Republic of Botswana

PUBLIC-PRIVATE PARTNERSHIP POLICY AND IMPLEMENTATION FRAMEWORK

MINISTRY OF FINANCE AND DEVELOPMENT PLANNING

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Table of Contents

List of Acronyms

DBES	Department of Building and Engineering Services
ICT	Information Communications Technology
MFDP	Ministry of Finance and Development Planning
MWT	Ministry of Works and Transport
NDP	National Development Plan
PEEPA	Public Enterprises Evaluation and Privatisation Agency
PPADB	Public Procurement and Asset Disposal Board
PPP	Public Private Partnership

1. INTRODUCTION

1.1 In 2000, the Government of Botswana adopted its Privatisation Policy aimed at providing an optimal balance between the public and private sectors so as to achieve sustainable economic growth. The Policy did not seek to define what activities ought to be carried out by Government and which activities should be undertaken by the private sector, but rather how best to balance the strengths and limitations of the private sector and Government's and how they can best complement each other.

1.2 The impetus for privatisation in Botswana springs from a desire to improve efficiency in the delivery of services, to raise the country's growth potential by securing stronger flows of foreign direct investment and technology transfer and to create further opportunities for the development and growth of the citizen business sector.

1.3 Botswana now has a more developed private sector, capable of supplying services for and on behalf of several Government Departments. The financial sector is also sufficiently developed to stimulate private sector participation initiatives that require financing.

1.4 The Privatisation Policy of Botswana defines privatisation broadly to encompass "all measures and policies aimed at strengthening the role of the private sector in the economy". The objectives of privatization in Botswana include, among others, the need to improve the efficiency in the delivery of public services by creating opportunities for greater private sector participation in the economy. The Government intends to achieve this by transforming the role of Government from that of provider and regulator to that of facilitator in order to attain its developmental goals in partnership with the private sector. To this end, the involvement of the private sector in public services provision through a Public Private Partnership method falls within privatisation.

2. BACKGROUND

2.1 In the 2002/2003 Budget Speech and the National Development Plan 9, Government announced that Public Private Partnerships (PPPs) would be used extensively as a form of procuring and financing infrastructure projects in the public sector to ensure sustainable investment in infrastructure as well as to restore soundness in public finances and bring down the budget deficit to a sustainable level.

2.2 To achieve this goal, Government must create a conducive environment to encourage and attract private sector investors to play a greater role in procuring and financing of infrastructure projects through PPPs in line with other countries which are competing for similar investment. Any PPP initiatives undertaken without creating a conducive environment for investing in PPP projects could result in a low uptake rate and perhaps with very high perceived risks, both of which can be detrimental to investor confidence.

2.3 As a first step to establish a strategic framework for PPPs in Botswana, the Public Enterprises Evaluation and Privatisation Agency (PEEPA) with the support of the SADC Banking Association, undertook an assessment of the current environment for

PPPs in Botswana in order to establish whether the policies, laws and suitable Sponsoring Institutions exist to facilitate PPP projects' implementation as well as to determine what additional measures may be required to create the necessary conducive environment for PPPs.

2.4 Relevant findings of the review were:-

2.4.1 The general policy and legal framework in Botswana is considered less enabling to deal efficiently with PPPs although there are no major impediments to inhibit PPP projects' implementation.

2.4.2 There are no standardized approaches and process guidelines to deal with the structure of PPP projects and no uniform framework to guide the treatment of tendered and unsolicited proposals.

2.4.3 The existing institutional set up and capacity to handle PPPs is inadequate. There is a lack of coordination of PPP initiatives as well as a lack of clarity of roles of government agencies and departments [e.g. PEEPA, Public Procurement and Asset Disposal Board (PPADB), Ministry of Finance and Development Planning (MFDP), Ministry of Works and Transport (MWT), among others] in the implementation of PPPs thus resulting in conflicting positions amongst the government agencies and departments.

2.5 Recommendations of the review included:

2.5.1 The creation of a stable policy framework.

2.5.2 The development of detailed PPP procedures and guidelines for project conception, preparation, procurement and management.

2.5.3 Ensuring that the legal requirements to support implementation of PPP projects are harmonized.

2.5.4 The establishment of a PPP Unit with the role of guardian of the PPP policy and includes overall co-ordination of implementation of the PPP projects, project planning, approval of financing and processes of PPP projects. In addition, its mandate includes to harmonise the institutional roles of PPP facilitators, regulators and implementers in Government, including PEEPA, PPADB, MWT, MFDP and others, to improve co-ordination and project identification and implementation.

2.6 A key finding of the review was that several of the privatisation modalities set forth in the Privatisation Policy include activities that are commonly described in other countries as PPPs and that a clear specification is required of the Privatisation Policy relating to PPPs together with a strategy for development and implementation.

2.7 The Privatisation Master Plan, which was adopted by Government in 2005, states that PPP is one of the strategies that will be used for private sector participation in the provision of infrastructure and services, especially as it relates to new projects. The Master Plan recognised the necessity of the development of a clear policy on the implementation of PPPs, the establishment of a legal and regulatory framework that promotes commercial and innovative approaches to service delivery as well as developing competitive bidding and procedures and guidelines specific to PPPs.

2.8 The Master Plan directed PEEPA to play a leading role in developing the overall guiding policy and setting up an effective regulatory framework for PPPs. The roles of the Ministry of Works and Transport, the Ministry of Finance and Development Planning and the Public Procurement and Asset Disposal Board were also recognized and described.

2.9 In 2006 PEEPA proceeded to develop an implementation strategy for the PPP programme in Botswana, informed by the above and a further examination of the existing legislative framework in Botswana, a review of international best PPP practices and an analysis of the application of those best practices within an African country context.

3. PUBLIC-PRIVATE PARTNERSHIPS POLICY

Public-Private Partnerships Defined

3.1 A PPP involves a contractual arrangement between a governmental institution and a private party whereby the private sector party provides public infrastructure and/or infrastructure related services and where the provision of such infrastructure and/or infrastructure related services is:-

(a) Based on measurable output (end result) specifications;
(b) Governed by a payment mechanism that provides payment only on delivery of services at required standards;
(c) Accompanied by a transfer of financial and operational risks with consequential financial effects; and
(d) Demonstrates Value for Money to Government.

3.2 Although PPPs typically relate to the provision of immovable infrastructure, such as roads, office accommodation, schools and hospitals they have been used to a lesser extent for movable assets such as vehicle fleets or pure services, such as social grant administration. This Policy envisages that such projects may be PPPs, as long as they satisfy the afore mentioned criteria (a) to (d).

Rationale for PPPs

3.3 Like many countries, the Government of Botswana faces challenges in the delivery of public services infrastructure including maintenance and operational obligations. New infrastructure needs to be provided and existing infrastructure upgraded to deliver public services more effectively and extend access to services to a greater number of the population.

3.4 In order to deliver such needed capital investments whilst maintaining sound fiscal policies, the Government requires alternate means of financing such investments including the use of PPPs. Internationally, PPPs are used effectively as a means of providing economic assets, such as roads and railways, government accommodation and social assets, such as schools and hospitals.

3.5 PPPs are important in the context of the Botswana economy in terms of the strategic and operational choices they offer to Government. They are strategic in the form of fostering economic growth by developing new commercial and investment opportunities for citizen investors and foreign direct investment and increasing competition in the provision of public services. They are operational in terms of providing opportunities for efficiency gains in the form of better quality and more cost effective delivery of services by private sector participants.

3.6 By entering into a PPP, the delivery of a public service infrastructure is enhanced by accessing the private sector's financial, managerial, professional and technical expertise. The necessary maintenance and operation of this infrastructure is also enhanced by private sector resources. This allows public services to be delivered more efficiently, which allows Government resources to be channelled into other areas where direct public investment and intervention is required.

3.7 Furthermore, involvement of the private sector, particularly citizen companies, in public service infrastructure provision enhances the role of the private sector in the economy of Botswana. Accessing private sector financing will develop and strengthen the Botswana financial capital markets and may stimulate additional foreign direct investment.

3.8 While PPPs form an integral component of Government's overall strategy for the provision of public services infrastructure across all appropriate sectors, they may not be the answer to all Government's project delivery needs. However, PPPs should be investigated in the first instance when suitable projects are being evaluated against the criteria discussed later in this Policy.

Policy Objectives

3.9 This Public-Private Partnership Policy provides a means to promote the efficient allocation and use of economic resources of Government and the private sector. Worldwide, the objectives of PPPs vary in certain aspects, but in general they include the following, which objectives are embraced by the Government of Botswana:-

(a) promoting or optimising the efficient allocation and use of economic resources of the public and private sectors;

(b) accelerating and/or improving infrastructure development and delivery for the public;

(c) defining the role of Government to ensure it has a clear understanding of the PPP project and the financing risks it is undertaking and that it can effectively monitor contract progress and service quality;

(d) creating a conducive environment that supports the establishment of stronger partnerships between the public and private sector for public infrastructure and services delivery;

(e) setting boundaries for Government's involvement with the private sector in the procurement of public infrastructure and services;

(f) promoting high quality public services and the efficient use of public assets by encouraging private sector innovation and risk sharing;

(g) ensuring that infrastructure and related services are delivered in accordance with best practice processes and ensure accountability;

(h) clarifying the role of the PPP Unit, set forth the institutional structure within which it operates and define the roles and responsibilities of all relevant Government stakeholders.

(i) assisting in the identification and filling of skill deficits in all major Government role players in terms of this PPP Policy;

(j) promoting and sustaining economic growth and employment opportunities; and

(k) providing clear mechanisms for monitoring and regulating service delivery.

Benefits of PPPs

3.10 While PPP procurement is only one of several options for procuring infrastructure and related services, the principal reason for using PPPs is that where the project is suitable and affordable, it can deliver better value for money than the alternatives.

3.11 The key advantages for using PPP procurement are:-

- The costs of the project infrastructure are spread over its useful life;
- The use of private sector skills to deliver the project on time, to budget and with improved levels of service delivery;
- The increased role of the private sector also encourages foreign direct investment and develops the citizen private sector further;
- Budget certainty which is especially relevant for the long term planning of economic development;
- Project risks are allocated to the party best able to manage them; in particular, the private sector takes lifecycle risk ensuring that assets are well maintained throughout the contract period;
- The public sector is forced to focus on outputs and benefits from the start, with payment only commencing when services are delivered;
- The quality of the service has to be maintained for the life of the PPP, ensuring users benefit in the long term and not just the short term; and
- The injection of private sector capital reduces the pressure on the Government purse and provides a reliable long term asset class for investors such as pension funds.

Challenges of PPPs

3.12 PPPs require complex contractual arrangements and as such the procurement process is lengthy and costly. Both Government and the private sector will require capacity and skills to undertake PPP procurement and to implement and manage PPPs. There is thus the need for capacity building in both Government and the private sectors. The perception of an implied loss of control by the public sector in its service provision and concerns of the higher cost of private finance in public infrastructure investments will need to be addressed.

3.13 These challenges are addressed in this Policy through project selection criteria, capacity building and the supporting PPP implementation guidelines.

Scope of PPPs

3.14 Internationally, PPPs have been applied to many sectors including office accommodation, airports, defense, housing, health, IT, ports, prisons, heavy and light rail, roads, education and water and waste services. The size of the project, risk profile and complexity, market capacity, Governments' public service delivery policies and end user requirements are factors that determine which infrastructure projects are undertaken as PPPs.

3.15 Government will in the initial years of the Policy, with the objective of ensuring that PPPs are implemented successfully, focus on procuring projects that are:

(a) Sufficiently large to justify the transaction costs;

(b) Not overly complex and that have a fair risk profile;

(c) Feasible to implement in terms of private sector capacity;

(d) Amenable to citizen participation in accordance with Government policy; and

(e) Visible in meeting immediate end user needs and / or non-controversial in terms of where Government has traditionally provided the services.

3.16 Thus it is envisaged that projects in the areas of serviced office accommodation, educational facilities, health facilities and transport infrastructure would be the candidates for the early PPPs in Botswana.

Scope of the PPP Policy

3.17 The process of procuring PPPs is subject to various approval requirements because of the large financial commitments that Government will enter into when contracting such agreements, the complexity of the contractual arrangements and the need to ensure that the PPP offers value for money.

3.18 Central Government provides funding to Local Authorities and Land Boards as well as many Public Enterprises. This Policy is, therefore, applicable to all Ministries, Departments, Public Enterprises, Land Boards and Local Authorities (hereafter "Sponsoring Institutions") that will rely on such funding to meet their financial obligations under a PPP contract. Public Enterprises that possess their own financial resources, and are not dependent upon Central Government funding at all should evaluate all infrastructure projects in accordance with this Policy and the PPP Guidelines as a matter of good governance and corporate practice. This is to ensure that any financial commitments can be met and that the PPP offers value for money.

Public-Private Partnership Principles

3.19 Implementation of the Public-Private Partnership Policy has to accord with the following principles:

(a) public Sponsoring Institutions purchase services, not assets;

(b) the services to be purchased are expressed as outputs or service standards, rather than on input specifications;

(c) risks are allocated to the party best able to manage them;

(d) the private party is compensated according to performance and penalties are imposed where performance fails to meet established performance indicators;

(e) a public-private partnership must demonstrate "Value-for-Money" based upon affordability to the public institution and transfer of significant risk to the private party;

(f) processes for the procurement and implementation of public-private partnerships must be transparent and accountable; and

(g) standardized procedures, as listed in the Public-Private Partnership Framework, must be used to minimise transaction cost and time.

Citizen Empowerment

3.20 The Government, in its Long Term Vision (Vision 2016) acknowledges that "there is a challenge to find concrete strategies to ensure citizen empowerment and to maximise the participation of citizen owned companies in the economy."

3.21 In response to this, consideration should be given to measures in the PPP processes that will assist the economic empowerment of Batswana through, among other means, requiring bidders in PPP tenders to:

- Associate with citizen owned companies in bidding consortia, where the feasibility study indicates the presence of such companies competent to provide the services required by the tender;
- Use local labour and supplies;
- Use local SMMEs

- Commit to skills transfer and capacity building of citizens providing the local labour.

3.22 It is recognised that non-citizen companies have advantages both in resources and in experience of PPP procurement. The PPP Guidelines include a specific Guidance Note on Citizen Participation which addresses, among others, the role of foreign companies in partnering with citizen companies.

3.23 Additionally, Government shall approach insurance companies and pension funds in Botswana to explain the benefits of financing PPPs.

4. PPP IMPLEMENTATION FRAMEWORK

4.1 The successful roll-out of PPPs requires an institutional and regulatory regime that is enabling and allows projects to be completed so that the benefits of increased private sector involvement and improved service delivery may be realised.

Legal and Regulatory Framework

4.2 The existing regulatory and legal framework governing procurement is embodied in the PPAD Act and the role of the Public Procurement and Asset Disposal Board (PPADB). A PPP is essentially a specialised form of procurement; albeit one that involves a detailed procurement process and substantial financial commitments by Government over a longer time frame.

4.3 To support the roll-out of PPPs, this Policy envisages the establishment and adoption of specific regulations to govern the procurement of PPPs within the current overall legislative framework. Relevant regulations to govern Central Government PPP projects have been developed and should be adopted as a new Part XIV of the existing PPAD Act Regulations.

4.4 Similarly, it will also be necessary to amend existing District Council regulations to provide for appropriate District Council budgeting guidelines for PPPs and also to amend existing Town Council regulations to empower town councils to procure infrastructure and related services.

Institutional Framework and Responsibilities

4.5 As outlined in the Privatisation Policy and Master Plan, the Sector Ministries are responsible for the implementation of privatisation, including procurement of private sector services through PPPs. The specialised nature of PPP procurement necessitates technical support for the sponsoring ministries and the size of the financial commitment requires the involvement of the Ministry of Finance Development and Planning (MFDP) in addition to PPADB statutory oversight of the procurement process.

4.6 The institutional framework envisages the following roles and responsibilities:

4.7 The Sponsoring Institutions (the Sector Ministries with their departments and public enterprises) have primary accountability for service delivery and are thus ultimately responsible for driving forward and implementing PPP projects. Under this Policy, they have the primary responsibility for identifying and initiation, sponsorship, procuring, implementing and managing PPP projects; albeit with technical assistance from MFDP. The Sponsoring Institutions will be intimately involved with the project throughout its lifetime, to ensure that the objectives of the project in addressing particular needs are achieved.

4.8 MFDP's role under this Policy will be one of advocacy for and co-ordination of PPP projects as well as providing support for capacity building. MFDP is also mandated to provide technical assistance to the Sponsoring Institutions throughout all the stages of a PPP project from project conceptualisation through to contract management, including the procurement of private sector partners. Due to the potential size and number of PPP initiatives as well as the complexity of the projects, a PPP Unit will be established in MFDP to ensure effective co-ordination of the Policy, project planning, approval of processes for PPP projects.

4.9 In line with its current statutory powers, the PPADB will be responsible for ensuring that the PPP procurement process is fair and transparent. To avoid duplication of activities and the associated implications for time and cost, the PPADB will not advise on the merits of the project itself but rather be primarily concerned with ensuring the integrity of the procurement process and that the PPP price is within the budget allocation. In accordance with its statutory powers, PPADB will have the power to approve bidding documents, adjudicate bid recommendations and formally award the tender.

4.10 MFDP co-ordinates the project planning as well as project financing processes and retains accountability for allocation of funds from the national budget. In the context of PPP projects, MFDP will assume the essential role in making provision for the necessary finances and ensuring that such finances will be available during the life time of a PPP project. Further, the MFDP shall adopt such rules as needed for confirming to the sponsoring Institution and PPADB that the funds for the particular PPP project will be available and a contract can be entered into.

4.11 Throughout the PPP process, many other stakeholders, including users, the contracting parties, funders, planners, environmentalists, the auditor general and the wider public will be involved. The nature of this involvement will depend very much on the nature of the project and may be limited to a specific stage, such as obtaining planning approval for a project. The Guidelines supporting this Policy include recommendations for involving the different constituents of the wider stakeholder community.

PPP Unit

4.12 In other countries, PPP Units or Departments have been established both as independent agencies and within government departments, often Ministries of Finance. The size of the Botswana economy, the likely quantum of deal flow and the limited resources available dictate that a separate organisation with its attendant costs is not justified. This is in line with the Government's strategy for rationalising public entities.

4.13 A specialist team of PPP experts will be established within the organisational structure of MFDP. A generic organisation structure of the proposed PPP Unit is attached as Annexure 1. The specialist team will comprise of experts with professions and experiences at least in the fields of law, economics, corporate and financial analysis and engineering.

4.14 The role of the PPP Unit, as the custodian of the PPP Policy, is to ensure the successful implementation of the PPP Policy and will be assigned with the following responsibilities:-

- overall co-ordination and monitoring of the PPP Policy and projects;
- technical assistance to Sponsoring Institutions;
- assisting in the selection of suitable PPP projects;
- approval of PPP feasibility studies and bid evaluation reports; and
- advocacy for PPPs and capacity building initiatives

4.15 The PPP Unit to be established within MFDP shall adopt processes and procedures as it deems necessary for carrying out its mandate.

PPP Contracts

4.16 The institutional arrangements and PPP Regulations to be introduced will govern the conceptualisation and procurement of PPP projects. The implementation of PPP project will be governed by the actual PPP contract signed, in terms of the required contract management plan.

4.17 The PPP contract will be based on "Standardised Contract Provisions" included in the PPP Guidelines supporting this Policy. These provisions, based on international norms for PPP contracts in the Botswana context, are detailed and include the specific obligations that both parties have under the contract. As is the typical international practice, the "Standardised Contract Provisions" will be modified as appropriate to meet the unique circumstances of each individual PPP project. A summary of the Standardised Contract Provisions is attached as Annexure 2.

5. PROCESS FOR THE IMPLEMENTATION OF PPPs

5.1 The PPP Guidelines provide a best practice guide for PPP practitioners (in both public and private sectors) on the processes and procedures to be followed by a government institution to obtain the required approvals for the procurement of PPP projects. The scope of these guidelines covers the four phases of the PPP Project Cycle. This is shown in Annexure 3, and includes:

- Project Initiation (Inception) Phase
- Business Case Consideration (Feasibility Study) Phase
- Project Procurement Phase
- Contract Management (Implementation) Phase
- Project Initiation (Inception) Phase

5.2 Government Sponsoring Institutions have the primary responsibility for identifying potential PPP projects as part of the National Development Plan (NDP) process and the annual budgetary process. PPP projects should be identified and prioritised using a cost benefit analysis that examines how well they address the NDP's development requirements. The PPP Unit shall co-ordinate this exercise to ensure that the NDPs include all projects that the Government should consider for procurement via the PPP method.

5.3 If the project passes this economic benefit analysis and with the concurrence of the MFDP, a pre-feasibility assessment is conducted by the sponsoring Institution with the assistance of the PPP Unit. This will examine the motivating suitability for procuring of the project as a PPP and carry out a high level costing to indicate whether the project has a potential for demonstrating value for money. The assessment of whether a development or service improvement project is suitable for procurement as a PPP will depend on the criteria including the size of the project, the capacity of both the public and private sectors to deliver the project, and the prospect of the project being affordable and offering value for money to Government.

5.4 The pre-feasibility project assessment will then be presented to the PPP Unit which will make a preliminary determination of whether the project is suitable for procurement as a PPP. If the project is suitable it will be registered by PPP Unit as a PPP project and enter the procurement phase. If the project is deemed unsuitable for a PPP, the Institution will consider alternate forms of procurement. On registration, a project committee shall be established to steer the project.

Business Case Consideration (Feasibility Study) Phase

5.5 In the second phase, a feasibility study is undertaken to help the Institution determine whether the PPP or conventional procurement method is the best option for implementing the proposed project. For an Institution to select whether to procure the project as a PPP, the feasibility study must demonstrate that the PPP choice is affordable, transfers appropriate technical, operational and financial risk to the private party and demonstrations value for money. It is therefore critical to the decision as to which procurement methodology is to be implemented. The feasibility study is carried out, where necessary, with the assistance of a transaction advisor who would be appointed by the sponsoring Institution with the assistance of the PPP Unit.

5.6 The feasibility study report will conclude whether or not the project should be procured as a PPP and if so what will be the likely costs to the Institution on an annual basis. The study must be approved by the project committee, the sponsoring Institution, and the PPP Unit. MFDP will confirm whether budgetary funds will be available for the project.

Project Procurement Phase

5.7 The procurement phase will commence once approval of the feasibility study has been secured from the PPP Unit. PPP procurement, like other forms of government procurement, is required to follow the highest standards of transparency and will be implemented under the relevant procurement regulations.

5.8 Subsequent to PPADB award of the project to the selected preferred bidder, financial closure should occur as soon as possible, signifying that the procurement has been successfully completed and the final PPP agreement has been signed.

Contract Management (Implementation) Phase

5.9 The implementation of public sector infrastructure projects using the PPP approach, is intended to deliver cost effective, reliable and timely services at agreed prices and to agreed quality standards, consist with legal standards, financial probity and management accountability. The success of this process will be significantly aided by the maintenance of a good relationship between the Institution and the private party.

5.10 PPP contract implementation requires proactive management of the relationship between the Institution and the private party. The Institution must establish a contract management team, ideally comprising of some members of the project committee, as they will possess the institutional knowledge of the project and be familiar with all of the risks that must be managed going forward.

5.11 Further, the Institution must put in place knowledge and succession management procedures for long-term PPP agreements, to ensure that all knowledge obtained during the procurement and implementation of the project is at hand, in recognition of the long-term nature of PPP contracts.

5.12 For PPP projects, contract management must address three key elements, namely partnership management to cover the relationship between the private party and the Institution, service delivery management through monitoring performance of the project and contract administration that covers authorization of payments and maintenance of reports and reporting.

6. Other Policy Guidance

6.1 In addition to the Policy guidance given above, regarding the selection of PPPs and the institutional framework that is proposed to govern the implementation of PPPs, the following Policy guidance is provided:

Funding Arrangements

6.2 PPPs involve very complex funding structures from traditional asset procurement. Government is required to budget over a longer period, private parties are required to invest equity and third party funders, that provide the bulk of finance in the form of debt, need to be comfortable with the risk allocation in the limited recourse financing structures.

6.3 This Policy requires that MFDP recognises the financial commitment to pay the Unitary Charge for the duration of the PPP project life. It may be necessary to amend the current annual budgeting process.

6.4 The funding requirement of citizen companies, to provide a share of equity, will also need addressing if the maximum development of citizen companies through PPPs is to be achieved. The current mandates of the existing development finance Sponsoring Institutions will require amending or a dedicated PPP fund will be established if a lack of finance for citizen companies participating in PPPs is to be avoided.

Accounting for PPPs

6.5 The disclosure of and the accounting treatment for PPPs is a matter of great interest to governments worldwide with substantial PPP budgeting and contingent financial obligation requirements. Currently, many governments in Africa and elsewhere are in the process of developing accounting standards for PPPs consistent with good government accounting and international accounting standards.

6.6 MFDP and the PPP Unit shall monitor the development of such standards and take a view as to any so adopted, which may inform a Botswana counterpart.

6.7 Once so adopted, this PPP Policy shall be amended to require compliance therewith.

Exemptions from PPP Policy

6.8 Certain exemptions from the guidelines and regulations underpinning this Policy may be granted on a case-by-case basis subject to the combined approval of the PPP Unit and PPADB. It should be noted that PPPs are, by their nature, structured arrangements and, whilst each project is different, deviation from fundamental principles will be a very rare occurrence.

6.9 Applications for an exemption, addressed to the PPP Unit and PPADB must be submitted in writing by the head of the Institution.

6.10 Applications will only be considered in only two instances:

- For the duration of a particular PPP project;
- For the Institution itself, for a specific period.

6.11 Exemptions for a particular PPP project will only be granted if the Institution demonstrates its capacity to meet the obligations of the PPP Regulations and the PPP Guidelines for the duration of the particular PPP project.

6.12 Exemptions for an Institution for a specific period will only be granted if the Institution demonstrates the capacity for procuring and managing all possible PPPs, in accordance with the PPP Regulations and PPP Guidelines without oversight and the required approvals, for a specific period of time.

Unsolicited Proposals

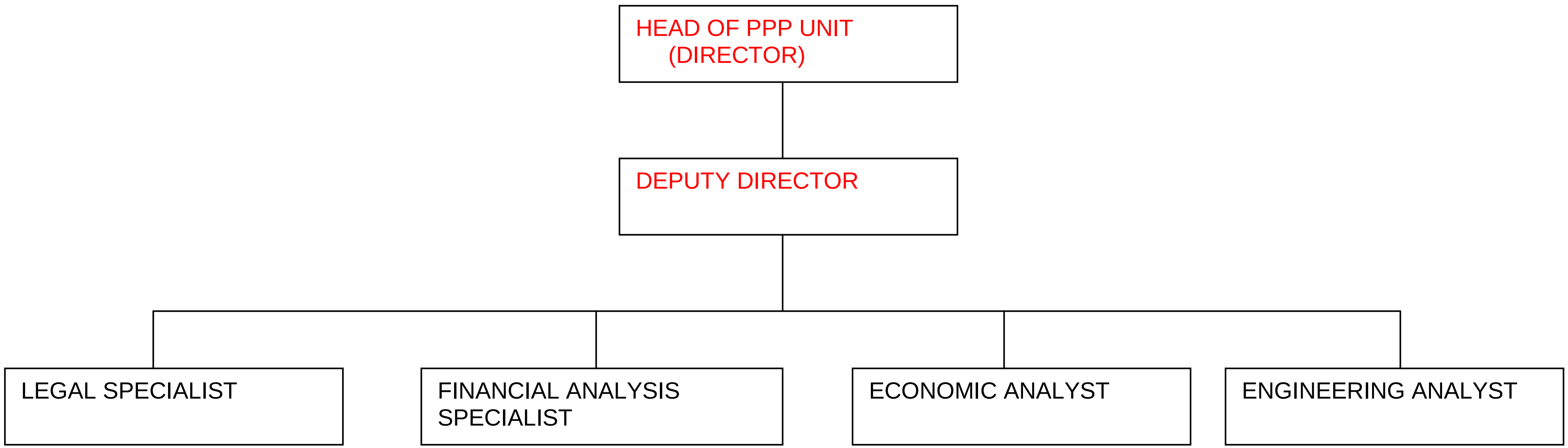
6.13 Although the process and procedures outlined above do not envisage unsolicited proposals, it is possible that such an approach might demonstrate substantial technical or financial innovation; or meet an unidentified need. For this reason, the PPP Policy does not exclude unsolicited proposals but rather requires that the fundamentals of a competitive and transparent procurement process must be preserved even in the case of unsolicited proposals.

Existing PPP Contracts

6.14 Any PPP contracts in existence as at the date of adoption of this Policy will remain enforceable until the end of the term of each contract.

Annexure 1

ORGANISATION STRUCTURE FOR THE PROPOSED PPP UNIT



Annexure 2

Summary of Standardised Contract Provisions for Public Private Partnerships (PPP)

Standard Clauses for Use in PPP Agreements - Summary

1. The Standard Clauses comprise some 44 clauses and 124 pages of text, based on international best practices, in the Botswana context.

2. Clause 1, Definitions, defines all of the important terms used in the PPP agreement.

3. Similarly, Clause 2, Interpretations, provides guidance on the principles to be applied when interpreting the agreement.

4. Clause 3, Project Documents, consists of provisions relating to the obligation of the private party to comply with the provisions of the Project Documents and sets forth requirements in terms of the nature of any documents not executed simultaneously with the execution of the PPP agreement.

5. Clause 4, Project Deliverables, addresses the obligations of the private party in terms of the Project Deliverables and further contains language relating to the fact that the parties will co-operate with each other.

6. Clause 5, General Obligations, among other things, forbids the private party from engaging in any business other than providing the Project Deliverables.

7. Clause 6, Private Party Warranties, contains all the warranties provided by the private party to its undertaking of the PPP agreement.

8. Clause 7, Private Party Indemnities, describes the indemnities it will provide to the Institution and any limitation on liabilities applicable to both parties.

9. Clause 8, Project Site Agreement, sets forth the requirement of the private party to undertake the project on the site provided by the Institution and the private party's responsibilities in terms of the use of the site.

10. Clause 9, Project Site Conditions, sets forth the private party's responsibilities in terms of becoming knowledgeable as to all aspects of the site conditions.

11. Clause 10, Private Party Consents, describes the private party's responsibility to obtain and maintain the required consents in connection with the performance of the Project Deliverables.

12. Clause 11, Duration of PPP Agreement, describes the project's term.

13. Clause 12, Equipment Standards, describes the private party's obligations in terms of any equipment needed for provision of the services.

14. Clause 13, Project Assets: General Obligations, describes the private party's responsibilities in terms of the Project Assets required to deliver the services.

15. Clause 14, Unitary Payment, sets forth the details of when and how payments to the private party are to take place, payment deductions, invoicing and payment arrangements, manner of payment, disputes, late payments and WHT.

16. Clause 15, Insurance, describes the private party's requirements for providing insurance.

17. Clause 16, Uninsurable Risks, sets forth the processes for determining uninsurable risks and the consequences of the occurrence of such risk.

18. Clause 17, Reinstatement, describes how insurance proceeds are to be deployed in terms of reinstating property that has been damaged or lost.

19. Clause 18, Consequences of a Relief Event, sets forth the processes to be followed when a Relief Event occurs.

20. Clause 19, Consequences of a Compensation Event, describe the processes to be followed when a Compensation Event occurs.

21. Clause 20, Force Majeure, sets forth the processes for claiming relief due to the occurrence of a Force Majeure event.

22. Clause 21, Unforeseeable Conduct, describes the procedures to be followed by the private party should it suffer economic loss or benefit due to Unforeseeable Conduct.

23. Clause 22, Variations, sets forth the procedures for adjusting the Unitary Payment for variations in the PPP agreement.

24. Clause 23, Key Personnel and Removal of Personnel, requires the private party to ensure that key personnel positions are always filled and the processes where the Institution requires the private party to remove its personnel.

25. Clause 24, Termination, describes the procedures for termination of the PPP agreement.

26. Clause 25, Effects of Termination, sets forth the provisions to be followed in the event of a termination.

27. Clause 26, Compensation on Termination For Institution Default, describes the payment to the private party where termination occurs by reason of Institution Default.

28. Clause 27, Compensation on Termination for Private Party Default, sets forth the procedures for termination for Private Party Default including payment to the private party and its lenders.

29. Clause 28, Compensation on Termination for Force Majeure, describes the process for determining payments to the private party on termination for Force Majeure.

30. Clause 29, Compensation on Termination for Corrupt Acts, sets forth the processes for determining the amount the Institution will pay to the private party's lenders in the event of termination for Corrupt Acts.

31. Clause 30, Institution Step-In, describes the Institution's rights to step in and take over the project for a certain period.

32. Clause 31, Information and Audit Access, requires the private party to provide the Institution all information necessary for the Institution to determine whether the private party is complying with the PPP agreement.

33. Clause 32, Audit Rights, Transaction Costs and Termination, describes the processes to be followed by the private party in the event it undertakes a refinancing of the debt applicable to the project.

34. Clause 33, Intellectual Property, describes the intellectual property rights of both the Institution and the private party.

35. Clause 34, Assignment, Subcontracting and Changes in Shareholding and Control, sets forth the processes to be followed by either the private party or the Institution should it desire to assign any of its obligations under the PPP agreement and the procedures to be undertaken by the private party in terms of any change in control of the private party.

36. Clause 35, Dispute Resolution, sets forth the processes to be followed in terms of resolving disputes.

37. Clause 36, Governing Law and Jurisdiction, states that the PPP agreement is governed by the laws of the Republic of Botswana.

38. Clause 37, Amendments, requires that no amendments to the PPP agreement take place except by an agreement in writing.

39. Clause 38, Waiver, sets forth the consequences of any waiver or indulgence by one party in terms of future waivers or indulgences, and the requirement that all such waivers or indulgences be in writing.

40. Clause 39, Entire PPP Agreement, sets forth what constitutes the PPP agreement.

41. Clause 40, Conflicts With Other Contracts, describes the hierarchy of any conflict between the PPP agreement and any Project Document.

42. Clause 41, Severability, states that wherever possible, if any provision in the PPP agreement is ruled illegal, invalid or unenforceable, the remainder of the contract shall remain in full force.

43. Clause 42, Counterparts, states that the PPP agreement may be executed in any number of counterparts.

44. Clause 43, Notices, sets forth to whom notices by either party should be sent.

45. Clause 44, Confidentiality, describes what constitutes confidential information of either party and how that information is to be kept by each party.

Annexure 3

Summary of Public Private Partnerships (PPP) Guidelines

PPP PROJECT CYCLE

PROJECT INITIATION

-NDP projects identified
- Cost benefit and pre-feasibility studies
- Register project and establish committee

- Institution
- PPP Unit

Outcome: Shortlist of Projects suitable for PPP procurement

BUSINESS CASE / FEASIBILITY STUDY

- Appoint transaction advisor (TA)
- Undertake detailed analysis of project in terms of costs and risk assessment
- Determine preferred option.

- Institutions
- TA Advisors
- Project Committee
- PPP Unit

Outcome: PPP project business case assessment, Feasibility Study including output specifications, risk transfer, value for money potential and affordability

Approval: 1. **Feasibility Study approval**
2. Funding approval to proceed with procurement

- MFDP
- PPP Unit
- Institutions

Pre-qualification

- Pre-qualification documents prepared,
- Expressions of interest are invited and evaluated
- Potential bidders are short-listed.

- Institutions
- TA Advisor
- Project Committee
- PPP Unit

Outcome: Pre-qualification documents
Shortlist of potential bidders

Approval: Pre-qualification documents and bidder shortlist

- Project Committee
- PPP Unit
- PPADB

Bidding

– Prepare tender documents
– Prepare concession contract
– Issue and evaluate tenders.

- Institutions
- PPP Unit
- TA Advisors
- Project Committee

Outcome: Preferred and reserve bidder

Approval: Tender documents and bidder shortlist

- Project Committee
- PPP Unit
- PPADB

Negotiation

Terms and conditions of PPP contract negotiated**.**

- Institutions
- PPP Unit
- Project Committee

Outcome: Final contract documents for signature

Approval: Contract award

- PPADB

CONTRACT MANAGEMENT

– Project implementation (e.g. construction) commences. Progress is monitored.
– Contract is managed using contract management plan to measure service delivery against contracted standards.

- Institutions

Outcome: Service delivery over the life of the contract

Summary of PPP Guidelines

1. These guidelines provide a best practice guide for PPP practitioners in both the public and private sectors.

2. The guidelines are structured sequentially, from project inception and registration to contract management and the implementation procedures at the expiry of a PPP contract.

3. The guidelines are to be used by all public entities of the Government of Botswana when assessing the procurement alternatives for any infrastructure project, whether listed in the NDP or not.

Project Initiation and Registration

4. The PPP Policy requires government Sponsoring Institutions to identify potential PPP projects as part of the NDP process and the annual budget review process.

5. PPPs may be used to procure immovable infrastructure and related operations and maintenance where the private sector provides financing and operations expertise and bears the risks related to these matters. They may also be used to procure movable assets and related maintenance and operations where appropriate risks are also undertaken by the private sector.

   Rules of thumb for procuring a project as a PPP include:-

   - Significant capital expenditure for infrastructure and related services;
   - Useful life of the infrastructure greater than 10 years;
   - Significant maintenance and operations expenditures will be incurred over the useful life of the infrastructure;
   - Project included in the NDP or sufficiently motivated;
   - Project involves creation of new infrastructure and new maintenance and operations obligations, not taking over existing infrastructure;
   - Apparent private sector interest and capacity in Botswana;
   - Procuring the infrastructure conventionally and staffing with new Institutional staff is problematic in terms of capacity, expertise and funding availability; and
   - Significant potential for citizen participation in the project.

6. The Institution will identify a specific, NDP catered-for project, and in conjunction with the development planning section of MFDP, conduct a cost-benefit analysis to determine if the project addresses the development needs listed in the NDP. If the project passes this economic benefit assessment, and with the concurrence of the MFDP, a pre-feasibility assessment must next be undertaken.

7. The pre-feasibility study assessment is conducted by the Institution with PEEPA assistance, addressing (a) motivation for procuring as a PPP, (b) an initial Value for Money assessment and (c) establishment of an in-house project management team, where the initial Value for Money assessment indicates the potential for procurement as a PPP.

8. The pre-feasibility study is then presented to the PPP Unit for confirmation suitability for PPP procurement. Where found to be suitable, the project is registered and a PPP project committee is established.

9. The PPP project committee includes the project leader from the Institution, who shall act as chair, other Institutional staff with technical, human resources, financial and legal expertise, a representative from PEEPA, a representative from DBES where immovable infrastructure is involved, and a project advisor from the PPP Unit.

10. The appointments by the Institution to the PPP project team are of key importance, as this team should remain together during all of the subsequent phases of the PPP procurement and, ideally, continue as a contract management team once the PPP agreement is executed.

11. Procuring an infrastructure project as a PPP will require additional Institutional expenditures that must be budgeted for. Early in the Project Initiation and Registration process, the Institution must examine its existing and near-term budget to ascertain it has the funds necessary to take the project through the PPP procurement processes. Additional expenditures include funding for a Transaction Advisor and additional funding for the Institution’s in-house project team, and/or funds for obtaining additional staff where in-house expertise is lacking.

12. The Institution must appoint a Transaction Advisor on the advice of the PPP Unit. A Transaction advisor is a person or persons that have appropriate skills and experience to advise the Institution with all phases of the PPP Procurement. It is typically a team of professional consultants working collectively under the direct control of the Institution.

13. The Transaction Advisor is procured in terms of the PPAD Act. The Transaction Advisor will contract with the Institution; hence the Institution’s project leader provides instruction to the Transaction Advisor.

14. No other consultants should be retained in terms of the project. The PPP project committee should meet regularly with the Transaction Advisor to receive progress reports, provide project direction and ensure ongoing Institutional input and support. The Transaction Advisor is remunerated per achievement of defined milestones.

Feasibility Study

15. A feasibility study assesses which procurement methodology – conventional, or as a PPP – is most appropriate. It is undertaken by the Transaction Advisor in collaboration with the PPP project committee. The Institution must approve the feasibility study before it is submitted for the approval to proceed with procurement.

16. The feasibility study must demonstrate whether the PPP choice is affordable, transfers appropriate technical, operational and financial risk to the private sector and demonstrates value for money.

17. The first stage of a feasibility study is the Needs Analysis. In projects that are included in the NDP, where the Institution has completed an approved Project Memorandum, the feasibility study may proceed to the Output Specifications and Project Definition activities described below.

18. For projects with no Project Memorandum, a Needs Analysis must be undertaken encompassing:-

- An assessment of the alignment of the project with the Institution's strategic objectives;
- Identification and analysis of available budget(s);
- The commitment and capacity of the Institution;
- Stakeholder information; and
- An assessment of the potential for citizen participation.

19. The proposed project outputs must be specified. Traditionally, government procures by stipulating the specifications of the infrastructure it wishes to procure. This is an "input specification". A PPP procurement specifies the output – the Institutional function that is to be provided by the infrastructure, and leaves the design of that infrastructure to the private party. The services that need to be provided constitute the "output specification." In every PPP some input specifications are required. However, output specifications should be used to the greatest extent possible. This requires the Institution to determine what it needs to be achieved, as opposed to how it will be achieved.

20. A brief description of the proposed scope of the project must be provided. This definition is a concise outline of the Institution's requirements that will permit the selection of reasonable service delivery options.

21. Next, a solution option assessment is undertaken. This assessment determines the best way to respond to a service need. Once that has been determined, then the procurement choice – either as a PPP or as a conventional procurement – is made.

22. The available solutions must be identified, ranging from preserving the status quo, to using conventional procurement, involving a large, up-front capital expenditure, with follow-on annual maintenance and service budget obligations and hiring new Institutional staff to undertake operations and maintenance, to procuring as a PPP, including the finance, design, construction, maintenance and operation thereof, via an annual unitary fee.

23. Each solution is then evaluated, assessing how each meets the service needs of the Institution, its funding options, a preliminary assessment of the risks to be retained by each option, the citizen participation potential, transitional management issues,

the technical suitability of each option, site issues, legislative compliance, effect on human resources, capability and willingness of the private sector to undertake any option identified, any qualitative factors and finally, the suitability of the project as a PPP such as the scale of the project, whether the output specifications are clear, whether the opportunity for risk transfer is present and whether there is market capability and appetite.

24. Only one option should be chosen for the Value Assessment.

25. The next step in the feasibility study is the project due diligence, which involves examining legal, site and citizen participation issues.

26. Having completed the project due diligence, the next step in the feasibility study is the value assessment, which determines whether the proposed PPP project demonstrates affordability, appropriate transfer of technical, operational and financial risks to the private sector and value-for-money.

27. This assessment entails construction of a base Public Sector Comparator (PSC) model, a risk-adjusted PSC model, construction of a PPP reference model and a risk-adjusted PPP reference model, undertaking various sensitivity analyses, demonstrating affordability, conducting an initial value-for-money test, making the procurement choice, verifying all information used in making the assessment, and submission of the feasibility study for approval to proceed with procurement.

28. The base PSC model describes the full costs to the Institution for delivering the specified outputs via the selected best option using conventional public sector procurement, including all capital and operating costs that will arise during the project.

29. The risk-adjusted PSC model is the base PSC model plus a costing for all the risks associated with the project. Government does not typically costs these risks, but it is necessary to do so in order to understand what the full costs to Government is if it undertakes the project. This entails first identifying all of the project risks, identifying the impacts of each risk and estimating the likelihood of each risk occurring, estimating the cost of each risk should it occur, identifying strategies for mitigating the risks and allocating the risks to the Institution, the private party, or as shared risks. For the risk-adjusted PSC, all risks are carried by the Institution as they would be for a conventional procurement.

30. To provide an early check on the project's affordability, the risk adjusted PSC model should be compared with the Institution's budget as estimated during the selection of the best solution option.

31. The next step is to construct the PPP reference model, which is a "shadow bid" involving costing the output specifications from a private party perspective. It must address the identical output specifications used in the PSC model.

32. Thereafter, a risk-adjusted PPP reference model is constructed to provide the Institution an indication of what the costs would be to the Institution for procuring the infrastructure as a PPP. It is an approximation of the "all in" costs to the Institution for undertaking the project as a PPP. It must reflect the likely costs

charged by the private party to manage the risks proposed to be allocated to it. And, because the purpose of this exercise is to determine the "all in" costs, the costs of the risks retained by the Institution and the costs of managing the PPP agreement must be reflected.

33. Sensitivity analyses are then conducted to see how each model changes if the underlying assumptions are changed, to see how those changes affect affordability, value-for-money and risk.

34. An affordability assessment now follows, comparing the risk-adjusted PPP reference model with available Institution budgets, bearing in mind that the term of the project may extend beyond the NDP period. If affordability cannot be demonstrated, the Institution must either re-examine or modify the output specifications to bring them within the affordability constraint, or abandon the project.

35. At this junction, the initial value-for-money test is conducted, which compares the Net Present Value (NPV) of the risk-adjusted PSC model to the risk-adjusted PPP reference. If the NPV of the risk adjusted PPP reference is less than the NPV of the risk-adjusted PSC, value for money has been demonstrated.

36. If the risk-adjusted PPP reference model shows the project affordable as a PPP and there is a reasonable indication that a PPP will result in a lower net present cost to the Institution – i.e., value-for-money – than a conventional public procurement, the Institution should procure the solution as a PPP. If it does not, then a conventional public procurement should be instituted.

37. Assuming that both affordability and value-for-money has been demonstrated, the Institution must next verify the information used for the models, verify that all legal requirements have been complied with to date, and have the Transaction Advisor sign off as to the accuracy and verifiability of all inputs to the feasibility study.

38. Next, a procurement plan that demonstrates the Institution's capacity and budget to undertake a PPP procurement must be prepared.

39. All of the foregoing must be compiled into a feasibility study report to be approved by the PPP project committee and then approved for procurement by both the MFDP, to indicate that funds will be available, following a peer review process from the PPP Unit.

40. Contents of the report will include discussions on the background to the report, the approach and methodology of the feasibility study, the needs analysis (if applicable), a statement of the output specifications and scope of the project, the solutions options analysis, the project due diligence, the value assessment and the procurement plan.

41. If at any time during the procurement process, facts emerge that differ significantly from facts assumed during the feasibility study, the feasibility study must be revisited to conform affordability, transfer of significant risks to the private party and value-for-money. The results of such revisiting must be communicated to the PPP Unit, which will determine whether the procurement should proceed or be abandoned.

PPP Procurement

42. The PPAD Act applies to the procurement of a PPP at the highest level; however, it is the responsibility of the Institution, together with the PPP project committee to manage the procurement in a manner that facilitates PPAD Act requirements.

43. The steps involved in the procurement process include issuing a Request for Qualifications (RFQ), evaluating the RFQ submissions, issuing a Request for Proposals (RFP) to a short-list of qualified bidders, evaluating submissions and selecting the preferred partner.

44. The objectives of the RFQ are to select a limited number of qualified bidders that have sufficient experience and commitment to prepare proposals and execute the project, set out the rules for participation in the procurement process, disseminate information about the project, give guidance on the expected structure of a bidder – the preferred structure is a consortium that, if selected will form a Special Purpose Vehicle (SPV) to execute the project and gather information from each bidder that is verifiable and can be evaluated. Only pre-qualified bidders will be invited to submit proposals to the RFP.

45. Critical considerations at the RFQ stage include limiting the number of pre-qualified bidders to three or four, requiring bid bonds from all bidders, the level of demonstrated citizen participation proposed by each bidder, the avoidance of conflicts of interest and the nature of parties eligible to participate in a bidder's consortium. As to the latter consideration, public entities, not-for-profit firms and black-listed private sector firms should not be allowed to participate in a bidder's consortium.

46. The RFQ document provides bidders the opportunity to present relevant information about themselves. The document must also set out how it will be evaluated, the evaluation criteria and processes.

47. The RFQ document will vary from project to project, but each document should generally contain a general disclaimer by the Institution as to any information in the document and that it reserves the right to terminate the procurement at any stage in the proceeding, the terms and conditions for issuance of the RFQ, including when and where responses are to be submitted, the purpose of the RFQ, an outline of the document, information about the project, the procurement process, instructions to bidders, required information from the bidders – so they may demonstrate their qualifications – and the RFQ evaluation process.

48. The RFQ is approved by PPADB and the Sponsoring Institution, via the PPP project committee and the PPP Unit prior to being advertised. The method for RFQ distribution must follow the Sponsoring Institutions' procurement plan. Any advertisement should contain sufficient information to inform prospective bidders of the project, what the expected role of the private party is to be in the project, the format of submissions, location and deadline for submissions, a contact name, where the RFQ documents may be obtained and the quantum and form of bid bond required.

49. The RFQ submissions must be evaluated in accordance with the evaluation criteria and methodology set forth in the RFQ, and will be undertaken by the PPP project

committee, with the assistance of the Transaction Advisor. Evaluation is accomplished by rating the bidders in terms of their responses to the evaluation criteria. The PPP Unit and the PPADB must approve this selection.

50. After the selection has been made, all bidders must receive a communication from the Institution as to the results of the selection process, and a pre-bid conference set for the short-listed firms where the RFP will be explained, together with the timetable for the remainder of the procurement.

51. The RFP generally is comprised of general information to bidders, essential minimum requirements, service specifications, standard specifications, a payment mechanism and penalty regime, the legal requirements and a draft PPP agreement, commitments required from bidders, evaluation criteria and bid formalities.

52. General information to bidders consists of:-

- An explanation of the project, description of the Institutional environment in which the project is to take place, the Institution's view of what the PPP is and the envisaged relationship between the parties, an identification of all project assets to be taken over by the private party and a statement in terms of the procurement framework and timelines;

- Instructions to bidders listing all items each bidder must comply with in order for the bid to be deemed complete, including bid bonds;

- Third party requirements such as requirements for provision of utilities;

- Identification of a data room where all project information is to be provided to the short-listed bidders;

- Disclosure of all available environmental impact data;

- A requirement that each bidder undertake a due diligence before bid submission in terms of all information provided on technical, financial and legal matters;

- A clear statement of the quality management system each bidder must propose; and

- Important definitions of terms used in the RFP.

53. Essential minimum requirements are those necessary for a bidder to meet the project objectives, including a demonstration, at least:-

- That the bidder has the financial resources necessary;

- The consortium is composed of eligible participants, consortium member details, term sheets or draft first-tier subcontracts and a mark up of the draft PPP agreement;

- The bidder's technical knowledge of each component of the services to be provided;

- The bidder's ability to meet citizen participation requirements; and
- Other minimum requirements, such as tax clearance certificates.

54. Bidders that do not meet these minimum requirements may be rejected for non-compliance.

55. The service specifications set forth in the RFP are a refinement of those described in the feasibility study. All outputs required to provide the service must be specified. The description of how the service specifications are to be met will be included in the schedules in the draft PPP agreement and are to be completed by each bidder.

56. Any standard specifications, such as ISO standards should be stated.

57. The payment and penalty regime are required to be set forth in the RFP. The payment mechanism is a unitary payment for full availability and performance of the services, an appropriate payment indexation, a penalty mechanism for penalising partial or complete failure of service performance by penalty deductions and a mechanism for dealing with changes to service requirements.

58. The legal requirements are those necessary to ensure the bidder's consortium has the legal status and capacity to fulfil the PPP agreement including shareholding agreements, corporate governance requirements and a full disclosure of the consortium structure, including lenders, sponsors and parent companies.

59. The RFP must include a draft PPP agreement, based upon the Standard Clauses for PPP Agreements.

60. Required bidder commitments are the crux of the RFP. They describe the information required from bidders on all aspects of the bid.

61. The evaluation criteria and categories for evaluation must be described in sufficient detail to focus the bidder's attention on the value-for-money areas of the RFP. The scoring methodology and point allocations should not be given, but the evaluation process and methodology should be described.

62. The scoring elements will include technical, citizen participation and price. The weighting for each element may vary within certain parameters, but the weighting for the technical element may not vary below 50% nor exceed 70% and the price weighting should not vary below 25% or exceed 45%.

63. The technical solution, in virtually every PPP, will encompass a development phase where the infrastructure from which the services will be provided is constructed and a delivery phase where the services are provided to the end of the contract term. Each bidder must describe a proposed solution for each phase. The technical solution also includes the legal solution (the consortium make up and the extent of mark up of the draft PPP agreement) and a financial solution addressing the financing structure to meet the capital and operations requirements required for providing the services.

64. The citizen participation element of the RFP requires each bidder to indicate how they will meet citizen participation requirements in both the development and delivery phases, and how their proposal reflects the citizen participation potential identified in the feasibility study.

65. Price is a distinct element in the evaluation of the bids. Each bidder must set forth its price in terms of a net present value of the unitary payments to be received over the life of the project.

66. All of the components of each bid must demonstrate a single, integrated solution capable of delivering value for money to the Institution.

67. Bid formalities comprise the date of submission, how proposals will be opened, bid bond requirements, bid validity periods, communication procedures, the Institution's reservation of rights, a description of the discretion to be exercised in bid evaluation, and a reservation of the Institution's right to conduct a Best And Final Offer (BAFO) process.

68. Upon completion of the RFP in accordance with the above, the completed RFP document and draft PPP agreement must be presented by the PPP project committee to the PPADB for approval, after which the document may be distributed to each pre-qualified bidder. Each bidder must be required to sign a Code of Conduct as a pre-condition to receipt of the RFP.

69. Clarification meetings with the short-listed bidders can expedite the procurement process. A pre-bid conference, after the RFP has been distributed is suggested, at which the bidders can request clarification as to any RFP provision. Later, a draft PPP agreement conference should also be held at which the bidders can seek clarification as to any of the provisions in the draft PPP agreement.

70. Individual bidder communications with the Institution are governed by the RFP, including a specification as to whom within the Institution the communication should be addressed and specifying a timeframe within which communications must take place. The PPP project secretariat shall maintain records of all such communications. Unless the communication contains confidential information, all individual communications and the response will be provided to all short-listed bidders.

71. Changes to a short-listed bidder's consortium may take place at any time up to the execution of a PPP agreement. The processes for so doing must be included in the RFP, and shall involve a process, similar to that followed in the RFQ, for evaluating the qualifications of any proposed substitute member of a short-listed consortium, to the effect that the changed consortium should score at least as high as the consortium did during the RFQ process.

72. Bid evaluation involves three steps – a preliminary evaluation and report to the PPP project committee by the Transaction Advisor, a review of that report and final evaluation by the PPP project committee and a report of the evaluation and request for evaluation approval from the PPP project committee to the PPP Unit.

73. The preliminary evaluation and report by the Transaction Advisor involves three steps – checking for completeness (all required documents submitted), compliance

(essential minimum requirements met) and a detailed analysis of the technical solution (including the legal and financial solutions), citizen participation proposal and price. The report consists only of the evaluations, without any recommendation.

74. The PPP project committee receives the report from the Transaction advisor, interrogates it, evaluates the overall integrated solution proposed by each bidder, scores the overall integrated solution, noting matters to be resolved before entering into a PPP agreement and compiles the total evaluation notes into a single recommended preferred and reserve bidder, for presentation to the PPP Unit for its approval.

75. The PPP Unit receives the report of the PPP project committee, and when satisfied that the process has been conducted in accordance with the guidelines and the recommended preferred and reserve bidder is supported by reasonable and justifiable information, it shall prepare a report to the PPADB requesting that it approve the designation so that negotiations can commence.

76. In the rare instance that there is not a clear preferred bidder, the procurement may undertake a Best and Final Offer (BAFO) process. Most projects do not need a BAFO process and the decision to conduct a BAFO should not be taken lightly.

77. A BAFO involves informing the bidders, preparing a request for a best and final offer, receiving the BAFO submissions and evaluating them and preparing a BAFO report and obtaining the approval of the PPP Unit.

Negotiations

78. Negotiations are a process, not an event, the outcome of which must be a PPP agreement, complete with all required schedules and an agreed payment mechanism.

79. Before the actual negotiations proceed, the Institution must undertake preparatory work which entails compiling a list of negotiating issues, gathered during the bid evaluation process and from the preferred bidder's mark up of the draft PPP agreement. These issues are placed in a matrix, where initial Institutional positions may be taken as to each one.

80. The negotiation team should consist of the Transaction Advisor plus representatives from the PPP project committee with appropriate expertise. Sub-teams should be established, if necessary, for each issue category. The chair of the PPP project committee is the negotiation team leader, who must liaison with PPP project committee's MFDP member, who will lead the financial/price sub-team.

81. A negotiations strategy must be developed. Initial contact is made with the preferred bidder, during which the initial list of issues is presented and discussed. The preferred bidder's negotiating team structure should be the same as the Institution's.

82. The negotiations should commence in accordance with a timetable on the agreed list of issues. Meetings should take place at agreed upon intervals.

83. Negotiations should be conducted in a professional, transparent manner. Final bargaining requires assessing and choosing alternatives on all issues. Conditions precedent should be avoided.

84. When all details are recorded and reflected in the PPP agreement and schedules and all conditions precedent clearly defined, formal settlement arrangements may be initiated. At this time, the Institution should commence discussions with the preferred bidder on development of the Institution's contract management plan.

85. When the PPP agreement is in a form suitable for execution, it must be presented by the PPP project committee to the PPADB, for contract award.

86. Financial closure takes place after the PPP agreement is signed, subsequent to PPADB award. Financial close should occur soon after contract signing.

Unsolicited bids

87. Unsolicited bids are not allowed, subject to the PPP Policy, as they present a risk of entering into obligations that do not demonstrate affordability, transfer of significant risk to the private sector and value-for-money and may violate the principles of transparency, fairness and competition.

Contract Management

88. The Institution must establish a contract management team. In recognition of the long-term nature of the PPP, the Institution must put in place both knowledge and succession management procedures.

89. The stages of contract management begin with the procurement processes, where contract management requirements are considered during the drafting of the bid documents, including the PPP agreement, continue during the development stage, where the infrastructure is designed, financed and constructed and conclude during the delivery and exit stages where the services are provided and the necessary transition matters addressed at expiry, where the Institution takes back the responsibility for providing the service.

90. PPP agreements will require regular reporting by the private party on the deliverables as a pre-requisite to receiving payment.

91. Most PPP agreements will experience changes that must be managed, per the procedures described in the PPP agreement. Special attention must be paid to changes during the construction of the infrastructure, as they may affect the costs of services to be provided.

92. Performance management during the delivery phase requires confirming that the outputs are delivered. The Institution must take care to focus on the delivery of the outputs and how they were delivered. Performance management focuses on:-

- Establishing service levels that constitute output delivery;
- Enforcing payment mechanisms, including payment certification and penalty assessment;
- Reviewing the financial performance and position of the private party against forecasts;
- Ensuring that all monitoring obligations by either party are met;
- Monitoring compliance with regard to insurance, security and safety systems;
- Managing all interfaces between the private party and the Institution;
- Ensuring that the dispute resolution processes are promptly and properly effected;
- Monitoring and correcting all instances of non-compliance by the private party;
- Establishing contingency plans for private party default;
- Managing all the changes that will occur; and
- Dealing with all end-of-contract matters, especially those concerned with the condition of assets upon expiry of the agreement.

93. Quality management is a prime responsibility of the private party, and the Institution must ensure the private party discharges that responsibility. Where private sector financing is involved, the Institution should liaise with the private party's financiers.

94. The Institution must prepare an exit strategy, in coordination with the private party to ensure the Institution's capacity to take over service provision upon agreement expiry. PPP contracts may provide for an extension of the term of the PPP contract.