

Client Alert

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Planning, Tendering and Closing Global PPP Projects

The sovereign funding gap caused by a low oil price environment, coupled with a global period of economic uncertainty, are two drivers leading governments, procuring authorities and state owned enterprises (**Authorities**), particularly in emerging markets, to embrace private financing of infrastructure projects, including through a public private partnership (**PPP**) model.

Private financing, whether under a Build-Own-Operate (BOO), Build-Operate-Transfer (BOT), Rehabilitate-Operate-Transfer (ROT), or other acronyms, is an effective method of infrastructure delivery, *if implemented correctly*.

PPP offers value for money and the ability to harness the private sector's infrastructure and financing expertise, which helps drive economies. Infrastructure delivery, particularly social infrastructure and essential services infrastructure (eg utilities), is critical for the wellbeing of society. Tapping into private forms of finance and expertise can keep these critical infrastructure pipelines moving in difficult economic times.

We are now seeing many State and National Governments enacting supporting legislation to deliver infrastructure projects. Infrastructure pipelines are being published and RFPs for advisers are underway. All of these factors suggest that private finance including PPP will be here for to support the various infrastructure plans and objectives over the coming decade.

The Benefits of Competitive Tendering

Government mandated competitive tendering exists globally due to the overriding duty on all governments to manage the public purse effectively and responsibly. A central component of this is that all public infrastructure procurements should be focussed on obtaining the best value for money. This can generally be described as obtaining the best blend of commercial and technical quality for the least financial outlay over the period of the project.

A well-managed competitive tendering process helps to illustrate that the procuring authority has a commitment to openness and transparency. This serves to increase the level of interest in future partnering opportunities.

A key consideration for all Authorities looking to embark on major infrastructure tenders is aligning their proposed PPP procurement process with any local procurement laws and regulations. These tendering laws are usually

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designed for more traditional procurement methods, not privately financed infrastructure projects, including PPPs.

In some instances, Authorities are enacting specific PPP laws to either override traditional tendering laws or to complement them, in a way that provides certainty for the public and private sectors embarking on PPP projects. In any event, legal advice will need to be sought to confirm the application or otherwise of such laws and rules and to confirm the procurement route.

Top 10 Tendering Tips

Below are some key issues for Authorities to consider when embarking on competitive tender processes for major infrastructure projects, including under a PPP model. Our “Top 10” tendering tips are not exhaustive, but they cover what the authors feel, based on experience, are critical steps to implement for the successful delivery of infrastructure projects.

Our tips are applicable across a wide range of sectors and for various Authorities. For example:

Sector	Examples of Authorities
Transport	<ul style="list-style-type: none"> • Department of Transport • SOEs and other Authorities in the Road, Rail, Airport & Port sectors (including logistics, catering, cargo etc)
Healthcare	<ul style="list-style-type: none"> • Department of Health • SOEs and other Authorities involved in healthcare, including public hospital owners
Education	<ul style="list-style-type: none"> • Department of Education • SOEs and other Authorities involved in education, such as schools, universities, colleges and training institutions
Civic	<ul style="list-style-type: none"> • Department of Justice, Economy etc • Local and Municipal Authorities related to courts, correctional services
ICT	<ul style="list-style-type: none"> • Department of Communications and Technology • SOEs and other Authorities involved in telephony, communications, data/IT
Culture	<ul style="list-style-type: none"> • Department of Cultural Affairs • SOEs and other Authorities who may be owners or managers of cultural assets, museums etc
Accommodation	<ul style="list-style-type: none"> • Department of Housing • SOEs and other Authorities involved in social and affordable housing schemes, or residential/student accommodation providers in other sectors (eg university housing)
Defense	<ul style="list-style-type: none"> • Department of Defense • SOEs and other Authorities involved in the defense sector
Energy/Utilities	<ul style="list-style-type: none"> • Departments of Energy/Power/Water/Environment • SOEs and other Authorities involved in any utility generator, distribution and/or transmission sectors • Master Developers of Real Estate (eg for district cooling).

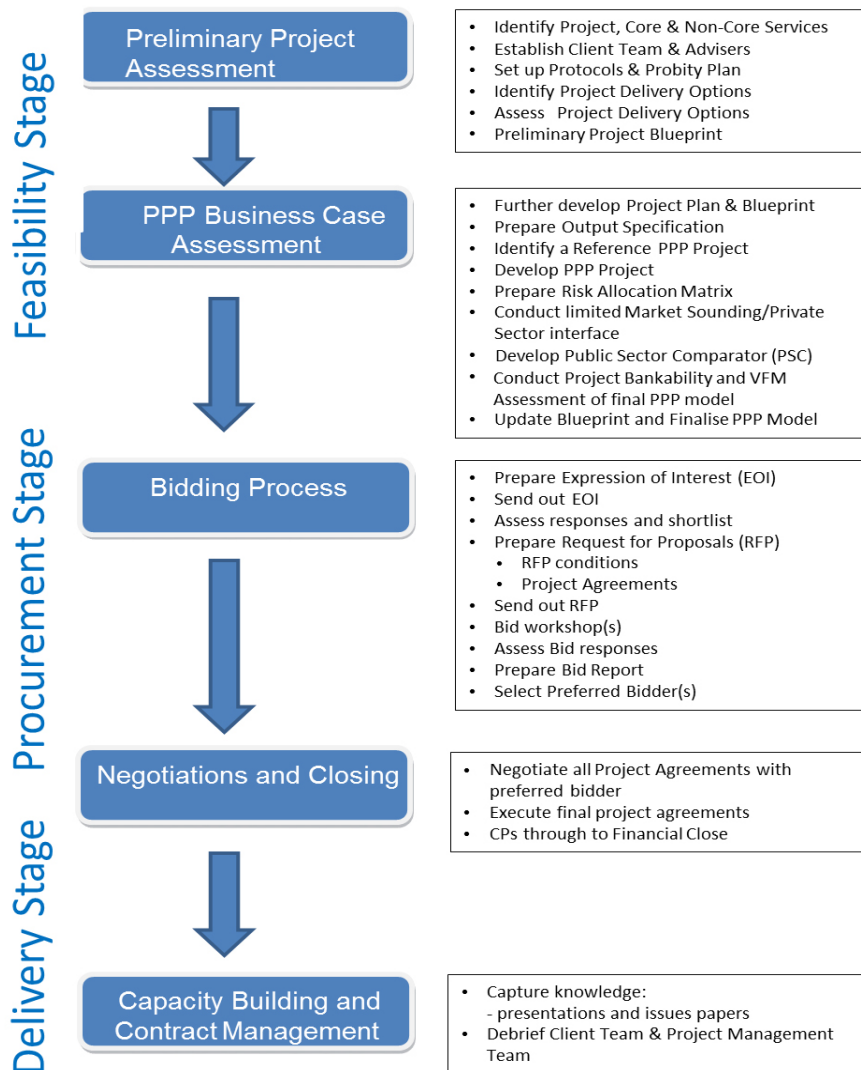
In our next article, we provide tips to bidders in approaching RFPs for major infrastructure projects.

1. Develop A Comprehensive Procurement Plan

Undertaking a PPP process is not simply a matter of issuing an RFP to a series of qualified builders to build a facility. The process starts with an idea. That idea develops into a plan, with objectives. That plan is then tested and further developed to ensure the project is viable and delivers value for money to the Authority. Only at this stage is a tendering exercise undertaken.

Accordingly, the most important part of running a competitive PPP procurement is invariably the work undertaken prior to the tender process commencing. A well thought out procurement plan reflects well on the Authority as it ensures a high quality level of organisation throughout the process and will be well received by bidders.

Generally, there are three (3) stages in a PPP project: Feasibility, Procurement and Delivery. Set out below is a detailed process map with a description of each of these stages:



An Authority's two initial considerations prior to starting should include these important two steps:

- a) **procurement team:** competitive procedures require commitments in terms of time and resources. An Authority should give serious consideration to the amount of man-hours it can commit to the procedure. An individual should be appointed to lead the client team throughout the entire process. Given the inherent complexity of major infrastructure projects, Authorities will need to engage external legal, technical and financial advisors early in the process; and
- b) **procurement timescale:** procurement processes are invariably driven by time. An unrealistic or expedited timeframe for a process runs the risk of leading to mistakes or the receipt of rushed and inaccurate bid submissions and re-tendering.

The output from the feasibility stage will be a *procurement plan*, which is approximately 15 - 20 pages in length. This is a blueprint by which all Authority stakeholders can refer at any stage of the procurement process. The blueprint will address:

- a) an overview of the project, including a description of the infrastructure and services required;
- b) the objectives of the Authority and any commitments (eg core services v non-core services);
- c) structuring & procurement options for the project;
- d) an overview of the recommended contractual arrangements for the project; and
- e) an implementation step-plan for the project, including timescales.

If a procurement plan is not developed, this is not fatal. It may, however, lead to delays to the process and increased costs later, in the form of additional advisory fees, higher bids costs and pricing and potentially bidder withdrawal.

2. Feasibility Stage: Conduct a 'Project Bankability' Test

Prior to tendering a major infrastructure project, the most effective method to test the project's 'bankability' is to internally test whether the commercial solution being sought will attract investment.

The purpose is to ensure the Authority's objectives can be met and that they align with the expectations of potential bidders. This can only be performed with experienced technical, financial and legal advisors who have successfully delivered major infrastructure projects in the given sector. Conducting a project bankability test will give reassurance to Authorities that their proposed project will be attractive to the market and will attract bids.

3. Feasibility Stage: Develop a Robust Output Specification

Major infrastructure projects requiring private finance are very different from traditionally procured construction contracts. Major projects are focused on outcomes which best meet the needs of the Authority. These needs are generally articulated in the form of an "output specification". Unlike traditional methods of procurement which tend to have input-based specifications, the underlying philosophy of the major infrastructure projects, including under a PPP model, is to focus on *output-based* specifications.

An output-based specification outlines an objective. Taking a 1000 pupil, 50 classroom school as an example, the requirement would be stated along the lines of:

'The private sector shall build a school to accommodate 1000 pupils which meets the Department of Education's class room design and maximum pupil standards'.

In other words, the outcome is stated, but not the method of achieving the outcome.

In contrast, in traditional procurement, an input-based specification would be more granular and might specify the requirement for 50 classrooms with exact dimensions, specifications and prescribed materials.

Output-based specifications afford bidders as much flexibility as possible to propose innovative, cost-effective designs of infrastructure. This is approached on a *whole of life* basis, taking advantage of new technologies and techniques. A *whole of life* basis means bidders are required to manage and maintain the infrastructure over the life of the project (maybe 25 or more years). In traditional procurement, a bidder is a building contractor who would focus on its obligations during the construction period (eg 12 months) and select materials and finishes accordingly, as it is not responsible for the operation and maintenance aspects.

As a minimum, Authorities should ensure that the output-based specification contains:

- a clear description of the scope of service;
- a clear description of the specific service requirements; and
- performance standards (sometimes called Key Performance Indicators or KPIs) for each service, which are then linked to a performance monitoring regime.

4. Feasibility & Procurement Stages: Conduct a Market Sounding Exercise / Expression of Interest

Unless an Authority has no time to conduct a market sounding exercise, the Authority should conduct an open day, or series of supplier meetings, market sounding questionnaires, meeting potential interested bidders. Later it can also issue a formal expression of interest (EOI) document.

An EOI is effectively a high-level “teaser” published by an Authority to generate prospective bidders to register their interest in participating in the given infrastructure project. It can be anywhere from 3 pages to 10 pages in length. No pricing is required from bidders at this stage; rather, this stage helps Authorities determine if prospective bidders have the technical capacity to deliver the project, should they be invited to bid.

Broad publication of an EOI ensures that Authorities are aware of a greater portion of the market potential. This is especially relevant for those Authorities with minimal experience in delivering major infrastructure projects. It is also relevant for private sector bidders who will be encouraged by infrastructure policy announcements in emerging markets.

Conducting a market sounding exercise and an EOI exercise and engaging with potential participants will allow an Authority to sense check that the opportunity is attractive to bidders. It will also ensure there is sufficient interest in the project to justify the procurement process, which can be long and costly. It also allows bidders to start planning before a formal request for proposals is issued.

5. Procurement Stage: Shortlist Bidders

An Authority will normally pre-qualify bidders based on technical experience after bidders have provided responses to an EOI. This is to avoid having 20 or more bidders. This is simply not manageable for Authorities.

Best practice suggests that five (but perhaps up to seven for pathfinder projects or projects with unproven technology) short-listed bidders are sufficient to maintain a competitive tendering environment whilst covering the risk of withdrawal by one or two short-listed bidders. Many bidders will in fact be consortia of multiple-parties including sponsors, lenders and FM/O&M Contractors and perhaps EPC contractors. Having too many shortlisted bidders may deter some bidders from bidding, as their chance of success may not justify the substantial bidding costs.

6. Procurement Stage: Conduct an RFP Process and Prepare Tender Versions of Legal Agreements in Advance

The cornerstone of the procurement stage is the tender document itself. This is often called the “request for proposal or RFP”, “request for tender” or “RFT” or “invitation to tender” or “ITT”. For the purposes of this article, the term **RFP** is used.

The RFP is an inherently complicated document and has specific differences to an RFP for a traditional construction procurement. Examples of these differences lie in the nature of output-based specifications, the payment mechanism, operational elements, financing requirements and end of term arrangements including termination payments. The nature, complexity and importance of the RFP document means that an Authority needs to allow sufficient time to prepare the RFP with assistance from experienced legal, technical and financial advisers.

The RFP establishes how a procurement will be conducted and the key milestones and rules with which all parties will be need to adhere. The Authority should ensure that the RFP document accurately identifies its anticipated needs and minimum requirements to enable bidders to gain an informed appreciation of the project. Particular areas of importance are an outline of the project, the tendering schedule, a description of the likely payment mechanism, technical overview, submission requirements and evaluation methodology.

It is critical that the Authority’s legal advisers draft tender versions of the project legal agreements and that these are included as appendices to the RFP. If time is against the Authority to include the project legal agreements, then Terms Sheets or Heads of Agreement should, as a minimum, be included in the RFP document. This approach is not recommended if time permits full project legal agreements to be prepared, as it will add further time and expense, given full project legal agreements will be later issued to bidders as addenda to the RFP to ensure firm pricing is received.

Preparing tender versions of these project legal agreements allows bidders to assess the project’s risk allocation and to take steps to manage their liabilities and risks. If these project legal agreements are not included, bidders may not bid, or may bid but reserve their position on all development and operational risks. Additionally, bidders will usually submit pricing on the basis of a certain risk allocation between the parties. As such, when the legal agreements are later submitted, bidders will seek to adjust their pricing if their assumptions are not met.

7. Procurement Stage: Post Bid Dialogue Sessions

After the RFP is issued, but before bids are received, it is not uncommon for the Authority to enter into dialogue with bidders. These are usually described as bid clarification sessions and they allow bidders to discuss points of clarification, to discuss technical solutions, to sense-check aspects of their proposals. These sessions can provide critical feedback to the Authority and its advisers.

On complex infrastructure projects, particularly with tight lead times, these sessions can be time consuming and provide a logistical challenge for the Authority. Momentum can be preserved through effective planning. This can be done by sending out an agenda identifying topics, individuals required, outputs required and periods of time for each bidder to present. Suggestions might include:

- **commercial:** this part of the session addresses issues such as the financial model, financing issues, and unitary payments/tariffs.
- **technical:** this part of the session addresses issues such key performance indicators, quality standards and performance management, as well as queries on any technical issues in the RFP.
- **legal:** this part of the session addresses issues such as project contractual structure, questions on risk allocation and bid compliance.

This approach has the added advantage of efficiently managing resources and not requiring all individuals within the Authority client team to be present during all discussions.

It is important in these sessions to treat all bidders equally and to ensure that the sessions are followed up with a formal addendum to all bidders with clarifying points.

8. Procurement Stage: Clear Evaluation Methodology

The evaluation methodology refers to the criteria used in an RFP process to evaluate the tender that is the most advantageous to the Authority.

The two main areas of evaluation are usually (1) commercial; and (2) technical. Within each of these areas, there will often be sub-criteria relating to particular requirements of the RFP. Sub-criteria are typically allotted percentage weightings to reflect their importance. The tenderer submitting the bid which scores the highest marks after being assessed against the evaluation methodology will usually be appointed the preferred bidder for the project.

An example of technical evaluation criteria for a hospital PPP project might include:

1. Bidder's experience of healthcare projects completed inside and outside the host country;
2. Robustness of Bidder's technical method statement and design philosophy; and
3. Robustness of Bidder's proposed implementation schedule.

Sample commercial evaluation criteria for a hospital PPP project might include:

1. Quantum of the Unitary Charge for performing the Services;
2. Bidder's proposals in relation to certain non-core services;
3. Robustness of Bidder's financing methodology; and
4. Bidder's comments on the Project Legal Agreements.

Each bidder is given a score of 0 - 100 for each criteria.

For example:

- 0 = fails to submit required documentation or submission;
- 20 = fails to meet criteria;
- 40 = below expectations;
- 60 = generally acceptable response, meets minimum criteria with few exceptions;
- 80 = good and acceptable response, meets minimum criteria with few exceptions;
- 100 = excellent response, meets minimum criteria with no qualifying exceptions.

Specific formulae is then used to calculate the weighting and to determine the bidder with the most advantageous proposal according to the Authority's objectives. The evaluation process should be subjected to testing prior to the launch of the RFP. This can be undertaken by passing 'mock' bidder scores through the evaluation model to identify any potential problems with the process.

The bid report, which is prepared by the Authority's legal, technical and financial advisers will contain summaries of each bid and the rankings, which is then used to assist the Authority in its selection process.

One final point to keep in mind for evaluation bids is to ensure that when issuing the RFP, the Authority limit the areas for comparison of bids. By this, we mean ensuring as far as possible that the Authority receives 'apples and apples'. For example, if there are various elements of a tariff, the Authority might ask bidders to price one of those elements and to assume the other elements. This occurs in utility PPPs. One of the traps in tendering is that Authorities allows too much scope for differences in bids, which can lead to a delay while the Authority tries to makes sense of the various bids.

Finally, allowing bidders to submit alternate commercial/technical proposals is one way to allow innovation from the private sector, but such alternate proposals should be accompanied by a compliant proposal.

9. Procurement Stage: Limit Scope for Negotiations

Experienced legal advisors will ring fence negotiation points prior to the preferred bidder letter award. This process is usually crafted within the RFP conditions of tendering. It is not uncommon for a preferred bidder to seek to open up points of risk once the competitive environment has concluded, so it is critical to ensure that all outstanding legal, commercial and technical points are clearly understood and where possibly, that steps are taken to fend off challenges after the preferred bidder is selected.

Authorities can do this by:

- **avoid revisiting agreed issues or introducing new ones:** the Authority should enforce a strict rule prohibiting the preferred bidder from admitting any new issues into negotiations (i.e. issues not raised previously in the bids) and the parties should not re-open issues already agreed upon;
- **involve lenders during the negotiation/dialogue stage:** it is not uncommon for the preferred bidder to seek changes to the project legal agreements which are attributable to the demands of the bidder's lenders, particularly if the lenders have not been sufficiently involved in the bid process. The scope for such lender mandated changes can be limited by requiring bidders to ensure that their lenders have reviewed the RFP and the key project legal agreements and that the bidder's comments take into account any requirements of the lenders;
- **agree a timetable for the negotiation:** establishing a timetable for negotiations will limit the scope for delaying tactics and ensure the overall timetable for the project is upheld;
- **reserving the right to negotiate with alternative bidder(s):** the prospect of a reserve bidder waiting in the wings in the event that negotiations with the preferred bidder fail, or indeed keeping two preferred bidders, often helps to retain a sense of competitive tension during contract negotiations. However, this can come at a cost;
- **issuing a preferred bidder letter:** this is a letter signed by the preferred bidder that documents all of the above points, particularly those outstanding issues to negotiate and each party's corresponding views. A form of this should be included in the RFP.

Following the above steps will help an Authority manage and control the closing out process from the preferred bidder stage through to contract signing and financial close.

10. Delivery Stage: Capacity Building of Authority Staff

Major infrastructure projects will be new to some Authorities, who may have traditionally procured their infrastructure assets through traditional means. Indeed, some individuals within Authorities and indeed within centralized project management offices, may be embarking on their first ‘pathfinder’ major infrastructure project. It is therefore important that the Authority’s external advisers guide their clients through each project step and thereafter help to build internal capacity for future projects.

Through maintaining records of steps and problems that arise and crucially, how such problems are resolved, will facilitate capacity building and help Authorities run future processes more efficiently. Workshops, issues papers and “lessons learned” papers are all tools that are routinely used by experienced advisers to help their Authority clients build internal capacity.

Conclusion

The above are some of the key considerations we believe will help Authorities successfully deliver their infrastructure projects. Our tips are not exhaustive, and proper legal advice should be sought in all cases. Our tips are not exhaustive, and proper legal advice should be sought in all cases.

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