

PRINCIPLES FOR THE PUBLIC GOVERNANCE OF PUBLIC-PRIVATE PARTNERSHIPS

A. Establish a clear, predictable and legitimate institutional framework supported by competent and well-resourced authorities

1. The political leadership should ensure public awareness of the relative costs, benefits and risks of Public-Private Partnerships and conventional procurement. Popular understanding of Public-Private Partnerships requires active consultation and engagement with stakeholders as well as involving end-users in defining the project and subsequently in monitoring service quality.

Only if the political level is aware of and accepts the costs and benefits of using PPPs can the issues around PPPs be tackled and balanced appropriately with stability and predictability. The Ministry of Finance, line Ministries and executive agencies should ensure that a coherent approach to PPP is rolled out in the public sector and is joined up with other initiatives in adjacent fields. Given their complexity and long-term scope engagement with civil society is a prerequisite for the successful use of PPPs. This is especially the case when PPPs provide key public services. PPPs should, ideally, form part of an integrated public-sector infrastructure investment and procurement framework.

Active consultation and engagement with stakeholders should be an integral element of the process. PPPs may be used to introduce a more private-sector approach to service delivery in sectors that have previously been a part of the government. This can have effect on both working conditions, the culture of the work place and opportunities for advancement. Labour unions consequently represent a key stakeholder group that can be substantially affected by the usage of PPPs. For PPPs to work and to be legitimate, labour should be actively involved. The same can be said for NGOs and other civil society groups which often have concerns that PPPs may have social and environmental consequences and impact the rights of minority groups. Active involvement of NGOs can create transparency about problematic issues that might otherwise be overlooked and become serious problems if not tackled at an early stage.

Defining outputs in the PPP contract is essential. It should involve end-users in defining the project and its output specification and subsequently in monitoring service quality once the project is operational. Defining outputs can be instrumental in achieving better alignment of service specification with user expectations and exert pressure on service providers to meet service standards. In addition, involving end-users in design and monitoring increases the likelihood of the effort being perceived as legitimate, fair and understandable. Independent public oversight of PPP implementation can also promote public sector innovation and better outcomes for the society as a whole through greater accountability and social control.

2. Key institutional roles and responsibilities should be maintained. This requires that procuring authorities, Public-Private Partnerships Units, the Central Budget Authority, the Supreme Audit Institution and sector regulators are entrusted with clear mandates and sufficient resources to ensure a prudent procurement process and clear lines of accountability.

A number of institutional roles should be competently pursued to secure and maintain value for money: a sound procurement process; implementing the specific PPP; fiscal and budgeting issues; auditing of the PPP; rule monitoring and enforcement. These roles can be maintained in a number of institutional set-ups, but it is important that they are kept separate so as not to confuse the key tasks of each actor and to secure lines of accountability.

The authority that is procuring the PPP is the institution ultimately responsible for the project, subject to approval, monitoring and advice from the other actors at various stages. The authority is responsible for preparation, negotiation and administration of the contract and for monitoring and evaluating contract performance during the construction and operation phases of the project. This is crucial to ensure government retains value for money during the whole life of the contract. This authority is, therefore, ultimately responsible for the PPP contract and its operation. By value for money is meant the optimal combination of quality, features and price, calculated over the whole of the project's life.

Given the complexity of PPPs and their somewhat infrequent use, critical skills to ensure value for money may need to be concentrated in a PPP Unit that is made available to the relevant authorities. A PPP Unit's function can be pursued by a number of complementary units. The PPP Unit can fill gaps in terms of specific skills, a lack of coordination or high transaction costs. Institutional shortcomings should be addressed taking the country's needs and current institutional context into account. The PPP Unit should enable authorities (e.g. line ministries) to create, manage and evaluate a PPP efficiently and effectively. This role requires that the PPP Unit has the requisite in-depth financial, legal, economic and project management skills. This capacity should be used to assess the specific PPP compared to the traditional public investment route. The PPP Unit should support the authority in its endeavor to secure value for money both in the procurement and in the implementation phases. This Unit should also make sure that procedural steps (gateways) are followed throughout. It is important that the role of the PPP Unit is clear and without conflicts of interest. While responsible authorities should draw on expertise from the PPP unit where necessary, it should be emphasised that they remain ultimately responsible for the project. Importantly, although the PPP Unit should help the relevant authorities prepare and negotiate the PPP contract, it should not decide on whether the PPP should move forward. This green-lighting process should be anchored in the Central Budget Authority.

To secure affordability and project quality the Central Budget Authority should scrutinise each PPP. The Central Budget Authority should check and monitor the PPP through each key phase: Planning; Feasibility, Design and Tender Preparation; Bidding and Contract Signing; and Construction and Operation. The Central Budget Authority should scrutinise the project for value for money, affordability, procedural steps and that the projects remain in line with political agreements. While the Central Budget Authority need not possess deep and specific knowledge of the PPP project's technical design, it needs sufficient capacity to evaluate the documentation presented to it. The Central Budget Authority should assure that capital investments are aligned with the government's short and medium term macroeconomic stability targets.

The Supreme Audit Institution (SAI) has an important role in examining whether the risks involved in PPPs are managed effectively. The SAI's reports to Parliament can keep the public informed about the

services that they receive and also disseminate best practice. The SAI should audit and assess the PPP ex post with regards to performance, finance and compliance. It should maintain sufficient capacity to give a clear verdict on whether or not the project ultimately represented value for money, suggest possible improvements to the regulatory PPP framework, the procurement processes and make available overall lessons regarding the use of PPPs and investments. All relevant information should be made available to the SAI.

2.6 Sound regulatory policy promotes the efficient functioning of regulatory agencies by ensuring that they operate under an appropriate and clear mandate, with the necessary independence from political influence and regulated subjects, that they are appropriately resourced and equipped, and that their decision-making is fully transparent and accountable. Where PPPs are employed in the delivery of infrastructure facilities with natural monopoly characteristics, the role, design and organisation of regulators is important to secure value for money for the public sector and protect users and consumers. This role should be clear to all (staff, regulated entities and the community). The appropriate sector regulator should consequently be consulted in the project design and subsequently monitor compliance with regulated service standards. This role is important not only in shaping the markets, but also with concrete issues such as service quality, profitability, tariffs and prices. Of particular interest in monopoly-like situations is the degree of profitability compared to the sector average using various benchmarks.

The above roles should be institutionally maintained at sub-national level.

3. Ensure that all significant regulation affecting the operation of Public-Private Partnerships is clear, transparent and enforced. Red tape should be minimised and new and existing regulations should be carefully evaluated.

A regulatory environment which meets the key principles of good regulation, as set out in the OECD Recommendation on Regulatory Policy and Governance, reduces the costs to business and enhances the chances that PPP projects bring value for money.

While the contract is the main basis for a PPP, it is necessary to have a clear and transparent regulatory framework that all parties can trust, is enforced and that does not create barriers to entry. Such a framework fosters competition and helps minimising the risk of conflicts of interest, regulatory capture, corruption, and unethical behaviour. To that end, governments should adhere to principles of open government. Access to information and the decision-making process should be open and equitable.

Private investment will be facilitated if unnecessary red tape is removed and delays to approval processes are reduced. An effective regulatory framework implies careful evaluation of new regulations and systematic review of the stock of significant regulations to ensure that they are up to date, cost effective and consistent and deliver the intended policy objectives. This may require the coordination of approval processes in specific circumstances to remove regulatory obstacles to the delivery of PPPs, such as coordinating and streamlining multiple layers of regulation that may affect projects – either across one or different levels of government (central/federal, sub-national/state and local). The rule of law and the protection of property rights and contractual rights are a key condition as also highlighted in the Principles for Private Sector Participation in Infrastructure.

B. Ground the selection of Public-Private Partnerships in Value for Money

4. All investment projects should be prioritised at senior political level. As there are many competing investment priorities, it is the responsibility of government to define and pursue strategic goals. The decision to invest should be based on a whole of government perspective and be separate from how to procure and finance the project. There should be no institutional, procedural or accounting bias either in favour of or against Public-Private Partnerships.

It is important that the projects that go ahead have been prioritised at the political level. The basis for the decision should include an initial cost assessment and evaluation of the opportunity cost that should feed into the affordability decision. The decision to invest should include a holistic cost-benefit analysis addressing the project's interaction with other government policy tools (such as spatial planning, regulation of traffic, utilities, and development plans) and objectives. Line ministries and other actors should not be allowed to develop their investment programs without aligning them with the government's overall political priorities.

On the basis of the initial cost assessment, the holistic cost benefit analysis and the political judgment, an initial affordability decision can be made and projects can be prioritised against each other. The cost-benefit evaluations and the ranking of different projects should be made available to the public to encourage debate about what large infrastructure projects are the most important. The investment decision should be separate from the decision as to how to procure and finance the specific project. To strengthen prioritisation between PPPs and traditional infrastructure procurement within the budget envelope decisions should be based on a whole of life, present value, approach for both.

There should be no institutional, procedural or accounting bias either in favour of or against PPPs. Value for money should be the only test as to whether a particular project is procured by way of a PPP or through conventional procurement routes.

5. Carefully investigate which investment method is likely to yield most value for money. Key risk factors and characteristics of specific projects should be evaluated by conducting a procurement option pre-test. A procurement option pre-test should enable the government to decide on whether it is prudent to investigate a Public-Private Partnerships option further.

Once the government has decided to move forward with the investment, a project should be subjected to a procurement option pre-test. This should guide government in selecting which mode of procurement is likely to deliver the most value for money. The following elements should be included in such an examination and thereby indicate to the policy maker whether it is worthwhile to investigate the PPP procurement option.

- What are the comparative costs of (a) finance (b) construction (c) operation, as calculated over the whole lifetime of the project, in each alternative mode of procurement?
- Can the risks of the project be clearly defined, identified and measured?
- Can the right types of risk be transferred to the private partner to ensure value for money?
- Does the project involve any transfer of risks onto other stakeholders, including workers and local communities?
- Is the risk appetite of potential private-sector partners sufficiently robust to explore a PPP?

- Do potential private-sector partners have a track record of good service delivery, responsible business conduct and PPP experience?
- What is the potential level of competition in the market? If competition is lacking, is the market contestable?
- Is there sufficient market interest in the project to generate a robust competition that will ensure a value for money outcome?
- How large are the whole of life benefits from combining the construction and the operating phases of a project in one contract?
- What are the risks of project failure associated with similar PPPs? What are the costs to the public authority associated with such failures?
- What contingent liabilities are associated with the project?
- Can the risks, cost and quality trade-offs be quantified and managed by the public sector?
- Can the desired project output be specified clearly ex ante? Is the planned project operating in a rapidly changing policy or demand environment? Are the underlying assets to be used to deliver the output in an area subject to rapid technological change?
- Is the potential PPP project of a size sufficiently large to justify the transaction costs?
- Who will make the contractual payments to the private-sector partner? Can some or all of the payments come from end-user charges?
- If end-user charges are levied will demand be sufficient over the lifetime of the project to ensure that the private partner generates the revenue required for it to maximise its profit? Might the potential private-sector partners accept demand risk in addition to availability risk?

If relevant, further analysis regarding using a PPP should be based on input from a prudent public sector comparator, or an equivalent to compare value for money across options, especially when operation is an important component of the project. There are different methods used to assess the relative value for money of the different delivery models. In principle, a public sector comparator compares the net present cost of bids for the PPP project against the most efficient form of delivery according to the output specification by conventional public sector means (the so-called reference project). The public sector comparator serves as a hypothetical risk-adjusted cost of public delivery of the output specification of a PPP project. The methodology for preparing the public sector comparator should be published.

6. Transfer the risks to those that manage them best. Risk should be defined, identified and measured and carried by the party for whom it costs the least to prevent the risk from realising or for whom realised risk costs the least.

After the fundamental assessment of specific issues and comparative costs, the key element in the decision to use PPPs is the transfer of risk from the government to the private partner. Risk is defined, identified and measured, and either retained by the public sector or transferred to the private partner through specific contract terms and an appropriate payment mechanism. Risk should be allocated where it can be best managed. By 'best' managed is meant the party for whom it costs the least to prevent the risk from realising, or for whom it costs the least to deal with the consequence of realised risk.

Risk should not be transferred to the private partner at any price for the sake of transferring risk alone or to achieve a desirable accounting treatment. Governments and public authorities cannot transfer to the private sector the risks associated with statutory responsibilities to maintain services.

An essential question is whether the risks of the project can be defined, identified and measured. The less this is the case, the more room there is for conflict over the contract, particularly when the risk realises. Potential private partners might also be unwilling, for an acceptable price, to take on risks that are not clearly defined, identified and measured. There should be clear methods in the contract by which risks can be apportioned when they materialise. This is particularly important in cases where risk is difficult to measure.

7. The procuring authorities should be prepared for the operational phase of the Public-Private Partnerships. Securing value for money requires vigilance and effort of the same intensity as that necessary during the pre-operational phase. Particular care should be taken when switching to the operational phase of the Public-Private Partnerships, as the actors on the public side are liable to change.

There is a danger that after the financial close of the PPP the attention from public sector decision-makers and key actors is substantially reduced. Should such a reduction of attention result in a concomitant reduction of capacity on the public side value for money can be threatened. Monitoring the performance of the PPP in the construction phase and the operational phase requires skill and dedication, especially as targets may shift and unforeseen, but legitimate, obstacles may arise. It is also the responsibility of the procuring agency to ensure that the private partner acts according to the norms of responsible business conduct as mentioned in the OECD Guidelines for Multinational Enterprises.

For the operational phase to be successful all relevant actors should remain involved. The responsibility for the operational phase of the project primarily rests with the procuring line ministry/ agency. Potential problems should be identified at this level and dealt with to the extent of these institutions' mandate. However, the PPP Unit, Central Budget Authority, Supreme Audit Institution and Regulatory Authorities should play their part and retain the appropriate level of ownership regarding the project.

Particular attention should be paid to contractual arrangements and monitoring capacity at later stages of a project so as to ensure that incentives do not deteriorate as the cost of non-compliance falls.

8. Value for money should be maintained when renegotiating. Only if conditions change due to discretionary public policy actions should the government consider compensating the private sector. Any re-negotiation should be made transparently and subject to the ordinary procedures of Public-Private Partnership approval. Clear, predictable and transparent rules for dispute resolution should be in place.

By monitoring and liaising with the private contractor, the public sector should maintain a project's value for money throughout its operation. The original risk transfer and contract terms should be maintained and care should be taken to make sure that the standards to which the private-sector contractor operates are not eroded without compensation to the public-sector authority. Clear rules stipulating the criteria, procedures and compensation for government expropriating the asset should be in place as prescribed in the Guidelines for Multinational Enterprises.

Nonetheless, in some cases the assumptions underlying the project may turn out to be flawed and in extreme cases this can lead the project towards failure. As the public sector has an interest, sometimes a statutory responsibility, in making sure the asset keeps operating smoothly; a re-negotiation should take place to investigate possible solutions. However, even if the current project outcome differs from what the private partner expected, it may just be a realisation of the risk that it carried. Both parties should distinguish between the realisation of risk and a genuine unforeseen change in circumstances. Only if conditions change due to discretionary public policy actions (i.e., “actions of the Principal”) should the government consider compensating the private sector. Any other compensation for changes in commercial conditions should be explicitly negotiated within the contract. Otherwise, the risks to re-negotiations of PPP contracts due to changes in international conditions not foreseen at the moment of the contract award could significantly increase fiscal costs of PPPs for the government. Clear, predictable and transparent rules for dispute resolution should be in place to resolve disagreement on the above between the public and private parties.

Furthermore, any re-negotiation that substantially alters the original agreement should be made public and be subjected to approval by the authority responsible for approving PPPs. Such an agreement should be as competitively done as possible.

9. Government should ensure there is sufficient competition in the market by a competitive tender process and by possibly structuring the Public-Private Partnerships program so that there is an ongoing functional market. Where market operators are few, governments should ensure a level playing field in the tendering process so that non-incumbent operators can enter the market.

Competition helps ensure the effective transfer of risk, that optimal solutions are developed by the private sector and that the most competitive bid is tendered. There should be competition for the market when tendering for PPP bids or in the absence of competition, the market should be contestable once the tendering is concluded and the PPP is operational. Thus, the private partner would know that there is the possibility of other private partners entering the market. To further strengthen competition, it can be beneficial to structure a PPP program to ensure an ongoing functioning market. This can possibly be achieved by unbundling the supply chain, so that different operators can enter various operational segments of the chain, and also by unbundling large-scale national or regional projects into different geographical parts. This is particularly important in cases where the PPP operator subsequently becomes a monopoly in a certain area. The OECD Recommendation Concerning Structural Separation in Regulated Industries can provide guidance in this respect.

It is beneficial to maintain an open and non-discriminatory investment environment and steps should be taken to ensure that domestic and foreign-owned firms can compete on an equal footing. Though private providers can coexist with State owned incumbents, measures to maintain a level playing field may be needed. According to the OECD Guidelines on Corporate Governance of State-Owned Enterprises, these measures include a clear separation between the public sector’s ownership function and other factors that may influence companies’ position, transparency regarding service obligations, access to finance and transparency concerning financial assistance and guarantees covered by the public purse.

C. Use the budgetary process transparently to minimise fiscal risks and ensure the integrity of the procurement process

10. In line with the government's fiscal policy, the Central Budget Authority should ensure that the project is affordable and the overall investment envelope is sustainable.

PPPs, as well as conventional long-term government borrowing for investment, are more difficult to integrate with the annual budget process than more ordinary variable expenditures that can be modified from year to year. This makes affordability assessments particularly important when the project is being prepared. An investment project is affordable if the expenditure and contingent liabilities it entails for the government can be accommodated within current levels of government expenditure and revenue and if it can also be assumed that such levels will be and can be sustained into the future. The investment expenditure budget, including an assessment of contingent liabilities, should be based on medium and long term fiscal projections and regularly updated. Limits on stocks and flows of PPP, while not a substitute for medium-term planning, can help contain fiscal costs and limit overall public sector long-term commitments to levels that are fiscally affordable. This applies to the overall public sector, regardless of the level of government from which the fiscal costs originated.

11. The project should be treated transparently in the budget process. The budget documentation should disclose all costs and contingent liabilities. Special care should be taken to ensure that budget transparency of Public-Private Partnerships covers the whole public sector.

Budget documentation should transparently disclose all information possible regarding the costs and contingent liabilities of the PPP. The information should include what and when the government will pay, and full details of guarantees and contingent liabilities. The payment stream from government under the PPP contract should be highlighted, particularly if it is back loaded. Preferably the information should be disclosed at the same time as the results of the long-term fiscal analysis that shows the long-term effects of the stock and new flow of PPP contracts. The treatment of PPPs should conform to The 2002 OECD Best Practices for Budget Transparency.

A particular challenge for the prudent and transparent usage of PPPs is the application of this tool outside of general government but within the public sector, in particular state owned enterprises (SOEs). SOEs can engage in PPP-type of arrangements that often, but not necessarily, require explicit, or implicit, guarantees from the central government. SOEs may have long-term obligations to purchase goods and services from the private sector, such as power and water purchase agreements. As these obligations in general are not included in the definition of public debt they may not be properly monitored by the central government. However, given the political importance of the provided services central government might very well be expected to assume some financial responsibility if needed. This may require that the Central Budget Authority actively monitors and mandates the use of PPP-like arrangements in the Public Sector at large.

Where central government has the relevant constitutional authority it should consider allowing sub-national governments to prudently use PPPs. If there are implicit or explicit central government guarantees to sub-national government levels, PPP activity should be controlled through rules on PPP stocks and flows. The Ministry of Finance should retain an up-to-date overview of all PPP liabilities relevant for central government. Given the fact that sub-national governments are less likely to accumulate a critical mass of projects over time central government should consider ways of leveraging its management capacity regarding PPPs to the benefit of sub-national governments.

12. *Government should guard against waste and corruption by ensuring the integrity of the procurement process. The necessary procurement skills and powers should be made available to the relevant authorities.*

Enhancing integrity necessitates recognising the risks inherent throughout the entire procurement cycle, developing appropriate management responses to these risks, and monitoring the impact of mitigating actions. PPP procurement should be a strategic profession, informed by an understanding of relevant commercial principles rather than a simple administrative process within a public organisation. This transformation necessitates developing knowledge and creating tools to support improved procurement management decision making. Enhancing integrity in public procurement should be placed within the broader management goals of the public sector as discussed in the 2008 OECD Principles for Enhancing Integrity in Public Procurement.