers the new facility to the public sector at the end of the lease term.

Finance Only: A private entity, usually a financial services company, funds a project directly or uses various mechanisms such as a long-term lease or bond issue.

Operation & Maintenance Contract (O & M): A private operator, under contract, operates a publicly owned asset for a specified term. Ownership of the asset remains with the public entity. (Many do not consider O&M's to be within the spectrum of PPPs and consider such contracts as service contracts.)

Design-Build (DB): The private sector designs and builds infrastructure to meet public sector performance specifications, often for a fixed price, turnkey basis, so the risk of cost overruns is transferred to the private sector. (Many do not consider DB's to be within the spectrum of PPPs and consider such contracts as public works contracts.)

Operation License: A private operator receives a license or rights to operate a public service, usually for a specified term. This is often used in IT projects.

The options available for delivery of public services range from direct provision by a ministry or government department to outright privatization, where the government transfers all responsibilities, risks and rewards for service delivery to the private sector. Within this spectrum, public-private partnerships can be categorized based on the extent of public and private sector involvement and the degree of risk allocation.

In UK public sector there is no legal requirement to adopt a uniform PPP project implementation procedure– all the different sectors engaged in PPP form of procurement, for example, the defence sector, education sector, housing sector, the ICT sector and so on, have created their own terms of engagement in terms of PPP projects, with input and support from regulatory, legislative and executive authorities. Although the first standard PFI contract was published in 1999, the different sectors have developed their own forms of contractual arrangements to suit their particular requirements⁴.

In many sectors, there are non-statutory guidance which provides model documentation and advice in relation to the PPP processes.

⁴ There is however a requirement to comply with the guidance available in a HMT Treasury publication – Standardisation of PFI Contracts (SoPC – currently at version 4 published in 2007) for PFI contracts

However, as a general overview,, the PPP project procedures follow 3 key phases -

4. Pre-Delivery Phase leading upto Contract Award
5. Delivery Phase leading upto Operational Delivery of the project and
6. Operational Phase

It may be noted that there are procedural differences between life-cycle based PPP projects and service based PPP projects.

Life-cycle based PPP projects relate to complete projects including design, finance, construction and operation, where as service based PPP projects relate only to the operating phase performing services and providing products for the duration of the contract (see Diagram 1).

1. Pre-Delivery Phase

At this initial phase, the primary objectives of the process are:

- a. Opportunity or Need Identification leading to Outline Planning
- b. Opportunity or Need Assessment leading to Approval of Outline Business Case
- c. Bidding Process leading to Contract Award

An indicative time line of this phase has been highlighted in Diagram 2.

1.1 Opportunity or Need Identification leading to Outline Planning

The objective at this stage is to identify opportunities or indeed the need areas where the public sector can achieve benefits through appropriate use of cooperation with the private sector. It is important to recognise that this is often a politico-technical decision.

Once an area has been identified, an outline business case for such cooperation has to be prepared which must give due consideration to key financial, technical and legal elements. The outline business case would also assess the necessity to prioritise the opportunity or need.

An outline business case may contain the following elements:

- e. Objective

- f. Scope
- g. Key milestones
- h. Indicative budget
- i. Indicative programme
- j. Key risks

1.2 Opportunity or Need Assessment leading to Approval of Outline Business Case

At this stage, the objective of the process is to identify whether the PPP model is suitable and appropriate for the realisation of the opportunity or the need, in relation to other alternative solutions that may be available.

The process to achieve this objective will involve:

- Identification of alternative approaches
- Assessing the options on the merits of feasibility (technical, legal, operational & logistical), economics (cost benefit analysis) and risk
- Selecting the best option based on the assessment outcome
- Developing the PPP outline business case if indeed PPP is the best option and finally
- Gaining approval of the outline business case from the appropriate authority

At the end of this process, the approved PPP outline business case becomes the “bible” of the project, containing a fairly detailed description of the preferred solution, key risks and risk mitigation tools and the success or the performance criteria for the project.

1.3 Bidding Process leading to Contract Award

The PPP procurement or bidding process, leading to contract award, is underpinned by EU Public Contracts Regulations 2005 (L/N177/2005) which enacted from 03 June 2005. The fundamental principles of this regulation are:

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

An indicative procedural flow chart is presented in Diagram 3.

1.3.1 Preparing for the Bidding Process

The procuring Authority will have to undertake a number of key steps in preparation of the bidding process. These include:

- Appointment of project procurement team
- Appointment of advisors (where appropriate)
- Determine whether to adopt a 2 stage or a 3 stage selection process
- Determining a detailed timeline
- Preparation of a Deliverable Specification and Value for Money benchmark (the comparator)
- Issue of Contract Notice, Information Memorandum and Pre-Qualification Questionnaire (PQQ)

1.3.2 Pre-qualification

The pre-qualification process broadly consists of the following steps:

- Evaluation of the Expressions of Interest against the Pre-qualification criteria. The Pre-qualification criteria usually includes tests of probity (good standing), technical competence and financial capability. These criteria are of general nature and independent of each other.
- On completion of the evaluation process, the tenderers are notified the outcome of their expressions of interest.

- Where the number of successful tenderers exceeds 5, a further round of selection will have to be undertaken.

1.3.3 Short-listing and preparation of ITT

At this stage of the procurement process, the key elements are:

- c. The short-listed bidders are required to focus on a specific project and make a further submission to prove their specific resolve, commitment and approach to the project. This usually will not call for a fully costed submission, although high-level costings are normally requested for.
- d. The responses from the tenderers are evaluated on their particular merits taking account of this submission. The number of successful bidders, at the end of this evaluation is usually restricted to 3 to which the ITT is issued.
- e. The procuring authority often takes this opportunity to update the original benchmark costings before issuing the ITT.

1.3.4 The Tenders

This stage comprises of the following key elements:

- After issuing the ITT, the tenderers are often allowed 12 – 18 weeks to submit their responses.
- Mid-tender meetings may be held with the tenderers if necessary, particularly if there are in grey areas in the ITT which require clarifications.
- Competitive Dialogue⁵ will be held separately with the tenderers upon receipt of their submissions.
- Once the dialogue phase is complete the bidders will be given an opportunity to revise and resubmit their tenders as “Best and Final Offers” (BAFOs).

Competitive Dialogue Process

⁵ The Procuring Authority will often use the Competitive Dialogue process as part of the bidding procedure especially for large and complex projects.

For large and complex projects, a competitive dialogue process is often used. The procuring authority will appoint an “ad hoc” committee to undertake the competitive dialogue on behalf of the appointing Authority.

The essence of Competitive Dialogue procedure is:

9. It is a process of discussion and review leading to a refinement of the tendered solution and the requirement;
10. This is carried out between the individual tenderer and the authorised representatives of the Contracting Authority;
11. Information gathered from tenderers is confidential and cannot be divulged to other tenderers;
12. Process covers broad package and is not solely price-based ñ but price is a key indicator and comparator to the contracting authority's own benchmark;
13. When the Competitive Dialogue procedure ends, tenderers re-submit their final proposal taking account of re-defined solutions emerging from the dialogue

1.3.5 Evaluation of BAFOs

The evaluation process for the BAFOs follow the key fundamental principles of public procurement and the following are the key elements at this step:

- BAFOs are ranked according to the most economically advantageous offer
- The ranking is undertaken on the basis of affordability and Value for Money tests
- If the preferred BAFO passes the requisite tests, the bidder submitting the BAFO is appointed as the “Preferred Bidder”
- Tenderers whose BAFOs are rejected are notified accordingly and reasons are given why they were not chosen.

1.3.6 The Preferred Bidder

At this stage, the competitive process ends and both parties work to proceed towards contract

signature by settling any minor outstanding contractual details.

This stage should not take longer than 12-18 weeks and contract signature (i.e. contract award) should lead directly to the commencement of works (the Delivery Phase).

No further discussions of commercial substance are anticipated at this stage

1.4 Contract Award leading to Delivery Phase

After signing the Contract, the key elements that require to be dealt with prior to the commencement of the delivery phase include:

- i. Confirmation of the business case with the private sector partner
- ii. Completion of negotiation of finance agreements, insurance, dispute avoidance/resolution processes, guarantees, payment mechanisms etc.
- iii. Establishing and implementing monitoring and performance regimes
- iv. Preparation and agreement to a detailed project delivery plan

After signing the Contract and establishment of the project delivery plan, the project delivery phase commences.

2. Delivery Phase

The delivery phase of PPP projects will be similar to construction projects in the sense that it has to go through the design and construction stages with the added element of financing where private financing options are utilised.

At this phase, the PPP project will have to be implemented in accordance with the approved and agreed business case. Key elements at this phase will include:

- i. Implementation of project delivery plan
- ii. Ensuring public sector monitoring and supervision
- iii. Establishment of risk-based contingency plan

- iv. Depending on the type of the PPP project (see Diagram 4) design, construction and delivery of the project.

The key outputs and objectives for this stage will focus on a timely provision of a fully commissioned and operational facility and services, ensuring the necessary *fit* between the service requirements, the payment mechanisms and the contractual monitoring regime.

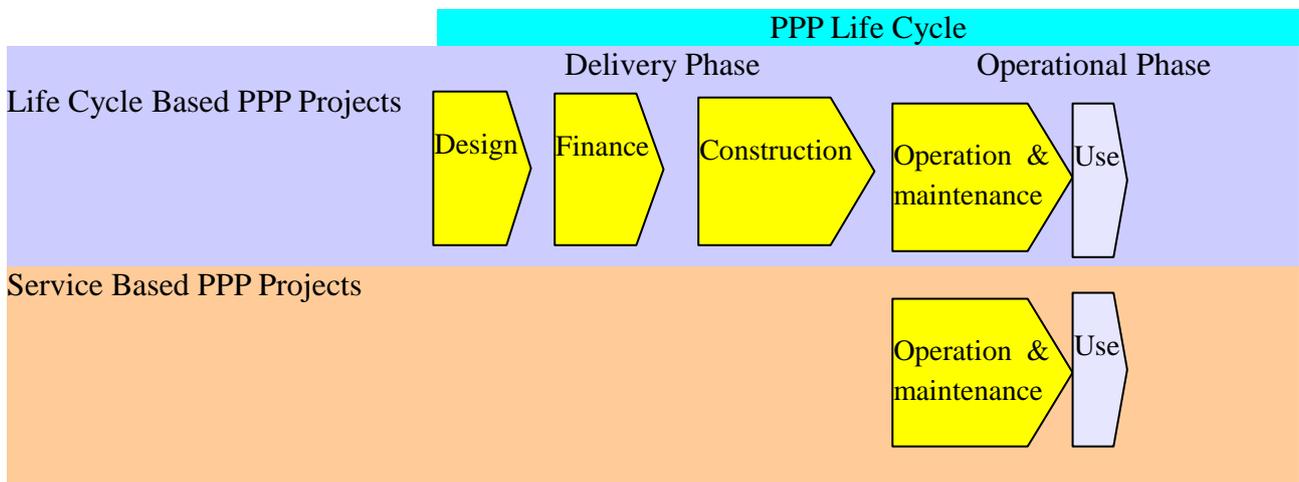
For service contract PPP projects this phase will not apply.

3. Operational Phase

At this stage, for both services based PPP and life cycle based PPP projects, the focus is on providing the service outcomes as expected in the approved business case for the PPP project.

The monitoring and payment mechanism for the private operator will depend on the type of the PPP project (see diagram 4).

Diagram 1: Life-cycle based and Service based PPP projects⁶



6 Girmscheid et al 2007

Diagram 2 - Indicative time table for PPP process: Upto Contract Award

Pre-Delivery Phase

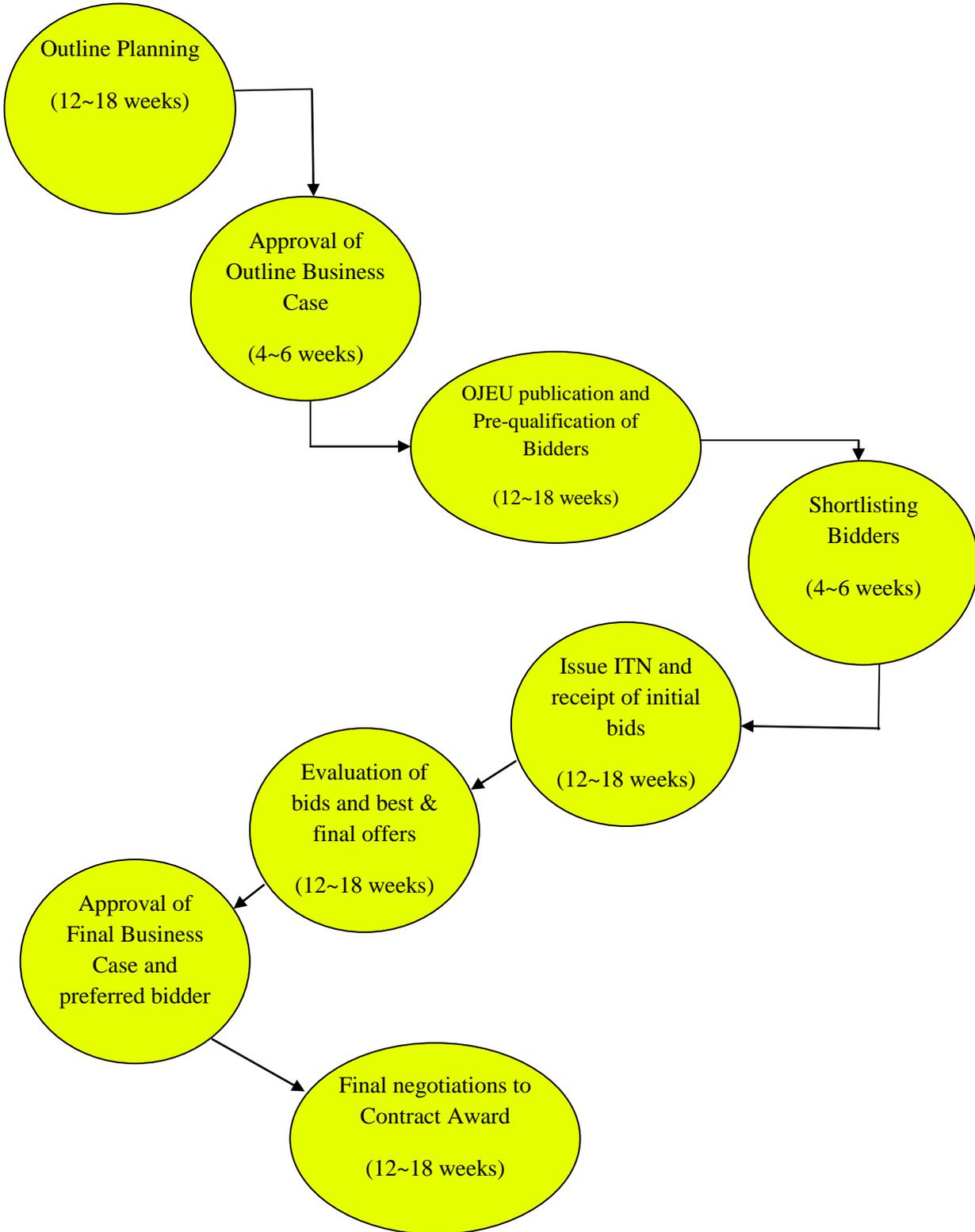


Diagram 3 – The PPP Procurement Process

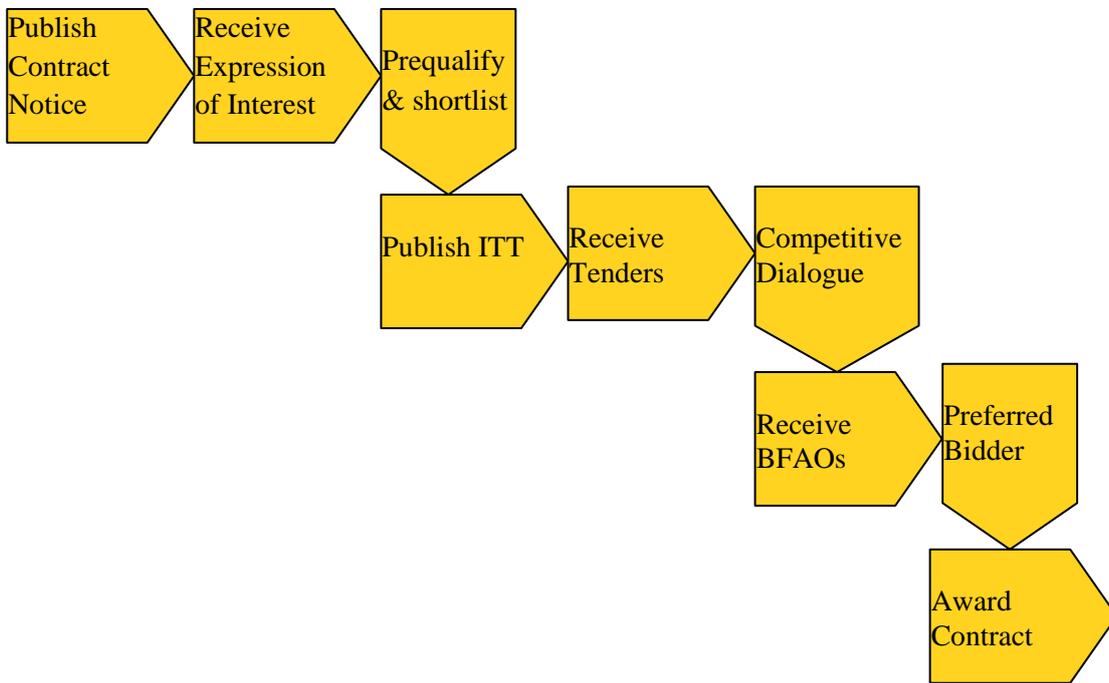
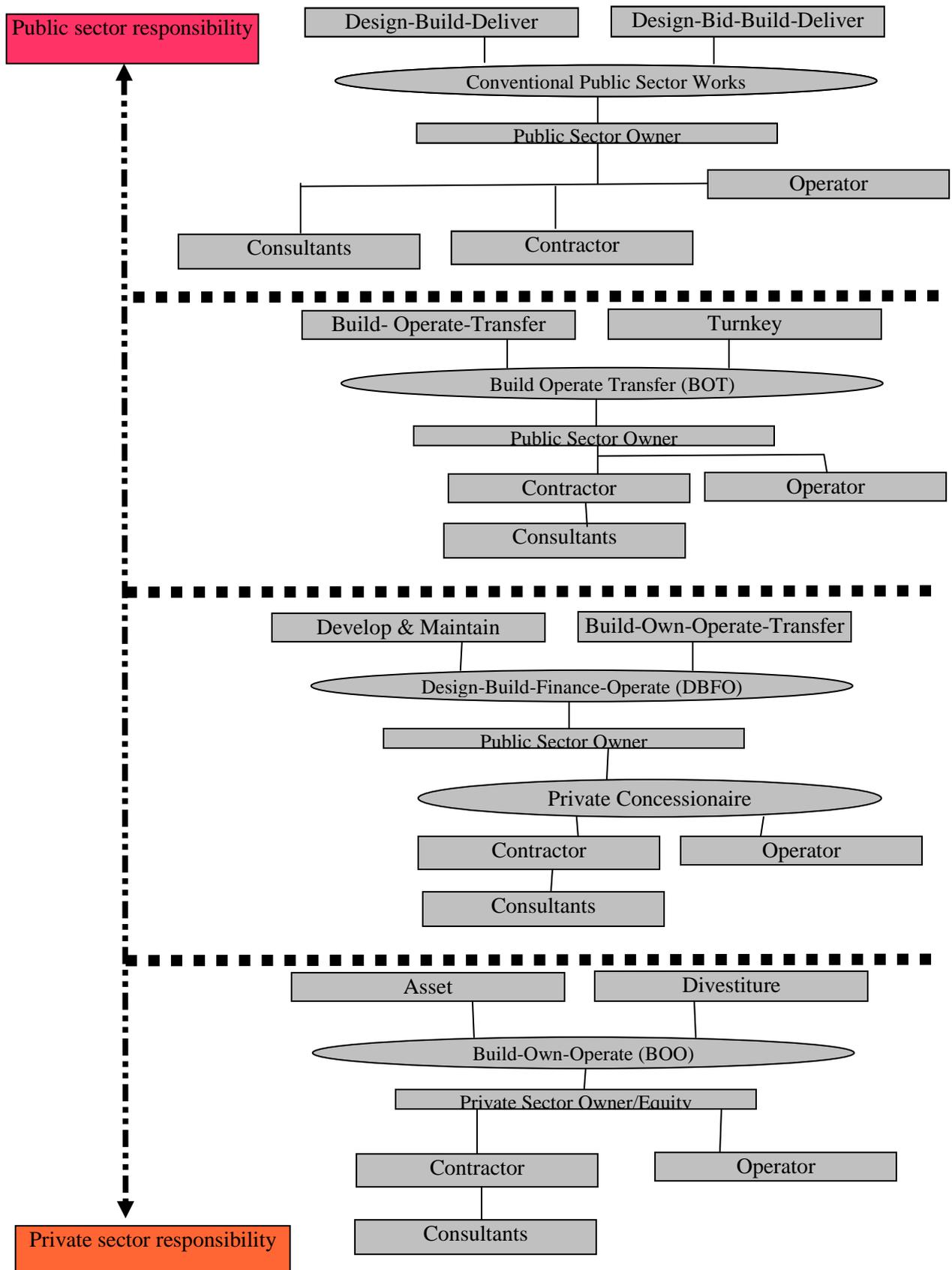


Diagram 4 : Different types of PPP projects⁷



7 Information distilled from "Guidelines for successful public private partnerships", EC, 2003

PPP PROCEDURES IN PORTUGAL

1- INTRODUCTION

Public Private Partnerships (PPPs) are contractual agreements, usually long-term ones, between a public entity and a private partner, with the objective of implementing a project and/or providing a service.

According to Portuguese legislation, PPPs can be defined as a long-term collaboration agreement between a public and a private entity, which comprehends (or may comprehend) the design, construction, financing and operation of public assets or the provision of public services, through the use of financing and management skills of the private sector, ensuring an adequate and effective transfer or sharing of risks from a whole-life-cycle analysis perspective.

Therefore in a PPP scheme, the private partner supports the implementation cost of the public infrastructure, namely the design and the risks (all or a substantial part of them) related to its construction and operation. On the other hand the public partner sets specifications on the design, technical, and operational characteristics of the project and determines the private partner's payment mechanism, either through payments linked with the availability of the project/service and the compliance with its output specifications, or through direct payments by the end-users of the service provided.

However PPP are complex matters, not only because of the dimension of construction projects underlined, but also due to the particular nature of the long-term contract, apparently with opposite objectives: to satisfy the public need; and to guarantee adequate profit to the private partner, within adequate risk distribution. Next chapters describe the steps and the mandatory procedures required to launch and monitor PPP projects in Portugal.

2- LEGAL FRAMEWORK

The evolution of PPP legal framework in Portugal in the past twenty years was characterised by the emergence of casuistic legislation produced to match different projects and services in accordance with the investment needs of each economy sector. This occurred, for instance, in 1997 highway concession programmes, in several contracts in the environment sector and in first generation of hospitals, launched in 2002.

However, the need to establish uniform criteria to contract PPP projects, the financial boundaries imposed by Government budgetary laws, and the mandatory recommendations of

Portuguese Supreme Audit Court, when controlling those projects, led the parliament to establish in 2003, a new legal framework applicable to every sectors and types of partnerships, through the Decree-Law 86/2003. After 3 years of application, that Law was amended by the Decree-Law 141/2006, with the objectives of:

- Better promote relations between Sector Public Departments and Ministry of Finance;
- Increase transparency, rigor and tight control in the preparation and development of projects;
- Clarify the risk sharing model between the public and the private partner;
- Regulate procedures related to contractual changes and resolution of disputes;
- Promote flexibility and efficiency in the conception of the PPP business model.

This legal framework also draws the basic characterising elements that must be assured in a relationship between a public and private entity, in order to enable it to be considered as a PPP:

- a) Long-term contract of continuous execution
- b) The satisfaction of a collective need by the private partner;
- c) Risk sharing between the public and the private entity;
- d) Total or partial financing assured by the private partner (a contract is considered a PPP whenever public expenditure is higher than € 10 million, and total investment is above € 25 million);
- e) The private partner should assume a substantial part or all of the risk involved in the operation activity.

Beyond this main legal framework, Public Entities should also comply with the Budgetary Law regarding financial expenditure (Decree-Law nº 91/2001) as well as with the Code of Public Contracts in respect to the procurement phase of the project.

Other general principles regarding transparency, contracting procedures and relations between private and public authorities also apply, under national and community laws:

- I) the **principle of equal treatment** requires the avoidance of any discrimination on the basis of nationality or any other criteria that can't be objectively justified;
- II) the **principle of transparency** means that public partner should advertise the intention to procure PPP projects, in order to ensure conditions of fair competition among potential bidders, avoiding monopolistic or quasi-monopolistic situations;
- III) the **principle of proportionality** means that any requirements imposed in the tender documents should be the necessary and the appropriate to reach the objective of the contract (avoiding requirements for technical, professional or financial capabilities disproportionate or excessive);

- IV) the **principle of concurrency** means that the technical specifications, controls, qualifications and certifications required in another member state of the European Union, should be recognized as equivalent;
- V) the **principle of protection of private rights** means that all decision, specially the rejection of a proposal, should be properly reasoned and may give rise to judicial protection of the private partner, including injunctions or provisional lawsuits;
- VI) the **principle of protection of the public interest** means that all decision-making concerning the award of the contract should respect national and Community law, and ought to minimize financial public contribution as well as to maximize the needs of the users for the enhanced public service that the private partner must assure;
- VII) the **principle of protection of the environment and sustainable development**, meaning that any decision or action should contribute to maintain the environmental balance, and to preserve natural resources for the sake of coming generations.

In Portugal, unlike most other countries, there isn't established a entity, with the aim of identifying projects that can be delivered via a PPP scheme, promoting their implementation and providing support and assistance to Public Departments in the context of all necessary procedures up to the end of the service or deliver of the public asset. However, there are Public Agencies that has jurisdiction and legal obligations regarding these matters, namely:

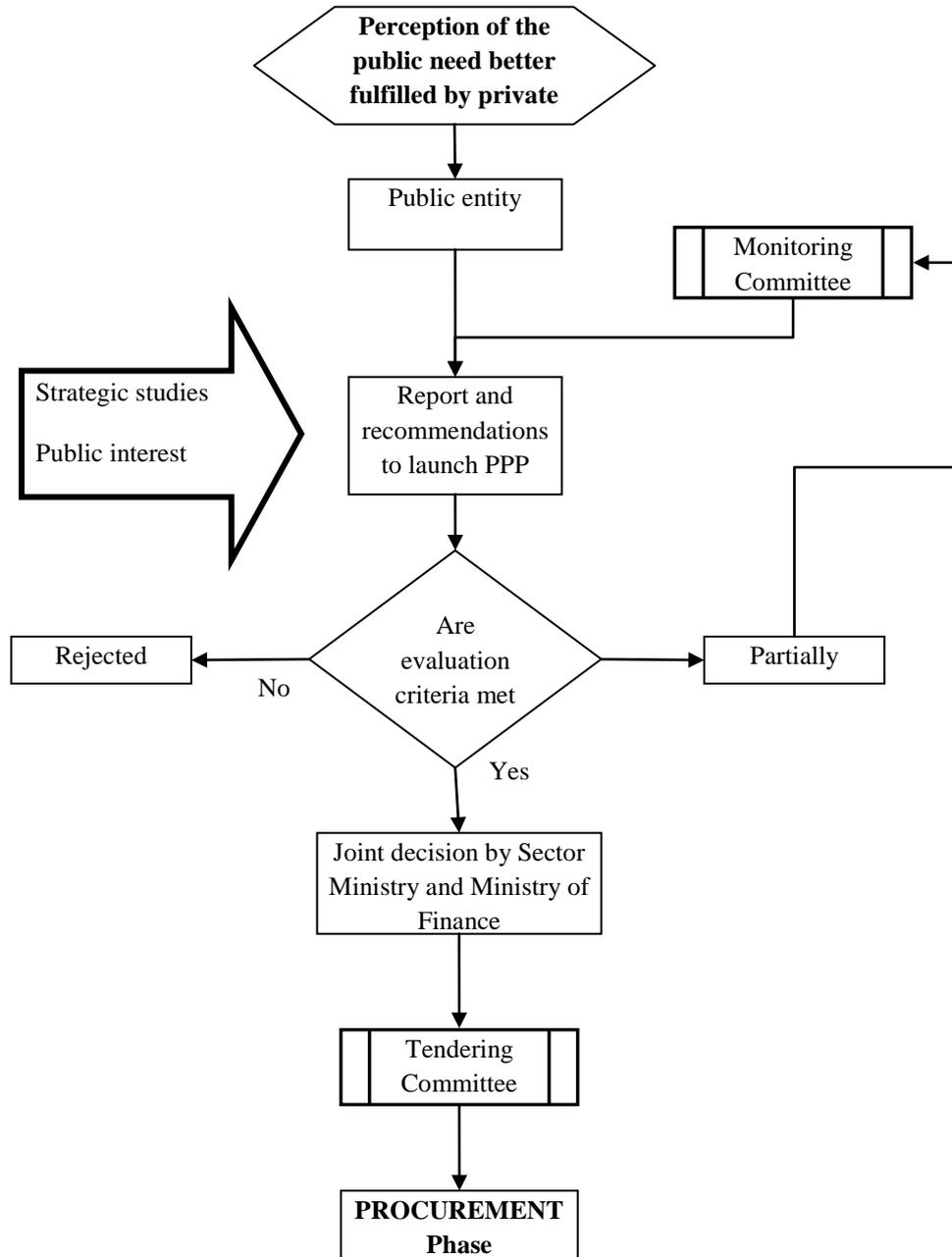
- Parpública, SA (State holdings), with the aim of providing technical support to the Ministry of Finance regarding the project evaluation and procurement process;
- GASEPC (Monitoring Office under State Secretary of Treasury), in order to control budget and multiannual expending regarding all PPP projects and Public Owed firms;
- EMPS (Partnerships for Health), depending on the Sector Minister, with the aim of promoting and implementation PPP projects in health sector (hospitals, health care systems, rehabilitation Centres)
- GPERI (Office under Public Works and Transportation Ministry), with the aim of monitoring PPP projects in transportation sector (roads, railways, ports, airports);
- IGF (Finance General Inspectorate), with competencies in the inspection and control of economical and financial aspects regarding PPP projects;
- TC (Supreme Audit Court) that provides external control of PPP, auditing the application of national and community laws, according to INTOSAI (International Organization of Supreme Audit Institutions) guidelines.

Recently, due to debt crisis, the two major Portuguese political parties have created a mixed workgroup composed by specialists to evaluate value for money of all PPP projects planned, in the procurement phase, or even those in the pre-construction stage. The aim is to decide whether

each project should continue or be suspended.

3- MANDATORY PROCEDURES TO IMPLEMENT PPP PROJECTS

In spite of most decisions to launch PPP projects are still sustained by political agenda as they emerge from electoral programs of political parties, particularly when construction of important infrastructure is involved, Portuguese legal framework requires a rational validation regarding the various aspects of the process, as shown in the following flowchart:



For each project or service, the public entity in charge of the investment must prepare a report with the recommendations and the justification to launch a PPP, submitted to the Monitoring Committee, which will evaluate the consistence of the following items:

a) Political framework of the project regarding political program of the Government;

According to this criterion, the intention of the public entity to launch a PPP project for fulfilling some public need or service, should comply with the political goals and/or programme and must have the support of the national Government.

b) Macro and micro-economic evaluation of the project's costs-benefits ratio and its public interest;

To argue the public interest of the PPP is to present financial, technical, socio-economic, political and legal reasons for which the construction of a specific infrastructure or the provision of a precise service should be fulfilled through a public private partnership. At the same time, a cost-benefit analysis should take place in order to verify the need for the project, the consent of the public opinion, the enhancing of economic activity, the technical supporting criteria such as the improved quality of services expected by the end-users, the forecasted cash flow (simulated with different internal rates of return), the scale of the project as a necessary attribute to offset transaction costs, the complexity of the construction project as the ingredient that compels private partner to look forward to unique project solutions, etc.

However, it is important to preserve the concept of public service during the procurement, construction and operation phase of the PPP project. Therefore, evaluating and monitoring Committees investigate if public service can be fully provided by the private partner, as sometimes public agencies prioritize instrumental objectives (budget control, environmental protection, infrastructure development), and forget the main objective of the PPP project, that is the public service to be provided.

c) Business model proposed, including financing sources and legal configuration;

The expectant business model for the PPP should be carefully prepared. This includes the definition of the PPP scheme for the whole life cycle of the project which may include design, construction, financing, maintenance and operation, as well as its legal configuration. In fact, according to Portuguese law, PPP agreements can be categorised into two different types: the contractual and the institutionalised. Contractual PPP indistinctively includes diverse modalities of association or collaboration between public needs and private investment, with the contracts being able to assume the forms of: public works concession, concession of public service, continuous supply, provision of services, management, and just collaboration, whenever the object of the contract is the use of an existing facility or infrastructure not belonging to the public partner. The institutionalised type includes all forms of joint-ventures between public and private stakeholders, where partners constitute themselves as a new commercial society with different types of responsibility and capital ownership.

The delimitation of the financial sources is essential to the implementation and the success of a PPP project. While in the traditional forms of public procurement, the public sector possesses and maintains its infrastructures, financing them via taxes or loans, and leaving for the private the risk and financing capability only during the construction period, in PPP schemes the private partner is responsible for the initial financing of the project, maintenance and operation costs as well as the delivery of relevant services during the lifetime of the contract.

For that reason the nature and risk of financing are totally different in the case of PPP projects. In this case the invested funds only return to the private partner through periodic payments by the public partner or by the end-user of facility, normally at the end of the construction and the beginning of operation period, and normally are directly linked to the performance of the services offered, which the private sector must maintain up to certain quality standard, until the last day of the contract.

According to their financing scheme, PPP projects fall into the following categories: projects that are designed, built, financed and operated by the private sector and their cost is repaid directly by the public sector through periodical rents (hospitals, schools, prisons); projects with capital cost shared between the State and the private sector, whilst the private partner has the total responsibility for the project (transportation infrastructure with subsidized investments); financially self-sustained projects, financed by the private sector, with investments repaid via revenues (e.g. tolls) from the end-users.

To launch a successful PPP project, the public partner should know exactly and beforehand the precise payments that have to be made during the contractual period, which are related with the feasibility of the financial model. For that reason, the model must contain: the sustainability of the financing sources including public funding requirements; the fiscal revenues and the affordability of accounting benefits for the public entity; the equity return on private investment; the financial soundness of the investment (bankability); the basic and alternative scenarios for revenues, expenses, losses and profits according to macro-economic variables (inflation rate, interest rate, economic expansion/retraction); the refinance necessities, etc.

d) Quantification of the public sector comparator to justify the option for the partnership;

The public entity should prove the *Value for Money* of the project, i.e the evaluation of the economy, efficiency and effectiveness of the partnership contract in comparison with the traditional public procurement model of providing the same goals, without recurring to private financing or management. This is called the Public Sector Comparator (PSC), an assumption of what the Net Present Cost (NPC) of the project would be if acquired through conventional

public sector procurement, which is then compared to the NPC estimated to the PPP project submitted to scrutiny.

Therefore the PSC estimates the hypothetical risk-adjusted cost if a project were to be financed, owned and implemented by a public entity, and should be calculated in accordance with the required output specification for the project, and the proposed risk allocation reflected in the contract and based on the most efficient form and means of government delivery. If PSC is higher than estimated NPC of the PPP procurement, the project should go forward; on the contrary, if PSC is lower than the estimated NPC of the PPP procurement project, alternative procurement routes, namely the public traditional model, ought to be found, as they offer better value for money.

On the other hand the PSC can be adopted as the key management tool in the quantitative assessment of value for money during the procurement process and the evaluation and comparison of bids, because it seeks to establish a 'base business plan' of what public sector provision of the project might look like. However, once decided the procurement model, it is important to recognize that the evaluation of the bids against the PSC is not a pass/fail test.

Since the PSC has been determined in an early stage of the project life cycle, to provide a preliminary cost and support during the development of the business case, and to assist with determining the budget estimate for funding, it is important to notice the full PSC can only be determined in a post design phase, with the output of the complete specifications. The PSC should also be changed with caution after bids are received, if it becomes apparent that a significant component has been mispriced or omitted.

e) Compliance with the Budget Law regarding multiannual expenditures;

Once PPP projects bring long-term financial risks to the State, public entities should comply with the budgetary discipline of the State Budget Law (Decree-Law n° 91/2001), as well as guarantee the sustainability of the expenditure regarding the multiannual budgeting system of the Public Sector, taking in account the annual limits imposed by the Government each year.

Due to the absence of universal rules for reporting and accounting expenditure resulting from PPPs, Portugal follows the recommendations of the EUROSTAT, concerning qualification of assets (public or private), and the stock of public debt (on or off-balance sheet). Therefore, and regarding concession models, the asset is considered private as long as less than 50% of project's revenues come from payments by the public sector (including investment subsidies); regarding PFI models, the expenditures will be considered off-balance, as long as the risk of construction, and at least, the risk of service availability or the risk of demand, are transferred to

the private entity.

- f) Establish harmonious and balanced contractual relationships, in respect to risk allocation and sharing, with a rigorous definition of contract's scope;

The PPP business and financial model should guarantee adequate revenues to the private partner, as well as profits related to the investment made and the level of risk taken. Therefore, if revenues (and profit) are below the expectations, all the operation can be put in risk; on the other hand, if they are much higher than expected, the public entity (and all tax-payers) loses its share of the extra profits, which goes exclusively to the private partner. In consequence, the risk allocation matrix and the risk mitigation practices should be adequately managed in order to minimize this type of occurrences.

Furthermore, risks must be allocated as a result of the better capabilities to manage them, and the contract should stipulate an effective risk transfer to the private partner. So, preferentially public entity should be responsible for supervision and monitoring the execution of the project, while construction, operating, management, financing and availability / demand risk should be allocated to the private partner.

Below is presented a typical risk allocation matrix between public and private partner in the most recent PPP roadway projects launched in Portugal:

| RISK | PUBLIC | PRIVATE |
|--|---------------|----------------|
| Design | | X |
| Land Acquisition (after expropriation being declared by State) | | X |
| Environment Compliance (corridors defined before tender) | | X |
| Operation and Maintenance | | X |
| Market/Demand (availability payments) | X | |
| Latent Defects | | X |
| General changes in law | | X |
| Force majeure | X | |
| Competing facilities (not previous planned) | X | |

 Shared risk, but mostly assumed by one of the partners

- g) Ensure transparency in the public tendering procedure by establishing careful evaluation criteria (factors and weight), as well as discipline in the negotiations stage;

The intention of this measure is to assure transparency in the procurement process of the PPP project, according to the European Community Rules, by giving adequate publicity to the weights, factors and sub-factors of the bids evaluation matrix.

- h) Forecast the possibility of non awarding, with minor responsibility to the public partner, in the case of suspension or cancelled procedure due to political or other major reasons;

The Portuguese law assure the possibility of termination the procurement process, in any phase, due to major reasons, like public interest, force majeure or political motivations. The intention of this measure is to protect the public entity from the payment of large compensations to bidders if these situations take place, by considering the possibility of its occurrence in the contract, as well as its consequences.

- i) Careful definition of all scenarios of possible non-compliance by the private partner, through the adoption of guarantees, penalties and the right to the termination of contract

Once the project is launched and the operation phase starts, public authorities are supposed to keep the public service running independently of what happen in the contractual relationship. So, in case of failure or non-compliance by the private partner, the contract should foresee some kind of guarantees and/or penalties. On the other hand, the private partner may use the weakness of public partner's position, whose mainly objective is to avoid service disruption, by strengthening its claim for a readjustment of the contract. Therefore, and because this position is obviously unavoidable, and is a legal right in commercial relationships, contract should predict specific risk mitigation procedures to avoid these type of situations.

4- PROCUREMENT PROCEDURE

In Portugal PPPs projects are submitted to public procurement law, because they involve public funds and the adjudicating entity is the public partner. The rules are the ones resulting from the transposition of the European Community Directives regarding the adjudication processes in water, energy, transportations and postal services sectors, as well as the code of public works contracting, supply and services (Law nº 18/2008, of January 29th).

The above legislation foresee are five different types of procurement procedures that contracting authority can choose depending on the estimated contract value, the type of the contract (public works, concessions), the nature of the public entity (government, municipality, public firm), or specific conditions (defence contracts, results of previous tenders processes, authors protection

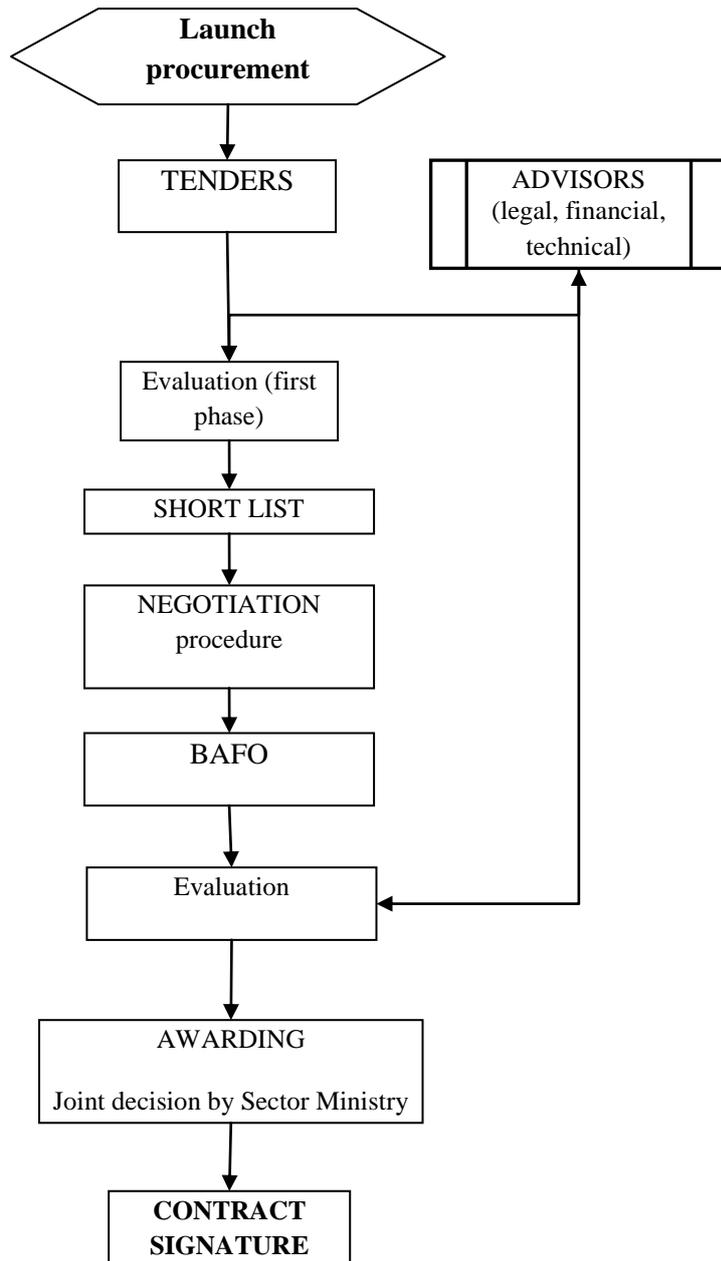
rights): open procedures, restricted procedures with or without previous publication of the contract notice, negotiated procedures and competitive dialogue.

However, due to high contract values normally associated to PPP contracts, especially those including the construction of heavy infrastructures, and to ensure transparency and increase competitiveness, PPPs procurement procedures are usually open to public and international competitors, with the contract notice publicised in the Official Journal of the European Community. After the first stage of the process, and based on the evaluation criteria (suitability of competitors, technical, financial, and legal aspects of the proposal), the best qualified tenders are chosen for a second stage of direct negotiations, concluded with the presentation of the “best and final offer” (BAFO) by the competitors included in short list. The contracting regulations regarding PPP tendering procedures, highlights, on one hand, the obligation to integrate in the tender documents an operation code with the rights and obligations of the parties established in the interest of the users of the service to be provided; on the other hand, the financial aspects of the project as well as all risks directly and indirectly assigned to the chosen contractual model, should be submitted to market competition.

Likewise, before the tendering procedure, the decision to launch a PPP (and the authorization for the expenditure) is enforced together by the Minister for Finance and the sector Minister responsible for the project. This decision must be taken based on a strategic study of the partnership, which should contain the tendering documents (general and special conditions, tender evaluation criteria, primary business plan), as well as a political, administrative, legal and financial evaluation of the project, expressing a positive judgment concerning the checking of all the assumptions contained in the framing legislation.

At the same time the conditions required to launch PPP projects are submitted to legal obligations to which the public entity is bound before starting the procurement procedure. Therefore, in order to transfer construction risk to the private partner, legal, environmental and urban licences and permits should be obtained by the public entity prior to the tender process.

The flowchart of the tender process can be as follows



According to the contracting law, the tender evaluation criteria should point to the most economically advantageous tender, or in some situations, to the lowest price. When the contract is to be awarded to the most economically advantageous tender, the Tendering Committee should examine and take into account not just economic parameters (like the Net Present Value) but other performance indicators of the project such as the quality of the services, the construction/maintenance/operation costs, the technical merit of the solutions, the aesthetic and functional characteristics, environmental aspects, delivery assets conditions, cost-effectiveness solutions, after sales service and technical assistance, delivery date and delivery period or period of completion of each phase, etc.

As referred in the precedent chapter, these criteria must be clearly specified in the tender documents, as well as the relative weight assigned to each evaluation factor.

5- PPP CONTROL AND MONITORING

During the execution phase of PPP projects, the Code of Public Contracts (Law nº 18/2008) highlights the duty of public entities to inform, monitor, survey and analyse contract changes, supervise benefit sharing, as well as monitor and evaluate the private partner performance.

Beyond this tight internal control PPPs are also submitted to the external scrutiny of the Supreme Audit Court in accordance with the interpretation of article 2 of the Law nº 98/97, which legitimises its broad powers (political, jurisdictional and technical) of surveillance, monitoring, control and audit all spending of public money in Portugal.

Therefore, and using the recommendations of INTOSAI beyond the confirmation of its legality, the Supreme Audit Court audits project expenditure, the future budget commitments, assesses the underlying motivations to the choice of the PPP model, evaluates the efficiency in the use of public money (the *VfM* of the partnership), the earnings achieved in comparison with the traditional public financing, analyses the transparency and validity of the procurement process, as well as the efficiency and effectiveness in the provision of public service. For that purpose it is necessary to analyse the overflow of contracts induced by the matrix of risk allocation and sharing between partners, namely, construction contracts, financing contracts, operation contracts, etc., in order to evaluate all the stages of partnership's life cycle since planning, procurement, contracting, physical and financial execution and operation.

According to international recommended practices, the Supreme Audit Court uses the 5P approach to audit PPP projects. The approach consists in verifying the contents of the five major steps through the development of the partnership, since the initial feasibility studies before launching the project, until assets delivery to the public entity:

- Planning (evaluating the validity and the rational of the support to the decision: value for money, alternatives, the base business case, PSC calculation etc.)
- Procurement procedures (transparency, draft tender documents, granting of permits previous to tender, number of bidders, etc.)
- Project (quality, cost, risks, etc.)
- Public position (affordability, risk sharing, control and monitoring systems, etc.)
- Project performance (service quality, financial sustainability, contract compliance, etc.)

During the operation phase, and particularly for those PPP projects which payment is based on the availability of the infrastructure the frequent analysis of Key Performance Indicators, is a tool used

either by the public entity responsible for the project, either by National Auditing and Regulation Authorities.

For instance, in respect to transportation projects, a datasheet has been developed which is available in a shared server of the Ministry of Transportation Planning Office, to be should be filled every month. The requested data is huge and includes several KPIs related to the evolution of the Partnership, namely:

- Economic/Financial indicators (Revenues/daily traffic, Revenues/Km, Operational Result/Km, EBIDAA/Km, equity and liquidity ratios)
- Quality indicators (availability, accident rates, environmental indicators, noise exposure)
- Operational activity (Diary traffic, number of Km/car, extension in operation, number of personnel/Km, etc.)
- Etc.

6- DISPUTE RESOLUTION AND TERMINATION OF CONTRACTS

Being PPP long term contracts disputable situations and the presentation of claims can occur during the life time of the project, namely when the risk allocation is changed by some particular event of a partner's responsibility. Therefore either general legislation or specific contract conditions should foresee their resolution through adequate mechanisms.

In the last few years, construction industry has encouraged the use of international commerce practices by arbitration as an attempt to avoid costly and timely courtroom litigation procedures for solving disputes, and Portugal is no exception. So in PPP contracts, particularly those projects involving heavy infrastructure construction, arbitration process is now used to settle disputes.

This is a formal dispute resolution procedure subject to statutory controls, whereby disputes are solved by a private arbitrator selected by common agreement, or by a private court, normally made up of three arbitrators, one appointed by each party and the third by common agreement. Arbitrators must have appropriate qualifications, work experience at the field and act impartially. During the arbitration process, arbitrators can call witnesses, require expert opinions and call the parties to testify, as well as other formal courtroom procedures.

Arbitration is voluntary, but once accepted by the disputing parties, or stated in the contract the final decision is binding, unless a break of procedures, fraud or conflict of interest can be proved, in which case the decision may be revised by a court of law. Accordingly, the final decision may be enforced by the courts if necessary. Nonetheless, there are arbitration systems where the decision can be submitted to a court of appeal.

The normal contract termination takes place by the end of the concession time, due to its expiration, conducting to the transference of the constructed assets to the public partner, provided they fulfill the required quality standards. But there are other forms of termination of PPP contracts:

First, by the will of the parts or mutual agreement if the contract is not performed at all, or is partially performed only. The public partner can also terminate the contract by invoking public interest, after one third of the contract duration (or after the time predetermined in the contract) has elapsed; in this case it has to assume the provision of the public service to the end users, as well as the rights and obligations of the private partner. In the case of the non-performance of the object of the contract by the private partner, the termination by default is also possible, as well as the temporary substitution (maximum one year) of the private partner by the public entity, in the management of the services within the scope of the contract.

Finally, *force majeure* events, in result of some extraordinary events not foreseen at the time of the contract award can also lead to its termination, due to an impossibility to perform contract obligations.

PPP PROCEDURES IN TURKEY

As a new public management in Turkey, we see that PPP projects play an important role for the constructions and establishment of the country.

In its simplest form, we can define the term “public-private partnership” as an arrangement in which a government and a private entity, for-profit or nonprofit, together perform or undertake a traditional public activity. In reality, it is a complex relationship between the public and private sectors often involving at least one government unit and a consortium of private firms created to build large, with high capitals, long lasting public infrastructure, such as an airport, highway, superstructures, or watering system project.

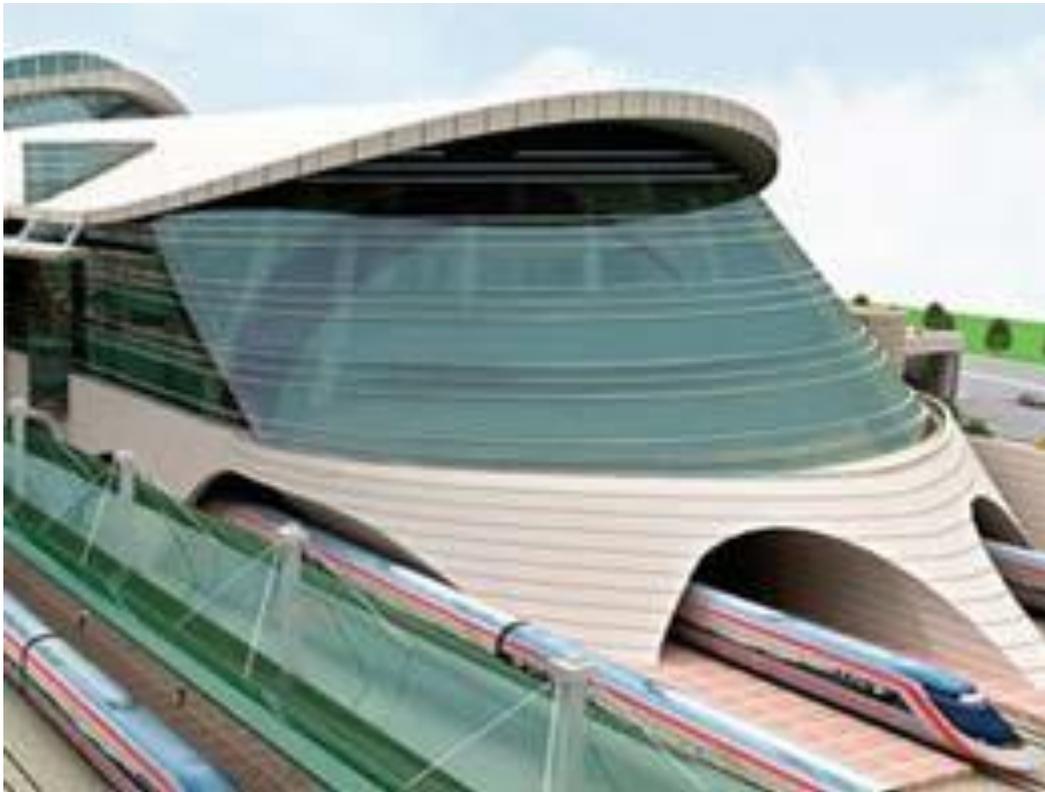
Both of the public and private sectors play important roles in PPP Projects. Here are some examples for PPP projects in Turkey which are either tendered or will be tendered in the coming months:



Map of Bosphorus Tube Gallery tendered in 2008 in Istanbul (TURKEY) by a PPP model of Build-Operate-Transfer, Source: http://www.yapi.com.tr/Haberler/tup-gecis-projesi-ankarada-kayboldu_82216.html



Source: <http://www.trt.net.tr/haber/HaberDetay.aspx?HaberKodu=8cb01923-414b-48bf-86dd-05a6c0a1e16a> North Marmara Highway Project containing the 3rd Bosphorus Bridge will be tendered very shortly as a Build-Operate-Transfer Model



High Speed Train terminal like a space base in Ankara will be tendered with a model Build-Operate-Transfer Model, Source : <http://blog.mircalem.net/tren-gari-gibi-uzay-ussu/>

Government has to be a clever buyer, meaning knowing what to buy, deciding from whom to buy it, and then determining what it has bought; that is, preparing careful specifications as what is to be purchased, conducting a competitive procurement in a competitive market, and monitoring the contractor's performance.

Kelman discusses these many issues in detail:¹

- Candidate selection: services suitable for outsourcing;
- Source selection: sole source, limited competition, or open competition;
- Type of contract: fixed price or cost reimbursement; completion contract (performance contract) or best-effort contract;
- Contract for multiple provisions: delivery order, task order, or indefinite-quantity procurement;
- Contract incentives and modifications, and resolution of claims and disputes;
- Criteria for evaluating bids;
- Degree of allowable official discretion;
- Nature and degree of oversight.

Contracting is likely to be better than direct, in-house provision under the following circumstances:

1. the more precisely a task or result can be specified in advance;
2. the more easily performance can be measured and evaluated;
3. the more competition there is among potential providers;
4. the less the activity is core to the agency's mission;
5. the more the demand for service varies over time;
6. the private providers can hire people with the needed skills more easily than government can;
7. the private providers have greater economies of scale in producing the service.²

Strong commitment from the top is needed to build the capacity for effective contracting because of the complexity and challenges of public contract management.

I. Process design issues

- A. Public and private sectors should submit their bids in parallel, not in sequence.
- B. The public agency should have access to consultant help.

- C. An independent body should evaluate public-sector proposals and bids.
- D. The government purchaser and the government provider should be separate entities.

II. Cost Issues

- A. Government should not mandate private-sector wages or benefits.
- B. Government should not establish a minimum savings threshold.
- C. Using “avoidable cost” in the cost calculation favors the public sector; using “fully allocated cost” favors the private sector.
- D. Transaction costs should be either excluded or included symmetrically, viz., included for the public sector when current delivery is private and for the private sector when current delivery is public.
- E. Contract administration and monitoring costs should be either excluded or included symmetrically, like transaction costs.

III. Contract Administration

- A. If a contract is awarded to the public agency, the terms should be documented in a memorandum of understanding.
- B. The performance of the public or private contractor should be monitored.
- C. The contract terms for the public or private contractor should include a penalty for failure to perform, and the penalty should be imposed whenever justified.

Source: Adapted from Lawrence Martin, “Determining a Level Playing Field for Public-Private Competition,” presented at the Northeast Regional Conference of the American Society for Public Administration, New York, NY, October 29, 1999.

By Public-Private Partnership. Infrastructure projects are increasingly being built through them (PPPs). Unlike the general use of this term as mentioned above, PPP in this sense refers to an arrangement where government states its need for capital-intensive, long-lived infrastructure and the desired facility is built using a complex combination of government and (mostly) private financing and then operated by a private entity under a long-term franchise, contract, or lease. The payments are usually spread over twenty to 99 years and cover construction, operation, maintenance, and capital costs. Typical PPP projects are roads, bridges, airports, water systems, pipelines, and power plants, and prisons, stadiums, schools, and municipal buildings have also been developed through this method.³

WARNINGS ABOUT PRIVATIZATION

Critical concerns about privatization are both pragmatic and theoretical (or ideological, or philosophical). The pragmatic concerns cluster about the kinds of failures that sometimes occur under privatization:

1. Public officials fail to specify properly the full dimensions of a service to be purchased from contractors; this inevitably leads to misunderstandings and disputes.
2. They undervalue an asset to be divested, thereby short-changing their citizens.
3. They fail to conduct a proper competitive procurement or sale. Conflicts of interest in procurement are a constant danger in the purchasing process of both public agencies and private companies; vigilance and oversight are necessary. Sole-source procurement is not necessarily bad, but one resorts to it with caution and only after full justification.
4. They fail to monitor the performance of a private provider, thereby abdicating their responsibility and leaving an opening for an unscrupulous provider to cut corners and lower service quality.
5. They fail to penalize poor performance, perhaps because of failure to monitor properly or because of a cozy relationship between the monitor and the provider.
6. They fail to set and maintain performance standards in a voucher system; agents authorized to accept vouchers and provide services (e.g., schools, private housing) must satisfy certain conditions germane to the service.
7. They fail to maintain a competitive environment after privatizing by delegation (e.g., contracting and franchising), and therefore the incumbent provider gradually acquires and exploits monopoly status. Trading a public monopoly for a private one is not a prescription for better government.
8. They fail to protect current employees adequately. Privatization advocates counter these concerns by pointing out that while privatization can indeed be mismanaged in these ways, management of ordinary public services suffers from many of these same shortcomings; that is, poor management can sometimes be found whether government is managing public employees or the privatization process. It is not inevitable, however, and it is easier to manage a privatized service than an in-house one, asserts Mayor Stephen Goldsmith of Indianapolis.⁴ (When mismanagement occurs in the private sector, market forces tend to weed it out ruthlessly. This rarely happens in the public sector; public agencies that perform poorly are often given a larger budget in order to improve their performance.)

As for the last-listed concern, about inadequate protection of current public employees, proponents reply that (1) many effective policies are commonly used both to protect workers and to balance the public interest with the workers' interest;⁵ (2) this is a value judgment, and

public employees are not entitled to greater job security than the vast majority of taxpayers who work without the dual protection of public-employee unions and tenure under a civil service system.

Public-Private Partnership model, initially, the countries meeting the infrastructure investments referenced as a way to provide the financing needed to, while efficient business management skills of today benefit from the private sector, the public is coordination of investments, the overall planning, monitoring and policy-making in areas such as regarded as a model for understanding the public will be provided. General understanding of some of the goods and services generated by the evident public, these activities participation of the private sector is gaining momentum in recent years. The private sector in these activities participates in various ways. This participation in the simplest terms, food service, or may not be limited to simple services such as personnel services, private sector financing provided by, the construction was done by the private sector and also by the private sector goes back to run investments. Private sector public goods under the various headings and services that support the production of these applications as a Public-Private Partnership known. In our country, being implemented in the Build-Operate-Transfer, Build-Operate, Management Rights Period and models such as Build-Lease applications actually a Public-Private Cooperation example.

Our country is one of the first to implement the Public-Private Partnership model, although approximately the last 20 year period examined, the model is applied, the private sector participation can not reach the desired levels, which was realized in the first Public-Private Partnership projects observed that there is usually a variety of reasons, including risk-sharing problems. Indeed, except for applications in energy and air transport sectors, Public-Private Partnership projects, widely applied in another sector.

Today, infrastructure investments, traditional investments of public funds allocated to a large consumes part. Infrastructure investments in developing countries, especially to perform the necessary financial requirements, in recent years widespread use of Public Private Increase the interest in co-operation. State financial impossibilities in this way at least not perform due to lead the way for investments.

The size of these funds should be used for projects, funding, projects design, construction and operation of such projects, as well as the difficulties encountered in having complex structures, public administration is an important decision and implementation stages the study necessitates the establishment of infrastructure. For this purpose, regulations of various countries Public-Private Partnership model in accordance with the update path and just went to Public-Private Partnership projects have set up special units to operate. European Commission, the Public-Private Partnership model provides a lower lifetime project cost, more efficient risk distribution, increase speed of realization of investments, increasing service quality, efficiency of resources utilization, creation of new revenue sources, more efficient in the light of the positive features, such as the understanding of public management, Public-Private Partnership practices 4 fundamental role:

1. Provide extra capital,
2. Alternative management and develop practical skills,
3. Provide greater value to consumers and society in general,
4. To determine more accurately the needs and resources more effectively make use of.

These features, as well as many Public-Private Partnership model of society taxes collected from all of society benefit from some of the goods and services can generate the production of socially unjust practices into the use of it is mainly the cost of moving to and investment services to meet the beneficiaries and provided a fairer appearance are exhibited. Prepared with this bill, the new arrangements for the following subject titles carried.

Defining the Concept of Public-Private Partnership: Currently, under various names special sector participation in provision of public services is a new concept for our country Public Private Cooperation is provided under the name of regulation.

Public-Private Partnership Legislation: The bill, with a scattered Public-Private Partnership legislation is structured within the framework of a law and eliminating differences in the application process is available to all in a single developed.

Defining Public-Private Partnership Models and Model Flexibility Obligations: In our country, is still applied to BOT, BOO, Build-Lease and Operating Rights models defined within the framework of a single law, and also various types of these models also allow the implementation are provided.

Extending the scope by adding new sectors: Existing Public-Private Cooperation not regulated by legislation, education, culture and infrastructure in areas such as general administration of this are covered by the bill.

Obligations of Public-Private Cooperation Process on Criteria Lens: The project brought into the condition of feasibility study and the selection of a more defined and rational decision-making process should act altogether.

Center for Responsible Public-Private Partnership Projects Establishment of a Unit: Public-Private Partnership projects, a unit responsible for the coordination of the SPO is created.

Public-Private Partnership Projects within the Concept of Risk Obligations and Warranties Definition: Successful Public-Private Partnership projects, the basic, the first element of effective risk sharing, as mentioned in this Act. Public guarantees monitoring of financial obligations and liabilities that may occur due to the macro has been developed to be compatible with mechanisms for economic balances.

The striking economic shifts of the 80's ushered a new era for the world economy, where privatization became one of the most essential and indispensable financial reforms on the economic agendas of many nations. As being one of the fundamental tools of the free market economy, privatization has been on Turkey's agenda since 1984.

Privatization in Turkey, not only aims to minimise state involvement in economic activities

and to relieve the financial burden of State Economic Enterprises (SEE) on the national budget, but also contemplates the development of capital markets and the re-channelling of resources towards new investments.

Turkey, one of the fastest growing economies of the world has positioned itself as an attractive and promising investment environment through the implementation free trade principles and establishment of dynamic capital markets as well as offering liberal incentives facilitating transactions for international investors and exporters.

The fundamental transformation in Turkish economy has moved the country from an inward-focussed import substitution model towards an export led growth and industrial one. The East-West expansion of the world's geopolitical horizons has opened up a new era for Turkey with many promising opportunities for international investors. The investment opportunities in Turkey are particularly attractive in the framework of country's ongoing ambitious privatization agenda. The involvement and participation of international investors is highly encouraged in the massive privatization program. The privatization process in Turkey with a view of relieving the burden of state economic enterprises on the national budget, has proved to be an important source of funds for the government and brought tangible results and progress within this philosophy. Although this task has not been easy, many state-owned companies have passed to the private sector.

PROCUREMENT in PPP in TURKEY

The Turkish Government concluded that PPPs have the potential to play a pivotal role in supporting the accelerated delivery of strategic national infrastructure; yield long-term value for money for the Exchequer - a concept embracing efficiency, effectiveness and economy rather than just least cost; and ensure quality public services. The legislations for prosperity and fairness supports the PPP process and calls for the development of a clear framework to assess the appropriateness of PPPs for infrastructure projects and to guide their implementation, taking into account the wider economic, social and environmental objectives that should guide infrastructural development, irrespective of the procurement method followed. The creation of an environment supporting the development of PPPs extends beyond the application of contract law to the development of consensus and understanding of the main objectives of PPP including, in particular, the need for quality public services. Collaborative management styles and working practices should foster successful partnership in PPP projects. Partnership skills at project level are a critical element of the PPP agenda. The fundamental principles determining a successful PPP programme have emerged from the deliberations of the participants in the Public-Private Advisory Group. These principles are central to the achievement of the objectives and the optimum use of PPPs including the maintenance of genuine partnership in the development of Turkish's PPP programme. PPPs should be progressed within the context of national policy (as set out in the National Development Plan) particularly in relation to the timely and cost-effective delivery of economic and social infrastructure priorities and quality public services. PPPs should yield value for money for the Exchequer, which includes: allocating risks to the party best able to control and manage them; and maximising the benefits of private sector efficiency, expertise,

flexibility and innovation. Private finance in PPPs should be additional to public finance, complementing Exchequer resources in funding investment in public infrastructure and public services. The introduction and development of PPPs should take place within the overall process and structures of social partnership and should be managed in an open and transparent manner. PPPs should also be consistent with relevant EU requirements and with best industry and business practices and social partnership agreements.

PPP issues should be reviewed through the structures and systems currently in place for managing the PPP programme. It is essential to ensure a standardised approach consistent with this framework to the development of the PPP programme overall, while recognising the need for sectoral flexibility to accommodate diversity at project level. The inter-departmental group, reporting to the advisory group and drawing on private sector expertise as appropriate, should prepare discussion papers, address and resolve issues and make recommendations to the advisory group with the primary objective of establishing the degree of standardisation needed to create an attractive market for PPPs across all sectors of public capital infrastructure and public services. Where the implementation of recommendations requires a high-level policy decision, they should be submitted through the relevant Department to the responsible Minister and, where appropriate, the Minister for Finance. The experience and expertise available across both in the public and private sectors and from the social partners should be utilised to advance the PPP process. The PPP Unit in the Department of Finance should bring forward proposals for the priorities and work programme of the advisory group for their consideration. The important role of the social partners in bringing forward proposals to the advisory group is also recognised. The principles underpinning this process should be taken into account in the operation of any new structures for managing the PPP programme. The projects should be procured in an open and transparent fashion consistent with national and EU procurement rules and with the need to ensure effective competition. Opportunities to avail of e-procurement should be actively explored.

THE LEGAL FRAMEWORK

The principles, procedures, authorised agencies and other issues regarding privatization are all set out in the Privatization Law No. 4046, dated 1994.

The Privatization Law in essence, regulates the principles of privatization namely; to improve productivity in the economy and to reduce public expenditures. This Law,

- expands the scope of assets to be privatized,
- provides adequate framework, funds and appropriate mechanisms to speed up the privatization and restructuring processes,
- establishes a social safety net for workers who lose their jobs as a result of privatization,
- establishes the Privatization High Council and the Privatization Administration to facilitate the decision making process in the privatization endeavour.

The ‘Law Regarding Making Amendments in Some Laws and in the Decrees With The Force of Law Dealing With Establishment and Duties of the General Directorate Turkish National

Lottery' numbered 4971, prepared in order to speed up privatization, has been put into effect by being published on the 15th of August 2003. In the framework of the aforementioned Law, stipulations have been placed in order to accelerate privatization applications through the arrangements that have been made to the Law No. 4046. These include arrangements that have been made to privatize the Turkish National Lottery by way of handing out licenses for the planning, organizing and arranging of the draws of the games and those enabling the utilization of convertible bonds in the privatization of Türk Telekom.

Bodies Responsible from Privatization under Law No. 4046

Under the Privatization Law No. 4046, privatization process is carried out by two bodies:

- Privatization High Council
- Privatization Administration

The **Privatization High Council** (PHC) is the ultimate decision-making body for privatization in Turkey. The Council, headed by the Prime Minister, is composed of four ministers.

PHC nominates the organisations for privatization through taking state-owned economic enterprises in and out of the privatization portfolio and is responsible from the methodology and timing of the privatization procedures by approving the final transfer procedure of the organizations to real people or/and legal entities.

The **Privatization Administration** (PA) is the executive body for the privatization process. It is a legal public entity with an exclusive budget, reporting directly to the Prime Minister.

PA's major duties include the execution of PHC's decisions, advising the PHC in matters related to the transfer of SEE's (State Economic Enterprises) into or out of privatization portfolio and restructuring and rehabilitation of SEE's in order to prepare them for privatization.

Privatization Mechanisms

Privatization Methods

Companies within the privatization portfolio are privatized through the use of one or more of the methods mentioned below;

- ***Sale***: Transfer of the ownership of companies in full or partially, or transfer of shares of these companies through domestic or international public offerings, block sales to real and/or legal entities, block sales including deferred public offerings, sales to employees, sales on the stock exchanges by standard or special orders, sales to investment funds and/or securities investment partnerships by taking into consideration the prevailing conditions of the companies.
- ***Lease***: Grant of the right of use of all or some of the assets of the companies for a defined period of time.
- ***Grant of Operational Rights***
- ***Establishment of Property Rights other than Ownership***

- *Profit Sharing Model and other Legal Dispositions Depending on the Nature of the Business.*

Privatization of Public Services

Notwithstanding with the provisions of Law No. 4046, governing the strategic sectors, the operational rights of the following can be transferred;

- Administrations with national and supplemental budgets and their properties, (dams, lagoons, highways, hospitals, ports, etc.)
- Public Economic Enterprises offering public services as a monopoly
- Enterprises with national and supplemental budgets that are in the form of an exclusive monopoly and/or Public Economic Enterprises that serve within the framework of their original establishment tasks.

In order to be able to privatize the above mentioned public service organizations through a transfer of ownership, separate laws should be adopted for each.

Other Governmental Bodies in charge of Privatization

Privatization of some specific sectors is undertaken by different governmental bodies. Namely, the privatization of Turk Telekom is undertaken by an independent Tender Committee, Ministry of Transportation issues mobile licences and that of state banks are to be accomplished by the Banking Regulation and Supervision Agency.

Value Assessment and Tender Phases of Privatization

Value Assessment Commissions

Value Assessment Commissions are established before each tender according to the provisions set out in Law No. 4046. Value Assessment Commissions employ at least three value assessment methodologies using various criteria regarding the organization such as its industrial, commercial and social features, service distinction, sector and market specifications, potential future cash flows, production methods, technological structure, movables and immovables and quotation of its stocks in the several exchanges.

Tender Commissions

Tender Commissions are established before each tender according to the provisions set out in Law No. 4046. The Tender Commission may decide to employ one or more of the tender methods listed below:

- Sealed Bid
- Negotiation
- Public Auction
- Sealed Bid Among Designated Bidders.

Competition Issues:

A pre-notification to the Competition Authority is made in advance of the announcement of tender conditions;

- where the market share of the entity to be privatized exceeds 20%

- where the turnover of the same entity exceeds 20 trillion Turkish Liras
- even though the aforesaid limits are not exceeded, where the entity to be privatized does have judicial or de facto special rights.

In addition to this, the company which takes over any entity shall obtain a permit from the Competition Board before beginning its activities where;

- acquiring parties' total market share in the relevant product market exceeds 25%
- acquiring parties' turnover exceeds 25 trillion Turkish Liras.

THE PRINCIPLES AND PRIORITIES OF PRIVATIZATION IMPLEMENTATIONS

PA undertakes privatization with attaching utmost attention to the expectations and requirements of the public and investors. Within this framework PA aims;

- easing the negative effects of unemployment due to privatization, through a social safety net (employment guarantee)
- increasing participation in the privatization implementations
- enhancing transparency of privatization activities
- protecting free market from anti-competitive mechanisms and preventing negative effects of possible monopolies
- enhancing the diffusion of capital into the layers of the society and deepening of the capital markets by increasing the number of participants.
- prioritising the privatization of state banks.
- securing "public interest" through establishing "golden shares" in strategic enterprises.
- privatizing natural resources exclusively through transfer of management rights.

PRIVATIZATION IMPLEMENTATIONS IN TURKEY

Organisations that can take place in the Privatization Portfolio:

- (State Economic Enterprises) SEE's, their enterprises, associated corporations, operations, operational units and assets, as well as the public shares in their participants, e.g. Etibank, Sümer Holding and Turban,
- Public shares and shares in commercial organisations that are not SEE's but those where the majority shares rest with the state.
- Public shares and shares that belong to the Treasury
- Organisations producing goods and services with national and supplemental budgets and their assets (dams, lagoons, highways, hospitals, ports, etc.)

Privatization Implementations During Period 1985-2010

Companies within the Privatization Portfolio:

Since 1985, state shares in 270 companies, 103 establishment, 22 incomplete plants, 8 toll motorways, 2 Bosphorus bridges, 1 service unit and 524 real estates and 6 ports have been taken into the privatization portfolio. Later, some of the companies, and real estates were excluded from the portfolio for various reasons. One of these was Türkiye Öğretmenler Bankası, which merged with Halk Bankası in May 1992 and Denizcilik Bankası which merged with Emlak Bankası in November 1992. Currently there are 16 companies in the privatization portfolio.

Finalized Privatization Transactions

Privatization implementations have started in 1984 with the transfer of incomplete plants of the State Economic Enterprises to the private sector for completion. In this juncture, 6 plants were sold to different investors and 9 plants were transferred to municipalities or to state enterprises on book value.

In 1986, privatization implementations have gained momentum and since then, 199 companies have been privatised where no more government shares exist in 188 of these.

Since 1985 until today, total proceed from the privatization implementations is recorded as USD 38.6 billion. Total revenue generated from entities within the privatization program between 1985-December 2004, together with USD 2.3 billion dividend income and USD 3.4 billion other income, has amounted to USD 14.3 billion. In the same period, total privatization expenses were USD 13.9 billion. The largest item in privatization expenditures (with about 98%) is the transfer to Treasury and financing of the companies in the privatization portfolio in the form of capital increases and loans.

Considering the privatization implementations for the last 15 years, one will observe that;

- State completely withdrew from cement, animal feed production, milk-diary products, forest products, sivil handling and catering services and petroleum distribution sectors.
- More than 50 % of the state shares were privatized in tourism, iron and steel, textile, sea freight and meat processing sectors.
- State has withdrawn from most of the ports and petroleum refinery sector.
- Privatization of public banks has commenced with Sümerbank and continued with Etibank, Denizbank and Anadolu Bank. The international and domestic offering of the 12.3 % state shares in İş Bank in May 1998, has been the largest public offering in Turkey until that time and recorded as one of the largest privatization proceeds among the emerging European markets.
- Public shares in Netaş and Tofaş were issued to foreign investors through international public offering for the first time, which served as a driving force of the integration of Istanbul Stock Exchange's (ISE) with foreign capital markets.
- Public shares in many companies were issued to the public, particularly in the beginning of this decade and this enhanced the institutionalisation of Istanbul Stock Exchange.

Privatization Implementations within the Tender Phase:

BAŞKENT NATURAL GAS DISTRIBUTION COMPANY:

Tender announcement for the transfer of operation rights for Başkent Natural Gas Distribution Company has been made on May 13, 2010. Last bidding date is July 19, 2010.

RUN-ON RIVER HYDRO PLANTS:

Tender announcement for the transfer of operation rights for 52 run-on river hydro plants has been made on December 2, 2009. By the last bidding date 615 bids have been received. Final negotiations have been started on May 04.

TURK SEKER (Sugar Processing):

Tender announcement has been made on September 11, 2009 for the privatisation of 6 factories of Türk Şeker A.Ş. Highest bid has been given by Ak-Can Şeker San. ve Tic A.Ş. as 606 million USD.

Tender announcement for the portfolio B of Türk Şeker for the 4 factories (Malatya, Elazığ, Erzincan and Elbistan) has been made on November 5, 2009. Tender has been suspended by the State Council.

TEDAŞ ELECTRICITY DISTRIBUTION:

Tender announcement for the sale of three electricity distribution companies; Çoruh Elektrik Dağıtım A.Ş., Osmangazi Elektrik Dağıtım A.Ş., and Yeşilirmak Elektrik Dağıtım A.Ş. has been made in April 2009. Highest bid for Çoruh is given by Aksa Elektrik as 227 million USD, for Osmangazi by Eti Gümüş A.Ş. as 485 million. and for Yeşilirmak by Çalık Enerji Sanayi as 441,5 million USD.

Another announcement for the 4 electricity distribution companies; Fırat, Uludağ, Vangölü and Çamlıbel, was made on November 10, 2009. Highest bid for Vangölü is given by Aksa Elektrik Perakende Satış A.Ş. as 100.100.000 USD, for Uludağ by Limak İnşaat Sanayi ve Tic. A.Ş. as 940 million USD, for Fırat by Aksa Elektrik Perakende Satış A.Ş. 230.250.000 USD and for Çamlıbel by By Kolin İnşaat Turizm Sanayi A.Ş. as 258.500.000 USD.

Latest announcement for the 4 electricity distribution companies; Gediz, Trakya, Boğaziçi and Trakya, has been made on March 19, 2010. Last bidding date is July 22, 2010.

TCDD PORTS:

Tender announcement for the transfer of operation rights for Iskenderun Port has been made on May 17, 2010. Last bidding date is August 04, 2010.

On the other hand, tender announcement for the transfer of management rights of Derince Port was made on June 21, 2007. Highest bid has been given by Türkerler Ortak Girişim Grubu as 195.250.000 USD.

PRIVATIZATION PROGRESS OF TURK TELEKOM

Türk Telekomünikasyon A.Ş. (Türk Telekom) is the incumbent telecommunications operator in Turkey. The Company traces its origins to the General Directorate of Postal, Telegraph, and Telephone (PTT), which was created in 1924. In 1995, as part of the division of the postal and telecommunications services, Türk Telekom was created as a joint-stock Company under the ownership of the Undersecretariat of Treasury of Republic of Turkey.

Türk Telekom provides integrated telecommunications services from PSTN to various other value added services. The company has a wide and modern network infrastructure covering the whole country and offers a wide variety of services to residential and commercial clients all over Turkey. Türk Telekom has demonstrated its inherent strength by producing a good performance and very positive financial results against the turbulent telecommunications market developments worldwide, for the last couple of years. Continuing strong cash flow,

improving margins through operational effectiveness, strong dividend yields, and rapid expansion of mobile business especially after the recently completed mobile consolidation and margin improvement for value added services are only some of the indicators of Türk Telekom's promising outlook. The biggest domestic merger and acquisition deal to date has given birth to a new and strong entity, AVEA, creating remarkable operating and financial synergies.

Turkey has secured an investment friendly environment for privatization with regulations matching European standards. With the enactment of law 5189, the foreign ownership restriction on the part of foreign investors is lifted, the scope of the golden share has been limited and the satellite business has been taken out of Türk Telekom to function as a separate public entity.

Turkish Government has undertaken a "tailor-made plan" for the privatization of Türk Telekom. In this framework, an Informatory Process was launched prior to the official tender announcement whereby, the Privatization Administration has informed the interested parties about the forthcoming process and delivered information about the company and the sector at large. 11 national and international companies registered to the Process and were provided with operational, legal and technological data of Türk Telekom as well as the upcoming privatization process.

Council of Minister Decree dated 15.10.2004 and no. 7931 stipulates that %55 of Turk Telekom shares will be sold block and the tender announcement shall be launched latest by December 31, 2004. The Decree also authorized the Türk Telekom Tender Committee to apply pre-qualification criteria to bidders during the tender process.

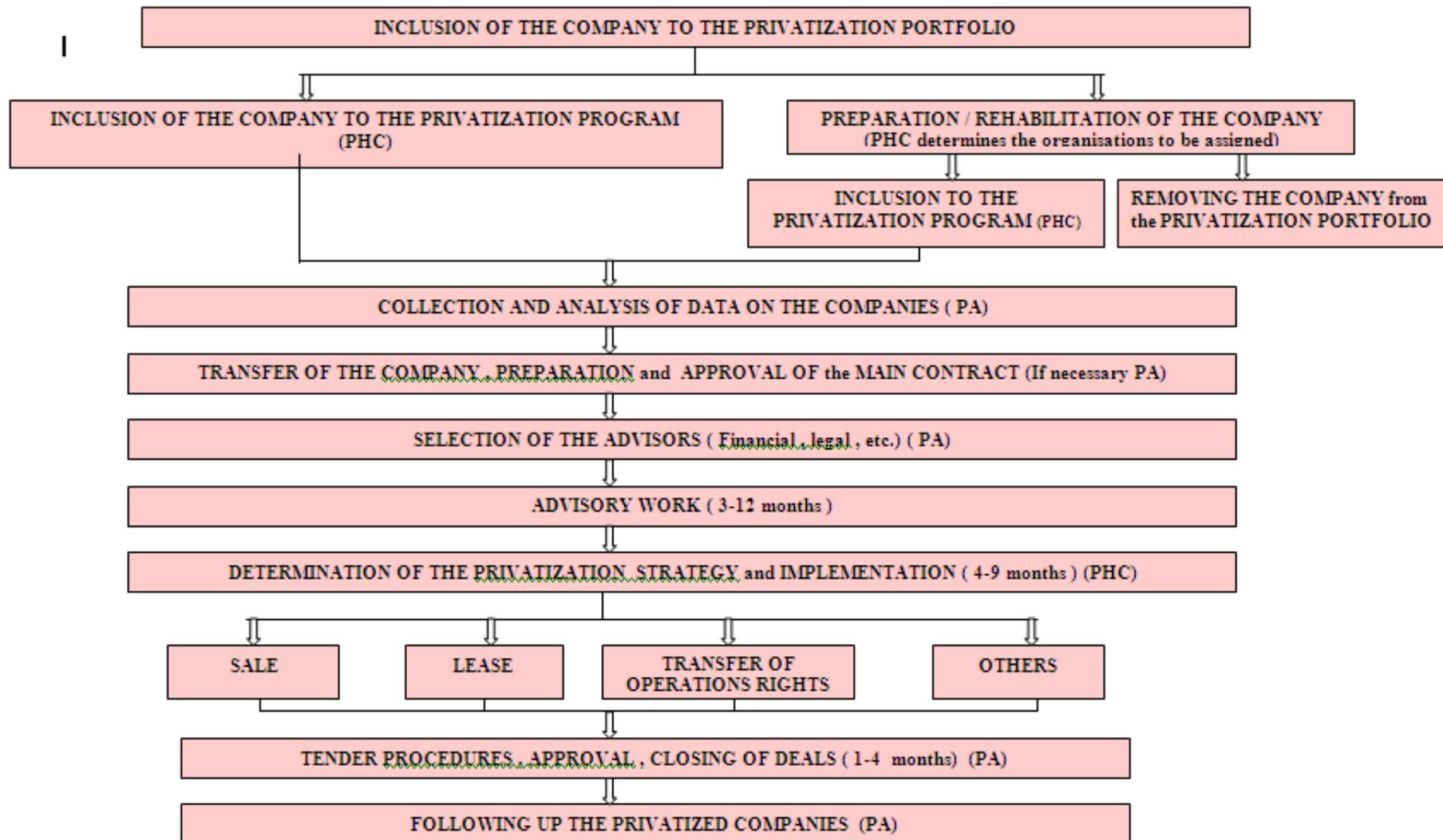
The formal tender process for the block sale of %55 of Türk Telekom commenced with the tender announcements on November 25, 2004. Four bids were submitted after a long and detailed due diligence process. The Tender Committee first evaluated the business plans and all four bidders who received scores over 75 points from such evaluation, were invited to the opening of the financial bids on July 1, 2005. After the joint bargaining process, Oger Telecoms Joint Venture Group (composed of Saudi Oger and Telecom Italia) submitted the highest bid, with 6.550.000.000 US Dollars.

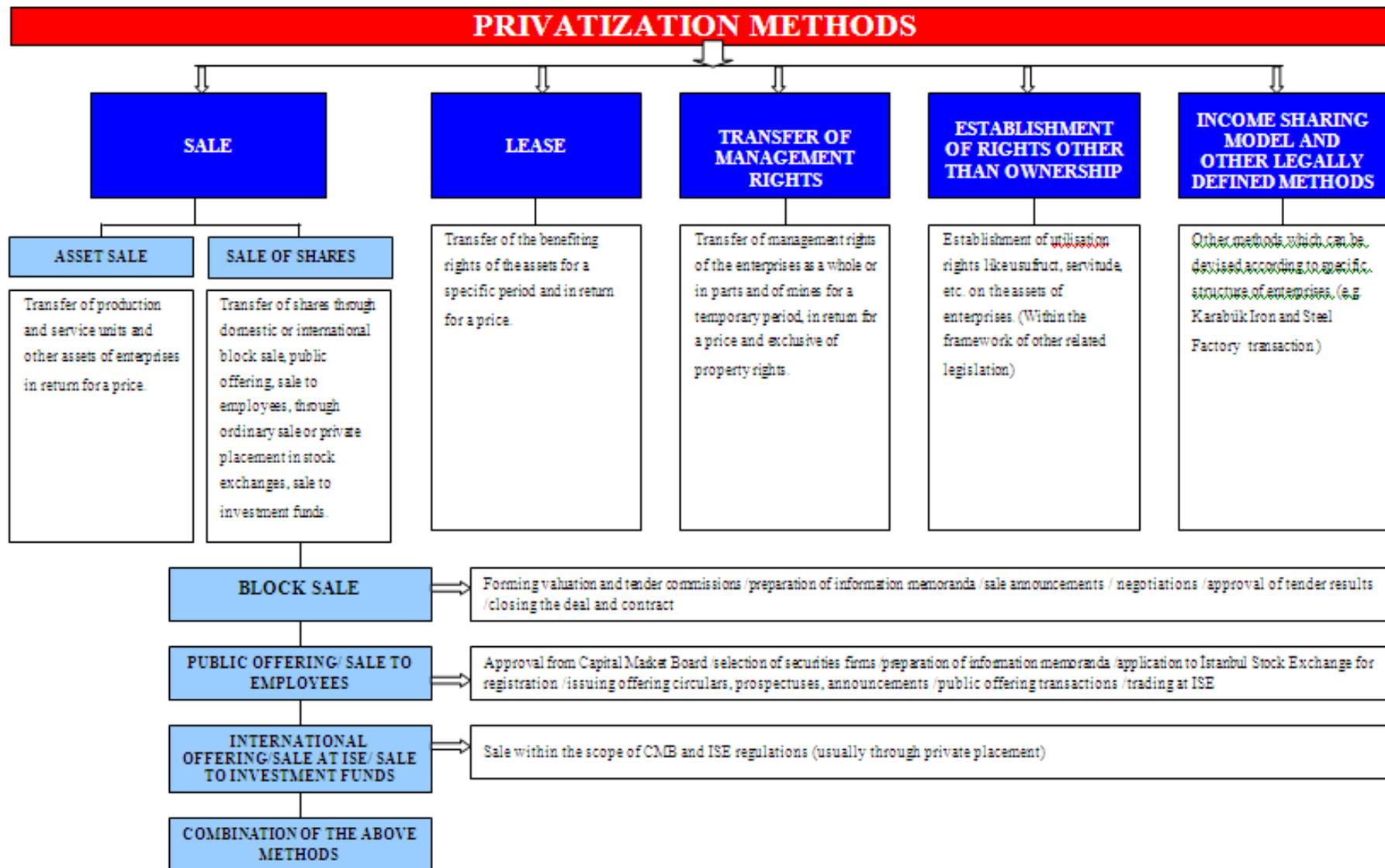
The result of the tender has been approved by the Council of Ministers and published in the Official Gazette dated 02.08.2005 and has become effective. Oger Telecoms Joint Venture Group and the Government signed the Share Sale and Purchase Agreement on 24 August 2005. The draft concession agreement was initialed by Turk Telekom and the Turkish Telecommunications Authority as per the tender process, The Council of State gave its opinion about the draft concession agreement on 21th. October 2005.

The Shareholders Agreement ve Share Pledge Agreement for Turk Telekom were signed on November 14, 2005. With the signing of these agreements, 55 % of Turk Telekom shares were transferred to Oger Telekomünikasyon A.Ş. (Consortium led by Saudi Oger and Telecom Italia) and Turk Telekom ceases to be a public company.

The Concession Agreement was signed on the same day between Turk Telekom and the Telecommunications Authority. 15% of Turk Telekom shares has been offered to public in May 2008.

PRIVATIZATION PROCEDURE





REFERENCES:

<http://www.ppp.org.tr/dokumanlar/pppturkey-aciliskonusmalari-lq.pdf>

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¹ Steven J. Kelman, “Contracting,” in Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002), 282–318.

² Ibid. See also, John D. Donahue, *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989), p. 81–100.

³ E. S. Savas, *Privatization and Public-Private Partnerships* (New York: Chatham House Publishers, 2000), 237-258.

⁴ Stephen Goldsmith, *The Twenty-First Century City: Resurrecting Urban America* (Washington, DC: Regnery Publishing, 1997), 70.

⁵ E. S. Savas, *Privatization and Public-Private Partnerships*, (New York: Chatham House Publishers, 2000), 291–96.

PPP Procedures in Ireland

Introduction

The PPP procedures in Ireland developed primarily from those used in PFI in the UK. However, as the Irish PPP market is much smaller than that in the UK, it quickly became obvious that some differences in procedures were required. The details presented in this paper are a summary of the guidance documents for PPP published by the Irish Central PPP Unit⁸. Figure 1 below outlines the differences in the procurement stages between a traditional project and a PPP in Ireland⁹.

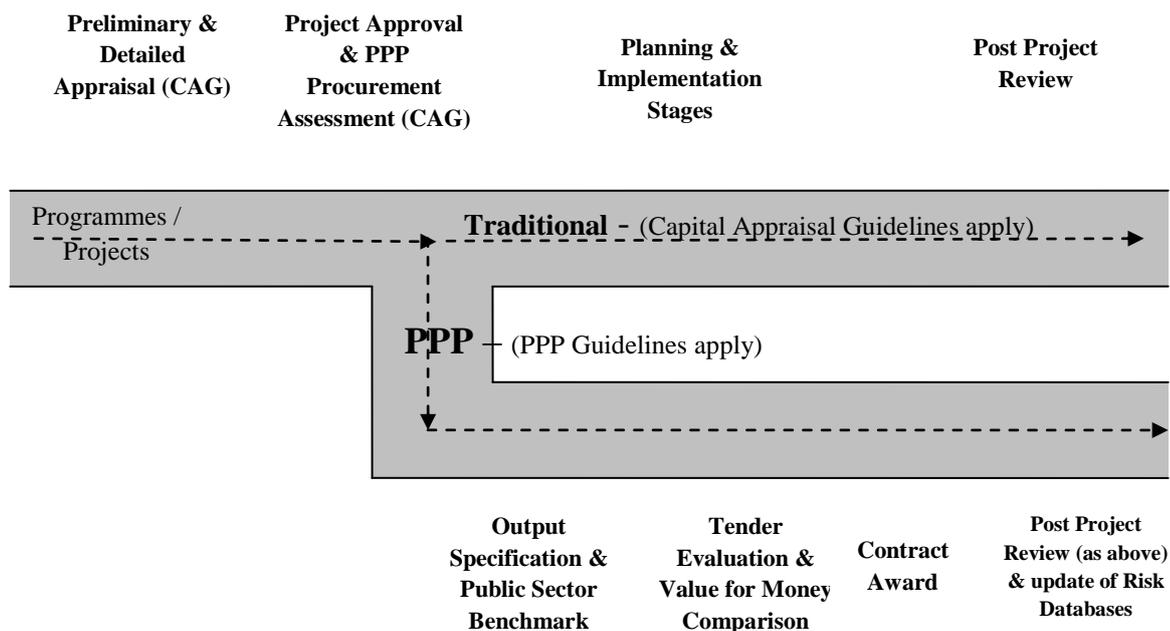


Fig. 1: Traditional and PPP Procurement Stages – Summary (Central PPP Unit 2006)

The vast majority of public investment remains conventionally procured with up to 10% of projects being procured as PPPs. A higher target than this was envisaged in the second National Development Plan (2006), but the financial difficulties in the Irish economy has reduced the private sector investment in the Irish market, thereby reducing the number of new PPPs coming to the market.

In relation to the Guidelines themselves, Figure 2 illustrates the steps in PPP procurement that is followed through from the start of the process through to the end. In addition, there are a number of different PPP procurement options available and the State Authorities must identify the PPP option which best reflects the needs of their project. Projects need to have the right risk, scale and

⁸ <http://ppp.gov.ie/key-documents/guidance/central-guidance/>

⁹ Central PPP Unit (2006) Central Guidance Note No. 6 (Technical) Assessment of Projects for Procurement as Public Private Partnership, Government Publications Office, Dublin

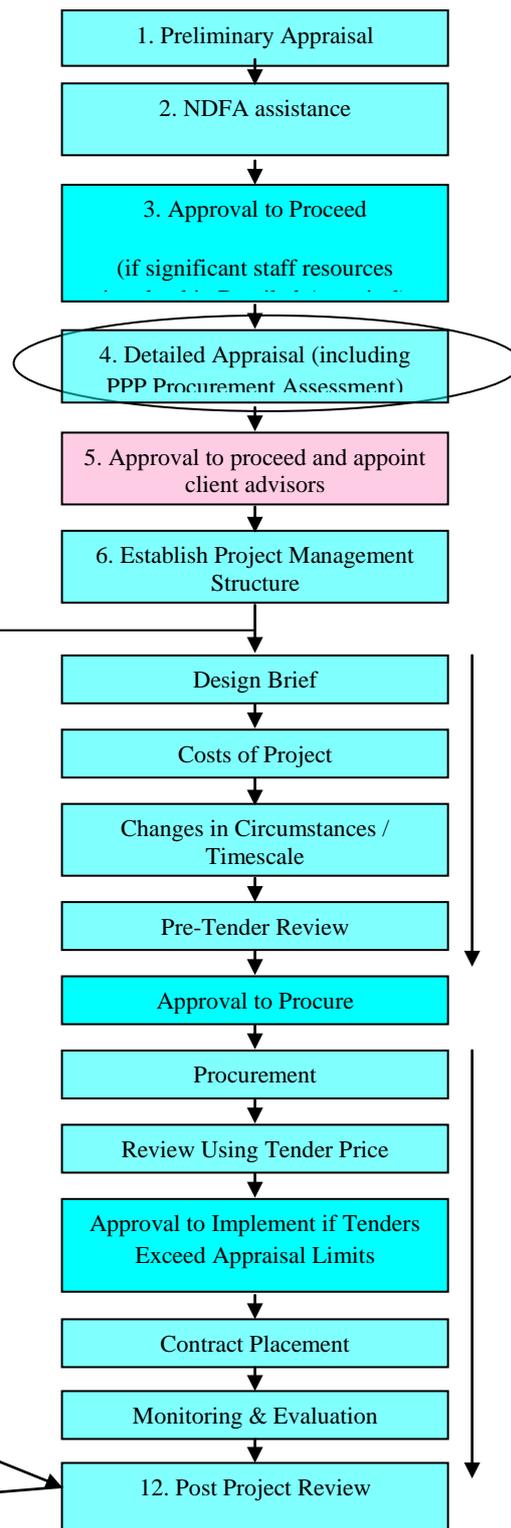
operational profile to justify the PPP approach. The Capital Appraisal Guidelines provide that “the option of procuring a project by PPP for projects costing over €20 million should be considered by the State Authority as part of the project appraisal”. Having completed the Preliminary Appraisal and sought the advice of the National Development Finance Agency (NDFA) as appropriate, the State Authority undertakes a Detailed Appraisal of the project (Step 4 in Figure 2). As part of the Detailed Appraisal, the State Authority will be expected to identify the most appropriate procurement mechanism by carrying out a PPP Procurement Assessment. There are a number of other tasks to be completed at this stage.

In preparing the Detailed Appraisal, the Sponsoring Agency is required to produce a reasonable estimate of the overall budget required to procure the project by:

- defining clearly the needs the project should meet and its objectives;
- listing the possible options and the constraints;
- quantifying financial costs (full capital costs and costs over life-cycle, including risk and contingency), and sources of funding;
- analysing the main options, valuing and quantifying the costs and benefits of each option (using multi-criteria analysis, cost benefit analysis, cost effectiveness analysis, financial analysis, Exchequer cash-flow analysis - as appropriate – and using the NPV approach to costs/benefits arising at different times);
- identifying the risks associated with each option, potential impact and strategy for dealing with risks;
- deciding on preferred option.

| Key | Responsible party |
|--------------------|-----------------------------------|
| Project Assessment | State Authority / Project Board |
| Approval | Sanctioning Authority |
| Audit | Process Auditor / State Authority |

Capital Appraisal Guidelines



PPP Guidelines

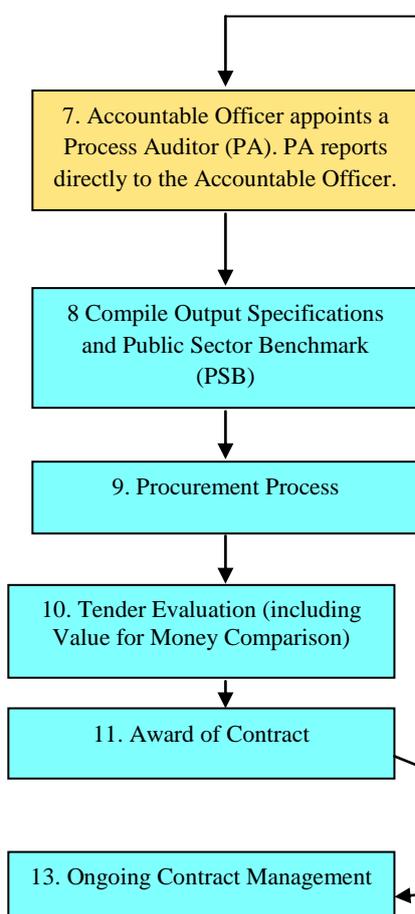


Fig. 2. PPP Procurement Steps within the Capital Appraisal Guidelines framework

As part of the Detailed Appraisal, the Sponsoring Agency should determine the most appropriate procurement mechanism and, if a PPP approach is being considered, a PPP Procurement

Assessment should be carried out. The PPP Procurement Assessment addresses a number of key issues in detail, some of which are:

- Is the project of sufficient scale and risk/operational profile to justify a PPP approach, and to carry the high transaction costs that will be involved?
- Does the project have the potential to deliver value for money if procured as a PPP?
- Which form of Public Private Partnership would provide the greatest potential to deliver value for money for the Exchequer?
- Has the Sponsoring Agency the statutory power or *vires* to enter into a PPP arrangement – is it listed in the Schedule to the State Authorities (Public Private Partnerships) Act, 2002 or does its governing legislation give it the power to enter into PPP arrangements?
- Is there potential for third party income which could significantly reduce the level of Exchequer funding required?
- Are all policy issues relevant to the project clear and fully agreed?
- Are the technology and other aspects of the sector stable, and not susceptible to fast-paced change?

The NDFA will provide financial, insurance and risk analysis advice to State Authorities in order to assist in determining the most appropriate procurement mechanism. Detailed factors to be taken into consideration in the context of a PPP Procurement Assessment will be issued in a separate technical note.

Approval to Proceed

Following appraisal of the proposed project, the Sponsoring Agency should approach the Sanctioning Authority for approval to proceed with the procurement of the project as a PPP. In deciding whether to grant approval, the Sanctioning Authority must take account of the priority of the proposed project in the context of the Authority's overall programme of expenditure, within the available Capital Envelope allocation(s). The Sanctioning Authority must establish that:

- the project should be approved, on the basis of the appraisal undertaken;
- all policy issues involved are clear and fully agreed, and the project is suitable for procurement as a PPP;
- there is no conflict with public sector numbers or HR policy or any other general policy;
- the scope / specifications are clear and agreed, and conform with sectoral norms;
- the capital cost of the project (both PPP and non-PPP elements) over the construction phase can be accommodated within the relevant Capital Envelope amount(s); and
- a PSB (for the PPP element) will be set before going out to tender,

If these criteria are met, the Sponsoring Agency may seek approval to proceed with procuring the project as a PPP.

In accordance with best practice, when approving a PPP project the Sanctioning Authority should convey its approval subject to an overall project budget, to include both PPP and non-PPP elements of the project, based on the estimated costs for the project itself and for project planning, etc., which will have been produced at Detailed Appraisal stage and on which the proposal to the Sanctioning Authority will have been based. Approval should also be subject to ongoing compliance with the other conditions set out above. The Sanctioning Authority may also impose additional conditions relevant to individual projects or sectors, if it considers this appropriate.

In PPP procurement, at this point the Sponsoring Agency has full authority to proceed to procurement (or to prepare the project for handover to the Centre of Expertise to procure it on its behalf, as appropriate), including the award of the PPP contract, subject to compliance with the conditions attached to the approval. If any of these conditions are breached, the Sponsoring Agency / Centre of Expertise, as appropriate, will have to revert to the Sanctioning Authority for revised approval.

Establishing Project Management Structure

Once approval to proceed has been received for a particular project, the Sponsoring Agency should, in accordance with Stage 2: Planning Stage of the *Capital Appraisal Guidelines*, decide on the appropriate management structure for overseeing the project. This will normally involve the appointment of a Project Board to manage the procurement of the project. Where the project is to be procured by the Centre of Expertise, on behalf of the Sponsoring Agency, the Project Board will be chaired by the Centre of Expertise following the handover of the project to the Centre of Expertise for procurement.

As part of these arrangements, a Project Manager should be appointed within the Sponsoring Department or Agency. The person to be appointed to the role should be a senior official, with personal responsibility for monitoring progress on the project and for reporting progress and issues arising to the Project Board. Regular reports should be submitted to the Project Board on how projects are progressing. If adverse developments occur the progress report should include recommendations to address the situation, including, where warranted, project termination. Where a project is being procured by the Centre of Expertise, the Project Manager should agree liaison procedures with the Project Board for the procurement phase of the project.

Appointment of Process Auditor

When approval to proceed with a project has been secured by the Sponsoring Agency, a Process Auditor should be appointed for the project.

Compiling Output Specifications and the Public Sector Benchmark (PSB)

Output Specification

At this stage, the Sponsoring Agency should proceed to draw up detailed Output Specifications for the project, similar to the “Project Brief” envisaged for traditionally procured projects in the *Capital Appraisal Guidelines*, but focusing on outputs rather than inputs.

Public Sector Benchmark

The Public Sector Benchmark (PSB) must be compiled at this point and is derived from the detailed Output Specifications. The PSB should be a comprehensive estimate of the cost (including risk valuations) of procuring those elements of the project that the private sector is to be invited to tender for in the PPP contract. It should be based on the whole life cost to the Sponsoring Agency of procuring (those elements of) the project using traditional procurement, and should include risks. This will build on the costings used in the Detailed Appraisal. As stated earlier, the PSB does not include any costs (or risks) which will be borne directly by the Sponsoring Agency irrespective of the procurement method used, and which are therefore not part of the PPP contract. In this way, the PSB will serve as a direct, like-with-like comparator for the private sector bids and, at evaluation stage, will form the basis for the value for money assessment of the highest ranking bid.

The PSB should include VAT where this would be payable by the Sponsoring Agency in any event were the project procured traditionally. This is necessary for budgetary purposes - to establish the full cost of the project to the Sponsoring Agency, in the context of the overall budget limit approved for the project. However, since the evaluation of the highest ranking bid against the PSB will be done on a VAT-exclusive basis, the VAT costs should be identified separately in the calculation of the PSB, to facilitate comparison with the tenders on a VAT-exclusive basis.

In the case of projects that are to be procured by the Centre of Expertise on behalf of the Sponsoring Agency, the PSB remains the responsibility of the Sponsoring Agency. It will be compiled by the Centre of Expertise, with input from the Sponsoring Agency and agreed by the Sponsoring Agency before going to the market. In order to take full account of costs which occur at different points in time, the final PSB cost should be expressed in Net Present Value (NPV) terms, thereby reflecting the ‘time value of money’. In circumstances where there is an absence of suitable data on traditional procurement costs, a hypothetical Public Sector Cost may be used to assist in the determination of the PSB. As a general rule, the Output Specifications and associated PSB should be finalised and should be up to date before any tender invitations are issued. Once the PSB has been finalised, the

second formal Value for Money test should be carried out to determine whether, in the light of the quantifications in the PSB, the conclusion reached in the PPP Procurement Assessment continues to be valid.

The finalisation of the Output Specifications, and associated PSB, for each project will be a matter for the Sponsoring Agency, within the approval / delegated sanction granted to them by the Sanctioning Authority. Provided that the terms of that approval / delegated sanction are not breached, it will not be necessary to seek further specific approval from the Sanctioning Authority for the detailed Output Specifications or PSB for individual projects. However, the PSB should be supplied to the Sanctioning Authority when finalised, for information. Current policy is that the final PSB, or any elements thereof, is **not made public** on the basis that revealing the amount that the State is willing to pay for a service may give tenderers an opportunity to increase their asking price above what they might otherwise seek. For this reason, where the public sector is likely to want to procure a similar project in the same or other sectors in the foreseeable future, such information should not be released even after the completion of the procurement process.

Procurement Process

The procurement process is commenced by requesting expressions of interest from the private sector. In general, this is followed by a pre-qualification evaluation and the issue of a tender invitation to consortia selected in accordance with the relevant criteria. Under EU procurement law, the nature and level of communication permissible with bidders / potential bidders will be determined by the procurement procedure chosen.

Tender Evaluation

In any procurement competition, all of the tenders received are first examined to determine whether they are “suitable” bids. The basis on which “suitability” will be determined should be clear and transparent and signalled in the tender documentation.

Detailed Evaluation of Tenders which have been deemed “suitable in principle”

If a tender meets the considerations for “suitability”, including any relevant budgetary considerations, it should then be considered “suitable in principle”. Such a bid will then be evaluated, scored and ranked according to the published Evaluation Criteria. The Sponsoring Agency or the Centre of Expertise (according to where responsibility for the procurement of the project lies in a particular instance), will have identified the most appropriate evaluation criteria for the project and these will have been made available to interested parties in line with the

requirements within the Directives. These criteria are used to score and rank the tenders.

Value for Money Comparison (VfMC) exercise

The highest ranking bid following this evaluation stage should be evaluated against the PSB in the Value for Money Comparison (VfMC) i.e establishment of the overall impact of the highest ranking bid on the Exchequer as compared to the impact on the Exchequer of the PSB.

It is possible that, having carried out the VfMC exercise, the PPP approach may be found to be more costly than using traditional procurement methods, i.e. the highest ranking bid does not compare favourably with the PSB, i.e. when it does not equal or beat the PSB. In such circumstances, the general principle is that this should be referred to the Sanctioning Authority and the appropriate Minister / the Government by the Sponsoring Agency. It may be considered that there are factors that would justify continuing with the PPP procurement despite the outcome of the VfMC exercise. The VfMC exercise has a particular quantitative focus; the relevant Minister / the Government may be of the opinion that there are other relevant considerations that justify awarding the contract to the highest ranking bidder. If the highest ranking bid equals or beats the PSB and the terms of the Sponsoring Agency's delegated sanction are adhered to and the capital cost of the project is consistent with the available Capital Envelope allocation of the Sponsoring Agency, the Sponsoring Agency / Centre of Expertise may then move to award the contract to the tenderer who submitted the highest ranking bid.

Contract and Financial Close / Award of Contract

When all issues are agreed, the signing of the contract marks the point where the public sector outturn costs are set and sealed for the duration of the contract, and may also mark the commencement of the construction process. Before signing the contract, the fourth (and final) formal Value for Money test should be carried out - a final test to (a) assess the impact of any changes in the interest rate(s) and/or discount rate(s) and (b) where the project has been procured using the Negotiated Procedure, to examine the effect of any proposed changes in the contract terms. Subject to the contract continuing to offer value for money, the contract should be signed.

Post Project Review

A post project review be carried out for all major projects once sufficient time has elapsed to allow the project to be properly evaluated with sufficient evidence of the flow of benefits / cost from it. There should be two separate focuses of this review: (i) project outturn, and (ii) appraisal and management procedures, which may be undertaken at the same time or at different times, but they should be done as soon as is practicable.

Once contract close is reached the cost of the project to the Sponsoring Agency is set and sealed for the duration of the contract. Therefore, since the maximum cost of the project is effectively known at this point, it is appropriate that an element of the post project review be undertaken at that stage. A comparison of the actual outturn costs of the project (as provided for in the contract) with the initial estimated costs (as set out in the PSB) should be undertaken and recorded. The post project review should be carried out by a party in a position to write an objective assessment and should be presented to the Accountable Officer in the Sponsoring Agency and to the Sanctioning Authority.

Ongoing Contract Management

In many instances, a PPP contract will include clauses that link payment to performance of specific obligations under the contract. In order to ensure that the full benefit is derived from these clauses, it is essential that the performance of the private sector partner is constantly monitored over the contract term and that these clauses are invoked, as appropriate. It is recommended that responsibility for this ongoing monitoring of the contract be assigned to a nominated party.

Where the contract has been negotiated by the Centre of Expertise, on behalf of the Sponsoring Agency, the Sponsoring Agency will be responsible for the management of the project after hand back but should make appropriate arrangements with Centre of Expertise to ensure a smooth transition and to ensure that the Department has sufficient familiarity with the obligations under the contract to put in place adequate long-term monitoring procedures.

It may be necessary, as a result of a change mechanism in a contract or other contractual requirements (such as pre-payments or refinancing), to renegotiate certain elements of a contract during its life, and to determine the resulting Exchequer / Sponsoring Agency implications. The NDFA must be consulted should this arise, and will advise the Sponsoring Agency in relation to any financial, risk or insurance implications of modifications to the contract terms.