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Guidance on PPP Legal Frameworks

2022 Edition

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INTRODUCTION

This Guidance is intended to aid government officials inform themselves about and establish suitable PPP legal frameworks and sets out key considerations and sample drafting in relation to a number of critical provisions in public-private partnership (PPP) legislation and supporting instruments. The Guidance explains the background to these essential legislative provisions, while providing benchmarking examples from markets with different legal traditions and maturities, to highlight the need to cater to a government's specific set of circumstances. Designed as a succinct and digestible practitioner's guide, the Guidance is not intended to cover every possible aspect of a PPP legal framework. Neither is it a recommendation to opt for PPP as the delivery model for projects, nor an analysis of PPP's advantages and disadvantages.

While PPP may be implemented on a one-off basis without any specific supporting legal and institutional framework, most countries with successful PPP programs rely on a sound enabling framework. These typically regulate the development and management of PPPs from upstream to downstream, anchoring PPP processes in the respective country's overall public investment management framework and providing for clear assignment of institutional roles and responsibilities, implementation of appropriate project origination and appraisal processes and strong risk management throughout the PPP lifecycle.

Numerous emerging and nascent PPP markets have therefore made and are making efforts to adopt their own PPP legislation, and in doing so are looking for good practice to follow. While several international organizations have developed guidelines for good governance in PPPs regarding different types of infrastructure projects, specific knowledge products on drafting PPP legislation have been less numerous. Important recent examples include the UNCITRAL Legislative Guide on Public-Private Partnerships (2019) and accompanying Model Legislative Provisions on Public-Private Partnerships (2019), as well as the Draft UNECE-EBRD People-first PPP/Concession Model Law (at the time of writing not yet formally adopted).

It is against this background that the World Bank developed the Guidance as a practical tool for government officials to complement the global body of knowledge as regards the understanding and drafting of PPP legal frameworks. In focusing on selected key legal provisions, the Guidance particularly aims to address considerations related to the fiscal, environmental and social sustainability of PPP projects as well as their resilience/adaptability to external shocks such as natural disasters, climate change extreme weather events and crises such as the COVID-19 pandemic.

With respect to the sample drafting contained in the Guidance, the authors would like to emphasize that it is neither intended to be exhaustive nor prescriptive, but is provided as illustrative and a starting point for jurisdiction-specific drafting. Specifically, it is not meant to be mandatory for use in World Bank financed operations which may involve the review or reform of legal enabling environments for PPP. Instead, the contents of this Guidance should be regarded as one of many inputs for governments to consider when thinking of establishing or amending an existing PPP legal framework. It should equally be noted that references to country examples throughout the document should not be interpreted as World Bank endorsement of the respective country's PPP framework/program or as recommended best practice. Rather, these examples are given for benchmarking purposes and to illustrate the drafting considerations explained in each chapter of the Guidance.

The authors would finally like to stress that this publication is seen as an evolving process. The intention is to develop further iterations of the Guidance as market practice around the key themes covered in this document (and any new areas) evolves, conceivably in response to the omnipresent challenge of climate change and other future crises.

DEFINED TERMS AND ACRONYMS

Capitalized terms and acronyms in this Guidance have the meanings set out below and additional capitalized terms used in the Sample Drafting sections are defined in those sections.

BAFO	means a best and final offer requested by the Contracting Authority or submitted by a bidder after the RFP bid round or the corresponding stage of the procurement process, as the context requires, as further described in Chapter 6 Procurement .
Contracting Authority	means a Government Entity that originates and/or proceeds to procure a PPP project and enters into the PPP Contract with the Private Partner. In certain cases, this may include state-owned enterprises, as further described in Chapter 3 Institutional Framework, Section 3.3.1 . Depending on the type of Government Entity it is, a Contracting Authority may enter into a portfolio of PPP Contracts as part of a PPP program or a single PPP Contract.
Direct Agreement	means a tripartite agreement between the Contracting Authority, the Private Partner and the Private Partner's lenders. This type of document is common in a project finance context. Lenders and the Contracting Authority typically enter into other tripartite/direct agreements with the Private Partner and entities it contracts with (e.g. the Private Partner's construction and operation/maintenance contractors) – these are not the focus in this Guidance except to the extent they constitute PPP Agreements.
E&S	means environmental and social, including climate change and related sustainability and resilience, as such matters are further described in Chapter 1 Guiding Principles, Section 1.4.1 .
FCCL	means fiscal commitments and contingent liabilities, as further described in Chapter 4 Project Origination and Appraisal .
Government Entity	means a public sector entity.
Guidance	means this Guidance on PPP Legal Frameworks.
Internal Evaluation Committee	means an internal Contracting Authority review board comprising qualified and impartial senior members who will review the Contracting Authority project team's evaluation of bids received and make recommendations about selection and award, as further described in Chapter 6 Procurement .
NDC	means nationally determined contributions to the global response to climate change under the Paris Agreement. ¹
O&M	means operation and maintenance.
PPP Agreement(s)	means all agreements involving the Contracting Authority (and any other Government Entities) in respect of a PPP project, including the PPP Contract.
PPP Contract	means a long-term agreement entered into between a Contracting Authority (or in some cases, Contracting Authorities) and a Private Partner which governs and regulates the relationship between the parties in respect of a PPP project.
PPP Manual	means a manual or handbook providing collated guidelines and requirements relating to PPPs that is prepared and amended from time to time by a Government Entity, PPP Unit or Contracting Authority, as the context requires, as further described in Chapter 8 Contract Management .
PPP or Public Private Partnership	means a long-term contractual arrangement between one or more Contracting Authorities and a Private Partner for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility and remuneration may be linked to performance.
PPP Unit	means a public sector body (i) designed to promote and improve the delivery of PPP projects, and (ii) empowered to do so via a specific mandate, as further described in Chapter 3 Institutional Framework, Section 3.3.3 .

¹[United Nations Framework Convention on Climate Change, 2015, Paris Agreement.](#)

Private Partner	means the private sector entity that enters into the PPP Contract with the Contracting Authority (often in the form of a special purpose company) and known as the project company. In certain cases, this may include state-owned enterprises, as further described in Chapter 6 Procurement, Section 6.4.1 .
Project	means any project, including, but not limited to, developing, financing, generating revenue from, designing, engineering, manufacturing, transporting, constructing, erecting, installing, commissioning, operating and/or decommissioning public infrastructure and/or the provision of a public service.
RFP (or ITT)	means a request for proposal (or Invitation to Tender) issued by the Contracting Authority, which includes the technical, financial, legal and E&S requirements of a project in response to which bidders submit proposals.
RFQ (or PQQ or EOI)	means a request for qualification (or Pre-Qualification Questionnaire or Expression of Interest) issued by the Contracting Authority, which includes certain information about a project and requests certain information from interested parties, to decide whether they pre-qualify to bid for the project.
SDG or SDGs	means the 17 Sustainable Development Goals at the core of the 2030 Agenda for Sustainable Development adopted by the United Nations General Assembly at the UN Sustainable Development Summit in 2015.
SOE	means a state-owned enterprise.
Tender Document(s)	means the RFQ/PQQ/EOI, RFP/ITT and BAFO.
UNECE	means the United Nations Economic Commission for Europe.
UNECE Guiding Principles	means the UNECE Guiding Principles on People-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals.
UNCITRAL	means the United Nations Commission on International Trade Law.
UNCITRAL Legislative Guide	means the UNCITRAL Legislative Guide on Public-Private Partnerships (2019). ²
UNCITRAL Model Legislative Provisions	means the UNCITRAL Model Legislative Provisions on Public-Private Partnerships (2019). ³
USP	means unsolicited proposals, as further described in Chapter 4 Project Origination and Appraisal, Section 4.3.2 .
VFM	means value for money, as further described in Chapter 4 Project Origination and Appraisal, Section 4.4.4 .

²[UNCITRAL. 2019. Legislative Guide on Public-Private Partnerships.](#)

³[UNCITRAL. 2019. Model Legislative Provisions on Public-Private Partnerships.](#)

SCOPE, PURPOSE AND STRUCTURE OF GUIDANCE

Scope and purpose of Guidance

This Guidance is intended for governments who wish to include public-private partnerships in their toolkit of methods for delivering infrastructure assets and services. It explains why a suitable PPP legal framework is essential and describes mechanisms for designing and implementing such framework.

This Guidance sets out the main aims of and requirements for a PPP legal framework, while recognizing that there is no "one size fits all" solution. It explains how to establish a PPP legal framework that will facilitate successful PPP project development, procurement and delivery in a way that takes into account the characteristics of the relevant jurisdiction. Drawing on good practice sources and benchmarks, including the UNCITRAL Legislative Guide, UNCITRAL Model Legislative Provisions and UNECE Guiding Principles, it provides succinct, practical guidance regarding:

- the drafting of PPP-specific primary and secondary legislation and guidance materials;
- the legal basis for the establishment and authority of institutions intended to drive the objectives set out in the relevant jurisdiction's broader PPP framework;
- the interaction between the PPP legal framework and the wider legal system; and
- the incorporation of key budgetary and E&S policy objectives into the PPP legal framework – to ensure such matters are considered at all stages of a PPP project and that PPPs align with government objectives relating to sustainability (including fiscal sustainability) and green, resilient and inclusive development.



This Guidance does not address in detail topics such as the background and rationale for PPPs (or the various types of PPPs), comparisons between PPP and other methods of procurement, or the detailed content of a PPP Contract. For detailed information on these aspects, see the materials referenced in the Chapters and in [Appendix A](#).

Benchmark examples and references to particular practice in certain countries are included for illustrative purposes only and should not be interpreted as the World Bank's endorsement of the respective country's PPP framework/program or as recommended best practice.

Structure of Guidance

[Chapter 1](#) provides an overview of the guiding principles and considerations relevant when establishing a PPP legal framework. [Chapters 2 – 8](#) provide a deeper dive into certain key elements, with guidance on how to translate the applicable jurisdiction-specific approach into legislative drafting; these chapters are structured in the following way:

- (a) **guiding principles and objectives** in formulating the relevant part of the PPP legal framework;
- (b) **a more detailed discussion of relevant aspects**;
- (c) **a toolkit of practical considerations** to support the implementation of (a) and (b). This includes a table summarizing the Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework, assuming that primary PPP legislation is appropriate in the relevant jurisdiction; to the extent that is not the case, the relevant items in the primary instrument column should be considered under the secondary instrument column; and
- (d) **sample drafting** that can be included in PPP legal instruments. This focuses on the core provisions that are recommended to be addressed in the primary legal instrument regulating PPP projects. In jurisdictions where primary legislation is not appropriate, these provisions can be adapted appropriately into secondary legislation/instruments and/or policy. It is important to note that the sample drafting is intended as a starting point and not as a precedent or an exhaustive set of provisions – each jurisdiction will need to tailor its approach to be consistent with its own system of government and legal tradition.⁴ A holistic approach is essential in drafting relevant instruments to ensure that provisions are coordinated, clear and aligned.

⁴See also the Introduction above.

[Appendix A](#) contains links to useful online resources (some of which are also referred to within the Guidance) and [Appendix B](#) contains a skeleton framework of a PPP Act, based on the content of the Guidance.



The E&S icon appears throughout the Guidance wherever it is particularly pertinent to consider the E&S (environmental and social, including climate change and related sustainability and resilience) matters highlighted in [Chapter 1 Guiding Principles, Section 1.4.1](#). [Appendix A](#) contains further materials on these topics, such as the World Bank's Climate Toolkit for Infrastructure PPPs.⁵

⁵[The World Bank. 2022. Climate Toolkits for Infrastructure PPPs.](#)

Guiding Principles



1. GUIDING PRINCIPLES

1.1 PPP legal framework as part of the overarching PPP framework

A country's PPP framework comprises:

- the policies – being the rationale, objectives, scope and implementing principles behind a government's decision to use PPPs to deliver public infrastructure assets and services; and
- the institutions, legal arrangements and public financial management processes that determine how PPPs are prioritized, identified, selected, evaluated, budgeted for, funded, procured, monitored and accounted for. It also determines which institution is responsible for each of those actions.⁶

The PPP framework sits within a country's overall strategy for social and economic development, being one of various means to procure and finance the provision of its infrastructure and services. As such, the PPP legal framework must align with the country's national policies, objectives, strategies and constraints, in particular from a fiscal, legal, environmental and social perspective.

The legal framework for implementing PPPs is an integral part of a country's overarching PPP framework and should contemplate and govern the whole lifecycle of PPP projects. As indicated in the [World Bank's PPP Reference Guide Version 3, 2017](#)⁷, the PPP legal framework can be seen as setting out "how" to deliver PPPs from a legal perspective, whereas the broader PPP framework explains "why" a government might use PPPs and "what" it might use PPPs for.

1.2 What is a PPP legal framework?

This Guidance refers to a PPP legal framework as the sum of a country's laws and regulations, as well as guidance, precedents and other materials, whether legally binding or not, that impact and govern the full lifecycle of PPP projects and confer legal authority on the entities involved in their delivery.

A PPP legal framework can comprise:

- (a) PPP-specific legislation and regulations (i.e. in the form of primary or secondary legislation);
- (b) official PPP-specific government guidelines, manuals or other documents issued by relevant Government Entities – these may not, strictly speaking, always have the force of law but often amount to mandatory policy to be followed by Contracting Authorities (and, where relevant, private sector participants) by virtue of requirements to be satisfied in the approval and bid processes; and
- (c) other legislation and regulations that are not PPP-specific but have an impact on PPP projects – for example, sector-specific legislation or regulations and general procurement, contract, company, arbitration or environmental law.

The Vietnam PPP Law No. 64/2020/QH14 of 2020 is an example of primary legislation enacted specifically for the purpose of formalizing the PPP legal framework and delivery of PPPs.

The Australian National PPP Policy Framework and National PPP Guidelines Overview are examples of PPP-specific guidance materials that are not set out in law but nevertheless set PPP standards in Australia.

The components of a PPP legal framework will vary from country to country depending on a number of factors unique to the country concerned, such as its legal system and the scope of its existing legislation. The primary types of legal frameworks used to deliver PPPs include:



- **Single PPP-specific statute-based framework:** this form of PPP legal framework is mainly set out in primary legislation, such as in Abu Dhabi (via the *2019 Abu Dhabi PPP Law*) or Jordan (via *Public-Private Partnership Law No. 31 of 2014*).
- **PPP-specific statute-based framework with multiple pieces of legislation:** similar to the above, this type of PPP legal framework is set out in primary legislation, but with different legislation applying to different types

⁶The World Bank, 2017. [Public-Private Partnerships Reference Guide Version 3](#), Module 2 and [PPP Knowledge Lab, n.d. Establishing the PPP Framework](#).

⁷The World Bank, 2017. [Public-Private Partnerships Reference Guide Version 3](#), Module 2 (pg. 61).

of PPPs. For example, many jurisdictions (particularly civil law jurisdictions) distinguish between two types of PPPs: (i) concessions – where the concessionaire's revenue primarily originates from payments made by users of the service (e.g. through road tolls); and (ii) partnerships, where the Contracting Authority pays a fee to the Private Partner in exchange for the performance of the services (e.g. through availability payments). In Benin, for example, these two types of PPPs are subject to different laws.⁸

- **Non PPP-specific statute-based framework:** this form of PPP legal framework is "derived" from the application of general legislation that is not specifically targeted to PPPs – usually comprising laws relating to public procurement, public investment and administrative law, but also in a lesser measure other laws such as those relating to competition, taxation, licensing, foreign investment or a specific sector. In Germany, for example, PPPs are mainly regulated through the German *Federal Budget Act* and other relevant legislation that may depend on the type of project being procured via PPP (e.g. the German *Energy Industry Act* for energy projects).
- **Non statute-based PPP guidance-based framework:** this type of PPP legal framework has few components set out in specific primary PPP legislation and is mainly set out in regulations, policies or guiding materials issued pursuant to existing general laws and statutory powers. Examples include the United Kingdom, South Africa and Australia. The latter, for example, has *National PPP Policy and Guidelines*⁹, which are applied by all federal, state and territory government agencies for the delivery of PPP projects.

1.3 Why establish a specific PPP legal framework?

While the majority of countries around the world have the basic legal framework that allows PPPs to be developed, not all jurisdictions have put in place bespoke legislation and associated frameworks to ensure there is a clear process for PPPs. This can lead to challenges, particularly when implementing PPP programs that aim to go beyond ad hoc development and aim for greater PPP scale. The importance of a clear legal framework in supporting successful PPP programs is widely recognized by PPP practitioners across both the public and the private sectors.¹⁰

This is because a well-designed PPP legal framework that is integrated into a jurisdiction's broader legal and political ecosystems is an important aspect of improving a country's ability to both:

- reliably attract competitive and experienced private sector and overseas investor interest** – with good governance, a clear PPP legal framework can demonstrate a government's commitment to developing a PPP pipeline in a transparent manner and over the long term, thereby improving market confidence and enhancing attractiveness for investment; and
- ensure that PPPs satisfy the needs of the public and the government** – by giving effect to PPP policy and (i) delivering VFM, (ii) being fiscally, socially and environmentally sustainable, and (iii) promoting accountability, transparency and integrity.¹¹

There can be tension between the two objectives above on individual PPP projects since government and private parties will each have their own motivations. To the extent their interests are not aligned, a well-designed PPP legal framework can help strike the right balance between them on an ex ante (rather than ad hoc) basis and allow government parties to take a proactive (rather than reactive) approach to this balancing exercise.

A set of good regulations is just one of the ingredients necessary to create high quality affordable infrastructure for all, but it is foundational in nature, underpins good governance, and signals to private sector developers and operators – as well as citizens – a government's commitment to efficiency, affordability, and sustainability of infrastructure investments.

The World Bank, 2020. Benchmarking Infrastructure Development



⁸See Benin – [Law n° 2016-24 creating the legal framework for PPP](#) and [Law n° 2009-02 creating the legal framework for concessions and delegations of public services](#).

⁹[Australian Government. National Guidelines for Infrastructure Project Delivery, Public-Private Partnerships.](#)

¹⁰See, for example, [UNECE, 2007. Guidebook on Promoting Good Governance in Public-Private Partnerships](#) and [UNCITRAL, 2019. Legislative Guide on Public-Private Partnerships.](#)

¹¹For further reading on this topic, see the [World Bank, 2020. Benchmarking Infrastructure Development](#) and [UNECE, 2018. Draft Guiding Principles on People-First Public-Private Partnerships for the United Nations Sustainable Development Goals, Part II](#) (in particular, Principle 4).

Benchmark Example: PPP investment growth in South Korea following establishment of PPP legal framework

South Korea had delivered many PPP projects before it put in place a PPP legal framework, with the enactment of its first PPP legislation in 1994, the amendment thereof in 1998, along with a slew of PPP-related policies including the creation of a PPP-focused government agency. Further amendment was enacted in 2005 extending the definition of PPPs to projects that had previously been excluded (e.g. social and environmental projects).

Over the same period, private investment in South Korean PPPs grew significantly: from KRW7 trillion (approximately USD6 trillion) for the 1994-1997 period to KRW27 trillion (approximately USD26 billion) for the 1998-2004 period and finally reaching KRW98 trillion (approximately USD83 billion) over the 2005-2019 period.

Accordingly, countries with historically successful PPP programs typically benefit from:

- (a) a broad PPP framework that sets out clear policy objectives to prepare, choose and implement PPP projects in a professional and transparent manner;
- (b) a PPP legal framework that facilitates the identification, selection, prioritization, evaluation, structuring, market sounding, procurement, negotiation, financing, and delivery of PPP projects in a manner that is consistent with, and supportive of, those policy objectives and aligned with existing legal frameworks;
- (c) strong government commitment to bring to market and deliver PPP projects in accordance with these frameworks;
- (d) clear roles and responsibilities for each entity involved in PPP project delivery; and
- (e) strong market engagement and participation from the private sector, driving competitiveness, greater VFM and innovation.

1.4 Key aims of a PPP legal framework

As highlighted above, a country's PPP legal framework must support the policy objectives in the broader PPP framework, which themselves are driven by strategy and policies set at the national level. Naturally, these policy objectives will be varied and differ from government to government, but certain key elements should be common to all PPP legal frameworks as outlined in this Section.

1.4.1 PPP contributions to environmental, social and resilience considerations

Policy objectives relating to environmental and social (**E&S**) and resilience issues should be reflected in every PPP legal framework: (i) to help countries meet their international and Sustainable Development Goal (**SDG**) commitments, and their Nationally Determined Contributions (**NDCs**) and Long-Term Strategies (**LTS**) under the Paris Agreement and National Adaptation Plans (**NAPs**) under the Cancun Adaptation Framework; (ii) to meet the demands of civil society in respect of these issues; and (iii) because private sector participants (particularly international investors and financiers such as commercial or multilateral development banks) are increasingly mindful of participating in PPPs that satisfy (or exceed) their own corporate social responsibility requirements and E&S-related commitments (such as the Equator Principles¹²).



Ensuring that PPP projects meet E&S and resilience objectives is a means of ensuring their sustainability: PPPs that are green, resilient and inclusive are more likely to be sustainable over their intended lifespan. Sustainability as a priority in PPPs is well recognized. One of the targets of the SDGs is to *"encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships."*¹³ PPP legal frameworks have an important role to play in promoting consideration of the balance between near-term infrastructure needs and long-term sustainability objectives.

¹²[Equator Association. 2020. Equator Principles. EP4.](#)

¹³[United Nations. 2015. Transforming our world: the 2030 Agenda for Sustainable Development](#) (goal 17.17).

PPP legal frameworks should therefore require consideration of issues pertaining to climate change and the environment, resilience, social considerations and human rights at every stage of the project, from origination and appraisal through to contract management, such that these issues can be properly addressed and the risks connected to them can be allocated to the entities best placed to manage them. Such considerations should be taken into account in feasibility studies, tender requirements and evaluation criteria and methodology, contractual provisions and risk allocation, environmental offset obligations, social grievance mechanisms, decommissioning regimes and flexibility in contractual frameworks to effect variations and other adaptation measures. This is expanded upon below and also discussed throughout this Guidance wherever relevant.

1.4.1.1 Environmental considerations

Placing the environment and climate change at the heart of PPP projects is critical. In light of rising sea levels, increasingly frequent droughts and wildfires and persistent record-breaking heatwaves around the world, there is little debate that PPP projects need to factor in climate change and the environment to fulfil their purpose over the long term.¹⁴



Due to their large scale and long-term nature (often spanning 20 to 50 years), PPP projects are particularly capable of impacting, and being impacted by, the environment and climate change in significant ways.

(a) How PPPs contribute to impacts on the environment and climate change

PPP projects often involve new construction and the use of primary resources. This implies new carbon emissions and often results in the modification of the natural environment. For example, toll road PPPs will usually require paving over previously unbuilt environments, the clearing of trees and vegetation and, where bridges are involved, the dredging of rivers and seabeds etc. PPPs that do not involve new construction may nevertheless present an opportunity for re-appraising the built environment and retrofitting/adapting existing structures. Due to their size, PPPs projects can have a non-trivial impact on a jurisdiction's ability to meet its environmental goals commitments. For instance, absent adequate safeguards, a country's PPP program could negatively affect its ability to fulfil its NDC commitments.

(b) How PPPs can be impacted by climate change

PPP projects tend to have long-term horizons, exacerbating their exposure to environmental and climate change risks broadly in two ways:

- climate change risks can affect the performance of a project by increasing the likelihood of environmental risks (soil erosion, gradual increases in temperature, etc.) or force majeure events (floods, tornadoes, landslides, etc.) – these may affect construction and supply chains or physically damage the functionality of the relevant asset; and
- climate change can also affect demand for the output of a project, either upwards or downwards (e.g. higher average temperatures leading to increased demand for electricity to power air conditioning, or changing snowfall patterns leading to reduced demand for tourist and transport infrastructure in certain mountain areas).

To ensure that PPP projects have an overall positive impact, careful attention needs to be paid to the way they are designed, developed and delivered. PPP legal frameworks have a critical role to play in this space by mandating measures to identify, adapt to, avoid and mitigate potential adverse impacts on the environment (and on PPP projects themselves).

PPP legal frameworks should require Contracting Authorities to assess a PPP project's potential environmental impact, as well as the likelihood of it being impacted by environmental and climate change risks throughout its lifecycle, in particular as part of the feasibility studies carried out during the origination and appraisal stages prior to procurement. This is to ensure that Contracting Authorities identify risks and opportunities to tackle environmental issues early on

¹⁴See [Inter-American Development Bank, 2020. Climate Resilient Public Private Partnerships: A Toolkit for Decision Makers](#); [PPP Knowledge Lab, n.d. Climate Change and Natural Disasters](#) and [The World Bank, 2022. Climate Toolkits for Infrastructure PPPs](#).

and take them into account in setting tender requirements and output specifications, formulating evaluation criteria and methodologies and including relevant risk allocation provisions in the PPP Agreements.

1.4.1.2 Resilience

Resilience refers to the potential for a PPP project to withstand or recover from any disruption or adverse impact caused by events that are infrequent and difficult to foresee, such as environmental disasters, epidemics, economic shocks and technological development.¹⁵



The challenges in incorporating resilience analysis into PPPs fall into two broad categories: (i) issues connected to the analysis of commercial viability and uncertainty in the cost implications of resilient investments; and (ii) contractual allocation of disaster and climate change risks and other external shocks between the public and private sectors and management of long-term contracts in situations of uncertainty.¹⁶ These are further detailed below:

(a) Resilience assessment from the onset of a planned PPP project

Resilience should be a core assessment metric from project origination and appraisal through to procurement, delivery, operation and contract management. As international organizations suggest, PPP legal frameworks should: (i) require PPP policies and regulations to include broad risk and vulnerability assessments that are consistent with the achievement of the jurisdiction's relevant targets (including, for example, the achievement of SDGs and NDC goals in the case of climate change and the environment, as mentioned above); (ii) make the inclusion of resilience, adaptation, mitigation and offset mechanisms in the origination, appraisal and procurement stages of PPPs essential; (iii) improve PPP project structuring and disaster and climate change risk allocation, for example in relation to force majeure; (iv) require the inclusion of risk sharing or mitigation instruments in PPPs (e.g. insurance); and (v) take into account innovative revenue and financing schemes in PPP Contracts to remunerate resilience activities.¹⁷

(b) Resilience in the PPP contractual framework

PPP legal frameworks should recognize that it is not possible to anticipate and pre-emptively address and price all risks in a PPP Contract, due to its typically long-term nature. They should not take an overly prescriptive approach in fixing contractual positions through legislation or mandatory guidance since such ex ante requirements might turn out to be inappropriate for a specific project over the course of its life, which can have perverse effects on resilience.

Instead, PPP legal frameworks should, as far as possible, enable PPP contractual arrangements to: (i) allocate risks appropriately but allow parties to deal flexibly with uncertain or unforeseeable risks (e.g. force majeure); (ii) include measures where appropriate to compensate private investors for increased costs flowing from disaster or shock events; (iii) include resilience within the PPP output specifications; (iv) include appropriate monitoring, reporting and disclosure obligations in respect of resilience output commitments; and (v) incentivize compliance with key performance indicators relating to resilience, for example through appropriate payment mechanisms. See [Chapter 7 PPP Agreements, Section 7.5.1](#) for further discussion on PPP Contracts.

1.4.1.3 Social considerations

PPP legal frameworks should procure that Contracting Authorities consider holistically how individual PPP projects fit into a community's overall goals and needs. Indeed, without careful management, a PPP project may create negative externalities that can disproportionately affect certain sectors of the community, which in turn can threaten the viability of that PPP project by highlighting relevant deficiencies and generating corresponding public opposition.



Examples of measures that may be required under PPP legal frameworks include:

- (a) appropriate consultation and inclusion of all relevant stakeholders in the development process;

¹⁵[U.S. Chamber of Commerce Foundation, n.d. Public-Private Partnerships and Infrastructure Resilience](#) (pg. 7).

¹⁶[The World Bank, 2017. Resilient Infrastructure Public-Private Partnerships \(PPPs\): Contracts and Procurement, The Case of Japan.](#)

¹⁷For example, see [Inter-American Development Bank, 2020. Improving Climate Resilience in Public Private Partnerships in Jamaica](#) (pg. 15).

- (b) creating safeguards for social protections and human rights that are set out in existing primary legislation and making this part of appraisal processes and PPP Contract provisions (where applicable);
- (c) minimum participation requirements for local personnel or specific groups (e.g. certain age, skill, gender, religious or ethnic groups) and the provision of training to disseminate skills and improve employment opportunities for the life of the project and beyond; and
- (d) minimum content requirements from local businesses such as suppliers and manufacturers to foster ongoing business and employment opportunities.

See [Chapters 4 Project Origination and Appraisal](#), [6 Procurement](#) and [7 PPP Agreements](#) for further detail on these issues.

1.4.2 Ensuring fiscal affordability in PPPs

A government should only implement PPP projects and programs if they are affordable on both a short and long-term basis within the country's public investment management and budgetary frameworks. In order to factor in the full extent of public exposure that may result from PPP projects and for the affordability of individual PPP projects to be verified and budgeted for, the PPP legal framework must require the Contracting Authority to fully evaluate and report on the potential cost of every PPP project it wants to undertake.

Doing this means not only determining the costs and benefits of each project independent of its method of delivery (whether PPP or otherwise), but also analyzing the fiscal commitments and contingent liabilities (**FCCL**) of each PPP project in a manner that ensures PPP project risks are identified, justified, quantified, provisioned, mitigated and managed. Such analysis needs to comply with relevant budgetary and long-term liability management policies and to take into account all payment obligations, support mechanisms (such as government guarantees) and contingent liabilities that may be triggered during the life of the PPP project.

This exercise can be carried out by the Contracting Authority in tandem with, or by reporting to, the applicable offices within the public investment management system. Ultimately, the approval of the ministry with overall responsibility for public finance sustainability (usually the Ministry of Finance) should be required to verify that the PPP project is fiscally affordable. Data from existing projects can assist with assessing long-term liabilities and this is an important reason why data collection and benchmark analysis should be required under the PPP legal framework (in addition to other reasons outlined in [Chapter 3 Institutional Framework, Section 3.3.3.4](#) and [Chapter 8 Contract Management](#)).

By incorporating this reporting requirement into the PPP legal framework, governments can ensure that Contracting Authorities are held to account and that no PPP project can proceed without satisfying relevant budgetary requirements. This also provides reassurance to private investors and project finance lenders that governments will not financially overcommit themselves and informs their perception of the credit risk associated with the relevant Contracting Authority or Government Entity.

The FCCL analysis should be carried out at various stages of the PPP project's lifecycle – at the origination and appraisal stage to assess whether procuring a PPP project is likely to be affordable and again prior to contract signature/selection of preferred bidder when the financial model is near finalized. Ongoing financial management throughout the life of the project should also be required to confirm that any material changes are affordable. See [Chapters 4 Project Origination and Appraisal](#) and [5 Approvals](#) for further detail on the above.

Benchmark Example

The **South African** PPP laws recognize that affordability is the cornerstone of a PPP project and require that the budget for the project be revisited at various stages of its lifecycle (inception, feasibility study and procurement).

1.4.3 Ensuring good governance in implementing PPP projects

A PPP legal framework must facilitate investment in and effective implementation of PPPs by embedding good governance principles and aims into all stages of PPP project development and ensuring these are reflected in the project outcomes. These include:

- ensuring the **efficient** use of resources in PPP projects, namely by minimizing delay, optimizing public expenditure through rationalization of the key stages of the lifecycle of a project, and minimizing the fiscal, social and environmental burden of PPPs on future generations;
- improving **decision-making** by government, namely by reducing corruption and increasing predictability, clarity and transparency, as well as fostering coordination, focus and clarity amongst entities involved in PPP project delivery;
- promoting **adequate risk allocation** principles in PPP projects by allowing parties to negotiate sensibly and flexibly, instituting robust appraisal and approval processes; and
- ensuring a **level playing field** for all by requiring that PPPs be developed and implemented in a way that involves all relevant stakeholders, does not harm people and applies rules to all equally.

These principles together with those in [Sections 1.4.1 and 1.4.2](#) apply to all aspects of PPP development and influence the content and structure of PPP legal frameworks as a whole. More specifically, [Chapter 7 PPP Agreements](#) considers the issue of risk allocation and [Chapter 6 Procurement](#) covers transparency and fairness, which are elements of paramount importance in the PPP legal framework.

1.5 Design objectives

As discussed above, a PPP legal framework must support the policy objectives of the broader PPP framework as decided by the government. PPP legal frameworks that are successful in doing this tend to be structured based on the following design objectives: (i) they are permissive rather than restrictive legal structures that are well integrated into the rest of the legal, political and financial system of a jurisdiction and can evolve over time; and (ii) they create a clear institutional framework that is adequately empowered and resourced to drive a PPP program. This Section summarises the key considerations which are explored further in [Chapters 2 – 8](#).

1.5.1 Creating a flexible legal structure well integrated into the overall legal system

Flexibility is a key consideration in establishing a PPP legal framework. It is critical in ensuring that a PPP legal framework can serve the evolving needs and objectives of a jurisdiction and its government as well as cope with technological and market changes and external shocks and crises, while also providing the certainty and predictability that is sought by private investors.¹⁸ Below is an overview of the flexibility of the different components of a PPP legal framework, together with a summary of varying approaches across different legal systems and how to ensure compatibility with the existing legal framework.

1.5.1.1 Governance types and flexibility of legal instruments

Primary legislation tends to be the least flexible instrument (being comparatively slow to enact and difficult to amend due to parliamentary processes), and should therefore: (i) set out the key principles and procedures and the base institutional framework governing the development of PPPs in a jurisdiction (e.g. including where applicable the establishment of a PPP Unit); (ii) specifically delegate to relevant Government Entities or the PPP Unit the power to develop secondary legislation and guidance on prescribed topics (and powers to carry out certain other activities as appropriate); and (iii) generally avoid being overly prescriptive or restrictive.

Secondary legislation is a more flexible instrument and therefore better suited to setting out detail pertaining to the specifics of PPP implementation and regulation, for example: (i) procedures for the origination, appraisal, procurement and approval of PPP projects and PPP Contracts (including the formulation of guidance and other materials); (ii) detailed transparency, disclosure and reporting obligations; (iii) empowerment of appropriate Government Entities to make certain decisions (e.g. on the operating procedures for a PPP Unit); and (iv) compliance monitoring and execution of the role(s) assumed by Government Entities. Secondary legislation instruments vary across jurisdictions but may consist of implementing regulations, delegated, legislative or statutory instruments, ministerial legislation, directives, or, in the EU, EU decisions addressing specific issues.

¹⁸[The World Bank, 2017, Public-Private Partnerships Reference Guide Version 3](#), Module 2 and [PPP Knowledge Lab, n.d. Establishing the PPP Framework](#).

Guidance and other materials are the most flexible instrument and can be used to set out any standards, policies, procedures, precedents (such as forms of PPP Contracts), guidelines and any other information that is not appropriate to be enshrined in legislation or not intended to be legally binding. Such materials are expected to be updated on a regular basis to adapt to changing market conditions. The authority to produce such materials may be delegated in primary or secondary PPP legislation or fall within the existing powers of a Government Entity (or PPP Unit). These may be sometimes seen as "soft law" as they do not necessarily have the force of law, however often amount to mandatory policy to be followed by public and private sector participants by virtue of requirements to be satisfied in the approval and bid processes.

1.5.1.2 Different approaches across legal systems

A jurisdiction's legal tradition – namely, whether it is a civil or common law jurisdiction – may shape the approach taken in terms of achieving this flexibility. Regardless of the applicable legal tradition, however, the predominant approach worldwide consists of a form of PPP-specific statute-based framework which either: (i) has a primary PPP/concession law and regulations that govern the entire lifecycle of a PPP project; or (ii) relies on existing legislation with PPP-specific provisions. In some (primarily common law) countries, by contrast, there is no PPP-specific legislation (whether it be a specific law, or specific provisions in existing laws) and PPP falls instead under existing statutory powers and authorities (and, for example, a more guidance-based framework. These jurisdictions instead tend to rely on policy statements, guidelines and precedents ("soft law") in addition to well established contract law that tends to promote party autonomy and freedom of contract. They may need to make minor legislative adjustments to ensure that the PPP legal framework can operate effectively.

Data shows that there is only a minor difference between common and civil law economies in terms of adoption of PPP-specific regulations, with 72% of common law and 81% of civil law economies opting for this type of PPP legal framework.

[The World Bank, 2020. Benchmarking Infrastructure Development, 2020](#)

Federal countries such as Australia, Brazil, India and the USA, which have both national and sub-national (i.e. state) governments, also need to assess where PPP-related legislative powers and competencies lie amongst federal or sub-federal/state authorities (and whether a coordinated approach should be taken amongst sub-federal/state governments). Budgeting considerations will play a part in this decision, particularly where federal funding support is key to sub-federal projects. [See Appendix A](#) for resources in relation to national PPP legal frameworks that have been put in place in different countries.

This Guidance does not recommend a specific approach in terms of how to set up a PPP legal framework. Indeed, various models have been successful around the world and there is no "one size fits all" approach. What matters is that the right balance of flexibility, stability and predictability is achieved for each jurisdiction, and that specific and adequate consideration is given to ensuring an effective PPP legal framework is in place. The sample drafting in [Chapters 2 – 8](#) highlights the type of provision which is likely to be appropriate to include in primary legislation implementing a PPP legal framework on a statute-based approach; however, the principles can be adapted to fit to the relevant jurisdiction's approach.

1.5.1.3 Compatibility of the PPP legal framework and existing legal framework

Regardless of the approach taken, it is critical that any change to the PPP legal framework is not adopted or made in isolation, but instead is compatible both with the wider legal framework and with the political and economic institutions and public investment management and fiscal systems that will impact PPPs.

To ensure that any existing legislation does not inadvertently cut across the aims of the PPP framework, it will need to be carefully reviewed. It may need to be amended or its scope restricted so as not to apply to PPPs, or to ensure it does not otherwise contradict or undermine the PPP framework. Where amending existing legislation is not practicable or achievable, an alternative route may be to clarify the application of existing legislation to PPP projects in the PPP legislation itself. Whether this will be an effective solution will depend on the specifics of the country in question and should therefore be considered on a case-by-case basis.

Applicable existing legislation tends to include any law governing: (i) the procurement of works or services by a Government Entity; (ii) Government Entities and their decision-making, authorities, and processes (administrative law); (iii) general contracting and commercial relationships; (iv) public investment management (*see text box to the right*); (v) foreign investment; (vi) expropriation and land acquisition; (vii) taxation; (viii) employment; (ix) the environment and sustainability; (x) competition/antitrust; (xi) sector-specific legislation; (xii) use of public land and natural resources; and (xiii) budgetary issues and government support. Any amendments required may be achieved through the PPP legislation itself by way of specific exemptions or adaptations. *See Chapter 4 Project Origination and Appraisal* for further detail.

To ensure PPPs are effectively planned and implemented and remain fiscally sustainable, a PPP program must become part of a government's strategic planning, and the PPP legal framework must be fully consistent with public financial management legislation, without any discrepancies between general fiscal and budgetary frameworks and special provisions on PPPs.

IMF, 2020. Well Spent: How Strong Infrastructure Governance Can End Waste in Public Investment, 2020

1.5.2 Creating a clear institutional framework for PPPs that is adequately empowered and resourced to drive a PPP program

Set out below is a summary of institutional and approval process considerations and relevant Government Entities – these areas are further explored in *Chapters 2 Scope and Application of the Legal Framework, 3 Institutional Framework and 5 Approvals*.

1.5.2.1 High-level institutional framework considerations

Participants and powers – a country's PPP legal framework should be clear as to: (i) which government stakeholders are intended to have a role in the PPP program (e.g. the central government, the Ministry of Finance/Treasury (or Ministry of Economy) or central planning ministry, other relevant ministries/departments/agencies, and the PPP Unit (*see Section 1.5.2.2*); and (ii) the scope of their authority, powers (including power to delegate), roles and responsibilities in connection with PPPs. Hierarchies and reporting lines should be clear, and overlapping jurisdictions should be minimized. This is particularly important where there is no bespoke PPP legal framework since private sector parties will want to ensure that PPP projects are being developed and procured in a manner that complies with applicable rules. Any ambiguity in the institutional frameworks that govern the PPP development process will cause uncertainty, deter private investment and impede project delivery. *See Chapter 3 Institutional Framework* for further detail, practical guidance and drafting examples.

Range of application – a PPP legal framework should recognize a broad range of PPPs across sectors and industries, and with different revenue structures (including, e.g., the collection of user tariffs or fees, availability payments by Contracting Authorities and revenue sharing mechanisms). It is usually appropriate and more straightforward to apply the same principles to all types of PPPs unless there is a clear and compelling reason to make legal distinctions.¹⁹ For this reason, any special legal regimes that exclude or only apply to certain PPPs (e.g. PPPs with national security implications) should be made clear. *See Chapter 2 Scope and Application of the Legal Framework* for further detail, practical guidance and drafting examples.

Approvals and authorizations – a PPP legal framework should also set out the required internal approvals and authorizations for PPP projects, including financial budget-related authorizations. *See Chapter 5 Approvals* for further detail, practical guidance and drafting examples.

1.5.2.2 Institutions involved in delivering PPPs

Depending on the jurisdiction, many ministries and other institutions will be involved in delivering PPP programs, including:

¹⁹[UNECE, 2021. Draft UNECE/EBRD People-first PPP Model PPP law and commentary.](#)

- the **Ministry of Finance** or the **Ministry of Economy** – typically, this ministry will retain ultimate decision-making power as to whether a given PPP project should be budgeted for and approved;²⁰
- the **Ministries governing environmental, cultural, land and planning matters** – typically, these ministries will be involved in granting key environmental, urban planning and other land-related authorizations that a PPP project will need;
- the **Contracting Authority** – this institution will vary depending on the type of PPP project being developed and can range from being a major ministry (e.g. the Ministry of Transport, Health, Education, Defense, Energy, etc.) or could also be a **municipal authority or other sub-sovereign entity**;
- specialized, function-specific bodies such as a **national audit office, attorney general** (or similar office that may have a role in controlling the legality of the PPP contractual arrangements) or **industry regulator**;
- **State-owned market participants** acting e.g. as grid operators or in some cases even as Private Partners; and
- a **PPP Unit** (or equivalent governmental organization) – typically: (i) designed to promote, support/facilitate/implement and improve the delivery of PPP projects; and (ii) empowered to do so via a specific mandate.

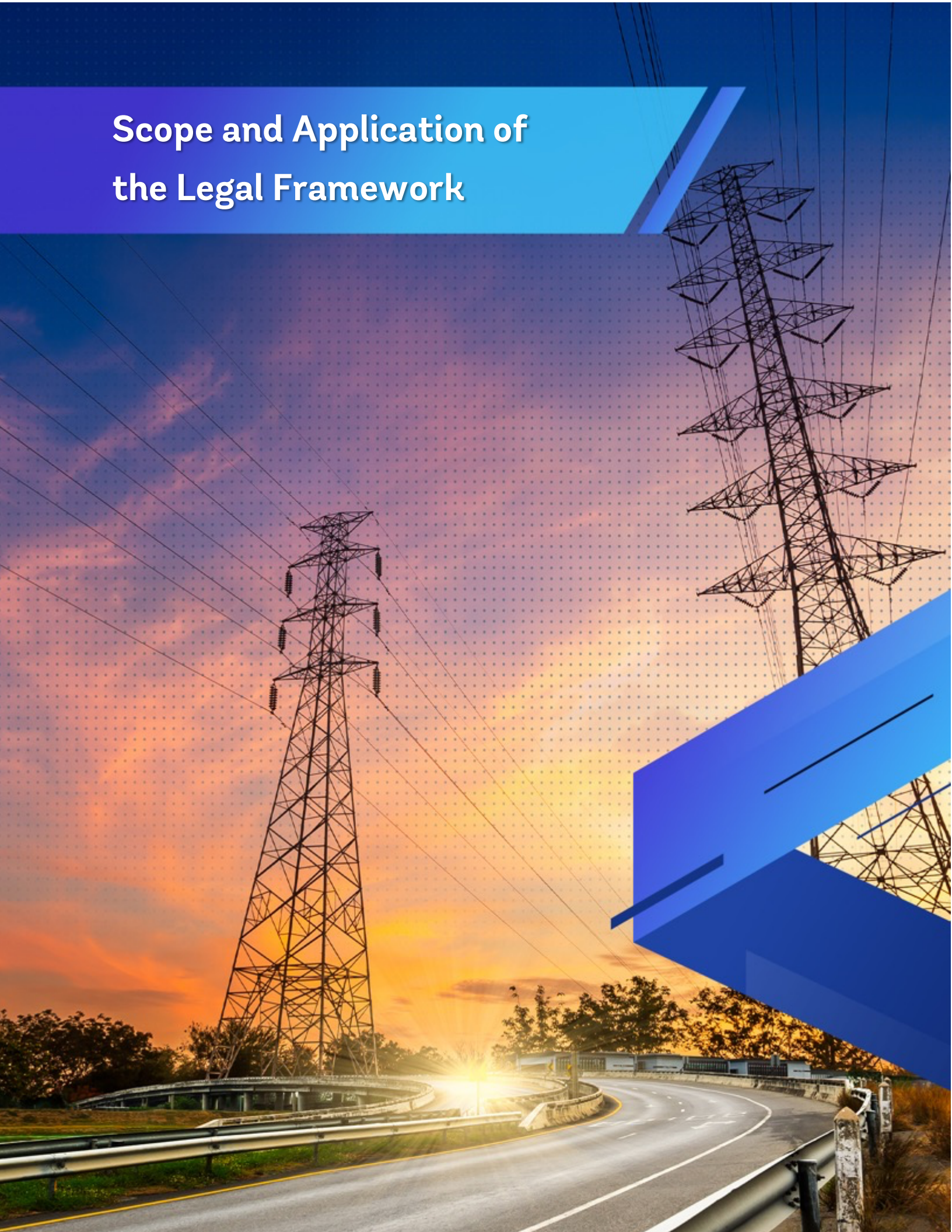
Directing such a wide range of actors on the government side alone requires significant resources and organizational skill. PPP Units can play a key role, not only in coordinating the parties involved, but also in strengthening a government's capacity to originate, appraise, procure, deliver and manage PPP projects and in creating a consistent and predictable environment for PPP development which encourages private sector confidence and investment.

While not a prerequisite, various jurisdictions with successful PPP programs have set up PPP Units.

See [Chapter 3 Institutional Framework](#) for practical guidance and drafting examples relating to PPP Units.

²⁰For ease of reference, this Guidance usually refers to the Ministry of Finance in connection with ultimate decision-making power with respect to budgeting and appropriation, but it should be noted that in some jurisdictions this function may be carried out by the Ministry of Central Planning or equivalent. See [Chapter 3 Institutional Framework, Section 3.3.3](#) on related points.

Scope and Application of the Legal Framework



2. SCOPE AND APPLICATION OF THE LEGAL FRAMEWORK

2.1 Introduction

In order to provide clarity to public and private entities about the eligibility of a project to be contracted as a PPP, governments should ensure that the scope of the PPP legal framework and the types of project that can be procured via a PPP structure are clearly identified in primary instruments. This typically includes describing what a PPP is and setting out any particular eligibility parameters for projects to be implemented as PPPs (such as size), as well as any exclusions.

A country's PPP legal framework should also reflect its objectives for PPPs and should provide clarity on the laws and policies applicable to a PPP project's whole lifecycle so that there is no confusion as to the relevant regime, particularly where there is existing legislation that could also apply. It is crucial that potential investors have such clarity.

This Chapter focuses on these elements and touches on the related authority of different Government Entities to procure PPP projects, an aspect explored further in [Chapter 3 Institutional Framework](#). Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting focuses on the key requirements recommended to be included in the primary legal instrument. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

2.2 Guiding principles and objectives

In order to establish the clear scope and application of the PPP legal framework, the objectives below should be taken into account. These are explored in more detail in [Sections 2.3 and 2.4](#).

2.2.1 Defining PPP and appropriate project eligibility parameters

The PPP legal framework must be clear what the concept of a "public private partnership" encompasses. While this can be set out in broad terms, not all infrastructure projects will be appropriate to be implemented as PPPs. Certain disqualifying criteria can be identified upfront and setting out eligibility parameters clearly in the PPP legal framework ensures that only suitable types of project can qualify as PPPs (projects which fall outside such parameters may be suitable for procurement using other methods).

2.2.2 Flexibility to align with changing national objectives

In defining the appropriate parameters of the PPP legal framework, it is also key for the government to ensure alignment with the process for formulating periodic national infrastructure plans and priorities. The PPP legal framework should have flexibility to adapt to changing priorities, practice or parameters efficiently, without undermining the fundamental elements of the primary instrument.

2.2.3 Clarity of the PPP legal framework and interaction with other applicable laws

If the country has existing procurement, PPP or other legislation that could be interpreted to apply to the PPP legal framework or to the types of PPP Agreements intended to be implemented, it should: (i) consider whether those provisions should be substituted or adapted through the PPP legal framework; and (ii) explicitly address this through law so there is no ambiguity about the regime applicable to PPP projects (for example, [see Chapter 6 Procurement, Section 6.2](#)). This may also include repealing certain laws, in which case care should be taken that this will not adversely impact existing projects or non-PPP sectors.

2.3 Scope of the PPP legal framework

2.3.1 Alignment with public investment systems and national infrastructure objectives

It is essential for the government to ensure alignment between the PPP legal framework and the process for formulating periodic national infrastructure plans and priorities. Identifying the types of project that are appropriate to be procured as PPPs will depend on each country's individual circumstances and needs to take into account the reasons for implementing a PPP program ([see Chapter 1 Guiding Principles, Section 1.3](#)) and the requirements of the public investment system in doing so. The PPP legal framework needs to support the



aim that when PPP projects are identified and selected they should be consistent with government priorities and not create a parallel pipeline of infrastructure investment. The framework should therefore also provide the flexibility for government to be able to amend relevant parameters as its priorities develop and to ensure that periodic reviews are carried out to secure timely alignment.

The scope of the PPP legal framework can be more general (e.g. apply across all infrastructure sectors) or can be restricted to specific sectors that the country identifies as being of strategic importance and which need private financing to meet delivery targets and timeframes. [See Section 2.4.2](#). In some cases, it may be appropriate for the government to require that all (or certain) infrastructure projects meeting relevant criteria are specifically considered for structuring as PPPs.

The government must also be clear from what date the parameters apply and whether (and to what extent) existing projects –and projects that have been initiated but not yet entered into –fall within or outside the framework.

2.3.2 Defining PPP

There is no single internationally accepted definition of "public private partnership", which is reflective of the fact that the term can have different meanings to different parties and in different jurisdictions and can encapsulate a range of payment structures and models (as highlighted in [Section 2.4.3](#)).

Definitions of PPP typically refer to the long-term nature of the contractual arrangements. A classification of "long term" is not necessarily included in primary legislation and may be expanded on in secondary instruments. To a large extent, the term will be determined by the nature of the contract, the need for the service/asset and the anticipated financial terms (including the key driver of affordability). PPP definitions also sometimes refer to the transfer of significant risk and management responsibilities to the Private Partner and may describe remuneration as being linked to performance. While there is typically a link between payment and performance in availability payment-based (government pays) models, it may not always be so clear-cut in all models (e.g. in user-pays models where demand can, but may not always, be driven by level of performance).

In order to retain flexibility as regards what constitutes a public private partnership for the purposes of the PPP legal framework, recommended practice is to adopt a robust and reasonably broad definition which does not specify any particular project or payment models and permits hybrid and innovative delivery approaches. Governments should consider adopting a description of both PPP and "Project" which is not overly definitive so as to avoid limiting themselves as to the type of projects which can constitute PPPs in the future. Ideally, the PPP legal framework should be designed to facilitate the development and implementation of as many different types or PPP project and as many different revenue structures as possible, without the need for further primary legislation to be enacted.

As a point to note in this context, it is important to remember that PPP is not privatization, which is a very separate process outside the scope of the PPP legal framework.

[See Section 2.6.1, Definitions/Article 2A \(and side text box\)](#) for a proposed definition of "Public Private Partnership" that is drafted to encompass different PPP models and revenue streams and for a broad definition of "Project".

Public Private Partnership is a long-term contractual arrangement between one or more Contracting Authorities and a Private Partner for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility and remuneration may be linked to performance.

See the [World Bank's PPP Reference Guide Version 3, 2017 Section 2.6.2, Article 2B](#).

2.4 Factors to determine eligibility of projects

The scope of the PPP legal framework may be further defined by reference to various factors. This can include size of project (e.g. in terms of capital expenditure, whole-life cost or scope), permitted sectors and contract model. In some countries, the framework may also differentiate between the ability (or jurisdiction) of relevant Government Entities to procure certain types of project. This Section explores various metrics that can be used.

One of the main challenges in developing PPP legislation is to select the appropriate criteria to ensure promotion of the country's desired infrastructure objectives while ensuring that only suitable types of project are eligible. The more inclusive the scope is, the more projects can be considered for implementation as PPP.

Ability to deliver optimal VFM is one of the key reasons why not all infrastructure projects are appropriate to be procured as PPP. Although VFM analysis (and other economic factors) form a crucial part of the project appraisal process, defining the scope of the legal framework is critical to setting the parameters of this assessment. [See Chapter 4 Project Origination and Appraisal](#) for further discussion of this point.

2.4.1 Size

Governments may want the PPP legal framework to apply only to projects with a minimum capital value (see *Benchmark Examples*) (or minimum operating expenditure value, if the project consists primarily of service delivery as the infrastructure already exists). Many countries use this metric to promote VFM by ensuring that eligible projects are large and substantial enough to justify the high transaction costs and complexity associated with a PPP project. The specific capital value will be individual to each country and be determined according to factors such as the country's financial and technical capacity to deliver projects through PPP (including the cost of procurement). It should also take into account the level below which the private sector is likely to decide it is uneconomic to bid.

It may be appropriate for the PPP legal framework to provide for different value thresholds, with different approval processes and responsible authorities according to each. Where PPP powers are devolved to regional, state or local government, national governments should ensure that the legal framework is clear as regards these entities' scope to set their own size parameters within the national framework (e.g. in Australia, New South Wales sets a higher minimum threshold than the federal threshold).

Governments should bear in mind that setting a minimum value to apply in all cases may have certain adverse effects. For example, if the value is high, this may limit entry to the market for smaller participants which in turn could lead to larger players dominating certain sectors and to capacity for new projects being saturated. Some sectors may over time also develop relevant expertise and efficient and market-accepted project templates which reduce the initial complexity and cost associated with early projects –this may result in new project values falling below the minimum threshold although the projects still offer VFM if procured via PPP. A PPP Unit can play an important role in driving such standardization efficiencies and governments should consider how to take such improvements into account in setting any size parameters.

To enable smaller value projects to be procured cost-effectively by PPP, allowance can also be made for bundling several projects together to meet a minimum value threshold – this can also enable certain efficiencies to be found in terms of replication of design and negotiation of contract terms. Bundling has been seen in the school sector particularly, for example in the UK.

Governments should also consider if providing for exceptions to size parameters is appropriate. This may be the case for high risk or innovative infrastructure projects that require very specialized capabilities.

Benchmark Examples²¹

In **Vietnam**, the PPP Investment Law (primary legislation) imposes minimum capital requirements for PPP projects depending on the sector. The threshold is (i) VND100 billion (USD4.4 million) for PPP projects in healthcare, education, and training, and (ii) VND200 billion (USD8.7 million) in other permitted sectors (unless the project is in an area with "difficult socio-economic conditions", in which case, the threshold is VND100 billion (USD4.4 million)).²²

The **Australian** National PPP Policy Framework (secondary instrument under a broad statutory power to procure infrastructure) states that projects with a total capital value exceeding AUD50 million (USD35.4 million) likely meet the VFM assessment. It is possible for projects with a lower value to be suitable for procurement by way of PPP, but sufficient VFM drivers must be demonstrated.²³ At state level, New South Wales sets an AUD100 million threshold (with the outcome awaited of a 2021 consultation whether to increase this to AUD200 million (USD142 million)).


See [Section 2.6.4, Article 2D.1\(a\) Option 1](#) for sample legislative drafting for excluding projects that do not meet a minimum capital value.

²¹USD exchange rate as at 6 May 2022.

²²[Vietnam – Law No. 64/2020/QH14](#), Article 4.

²³[Australian Government, National PPP Policy Framework, 2015](#) (section 3.1.3).

2.4.2 Sector

Governments sometimes consider restricting the use of the PPP model to specific sectors only. This may be because their priority is to develop infrastructure in a specific sector (e.g. healthcare, transport or energy), or because they want to build experience and momentum by starting with fewer sectors. Governments may also wish to exclude sensitive sectors (or certain sensitive elements of such sectors) from the scope of the PPP legal framework (e.g. defense or national security). [See Section 2.6.4, Article 2D.1\(b\) Option 1 and Chapter 6 Procurement, Section 6.6.1, Article 6A.1\(c\)\(iii\)](#) for considerations related to excluding "sensitive" sectors. 

Limiting the application of the PPP legal framework to specific sectors is not usually recommended because a country's infrastructure requirements develop over time and it is more efficient for the legal framework to provide flexibility. However, this approach could be relevant where there is existing adequate legislation regulating particular sectors, in which case the PPP legal framework should clarify the extent to which certain sectors are excluded from its ambit and how the alternative regimes apply. Establishing consistency in approach across sectors as far as possible will promote market confidence and understanding, and enable government procurement skills to be more easily transferable between sectors.²⁴

If scope is defined by reference to the inclusion or exclusion of certain sectors, it is important to carefully consider how to clearly define such sectors and related infrastructure to avoid any uncertainty as to whether a project falls within the legal framework or not. The power to expand or clarify sector scope could also be delegated to secondary instruments/particular bodies, if appropriate.

Benchmark Examples

In many countries, the primary legislation setting out the PPP legal framework does not limit its scope by sector, so infrastructure projects in any sector may be considered for PPP. Examples include **Colombia, South Africa, Mexico, and Poland**.

Senegal's PPP law applies to all economic and social sectors, except for energy, mining and telecommunications,²⁵ which are subject to a different and existing legislative regime.

[See Section 2.6.4, Article 2D Options 1 and 2](#) for sample legislative drafting for defining the sectors in which PPP Projects can be carried out using a permissive and a restrictive approach.

2.4.3 Contract model

Governments sometimes want to design the PPP legal framework so that it recognizes and applies to a particular range of project models and/or revenue structures or allows for particular levels of public sector participation (such as allowing the Contracting Authority to own an equity stake in the project company it contracts with²⁶). However, in order to preserve flexibility and the ability to adapt to changing needs more easily, it is good practice for the PPP legal framework to use broad terms to describe eligible approaches without limiting application to specific types or forms. This is particularly the case where primary legislation is used, as the power to set out more detailed parameters can be delegated to secondary instruments which also allow for more detailed explanation of certain approaches. This avoids the situation which has arisen in some countries where legislation has described PPP structures in such a detailed and/or rigid way that it has been problematic trying to bring to market projects which do not fit within those classifications.

A multitude of names and acronyms exist for describing various PPP structures, based on the Private Partner's contractual responsibilities and/or the ownership of the relevant asset and/or the payment model (e.g. Concession, Build-Own-Operate-Transfer (**BOOT**), Design-Build-Finance-Operate (**DBFO**), Design-Build-Operate (**DBO**), "user

²⁴It should be noted that in some jurisdictions, certain sectors (in particular, energy and other utilities) are designed in such a way that they are "regulated markets" in respect of which the scope of application of the PPP legal framework is potentially quite limited. This is not necessarily because there is an express limitation regarding the applicability of the PPP legal framework, but because the relevant regime by necessity operates in a different way structurally and government involvement is typically limited to a regulatory function.

²⁵[Senegal – Loi 2014-09 du 20/02/2014 relative aux contrats de partenariat \(PPP\)](#), Section 1, Article 2.

²⁶For further discussion of Government taking equity stakes, see Section C of "PPP Contracts in Context" in [The World Bank, 2019, Guidance on PPP Contractual Provisions](#).

pays" or "government pays" etc.). The absence of certain terms in a name (such as "Finance", "Operate", "Manage" or "Maintain") does not necessarily mean that such responsibility is not included in the model so a name should not be relied on as a comprehensive description without due diligence. Although many countries distinguish between "concession models" and "PPP models", or between contract types according to their purpose or revenue model, these distinctions are often historical and result from the development of those concepts under various legal traditions.

As all these terms can have different interpretations in different countries and markets, and can in fact be rather different in implementation, it is recommended practice to avoid using such terms in legislative frameworks. It is preferable to adopt one regime which encompasses all these forms of PPP to avoid (i) potential uncertainty over which regime applies, and (ii) differences in approach for aspects which are essentially all based on the same principles and financial bases. If different regimes do exist, it is good practice for the PPP legal framework to ensure that it is clear how they operate in relation to each other and for amendments to be made to existing regimes to align them as far as possible with each other and with the principles set out in this Guidance.

Some PPP structure descriptions (or PPP definitions) refer to the position on "demand risk" and whether it is transferred to the private sector or retained by government. In practice, demand risk is rarely capable of being wholly transferred and using this or similar terms in legislation can be misleading.

Benchmark Example

The **Mexican** PPP law (primary legislation) adopts a non-exhaustive approach and identifies a broad range of PPP types and funding structures that fall within the ambit of the law.²⁷

However, the head of the Investment Unit within the Ministry of Finance identifies from time to time the project structures that may be approved, depending on the country's strategic priorities at that time.

For the purpose of this Chapter, the PPP Contract models themselves are not explored in detail but the following Tables set out a brief overview of (i) the typical payment models and revenue sources and (ii) the types of PPP model often seen in projects. As the Tables indicate, there can be a range of approaches within these descriptions and this demonstrates why legislating too prescriptively may not be the best approach. In practice, many projects use a hybrid of these models rather than rigidly implementing one form of structure. It is also important to note that selection of the appropriate contract model for a PPP project should be part of the implementation process, and not a factor in determining eligibility to be a PPP.

2.4.3.1 Overview of PPP Contract payment models and revenue sources

Selection of the most appropriate payment model will depend on various factors such as the nature and funding history of the service to be provided (i.e. whether it is a publicly funded service), the forecast level of demand for the service, the ability of users to pay and the opportunity for generating third-party revenue.

Overview of PPP Contract payment models and revenue sources	
"Government pays" availability payment model	The Contracting Authority pays the Private Partner for the "availability" of the services/asset provided. Payments are usually conditional on availability at a contractually defined standard, regardless of the level of actual usage, and may be subject to "performance-based" adjustments. These payments are typically the sole source of revenue for the Private Partner. This model is seen in projects, for example, where: (i) the Private Partner has no influence over user demand (e.g. a hospital or prison); (ii) user demand is considered too low or uncertain to generate sufficient revenue through any other model for the project to be considered financeable by the Private Partner; and/or (iii) there may be legal constraints or political obstacles to imposing payments on users (e.g. essential health services).

²⁷[Mexico: Ley de Asociaciones Público Privadas – Law on Public-Private Partnerships \(Mexico\)](#), Article 10.

Overview of PPP Contract payment models and revenue sources	
"Government pays" demand-based model	The Contracting Authority pays the Private Partner for the services/asset provided based on usage (e.g. a shadow toll road project).
"User pays" demand-based model	The Private Partner collects fees, tariffs or tolls directly from the end-users of the asset/service (e.g. a real toll road project).
Hybrid model	The payment model can be a hybrid of the above, particularly where some level of government revenue support is needed. This is typically where forecast demand levels are not certain enough for a project to be considered financeable by the Private Partner without a government support mechanism. For example, demand-based models may include a subsidy based on availability/performance or on output (i.e. number/type of users); and minimum revenue guarantee/viability gap funding mechanisms are also seen (e.g. in road or light rail projects). These arrangements can involve sharing revenue risk both above and below certain thresholds (often known as a "cap and collar" mechanism), so the government also shares in revenues above a certain level. Capital payments by the government may be appropriate in certain cases.
Other revenue sources	Some projects may also offer the opportunity for third-party revenue through (i) other types of user (e.g. facility hire fees by third-party users in a school project), (ii) associated businesses (e.g. fees/rents paid by motorway service station concessions or airport retail outlets), or (iii) other commercial revenues (e.g. fees for advertising space in transport hubs).

2.4.3.2 Overview of common PPP structures

As mentioned above, there are many names and acronyms used to describe project structures and what is understood by these terms can vary between jurisdictions and even sectors. The Table below displays some of the most typical categorizations across the spectrum of "financed" and "non-financed" PPPs. However, it is not intended to be an exhaustive list of the types of PPP structure and is included for illustrative purposes only. See the [World Bank's PPP Reference Guide Version 3, 2017, Module 1](#) for further information.

Overview of common PPP structures ²⁸			
	DBFO/DCMF	Concession	BOT/BOOT or BTO
Description	A "Design-Build-Finance-Operate" or "Design-Construct-Manage-Finance" project is where the Private Partner has certain responsibilities in relation to the asset but does not own it and transfers it back to the Contracting Authority at the end of the contract.	A concession is an arrangement where the Private Partner is granted certain rights in relation to an asset (sometimes in return for a fee and/or royalty paid to the Contracting Authority) and transfers the asset to the Contracting Authority at the end of the contract.	A "Build-Operate-Transfer"/ "Build-Own-Operate-Transfer" or "Build-Transfer-Operate" project is where the Private Partner has certain responsibilities in relation to the asset, owning it until it transfers it to the Contracting Authority (in a BOT/BOOT at the end of the contract, in a BTO after construction).
Private Partner responsibilities	Design, build, operate, maintain and finance the asset.	Design, build, operate, maintain, finance and "monetize" (i.e. generate revenue from) the asset.	Design, build, operate, maintain and finance the asset.
Payment structure	Typically "Government pays": Private Partner receives a payment from the government as described in Section 2.4.3.1 . Other structures also possible.	Typically "User pays": Private Partner collects payments from end-users as described in Section 2.4.3.1 . Other structures also possible.	See DBFO/DCMF.

The above structures envisage the Contracting Authority taking back (or having the option to take back) the relevant asset at the end of the PPP Contract. In some sectors, there are models which are based on a "Build-Own-Operate" ("BOO") approach where the asset is not returned to or owned by the public sector (other than in exceptional circumstances). BOO can also be seen as a form of PPP. For example, in the energy sector in some countries (e.g. where there is not a separately regulated market), the Private Partner may be an independent power producer, contracting with the public sector through a power purchase agreement and retaining ownership of the facility.

See [Section 2.6.1, Definitions/Article 2A](#) for a proposed definition of Public Private Partnerships that is drafted broadly in order to encompass different PPP models and options for revenue streams.

2.4.4 Authority/Jurisdiction of the legislative body

The application of the PPP legal framework should be considered in light of the country's regulatory environment. If the country is a federal government, it may be appropriate for the national PPP legal framework to apply to federal entities only and for regional/state governments to be empowered to implement a regional/state framework directly or to further supplement the national framework. The key factor is to ensure that the applicable frameworks work together efficiently and do not create uncertainty. For example, in cases where regional/state governments require support such as a guarantee or viability gap funding from federal/national government, the PPP legal frameworks must harmonize, so

²⁸This is not an exhaustive list of types of PPP structures or names/acronyms and this table is included for illustrative purposes only. Acronyms are used for reference only and can also be seen used in other contexts (e.g. a "User Pay BOT" is another form of "concession").

that it is clear whether the government entities providing such support have an approval role at project implementation level.

As further discussed in [Chapter 3 Institutional Framework](#), a country may also wish to limit the levels of government empowered to undertake PPPs (e.g. national, regional and municipal).

Benchmark Example

The law setting out the main provisions that pertain to PPPs in **Nigeria**, a federal country, states that it applies to investment and development projects relating to federal infrastructure, procured by any "Federal Government Ministry, Agency, Corporation or body".²⁹ However, Nigeria's constitution³⁰ also applies, which divides legislative power into three lists: infrastructure assets in the "exclusive list" are the exclusive preserve of the federal government; both the federal and state governments may legislate on items listed in the "concurrent list" which includes different types of infrastructure assets; and the "residual list" is reserved for local governments. The net effect of this distribution of power is that there is both federal and state legislation regulating PPPs.

2.5 Toolkit for determining the scope of the PPP legal framework

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above. The application of the PPP legal framework should be clear and certain, however, it should also be flexible (to the extent possible under the local governance structure and legal traditions) and cognizant of government capacity.

2.5.1 Objectives of the law

A technique that can clarify the strategic objectives and priorities of the country without compromising the generality of the scope of the legal framework is to introduce a provision describing the aims of the law (e.g. if the PPP legal framework is to be set out in a standalone legal instrument). Such provision would appear in the preamble or explanatory note accompanying the law (according to the legal tradition of the relevant country) and so would not necessarily form part of the binding provisions of the law. This approach can give guidance about how the legal framework is intended to apply, and the types of projects it intends to capture.



Alternatively, a similar provision may be included in secondary legislation or policy/guidance documents issued by a competent authority.

See [Section 2.6.2, Article 2B](#) for proposed drafting of a provision describing the objectives of the PPP legal framework.

2.5.2 Agility to adapt to changing needs and priorities

As explained in this Chapter, the priorities and strategic objectives of a country with respect to infrastructure and development needs may change over time. Therefore, a "permissive" approach with respect to sectors, models and authority jurisdiction is recommended over a "restrictive" PPP legal framework (to the extent possible under law).



The core elements should be set out in primary legislation alongside powers delegated appropriately to a government entity (such as a particular minister or the PPP unit) to issue secondary instruments (e.g. regulations, policies and guidelines) which formulate or adapt detailed criteria (for example, where these may be more technical and may also necessitate amendment over time).

See [Section 2.6.3, Article 2C](#) for sample legislative drafting about the overall scope of the PPP legal framework and [Section 2.6.4, Article 2D](#) for alternative drafting options reflecting the **permissive** and the **restrictive** approaches.

²⁹[Federal Republic of Nigeria, 2005. Infrastructure Concession Regulatory Commission \(Establishment, Etc\) Act, Article 1\(2\).](#)

³⁰[Constitute Project, 2021. Nigeria's Constitution of 1999 with Amendments through 2011.](#)

2.5.3 Checklist of considerations

In determining the scope of the law and the metrics that are appropriate for defining eligible projects under the PPP legal framework as outlined in the Chapter, the following checklist should be considered

Jurisdiction/ aims	<ul style="list-style-type: none"> → What are the applicable PPP policy objectives? → What are the competences and authorities of the lawmakers/relevant government levels? → Is it a federal system with federal as well as state authority or a central government with significant delegated powers to regional/local authorities?
Project Application	<ul style="list-style-type: none"> → Should the framework apply to existing projects and projects that have already been initiated? If so, to what extent? → Are there specific sectors that are regulated by existing legislation in the country or that require different treatment due to specific priorities or other considerations? → Does the country want to exclude sensitive sectors (or certain sensitive aspects of such sectors) from the PPP legal framework? → Is there existing PPP or other relevant law that requires repealing?
Contract Model	<ul style="list-style-type: none"> → Are there any policy reasons to exclude specific contract models or revenue structures? → Are there public debt requirements that preclude certain revenue structures?
Size	<ul style="list-style-type: none"> → What is the minimum threshold to achieve VFM on a project basis? → How does this factor in considerations such as impact of efficiencies over time, bundling of smaller projects and market capacity/barriers to entry? → Are there strict public debt regulations that should be considered in defining the size of PPP projects?

2.5.4 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Application of the Legal Framework

Primary Instrument	Supporting Secondary Instruments
<ul style="list-style-type: none"> • Objectives of the law: as part of the preamble and/or explanatory note (not binding). 	Further guidance on objectives.
<ul style="list-style-type: none"> • Definition of Public Private Partnership and Project (reasonably broad). 	Guidance on what falls under these definitions.
<ul style="list-style-type: none"> • Scope of the law: describing its application to all phases of; projects procured by relevant Government Entities; specifying relevant date of effectiveness and application to projects already underway. <i>[To tie in with Eligible Projects as applicable.]</i> 	Guidance on what is within scope.
<ul style="list-style-type: none"> • Eligible projects description: <ul style="list-style-type: none"> • Option 1 (permissive): – all projects to be contracted as PPPs with specified exceptions. <li style="text-align: center;">OR • Option 2 (restrictive): – use of PPPs limited to specific sectors only. <p><i>See also Chapter 4 and Section 4.5.2.</i></p>	Guidance on eligibility of projects and criteria. <i>See also Chapter 4 and Section 2.4.3 for guidance on contract/payment model under the project implementation process.</i>
<ul style="list-style-type: none"> • Grant of authority/responsibility to relevant Government Entity to adapt eligibility criteria through specified instrument (and powers to delegate if appropriate). • Consider other relevant direct/delegable powers and responsibilities, e.g. to carry out periodic reviews to ensure alignment with national priorities. <i>[May be a PPP Unit role.]</i> 	Implementation of direct/delegated authority via relevant instrument. Related guidance.
<ul style="list-style-type: none"> • Clarification on relationship of this law with existing laws • Repealing of any existing PPP or other laws, as needed. 	Guidance on relationship between laws.

2.6 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 2.5.4](#). The underlying detail of certain elements may be more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

2.6.1 Definitions (Public Private Partnership)³¹ / Article 2A

Definitions:

Private Partner means the private sector entity that enters into the PPP Contract with the Contracting Authority.

Project means any project, including but not limited to developing, financing, generating revenue from, designing, engineering, manufacturing, transporting, constructing, erecting, installing, commissioning, operating, maintaining or decommissioning public infrastructure and/or the provision of a public service.

Public Private Partnership means a long-term contractual arrangement between one or more Contracting Authorities and a Private Partner for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility and remuneration may be linked to performance.

Definition to be adapted should different structures be contemplated e.g. government involvement. See Section 7.4.4(a).

The proposed definition is deliberately generic and does not identify key functions of developing the PPP (e.g. construction, design and financing) or handover from the private party to the government. These aspects can be further detailed in other parts of the primary instrument (if applicable – e.g. the definition of Project) or in secondary/guidance

2.6.2 Objectives of the Law – Preamble – Article 2B [Non-binding]

The aim of developing and implementing projects as PPPs is to:

- (a) encourage participation of the private sector (local and international) in Projects and to promote investment in various strategic sectors of economic and social value;
- (b) enable the Government to implement Projects efficiently and effectively throughout the Project lifecycle, in a way which ensures that (i) environmental, social, inclusive, sustainability, climate change and resilience matters are considered and appropriately monitored and addressed; and (ii) fiscally responsible and sustainable policies are adopted and applied in accordance with public spending and investment management systems;
- (c) capitalize on the financial, administrative, organizational, innovative, technical and technological capabilities and expertise of the private sector, to enable the public to benefit from quality and cost-efficient government infrastructure and services;

Consider adding a provision explaining the objectives of the PPP legal framework in a non-binding part of the main legislation, secondary instrument or policy document.

This list of objectives can be modified as needed to reflect the country's strategic aims and to ensure inclusion of applicable principles (such as "people first").

Consider how to address related responsibilities and delegated powers, such as periodic reviews to align with changing national priorities.

³¹All defined terms in the [Sample Drafting sections of Chapters 2 – 8](#) will be typically set out in one Definitions section of the law/instrument. Certain definitions (such as the definition of PPP) may be rendered as substantive provisions.

- (d) maximize and monitor productivity, improve the quality of public services, and adopt efficient management practices to develop and monitor such services;
- (e) transfer knowledge and skills from the private sector to the public sector, and train and qualify employees of Contracting Authorities and related Government Entities to manage and operate Projects;
- (f) transform and complement Government approach in providing and managing certain infrastructure and public services so that the most effective model can be selected, and focus placed on a whole lifecycle approach to project management using approved policies and quality controls to deliver increased accountability for the delivery and long-term management of public assets;
- (g) promote the competitiveness of Projects in local, regional, and international markets.

For example, in the context of airports, ports, hospitals to promote/consolidate a country's health tourism sector, energy etc.

2.6.3 Scope of application – Article 2C

1. This Law establishes the general framework governing the origination, appraisal, approval, procurement and management of Public Private Partnerships initiated after the effective date of this Law.
2. This Law shall apply to any Project that is being procured by [a federal government authority][central government ministry][any Contracting Authority] and is within the definition of a Public Private Partnership.
3. [This Law shall not apply to Projects which are initiated before the effective date of this Law except as regards [state relevant Articles which will apply/clarify any uncertainties.]]

If there are existing PPPs (initiated or signed), amend Article 2C.1 as appropriate and clarify the extent to which the law applies (fairly) to such projects e.g. in Article 2C.3).

Adapt/delete drafting as appropriate to reflect relevant federal or centralized system etc. and if certain levels of government are excluded.

Drafting should also tie in with relevant provisions outlined in Articles 2D, 2E and 3A (Section 3.5.1) relating to eligible projects, existing laws/repeals and Contracting Authorities.

2.6.4 Sectors and excluded Projects – Article 2D

Option 1 (Permissive approach):

1. The provisions of this Law shall not apply to any Project that is within the definition of Public Private Partnership but which:
 - (a) has a capital value that is less than **Option A:** [insert figure] **OR** **Option B:** the value stipulated under [refer to relevant secondary legislation which sets the minimum monetary value] **OR** **Option C:** the value set by [delegate the authority to determine the minimum monetary value]; or
 - (b) involves [specify particular sensitive elements of] military or national security-related procurement contracts; or
 - (c) falls under [specify relevant sector-specific legislation and clarify any exceptions/circumstances where aspects of the PPP law still apply].
2. The [specify relevant Government Entity] has the power to amend this list by [specify appropriate instrument].

Adapt/delete drafting as appropriate to address any requirements relating to different levels of government.

Only include Article 2D.1(b) if appropriate. See also Article 6A (Section 6.6.1).

OR

Option 2 (Restrictive approach):

1. Public Private Partnerships may be initiated and entered into by Contracting Authorities in the following sectors: *[specify the relevant sectors in the body of the law or in a schedule]*.
2. The *[specify relevant Government Entity]* has the power to amend this list by *[specify appropriate instrument]*.

2.6.5 Relationship with other legislation / Repeals – Article 2E

[This Article should address any potential conflicts with existing laws so that it is clear what regime applies to PPP projects; any existing PPP/other law that is to be replaced should be repealed. The drafting should also tie in with corresponding provisions which may be required in other sections of the legislation.]

Option 1 uses the "permissive" approach and permits all projects to be contracted as PPPs with specified exceptions. See Section 2.4.2.

Option 2 uses the "restrictive" approach and limits the use of PPPs only to specific sectors. Consider including power to amend the list by delegating to an appropriate entity.

Institutional Framework



3. INSTITUTIONAL FRAMEWORK

3.1 Introduction

A crucial element in the success of a PPP program is establishing an institutional framework that clearly sets out the roles, responsibilities and powers of the Government Entities involved and their relationship to each other. This can empower and motivate relevant entities to drive the government's PPP agenda forward and promotes efficiency, transparency and accountability within government, which in turn gives the private sector confidence in the PPP program. The PPP legal framework plays a key part in defining, allocating and facilitating the coordination of such roles and responsibilities and, where applicable, establishing new institutions to support the planning and implementation of projects that promote the government's infrastructure priorities.

This Chapter focuses on the identification and responsibilities of relevant entities (including the Ministry of Finance, the PPP Unit and the Contracting Authority). Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting focuses on the key requirements recommended to be included in the primary legal instrument. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this. [See Chapter 5 Approvals](#) for the approval process itself.

3.2 Guiding principles and objectives

In order to establish a clear institutional structure for delivery of a PPP program and the whole PPP Project lifecycle, the PPP legal framework should address the key guiding principles and objectives set out below.

3.2.1 Clarity and purpose of structure

The PPP institutional framework should establish where in government the core capabilities reside. These are:

- (a) the ability to set technically informed rules and requirements (via appropriate instruments) for how PPPs must be carried out;
- (b) the power to monitor compliance and enforce those requirements (via approvals and monitoring processes); and
- (c) the provision of support for Government Entities in adhering to such rules and requirements (via guidance and supporting bodies such as a PPP Unit).

The framework should provide clarity regarding the government stakeholders that need to be involved to achieve these key capabilities, specifying the scope and hierarchy of their roles and the allocation of their responsibilities, including how any issues between them will be resolved. This minimizes the risk of projects failing to proceed, or being delayed, due to administrative confusion within government. A clear framework enables Contracting Authorities to have confidence in planning the whole project lifecycle and in turn gives the private sector confidence in the PPP program. Some countries have experienced issues with implementing their PPP legal framework due to lack of clarity in this regard.

Establishing the appropriate institutional framework structure is the key objective, but in doing so governments also need to consider their capacity to "operationalize" it. This will differ between countries and depend on applicable circumstances (such as available resources, particularly at the start of establishing a PPP program, and other vulnerabilities). See the [World Bank's PPP Reference Guide Version 3, 2017, Module 2](#) for further information.


3.2.2 Power to contract

A key part of the institutional framework includes having certainty regarding Government Entities' powers to enter into PPP Agreements (e.g. central government authorities only, sectoral or municipal entities) and their roles and responsibilities in the PPP project cycle.

Private sector parties will carry out detailed due diligence on the capacity and authority of the Government Entities they are going to contract with, and any uncertainties may cause delays and require time-consuming legislative fixes. This in turn may also adversely affect private sector interest in, and the level of competition for, PPP projects that the

government wants to bring to the market. It is therefore key that the legal framework clearly sets out such powers, roles and responsibilities.

3.2.3 Identifying relevant Government Entities

It is key to identify the Government Entities that should be involved in a PPP project and at what stage of the project cycle they should be involved. Coordination between Government Entities and efficient use of skills and expertise is essential to creating an effective PPP program and promoting transparency and accountability through the life of a PPP project. Typically, the structure will encompass the Ministry of Finance (particularly on issues related to fiscal sustainability of PPPs), the Contracting Authorities and the country's PPP Unit (if established). Other key governmental stakeholders may be involved: for example, to ensure: (a) delivery of government infrastructure investment priorities and aims in alignment with public investment management systems; and (b) implementation of particular aims, for example, in respect of planning regulation, climate change resilience and carbon reduction. See [Section 3.3.4](#) for further discussion of the typical entities involved. 

In some countries, there may also be public entities with wide approval roles that must be considered; for example, in the context of procurement (e.g. the National Agency for Public Procurement in Romania) or in the context of the audit and validation of government accounts and related acts, in order, for example, for payment obligations to be enforceable (e.g. Portugal's and Brazil's respective Tribunal de Contas).

Benchmark Example

Jordan's PPP law establishes two bodies that are required to work together and support the development and management of PPP projects:

- (a) a working team comprising the Minister of Finance, the Minister of Planning, the Minister of International Cooperation and the Ministry of Industry and Trade. The working team's tasks include identifying priority projects, issuing policy and secondary legislation concerning PPPs and tabling tenders to the Jordanian Parliament for approval;³² and
- (b) the PPP Unit, which is responsible for providing support to Contracting Authorities, proposing policy documents for the approval of the working team, and overseeing the ongoing management of PPP projects.³³

The institutional structure in Jordan is designed to engage all relevant stakeholders and allocate responsibilities efficiently and in a manner consistent with its public institutional infrastructure.

3.2.4 Structure for the whole lifecycle

The structure should take into account the whole lifecycle of PPP projects and ensure that the relevant Government Entity's roles and responsibilities are clear at each stage: this means from origination, procurement and contract award through to contract implementation and management, and ultimately handback of the project assets at the end of the PPP Contract. The PPP Unit, the Internal Evaluation Committee, the Ministry of Finance and other approval bodies and Government Entity stakeholders will all be involved with the Contracting Authority at certain stages of the process. Market confidence will be built from showing that the structure works efficiently and is adhered to throughout the life of a PPP project and that the government has the relevant resources needed for the whole life of the project. See [Chapters 5 Approvals and 8 Contract Management](#) for more detailed discussion on allocation of roles and responsibilities at various stages of a project's life.

3.2.5 Alignment with existing structures

A country's institutional structure for PPP must be aligned with its political, legal and administrative traditions and existing frameworks. In many jurisdictions, standalone PPP laws or legal frameworks will need to explicitly address the allocation of roles in the context of PPP development and management. However, this does not apply to all jurisdictions:

³² [Jordan, PPP Law \(Law No. 17 of 2020\)](#), Articles 6 and 7(12).

³³ [Jordan, PPP Law \(Law No. 17 of 2020\)](#), Article 7.

for instance, common law jurisdictions tend to achieve the allocation of responsibilities by using the "soft law" approach through existing non-PPP-specific statutory powers and authorities. *See Chapter 1 Guiding Principles, Section 1.5.1.*

In addition, in some jurisdictions, ministries or local authorities may have powers to contract up to a certain financial level without having to involve other Government Entities. This may not be the most appropriate process for PPP projects and governments should consider whether a bespoke structure is needed and what legislative or policy adjustments may need to be implemented. This assessment should form part of a country's initial analysis when considering its PPP legal framework.

Benchmark Example

As highlighted in *Chapter 2 Scope and Application of the Legal Framework, Section 2.4.4*, federal countries often have a PPP legal framework that applies on a federal level and to federal ministries (as Contracting Authorities), while giving individual states autonomy to implement separate or supplementary PPP legislation that is driven by the strategic objectives of that state. For example, **Brazil** implemented a federal PPP Act while the state of São Paulo (amongst other states) has a separate PPP law.

3.2.6 Fiscal sustainability of PPPs

Compliance with the Ministry of Finance's (or equivalent entity's) directions is vital for the successful origination and implementation of a PPP project. The Ministry of Finance oversees the country's financial priorities and budgetary allowances and constraints, and therefore plays a key role in determining PPP policy and the financial parameters applicable to PPPs. As PPP projects have long-term fiscal implications which may not be caught by the fiscal controls delivered by periodic budgetary and public investment management processes, the Ministry of Finance must be given a clear (often "gatekeeping") role to ensure Contracting Authorities cannot use PPP projects as a means to bypass fiscal controls. In order to ensure that its requirements are adhered to from the start of a project's lifecycle and that appropriate dialogue is in place, its role in PPP delivery may be specifically defined in legislation. This may include direct involvement in, or the power to delegate or assign certain responsibilities to, other bodies, including a PPP Unit (if applicable). *See Section 3.3.2* for more on the role of the Ministry of Finance.

Benchmark Examples		
In Poland , the PPP Act ³⁴ enables the ministry responsible for regional development and planning to develop secondary regulations about the nature of projects that can be procured. In doing so, it must coordinate with the Ministry of Finance to ensure that controls on public finance are efficiently managed.	In Vietnam , the PPP Investment Law ³⁵ entitles the Ministry of Finance to work together with other stakeholders regarding financial aspects of PPP projects, including to direct other authorities to issue documents regarding the financial criteria to be applied to potential PPP projects and to take responsibility for developing and implementing the financial aspects of PPP projects.	The PPP laws in South Africa require national and provincial government and municipal governments to obtain the approval or views and recommendations of the relevant treasury at various stages of a PPP project lifecycle. ³⁶

³⁴[Poland – Act of 19 December 2008 on public-private partnership](#), Article 18A(b).

³⁵[Vietnam – Law No. 64/2020/QH14](#), Article 91.

³⁶[Republic of South Africa. Treasury Regulation 16 issued to the Public Finance Management Act, 1999 \(PFMA\)](#); and [Municipal Public-Private Partnership Regulations issued to the Municipal Finance Management Act, 2003](#).

3.3 Relevant stakeholders and the allocation of responsibilities

3.3.1 Contracting Authority

Types of Government Entity: As already noted under [Section 3.2](#), the PPP legal framework should be clear which Government Entities are empowered to enter into PPP contractual arrangements with Private Partners (and when they are expected to consider such arrangements) and this may need to be specified in bespoke legislation. In many countries, central Government Entities (such as ministries or specialized departments within ministries) are the only entities allowed to do this, while in other countries, this power is delegated further to local authorities and municipalities.

In some cases, it may also be appropriate to authorize government-related entities such as state-owned enterprises (SOEs) to act as Contracting Authorities. This will depend on various factors, such as how the SOE is structured and financed, including what level of government funding support it can rely on. This will be key to Private Partners' due diligence on the SOE's creditworthiness. Other factors include: (i) how the SOE is regulated and what recourse Private Partners will have against it, as compared to other Government Entities that act as Contracting Authorities; (ii) what other roles it may hold in the proposed project structure (e.g. as offtaker, asset owner or even regulator) and how this may affect its ability to perform each role independently; and (iii) its relationship to other Government Entities that may be contractually involved. Private Partners will be concerned to ensure that all contracting is on commercial arm's length terms and that they are not disadvantaged by government connections. [See also Chapter 6 Procurement, Section 6.4.1.](#)

Contracting Authority's primary responsibilities: in respect of a proposed PPP project, these include preparing the proposal and conducting feasibility studies during the origination and appraisal phases, preparing Tender Documents, acting as the procuring entity, liaising with the PPP Unit and other stakeholders and engaging and supervising external advisers (e.g. legal, financial, technical and insurance).



In the early phase of a Contracting Authority's PPP program, when resources and experience may still be growing, the PPP Unit may play a greater role in assisting with these roles. Following contract award, the Contracting Authority's primary role is being the Private Partner's PPP Contract counterparty, fulfilling its obligations under, and managing, the contract. [See Chapters 7 PPP Agreements and 8 Contract Management](#) for further detail.

Fiscal implications relating to different types of Contracting Authority: As outlined in [Sections 3.2.5 and 3.2.6](#), alignment with the jurisdiction's wider local and municipal government framework is critical. Depending on the jurisdiction, primary legislation at federal level, for example, may not bind state, provincial or municipal entities, and the federal PPP legal framework will need to interface with sub-federal PPP legal frameworks. Ultimately, the role of the PPP legal frameworks is to ensure that, to the extent sub-national or sub-federal entities are intended to be able to procure PPP projects, there is proper accounting for the liabilities they incur on behalf of any national or federal government, whether these be direct liabilities (such as guaranteed payment obligations), contingent liabilities (such as early termination payments), or implicit liabilities (such as the cost of continuing critical services in the event of Private Partner insolvency). Careful consideration should be given to the scope of sub-national and sub-federal entities' rights and powers (and the level of debt they are permitted to incur) in case specific amending legislation is required to enable PPP procurement. Governments should also consider whether the entities seen as appropriate to procure PPPs have the right to incur debt at all, since some legal systems place restrictions on the ability of certain entities (e.g. local or municipal entities) to incur debt. This analysis will also need to take into account the process for ensuring the relevant entity has the ability to service the project debt it will incur, which may be through application for budgetary credit or appropriation. Since this may be an annual rather than "one-off" process, private sector parties may have concerns with respect to any system that does not "guarantee" funding from one year to the next.

Where constraints exist, an efficient mechanism should be introduced to permit those entities either (i) to incur debt, or (ii) to apply to the Ministry of Finance for a right to incur debt in connection with a PPP project; this should be coupled with a mechanism to ensure funding will be in place for the life of the project. This is essential for the market's confidence in a project and potential bidders will carefully assess the capacity of the Contracting Authority to borrow (incur debt) and enter into contracts.

Benchmark Example

South Africa's PPP framework permits all spheres of government, being national, provincial and local government, to procure projects using the PPP structure. Different legislation regulates the capacity of national and provincial governments³⁷ and municipal governments³⁸ to procure PPPs. When procuring a PPP, national and provincial governments are also required to follow the process set out in the South African PPP Manual³⁹. Municipal governments must follow the Municipal Service Delivery and PPP Guidelines – these are substantially similar to the PPP Manual but take into account the different legislation applicable to municipalities. Both the PPP Manual and Municipal PPP Guidelines require the involvement of the PPP Units and approval and/or consultation with the relevant treasuries at various stages of the PPP process.

See [Section 3.5.1, Definition and Article 3A](#) for a proposed definition of the Contracting Authority that describes the type of entity that can act as a Contracting Authority.

3.3.2 Ministry of Finance

In most jurisdictions, the Ministry of Finance (or equivalent Government Entity acting as the central budgetary authority) plays a key role in both: (i) considering the overarching PPP strategy of a country and identifying its infrastructure priorities within national budgetary and public investment management constraints; and (ii) ensuring that any PPP projects that are consequently implemented meet relevant financial requirements. As outlined in [Chapters 1 Guiding Principles and 5 Approvals](#), it is essential that the short and long-term fiscal impact and affordability of every project are fully assessed at all relevant stages of the lifecycle to deliver the fiscal sustainability objective outlined in [Section 3.2.6](#). These roles may be carried out by different arms of the Ministry of Finance.



The Ministry of Finance should be engaged from an early stage in any PPP project, by setting requirements that have to be satisfied by Contracting Authorities before they can proceed further and by granting key stage approvals. Its engagement is critical to: (i) ensure that the proposed PPP project is fiscally affordable and correctly accounted for in both short and long-term budgetary and investment management systems; (ii) support the Contracting Authority and the PPP Unit to maximize VFM in the design of the PPP project (including considering the need for government financial support and risk allocation/mitigation mechanisms); and (iii) coordinate with the PPP Unit or other government bodies to account for the proposed PPP project within the wider framework of the government's strategic priorities and investment program.

Early engagement is essential and it would be detrimental to limit the Ministry of Finance's role to only approving a project at the latter stages of bid evaluation when all parties have already invested significant time and cost in the whole project process. This is because of the impact a late-stage decision might have. For example, if the Ministry of Finance decided that a PPP project was not aligned with government priorities or was fiscally unaffordable so that it needed to be reconsidered or modified, the Contracting Authority and the country's PPP program would lose market credibility. The risk of such reputational damage, combined with the significant time and cost that would have already been invested by both public and private sector parties, might also wrongly influence a decision to approve the project despite its failings. For these reasons, the Ministry of Finance should play a role in the origination and appraisal stages (including the feasibility analysis and budget preparation), prior to a PPP project being tendered to the market and at a stage where a decision to modify or reconsider the project can be made before substantial time and cost has been incurred.

The Ministry of Finance should be involved through the key stages of the project's lifecycle. Its subsequent and ongoing involvement during the procurement and contract management phases is summarized further in [Chapter 5 Approvals](#). Where there are long time delays between certain stages, it is important for the Contracting Authority to ensure that the Ministry of Finance is kept informed and that relevant information provided to it is refreshed appropriately.

See [Section 3.5.2, Article 3B](#) for sample legislative drafting in respect of the role of the Ministry of Finance.

³⁷[Republic of South Africa, Treasury Regulation 16 issued to the Public Finance Management Act, 1999 \(PFMA\).](#)

³⁸[Republic of South Africa, the Municipal Systems Act, 2000,](#) and [the Municipal Finance Management Act, 2003.](#)

³⁹[Republic of South Africa, National Treasury PPP Unit, 2004. Public Private Partnership Manual.](#)

3.3.3 PPP Unit

Establishing a PPP Unit can be an effective strategy for the centralized management and oversight of a country's current and future PPP project portfolio. As well as the organizational advantages, establishing a consistent approach and promoting best project development and management practice across PPP projects can boost market confidence in a country's PPP program and increase private sector interest.

The existence of a PPP Unit alone, however, is no guarantee of strengthened PPP capability within a jurisdiction. PPP Units perform best when: (i) there is political commitment to the PPP program (for example, through a senior minister or ministry seen as a "PPP champion"); (ii) the procurement process is generally transparent and competitive; and (iii) there is coordination between the PPP Unit and the rest of government (e.g. clear lines of responsibility between ministries, departments and agencies).

Political commitment to a PPP program (or lack thereof) is not an issue that can reliably be addressed via a PPP legal framework. However, PPP legal frameworks can be designed to address items (ii) and (iii) above, and to ensure that a PPP Unit's functions, legal authority and resources are aligned with the aims of its country's PPP framework, including with its overall public investment management processes, policies, rules and regulations.⁴⁰

3.3.3.1 Scope and roles

The scope of a PPP Unit's role can vary according to the relevant jurisdiction and remit, capacity and expertise of other Government Entities. In establishing a PPP Unit, governments must ensure that it is appropriately funded to be able to deliver its responsibilities effectively. The key factors are outlined below.

- (a) **Allocating functions:** Depending on a government's aspirations and the jurisdiction's legislative structure, the scope of a PPP Unit's functions can either extend to all types of PPPs procured by Contracting Authorities at all levels of central and local government, or instead be limited to (or carve out) specific sectors or governmental levels. A PPP Unit's remit can include two main aspects: (i) performing a guidance, supervisory and coordination role; and (ii) performing an approval role. [See Section 3.3.3.5](#). These roles should be clearly defined and carried out separately and objectively and may be allocated to different parts of a PPP Unit. It is essential that the PPP Unit's responsibilities are able to be carried out in a complementary way, such that conflicts are avoided (e.g. that its role in promoting PPP projects does not undermine the need for quality control and objective approval processes). The Table below sets out the common scope and functions of a PPP Unit.

While PPP Units have been associated with successful PPP programs even where they do not carry out all these functions, evidence has shown that PPP Units with only a limited number of functions tend to be less successful.⁴¹ What is critical for the success of a PPP Unit is that the PPP legal framework explicitly and clearly allocates functions and formalizes lines of responsibility between the PPP Unit and other Government Entities.




- (b) **Delegating legal authority:** A PPP Unit's legal authority must be consistent with the functions it is expected to carry out. For example, if a PPP Unit is expected to have a quality control function, it should also be empowered to compel amendments to PPP projects that it has assessed as not meeting minimum quality thresholds.
- (c) **Allocating funding and resources to the PPP Unit:** The PPP legal framework may simply need to formalize the PPP Unit's position within a particular Government Entity if that entity has sufficient resources and can allocate the PPP Unit's required budget itself (e.g. the Ministry of Finance) – [see Section 3.3.3.3](#). However, if the PPP Unit sits outside a Government Entity, then the PPP legal framework will need to provide how the PPP Unit will be funded and, as applicable, legally empower the PPP Unit to appropriate the resources it

⁴⁰See [European PPP Expertise Centre, 2014. Establishing and Reforming PPP Units Analysis of EPEC Member PPP Units and lessons learnt](#) for further discussion.


⁴¹For example, see [The World Bank and Public-Private Infrastructure Advisory Facility, 2007. Public-Private Partnership Units – Lessons for their Design and Use in Infrastructure](#) (pg. 59 and pg. 69).

needs to carry out its functions. In such cases, government must consider how this can be effected (e.g. by allocating budget direct to the PPP Unit or by providing for appropriate fees to be chargeable to Government Entities using its services – in the latter case it is important that such fees are not allowed to deter relevant entities from using the PPP Unit's services).

The Table below describes typical responsibilities delegated to PPP Units.⁴²

Key responsibilities of a PPP Unit	
Area	Examples
1. Secondary instrument proposal, formulation and promulgation	<ul style="list-style-type: none"> Develop and publish secondary legal instruments, general guidance, and/or policy documents as delegated by PPP legislation/legal framework (and, if applicable, collate them into a PPP Manual).
2. Policy proposal, formulation and coordination 	<ul style="list-style-type: none"> Determine the pipeline for development of projects based on the government's strategic priorities and E&S and fiscal considerations. Propose and formulate policy and strategy based on information gathered from various Contracting Authorities and Government Entities. Coordinate initiatives and harmonize policy with key Government Entities, stakeholders and Contracting Authorities.
3. Quality control in respect of PPP projects as a whole 	<ul style="list-style-type: none"> Evaluate past and ongoing PPP projects to promote best practice guidelines for future projects (including E&S, technical, legal and financial). Provide reference information and precedents to new PPP projects. Publish guidance focused on "lessons learnt" from past projects.
4. Technical assistance for Contracting Authorities (including technical, legal, financial, regulatory) 	<ul style="list-style-type: none"> Support and provide technical assistance to Contracting Authorities and other Government Entities throughout the PPP project cycle, including during the origination and appraisal, procurement and contract management stages. Provide assistance to Contracting Authorities in relation to engaging external advisors. Propose and provide personnel with relevant expertise to join project teams or assessment and approval bodies (where appropriate). Provide training to public officials in all aspects of PPPs and sharing 'lessons learnt' from each project with other key Government Entity stakeholders.

⁴²This table is for illustrative purposes only. See also relevant resources in [Appendix A](#) for more information.

Key responsibilities of a PPP Unit	
Area	Examples
5. PPP marketing/promotion	<ul style="list-style-type: none"> Maintain an interactive website and upload information that facilitates due diligence by investors (e.g. laws, policy papers, history of PPP projects). Publish information and issue press releases and statements about upcoming projects. Perform general communications and outreach functions, including advising Government Entities on how to deal with the media in relation to PPP projects.
6. Standardization/dissemination of contractual templates and other guidance 	<ul style="list-style-type: none"> Standardize PPP Contracts (and other PPP Agreements), business case templates, financial models and tender documents as the country's PPP program develops. Support Contracting Authorities by reviewing draft PPP Contracts (and other PPP Agreements) during the procurement phase of projects with the aim of harmonizing with other recent projects. Publish guidance and recommendation papers on market-wide issues to ensure consistency of approach by Contracting Authorities (e.g. how to address matters affected by COVID-19).
7. Data collection and analysis management	<ul style="list-style-type: none"> Collect data from Contracting Authorities. Publish/circulate to key Government Entities and stakeholders financial reports on performance of past and ongoing projects. Maintain a centralized database of past and ongoing PPP project information for public sector access.
8. Coordination of stakeholders and other functions	<ul style="list-style-type: none"> Coordinate joint engagement of key Government Entities' stakeholders and Contracting Authorities to promote efficient project approval and implementation processes. Be responsible for "wrap-up" and other coordination matters that do not fall within the scope of another stakeholder.
9. Approval and assessment of PPP projects	<ul style="list-style-type: none"> Act as a "gateway" approval body for projects, where applicable, or form part of an approval body. Assess projects to advise approval bodies.

3.3.3.2 Composition of the PPP Unit

The composition of the PPP Unit may be decided by law and require the presence of key figures (e.g. a senior representative of the Ministry of Finance and/or Planning). Alternatively, composition of the PPP Unit may be delegated to the ministry or other government body overseeing the PPP Unit.

Resourcing and expertise are vital for the utility and credibility of a PPP Unit. To enable the unit to deliver the functions described in [Section 3.3.3.1](#), it should be led by a senior experienced figure with a direct report into a senior level of government. It should be staffed by individuals with relevant legal, financial, E&S and technical expertise, who have appropriate experience of PPP transaction delivery (e.g. from other jurisdictions or earlier PPP projects which preceded the establishment of the PPP Unit). Governments should be prepared to recruit from the private as well as the public

sector and at a senior level, with corresponding remuneration. The desired approach to these matters may be addressed in secondary instruments.

Benchmark Example

The team in the **United Kingdom's HM Treasury Taskforce** (set up in 1997, the first main incarnation of its market-leading private finance initiative (PFI) PPP Unit) were recruited specifically to have a variety of skills and backgrounds (including careers with government and with the private sector). Its staff had a combination of full-time staff and secondees from the private sector, depending on capabilities required from time to time.

Certain central government departments/ministries in the UK also established their own PPP Units, e.g. the Department of Health and the Ministry of Defence, and implemented standardization guidance and templates etc. issued by the Treasury Taskforce, subject to sector-specific adaptations.

The UK's Treasury Taskforce is an example of how entities evolve as a country's PPP expertise increases – for a time it became a public-private partnership itself with an arm's-length relationship with HM Treasury and operational independence (with 51% private sector ownership), also investing in projects itself. Today, the UK's "PFI Centre of Excellence" has a primarily advisory and support function and sits within the broader Infrastructure Projects Authority which reports to the Cabinet Office and HM Treasury.

3.3.3.3 Location of the PPP Unit within the political framework

Effective PPP Units tend to sit within the Ministry of Finance because of its significant power due to its control of scarce government resources. In some political systems, the Government Entities with this type of power are central planning or policy coordination agencies and these could be a suitable home for effective PPP Units as well.⁴³ Locating a PPP Unit within a "neutral" ministry can help ensure government-wide buy-in, as can ensuring the PPP Unit is seen as a center of expertise to assist Contracting Authorities and not as an arm of a Ministry they might otherwise prefer to keep at arm's length. Regardless of where the PPP Unit is located in government, it is essential that it retains a balanced and coordinated approach to the key objectives of the PPP framework and is not swayed by other drivers of its parent ministry.

A PPP Unit that sits within a Ministry of Finance may have delegated powers without the need for specific empowerment through legislation; if not, or if a PPP Unit is independent and does not form part of an existing Government Entity that already has the legal power to carry out relevant functions, then it is critical that the PPP legal framework suitably empowers the PPP Unit.

PPP Units may have a role in relation to PPP projects developed by all levels of government or be specifically set up to assist particular levels, such as local/municipal authorities (e.g. UK Local Partnerships).⁴⁴ Some ministries may want to establish their own internal PPP Units to coordinate sector-specific PPP programs (see UK Benchmark Example above). Where a central PPP Unit exists, it is advisable that sector-specific and local government PPP units benefit from and implement central unit guidance and materials, and tailor these as appropriate to their own sectors, rather than producing their own. This will ensure conformity across a country's PPP projects and promote market confidence and understanding.

Some PPP Units may sit within an infrastructure body that has a broader remit than just PPP; this may provide benefits in terms of coordination with and awareness of wider infrastructure planning. Each jurisdiction should consider how best to nestle a PPP Unit within its institutional infrastructure to optimize its access to resources, skilled personnel and ability to coordinate efficiently with the relevant stakeholders.⁴⁵

⁴³[The World Bank and Public-Private Infrastructure Advisory Facility, 2007. Public-Private Partnership Units – Lessons for their Design and Use in Infrastructure](#) World Bank Group, 2007 (pg. 67-68).

⁴⁴[UK: Local Partnerships \(jointly owned by the Local Government Association, HM Treasury and the Welsh Government\).](#)

⁴⁵[The World Bank. PPP Units Around the World.](#)

Benchmark Examples

In **South Korea**, the Public Investment Management Center for Infrastructure (which includes the equivalent of a PPP Unit) is established by law as an independent entity that is annexed to the Korea Development Institute,⁴⁶ a Government Entity tasked with research on various economic, social and fiscal matters.

In **Portugal**, Unidade Técnica de Acompanhamento de Projetos (**UTAP**) was established by law in 2012⁴⁷ as a dedicated PPP/Concessions Unit with legal, economic and financial expertise to ensure better coordination of technical support across the public sector, strengthen the retention of knowledge and experience and reduce reliance on external advisors. It is an autonomous administrative entity under the direct authority of, and fully funded by, the Ministry of Finance; its senior-ranking head reports directly to the Secretary of State of Finance of the Ministry of Finance. A number of PPP activities had originally been delegated in 2003 to Parpública – Participações Públicas, S.A., a state-owned holding company whose primary role was to manage state equity holdings and some PPP expertise existed in other ministries and bodies.

In **South Africa**, a PPP Unit was established by the National Treasury/Ministry of Finance to oversee all PPP projects in the country. This national PPP Unit subsequently became part of the Government Technical Advisory Centre (**GTAC**). In addition to the national PPP Unit, various PPP Units at a provincial level were established and housed at the various Provincial Treasuries. These provincial PPP Units, working together with the national PPP Unit, are primarily responsible for PPP within the relevant province.

3.3.3.4 Information coordination

In addition to coordinating the roles and responsibilities of government stakeholders and disseminating information within government, the PPP Unit should assume responsibilities that help bridge the information gap between private sector stakeholders and Contracting Authorities. A key function is centralized collection of data and information about completed, ongoing and potential PPP projects. The key data about these projects (e.g. overall value, description of the infrastructure asset, phase of construction or operation and time of completion) should be made easily accessible online. In doing so, prospective bidders can easily access information about the country's past or future pipeline of PPP projects, and better understand the priorities of the government in this respect. This will in turn increase market confidence in that country's PPP program and encourage bidders and financiers to participate in future projects. The advantage of allocating this role to a PPP Unit is that it can become known as the "go-to" authority for reliable information about the country's PPP projects and pipeline.⁴⁸

⁴⁶[South Korea, Act on Public-Private Partnerships in Infrastructure \(Act No.15460, 13. Mar. 2018\)](#), Article 23.

⁴⁷[Portugal – Decree Law 111/2012](#).

⁴⁸Governments may want to consider using the legal framework to formally establish a "PPP data center" (e.g. under the auspices of the PPP Unit or other appropriate Government Entity) – see also [Chapter 8 Contract Management](#).

Benchmark Example

A key responsibility of the Infrastructure Concession Regulatory Commission, **Nigeria's** PPP Unit, is to publish an annual list of federal projects eligible for procurement by PPP in at least three national newspapers.⁴⁹ The aim of publishing the annual list is to help Contracting Authorities and the private sector target specific projects for implementation as a PPP.

See [Sections 3.5.3 and 3.5.4, Articles 3C and 3D](#) for sample legislative drafting in respect of the establishment of the PPP Unit, allocation of a budget and delegating roles and responsibilities to it.

3.3.3.5 Decision-making and approval role

As highlighted in [Section 3.3.3.1\(a\)](#), a PPP Unit may have both an approval as well as an advisory role. If this is the case, it is important that these roles are distinct and carried out independently of each other.

Depending on the institutional and approval frameworks, the PPP Unit may itself be required to provide approvals of the Project to the Contracting Authority, or to advise relevant bodies whether approval is appropriate.

Separately, as part of supporting Contracting Authorities throughout all stages of the proposed PPP project development, the PPP Unit may have a continuous review role and engage with relevant Government Entity stakeholders to ensure that any approvals needed are obtained. It may participate in the process of applying for approvals required for the proposed PPP project, either by itself or in conjunction with the Contracting Authority and other stakeholders.

See [Chapter 5 Approvals](#) for a more detailed discussion on applying for approvals and the role that PPP Units can play in that process.

3.3.4 Other potential stakeholders and avoiding issues

In addition to the Ministry of Finance and PPP Unit, other Government Entity stakeholders may be involved in PPP projects during the PPP lifecycle. Their functions are country-specific and are typically addressed in the legislation governing their establishment; however, the PPP institutional framework should clearly set out their roles and responsibilities. Governments must consider how to integrate them into the PPP institutional framework and whether additional legislation or guidance is required to clearly define their roles in that context.

Early engagement typically helps facilitate efficient relationships and can be influential in ensuring that projects are developed in accordance with applicable requirements and with minimal conflict and complications. Coordination of these entities and keeping to project timetables during the procurement phase will be a key factor and the PPP Unit can have a role in facilitating this. It is important to have a clear method of ensuring that delays and differences of opinion between stakeholders are efficiently resolved. This can be achieved by having a clear hierarchy as between relevant entities, by creating a form of periodic review committee consisting of representatives of the relevant entities with processes to ensure any issues are resolved efficiently, and/or by giving a higher authority the power to resolve any issues.

Due to the bespoke nature of any legislation that would govern the remit of other Government Entities, the sample drafting in [Chapter 5 Approvals](#) does not cover this aspect. By way of example, set out below is an overview of certain potential stakeholders.

3.3.4.1 "PPP Council" or "PPP Committee"

Some jurisdictions establish a form of "PPP Council" or "PPP Committee", typically consisting of senior-level members of key Government Entities involved in the PPP process –this may be on a project-by-project level or at an overarching macro level (e.g. as part of the institutional approval process). This can demonstrate cross-government support and lend added legitimacy to certain projects. However, governments should avoid imposing unnecessary levels of bureaucracy and creating bottlenecks in approval systems and should consider whether bilateral involvement of relevant bodies with the Contracting Authority may prove more effective than trying to coordinate committee responses (provided there is a means of resolving any issues between such bodies). Where such council or committee is established, it should be strictly limited to key Government Entities only and be supported by appropriate expertise (for

⁴⁹[Federal Republic of Nigeria, 2005. Infrastructure Concession Regulatory Commission \(Establishment, Etc\) Act](#), Article 2(4).

example, via the PPP Unit) so that it is equipped to make decisions on all technical and other matters within its remit. The approach taken will depend on the jurisdiction involved. [See Chapter 5 Approvals, Section 5.3.2.2](#) for an example of an overarching PPP Committee in Uganda.

3.3.4.2 Environmental, cultural, land and planning authorities

Government Entities regulating environmental, cultural, land and planning matters will typically be involved in PPP projects, particularly from an E&S perspective. It is important to consider their roles from an early stage to ensure projects are developed in accordance with applicable law and to maximum reasonable public benefit with minimum complications. The environmental authority, for example, is usually tasked with assessing the socio-environmental impact of the project and climate impact at an early stage of defining the project scope. The land and planning authorities will, for example, be involved in assessing use of government land and the need for planning conditions. Cultural authorities will be involved in ensuring historical or culturally important sites and indigenous people are taken into account in the development process. The early involvement of relevant entities will help determine whether any technical aspects of a project should be reconsidered and whether any preventive or mitigating measures need to be introduced, and what requirements should be included in the Tender Documents.



Benchmark Example

Uruguay's PPP law requires a submission to be made to the Ministry of Housing, Land and Environment (Dinama) in respect of a PPP project which is being developed. Dinama is responsible for assessing the project's socio-environmental impact and classifying it as category A (neutral), B (moderate adverse environmental impact) or C (significant negative environmental impact).

Dinama's classification will determine whether any further impact assessments, approvals or preventive measures are required to proceed with the project.

3.4 Toolkit for allocating roles and responsibilities

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

3.4.1 Checklist of considerations

It is essential that a holistic approach is taken in establishing the PPP legal framework needed to deliver the three core capabilities of the institutional framework, which are:

- (a) the ability to set technically informed rules and requirements (via appropriate instruments) for how PPPs must be carried out;
- (b) the power to enforce those requirements (via approvals and monitoring processes); and
- (c) provision of support for Government Entities in adhering to such rules and requirements (via guidance and supporting bodies such as a PPP Unit).

This is because certain provisions and corresponding actions may be most appropriately addressed through legislative provisions and instruments covered in other chapters of this Guidance.

In determining the appropriate PPP legal framework for implementing the institutional framework outlined in this Chapter, the following checklist should be considered:

Responsibility	<ul style="list-style-type: none"> → What action is needed? Which Government Entity is best placed to be responsible for it? → Are there any operational capacity issues to take into account? → Where and how does responsibility for this action need to be specifically provided for? → What is the suitable secondary instrument for developing details set out in outline in primary legislation (and how best to collate them)? → Do other Government Entities have related responsibilities which need to be coordinated and aligned? Do they need to be consulted or informed? Is the hierarchy clear and a mechanism to resolve disagreements in place?
Powers	<ul style="list-style-type: none"> → What powers does the responsible Government Entity need to deliver the action? → How should compliance with rules and requirements set by the entity be enforced, where applicable? → Do delivery/enforcement powers or mechanisms need to be specifically provided for?
Resources	<ul style="list-style-type: none"> → What funding and resources does the responsible Government Entity need to deliver the action? → Do these need to be specifically provided for?
Accountability	<ul style="list-style-type: none"> → How is performance of the responsible Government Entity monitored and assessed? → To whom, and how, does it report on the actions for which it is responsible? → Does this need to be specifically provided for?

3.4.2 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Institutional Framework

Primary Instrument	Supporting Secondary Instruments
<ul style="list-style-type: none"> • Contracting Authority definition/eligibility (including any applicable criteria relating to governmental level, scope of authority and contract value etc.). • Consider also power to contract. 	Guidance on these matters.
<ul style="list-style-type: none"> • Role, responsibilities and powers of relevant Government Entities for the whole PPP lifecycle, e.g.: <ul style="list-style-type: none"> • Contracting Authority • Ministry of Finance (including the power to delegate further matters and/or provide more detail on outlined matters). <i>[Tie in with other relevant provisions.]</i> 	Guidance. Implementation of delegated authority via relevant instrument.
<p>Establishment of required bodies:</p> <ul style="list-style-type: none"> • PPP Unit and its role, responsibilities and powers (in outline or detail); allocation of relevant powers/budget. • Any other bodies (such as PPP Committee). • Grant of authority/responsibility to relevant Government Entity/ies to direct such bodies and delegate powers as appropriate and/or provide more detail on outlined matters. 	Implementation of responsibilities/delegated authority via relevant instruments (including, for example, development of PPP guidance on contractual matters, contract management and, if applicable, the PPP Manual).
<ul style="list-style-type: none"> • Relationship between relevant Government Entities (including in relation to disagreements) and grant of any appropriate authority. <i>[If needed.]</i> 	Implementation of responsibilities/delegated authority via relevant instruments; and further guidance.
<ul style="list-style-type: none"> • Relationship with relevant existing laws. <i>[If needed – see similar provisions.]</i> 	Guidance on relationship between laws.
<p><i>Optional – if required:</i></p> <ul style="list-style-type: none"> • Requirement for a PPP Manual setting out all/certain PPP policies, requirements and processes as described in outline. • Grant of authority/responsibility to the relevant Government Entity (or PPP Unit) to issue (and amend) PPP Manual. <i>[If applicable and not included in the primary instrument already.]</i> • Obligation on Contracting Entities/other relevant entities to comply with PPP Manual. 	Implementation of responsibilities/delegated authority via relevant instruments to develop and promulgate PPP Manual. <i>[If not included already in the primary instrument e.g. in PPP Unit's obligations.]</i>

Institutional Framework	
Primary Instrument	Supporting Secondary Instruments
<i>[If applicable and not included in the primary instrument already e.g. in Contracting Authority's obligations.]</i>	
<p>Optional – if required and not within existing entity:</p> <ul style="list-style-type: none"> • Establishment of PPP Data Center and its roles, responsibilities and powers. <i>See also Chapter 8.</i> 	Implementation of responsibilities/delegated authority via relevant instruments; and further guidance.

3.5 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 3.4.2](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

3.5.1 Contracting Authority – Definition and Article 3A

Definition:

Contracting Authority means the public body that has the power to procure a Project as a PPP in accordance with Article 3A.1 of this Law.

1. The following public bodies have the power to procure a Project and enter into PPP Agreements for the implementation of a Project: *[insert description of the relevant entities that may act as a Contracting Authority and enter into PPP Contracts, and any limits].* A Contracting Authority shall be responsible for carrying out all actions required for the purposes of originating, appraising, procuring, implementing and managing the Project concerned in accordance with this Law (except any expressly designated as the responsibility of other parties in accordance with this Law), including the following obligations:
 - (a) proposing the PPP and preparing detailed assessments setting out the financial and economic feasibility and the potential impacts and risks of the Project, including social-environmental and climate change;
 - (b) preparing feasibility studies;
 - (c) taking primary responsibility for preparing all technical specifications;
 - (d) engaging and supervising suitably qualified external advisers, as needed;
 - (e) preparing Tender Documents and managing the procurement process;
 - (f) preparing and entering into the PPP Contract (and related documentation); *[Adapt and cross-refer to any relevant Articles relating to these matters, e.g. see Articles under Sections 6.6 and 7.6.]*

This is country-specific and should specify, as applicable, the relevant federal, central, provincial, regional or local authorities, or specific government entities. Any limits on the scope of their powers may need to be cross-referred to (e.g. by reference to project value) – and should tie in with relevant provisions outlined in Section 2.6.

Article 3A.2 should be adapted to reflect whether a PPP Unit is established and the scope of its role, and any other obligations to report to relevant government entities, such as national audit bodies or a PPP data centers. It should also tie in with and, where applicable, cross-refer to other obligations set out separately in the Law.

If specific approvals are needed or other bodies are involved in appointing advisers, move/adapt this provision as appropriate.

- (g) managing the PPP Contract and exercising its rights and fulfilling its obligations under the PPP Contract; *[Adapt and cross-refer to any relevant Articles relating to contract management/manual and the PPP Contract under this Law, e.g. see Definition/Article 7A (Section 7.6.1) and Articles 8B and 8C (Sections 8.5.2 and 8.5.3).]*
- (h) working closely with the PPP Unit [as appropriate]; *[If any; adapt and cross-refer to any specific obligations etc., as applicable.]*
- (i) preparing periodic update reports to the PPP Unit on each PPP that it procures, throughout the life of the Project on a *[state required regularity]* basis; [and]
- (j) providing reports and data as required and according to the timeframe specified by *[specify relevant public bodies]* [and]
- (k) [complying with the PPP Manual.] *[Include/adapt and tie in with Article 3E (Section 3.5.5), as applicable.]*

3.5.2 Ministry of Finance – Article 3B

In relation to the procurement of PPPs, the Ministry of Finance shall be responsible for: (i) analyzing the fiscal aspects of a potential PPP Project proposed by a Contracting Authority; (ii) working appropriately with the PPP Unit and any Contracting Authority to communicate on a regular basis the Government's investment strategy relating to PPP Projects; (iii) issuing the budgeting guidelines concerning PPP Projects; and (iv) reviewing/granting approvals in accordance with *Articles 5A and 5B [insert as appropriate – see Sections 5.5.1 and 5.5.2].*

The references to 'Ministry of Finance' should be adapted or replaced by a reference to the relevant body in that jurisdiction.

3.5.3 Establishment of the PPP Unit – Article 3C

1. A unit called the "PPP Unit" shall be established as a permanent unit within *[describe the body to which the PPP Unit will be attached or be under the auspices of (e.g. within the Ministry of Finance or similar ministry) and reporting requirements (e.g. directly to the Minister or as an independent Government Entity)],* and shall assume the responsibilities given to it under this Law and *[describe any other applicable legislation (including any regulations or secondary legislation)].*
2. The Ministry of Finance shall allocate an annual budget to the PPP Unit and shall determine its composition pursuant to *[insert reference to applicable secondary legal instruments that the Ministry has power to issue from time to time].*

The location and funding of the PPP Unit should be adapted to the context of the country's institutional framework. It is common for the PPP Unit to sit under the auspices of the Ministry of Finance or a central planning authority.

It is critical to ensure that the PPP Unit is empowered by legislation to carry out all its responsibilities and has an allocated budget enabling it to do so.

3.5.4 Role of the PPP Unit – Article 3D

Option 1: The PPP Unit shall assume the responsibilities delegated to it from time to time by the Ministry of Finance pursuant to *[insert applicable secondary legal instrument].*

OR

Option 2: The responsibilities of the PPP Unit in relation to PPPs will include:

- (a) proposing, formulating and promulgating the PPP policy (including any guidance material and policy documents, and updates and amendments that may be required from time to time) in respect of PPP Projects [and collating these in the PPP Manual];
- (b) proposing, developing and publishing [guidance on PPP contractual provisions][standardized Project documentation relating to PPP Projects][contract management guidance][*other materials under this Law*] in accordance with Articles 7A and 8A; *[Adapt/insert relevant Articles as appropriate]*

Include reference to PPP Manual if the intention is to publish all relevant materials in one place. Adapt drafting and definition if it is to include materials relating to (b) below and PPP

Provisions should tie in with requirements set out in provisions relating to PPP Agreements, contract management etc. See Sections 7.6 and 8.5.

- (c) overseeing the procurement of PPP Projects and generally promoting the use of PPP by Government Entities;
- (d) supporting and providing technical assistance to Contracting Authorities and other Government Entities throughout the PPP project cycle, including during the origination and appraisal, procurement and contract management stages (including where applicable by leading the proposed PPP project from origination to financial close and/or providing early-stage support for a proposed PPP Project to a Contracting Authority by (i) reviewing the outcome of any appraisal processes for proposed PPP Projects and (ii) communicating with the Ministry of Finance and applicable Government Entities concerning the proposed PPP Project);
- (e) advising Government Entities on the methodology for conducting appraisal processes relating to PPP Projects;
- (f) preparing an appraisal procedure for PPP Projects in operation;
- (g) providing assistance and training (including legal, technical and financial) to Government Entities on an ongoing basis in connection with the tendering, implementation and management of PPP Projects;
- (h) establishing and maintaining a centralized PPP database(s) with PPP Project data that can be accessed as appropriate by public and private sector parties, respectively;
- (i) collecting data in respect of PPP projects from Contracting Authorities and other Government Entities;
- (j) reporting on and measuring the success of PPP Projects on a regular basis;
- (k) [assessing origination proposals, appraisal outcomes and feasibility studies submitted by Government Entities and the private sector and determining suitability for procurement as a PPP;] and
- (l) [approving the procurement of a project by way of PPP as required under *[insert Article/relevant instrument – see Section 5.5].*]
- (m)

These final two "approval-related" functions should be adapted according to the PPP Unit's role in the approval processes.

Consider also whether provisions defining the roles of other stakeholders are required (e.g. if a PPP Council or Committee is adopted or where a national audit institution or planning department plays a key role). Existing entities' roles are usually already addressed elsewhere in a country's legal framework but it is important to ensure that the overall institutional framework is coherent in the context of PPP. Consider if additional provisions may be required to clarify roles and position under existing laws. See also Article 2E in Section 2.6.5.

3.5.5 PPP Manual – Definition and Article 3E *[if applicable]*

Definition:

PPP Manual is the manual which contains [all] / *[specify which]* [guidance/policies] issued by the *[insert relevant authority, PPP Unit or Contracting Authority]* pursuant to this Law, setting out the rules and procedures required for the implementation of the provisions of this Law.

1. A Contracting Authority must comply with the PPP Manual unless the *[relevant authority/PPP Unit]* permits it to do otherwise on reasonable grounds.

3.5.6 Establishment of Data Center – Article 3F *[if needed]*

[Include if data collection and related responsibilities are not included within the functions of another entity (e.g. the PPP Unit) – see also Chapter 8 Contract Management].

If used, adapt according to intended purpose (i.e. whether this manual is intended to apply only to PPP policy and implementation guidance (e.g. contract management policies and detailed provisions for items set out in outline in primary legislation) or also to include materials relating to PPP Contract guidance and model contracts etc.). Tie in to corresponding provisions (e.g. PPP Unit responsibilities and Contracting Authority obligations).

Project Origination and Appraisal



4. PROJECT ORIGINATION AND APPRAISAL

4.1 Introduction

This Chapter sets out how PPP legal frameworks should establish procedures for originating and appraising projects (whether proposed by the public or private sector) to assess if they are consistent with a government's broader PPP objectives and meet the minimum government thresholds for proceeding to development as PPP projects. Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting focuses on the key requirements recommended to be included in the primary legal instrument. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

Contracting Authorities can find it difficult to assess whether a project will meet overall threshold requirements for PPP until the project is fully scoped and priced, which will only happen at the final stages of the tender process (and even then, the winning scope will not usually be finalized in total detail until after the project has been awarded and the PPP Contract has been signed). Contracting Authorities can therefore end up in a situation where, on the one hand, they do not wish to incur the substantial costs of developing a PPP until they know the project meets the requirements for PPP procurement, but on the other hand, they cannot tell with a reasonable degree of certainty if the project does meet those requirements until it has been developed.

PPP legal frameworks can to an extent address this issue by: (i) requiring that Contracting Authorities ensure that a project is a good fit for implementation as a PPP before making any significant investment; (ii) breaking down the project preparation process into progressively more rigorous (and expensive) development phases; and (iii) setting out at least broad requirements for development as a PPP at an early stage, with progress to each new phase being subject to verification that the project continues to meet the applicable thresholds for development as a PPP. This verification process is distinct from a formal approval process carried out by Government Entities other than the Contracting Authority (or other entity driving the screening and appraisal process) – *see Chapter 5 Approvals* with respect to those.

This Chapter refers to these processes as project **origination** (which includes identification and screening) and **appraisal**. Their sub-components include assessing: (i) environmental and social sustainability; (ii) feasibility and economic viability; (iii) commercial viability; (iv) VFM; and (v) fiscal sustainability.

Early development phases of a PPP	
Phase	Considerations
<ul style="list-style-type: none"> Project origination: identification 	The public sector and the private sector (if allowed in the PPP legal framework) can identify projects for development as PPPs.
<ul style="list-style-type: none"> Project origination: screening 	A project is screened for suitability for development as a PPP.
<ul style="list-style-type: none"> Project appraisal 	The PPP project is appraised. Appraisal and identification are processes that inform each other until the project has been fully scoped for the purposes of approval to proceed to procurement.
<ul style="list-style-type: none"> Project approval 	The PPP project is submitted to the relevant approving authority for formal approval – often as part of a multi-stage approvals process. <i>See Chapter 5 Approvals.</i>

4.2 Guiding principles and objectives

In order to establish a clear institutional structure for originating and appraising PPPs, the PPP legal framework should address the key aims described in *Chapter 1 Guiding Principles* and the particular guiding principles and objectives set out below.

4.2.1 Ensuring origination and appraisal processes are adapted to PPPs

Public investment management regimes typically already contain project origination (including identification and screening) and appraisal processes that apply to traditional public sector contracting.

However, most public investment projects procured via traditional methods are defined by reference to their inputs. By contrast, PPP projects tend to be defined by their output. In addition, PPPs may frequently be large-scale and long-term projects that bundle different infrastructure development activities together (e.g. design, build, operation and/or maintenance) and usually include a specific financing structure that supports them. PPPs therefore require more sophisticated origination and appraisal processes. As a result, most jurisdictions will need to adapt their existing broader public investment processes to cater for PPPs, while at the same time ensuring consistency, since most successful PPP projects should originate from the broader public investment process.⁵⁰ PPP legal frameworks should set out output-focused and robust legal, technical, commercial, environmental (including climate change) and social diligence processes to be followed to determine whether, once identified, a project may be suitable for development as a PPP. This process is often referred to as "screening".

In addition, these processes should: (i) include a strategy to meet the government's broader socio-economic, environmental and climate objectives; (ii) mandate project assessment in light of those objectives; (iii) require benchmarking (including benchmarking of other similar projects in the relevant jurisdiction or internationally), feasibility and cost-benefit studies; (iv) promote project pipeline development; and (v) direct prioritization of projects within that pipeline.



4.2.2 Promoting PPPs through the origination and appraisal process

Not all projects will be suitable for structuring as PPPs or consistent with a government's PPP strategy. For example, a project may not have sufficient attributes to justify the high origination and appraisal costs typically associated with PPPs, or may fall within a sector that the government wishes to exclude from its PPP program. Conversely, some projects may be excellent candidates for PPPs – this could be, for example, because of certain project attributes such as size or because they are in an industry where the private sector is considered particularly adept at delivering better value. This assessment is closely tied with the criteria for determining eligibility of projects to be covered by the PPP legal framework, as discussed further in [Chapter 2 Scope and Application of the Legal Framework, Section 2.4](#).

Governments may therefore wish to mandate that certain projects be considered for development as a PPP in the origination and appraisal process. Similarly, the origination and appraisal process should set out circumstances in which a project will be excluded from consideration as a PPP.

4.3 Origination

This Section sets out key considerations relating to the origination and appraisal of PPP projects, including who may originate a project and the core assessments needed to determine if a project is suitable to continue to be developed as a PPP.

4.3.1 Public sector origination

Public sector origination is where a Contracting Authority (or PPP Unit) identifies and screens a potential project for consideration as a PPP.

Project identification is the process at the conclusion of which it is determined whether a project will be suitable for private sector participation and implementation as a PPP and a fuller description of the project will be produced. This description should include the expected outputs of the project and the end-users, as well as the facilities (whether physical or software) and the technology to be used (at a high level, where relevant), such that lifecycle costs (capital, operating, maintenance and decommissioning costs) can be estimated.

Once identified, a project is screened for PPP suitability. Screening is an iterative process and may be carried out at multiple stages of the origination process. The PPP legal framework should determine when and how projects should be screened (as well as by whom – [see Chapter 3 Institutional Framework](#)).

⁵⁰See [The World Bank, 2020. Benchmarking Infrastructure Development 2020: Assessing Regulatory Quality to Prepare, Procure, and Manage PPPs and Traditional Public Investment in Infrastructure Projects](#); [The World Bank, 2017. Public-Private Partnerships Reference Guide Version 3](#); and [European PPP Expertise Centre, 2021. EPEC Guide to Public-Private Partnerships](#).

Screening considerations should include: (i) environmental and social sustainability; (ii) feasibility and economic viability; (iii) commercial viability; (iv) VFM; and (v) fiscal sustainability. [See Section 4.4](#) for further detail on these considerations as part of the appraisal of a PPP project.



Screening projects for development as PPPs	
Screening can occur...	Examples
<ul style="list-style-type: none"> as part of a (pre-) feasibility study or strategic options analysis. 	<ul style="list-style-type: none"> In South Africa, implementation of a project via PPP forms part of the initial analysis of a project as a candidate for public investment. In addition, a Contracting Authority is required to notify the National Treasury and the relevant provincial of a potential PPP project.⁵¹
<ul style="list-style-type: none"> after a project has been appraised and approved as a public investment. 	<ul style="list-style-type: none"> In Chile, the National Planning Commission assesses all public investment projects from a cost-benefit and social return perspective. PPPs are drawn from the list of projects that pass this assessment process.
<ul style="list-style-type: none"> immediately after a project has been budgeted as a public investment project. 	<ul style="list-style-type: none"> In Australia, a project must be approved and budgeted for as a public project before it can be screened for development as PPP (in which case budget allocations are then adjusted).

[See Sections 4.6.2 and 4.6.4, Articles 4B and 4D](#) for sample legislative drafting in respect of public sector origination of a PPP project.

4.3.2 Private sector origination

Some jurisdictions allow the private sector to submit unsolicited proposals (**USPs**) for PPP projects, i.e. proposals that are not in response to a government request for proposals in a PPP tender process but are instead put forward by the private entity on its own initiative. At the origination and appraisal stage, allowing USPs presents both risks and opportunities for governments – see some high-level examples below. USPs should also be considered from a procurement perspective: [see Chapter 6 Procurement, Section 6.3.4.2](#) for guidance on this issue.

Risks and opportunities in USPs	
Risks	Opportunities
<ul style="list-style-type: none"> USPs may not be sufficiently integrated with the government's policies and strategy and, if allowed to proceed, can divert government attention or resources away from priority projects. 	<ul style="list-style-type: none"> USPs may help governments identify and prioritize projects.

⁵¹[Republic of South Africa, National Treasury PPP Unit, 2004, Public Private Partnership Manual: National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act.](#)

Risks and opportunities in USPs	
Risks	Opportunities
<ul style="list-style-type: none"> USPs tend to be less conducive to transparency and competitive tender procedures and can result in poor VFM. 	<ul style="list-style-type: none"> USPs may reduce the burden and cost of early-stage project identification for governments. If structured and implemented correctly, USPs can be better suited for fast-track implementation and can provide more process flexibility.
<ul style="list-style-type: none"> USPs can exacerbate issues relating to imbalances of information between public and private partners since they originate with the private sector. 	<ul style="list-style-type: none"> USPs can suggest a wider range of solutions to address infrastructure gaps since the private sector can have greater knowledge of possible solutions to infrastructure challenges than the public sector. This is particularly the case where the Contracting Authority has a clear idea of the policy outcomes it wishes to achieve, but it is difficult (due to a lack of technical ability or otherwise) for the Contracting Authority to identify suitable projects, technical proposals and technologies to meet such objectives.
<ul style="list-style-type: none"> USPs tend to skew the balance of risk and reward in favor of the private sector. 	<ul style="list-style-type: none"> USPs can facilitate the mobilization of private finance and reduce market risk.
	<ul style="list-style-type: none"> USPs can enhance market confidence in a government's PPP program if that program is not yet well established.

As demonstrated in the Table above, the risks potentially associated with USPs are significant. Governments should be wary not to let USPs become a way to circumvent the PPP appraisal requirements or to undermine the competitive bidding process described in [Chapter 6 Procurement](#). If the PPP legal framework allows for USPs to be used as a means of originating PPPs, then the rules that govern them should be consistent with those that govern other PPPs and USPs need to be appropriately managed and appraised on terms no less rigorous than those that apply to public sector-originated PPPs. The PPP legal framework should set out explicit procedures to that effect.

See [Chapter 6 Procurement, Section 6.6.8, Article 6H](#) for sample legislative drafting in respect of USPs.

In some regions, a hybrid model of origination exists where certain donor governments suggest projects involving sponsors from their home countries. In such cases, it remains critical that the same rigorous appraisal process be applied as for projects originating in the public and private sectors.

4.4 Appraisal

Appraising PPPs refers to a process of analysis and evaluation to determine, fundamentally, whether a project should be procured as a PPP. The appraisal process often occurs in progressively more detailed and rigorous phases and should be closely connected with the process of identification and screening, since both processes inform each other: projects must reach a sufficient level of development to be fully appraised, and conversely they must be appraised as meeting all relevant criteria for development as PPPs to go through each successive development phase.

The PPP legal framework should set out appraisal processes and criteria. The bulk of this Section is devoted to the content of these criteria, being: (i) environmental and social sustainability; (ii) feasibility and economic viability; (iii) commercial viability; (iv) VFM; and (v) fiscal sustainability.

It may be appropriate to prescribe very detailed appraisal processes to ensure government objectives are achieved. However, governments should consider the appropriate means (and legal instrument) for designing, mandating and managing those appraisal processes, taking into account that they may need to evolve to reflect changing policy goals and markets, expanding PPP pipelines or growing sophistication within public bodies responsible for PPPs, and also need to avoid conflicts of interest between Contracting Authorities and appraisal bodies.

In terms of process, analyses against these criteria are often set out in "feasibility studies" of varying levels of detail as the project develops, however there are many possible ways to refer to these analyses as a whole. The drafting provided in [Chapter 5 Approvals, Section 5.5](#) refers to such feasibility studies but different approaches are possible.

See [Sections 4.6.2 and 4.6.3, Articles 4B and 4C](#) for sample legislative drafting in respect of high-level PPP appraisal requirements.

4.4.1 Environmental and social sustainability

PPP projects – and indeed virtually all infrastructure projects – usually have an environmental and social (E&S) impact and create E&S risks that must be assessed at the start of the process. PPP legal frameworks should take a broad approach to E&S assessment and strive to include appropriate consideration of climate change, environmental resilience and inclusive development, such as set out in the SDGs. Appropriate E&S impact assessment is key in order to appraise whether a project is justifiable to be undertaken from an E&S perspective and what measures may be required to reduce risks and mitigate any adverse effects. The success and long-term viability of a PPP project depend on the effective management and appraisal of E&S risks through the project lifecycle and may also be critical to securing financing. This is because many investors – particularly multilateral development banks and international financial institutions, but increasingly also commercial banks and other global investors – tend to require compliance with national (and international) laws and E&S standards as a condition for investing in a project. The PPP legal framework should therefore set out requirements for the content and timing of E&S assessment. [Chapter 1 Guiding Principles](#) sets out further considerations in relation to E&S matters.



In terms of methods, an E&S assessment primarily consists of targeted studies and due diligence reports (including stakeholder consultations) to determine what the risks are, who will be affected, and how the risks and potential negative impacts can be mitigated, offset or compensated for. This may be carried out either internally by specialist units within government or by specialist consultants employed by the Contracting Authority (or other entity responsible for screening, such as the PPP Unit), or by a private sector entity in the case of USPs (or by a combination of both). PPP legal frameworks should ensure that E&S studies are appropriate by assessing all relevant aspects of a PPP project and can mandate that they be undertaken as part of a broader feasibility study or on a standalone basis. In some jurisdictions, pre-existing legislative instruments may regulate E&S assessments; PPP legal frameworks should take this into account by referring to or updating the requirements of such instruments as necessary in a PPP context. In terms of timing, assessment should occur at multiple stages of the project cycle to provide continuous feedback into the development process.

E&S studies as part of project appraisal	
Content of assessment	Timing of assessment
<ul style="list-style-type: none"> The entire lifecycle of a PPP needs to be assessed from an E&S perspective, not just implementation – this includes design, construction, operation and decommissioning.⁵² 	<ul style="list-style-type: none"> From identification and at each decision gate during the appraisal process, to ensure the outcomes of E&S assessments are fed into each successive phase of appraisal.
<ul style="list-style-type: none"> A PPP needs to be benchmarked against PPP strategy and policy, applicable law, governance frameworks, National Climate Action Plans and a country's NDCs (as these may be translated into national legislation and/or project pipelines) and the environmental and social characteristics of the location where it is planned to be built/operated. 	<ul style="list-style-type: none"> Prior to tender, to ensure that E&S requirements are factored into tender requirements so that bidders' proposed E&S measures and costs are factored into their bids and can be evaluated.

⁵²[European Commission Directorate-General Climate Action, 2011. Non-paper Guidelines for Project Managers: Making vulnerable investments climate resilient](#) (Climate-ADAPT 2012, 17–53).

E&S studies as part of project appraisal	
Content of assessment	Timing of assessment
<ul style="list-style-type: none"> Consideration of relevant data must be mandated, for example climate change or geological data, or data gathered by PPP Units. 	<ul style="list-style-type: none"> Projects in sectors with long cycles for PPP identification, structuring, procurement and implementation may need to be benchmarked against possible alternatives on an ongoing basis to ensure the E&S assessment remains relevant.
<ul style="list-style-type: none"> E&S assessment should specifically address climate change (including both project impact on, and resilience to, climate risks and/or vulnerability to climate hazards), social impact and inclusivity. 	

4.4.2 Feasibility and economic viability

Feasibility and economic viability refers to the process of technical and economic assessment required to ensure a PPP project is a sound and affordable investment and consistent with national development strategies. This assessment tends to comprise two aspects: determining whether it is (i) feasible, and (ii) economically viable. If there are existing assessment processes applicable to infrastructure projects generally, the PPP legal framework should factor these in to ensure a coordinated approach to avoid any unnecessary duplication.

4.4.2.1 Assessing feasibility

This requires detailed studies from a range of perspectives:

- (a) **Technical feasibility** refers to whether the project can be implemented as planned, using proven technologies, and without unmanageable technical risks.
- (b) **Legal feasibility** refers to whether there are any legal barriers to the PPP, including for example identifying any legal constraints preventing the Contracting Authority from entering into the relevant PPP Contract.

4.4.2.2 Assessing economic viability

A project can be considered economically viable if its expected economic benefits exceed its economic costs (i.e. factoring in externalities). Economic viability assessments can also include a cost-effectiveness analysis to determine whether the project is the lowest-cost alternative to achieve the expected economic benefits. (This concept is distinct from affordability or fiscal sustainability which is addressed in [Section 4.4.5](#).)

The role of the PPP legal framework is to ensure that the assessment is carried out and taken into consideration by the Contracting Authority. The PPP legal framework can be more or less prescriptive on this issue.

In carrying out economic viability assessments, cognitive biases (for example unrealistic optimism) have been shown to lead to suboptimal decision-making in infrastructure projects. PPP legal frameworks can require specific measures to overcome the effect of such biases at the appraisal stage. An example of this type of measure is in the UK HM Treasury's [Green Book guidance material on how to appraise and evaluate policies, projects and programs](#) – this effectively mandates accounting for such unrealistic optimism by measuring it as an operating expenditure item.

See <https://www.gov.uk/government/publications/green-book-supplementary-guidance-optimism-bias>

Benchmark Examples

In **Australia**, the National PPP Policy and Guidelines set out specific economic feasibility assessment procedures that PPP projects must go through, specifying in significant detail applicable methodologies that are intended to be applied in the assessment process.⁵³

In the **Philippines**, all major infrastructure projects (including PPPs) are required to go through a feasibility and viability assessment process. The National Economic and Development Authority's Reference Manual on Project Development and Evaluation sets out the detail of those feasibility and viability assessments.

4.4.3 Commercial viability

Commercial viability refers to whether a PPP is likely to successfully attract suitable sponsors, investors and lenders by providing adequate financial returns for reasonable risks. Commercial viability can be estimated during the appraisal stage but can only be confirmed through the tender process when bids are received.

The Contracting Authority may build an indicative financial model to forecast costs, cash flows and returns in various scenarios (taking into account current and future demand) and to express (in financial terms) the project's ability to continue generating returns in different market conditions – all prior to tendering the project in order to determine whether government support might be necessary to make the PPP commercially viable. The Contracting Authority may also wish to identify specific risks and their proposed allocation in the PPP Contract at a high level. It is worth noting that in a "user pays" PPP, affordability for end-users should be taken into account as part of the commercial viability/demand analysis of the asset.

Contracting Authorities may wish to carry out market sounding exercises at this stage of the process to improve understanding of investor and lender attitudes and to determine the nature and extent of any credit enhancement measures or specific approaches under the PPP Contract that may be required, as well as any change in the project scope or financing structure.

For example, in a "user pays" PPP where the Contracting Authority wishes to cap user charges at a prescribed level, market sounding may reveal that the prescribed level will not yield sufficient returns to remunerate the Private Partner's capital investment. Market sounding might therefore also indicate that government support will be required to make the project commercially viable. If this is likely, bidders will typically be asked to include in their bid the level of government support that they need for the project to be commercially viable (within parameters) and this will be determined by, and included in, their financial model. [See Chapter 7 PPP Agreements](#) regarding government support.

The PPP legal framework should specifically allow for different types of government credit support to be provided where justified (and subject to the relevant approval processes, as set out in [Chapter 5 Approvals](#)), in order to give Contracting Authorities sufficient flexibility in how best to structure support on specific projects or promote specific policy objectives. Government credit support may comprise direct funding (e.g. public sector capital contributions) and contingent support or guarantees to the private sector participants for risks that the private sector cannot effectively manage or mitigate against. [See Chapter 7 PPP Agreements, Section 7.4.4](#). Governments may also wish to design bidding processes such that the private sector will compete on the basis of the lowest government support. In any event, government support would also be subject to a fiscal sustainability assessment, as detailed in [Section 4.4.5](#).

Many PPPs have suffered from studies of predicted demand that overestimated the revenue generation potential of certain infrastructure assets. Well-known examples include the Sydney Airport Link Line, the Bangkok Skytrain project, the STAR and PUTRA rail projects in Kuala Lumpur, the Dulles Greenway toll road in the US and M6 toll road in the UK. The PPP legal framework should compensate for this type of optimism bias.

⁵³[Australian Government, 2013. National PPP Policy and Guidelines Volume 5: Discount Rate Methodology Guidance.](#)

Benchmark Examples

In **Indonesia**, the Indonesia Infrastructure Guarantee Fund has issued guidelines regarding the criteria to assess the opportunity cost of issuing guarantees to private investors in PPPs, which include economic viability (amongst other criteria).

In **Croatia**, the government provided in-kind support for the Zagreb-Macelj toll road in the form of land and contingent debt drawn down whenever revenues were insufficient to cover debt service, leaving demand risk with equity holders but thereby protecting the lenders and ultimately improving the financing outlook for the project.

4.4.4 Value for money

VFM refers to achieving the optimal cost/benefit structure in delivering a project to meet the demand for the output of that project. It may be done for both socio-economic flows and financial/fiscal impact flows, with some jurisdictions requiring that both be done. This is one of the key objectives in implementing a project via PPP as opposed to via another method of government infrastructure procurement. Governments may require Contracting Authorities to carry out a VFM analysis at the appraisal stage to establish the rationale for private sector participation and determine whether adopting the PPP route is likely to offer better value for the public than other methods of government contracting (such as direct procurement of asset construction and subsequent operation by the government itself).

VFM analysis typically involves a combination of qualitative and quantitative approaches, as further described below.

Approaches to VFM analysis	
Qualitative VFM analysis	Quantitative VFM analysis
<ul style="list-style-type: none"> Involves principally a sense-check of the rationale for using PPP, e.g. querying whether a specific project is suitable for private financing (and participation in development, construction and operation, as applicable) and whether the conditions are in place for the project to achieve VFM (based on proper structuring and the achievement of a competitive tender process). 	<ul style="list-style-type: none"> Involves comparing the cost of procuring the same project via PPP rather than via traditional public sector procurement, either by comparing the risk-adjusted fiscal costs to government under each method of procurement, or by carrying out an economic costs-benefit analysis for both options.
<ul style="list-style-type: none"> Tends to occur at the early stages of PPP development and can form part of the screening or identification process. 	<ul style="list-style-type: none"> Tends to occur at later stages of PPP development as a tool for assessment and approval by finance ministries (although it is preferable for this analysis to be carried out as early as possible – at least at a high level).

Many jurisdictions set out detailed requirements for VFM analysis in their PPP legal frameworks, typically in secondary instruments rather than primary legislation; this is good practice since VFM criteria can evolve rapidly and secondary instruments tend to provide more flexibility for adaptation (as discussed in [Chapter 2 Scope and Application of the Legal Framework, Section 2.2.3](#)). VFM analysis is a complex topic that requires careful consideration at a policy level. For detailed discussion on approaches to assessing VFM, see the footnoted resources as a good starting point.⁵⁴

⁵⁴See the bibliography set out in [The World Bank, 2017. Public-Private Partnerships Reference Guide Version 3](#), Module 3, Section 3.2.4 Assessing Value for Money.

Benchmark Examples			
France mandates qualitative preliminary analysis of PPPs, which includes benchmarking projects on whether the PPP model is appropriate for the delivery of the project in question and commercial attractiveness.	Jamaica's methodology for assessing VFM is set out in the Caribbean PPP Toolkit. ⁵⁵	New Zealand's PPP guidance material directs the use of a quantitative cost-benefit analysis as the main tool for assessing infrastructure development options.	In South Africa , the VFM analysis is set out in the South African PPP Manual and the Municipal Service Delivery and PPP Guidelines.

In a PPP context, VFM is not limited to cost reduction – indeed, PPPs are often on their face more expensive than other methods of infrastructure development. The "value" proposition of PPPs is usually found elsewhere, for example, through the following:

- (a) the procurement of higher-quality services – for example, procuring the services of a private sector port manager to optimize the economic benefits that can flow from having a more efficient port capable of increasing trade, promoting employment and attracting further investment;
- (b) limiting cost and time overruns – through the use of private sector management methods, thereby ideally improving public sector capital and operational expenditure efficiency;
- (c) the transfer of certain risks to the private sector (whether complete or partial) – for example, transferring demand risk in PPPs where revenue is primarily driven by user charges;
- (d) implementation of a whole lifecycle approach to costing projects – with deliberate consideration of long-term operation and maintenance (**O&M**) aspects that tend to be underestimated in traditional government contracting;
- (e) access to better design, technology and innovation that may not be available to traditional procurement contractors;
- (f) access to specific and specialized experience in relation to the services that are being procured;
- (g) unlocking access to cheaper service providers and other market participants – if the PPP program is proven to be robust (often after successfully procuring projects with "first in market" participants); and
- (h) access to private financing – which, although usually more expensive than public financing, gives governments greater flexibility and discretion in leveraging available public resources by (i) benefiting from the private sector incentives for financial efficiencies that private finance brings, and (ii) enabling governments to allocate available public funds to other projects or programs for which alternative financing might not be available.

Comparing only the fiscal costs of a PPP versus traditional public procurement may therefore be inadequate if it is expected that service levels may improve significantly. In such cases, economic cost-benefit analysis may be a better approach than fiscal cost comparison alone. PPP legal frameworks should cater for these different approaches by

⁵⁵[Inter-American Development Bank, 2017. Caribbean Public-Private Partnerships \(PPP\) Toolkit](#) (Module 4, Section 8).

promoting VFM analysis in general. PPP legal frameworks can be flexible as to VFM methodology to ensure that all expected sources of value are appropriately captured, however governments should strive to ensure that methodologies are applied consistently across projects (including non-PPP projects) and sectors.

4.4.5 Fiscal sustainability

Even if a project meets E&S sustainability requirements, is feasible as well as economically and commercially viable and VFM analysis shows PPP to be the best procurement method for it, a government still needs to determine if it has the requisite financial or fiscal resources – particularly if any government support is included in the PPP structure. PPP legal frameworks should therefore require fiscal affordability analysis at the origination and appraisal stage – as well as confirmation that the PPP project is consistent with that analysis at the preferred bidder/award stage (in certain cases, for example where a negotiated approach is used, the analysis may need to be updated or performed anew).

Determining whether a PPP project is affordable from a fiscal perspective requires assessing the fiscal commitments it will generate. There are two main types of fiscal commitments: direct and contingent liabilities. These are summarized in the Table below.

Types of fiscal commitments	
Direct liabilities	Contingent liabilities
<ul style="list-style-type: none"> Liabilities that are expected to materialize in the normal course of the PPP project (assuming the private sector performs in accordance with the PPP Contract). These are contractual payment commitments for the Contracting Authority that do not depend on the possible occurrence of future events, even if the quantum of those commitments may fluctuate (e.g. due to performance deductions). Examples include availability payments and government support payments such as shadow tolls/subsidies per unit or user of a service. 	<ul style="list-style-type: none"> Liabilities that are (i) explicit contingent liabilities assumed by the Contracting Authority in the PPP Agreements, arising on the occurrence of certain risk events and calculated in accordance with contractual mechanisms (e.g. payment following a change in law or early termination), or (ii) implicit contingent liabilities that would in practice fall on the Contracting Authority or other Government Entity, arising on the occurrence of other events not expressly set out in PPP Agreements (e.g. expenses following insolvency of the Private Partner). The Contracting Authority will not need to make any payments in respect of those liabilities if the event in question does not occur – for example, no early termination payment will arise under a PPP Contract if it is not terminated early, and a minimum revenue guarantee will not be called if revenue is always above the relevant floor.
<ul style="list-style-type: none"> Direct liabilities become increasingly better defined during the structuring process as a PPP project and its financial model are refined. The value of direct liabilities is usually the difference between the cost of the project (which cost includes return on capital) and any revenue the project can expect to earn from non-government sources (e.g. user fees). 	<ul style="list-style-type: none"> It may be appropriate for the Contracting Authority to accept contingent liabilities under a PPP Contract if it is the party best placed to bear the risk of the relevant events occurring.
<ul style="list-style-type: none"> Direct liabilities can be measured via (i) estimated annual payments (which are used principally for budgeting), or (ii) the net present value of payments (which are used principally for reporting). 	<ul style="list-style-type: none"> Contingent liabilities can be measured (i) on the basis of the assumed value of those liabilities in different scenarios (for example a worst-case termination scenario), or (ii) using statistical analysis to adjust the value of liabilities on the basis of their likelihood.

Contracting Authorities must assess the likely costs of both types of commitments and whether they are affordable for the government within short and long-term budgetary constraints. The PPP legal framework should prescribe methodologies for valuing both direct and contingent liabilities and determining affordability and how such liabilities will be accounted for. These risk analysis methodologies should be consistent with the applicable fiscal framework and be updated accordingly. They are typically set out in secondary instruments and can promote the use of a mix of quantitative and qualitative approaches similar to the methodology described in [Section 4.4.4](#) in respect of VFM.

Governments may however wish to seek a balance between sophisticated risk analysis methodologies and simpler assessment practices that Contracting Authorities and PPP Units will find easier to use in practice, and the PPP legal framework should reflect that balance.

It is worth noting that PPPs are increasingly unable to be treated as being wholly "off balance sheet" from an accounting perspective, with accounting bodies and international organizations focusing on the overall balance of risk and reward in PPP Contracts in their classification – architects of PPP legal frameworks should be alert to this trend.

4.5 Toolkit for implementing processes

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

4.5.1 Checklist of considerations

Implementing origination and appraisal processes should be done in a manner that is consistent with other related aspects of a PPP legal framework, particularly as regards procurement and approvals. For example, as a project develops, the PPP legal framework should be clear as to what approvals are required (and from whom) such that the project can progress through the various stages of the origination process. [See Chapter 5 Approvals](#) for further details.

In determining the appropriate PPP legal framework for implementing the origination and appraisal objectives and processes outlined in this Chapter, the following checklist should be considered:

Responsibility	<ul style="list-style-type: none">→ Which entities are involved?→ What are their roles and responsibilities at each stage of the processes? Are they adequately empowered?→ Who can identify potential projects? Public and private sector?
Processes	<ul style="list-style-type: none">→ Consider the key aspects – what needs to be set out in primary law?→ Consider the detailed aspects – what is the suitable secondary instrument for these? How should they be developed and promulgated?
Existing systems	<ul style="list-style-type: none">→ How will the processes dovetail with existing systems and processes?→ What adaptations are needed?
Support Measures	<ul style="list-style-type: none">→ Consider need for government support mechanisms – what type and necessary processes?

4.5.2 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Project Origination and Appraisal	
Primary legislation	Secondary instruments
<ul style="list-style-type: none"> • Definitions of various terms i.e. origination, appraisal, identification etc. 	In-depth guidance/information on aspects of the definitions.
<ul style="list-style-type: none"> • Grant of powers/responsibility to: <ul style="list-style-type: none"> • propose a PPP (public/private sector) • determine if the proposal is taken forward. • define the required process, criteria and assessments (in outline) (including the power to delegate further matters and/or provide more detail on outlined/mandatory matters). 	<p>Implementation of responsibilities/delegated authority via relevant instruments and further guidance, including detailed information on eligibility, process, criteria and assessments.</p> <p><i>See also Section 2.5.4 and Section 6.5.2.</i></p>
<ul style="list-style-type: none"> • Mandatory appraisal process assessment factors (in outline), including: (i) environmental and social sustainability; (ii) feasibility and economic viability; (iii) commercial viability; (iv) value for money; and (v) fiscal sustainability; • Grant of authority/responsibility to relevant Government Entity/ies to adapt list and/or provide more detail on outlined matters and/or delegate powers as appropriate. 	<p>Implementation of responsibilities/delegated authority via relevant instruments to provide detailed information on how the factors will be assessed.</p> <p>For example, in respect of:</p> <ul style="list-style-type: none"> • VFM analysis: when it will be carried out, which entities have the power/obligation to provide input, whether the analysis will be carried out using qualitative or quantitative methods (or both) and further detail on the content of such methods; • E&S assessment: similarly, the types, scope and timing of the assessment, the stakeholders with the power/obligation to provide input, etc.
<ul style="list-style-type: none"> • Mandatory inclusion (or exclusion) of certain projects for consideration as PPPs (e.g. due to their size or sector). • Consider power/responsibility to adapt/review the relevant list, delegate further matters and/or provide more detail on outlined matters. <i>See also Section 2.5.4.</i> 	Implementation of responsibilities/delegated authority via relevant instruments and further guidance on relevant sectors/industries and any sector- or industry-specific adjustments to relevant processes.
<ul style="list-style-type: none"> • Grant of power to offer government support mechanisms in PPPs [and applicable processes/Government Entities]. <i>[If needed.]</i> <p><i>See also Chapter 7 and other relevant Chapters and processes.</i></p>	Guidance on permissible government support mechanisms and any review/approval processes and entities (and implementation of any responsibilities/delegated authority via relevant instruments). <i>See also Chapter 7.</i>

4.6 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 4.5.2](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

4.6.1 Definitions (Processes)/Article 4A

Definitions:

Appraisal means the processes by which the Contracting Authority carries out increasingly detailed analysis of a potential PPP to determine whether it should be developed as a PPP.

Identification means the process by which a Project is initially proposed for development as a PPP.

Origination means the process via which the Contracting Authority identifies and successfully screens a Project for procurement as a potential PPP prior to Appraisal.

Project means any project, including but not limited to developing, financing, generating revenue from, designing, engineering, manufacturing, transporting, constructing, erecting, installing, commissioning, operating, maintaining or decommissioning public infrastructure and/or the provision of a public service.

Screening means the legal, technical, commercial, environmental and social diligence process used to determine whether a Project may be suitable for development as a PPP.

4.6.2 Project origination – Article 4B

1. A PPP Project may be proposed by a Contracting Authority (including, as the case may be, the PPP Unit), or a private sector entity. *[Note: drafting to tie in with USP drafting – see Article 6H (Section 6.6.8) and Chapter 6.]*
2. The [PPP Unit/relevant authority responsible for PPPs] shall determine if a Project proposed as a PPP should be selected to be taken forward and considered as a potential PPP.
3. Subject to Article 4C, the *[specify relevant materials]* **OR** [PPP Unit/relevant authority] shall specify the process, criteria and assessments required in connection with the identification, screening and appraisal of potential PPP Projects.

The drafting in Articles 4B and 4C is intended not to be prescriptive with respect to the process or format of any identification, screening or appraisal requirements. Instead, this drafting aims to identify a number of "minimum" requirements for consideration, with further detail to be set out in secondary materials.

4.6.3 Factors to be considered in origination and appraisal processes – Article 4C

1. For the purposes of Origination and/or Appraisal of a Project as a potential PPP, the following factors must be assessed *[Note: further specification of the below will be developed as set out in Article 4B.3 above:]*
 - (a) how the Project is in the public and national interest;
 - (b) whether the Project is consistent with the Government's investment, development and climate strategies, plans and priorities;
 - (c) the feasibility of the Project from a legal, technical, economic and social perspective, including its impact on human rights and local communities as well as remediation plans for any potentially adverse impacts;
 - (d) the feasibility of the Project from an environmental perspective, including its impact (i) from a whole lifecycle perspective, (ii) on climate change and (iii) on the *[insert jurisdiction]*'s ability to meet *[specify all applicable environmental commitments]*, as well as remediation plans for any potentially adverse impacts;
 - (e) the anticipated fiscal commitments resulting from the Project taking into account direct and contingent liabilities and the Project's fiscal sustainability, having regard to the *[insert budget specifics etc.]*;
 - (f) the comparative VFM in procuring the Project as a PPP versus alternative procurement methods;

This type of provision (and/or the more detailed specification) should cross-refer to applicable environmental legislation. This includes (i) international commitments under e.g. the Paris Agreement, but also international conventions such as the Ramsar Convention on Wetlands, and (ii) national environmental protection legislation.

This type of provision (and/or the more detailed specification) should cross-refer to the applicable budget legislation and the relevant process for taking a PPP into account in the public investment management system.

- (g) an assessment of the key risks and the proposed risk allocation of the Project as between the Contracting Authority (and any other Government Entities) and the Private Partner (and any other private sector counterparties;⁵⁶
- (h) the Project's costs, commercial viability and the availability of Government funding and any proposed form of Government support and incentives for the implementation of the Project;
- (i) the volume of capital investment and technical expertise required to contribute effectively to delivering or improving the performance of public infrastructure facilities and ensuring the quality of associated public services; and
- (j) international best practice in the implementation of similar Projects (including whether other countries have implemented similar projects as PPPs).

4.6.4 Mandatory consideration of PPP – Article 4D

1. [The PPP Unit and] [all relevant Contracting Authorities] shall seek to promote the use of PPPs to deliver public infrastructure and the provision of public services.

Optional drafting to be selected based on governments' strategic priorities.
2. Contracting Authorities shall be obliged to consider PPP as a method of procurement for all Projects (and, if requested by the PPP Unit, shall provide evidence of such consideration), provided that (in respect of each Project):
 - (a) the Project is a project to which Articles 2C and 2D *[insert any other relevant Articles]* of this Law apply and meets the criteria for [PPP/specify certain types of PPP] as set out in *[insert relevant Articles/ relevant materials]*; and

All Projects that fall within the scope of the PPP law should be captured by this Article.
 - (b) there are no compelling strategic or public interest reasons to procure the Project through alternative procurement methods.
3. Promptly on identifying a Project as a potential PPP, the relevant Contracting Authority shall submit a proposal in respect of the Project to the [PPP Unit/relevant authority], in accordance with the processes specified in Article 5A *[insert any other relevant materials/Articles]* in respect of In-Principle Approval.

See Chapter 5 for discussion regarding approvals (and Section 5.5.1).

4.6.5 Credit support – Article 4E

[Consider whether any specific provisions are needed in this section in relation to PPP government support mechanisms and where best these should sit in the primary instrument, together with any delegated powers etc. See also sample drafting in Article 7F (Section 7.6.6).]

See Chapters 4 and 7 for further discussion.

⁵⁶See [Chapter 7 PPP Agreements](#) for further detail on risk allocation.

Approvals



Frequency:
75 GHz

Utilisation:
95 %

Speed:
18 Gb/s

Data Compression:

Seed:

5. APPROVALS

5.1 Introduction

The PPP legal framework should identify the types of approvals required for developing and managing a PPP project, as well as the entities responsible for providing those approvals. The approval structure must cover the entire project lifecycle, both pre and post contract signature. Its purpose is: (i) to introduce decision points by key stakeholders at key stages of the PPP origination, appraisal and procurement processes to assess whether or not a project should progress to the next stage; and (ii) once the PPP Contract is signed, to ensure contractual decisions are properly considered and approved by the appropriate authorities in the contract management phase. It is essential that an efficient and coordinated process is implemented which meets the objectives described below.

This Chapter explains how the approval matrix should be developed and focuses on the approval process during the PPP origination, appraisal and procurement phases ([Chapter 8 Contract Management](#) sets out more detail on the contract management phase). Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting focuses on the key requirements recommended to be included in the primary legal instrument. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

Greater detail about the procedural aspects of applying for approvals, criteria to be reviewed for issuing the approvals and overall timetable is recommended to be included in secondary instruments/policy guidance. In addition, when establishing a clear approval framework, governments should take into account any existing related legislation (e.g. legislation regarding the legal capacity of, and delegation of powers to, relevant Government Entities, including in respect of environmental, labor, health and safety). [See Chapter 1 Guiding Principles, Section 1.5.1.](#)

5.2 Guiding principles and objectives

In order to establish an effective approvals process for PPP that regulates the types of approvals required and the Government Entities required to provide them, the PPP legal framework should address the key guiding principles and objectives set out below.

5.2.1 Implementing a fiscally responsible process

A properly designed approval process ensures that: (i) projects that are judged ineligible to be developed as PPPs can be eliminated early, prior to time and cost being invested by public (and private) entities; (ii) the project proceeds to signature having satisfied the criteria set out in [Chapter 4 Project Origination and Appraisal](#); (iii) the project has the required political support; and (iv) the project continues to be managed responsibly after signature.

5.2.2 Creating an efficient process by engaging and coordinating key stakeholders

Establishing a process which takes into account all relevant approval entities, identifies responsibilities of those entities, and sets out a clear timetable for delivering responses is essential for efficient origination, appraisal, procurement and contract management, as further discussed in [Section 5.4.2](#). It also demonstrates that the PPP program and individual projects have relevant and coordinated government engagement.

The government stakeholders to be involved will depend on the composition of each country's institutional framework but are likely to include the Ministry of Finance for fiscal aspects, environmental authorities for sustainability and climate change considerations, and planning authorities for infrastructure objectives. [See Chapter 3 Institutional Framework](#) for a more detailed discussion.

5.2.3 Defining roles of authorities

Clear allocation of approval responsibilities to the appropriate Government Entities is essential to provide clarity to both the public and the private sector. This varies between countries since each government is structured differently and each government will need to consider the structure appropriate for it. The key points to consider are which Government Entity has:

- the technical capability to review the subject matter which requires approval. Often, this is the Ministry of Finance or a linked authority because fiscal impact is a fundamental aspect of the approvals; and

- the delegated powers and capacity to grant approvals. This will depend on the country's governance structure and analysis may result in additional powers needing to be granted or existing powers clarified (e.g. under primary PPP legislation).

See [Chapter 3 Institutional Framework](#) for a more detailed discussion on allocation of institutional responsibility.

5.2.4 Ensuring compliance with national policy objectives, fiscal constraints and climate commitments

The involvement of relevant stakeholders and regulators through the approvals process enables governments to ensure that the threshold requirements and objectives set out in [Chapter 4 Project Origination and Appraisal](#) are taken into account throughout the project lifecycle. For example, importantly, this enables proposed PPP projects to be considered in the context of a country's NDCs, and any related national action plans and long-term strategies to combat climate change.



5.2.5 Building market confidence

A well-designed approval structure reassures both Private Partners and Contracting Authorities that the project has the necessary justification and support to be developed, procured and managed as a PPP. Adhering to the process and timeframes creates certainty for all parties and builds market confidence in the government's PPP program.

5.3 Approval process structure up to contract award

As described above, the approval structure should address all stages of the PPP project lifecycle. This Section focuses on the stages up to contract award (origination, appraisal and procurement) and [Chapter 8 Contract Management](#) sets out more detail on the contract management stage.

5.3.1 Overview of "gateway" approval process during procurement

It is good practice to structure the approval of a PPP project's origination, appraisal and procurement as a "gateway process" as this firmly embeds the principles set out in [Chapter 4 Project Origination and Appraisal, Section 4.4](#) by ensuring the financial, technical, legal, environmental and social impact of a project is monitored and approved at key stages. This process typically requires two main formal decision points, each of which is a "gate" through which the project must pass in order to continue to be procured as a PPP:

- (a) an **in-principle approval** at the conclusion of the origination and appraisal stage, prior to commencing the procurement phase (i.e. before putting the project forward to the market by issuing Tender Documents) ([see Section 5.3.2.1](#)); and
- (b) a **final approval** requiring the appropriate Government Entity(ies) to approve the project on its final terms (i.e. prior to selecting preferred bidder or entering into the PPP Contract, as applicable) ([see Section 5.3.2.2](#)).



Additional interim review/approval points may be included in the overall approval process, however it is recommended that formal gateways are limited to two key stages. Requiring more formal stage approvals can build inefficiency and delay into the process and be burdensome to the approval entities involved. Concerns over the need to formally approve every step can be alleviated by designing the two key approval stages in a way which: (A) requires all relevant information to be submitted by prescribed deadlines; and (B) enables approvals to be granted, where appropriate, on the strict condition that the project continues to meet the criteria determined in the course of the origination and appraisal process in terms of (i) environmental and social sustainability, (ii) feasibility and economic viability, (iii) commercial viability, (iv) VFM and (v) fiscal sustainability.

Other forms and stages of review can be built into the structure through the Contracting Authority's (and its line ministry's) internal review process and the involvement and composition of the project team and Internal Evaluation Committee (if any). For example, as discussed in [Chapter 4 Project Origination and Appraisal](#), the origination and appraisal process is iterative and will realistically require multiple feedback loops. Similarly, during the procurement stage, the Contracting Authority's project team should report periodically to senior personnel or the Internal Evaluation Committee (and, where applicable, the PPP Unit) on the project. These interim reviews provide opportunities for all parties to assess and review project progress against relevant parameters (financial, legal, technical, environmental and social). The project team and those it reports to should have the appropriate expertise to carry out such assessments effectively. Similarly, ensuring any other review and approval committees are composed of appropriately qualified members adds further rigor into the bid evaluation process.



Where primary PPP legislation is being implemented, the requirement for key approvals is recommended to be included in the PPP law. In countries where primary PPP legislation is not necessary, the approval structure is typically implemented through secondary instruments, policy or guidance, but these key approval stages should be clearly mandated.

5.3.2 Primary approvals in the "gateway" approval process

5.3.2.1 In-principle approval

The purpose of this approval is to ensure that the Contracting Authority has presented the key elements of the project proposal to key stakeholders and has obtained buy-in for the project at an early stage following the origination and appraisal process described in [Chapter 4 Project Origination and Appraisal](#). Essentially it is approval of its outline business case. The Ministry of Finance (or equivalent entity) and the PPP Unit are typically the Government Entities that need to review and approve the project at this stage, however the approving entities will vary between countries. [See Chapter 3 Institutional Framework](#) for a further discussion about the applicable institutional structure.

In introducing an early "gate" for approval of the outcome of the origination and appraisal process, both the Contracting Authority and the Private Partner can be confident that the project has the necessary institutional support for the transaction to proceed to the next stage (i.e. to procurement). It also enables projects that do not meet the requirements of the origination and approval process to be ruled ineligible for development as a PPP before any further time is spent or cost incurred.

The process should require the Contracting Authority to submit the information needed by the approval entities to carry out their review. The level of information required is typically set out in secondary instruments or guidance although key requirements can be set out in summary form in primary legislation. Requirements should be tailored to ensure that key elements are included. For example, the Contracting Authority should be required to demonstrate how the project will contribute to climate change mitigation (including as regards the impact of the project itself) and what mitigation measures and mechanisms will be included to ensure climate change resilience and adaptation are embedded in the project.

For the reasons mentioned above, it is not recommended to require formal approval at each stage of the origination and appraisal process. [See Section 5.3.1.](#)



[See Section 5.5.1, Article 5A](#) for sample legislative drafting for the process of applying for and obtaining the in-principle approval.

5.3.2.2 Final approval

The technical, legal, financial, environmental and social metrics of a project develop throughout the course of the procurement process and engagement with bidders and bids will be evaluated against specified evaluation criteria and cost comparators. By preferred bidder stage, the expected project costs and risks should be clear. At this stage, it is critical for the appropriate approval entities to verify whether the preferred bid enables the project to meet all applicable (i) environmental and social sustainability, (ii) feasibility and economic viability, (iii) commercial viability, (iv) VFM and (v) fiscal sustainability requirements, and to approve entry into the PPP Contract. Essentially, this is approval of the project's final business case.



This stage may occur either: (i) prior to selection of preferred bidder; or (ii) prior to signature of the project agreement. In drafting the legislative framework, the following factors should be carefully assessed to determine the appropriate timing for this approval.

Option 1: final approval prior to selection of preferred bidder

- (a) **Considerations:** Selection of preferred bidder is the stage by which all key information and contractual terms should typically be established and such selection should be the focus of the approvals process. It can significantly undermine market confidence in a PPP program, and is also a waste of public and private sector time and money to announce a preferred bidder and proceed to finalize the PPP Contract and other PPP Agreements only to have final approval of contract award refused for reasons which could have been established prior to preferred bidder selection. Private sector participants will assess the risk of this happening through due diligence on the approvals process and the government's track record – if the risk is too great they may choose not to bid for the project.

- (b) **Implementation in Practice:** The approval can be granted on the condition that there will be minimal deviation from the approved terms of the preferred bid in the finalized terms of the PPP Contract and other PPP Agreements. In addition, to alleviate government concerns regarding the final contractual terms following approval of preferred bidder, selection can be conditional on satisfaction of certain limited matters – e.g. satisfactory completion of any envisaged funding competition (i.e. where financing providers compete to provide project funding on the basis of the agreed form PPP Contract), final pricing being within a certain envelope or finalization of documentation by a specified date.

Option 2: final approval after selection of preferred bidder but prior to signature of PPP Contract

- (a) **Considerations:** There may be particular reasons, such as existing legal requirements or formalities, why a government needs the final approval to be formally given after selection of preferred bidder (i.e. as approval to proceed to contract award and signature).
- (b) **Implementation in Practice:** If this is the case, due to the reasons set out in Option 1(a) above, the preferred bidder selection must involve a sufficiently detailed level of financial (and other key criteria) approval that enables all parties to be confident that final approval is not at risk. This may be achieved through the composition of the approvers at the preferred bidder stage (e.g. by including a representative of the Ministry of Finance or its PPP Unit) (see Section 5.3.1). Assuming this has been the case, formal approval after preferred bidder is more a cosmetic formality which confirms the conclusions at the preferred bidder selection stage and the satisfaction of any conditions imposed.

In order to obtain relevant approvals, the process should require the Contracting Authority (e.g. its Internal Evaluation Committee) to submit a report setting out the information needed by the approval entity/ies to carry out their review. The detail required for such report is typically set out in secondary instruments or guidance.

See Section 5.5.2, Article 5B for sample legislative drafting for the options above.

Benchmark Examples	
<p>Uganda</p> <p>In-principle approval: The PPP committee, a body established by law comprising a number of senior public officials (including a representative of the Ministry of Finance who acts as chairperson), must approve project proposals by Contracting Authorities at an early stage. The PPP committee is suitable to provide the in-principle approval as it is also responsible for reviewing feasibility studies and approving budget allocations for PPP projects.</p> <p>Final approval: The Ugandan Cabinet is required to approve the PPP Contract prior to its execution. This step occurs upon completion of due diligence, VFM, financial, technical and legal assessment of the project and preferred bidder.⁵⁷</p>	<p>Portugal</p> <p>In-principle approval: As a pre-requisite to issuing a tender to market, the Ministry of Finance and the applicable line ministry for the project are required to approve the project proposal.</p> <p>Final approval: The Ministry of Finance and the applicable line ministry for the project are required to approve signature of the PPP Contract upon completion of due diligence and bidder evaluation.⁵⁸</p>

⁵⁷ [Uganda – The Public Private Partnerships Act, 2015](#), Sections 5, 7(d) and 26(3).

⁵⁸ [Portugal – Decree Law 111/2012 \(Decreto-Lei n.º 111/2012\) – PPP Law 2012](#)

5.3.3 Other approvals during origination, appraisal and procurement

For the reasons highlighted in [Chapter 3 Institutional Framework](#), the Contracting Authority needs to establish at an early stage which other Government Entities (in addition to the key approval entities) may have some authority in relation to the project and need to provide approval. These vary vastly between countries, but typically include: (i) planning and environmental authorities and (ii) sector authorities (e.g. transport, health, education, etc.).



The Contracting Authority should identify and engage with all such entities during the origination and appraisal stage to ensure buy-in prior to issuing the tender, and to avoid any delays to signing and financial closing of the PPP Contract. If established, the PPP Unit can assist by playing a coordination role in this respect.

Analysis of the legal framework should enable governments to anticipate where such situations may arise and to provide clarity on whether such entities form part of the gateway approval bodies or Internal Evaluation Committee and/or how their involvement is to be managed. If they are to remain separate then the process should require the Contracting Authority to demonstrate at relevant gates that such additional approvals have been obtained or that there is a clear process for them being obtained. In some cases, it may be appropriate for the eventual Private Partner to be responsible for obtaining certain approvals and this should be clearly flagged and bid against in the Tender Documents.

There should also be clear timeframes applicable to all relevant entities for assessing such approvals in order to avoid delays to the project development process. Governments should consider how best to ensure these are adhered to so that the PPP process is not derailed by government bureaucracy. This is key for market confidence in the whole PPP process, as well as to delivery of the relevant project.

While regulation of such approvals will depend on the relevant jurisdiction and its existing legal framework, one approach to ensure that this analysis has been carried out by the Contracting Authority is to require the feasibility study and/or the Project proposal to identify the approvals required. [See Section 5.5.1, Articles 5A.1 and 5A.2](#) for sample legislative drafting in this regard.

Benchmark Example

In the **Philippines**, the PPP law requires the Tender Documents to identify the requirements of relevant regulatory authorities. The PPP law lists a non-exhaustive list of potentially relevant authorities, including the environmental authority, the water authority and the toll authority, and clearly identifies the permits that each of those would issue.⁵⁹ In doing so, it places an obligation on the Contracting Authority to carry out the required due diligence at the appraisal stage, and provides clarity to the market about the applicable regulatory framework.

5.4 Toolkit for implementing an efficient approval process

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

5.4.1 Stages of approval

As discussed in [Section 5.3](#), the approvals process should be designed to ensure that the whole PPP development process is efficient and effective. This Section sets out a timeline describing the critical approvals that should be considered and regulated by the PPP legal framework throughout the project cycle. The aim of the Table is to illustrate how the in-principle and final approvals sit alongside other phases and processes described in this Guidance.

⁵⁹[The Philippines – The Philippine Amended BOT Law R.A. 7718 and its 2012 Revised Implementing Rules and Regulations](#), Section 4.2(k).

STAGE IN PROJECT CYCLE	PURPOSE	RELEVANT ENTITY
ORIGINATION	<ul style="list-style-type: none"> Identify and propose a project for development as a PPP Screen the project through legal, technical, commercial, environmental (including climate change) and social diligence processes 	<ul style="list-style-type: none"> Contracting Authority/line ministry
APPRAISAL	<ul style="list-style-type: none"> Identify/confirm if the proposed project meets PPP eligibility criteria/falls within PPP law/regulation Carry out due diligence in respect of environmental and social sustainability, feasibility and economic viability, commercial viability, VFM and fiscal sustainability 	<ul style="list-style-type: none"> Contracting Authority/line ministry Input and clearance from applicable sector authorities (e.g. transportation, energy, or health, as appropriate) required Input from environment and planning authorities required
	<ul style="list-style-type: none"> Review the outcome of the due diligence process 	<ul style="list-style-type: none"> Ministry of Finance/PPP Unit
Gateway 1	Ministry of Finance/PPP Unit provides "in principle" approval for procurement of the proposed project as a PPP	
PROCUREMENT (Call for Tender)	<ul style="list-style-type: none"> Launch and run procurement process, evaluate bids (including financial, legal, technical, environmental and social aspects) and select preferred bidder 	<ul style="list-style-type: none"> Contracting Authority (with support from PPP Unit, as required) Input from legal or regulatory authorities (e.g. Ministry of Justice) is sometimes required
	<ul style="list-style-type: none"> Select preferred bidder 	<ul style="list-style-type: none"> Contracting Authority (primarily) with clearance/approval from Ministry of Finance/PPP Unit regarding budgetary impact
Gateway 2 (First option)	Ministry of Finance / PPP Unit provides final approval for selection of preferred bidder/entry into the PPP Contract (unless final approval is at the Award Stage)	
PROCUREMENT (Award)	<ul style="list-style-type: none"> Finalize PPP Contract (to the extent permitted in the jurisdiction) and take steps towards commercial close 	<ul style="list-style-type: none"> Contracting Authority
	<ul style="list-style-type: none"> Review PPP Contract prior to signing and assessment of any change to fiscal impact and risks 	<ul style="list-style-type: none"> Ministry of Finance/PPP Unit
Gateway 2 (Second option)	Ministry of Finance/PPP Unit provides final approval for entry into the PPP Contract (unless this approval was provided at preferred bidder stage)	
CONTRACT MANAGEMENT (After signing/ financial closing)	<ul style="list-style-type: none"> Review and agree changes to PPP Contract or key decisions 	<ul style="list-style-type: none"> Contracting Authority Ministry of Finance/PPP Unit approval required for material changes and decisions

5.4.2 Timing

It is key for the overall process to have timeframes that are clearly established within government. This is to ensure that all relevant entities are required to act in a timely manner which enables the published procurement timetable to

be met and the process to be efficient. The appropriate overall timetable will vary according to the specific project and guidance on such matters is typically addressed in secondary legal instruments and guidance. Where the key approvals are set out in primary legislation, it is advisable to include a timeframe for response which is achievable by the Government Entities concerned, but which keeps the PPP process firmly on track. [See Chapter 6 Procurement](#) for further discussion.

Once the PPP Contract is signed and in effect, there will be contractual timeframes with which the Contracting Authority must comply when providing various responses and decisions. It will therefore be essential for the Contracting Authority's contract management processes to set out appropriate internal response timeframes which enable it to comply with its obligations under the PPP Contract and other PPP Agreements so that it is not in breach. [See Chapter 8 Contract Management](#) for further detail.

5.4.3 Checklist of considerations

In determining the appropriate PPP legal framework for implementing the approval processes outlined in this Chapter, the following checklist should be considered:

Approvals	<ul style="list-style-type: none"> → What approvals are needed? → What entity/ies should give them and are they adequately empowered? → Are there institutional traditions to consider?
Timings	<ul style="list-style-type: none"> → At what stage should the approvals be given? → How can the risk of failing a project late in the process be avoided/ mitigated? → Has the whole project lifecycle been considered?
Design	<ul style="list-style-type: none"> → Is the process efficient and achievable, with clear timeframes and interactions? → Is unnecessary bureaucracy minimized? → Are any new entities to be created?
Conflicts	<ul style="list-style-type: none"> → Who has the final decision and can resolve disagreements between Government Entities?

5.4.4 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Approvals	
Primary Instrument	Secondary Instruments
<p>Obligation on Contracting Authority/Government Entity to:</p> <ul style="list-style-type: none"> • carry out PPP feasibility study including mandatory appraisal criteria. <i>See Sections 4.5.2 and 4.6.3 (Article 4C).</i> • submit proposed project with feasibility study for In-Principle Approval in accordance with process requirements • submit proposed project for Final Approval in accordance with process requirements. 	<p>Guidance on aspects and key approvals (including as set out below); guidance on any other recommended interim approvals and processes.</p>
<p>Power/Obligation on Ministry of Finance/Government Entity to:</p> <ul style="list-style-type: none"> • review/approve/reject In-Principle and Final Approval submissions in accordance with any specified process requirements (e.g. time period). 	<p>Guidance on procedural aspects (as below), such as criteria to be reviewed for issuing the approvals and overall timetable.</p>
<ul style="list-style-type: none"> • Mandatory requirements for In-Principle Approval process: <ul style="list-style-type: none"> • Feasibility Study (and content). • Process (including timeframes) <p>For both:</p> <ul style="list-style-type: none"> • Option 1: – outline of requirements, and grant of power and responsibility to develop further detail. <p>OR</p> <ul style="list-style-type: none"> • Option 2: – prescribed detailed requirements (and grant of power and responsibility to adapt, if appropriate). <p><i>[To the extent not covered under Chapter 4.]</i></p>	<ul style="list-style-type: none"> • Option 1: Implementation of responsibilities/ delegated authority via relevant instruments to set out detail of feasibility study content and process. <p>OR</p> <ul style="list-style-type: none"> • Option 2: guidance on relevant matters (and, if applicable, implementation of responsibilities/ delegated authority via relevant instruments).
<ul style="list-style-type: none"> • Mandatory requirements for Final Approval process: <ul style="list-style-type: none"> • Form of proposal (content) • Process (including timeframes) <p>For both, see In-Principle Approval Options 1 and 2 above.</p>	<p>As above.</p>

5.5 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 5.4.4](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

5.5.1 In-Principle Approval – Article 5A

1. A Government Entity seeking to develop a Project as a PPP shall carry out a feasibility study in accordance with *[refer to secondary instrument or specify parameters regarding the requirements of the feasibility study which should cover the factors listed pursuant to [Articles 4B.3, 4C \(Sections 4.6.2 and 4.6.3\) and possibly Article 5A.2 Option 2\(c\)](#)]*. If it determines that the potential Project is suitable to be structured as a PPP, it shall submit a proposal to the Ministry of Finance *[and insert applicable entity and any other authorities]* for in-principle approval to proceed to procure the Project pursuant to *[refer to procurement phase Articles – see [Section 6.6](#)]*.

Governments should decide whether the proposal should be submitted not only to the Ministry of Finance but also to other entities such as the PPP Unit, and/or any other competent authority. See [Sections 4.6.2 and 4.6.3](#) and also [Chapter 3](#).
2. **Option 1:** Any proposal submitted by the Government Entity pursuant to Article 5A shall include the feasibility study and contain sufficient detail in respect of the Project to enable the Ministry of Finance *[and list authorities indicated above]* to evaluate the Project in accordance with *[refer to applicable secondary instruments etc. that provide full detail on required content of the proposal/process]*.

OR

Option 2: Any proposal submitted by the Government Entity pursuant to Article 5A shall include the feasibility study and contain the following information: *[Feasibility study will include [Articles 4B.3 and 4C \(Sections 4.6.2 and 4.6.3\)](#) requirements and possibly (c) below.]*

 - (a) the technical requirements of the Project;
 - (b) any other regulatory authorities that may be required to approve the Project or aspects of the Project;
 - (c) any permit, authorization or permit required for developing or approving the Project;
 - (d) the proposed procurement process and the rationale for such process; and
 - (e) the proposed risk allocation to be included in the PPP Contract.]

This requirement should encompass how the project will contribute to climate change mitigation (including the impact of the project itself) and what mitigation measures and mechanisms will be included to ensure climate change resilience and adaptation are embedded in the project. See [Chapter 4](#) and [Sections 4.6.2 and 4.6.3](#).
3. The Ministry of Finance *[and insert applicable authority/ies]* shall review a proposal submitted by a Government Entity pursuant to Article 5A and approve, reject, or request further information regarding the Project within *[insert figure]* days of receiving the proposal.

This list can be further substantiated as required to enable a comprehensive assessment by the approving entity.

5.5.2 Final Approval – Article 5B

1. **Option 1:** The *[Contracting Authority][Internal Evaluation Committee]* shall submit the preferred bidder recommendation and supporting information from the evaluation process to the Ministry of Finance *[and insert appropriate approving authority/ies]* for final approval prior to selection of preferred bidder. The Ministry of Finance *[and insert appropriate approving authority/ies]* shall respond to the request for final approval within *[insert figure]* days.

See [Section 5.3.2.2](#) for discussion of these two x for formal final approval.

The time period to be inserted will depend on the Option selected and the level of review required. See also [Section 5.4.2](#).

OR

Option 2: The [Contracting Authority][Internal Evaluation Committee] shall submit the PPP Contract and related documentation to the Ministry of Finance [and *insert appropriate approving authority/ies*] for final approval prior to contract award. The Ministry of Finance [and *insert appropriate approving authority/ies*] shall respond to the request for final approval within [*insert figure*] days.

Procurement



6. PROCUREMENT

6.1 Introduction

The procurement process for PPP projects should be regulated, transparent and clear as it is an essential aspect of incentivizing bidder participation and evaluating and selecting the appropriate Private Partners to deliver PPP projects. There are various procurement processes that can be applied in PPP projects and governments should ensure that the PPP legal framework allows for appropriate options and is clear on how any existing procurement regime applies or is disapplied as regards PPP projects. The most common procurement process is a competitive tender procedure, which is widely recognized as a method that encourages cost and time-efficiency, quality, non-discrimination and transparency.⁶⁰

This Chapter outlines procurement procedure approaches and the key considerations involved, focusing on competitive bidding. Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting sets out key provisions recommended to be included in primary legal instruments. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

6.2 Guiding principles and objectives

In order to implement and regulate an efficient procurement process for PPP, the PPP legal framework should address the key guiding principles and objectives set out below.

6.2.1 A clear, fair and transparent process for the procurement of PPPs

The legal instrument setting out the core procurement measures should: (a) set out a clear, structured and transparent approach for procuring PPP projects which considers the entire lifecycle of a project and promotes fairness between competitors; (b) describe the different procurement/tender procedures available in the country and the situations in which they could be used (e.g. open tender or restricted tender to pre-qualified bidders, competitive negotiation strategies and/or single-source appointments); and (c) prioritize procurement procedures that enable competition, deliver high-quality outcomes and reduce costs for both Contracting Authorities and bidders. *See Section 6.3* for further detail.

6.2.2 Alignment with existing laws and regulations

As with the overall PPP legal framework, the procurement framework for PPP projects needs to be appropriately aligned with the existing in-country legal framework for government procurement to ensure there is a clear process for procuring PPP projects and that Contracting Authorities are appropriately empowered. Without appropriate analysis to identify and implement any necessary legislative steps, there is a risk that the existing procurement framework will be incompatible with the objectives of the PPP process. This could cause significant delays and also deter bidders from participating, since bidders will be carrying out their own due diligence of the legal framework involved to assess whether it is clear and robust enough to merit the time and cost involved in bidding.

The procurement framework can be implemented using different legal instruments and the approach will vary from one jurisdiction to another, depending on the legal system and existing legal framework. In common law countries, procurement rules tend to be set out in policy documents or regulations (as opposed to primary legislation) and may apply in principle to PPPs as well as other government procurement programs. This approach is viable if the procurement rules and any PPP-specific rules do not have overlapping or contradictory provisions. Civil law countries often have standalone PPP legislation enacted by statute that regulate all aspects of PPPs, including procurement.

Jurisdictions that are newly adopting a PPP legal framework but have existing procurement legislation have to consider whether the existing procurement legislation is compatible with the scope of the new PPP framework. If there is a risk of any ambiguity about the rules applicable to the procurement of PPPs, the existing procurement rules may need to be either (i) amended to explicitly cover PPP projects, or (ii) disapplied for PPP projects and PPP-specific legislation enacted. Ongoing awareness is essential to ensure that any changes to general or PPP-specific procurement legislation does not create new conflicts or ambiguities.

⁶⁰[UNCITRAL, 2019. Legislative Guide on Public-Private Partnerships](#), Chapter I(B)(g) and [The World Bank, 2017. Public-Private Partnerships Reference Guide Version 3](#), Module 3, Section 3.5 (Managing PPP Transactions), Box 3.11 (Competitive Procurement or Direct Negotiation).

Benchmark Examples

India is a common law jurisdiction and adopts a federal government system. It does not have legislation that applies on a country-wide basis in respect of PPP procurement. However, there are aspects of federal law that apply to procurement throughout the country and some states have developed their own local legal instruments or policy that regulate the procurement of PPP projects within those states.

The **Kuwait** PPP law (2014),⁶¹ a standalone law (primary legislation) that regulates PPP projects, explicitly disappplies the preceding general procurement law from the procurement of PPPs due to the number of provisions considered to be incompatible with the procurement of PPPs.

In **South Africa**, the secondary legislation applicable to PPP procurement was drafted to align with the primary procurement legislation which existed in the country at the time. Conflict between these legislative instruments can arise where certain subsequent amendments of the primary procurement legislation do not necessarily align with the intentions of a PPP procurement.

6.2.3 Delivery of infrastructure priorities through effective evaluation process

The legislation should require alignment between the procurement process and the outcomes of the origination and appraisal process described in [Chapter 4 Project Origination and Appraisal](#) as well as ongoing verification of the same. This is critical to promote the jurisdiction's PPP policy goals.

In practice, this alignment will be achieved through:

- the Contracting Authority's choice of a procurement/tender procedure and developing the evaluation criteria, which will be informed by the results of analyses performed during the appraisal phase;
- the appointment of a competent team to carry out the evaluation process; and
- the Tender Documents (notably, the evaluation criteria, minimum bidder requirements and integration of E&S requirements).



6.3 Procurement procedures

The process of tendering PPPs (including producing the Tender Documents, evaluating bidders and finalizing the PPP Contract) can be costly and time-consuming for all parties. A government can mitigate costs and risks by effectively regulating the procurement process. Governments are encouraged to carefully consider their PPP needs and their capabilities, and to adopt legislation that provides an efficient and robust structure for tendering. This is important in attracting private sector investment because bidders will carry out due diligence on the PPP procurement framework to inform their decision on whether to bid for a particular PPP Project. There are various procurement procedures that can be adopted but, for the reasons set out in [Section 6.3.1](#), it is recommended that governments adopt a competitive bidding model as the standard procurement mechanism, and consider whether any other secondary tendering processes may be required.

6.3.1 Standard Competitive Bidding

Governments can encourage competition by establishing a clear and reliable tendering framework through legislation, designed to incentivize the private sector to participate in tenders. Governments benefit because the competitive environment encourages bidders to prioritize VFM when pricing, and Governments can compare and pursue the proposal that provides the best value based on the criteria set. Bidders also benefit as a clear tendering process provides transparency and mitigates the risk of potential corruption.

There are various procurement methods that use competitive bidding, and within these methods various approaches can be taken. Governments should consider what the main drivers are when setting out required or preferred procedures in the PPP legal framework. The role of PPP procurement legislation is to define the parameters of the

⁶¹ Kuwait – Law No 116 of 2014 Regarding Public Private Partnerships, Article 9.

available procedures and to identify the minimum requirements for each stage and Tender Document as this will enhance the transparency, credibility and reliability of the tender process and encourage bidder participation. These requirements should not be overly prescriptive in order to give the Contracting Authority appropriate flexibility to adapt and adopt Tender Documents and a bidding process that are appropriate for the relevant project. However, while it is good practice for legislation to give flexibility to the Contracting Authority to choose an approach that best aligns with its requirements, there may be factors such as significant corruption risk or market maturity which make it necessary to legislate for more rigid processes only (or for specific approvals to be given if the Contracting Authority wants to use a more flexible approach). This will depend on the relevant jurisdiction.

The Contracting Authority's choice of approach will depend on various factors, including:

- (a) bidder interest for the project – this can be partially assessed by carrying out preliminary market soundings as part of the appraisal process (as further described in [Chapter 4 Project Origination and Appraisal, Section 4.4.3](#)), or by formally asking for expressions of interest (**EOIs**); and
- (b) size and complexity of the project – this includes how well equipped the Contracting Authority is to scope the project itself and whether it would benefit from input from market participants prior to or as part of the formal bid process.



It is generally best practice to use a multi-stage bidding process for PPP projects because this enables the Contracting Authority to narrow down the field of eligible bidders through a comprehensive pre-qualification stage and to assess whether VFM can be maximized through additional stages of competition after the initial bids. This is particularly appropriate for PPP projects that are complex or being tested for the first time in a country. Such pre-qualification criteria should be carefully considered and designed to encourage bidder participation, and could be developed with the input of an independent authority (such as a PPP Unit or similar body).

This Guidance focuses primarily on the multi-stage bid process but also describes the single-stage process as an alternative competitive bidding procedure. [See Section 6.6.1, Article 6A.1\(b\)](#) for sample legislative drafting for the competitive bidding procedures; the proposed provision identifies the multi-stage procedure as the default process, and permits a single stage procedure in limited circumstances.

Under both approaches, the Contracting Authority will typically establish a team to carry out the various aspects of the project's bid evaluation process and this team will report to an internal supervisory evaluation or awards committee typically made up of more senior, qualified and impartial members of the Contracting Authority (an "**Internal Evaluation Committee**" in this Guidance).⁶²

The following Table provides an overview comparing the multi-stage and single-stage bidding procedures and these are discussed in further detail in [Sections 6.3.2 and 6.3.3](#).

⁶²In some jurisdictions, a separate Internal Evaluation Committee may not be necessary and the primary project/evaluation team can assume the role of evaluating and (subject to other applicable approvals) awarding the project. Such approach is appropriate where it is difficult to find qualified or experienced members for the evaluation panel and it is logical for the same team to carry out the full evaluation and awards process.

Comparing Competitive Bidding Procedures	
Multi-Stage	Single Stage
<ul style="list-style-type: none"> • Good practice where a country has limited PPP experience or new PPP legislation (in which case, it may require support in carrying out its first multi-stage tenders), or when there is uncertainty regarding the level of bidder interest for the project. 	<ul style="list-style-type: none"> • Should be limited to simple or standardized projects, or where a country has extensive PPP experience in the relevant sector.
<ul style="list-style-type: none"> • Usually involves pre-qualification of bidders and potentially shortlisting. 	<ul style="list-style-type: none"> • Usually involves no or limited pre-qualification of bidders.
<ul style="list-style-type: none"> • Restricted tender process (RFP is only issued to pre-qualified bidders, and may be limited to the top-ranked pre-qualifiers provided this does not create an effective "monopoly" amongst certain bidders). 	<ul style="list-style-type: none"> • Open tender process (RFP is issued to a large number of bidders). It is burdensome and expensive to review a very large volume of bids, therefore an open tender is only appropriate if a limited number of responses is expected (e.g. due to limited market capability).
<ul style="list-style-type: none"> • Suitable where technical specifications are more complex or where there are limited companies with the required technology, and the Contracting Authority can only prepare a conceptual design or performance specification at the outset. 	<ul style="list-style-type: none"> • Suitable where technical specifications are simpler or where a similar project has already been tendered by the same authority, so setting and responding to the scope is straightforward, and the competition is likely to be determined primarily by the terms of the commercial bids.
<ul style="list-style-type: none"> • Can involve a draft RFP phase where bidders' input on the proposed project scope and specification is obtained to help the Contracting Authority finalize the RFP. 	<ul style="list-style-type: none"> • Does not require prior bidder input on proposed scope.
<ul style="list-style-type: none"> • If the two envelopes process is run as two consecutive bid stages (during the second formal stage), bidders may be permitted to revise or clarify technical proposals submitted as part of the technical bid qualification process. This will not happen where the two envelopes are required to be submitted at the same time. 	<ul style="list-style-type: none"> • Bidders will not be able to revise technical bids as the whole bid is submitted at the same time.
<ul style="list-style-type: none"> • Further negotiation may be permitted. Can include a competitive dialogue/negotiation phase after bid submission and evaluation to improve bid terms if appropriate, but subject to maintaining fairness and transparency amongst bidders (so likely to lead to a BAFO). 	<ul style="list-style-type: none"> • Negotiation/competitive dialogue after bid submission not envisaged.
<ul style="list-style-type: none"> • More bid phases are likely – e.g. a clarification phase is likely after bid submission; and BAFO stage enabling certain terms to be revised. 	<ul style="list-style-type: none"> • Fewer bid phases envisaged – bid clarification may be used but may not be appropriate or necessary. • BAFO stage less likely.
<ul style="list-style-type: none"> • Slower timeframe (from RFQ to award). 	<ul style="list-style-type: none"> • Quicker timeframe (from RFP to award).

6.3.2 Multi-Stage Bidding Procedure

(a) Pre-qualification


In the first formal stage, the Contracting Authority may issue an RFQ to carry out an initial assessment of the capacity of potential bidders (e.g. legal, technical and financial capacity). The advantage of this preliminary assessment is to enable the Contracting Authority to efficiently identify suitable bidders and eliminate non-qualifying bidders without spending cost and time reviewing bids that are unlikely to meet these essential qualification criteria. This is sometimes in the form of a questionnaire (a **RFQ**) so that bidders respond in a more uniform way which is more efficient for the Contracting Authority to evaluate. Qualifying bidders may sometimes be ranked according to pre-qualification evaluation criteria if only a certain number can be taken forward for the RFP phase. The Contracting Authority should also ensure that potential bidders are clear as to the project objectives and that the shortlisting/ranking criteria is made known to bidders upfront in the relevant Tender Documents.

Benchmark Examples

Many jurisdictions including **Colombia, India** and **Mexico** permit issuance of an RFP to a closed group of bidders that have met pre-qualification requirements through a RFQ.

(b) RFP issued to pre-qualified bidders: detailed response submitted

In a second formal stage, the Contracting Authority issues an RFP to the pre-qualified bidders, who will prepare comprehensive technical and commercial (including financial and legal) proposals. It is good practice to include template contractual documentation (e.g. the PPP Contract and other key PPP Agreements) as part of the RFP documentation. The process is outlined below:

1. Bidders should be required to submit their proposals made up of two parts or "envelopes":
 - envelope one contains the technical proposal and legal qualifications (and any further related qualification information requested); and
 - envelope two contains the commercial proposal (and any further related qualification information requested).
2. The bidding procedure in the RFP should identify the process for submitting and opening each envelope, with the commercial envelope usually to be opened in public.
3. As the technical proposal is so important in terms of project delivery and a key part of the VFM assessment, its evaluation should not be swayed by pricing. To achieve this, it is good practice for the Contracting Authority to open all technical proposals first (envelope one), while the commercial proposals (envelope two) remain sealed. The Contracting Authority will check if each bidder and its technical proposal satisfies minimum qualification criteria and, if so, will proceed to evaluate the merits of the technical proposal. The Contracting Authority will also check if the bidder meets the legal qualification criteria. The Contracting Authority then assesses the bids on a *pass or fail basis*. Proposals (and bidders) which do not satisfy qualification criteria will not be evaluated and their commercial proposals will not be opened. Sometimes this stage can be conducted as two consecutive envelope submissions with the technical bid able to be discussed and revised as part of the qualification process and only qualifying bids will then be invited to submit the corresponding commercial bid. Revisions are not permitted where both envelopes are required to be submitted at the same time. 
4. The Contracting Authority then publicly opens the commercial proposals (envelope two) of those bidders with qualifying technical and legal proposals. If minimum commercial qualification criteria have been met, it will proceed to evaluate the commercial proposals (including pricing). The Internal Evaluation Committee will rank such proposals.

This method is considered best practice as it facilitates a fair and efficient evaluation process for the Contracting Authority, enabling it to evaluate the merits of the technical and commercial aspects of a bidder's proposal

independently of each other. To allow flexibility (e.g. if the procurement process needs to be run swiftly) governments may want the process to allow for evaluation of both qualifying envelopes to take place at the same time, provided that the outcomes are kept confidential until evaluation of each has been completed.

As regards evaluation, an efficient approach is (i) to use "pass or fail" (i.e. without scoring or ranking) for envelope one containing the technical proposal; and (ii) to rank the envelope two bids containing the commercial proposals. This is considered best practice as it allows the Contracting Authority to meet its minimum requirements at the best price the market can offer, while minimizing subjectivity in the evaluation of technical proposals. Strategically, it also facilitates explaining the outcome of evaluation to all stakeholders, including politicians and the general public.

(c) Competitive Dialogue and/or BAFO

Following bid submissions, the bid process may permit (i) clarification meetings; (ii) a competitive dialogue and negotiation with bidders who have submitted qualifying bids (i.e. an opportunity to comment and negotiate on the proposals simultaneously and in a transparent manner with each bidder); and/or (iii) a best and final offer (**BAFO**) phase, being an additional step at the final stages of the evaluation process inviting all or a shortlist of bidders who have submitted qualifying bids to submit their best and final offers (which may include a reduction in price and/or revision to other terms).

The aim of this stage is to improve the quality of the bid submissions and deliver better outcomes by facilitating clear and transparent communication between the bidders and the Contracting Authority.

Allowing competitive dialogue and negotiation may bring certain risks as regards fairness and transparency amongst bidders if it leads directly to the selection of a preferred bidder. Ways to address this include limiting dialogue to certain bid elements or requiring a BAFO stage at the end of the dialogue process so that all shortlisted bidders have the opportunity to bid.



Benchmark Examples

It is usually good practice for PPP procurement legislation to permit a range of strategies in multi-stage tendering (e.g. competitive dialogue and a BAFO) to enable each Contracting Authority to use those that are best suited for its particular project. Countries are increasingly reflecting this; for example, **Zambia** amended its PPP legislation in 2018 to make a competitive dialogue and a BAFO available.⁶³

South Africa is another jurisdiction that explicitly permits and regulates the use of BAFOs. However this is addressed in secondary legal instruments issued by its central PPP unit.⁶⁴

(d) Preferred bidder

On completion of the evaluation process, the bids will be ranked and a preferred bidder will be identified by the Contracting Authority (and confirmed by its Internal Evaluation Committee). Once the preferred bidder is approved (taking into account the approach adopted under [Chapter 5 Approvals, Section 5.3.2](#)), the Contracting Authority will finalize any outstanding negotiations and documentation with the preferred bidder (within the permitted parameters of the tendering process) within a reasonable timeframe. No material changes to the project scope or to any terms identified as non-negotiable in the Tender Documents will be permitted. The preferred bidder may be required to submit a bid bond to ensure that it will be required to enter into the PPP Agreement in accordance with its accepted final offer.

If the Contracting Authority is unable to finalize negotiations with the preferred bidder within a reasonable timeframe, it should have the right to re-engage with previously shortlisted bidders in the order of their evaluation ranking. If it is still unable to finalize the project with a bidder, it should modify or cancel the tender.

⁶³Zambia – Act No. 9 of 2018 amending the Public-Private Partnership Act (2009), Article 34.

⁶⁴Republic of South Africa. National Treasury PPP Unit. 2004. [Public Private Partnership Manual: National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act.](#)

(e) Contract award


Once negotiations are finalized, the final stage is to proceed to formal contract award/signature.

The Contracting Authority (typically via its Internal Evaluation Committee) makes a recommendation to award the contract to the preferred bidder. The recommendation will be formally shared with the Ministry of Finance (or other awarding body) for validation and approval (taking into account the approach adopted under [Chapter 5 Approvals, Section 5.3.2](#)) and subsequent announcement. Award/signing will take place after a specified period of time has elapsed to allow for any challenges by other bidders. [See Section 6.4.4](#)).

[See Sections 6.6.3 – 6.6.5 \(Articles 6C – 6E\)](#) for sample legislative drafting in respect of the process of evaluating bidders, options at the disposal of the Contracting Authority for negotiating with bidders, and announcement of a preferred bidder and award.

[See Chapters 3 Institutional Framework and 5 Approvals](#) for a further discussion about the institutions involved in the decision-making process outlined above.

6.3.3 Single-Stage Bidding Procedure

- (a) A single-stage procurement process is an open tender that permits any interested parties to submit bids in response to the criteria set out in the Tender Documents. A limited, preliminary compliance check is usually carried out to ensure that interested bidders meet standard qualification criteria (e.g. limited to the capacity of the bidder and involving evaluation of their constitutional documents).
- (b) As with the multi-stage procedure, bidders are usually required to simultaneously submit their proposal in two envelopes (technical and commercial) and the subsequent process is broadly as outlined in [Section 6.3.2\(b\) – \(e\)](#), except that post-bid negotiation is typically not permitted and a BAFO stage may be less likely.
- (c) In accordance with the same process outlined above in [Section 6.3.2\(e\)](#), the Contracting Authority will recommend award of the tender based on an overall evaluation of the technical and commercial proposals. The evaluation criteria may be weighted towards financial criteria if this procedure has been selected because the technical solution is straightforward and the commercial proposal is the expected determining factor. 
- (d) While this form of procedure is for situations where a single bid round should be sufficient and only limited (if any) clarification/negotiation post bids should be needed, the procedure should also allow for flexibility and a BAFO round may be introduced to achieve a more competitive outcome for the Contracting Authority.

Benchmark Examples

The state of **West Bengal in India** adopts a single stage (with simultaneous submissions of technical and financial envelopes) procedure as the standard procurement policy.⁶⁵

Similarly, in the **Philippines**, the standalone PPP law prescribes that procurement for PPP projects should use the two envelopes method which are submitted simultaneously in a single-stage.⁶⁶

6.3.4 Secondary Procurement Methods

PPP procurement legislation should identify competitive bidding as the default process for tendering PPPs, but there may be exceptional circumstances that require alternative and expedited procedures. The key alternatives are described below.

⁶⁵[Asian Development Bank, 2006. Workshop Report – Facilitating Public-Private Partnership for Accelerated Infrastructure Development in India.](#)

⁶⁶[The Philippines – The Philippine Amended BOT Law R.A. 7718 and its 2012 Revised Implementing Rules and Regulations.](#) Section 5.7.

6.3.4.1 Single-source contracting

It may be appropriate for legislation regarding PPP procurement to permit the government to directly solicit a particular contractor or supplier where the relevant project is: (a) urgent and it would not be feasible to procure it using the standard competitive bidding process due to time constraints; (b) requires technology which is protected and not generally available in the market; and/or (c) is highly sensitive (e.g. relates to public interest or national security concerns). As this procedure will not involve any competitive element, its disadvantages may be that the bidder has more leverage, may submit a highly priced bid and may not be willing to negotiate the terms.

Therefore, any regime for such projects should be well defined (including as regards applicable tender and evaluation requirements), limited and clearly stated to be an exception to the standard procurement process. In particular, unless there are particular time or national security concerns which dictate otherwise, single-source contracting should be: (i) subject to public notification requirements, so that market participants are aware that the process is being used; and (ii) allow for standstill periods, both at the time the decision is made to use single-source contracting and at the award stage, to allow other market participants to challenge the decision to use the process. [See Section 6.6.1, Article 6A.1\(c\)](#) for sample legislative drafting in respect of single-source contracting.



6.3.4.2 Unsolicited Proposals (USPs)

As mentioned in [Chapter 4 Project Origination and Appraisal](#), a private sector party may, on its own initiative, approach a Government Entity to suggest a PPP project (known as a USP). The ability to present USPs may encourage private sector parties to present innovative ideas or implementation methods for PPP projects. However, allowing USPs may also create challenges for governments in terms of (i) appraisal or (ii) pressure from the private sector (for example, (a) to agree to a proposed project within a short timeframe that does not allow for full consideration of all the issues, and/or (b) to use relationship pressures if the relevant private party sector has an existing strategic role on other projects in the country). Evidence shows that USPs create fiscal risk and governance issues⁶⁷ and do not generally achieve the best VFM unless these projects are subsequently tendered.⁶⁸

A government must carefully consider its policy concerning USPs and whether the legislation concerning PPP procurement should encourage or restrict USPs. [See Chapter 4 Project Origination and Appraisal, Section 4.3.2](#) for further detail on this point.


Considerations for developing policy on USPs	
When to restrict USPs?	When to encourage USPs?
<ul style="list-style-type: none"> • If the government has a clear idea of its infrastructure requirements and can formulate its technical requirements. • If the government has limited experience or capabilities to review or evaluate USPs. • Where there are historically active private sector parties in the country that may place pressure on government officials to pursue new initiatives directly, rather than through a competitive process. 	<ul style="list-style-type: none"> • If the government is interested in attracting proposals for new and innovative technologies for which it is unable to formulate a detailed description.
How to restrict USPs?	How to encourage USPs?
<ul style="list-style-type: none"> • Do not introduce incentives to USP proponents. 	<ul style="list-style-type: none"> • Introduce incentives for USP proponents where those USPs are accepted by the government. See subparagraph (d) below.

⁶⁷[The World Bank and Public-Private Infrastructure Advisory Facility, 2018. Policy Guidelines For Managing Unsolicited Proposals In Infrastructure Projects, Volume 1, Main Findings & Recommendations.](#)

⁶⁸[The World Bank, 2020. Benchmarking Infrastructure Development 2020: Assessing Regulatory Quality to Prepare, Procure, and Manage PPPs and Traditional Public Investment in Infrastructure Projects](#) (pg. 71).

Considerations for developing policy on USPs	
When to restrict USPs?	When to encourage USPs?
<ul style="list-style-type: none"> Strictly regulate the admissibility criteria for USPs received. Make any USPs that are accepted subject to a competitive bidding process. 	

It is important to explicitly regulate whether USPs are prohibited or allowed to avoid any uncertainty about whether PPP projects can be procured by this method. In the limited circumstances where it may be appropriate for a PPP legal framework to allow USPs, it is critical to ensure that they cannot be used as means to bypass the procurement processes that would apply if the project had been identified by a Contracting Authority. A government can adopt the following strategies through legislation to ensure that any USP submitted is comprehensive and that any PPP project initiated through USPs remains competitive:

- admissibility criteria for USPs received should be strictly defined by law;
- if the government receives a USP that it is interested in pursuing, the government must convert the USP to a competitive tender to give other bidders an opportunity to compete with the initial USP proponent;
- while the USP will originate with the private sector – and therefore public sector identification processes may not apply – the USP should still go through the same screening and appraisal process as publicly originated PPPs, as further described in [Chapter 4 Project Origination and Appraisal, Section 4.4](#); and 
- to encourage the private sector to submit fully-formed USPs (including feasibility assessments by the USP proponent), the government can (but does not have to) allow incentive mechanisms. The extent to which it will do so will depend on its appetite for encouraging USPs. Any incentive should only apply if the government decides to progress with the USP and converts it into a competitive tender. Government options are:

Type of incentive	Recommended practice?
<ul style="list-style-type: none"> No incentive mechanism (with or without the compensation of USP-related costs). 	✓ Yes: If the USP proponent is not selected, a right to recover some costs of proposing the USP may apply.
<ul style="list-style-type: none"> Default short-listing of the USP proponent during the RFQ or RFP stage. 	✓ Yes: This is an effective way to reward the USP proponent without impacting the Contracting Authority's ability to evaluate bidders.
<ul style="list-style-type: none"> A bonus mechanism awarded to the USP proponent in the evaluation of bids. 	× No: The Contracting Authority may become bound to select an offer which is inferior in quality or price, which negatively impacts VFM.
<ul style="list-style-type: none"> A "right to match" awarded to the USP proponent, permitting them to match the terms of the most competitive bid. 	× No: This can undermine the objectives of fair and competitive procurement

See [Section 6.6.8, Article 6H](#) for sample legislative drafting regulating USPs.

6.4 Additional considerations

In this Section, we describe practical considerations and regimes that should be included in PPP procurement legislation to support the implementation of the principles discussed in [Section 6.2](#), and to provide a structure and safeguards for the competitive bidding process described in [Section 6.3](#).

6.4.1 Participation

Legislation should set out or contemplate certain broad criteria with respect to the identity of potential bidders. It should permit local and international private sector entities to bid individually or in consortia. Potential benefits of consortia bidders include: (i) enabling companies to consolidate their competencies to achieve the aim of the PPP project; and (ii) creating partnerships between international and local companies that could develop local private sector capabilities by engaging with experienced international firms. *See Section 6.6.1, Article 6A.2* for sample legislative drafting in this respect.

Governments are generally discouraged from requiring bids to involve local entities in a consortium unless there is a compelling reason to do so. Such involvement may not improve the quality of the bids received and may potentially have an adverse effect on market interest and competition. Requirements for a certain amount of local content in the form of employment and suppliers is likely to be a better route to boost local involvement. Generally, the Private Partner will be established as a locally registered entity (although using a local entity should not be a requirement if company incorporation is unnecessarily complex or time-consuming in the relevant jurisdiction). *See Chapter 7 PPP Agreements, Sections 7.3.2 and 7.6.3, Article 7C.*

Consideration should also be given to whether Government Entities (and government-related entities) can bid for PPP projects and how that may need to be addressed by PPP legislation (or the legal framework). This is not typical but may be relevant in jurisdictions where certain public sector entities are structured in a way that enables them to have the financial and technical capability to take on PPP projects themselves (for example, certain state-owned entities, agencies or enterprises, particularly if the PPP relates primarily to service provision as opposed to construction). Analysis of other procurement legislation will also be relevant as this can have a wide definition of (and application to) Government Entities (and government-related entities). *See Chapter 3 Institutional Framework, Section 3.3.1* with respect to state-owned entities as Contracting Authorities.

Benchmark Examples		
<p>The Abu Dhabi procurement framework sets a minimum threshold project value of AED500 million below which certain government-related entities are not allowed to participate as bidders. This is to encourage private sector parties to participate in competitions which might otherwise be dominated by such entities.</p>	<p>In France, Caisse des Dépôts et Consignations and its subsidiaries represent a public group that serves the public interest and economic development of the country and carries out functions in the public interest that support public policies pursued by the State and local authorities. It can also carry out competitive activities. It is closely supervised and guaranteed by the legislative authorities.⁶⁹</p>	<p>In South Africa, the government adopted a policy of broad-based black economic empowerment (B-BBEE) which is part of the country's overall growth strategy. B-BBEE seeks to redress the stifling economic effects of apartheid by promoting black economic empowerment and participation in the South African economy. The determination of a company's B-BBEE rating takes into account factors such as equity ownership, management control, skills development, enterprise development and socio-economic development. Government departments and organs of state take into account B-BBEE when procuring goods and services (including PPPs).⁷⁰</p>

⁶⁹[Caisse des Depots Groupes, n.d. Our tasks.](#)

⁷⁰[Republic of South Africa, Department of Trade, Industry and Competition, 2014. Broad-Based Black Economic Empowerment.](#)

The potential participation of Government Entities (and government-related entities) is not contemplated in the sample legislative drafting in [Section 6.6](#) and will require careful consideration of additional issues such as maintaining a fair competition, conflicts of interest (e.g. in the evaluation process), financial risk allocation, creditworthiness and approval of participation and ultimate contract award.

Separately, structures involving Government Entities (and government-related entities) having an equity stake in the project company will similarly require specific considerations and treatment. [See also Chapter 7 PPP Agreements, Section 7.4.4\(d\)](#).

6.4.2 Transparent and credible procurement

Legislative provisions for PPP procurement must require the Contracting Authority to comply with the following responsibilities to enable a transparent and credible procurement process:

- (a) publish information relating to the procurement process (e.g. notice of tender, Tender Documents and evaluation criteria) in accordance with specified time periods and in a manner that is accessible (e.g. through a known website and mass media) to all potential bidders and participants;
- (b) publish a robust and transparent evaluation process and a clear methodology for evaluating and ranking various aspects of the bids received;
- (c) publish any queries, responses and additional information to all active bidders in a timely manner for fairness and transparency. This includes any pre-bid information, clarifications made, additional documentation circulated or availability of any site visits;
- (d) make any meeting and site visit opportunities available to all active bidders on an equal basis, both in the pre-bid and tender phases;
- (e) establish an Internal Evaluation Committee comprising qualified and impartial members who will review the Contracting Authority project team's evaluation of bids received and make recommendations about selection and award; and
- (f) establish a timetable for the lifecycle of the bid process.

The legal framework should also consider requirements for publication of the signed PPP Agreements, in particular the PPP Contract, consistent with existing government disclosure practice. Some countries, such as the UK, require copies of government contracts (redacted of commercially sensitive information as appropriate) to be placed in government digital libraries. The position regarding subsequent amendments should also be considered so that these are disclosed on the same basis and the published PPP Agreements kept current.

[See Section 6.6.2, Article 6B](#) for sample legislative drafting of key provisions relating to the transparency and disclosure of the PPP procurement procedure.

6.4.3 Modifying or cancelling bids

The Contracting Authority should be able to make minor modifications to the tender, and it is good practice for the Tender Documents to reserve its right to do so. Significant modifications will typically require the tender process to be cancelled and restarted.

PPP procurement legislation should permit the Contracting Authority to cancel (or in some cases, modify) the tender in particular circumstances, such as where: (a) no compliant proposals are received; (b) only one compliant proposal is received which is not sufficiently financially competitive by reference to the evaluation parameters; (c) a change to the project objectives/scale of the project is required; (d) adverse results emerge during ongoing appraisal with respect to the criteria set out in [Chapter 4 Project Origination and Appraisal, Section 4.4](#); (e) it is unable to finalize the terms of the project with a preferred bidder; (f) bribery, brokerage, bid rigging or fraud (or similar events) occurs; (g) it becomes aware it has failed to comply with the law or its own tender process; or (h) it is so directed by the complaints panel as outlined in [Section 6.4.4](#).

In addition, governments should consider whether it would be beneficial to include a discretionary right for the Contracting Authority to cancel or substantially modify a tender process which has begun. In civil law jurisdictions, Contracting Authorities often have the right to do so under general public law principles, in which case, procurement

legislation does not have to address this issue specifically. In all cases, the Tender Documents should clearly indicate if the Contracting Authority will have such rights. The following factors should be considered:

Key considerations regarding the Contracting Authority's discretionary right to cancel/substantially modify a tender	
Advantages	Disadvantages
<ul style="list-style-type: none"> Flexibility for the Contracting Authority Opportunity to improve tender terms or specifications if there is low interest from bidders. Negative effects will lessen over time if it becomes clear that the right is exercised infrequently. 	<ul style="list-style-type: none"> Bidders may consider the procurement process unreliable and be deterred from participating. Will likely preclude the participation of bidders lacking the financial ability to absorb bid costs, thereby reducing the bidder pool and competition. May adversely impact market confidence, especially if the country does not have prior PPP experience. Can create lack of clarity on the procurement process and risk of seeming unfair if conditions are seen to change to favor certain bidders. May encourage Contracting Authorities to proceed with tenders they have not fully assessed if they know they can cancel them. Could lead to a reduction in quality of bids, as bidders try to minimize their bid costs.

The Contracting Authority must be required to communicate any cancellation or modification of the tender clearly and in a transparent manner to all bidders (as further discussed in [Section 6.4.2](#)).

See [Section 6.6.6, Article 6F](#) for sample legislative drafting in respect of the Contracting Authority's right to cancel or modify tenders.

6.4.4 Challenges by bidders

To maintain transparency and accountability of the Contracting Authority throughout the PPP procurement process, legislation setting out PPP procurement measures should require the following:

- (a) **Complaints mechanism:** The Contracting Authority should respond to any concerns raised by bidders during the tender process. Legislation should prescribe a complaints mechanism that: (i) identifies the nature of complaints or appeals that may be raised by bidders (e.g. limited to abuse of process or non-compliance with procurement procedure); and (ii) establishes an impartial body (a "complaints panel") to process and determine such complaints or appeals. Governments should consider carefully how to ensure the panel has the appropriate expertise and independence to reassure Private Partners of the panel's capability and impartiality.
- (b) **Standstill process:** The Contracting Authority should inform all shortlisted bidders when a preferred bidder is selected and before award of the contract is made. Legislation may prescribe: (i) a standstill period, being a period of time between identifying who should be awarded the contract at the end of the final evaluation process and before formal award (i.e. signing) of the contract (e.g. [see Section 6.3.2\(e\)](#)), during which other bidders can voice any concerns; and/or (ii) a judicial review or final appeal process to settle any disputes with shortlisted bidders, as appropriate in that jurisdiction. Most countries have a complaints review system, but a limited number have a clear timeline or a standstill period for the review process. Introducing these enhances the efficiency of the complaints process.


Benchmark Examples

Zimbabwe⁷¹ and **Benin**⁷² have introduced standstill periods as part of the procurement process (corresponding to [Section 6.4.4\(b\)](#)) which run from the announcement of the intention to appoint a preferred bidder.

See [Section 6.6.7, Article 6G](#) for sample legislative drafting setting out a complaints mechanism and the manner in which this can be addressed with bidders.

6.4.5 Ongoing verification with respect to appraisal criteria

As discussed in [Section 6.2.3](#), the following parameters will promote the implementation of the outcomes of the appraisal process described in [Chapter 4 Project Origination and Appraisal](#) during the procurement process and the core requirements can be set out in PPP legislation:

- (a) As a minimum, the RFP or RFQ should identify the parameters of the assessment and evaluation criteria, including:
 - (i) identifying the qualification criteria;
 - (ii) identifying an appropriate methodology for assessing quantitative and qualitative aspects of submissions received; and
 - (iii) binding the evaluating body to compare and evaluate submissions received in accordance with the evaluation criteria and the evaluation process set out in the relevant Tender Document.
- (b) To promote green resilient and inclusive infrastructure, bids can be required to be assessed against relevant criteria, with project-specific detail to be set out in the Tender Documents (such as requiring bidders' responses to the environmental impact assessment carried out in respect of the project and how to minimize such impact). 
- (c) On completion of the evaluation process, the Contracting Authority should not be able to award the project until it obtains the formal approval of the Ministry of Finance (or other relevant approving body). See [Chapter 5 Approvals](#) for a further discussion on integrating the approval process and [Section 6.3.2\(e\)](#).

The project documentation and the detailed evaluation criteria and methodology will be developed on a project-by-project basis (typically based on secondary instrument policy or guidance rather than in primary legislation), and be set out in the Tender Documents.

6.5 Toolkit for implementing procurement framework

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

6.5.1 Checklist of considerations

In determining the appropriate PPP legal framework for implementing the procurement processes and considerations outlined in this Chapter, the following checklist should be considered:

⁷¹Zimbabwe – Public Procurement and Disposal of Public Assets Act (No 5 of 2017), Article 55.

⁷²Benin – Partenariat Public-Privé (Loi n°2016-24 du 11 octobre 2016), Article 41.

Processes	<ul style="list-style-type: none"> → What procurement process options are appropriate? → Are there any reasons not to make the multi-stage competitive process the default approach? → Who should be eligible to bid? → Should USPs be permitted? If so, within what parameters? → What powers to modify/cancel a process are appropriate? → What rights to challenge a process are appropriate?
Requirements	<ul style="list-style-type: none"> → What are the minimum process requirements to set out in the primary instrument for each stage? → Consider the detailed aspects – what is the suitable secondary instrument for these? How should they be developed and promulgated?
Obligations	<ul style="list-style-type: none"> → What obligations need to be set out in the primary instrument for each stage? → What is the suitable secondary instrument for guidance/policy in relation to these?
Existing systems	<ul style="list-style-type: none"> → How will the processes dovetail with existing laws and processes? → What adaptations are needed?

6.5.2 Summary of appropriate implementation instruments

The Table below summarizes this Chapter’s guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Procurement	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Available procurement procedures: <ul style="list-style-type: none"> • e.g. multi-stage and expedited single-stage (and, if applicable, single source), specifying default process; and • minimum required criteria (in outline). • Grant of authority/responsibility to relevant Government Entity/ies: <ul style="list-style-type: none"> • to provide more detail on above outlined matters and/or delegate powers as appropriate; and • to approve selected procedure. <p><i>[To tie in with existing legal framework.]</i></p>	<p>Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outlined matters as further described below. (This may include procedures, evaluation criteria and methodology – which will also be included in the Tender Documents.)</p> <p>Guidance on relevant matters.</p>
<ul style="list-style-type: none"> • Eligible participants (consortia, public sector etc.). 	<p>Guidance on relevant matters.</p>
<ul style="list-style-type: none"> • Obligations on Contracting Authority in relation to whole process – as detailed below. 	

Procurement	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Minimum requirements for establishing Contracting Authority evaluation team process and entities (in outline) <i>(unless left to delegated powers)</i>. 	Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters.
<ul style="list-style-type: none"> • Transparency and disclosure requirements and Contracting Authority compliance obligations to ensure fair and transparent procurement (content, timing, medium etc.) (in detail/outline).* <p><i>[To tie in with existing laws.]</i></p>	Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters.*
<ul style="list-style-type: none"> • Pre-qualification process minimum requirements (request content, submission and review) (in outline).* • Obligation on Contracting Authority in relation to review process. 	Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters.*
<ul style="list-style-type: none"> • Request for proposal process: minimum requirements (request content, submission and approval) (in outline).* • Core Contracting Authority obligations in relation to process and bid evaluation (in outline).* • Grant of authority/responsibility to relevant Government Entity/ies to review/approve/suggest BAFO. <i>[Tie in with Approvals – see Chapter 5.]</i> 	Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters.*
<ul style="list-style-type: none"> • Preferred bidder process: minimum core requirements and obligations.* • Grant of authority/responsibility to relevant Government Entity/ies for selection, approval and announcement, contract award and timing. 	Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters.*
<ul style="list-style-type: none"> • Power to modify or cancel tender process (and process): <ul style="list-style-type: none"> • Option 1: broadly unrestricted; <p>OR</p> <ul style="list-style-type: none"> • Option 2: restricted – eligible circumstances listed. • Right to challenge tender process: <ul style="list-style-type: none"> • Option 1: – detailed provisions setting out process and grounds on which a challenge can be raised; <p>OR</p> 	Guidance on relevant matters.
	Guidance on relevant matters.

Procurement	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Option 2: – no detail on process (only for use if a relevant complaints procedure is set out in other legislation). 	
<ul style="list-style-type: none"> • Right to submit unsolicited proposals* and: <ul style="list-style-type: none"> • associated obligations on Government Entity/ies and private proponent; • core process requirements (in sufficient outline); • ability to provide incentives (in outline) (or detail of incentives). <i>[Consider most appropriate instrument to address incentive mechanisms.]</i> 	Implementation of responsibilities/delegated authority via relevant instruments e.g. to provide further detail of outline matters; Guidance on relevant matters.*
<ul style="list-style-type: none"> • *Grant of authority/responsibility to relevant Government Entity/ies to provide more detail on all above outlined matters and/or delegate powers as appropriate. <i>[Tie in with PPP Unit responsibilities.]</i> 	*Implementation of responsibilities/delegated authority via relevant instruments – e.g. to provide further detail of outline matters; Guidance on relevant matters. <i>[Tie in with PPP Unit responsibilities.]</i>

6.6 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 6.5.2](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

6.6.1 Procurement Procedure (and Eligible Bidders) – Article 6A

1. The permitted procurement processes for PPP Projects shall consist of the following:
 - (a) a multi-stage tender process, pursuant to which interested bidders will be selected through a prequalification round and the subsequent Tender Documents will be issued to selected pre-qualified bidders. This will be the ordinary method of procurement that shall be followed unless Article 6A.1(b) [or Article 6A.1 (c)] applies; [and]
 - (b) an expedited process, which will consist of a single tender stage (with no or limited pre-qualification round) to be used only in circumstances where (in the reasonable opinion of the Contracting Authority and *[insert independent third party entity]*): (i) there is no benefit in pre-qualifying bidders, due to there only being a limited number of capable bidders in the market, or (ii) there is no or limited technical complexity to the Project such that the competition is expected to be primarily determined by the commercial terms submitted; and
 - (c) a single-source appointment, pursuant to which the relevant Contracting Authority may engage in direct negotiations with one or more bidders, to be used only in circumstances where (in the reasonable opinion of the Contracting Authority and *[insert independent third party entity]*) there is:
 - (i) **an urgent need to deliver the asset or service such that it would not be feasible to procure the Project through a tender process as described in Article 6A.1(a) or (b) above;**
 - (ii) **there is only one prospective Private Partner in the market that is capable of delivering the Project;**
 - (iii) **the Project has sensitive elements relating to national defense, national security or which involve protection of the *[insert country]*'s secrets; or**
 - (iv) **there are other compelling reasons of public interest.**
- The choice of procedure for a Project must in each case have been approved by *[insert reference to relevant approving authority – this should be the entities providing the In-principle approval (see Article 5A (Section 5.5.1))]*.
2. A consortium comprising multiple local or international private sector entities or organizations (however comprised) may participate in tenders.
 3. [Government Entities are not permitted to participate in tenders as bidders unless *[specify criteria/particular Government Entities]*.]

It is advisable for an independent authority (such as a PPP Unit) to approve use of this

Process (c) is optional and will depend on whether the government wants to permit direct

Article 6A.1(c)(iii) should be clearly defined to mean specific sensitive military/security purposes. The drafting should not allow a loophole for projects lacking the same sensitivities to avoid competitive procurement, whatever sector they are in (e.g. military accommodation projects, "energy security" projects, etc.) Relevant safeguards for single-source procurements should still apply. See Article 6A.5.

To be included and adapted if needed, with appropriately defined terms. See Section 6.4.1.

4. [The Contracting Authority will establish an internal evaluation committee for the Project which will supervise and determine the qualification and selection of bidders at each stage of the procurement process ("**Internal Evaluation Committee**").]
5. [If a PPP Project is procured pursuant to the single-source contracting procedure specified in Article 6A.1(c), the Contracting Authority shall: (1) make public notifications regarding such PPP Project and specify that the single-source contracting is being used; and (2) allow for a reasonable standstill period at the time of the decision to appoint a contractor.]

This is an internal supervisory committee (see Section 6.3.1) – its composition may be set out in guidance from the PPP Unit. If this provision is included in legislation, related drafting and references to the Contracting Authority may need to be adapted. If higher awards bodies are to be required, drafting will similarly need to be adapted.

Add applicable requirements/ safeguards as regards evaluation and be clear which other provisions of the law apply.

6.6.2 Transparent and credible procurement – Article 6B

1. The tender process for PPP Projects shall be subject to the principles of transparency, freedom of competition and equal opportunity and carried out in accordance with the rules and procedures provided for under *[refer to applicable laws]*. The Contracting Authority must comply with this law and the requirements set out in the Tender Documents.
2. In order to maintain transparency and equality, the relevant Contracting Authority shall make the following information in respect of a PPP Project available online on a public web-based platform and in a timely manner appropriate to the type of information and via *[insert any other method of publishing the information, if needed – e.g. specific government portal or gazette accessible by the public, or digital library]*, to the extent consistent with reasonable confidentiality or sensitivity restrictions:
 - (a) a tender notice prior to the commencement of the procurement process for the PPP Project, including a timeline of the anticipated procurement process and the qualification criteria for bidders;
 - (b) Tender Documents including the bidder evaluation criteria;
 - (c) a summary of all major decisions relating to the approval of the PPP Project, the procurement process and the applicable evaluation criteria;
 - (d) information about any modification or cancellation of the procurement process;
 - (e) information relating to the selection of the Private Partner(s), including notice of preferred bidder, notice of award (together with the grounds for selection and a summary of the essential terms of the PPP Contract (including as a minimum, the price per unit, term of the agreement and project parties)); and
 - (f) the PPP Contract (and other PPP Agreements) and subsequent amendments, redacted of such (i) commercially sensitive information and (ii) personal information *[in compliance with [insert applicable data protection laws], as agreed by the parties to the relevant agreements]*.
3. During the procurement process for a PPP Project, the relevant Contracting Authority shall publish any additional information about the Project in a timely manner (and at the same time) to all participating bidders, including any clarifications made or responses to queries, additional documentation circulated or any site visits.

May not need last sentence if covered adequately elsewhere/implicit but note that it ties into avenues for complaints etc.

Time periods will depend on the item – e.g. Tender Documents should be uploaded straightaway, PPP Contract/amendments should be published within e.g. 30 days. Adapt as necessary to provide for authority to issue detailed regulations.

The PPP Contract should include provisions facilitating disclosure and transparency in compliance with applicable laws – see Section 6.4.2 and Chapter 10 Confidentiality, Disclosure and Transparency in the [World Bank's Guidance on PPP Contractual](#)

6.6.3 Pre-qualification of Bidders – Article 6C

1. Where pre-qualification is required (or considered appropriate) in accordance with Articles 6A.1(a) or (b), the Contracting Authority will conduct a pre-qualification process in accordance with this Article prior to issuance of a request for proposal.
2. The Contracting Authority will issue a request for qualification to potential bidders which shall include the PPP Project scope, timetable, general contractual risk allocation, bidder qualification requirements (including technical qualifications and experience, and evidence of legal and financial capacity) and deadline for and means of response submission. Each potential bidder who wants to be considered for pre-qualification must submit a response in accordance with the terms of the request.
3. The Contracting Authority will review and assess the responses submitted in accordance with the qualification requirements and determine which bidders are pre-qualified to proceed to the next stage of the procurement process.

See Section 6.3.1 and Article 6A.4 for possible role of the Internal Evaluation Committee.

6.6.4 Evaluation of Bid – Article 6D

1. Following pre-qualification in accordance with Article 6C, or where no pre-qualification is considered appropriate in accordance with Article 6A.1(b), the Contracting Authority will issue a request for proposal (i) in the case of Article 6C, limited to all pre-qualified bidders, or (ii) in all other cases, to which all interested bidders may respond. Each request for proposal issued by a Contracting Authority shall include:
 - (a) general information about the Project, including minimum project requirements, output specification, timing of key milestones, and environmental and social requirements *[ensure this captures climate change/sustainability and resilience] [including local content requirements if applicable]*;
 - (b) key terms (as a minimum) of the PPP Contract and other PPP Agreements, or a full draft of the PPP Contract and other PPP Agreements, with a clear statement about which terms are non-negotiable;
 - (c) a summary of the applicable bid process and timeline (specifying the deadline for and means of bid submission), including the process for and availability of dialogue, clarifications and site visits before and after bid submission;
 - (d) clear and transparent evaluation criteria (including minimum qualification criteria); and
 - (e) bidder qualification requirements (including technical qualifications and experience, and evidence of legal and financial capacity) to the extent not already provided and/or to confirm the current validity of the pre-qualification response pursuant to Article 6C.
2. Prior to bid submission, the Contracting Authority shall respond to clarification requests received from participating bidders in a timely and transparent manner and may convene meetings, site visits or dialogues with participating bidders. The Contracting Authority shall share clarifications and additional information in a timely manner (and at the same time) with all bidders, and all participating bidders shall have the right to attend any meetings, site visits or dialogues on a fair and equal basis. Following bid submission, the Contracting Authority may conduct clarification [and negotiation/competitive dialogue] meetings with bidders on the basis set out in the request for proposal in an equal and transparent manner.
3. The Contracting Authority will determine the qualification of bids and, as applicable, bidders in accordance with the process set out in the request for proposal and will review and assess all aspects of qualifying bids received (including compliance with technical, financial, legal and environmental and social requirements *[ensure this captures climate change/sustainability and resilience]* criteria). Each qualifying bid will be given an evaluation score and ranked in accordance with the evaluation criteria published in the request for proposal.

Depending on the scope of the PPP Unit's work, providing further detail of these criteria should be clearly delegated to it.

Note that even where pre-qualification takes place, there will be more detailed bidder qualification criteria required at this stage.

Drafting of relevant provisions should carve out/be adapted appropriately for "single-source appointments" if that mechanism is used.

4. The Contracting Authority will submit the results of the evaluation and its recommended shortlisted bidder(s) to the *[list appropriate authorities (e.g. PPP Unit)]* for approval in accordance with Article 5B. Subject to Article 6D.5, the recommendation will identify the highest ranked participating bidder as the preferred bidder.

See discussion of final approval stage in Sections 5.3.2 and 5.5.2.

5. The *[insert relevant authority]* [with input from the Contracting Authority] and *[list any other appropriate authority (e.g. PPP Unit)]*, may determine that it is in the best interests of the Project to run a further shortlisting round after submission of proposals by bidders, including, but not limited to, requesting bidders to submit a "best and final offer".

6. If it determined that a further shortlisting round is in the best interests of the Project, this shall be run on the same basis as the request for proposal round set out in this Article 6D.

6.6.5 Announcement of Preferred Bidders – Article 6E

1. Following approval of the preferred bidder by the *[insert relevant authority]* pursuant to Article 6D [and Article 5B], the Contracting Authority will announce the preferred bidder and invite it to finalize any aspects and terms of the PPP Contract and other PPP Agreements outstanding following the evaluation stage within a specified reasonable period of the announcement. No material changes to the preferred bidder's bid or to the scope of the Project are permitted and no changes are permitted to any terms of the PPP Contract and other PPP Agreements identified in the request for proposal as "non-negotiable".

Any specific period specified in legislation should be a realistic period. See discussion of final approval stage in Section 5.3.2.

2. If the Contracting Authority is not able to finalize the terms of the PPP Contract and other PPP Agreements with the preferred bidder (i) due to material deviations by the preferred bidder from the requirements of the Contracting Authority and (ii) following expiry of a period of discussions at least equal to the period specified pursuant to Article 6E.1, it shall be permitted to unilaterally and unconditionally cease discussions with the preferred bidder and instead invite the next highest ranked bidder to finalize the terms of the PPP Contract and other PPP Agreements. This shall be on the same basis as set out in Article 6E.1 and this Article 6E.2 and, if unsuccessful, this process may be repeated in turn with the remaining bidders (in descending order of ranking).

3. Following successful finalization of outstanding terms, the Contracting Authority shall notify the *[insert relevant authority]* that the PPP Contract is ready for formal award to the preferred bidder. The *[insert relevant authority]*[Contracting Authority] shall make a formal announcement that the preferred bidder will be awarded the PPP Contract after a standstill period of *[insert appropriate figure]* working days and the Contracting Authority shall notify each shortlisted bidder. The notice shall identify the selected Private Partner (together with the grounds for selection and final approval of the Ministry of Finance [and *insert appropriate approving authority/ies*]) and include a summary of the essential terms (including as a minimum, the price per unit, term of the agreement and project parties) of the PPP Contract. On expiry of the standstill period and subject to Article 6G, the PPP Contract shall be awarded in accordance with the notice.

The announcement would occur after final approval is obtained pursuant to Article 5B (see Section 5.5.2). See also discussion of final approval stage in Section 5.3.2 and standstill in Section 6.4.4(b).

6.6.6 Modification or cancellation of tender – Article 6F

1. **Option 1:** The Contracting Authority, may, at any time during the tender process, elect to modify or cancel the Project and/or tender process and must notify and provide supporting information on an equal basis to all bidders of the modification or cancellation.

A government may opt for a cancellation right which is either more flexible or more prescriptive. Refer to Section 6.4.3 for further analysis on this point.

OR

Option 2: The Contracting Authority may cancel [or, where appropriate, modify] the tender process if:

- (a) no applicants for pre-qualification meet the requirements of the request for qualification or no bidders meet the requirements of the request for proposal;
- (b) no compliant proposals are received or only one compliant proposal which is not sufficiently financially competitive is received;
- (c) there is a material change to its objectives and/or requirements specified in the request for qualification or request for proposal;
- (d) it identifies a significant social or environmental risk;
- (e) it is unable to finalize the terms of the PPP Contract and PPP Agreements with a preferred bidder;
- (f) there is evidence of (i) corruption, bribery, receipt or brokerage or similar behaviors, (ii) bid rigging or collusion, (iii) fraud, or (iv) abuse of position or power by any of the bidders or [Government Entity official], as applicable;
- (g) it fails to comply with the law or the tender process; or
- (h) the Complaints Panel so directs it.

The Contracting Authority must notify and provide supporting information on an equal basis to all bidders of the cancellation [or modification].

6.6.7 Challenges to the Tender Process – Article 6G

Option 1:

1. The *[insert relevant approval body primarily responsible for approving the Project in the country – e.g. the PPP Unit, the Ministry of Finance or another impartial entity]* shall establish a Complaints Panel that will be responsible for reviewing challenges and appeals made in respect of the tender process. The Complaints Panel shall consist of [three or five] impartial and experienced members, who shall not have any conflict of interest with *[refer to government bodies responsible for reviewing and evaluating bids]*.

See Section 6.4.4 for discussion of complaints.
2. Bidders will be entitled to make an appeal at any point during a tender process up to no later than *[insert standstill period]* working days after the date of announcement of award pursuant to Article 6E.3.
3. An appeal may only be raised on the basis of the following grounds:
 - (a) the Tender Documents or process failed to comply with the requirements of this Law, *[refer to any other specific relevant laws]* or other relevant laws [or with the Tender Documents];
 - (b) the Private Partner selection process violated the requirements of this Law, *[refer to any other specific relevant laws]* or other relevant laws [or the process set out in the Tender Documents] so as to adversely affect fair and transparent competition between bidders; or
 - (c) there is evidence of corruption, bribery, receipt, brokerage or similar behavior, bid rigging or collusion, fraud or abuse of position or power in relation to the tender process to the extent that such acts may have actually affected the results of the tender (without prejudice to any other applicable laws).
4. The bidder shall set out the grounds upon which it wishes to make an appeal and the bidder shall submit all necessary supporting documents with the appeal.
5. In order for the appeal to be successful, the bidder must show that the grounds of its appeal:
 - (a) can directly reduce its chances of being awarded the PPP Contract where the notice of award has not yet been issued; or
 - (b) materially contributed to it not being awarded the PPP Contract where the notice of award has been issued.
6. If the Complaints Panel:

- (a) believes that the appeal is well founded; and
- (b) the bidder's chances of being awarded the PPP Contract will be seriously reduced should the procurement process continue,

it may order a suspension period whereby (i) the procurement process, or (ii) if the announcement of award has been made, the Project implementation, is suspended until a determination is passed on the appeal.

- 7. [If the Complaints Panel determines that the appeal is successful, it shall issue its recommendation to *[refer to the relevant approval body]* to rectify the breach, provided that if a recommendation of the Complaints Panel involves the disqualification of a bidder, the *[refer to the relevant approval body]* must obtain the approval of the *[relevant Minister/entity]* before taking that action.]

OR

Option 2:

- 1. A bidder that claims to have suffered, or that it may suffer, loss or injury because of the alleged non-compliance of a decision or action of the Contracting Authority with the law [or with the Tender Documents] may challenge the decision or action concerned in accordance with *[insert the provisions of the enacting country's laws governing the review of decisions made in procurement proceedings]*.

Only use Option 2 if a relevant complaints procedure is set out in other legislation.

6.6.8 Unsolicited Proposals – Article 6H

- 1. A private sector entity may submit unsolicited proposals to a Government Entity where it believes a Project may be suitable for procurement as a PPP. The Government Entity is authorized to consider unsolicited proposals if no PPP appraisal or tender selection procedures have been planned or initiated in respect of such Project.

Optional clause. Refer to Sections 4.3.2 and 6.3.4.2 for guidance on how to address USPs.

- 2. If the Government Entity considers the unsolicited proposal to be in the public interest,⁷³ the Government Entity may invite the proponent to submit further information and documentation to complete an evaluation of the proponent's qualifications and the technical and financial feasibility of the proposed PPP (including, but not limited to, technical, fiscal, social and environmental considerations). This may include (at the proponent's cost or as otherwise agreed by the Government Entity) a technical and financial feasibility study, a social and environmental impact study and any other information requested by the Government Entity to assess the proposed PPP comprehensively in accordance with criteria set out in Articles 4B.3 and 4C.

See Articles 4B.3 and 4C (Sections 4.6.2 and 4.6.3) for a list of factors.

- 3. If the Government Entity decides to pursue the proposed PPP, it shall initiate a procurement process pursuant to Article 6A.1(a) *[the standard competitive tender process]*. The Government Entity shall invite the proponent to participate in the procurement process.

Optional: The Government Entity may elect to give the proponent an incentive (either automatic pre-qualification or shortlisting or reimbursement of certain costs incurred prior to the procurement process) in recognition for originating the PPP proposal.

See Section 6.3.4.2, for guidance on potential incentives to USP proponents.

- 4. The Government Entity shall respect the confidentiality, intellectual property, trade secrets and other exclusive rights of proponents in connection with any unsolicited proposals received.

⁷³The concept of "public interest" is country-specific and should be expanded on and identified correctly to ensure that unsolicited proposals remain strictly regulated. Countries may refer to an existing description of public interest (or similar concept) at law. Countries should also substantiate this further in any secondary regulation or implementation guidelines. See also other drafting references to this concept to ensure consistency.

5. The *[insert relevant instrument (e.g. PPP Manual/secondary legislation/guidance materials) and/or responsible entity]* shall set out the rules governing unsolicited proposals (which shall be consistent with rules for the assessment of proposals solicited by a Contracting Authority), including:

- (a) the process for the submission, assessment and approval of an unsolicited proposal;
- (b) the protection of the confidentiality, intellectual property, trade secrets and other exclusive rights in connection with unsolicited proposals; and
- (c) available incentives and benefits to the private sector proponent for the development of unsolicited proposals; and
- (d) principles to be followed to guarantee the transparency of the process.

Each jurisdiction should consider whether it is more appropriate for these mechanisms to be addressed in primary legislation or secondary instruments.

PPP Agreements



7. PPP AGREEMENTS

7.1 Introduction

This Chapter explains the role of PPP legal frameworks in ensuring that the agreements entered into by Government Entities in respect of individual PPPs are able to give effect to the intention of the parties, as well as further the relevant jurisdiction's PPP policy objectives. It is at the project contract level that these elements are tested in terms of (i) the legal viability of the proposed contractual provisions (as determined by the jurisdiction's legal system) and (ii) the commercial reality of the proposed risk allocation (as determined by market responses to a tender version of the PPP Agreements).

In order to ensure that Contracting Authorities are able to enter into PPP Agreements which support and deliver the government's PPP aims, the PPP legal framework must be designed to clearly establish (i) any requirements to contract on certain terms consistently across the PPP market (including any scope for deviation) and (ii) the ability to contract on those terms (in terms of compatibility with existing laws and powers). This will include considering how to address the needs of individual PPP projects and changing environments and circumstances. Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments and the sample drafting focuses on the key requirements recommended to be included in the primary legal instrument. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

This Chapter refers to all agreements involving Government Entities as **PPP Agreements**. PPP Agreements typically comprise the following documents:

- (a) the main agreement between the Contracting Authority and the Private Partner – this can be referred to as the concession, project agreement, investment agreement, implementation agreement, etc. depending on jurisdictions and sectors (in this Guidance, the **PPP Contract**);
- (b) a direct (or "tripartite") agreement between the Contracting Authority, the Private Partner and the Private Partner's lenders when the PPP project is project-financed,⁷⁴ under which the Contracting Authority acknowledges the lenders' security interests in the project and step-in rights and cure periods (amongst other assurances) are provided in favor of the lenders;
- (c) leases or other land- and property-related agreements, usually involving a Government Entity (albeit not always the Contracting Authority) and the Private Partner; and
- (d) if applicable, government support and credit support instruments such as letters of support given by a Government Entity (often a different entity from the Contracting Authority) in favor of the Private Partner.

7.2 Guiding principles and objectives

In order to establish an effective basis for PPP Agreements and to regulate individual PPP Agreements in a comprehensive and coherent manner, the PPP legal framework should address the key guiding principles and objectives set out below.

7.2.1 Clarifying the relationship between contractual intentions and the existing legal framework

The PPP legal framework should establish the extent of the parties' freedom to contract and operate to resolve any conflicts and remove any ambiguities between, on the one hand, the contractually agreed terms intended to govern a PPP project, and on the other hand, existing laws or regulations (including sectoral regulations and implied contractual terms) that would cut across this contractual regime. For example, some legal frameworks may provide for mandatory hardship regimes which apply in certain circumstances and entitle the affected contractual party to re-negotiate or obtain different relief to the risk allocation position the parties have contractually agreed. The PPP legal framework should strive to eliminate or at least minimize any uncertainty that may result from the application of any such underlying legal principles to PPP Agreements.

⁷⁴See [The World Bank, 2019. Guidance on PPP Contractual Provisions](#), Chapter 7: Lenders' Step-in Rights.

7.2.2 Ensuring PPP Agreements are enforceable against all parties

The PPP legal framework should ensure that the Contracting Authority's commitments under PPP Agreements are legally enforceable. For example, where appropriate, the PPP legal framework should ensure that if any existing laws prevent or limit the government from waiving its sovereign immunity, a clear exception should be made for PPPs. See [Sections 7.4.2 and 7.4.3](#) which elaborate on this example.

7.2.3 Ensuring delivery of PPP policy and market consistency

PPP Contracts must be able to be drafted and operate in a way which enables governments' PPP policy objectives to be delivered. At a macro level, this includes ensuring that Contracting Authorities take a consistent approach to contractual risk allocation across a country's PPP market (subject to individual project specifics) to enhance private sector confidence in the government's PPP program.

7.3 Regulating and facilitating PPP Agreements

This Section gives an overview of how the guiding principles for regulating PPP Agreements should be put in place in the PPP legal framework and the considerations involved. The detail of these matters is recommended to sit within secondary instruments and guidance, with primary PPP legislation principally being used to address any fundamental enabling concepts (such as freedom to contract – see below) as well as inconsistencies or ambiguities in the broader legal framework that might adversely affect the parties' contractual intentions.

7.3.1 Freedom to contract and certainty of obligations in PPP Agreements

Principles of negotiation and the freedom to negotiate and contractually agree on the risk allocation for a given PPP project should, in theory, be fundamentally the same in all jurisdictions. However, some legal systems may place limits on parties' ability to enter into bespoke contractual arrangements – including in the case of a PPP Contract.

Degrees of contracting freedom in different jurisdictions	
Common law	In common law jurisdictions, parties typically enjoy extensive freedom of contract and few provisions are implied into a contract by law. Generally speaking, everything that is not expressly prohibited by law is permitted. Judicial decisions set precedents which will be followed in the determination of contractual disputes. This incentivizes parties to be as detailed as possible in contractual drafting. Nevertheless, some legislation – with general procurement law being one of the usual suspects – may constrain parties' ability to contract.
Civil law	Civil law jurisdictions tend to be more prescriptive than common law systems, with codified provisions and underlying principles sometimes implied into civil law contracts without being expressly included in the drafting. For example, civil law systems may create certain economic rebalancing rights (particularly following economic hardship) or termination rights that will be implied into any contract with a public authority. This has potentially far-reaching implications for any PPP Contract. Not all civil law jurisdictions allow parties to contract out of such rules.
Islamic law	In jurisdictions (more commonly civil law) where the Shariah is a source of law, projects may have to be structured so that they do not contravene certain prohibitions against <i>riba</i> (interest) and <i>gharar</i> (uncertainty), if they apply. This can be done by using well-established Islamic financing techniques (such as procurement leasing (<i>istisnā'ijāra</i>) and cost-plus financing (<i>murābāha</i>)). These structures, while compliant with the Shariah, achieve the same commercial outcomes as non-Shariah structures. ⁷⁵

Limiting contractual freedom for parties in connection with a PPP Contract has certain downsides. It may be difficult for the commercial agreement between the parties to be implemented as intended and the nature of the parties' obligations may be less certain (e.g. if specific terms are implied into the PPP Contract rather than expressly included). Dispute

⁷⁵Further reading: [The World Bank, 2017. Mobilizing Islamic Finance for Infrastructure PPPs.](#)

risk consequently increases and, as a result, private sector participants may view the PPP Contract as more risky and may be less willing to invest in the relevant jurisdiction or will do so in a way which drives up the cost of financing. For example, lenders/investors are more likely to seek enhanced risk mitigation measures at a cost which is invariably passed on to the project and mostly recovered from project revenue (i.e. through the price paid by the Contracting Authority or end users), thereby potentially limiting the benefits and increasing the cost of the project to the government.

The role of a PPP legal framework in this context is to foster clarity and certainty in the existing legal framework in order to facilitate the execution of PPP Contracts on terms that properly reflect the understanding reached between the investors and the Contracting Authority and are in line with the government's PPP program objectives.

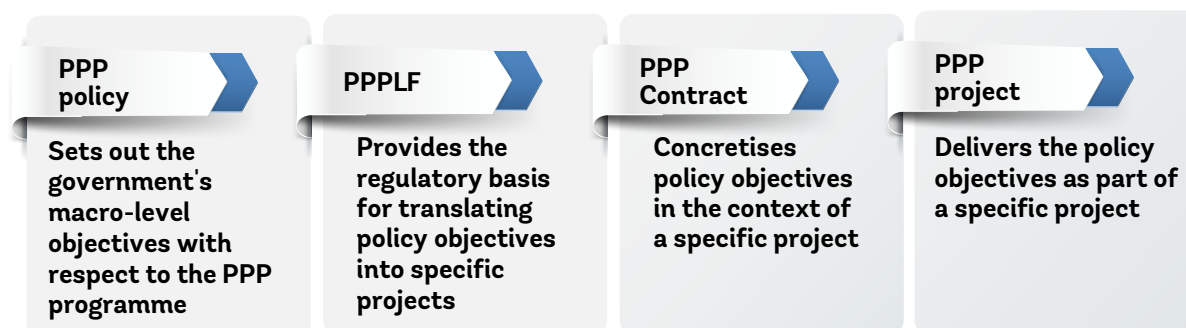
There are two main ways the PPP legal framework can provide this enhanced certainty:

- **by increasing parties' freedom to contract; and/or**
- **by clarifying legal rights or obligations that parties cannot contract out of.**

Enhancing certainty with respect to legal frameworks applicable to PPP Agreements	
Increasing parties' freedom to contract	Clarifying rights or obligations parties cannot contract out of
<ul style="list-style-type: none"> • A PPP legal framework can expressly exclude or exempt PPP projects from certain laws (for example, general procurement laws or administrative law) essentially creating a bespoke regime for PPPs. 	<ul style="list-style-type: none"> • In some cases, the PPP legal framework will not be able to increase freedom to contract, or the government will not wish to grant parties that freedom for certain policy reasons. For example, the government may not wish to set a precedent regarding the optionality of these regimes or may want to maintain existing constraints (e.g. in relation to the commercial use of strategic infrastructure).
<ul style="list-style-type: none"> • Alternatively, a PPP legal framework can expressly clarify that parties to PPP Agreements have the freedom to contract out of laws that would otherwise apply to (or be implied into) PPP Agreements. 	<ul style="list-style-type: none"> • In this scenario, the PPP legal framework should seek to expressly enumerate those laws and principles that will limit freedom of contract in PPP projects to enhance transparency and certainty for all parties, particularly the private sector participants.

7.3.2 Alignment with PPP policy

The PPP Contract is in the conduit to ensuring that the government's PPP policy is ultimately reflected in PPP projects. From a government perspective, the relationship between the policy objectives of its PPP program and actual PPP projects can be conceptualized – albeit much simplified – as follows:



PPP policy objectives often change. The PPP legal framework should therefore ensure that PPP Units and the government are legally empowered to draft and negotiate PPP Agreements in a manner that promotes those policy objectives and to customize or refine PPP Agreement templates. [See Section 7.3.3](#). For example, a common means of furthering specific policy goals is to provide tailored incentives to Private Partners as part of the PPP contractual arrangements. [See Section 7.6.6, Article 7F](#) for a drafting example.

Benchmark Examples

Many jurisdictions around the world impose **local content requirements** on foreign investment, such as the use of a certain percentage of local workforce or business. PPP projects can be a good way of delivering short- and long-term local content objectives but PPP legal frameworks that mandate local content requirements without flexibility may deter foreign investors if such requirements are seen as too difficult or too costly to fulfil.

Governments can encourage foreign private entities to bid for and participate in PPP projects by making appropriate allowances for local content. Where necessary, the PPP legal framework can facilitate relaxation of, or provide additional clarity on, any such requirements for project-specific reasons.

By way of example, the PPP law in **Vietnam** provides that investors who commit to using domestic contractors, goods and materials are eligible for preferential treatment during the bid evaluation process. However, the PPP law does not contain any requirement to employ nationals or use local content. This is a good example of incentivizing foreign public entities to engage with local suppliers and contractors without being overly restrictive. A similar example is found in the **West African Economic and Monetary Union (WAEMU)** regulations, which provide that bidders who commit to subcontract at least 30% of the total value of a public contract to a domestic WAEMU enterprise may be given preferential treatment.

[See Section 7.6.3, Article 7C](#) for sample drafting of how local content may be addressed in legislation. See the World Bank website for further information.⁷⁶

[See Chapter 1 Guiding Principles](#) for further detail regarding PPP policy objectives and how these should be reflected in the PPP legal framework.

7.3.3 Using standard form templates to balance flexibility and consistency of documentation across the PPP market

The PPP legal framework needs to strike a delicate balance between two ostensibly competing objectives: promoting consistency in contractual terms across the jurisdiction's PPP market and allowing parties the flexibility they need to strike sensible agreements on a project-specific basis.

There are clear advantages in the PPP legal framework providing guidance or parameters with respect to risk allocation as a means of promoting consistency.⁷⁷ In particular, this can: (i) minimize the risk of divergent approaches between different Contracting Authorities for projects in the same or similar sectors (a factor which can negatively affect the roll-out of a jurisdiction's PPP program over the long-term by creating unnecessary complexity); (ii) provide comfort to investors as to their minimum and maximum risk exposure before committing to a binding bid process, thereby increasing the attractiveness of a PPP program; and (iii) allow government to implement PPP programs with greater speed, efficiency and consistency and at lower cost.

This sometimes leads governments to over-emphasize consistency by setting out detailed requirements relating to risk allocation in PPP Agreements in primary legislation.

As discussed above, flexibility is a critical element in ensuring the bankability of PPP Agreements. To balance these objectives, the PPP legal framework may provide for a relevant Government Entity – typically the PPP Unit – to prepare specific guidance on drafting PPP Agreements and draft (ideally sector-specific) standard form documents (or use

Setting out PPP risk sharing mechanisms in primary legislation is not usually appropriate since a lack of flexibility may lead to uncompetitive projects that cannot dynamically align with evolving market practice (and may ultimately deter foreign investment). However, consistency within sectors is important and setting out risk allocation principles in primary legislation may sometimes be appropriate.

⁷⁶[The World Bank. SMEs and PPPs.](#)

⁷⁷[Global Infrastructure Hub. 2019. PPP Risk Allocation Tool 2019 Edition.](#)

sensible precedents from successfully banked deals), while allowing the Contracting Authority to customize and negotiate these documents to reflect specific project risks and market trends.

An appropriate degree of control over the contents of negotiated PPP Agreements can then be exercised by mandating specific review and approval procedures by appropriate Government Entities, such as the PPP Unit and the Ministry of Finance (or other authorized ministry) and, by requiring the Contracting Authority to justify any deviations from key standard terms. [See Chapter 5 Approvals](#) for further detail.

This approach allows the PPP Unit to provide centralized, coordinated guidance at a policy level in a non-binding (or soft law) manner via model documents (ideally sector-specific, as indicated above). This will typically have a market-shaping effect and lead to increasing consistency between PPP projects. At the same time, project-specific issues remain able to be negotiated and tailored by the parties to the PPP Agreements. [See Chapter 8 Contract Management](#) for further details.

Benchmark Examples		
While the Polish PPP Law does not require the use of standard form PPP Contracts, the Minister of Regional Development must prepare and disseminate examples of template agreements. Therefore template agreements are available in practice but there is no express legal requirement to use them.	There is no state or federal law which mandates a particular form of contract for PPPs in Australia . However, the National Guidelines for PPP provides a framework and standard terms to assist public and private sectors to work together and improve service delivery. ⁷⁸ In addition, various States have developed their own standard terms that are used as a base for all PPP projects procured by the relevant State government.	In South Africa , Standardised PPP Provisions ⁷⁹ prescribe how key issues must be dealt with in PPP Contracts and form the basis of most draft PPP Contracts. (They assume that project finance will be used to fund the PPP project, which may not necessarily be the case.)

The [World Bank's Guidance on PPP Contractual Provisions, 2019](#)⁸⁰ sets out detailed guidance on how to draft a PPP Contract and can be used by PPP Units in preparing a standard form PPP Contract.

7.4 Treatment of contractual terms in primary instrument

This Section describes certain key terms or features of PPP Agreements that may need specific treatment in primary law to support the implementation of the principles discussed in [Section 7.2](#) and the regulatory strategies outlined in [Section 7.3](#). While the Guidance focuses on the elements that typically require consideration in this context, each jurisdiction should consider its own needs. In terms of the most appropriate type of legal instrument for each issue, depending on the provision in question, high-level principles are generally recommended to be set out in primary legislation, with more detailed or technical matters to be set out in secondary legislation or guidance materials.

7.4.1 Governing law

The governing law of PPP Agreements is a key consideration for the viability of projects, in particular for foreign investors. The PPP legal framework must therefore ensure that parties have full clarity as to their options regarding choice of governing law in any PPP Agreement.

Some jurisdictions may mandate that their governments may only enter into agreements governed by the law of that jurisdiction. Other jurisdictions may formally allow the government to choose the laws of a third party country to be the governing law of agreements it enters into, but political considerations may render this problematic in respect of PPP Agreements. As a consequence, using local law as the governing law of PPP Agreements is a requirement in many

⁷⁸ [Australian Government, 2008. National Public Private Partnership Guidelines: Overview.](#)

⁷⁹ [Republic of South Africa, National Treasury, 2004. Standardised PPP Provisions.](#)

⁸⁰ [The World Bank, 2019. Guidance on PPP Contractual Provisions.](#)

jurisdictions – particularly as regards the PPP Contract where overwhelming market practice is that those agreements will be governed by local law. If governments want to require the use of local law as the governing law of PPP Agreements, the PPP legal framework should seek to clarify any ambiguity that could arise due to the position under the existing legal system.

Although most PPP Contracts are governed by the law of the Contracting Authority's jurisdiction, where the legal principles and jurisprudence of a jurisdiction are not familiar to foreign investors or are in a state of change or development, this may discourage investment due to perceptions of uncertainty or the risk that a government may wish to legislate its way out of contractual arrangements. Where this is perceived to be an issue, governments should, if possible, consider using the PPP legal framework – typically by way of primary legislation – to explicitly allow PPP Contracts and direct agreements to be governed by a law other than that of the jurisdiction in which the PPP project is located. See the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapter 11 Governing Law and Dispute Resolution](#) for further discussion.

Benchmark Example

Poland has a PPP program where the PPP law does not restrict the use of foreign law as the governing law.

See [Section 7.6.2, Article 7B.1 Options 1 and 2](#) for sample legislative drafting on this point.

7.4.2 Sovereign immunity and dispute resolution

In most jurisdictions, Government Entities enjoy sovereign immunity, i.e. certain privileges and immunities before local and foreign courts (such as immunity from suits or the enforcement of judgements by a private investor).

In a PPP context, however, private sector participants typically expect PPP Agreements to be enforceable against the public sector counterparty. This is because they assume very significant risks in entering into long-term contracts which require large upfront investment and borrowings to fund the construction of the PPP assets. The Private Partner's revenue streams (and therefore its payment rights and debt repayment obligations) typically only arise far in the future once the assets are built and operation commences. To balance these risks, private investors typically need clear reassurance that they will be able to legally enforce the Contracting Authority's payment and other contractual obligations against it, should the need arise.

To the extent that the existing legislative framework does not provide clear guidance as to the ability of the applicable Government Entities to waive sovereign immunity, the PPP legal framework should provide for this – typically in primary legislation. Ideally, the PPP legal framework will also be clear as to the scope of the waiver permitted, and the form in which the waiver must be given to be effective.

In addition, due to concerns about the local judiciary's possible lack of familiarity with PPPs or the unpredictability of judicial outcomes, foreign investors often seek to have disputes submitted to international arbitration (or other neutral forums) and to implement other alternative dispute resolution mechanisms such as expert determination or mediation. The PPP legal framework should therefore make explicit what dispute resolution options are available to be used in PPP Agreements so that the Contracting Authority has options available which are suitable for a long-term partnership. Any uncertainties as regards dispute resolution approaches and the existing legal framework should be clarified.

For further discussion on immunity waivers and dispute resolution forum and processes appropriate for PPP Agreements, see the considerations outlined in the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapter 11 Governing Law and Dispute Resolution](#).

See [Section 7.6.2, Articles 7B.2 and 7B.3](#) for sample legislative drafting on dispute resolution and waiver of sovereign immunity.

7.4.3 Facilitating project finance – security, lender step-in and direct agreements

PPP project financings by third party lenders are typically structured as "non-recourse" or "limited recourse" financings, where lenders can be paid only from the Private Partner's revenues, with "no" or "limited" recourse to its equity investors. These lenders loan funds to the Private Partner based on an analysis of the projected cash flows generated under the PPP Contract to repay their debt. Any risk to those cash flows, such as through early termination of the contract which may not yield enough compensation to fully repay the debt, requires mitigation. As a result, lending is typically subject to the lenders being able to (i) take security over sufficient assets to cover the debt, and (ii) step into the PPP Contract in the event of Private Partner default to preserve or realize their security.

Both of these concepts imply that the Contracting Authority and the government will need to subordinate certain of their rights (such as resuming possession of certain assets, calling on their own security or terminating PPP Agreements) to the rights of the lenders. However, not all jurisdictions have a legal framework that clearly allows for this to take place, and PPP legal frameworks may need to address any such gaps. Typically, this will need to be set out in primary legislation.

While governments may be concerned about allowing lenders to take ownership of or sell key infrastructure assets, it is important to recognize that project assets by their nature are not always very marketable. The lenders' security package is therefore as much for defensive purposes to protect the lenders' rights in insolvency proceedings as it is for ensuring that lenders have a seat at the negotiating table with the Contracting Authority if the project is in distress.

7.4.3.1 Security

From a project finance lender perspective, the ability to take certain project-related security is critical since the Private Partner (i.e. the entity borrowing from the lenders) usually does not have any assets other than those relating to the PPP project; typically these are the project asset, certain rights to the land the asset is on, and contracts entered into in connection with the project. In addition, the lenders typically have only limited (if any) recourse against the Private Partner's parent companies. Being able to provide security is key for the Private Partner to enhance its creditworthiness in a limited recourse project financed PPP and is a critical item of due diligence for lenders.

However, in many jurisdictions the law governing security interests is often complex – particularly where Government Entities or government-owned land or other property may be involved. This will not necessarily prevent the implementation of limited recourse project financing and adequate alternative structures may still be achievable. Skilled transaction advisors may in some cases be able to help investors overcome their unfamiliarity with novel legal regimes, but this may not always be enough to address private sector risk perception. To ensure a favorable investment environment which facilitates secured lending and is attractive to private financing, PPP legal frameworks should address any deficiencies or ambiguities in relation to lenders' ability or right to take, perfect and enforce security in connection with PPP projects. Given that the law of security interests is usually set out in primary legislation, further primary legislation may be needed to achieve this. [See Section 7.6.4, Article 7D](#) for drafting guidance.

7.4.3.2 Lender step-in rights and direct agreements

"Lender step-in" refers to a process whereby the entities who have lent to a PPP project on a non- or limited-recourse basis effectively temporarily or permanently "take control" of the PPP project following a material default by the Private Partner under the PPP Contract. The lenders step into the Private Partner's shoes under the PPP Contract and attempt to cure the relevant default. This can be done by the lenders themselves, or through a substitute project company. From the lenders' perspective, this can be preferable to letting the Private Partner suffer the consequences of the material default – i.e. termination of the PPP Contract and loss of the associated revenue stream which in a non-or limited-recourse financing is the likely main source of funds to repay the lenders. Termination is likely to result in the Private Partner's inability to keep servicing debt and/or in a termination compensation payment from the Contracting Authority which may not fully cover outstanding debt.

This step-in process is usually formalized via a "direct agreement" between the lenders, the Private Partner and the Contracting Authority (and potentially other Government Entities). Common legal issues that arise in connection with direct agreements include: (i) whether the Contracting Authority is in fact able to subordinate any of its own rights to the lenders' rights following a Private Partner default; and (ii) (as with granting security) whether lenders can step in to own or manage public assets and services, particularly through a substitute project vehicle (since the existing legal framework may sometimes prohibit assignment of a PPP Contract and related authorizations and permits).

In certain jurisdictions, there may be mandatory laws preventing the granting or enforcement of lender step-in rights (in particular, under public policy rules applicable to insolvency procedures and/or public procurement regulations applicable to Contracting Authorities which have not been tailored to PPP projects).

In case the existing legal framework is lacking or ambiguous as regards any of these issues, the PPP legal framework should clearly set out the scope of what is permitted. Depending on the jurisdiction's existing legal framework, this may need to be addressed in PPP-specific primary legislation. Well-drafted PPP laws typically authorize entry by a Contracting Authority into both PPP Contracts and the direct agreements that usually accompany them, recognizing such lender step-in rights.

Direct agreements and the step-in rights they contain have rarely been tested in court.

They are principally a defensive mechanism from the lenders' perspective. By providing a framework for the parties to negotiate a way forward following a material default, direct agreements are seen as a useful means to protect any debt outstanding and therefore increase the bankability of a project.

For further discussion on these topics see the [World Bank's Guidance on PPP Contractual Provisions, 2019](#), Chapter 7 *Lenders' Step-in Rights*; and for sample legislative drafting see [Section 7.6.4, Article 7D](#).

Benchmark Examples		
<p>The PPP law in Vietnam provides that lenders can step in or appoint a third party to take over the rights and obligations of the Private Partner – consistent with the recommendations of this Section.⁸¹</p>	<p>The same approach is taken under the Standardised PPP Provisions in South Africa.⁸²</p>	<p>In Slovakia, certain types of PPP projects (concessions) are not transferable to a replacement Private Partner without going through a retendering process. This issue can be partially addressed by allowing the transfer of the shares in the project company, however this exposes any entity stepping into the project to the liabilities of the project company and the PPP assets. This cuts across fundamental project finance principles and presents significant bankability concerns for lenders.</p>

7.4.4 Government credit support

There are three main types of credit support that governments may need to consider offering to private investors with a view to making certain PPP projects commercially viable and bankable. These are:

- (a) **government support** – this is any support (e.g. direct funding such as public sector capital contributions, tax exemptions and contingent guarantees) intended to plug potential commercial viability gaps in a PPP project. Commercial viability is described in more detail in [Chapter 4 Project Origination and Appraisals, Section 4.4.3](#);
- (b) **performance guarantees** – these are provided by the government, a Ministry of Finance or a third party (e.g. a partial-risk guarantee from a multilateral development bank) in respect of the contractual obligations of Government Entities that enter into PPP Agreements to strengthen their payment covenants. These can take the form of a guarantee instrument or pre-funded reserve/escrow accounts – common examples include guarantees in respect of the Contracting Authority's (or offtaker's) payment obligations;
- (c) **foreign exchange and transferability guarantees** – these are guarantees in relation to the Private Partners' (and related private sector parties') ability to exchange income or payments received in local currency into foreign currency and remit them to their home jurisdiction; and
- (d) **governments taking equity stakes** in project vehicles – this can be effected, for example, through taking preferred shares with below-market equity internal rate of return (IRR) or subordinated shareholder loans with below-market interest rates. For further discussion of factors to consider, see "PPP Contracts in Context" in the [World Bank's Guidance on PPP Contractual Provisions, 2019](#).⁸³

Typically, the form of credit support will be set out in the PPP Agreements and private investors and lenders will diligence their reliability from a legal perspective. The PPP legal framework should therefore address any uncertainty or other issues relating to the legal feasibility of the provision of government credit support. Depending on the jurisdiction's existing legal framework, this may need to be explicitly addressed in PPP-specific primary legislation (for example, in civil law jurisdictions, government credit support may need to be accounted for in the budget and may

⁸¹[Vietnam – Law No. 64/2020/QH14](#), Article 63.

⁸²[Republic of South Africa, National Treasury PPP Unit, 2004, Public Private Partnership Manual: National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act](#).

⁸³Governments wishing to consider this approach should carefully consider any resulting adaptations needed to the aspects outlined in this Guidance.

therefore need to be legislated for). The PPP legal framework's goal in such cases may be limited to harmonizing the conditions required for a Government Entity to grant such credit support).

Another benefit in facilitating such credit support is that it effectively allows the government/Contracting Authority more flexibility in structuring a PPP project and pursuing specific PPP policy objectives (for example, government credit support could be contingent on the fulfilment of certain E&S objectives). See [Chapter 4 Project Origination and Appraisals, Section 4.4.3](#). Other potential benefits include attracting a larger quantum of private capital from a more diverse or higher-caliber pool of bidders and lenders on more favorable terms, with consequent cost benefits which can then be passed through to the government or end-users.



The PPP legal framework should allow Contracting Authorities flexibility in negotiating the terms of any such government credit support, while also setting out appropriate processes for such support to be properly taken into account from a fiscal affordability perspective (in particular with respect to contingent liabilities). See [Chapter 4 Project Origination and Appraisals, Section 4.4.5](#) and related guidance⁸⁴ on this point.

7.4.5 Early termination

Early termination rights are important to all parties in a PPP project since they enable them to minimize their exposure and losses in the event that their counterparty fails to perform or is otherwise in default. Common early termination rights in PPP Contracts include termination for material breach, insolvency, failure to make payments by prescribed deadlines, failure to comply with bribery or anti-money laundering legislation or policies, and prolonged force majeure.

In some jurisdictions, however, the existing legal framework may place restrictions on parties' ability to terminate contracts early, or – more commonly – may create statutory or common law rights to terminate which can be wider or less specific or predictable than is intended or desirable in the context of PPP Agreements. Examples include:

- (a) statutory rights to terminate for convenience or on the grounds of public interest (as seen in many civil law jurisdictions) – these may not only be inconsistent with the parties' intentions in a PPP Contract, but may also call into question the Contracting Authority's ability to subordinate its statutory termination rights to the lenders' step-in rights under a direct agreement; and
- (b) absence of PPP-specific rights – the expectation in some jurisdictions is that the Private Partner will rely on general recourse to legal proceedings to terminate for Contracting Authority default⁸⁵ as opposed to having a clearly defined contractual right and mechanic. This may require a successful application to a tribunal before the Private Partner can terminate, increasing uncertainty for the Private Partner and exposing it to potentially unrecoverable losses.

These rights and requirements are generally not consistent with market expectations with respect to termination procedures in a PPP context. The PPP legal framework should therefore – via primary legislation – operate to remove any ambiguities and to allow parties to opt out or contract out of such provisions where feasible.

The actual content of any contractual rights to terminate early (i.e. the relevant trigger events) will be negotiated between the parties and should not be prescribed in primary PPP legislation but addressed in secondary instruments such as policies or PPP Unit guidance on PPP Contracts. See the [World Bank's Guidance on PPP Contractual Provisions, 2019](#), Chapter 6 *Termination Events* for further context on these issues.

PPP Agreements typically set out different rights/ thresholds for termination by the Contracting Authority depending on the type of default that has occurred and the specific project.

For example, in an urgent project, a termination right could accrue upon failure to complete that project by a longstop date, while for a less urgent project, the Contracting Authority could forgo such a right.

Contracting Authorities should also consider termination rights as tools to further or protect policy objectives. As environmental protection and climate change concerns become increasingly prevalent, Contracting Authorities may wish to ensure they include such rights to combat behaviors that could harm the environment.

⁸⁴[The World Bank, 2019. Government Guarantees for Mobilizing Private Investment in Infrastructure.](#)

⁸⁵This has been the case in certain projects in e.g. France.

7.4.6 Contracting Authority step-in

As is the case for lenders, the Contracting Authority will typically wish to ensure that it is able to step into the Private Partner's shoes under a PPP Contract in certain circumstances, to manage the whole or affected part of the project. Such situations would typically involve some form of genuine emergency and/or threat relating to the structure of the project facility or the works, health and safety or the environment; national security; or where the Contracting Authority has to ensure discharge of a statutory duty.

Often, the Contracting Authority will already have statutory powers to do this in the existing legal system. However, it is good practice for the PPP legal framework to both: (i) establish and formalize the existence of the Contracting Authority's statutory step-in rights (typically in broad terms); and (ii) provide for the Contracting Authority to have a contractual right to step-in (typically accompanied by specific and detailed step-in procedures including notice requirements and provisions as to liability for costs incurred (which may vary according to the grounds for step-in and whether the Private Partner is at fault, etc.)). This not only helps increase certainty for all parties with respect to the parameters of the exercise of such rights, but may also minimize dispute risk if they are exercised.

PPP legal frameworks should also provide for the possibility of the Contracting Authority subordinating its rights to the lenders' own step-in rights, as discussed above. However, the detailed circumstances of the Contracting Authority's right to step in should be governed by the relevant PPP Agreement. This is because the Contracting Authority's needs in terms of step-in are likely to change from project to project and vary according to whether the project is in the construction or operation phase (e.g. there may be greater urgency for step-in rights to crystallize in the operating phase of an airport or prison project compared to a toll road project).

See [Section 7.6.5, Article 7E](#) for sample legislative drafting on this point. See the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapter 4 Contracting Authority Step-in Rights](#) for further context on these issues.

7.4.7 Compensation on termination

As highlighted above, termination of PPP Contracts (and related Project Agreements) before the end of their term (i.e. "early" termination) typically occurs due to a material default of either party or due to certain long-term disruptions such as prolonged Force Majeure events. Early termination rights in PPP Contracts are usually accompanied by provisions relating to termination compensation payable to the Private Partner (and, through the direct agreement, its lenders) and a right for the Contracting Authority to take over the project assets. Sums vary according to the reasons for such early termination. Lenders will usually seek to ensure they can recover most of the debt outstanding at the date of termination (regardless of the grounds for termination or who is the defaulting party). Anything that cuts across this goal will usually deter significant limited recourse debt financing. See the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapter 6 Termination Events, Chapter 8 Termination Payments and Chapter 9 Handback of Assets at End of Contract](#) for further discussion of these topics.

The PPP legal framework should address this topic directly. There are three key considerations in connection with this issue that merit careful examination as part of the PPP legal framework:


- (a) Bankability – compensation on termination is a key driver of bankability so to the extent there is any ambiguity in the existing legal framework, a Government may wish to use the PPP legal framework to clarify that Contracting Authorities are authorized to contractually commit to paying termination compensation.
- (b) Contingent liabilities – in tandem with the above, compensation on termination constitutes a contingent liability for the government. This contingent liability must therefore be properly considered during project appraisal and at the approval stage. Where actual payment of such liabilities needs to be authorized by parliamentary legislative or appropriations processes, governments need to consider how such processes will apply to payment obligations under PPP Agreements and ensure that the PPP legal framework (and relevant PPP Agreements) sets out time periods for payment which match such processes. In the Philippines, for example, the government requires a two-year grace period for the payment of termination compensation (which can include interest) since this is the maximum period of time for the parliamentary appropriation process. Governments should also consider whether the time and uncertainty involved in such processes may deter

As with termination rights, PPP Agreements may set out different rights/thresholds for step-in by the Contracting Authority depending on the type of event that has occurred and the nature of the specific project. This can vary between countries. In some countries, for example, rights are considered necessary at all stages of a prison project, whereas in others rights are considered key only in the operating phase.

Again, Contracting Authorities should consider step-in rights also as tools to further or protect policy objectives such as E&S concerns.



third party lender involvement and whether alternative processes for PPP payments should be considered under the PPP legal framework (for example, if the termination payment can be construed as a true sale).

- (c) Protection of policy objectives – compensation on termination could potentially be used as a tool to protect certain PPP policy objectives. By way of example, Private Partners (and their lenders) will typically seek to cap their maximum exposure and default termination payment deductions to a prescribed percentage of the contract price. This cap can be subject to certain carve-outs in the PPP Agreements, and Contracting Authorities may wish to include environmental liabilities in those carve-outs – meaning that the Private Partner's liability for breaches of environmental obligations would be uncapped which should therefore incentivize greater compliance. 


PPP legal frameworks should require proper consideration (including as part of the approval and procurement processes) of how possible termination payments can be effected under the public investment system. They should also create legal certainty with respect to the scope of possible contractual termination rights and obligations as between Contracting Authorities and Private Partners (and their lenders). To allow for sufficient flexibility, however, the detail of such termination rights is best dealt with in secondary instruments (such as policies or PPP Unit guidance on PPP Contracts). See the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapters 6 Termination Events and 8 Termination Payments](#) for further detail on how and why PPP Agreements should address these points and [Chapters 5 Approvals and 6 Procurement](#).

7.4.8 Change in circumstances

PPP Contracts are long-term agreements: they often have terms of 20 years or more, over which period many of the circumstances of a PPP project are likely to change. This is usually a major source of concern for Private Partners and their lenders as pricing is based on factors known at the time of bidding. The PPP legal framework should ensure that parties have the flexibility (within appropriate parameters) to negotiate appropriate risk allocations and associated mechanics between themselves in respect of certain changes and to set these out clearly in the relevant PPP Agreements.

The PPP legal framework's role in this respect is to ensure that: (i) the parties are able to strike the appropriate commercial deal to allocate the risks associated with such changes in circumstances; (ii) the overall legal position is clear between underlying legal principles/existing laws and the PPP Contract; (iii) the origination, appraisal and approval processes properly take into account any liabilities that might accrue to the Contracting Authority as a result of such risk allocation; and (iv) consistency in risk allocation across the PPP market is promoted.

Two forms of change in circumstance which are key to PPP Contracts and always require consideration as part of the PPP legal framework are force majeure events and changes in law. The ability to contract freely in relation to these aspects will depend on the existing legal framework and whether the PPP Contract and associated documents can include contractual provisions which derogate from existing legal principles. As this will depend on each jurisdiction, the sample legislative drafting in [Section 7.6](#) does not include detailed specific provisions, but governments should consider whether primary PPP legislation should clarify the extent to which derogation is allowed, particularly under the PPP Contract. The Table below outlines relevant considerations. For further discussion, see the [World Bank's Guidance on PPP Contractual Provisions, 2019, Chapters 1 Force Majeure, 2 Material Adverse Government Action and 3 Change in Law](#).

Types of changes in circumstances	
Force Majeure	Change in law
<ul style="list-style-type: none"> In a PPP context, Force Majeure typically refers to an event which is outside the parties' control and makes it impossible for one party to fulfil all or a material part of its contractual obligations. It may be (or must be, in many civil law jurisdictions) unforeseeable or unavoidable. Many legal frameworks set out a statutory or conventional definition of this expression, which may not be consistent with the definition the parties want to use under the PPP Contract to reflect their agreed risk allocation. Similarly, the parties may wish to specify in detail the consequences of Force Majeure events (e.g. which party bears what costs and time consequences) in a way that is not necessarily in compliance with or contemplated by the wider legal framework. The PPP legal framework should be clear as to whether any underlying existing definition must apply to the PPP Contract or whether the parties are able to derogate from or adapt this definition to suit their purposes. For example, parties may expressly wish to exclude certain events from the definition of Force Majeure and make them squarely the responsibility of one of the parties – e.g. earthquakes in an area of known geological activity where the Private Partner is contracted to build a tunnel, certain catastrophic weather events outside of a prescribed frequency (or "return period"), or weather events previously considered to be Force Majeure but made more frequent (and therefore predictable) by climate change (such as floods or hurricanes), depending on the region.⁸⁶ Other underlying existing legal principles (such as hardship provisions) may also be capable of operating to provide the affected party with relief from adverse financial consequences of certain circumstances. The effect of these must also be considered and the PPP legal framework should be clear on the scope for derogation. 	<ul style="list-style-type: none"> The expression "change in law" typically refers to any change in the legal framework that occurs after the specific date at which the Private Partner's contractual pricing is fixed. The precise definition of "change in law" is typically set out in the PPP Contract itself and may carve out or distinguish between certain changes (e.g. changes which are discriminatory/non-discriminatory towards PPP participants). To the extent there is any ambiguity regarding parties' ability to contract out of any date prescribed in any legal instrument, the PPP legal framework should resolve it. Changes in law can have a significant effect on the ability of the Private Partner to deliver the PPP project – for instance, they can slow down the project or increase costs for the Private Partner in ways that were not anticipated (e.g. by requiring new approvals or compliance with new standards). Since changes in law are likely over a long-term PPP Contract, particularly in markets with developing legal systems, the Private Partner is unlikely to be willing to consider all such changes as part of the "cost of doing business" in that country and will want to have express contractual provisions in the PPP Contract to protect it from the effects of certain changes as opposed to having to rely on underlying legal principles which might operate to provide some relief. <div style="display: flex; align-items: flex-start;">  <ul style="list-style-type: none"> Governments may wish to ensure that Contracting Authorities are clearly entitled under the PPP legal framework to provide Private Partners with sufficient change in law protection to incentivize their participation and that the legal framework is clear as to the effect of any underlying legal principles. </div>

Other types of changes in circumstances (e.g. changes to the PPP Contract, refinancings, project/asset handback, other delay events, etc.) should also be addressed in the PPP Contract and may need specific consideration in the

⁸⁶See [The World Bank, 2019. Guidance on PPP Contractual Provisions](#), Chapter 1 Force Majeure, Section 1.3 regarding this point and associated insurability considerations.

PPP legal framework to ensure there are no uncertainties as regards the scope of the parties' freedom to contract or the approvals needed in certain circumstances. For further information on these topics, see [the World Bank's Guidance on PPP Contractual Provisions, 2019](#) and [Chapter 8 Contract Management](#).

In limited cases, however, the PPP Agreements will not be able to allocate risks "in advance" via agreed contractual mechanisms and in those cases, renegotiation of PPP Agreements may be required. For further discussion, see [Chapter 8 Contract Management, Section 8.3.10](#).

7.4.9 Language of documentation

It is important that the contractual language of choice for PPP Agreements is clear and whether more than one language is permitted or required – and which will prevail in the event of inconsistency. This may be set out in existing law already, in which case it is essential to ensure the position facilitates and is clear as regards PPP Agreements. Legislative action may be needed if the position requires clarification. Cases where this may need to be considered include where countries have more than one official language or where it is evident that another (more familiar) language is needed in order to attract international private participants so that the government's PPP policy objectives can be achieved.

7.5 Toolkit for regulating PPP Agreements

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

7.5.1 Checklist of considerations

In determining the appropriate PPP legal framework for implementing the objectives outlined in this Chapter in relation to the PPP Contract and other PPP Agreements, the following checklist should be considered:

Contract terms	<ul style="list-style-type: none"> → What is the best means of ensuring appropriate and consistent PPP contract risk allocation to deliver PPP policy objectives? → Who is best placed to develop and deliver guidance on contractual provisions or standard model contracts (and amendments) (and monitor compliance)?
Scope of powers	<ul style="list-style-type: none"> → Do the relevant Government Entity/ies have adequate power to contract in respect of all matters (e.g. taking into account the nature of relevant provisions, financial commitments undertaken etc.)? → Is a clear obligation to contract on the required terms needed? → What level of flexibility to deviate from standard terms is appropriate and what approval parameters should apply? → Do credit support mechanisms need specific provisions? Consider approvals.
Freedom to contract	<ul style="list-style-type: none"> → Do the parties have freedom to contract on the basis of the desired PPP risk allocation terms? → What existing laws might impact on this ability? Can they be adapted or contracted out of? → What changes to laws may be needed and what is the best means of achieving this?
Specific legal provisions	<ul style="list-style-type: none"> → Does the primary instrument need to expressly permit certain contractual arrangements? → Does the primary instrument need to be prescriptive in relation to certain key matters? → Should power be given to a relevant Government Entity to develop certain related criteria? → As above, consider existing laws and systems.

7.5.2 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

PPP Agreements	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Obligation on Contracting Authority to enter into a PPP Contract (and related agreements) based on required terms: <i>[Tie into obligations under Chapter 3.]</i> • Option 1: Description of provisions to be included and detail to be provided in secondary instrument / responsibility delegated to relevant Government Entity (e.g. PPP Unit) <p>OR</p> <ul style="list-style-type: none"> • Option 2: PPP Contract (and related documents (as applicable) to be developed by Government Entity (e.g. PPP Unit) • Grant of authority/responsibility to the relevant Government Entity (or PPP Unit) to issue (and amend) standardized/model/template PPP Contract/Agreements/guidance (and/or delegate powers to do so). <p><i>[Relevant contractual terms to take into account specific contractual provisions in the law – see below.]</i></p>	<p>Implementation of responsibilities/delegated authority via relevant instruments – e.g. authorizing PPP Unit to issue (and amend) such standardized/model/template PPP Contract/Agreements if not set out expressly in primary instrument; Guidance on relevant matters.</p> <p><i>[Tie in with PPP Unit responsibilities elsewhere]</i></p> <p>Issuing/updating the above.</p>
<ul style="list-style-type: none"> • Specific powers and provisions in respect of any terms which need express treatment to: <ul style="list-style-type: none"> • enable the Contracting Authority to contract in accordance with PPP risk allocation and policy aspirations; and/or • to clarify any ambiguities/restrictions due to existing laws. Local law analysis required but may include: <ul style="list-style-type: none"> • governing law; • dispute resolution; • waivers of sovereign immunity; • local content; • security arrangements and financier step-in; • Contracting Authority step-in; • incentives, tax exemptions, government support; • termination and compensation; and • force majeure, change in law and other changes in circumstances; and/or 	<p>Implementation of responsibilities/delegated authority via relevant instruments; Guidance on relevant matters.</p>

PPP Agreements	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Grant of authority/responsibility to the relevant Government Entity (e.g. Ministry of Finance or PPP Unit) to amend the above within specified bounds (or to delegate such powers as specified). Clarification/resolution of any ambiguities/issues under existing legislation that could impact on PPP contractual matters. 	
<ul style="list-style-type: none"> • Required/permitted language(s) of documentation and precedence 	Guidance on relevant matters.
<ul style="list-style-type: none"> • Relationship with relevant existing laws. <i>[If needed – see similar provisions.]</i> 	Guidance on relationship between laws.

7.6 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 7.5.2](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

7.6.1 PPP Contract – Definition and Article 7A

Definition:

PPP Contract means the long term agreement to be entered into between a Contracting Authority and a Private Partner which governs and regulates the relationship between the parties in respect of a PPP Project.

Definition to tie in with other defined terms.

1. **Option 1** (relating to setting out high-level contents of a PPP Contract in the PPP legal framework): The PPP Contract will contain provisions addressing the matters set out in [refer to relevant instrument e.g. guidance or (subject to its scope) the PPP Manual] which the [PPP Unit/relevant authority] will issue, including but not limited to provisions that deal with (a) laws governing the contract, waivers of sovereign immunity and dispute resolution, (b) risk allocation on the occurrence of various events including changes in circumstance, (c) step-in rights, and (d) termination rights and compensation due on termination). [Adapt/repeat for other PPP Agreements as appropriate (e.g. Direct Agreement/government support mechanism).]

This approach outlines certain necessary provisions but delegates the detail to the relevant Government Entity. It does not expressly envisage a standard form contract. Tie in with other provisions (e.g. as regards PPP Unit responsibilities – see Chapter 3).

OR

Option 2 (relating to standardized template PPP Contracts): The PPP Contract will take the form of the [model PPP Contract] that the [PPP Unit/relevant authority] shall prepare and issue for use as the basis for each PPP Contract to be developed for each Project, provided that the Contracting Authority shall be entitled to tailor and update that form on a case-by-case basis to suit the needs of the relevant Project subject to [insert relevant approvals provisions]. [Adapt/repeat for other PPP Agreements as appropriate (e.g. Direct Agreement/government support mechanism).]

This approach delegates all detail to the relevant Government Entity but expressly envisages a standard form contract. As above, tie in with other provisions.

2. The PPP Contract for each Project will be entered into by the relevant Contracting Authority.
3. **If applicable:** The PPP Contract may stipulate that [specify relevant provision of existing law – e.g. the statutory provision setting out the definition of Force Majeure, or granting the Contracting Authority the right to terminate for convenience] shall be excluded in relation to that PPP Contract. [Adapt/qualify as appropriate.]

Tie in/adapt according to other provisions relating to the Contracting Authority's role and powers.

Consider whether specific legislation is required to ensure clarity and whether this can be achieved given the existing legal framework. See Section 7.3.1.

7.6.2 Governing law, dispute resolution and waiver of sovereign immunity – Article 7B

1. **Option 1:** The governing law of a PPP Contract shall be the law agreed between the parties and stated in the PPP Contract. [Adapt/repeat for other PPP Agreements as appropriate.]

See Section 7.4.1 and cross-refer to existing legislation as needed for clarity.

OR

Option 2: The governing law of a PPP Contract shall be the laws of *[insert relevant jurisdiction]*. *[Adapt/repeat for other PPP Agreements as appropriate.]*

2. A PPP Contract may stipulate that disputes be settled by reference to the competent courts of an agreed jurisdiction (which shall be stated in the PPP Contract) or by an alternative dispute resolution mechanism, including mediation, arbitration, expert determination, or any combination thereof. *[Adapt/repeat for other PPP Agreements as appropriate.]*
3. The Contracting Authority shall not be entitled to any state or sovereign immunity in relation to any differences or disputes under any PPP Contract to the extent it has agreed to waive such immunity. *[Insert provisions relating to relevant approvals of such waivers and/or tie to permitted positions included in PPP guidance/model contracts above.]* *[Adapt/repeat for other PPP Agreements as appropriate.]*

See Section 7.4.2.

Include/ adapt as appropriate.
See Section 7.4.2.

7.6.3 Local Content – Article 7C

1. A PPP Contract may require the Private Partner to commit to hire domestic labor or contractors, and use domestic goods, supplies, materials or equipment. Any such requirement shall be disclosed clearly in the Tender Documents.

7.6.4 Security Interests and financier step-in – Article 7D

1. Where third party financiers are providing debt finance to a Project:
 - (a) it shall be permissible for the Private Partner (and/or any of its *[affiliates – to be defined adequately to include joint venture shareholders]*) to create security interests in favor of third party financiers of the Project over any of its assets, rights or interests, including those relating to the PPP, in particular: *[Cross-refer to existing legislation as appropriate.]*
 - (i) **security over movable or immovable property owned by the Private Partner (or any of its affiliates), its interests in PPP assets or shares in the Private Partner (or any of its affiliates); and**
 - (ii) **a pledge or other security over the proceeds of, and receivables owed to the Private Partner for, the use of the facility or the services it provides; and**
 - (b) the relevant Contracting Authority shall be entitled to enter into any step-in arrangements with such third party financiers with respect to the PPP Contract, including in respect of entering the PPP Contract and associated PPP Agreements. *[Tie to required relevant approvals of relevant arrangements.]*

Adapt to reference jurisdiction-appropriate security interest terms and to include any clarifications needed regarding permitted security in relation to "public" land/assets.

The nature of step-in should be clearly described and PPP Agreements definition should include relevant lender step-in/direct agreement.

7.6.5 Contracting Authority step-in – Article 7E

1. The PPP Contract shall include provisions allowing the Contracting Authority to step in and take control of a Project in circumstances where *[in the Contracting Authority's reasonable opinion]*

Option 1 (more general): the impact of the circumstances may cause harm to the public interest or interruption to a public facility or service that is required to operate on a continuous basis for the public good. **OR**

Option 2 (more specific): there is a serious risk to the health and safety of persons or property or the environment; there is a need to discharge a statutory duty; an Emergency *[define to refer to cases where the emergency services are mobilized]* has arisen; and/or *[include any other overriding public interest reason]*.

Drafting should refer to any existing applicable emergency legislation. The appropriate option will depend on the relevant jurisdiction and existing laws and should tie in with what is delegated as regards setting out permitted positions in PPP guidance/model contracts above.

7.6.6 Credit support – Article 7F

1. Subject to *[specify relevant approvals]*, the [PPP Unit/*relevant authority*] may propose incentives or guarantees in order to improve the attractiveness of a Project to the private sector, including, but not limited to: (a) tax exemptions; (b) in the case of user- or revenue-based PPPs, minimum user, revenue or other downside protections and/or bonus user and/or revenue incentives; (c) additional third party revenue opportunities; (d) direct contributions to capital works costs; and/or (e) contributions through land.
2. Subject to *[specify relevant approvals]*, the [Contracting Authority][PPP Unit] may propose a Government guarantee to guarantee the financial obligations of the Contracting Authority in relation to the PPP Contract.

See Section 7.4.4 and also discussion in Chapter 4, and Article 4E (Section 4.6.5), on credit support mechanisms (and government equity stakes).

Guarantees in connection with any PPP project should be subject to the Ministry of Finance's review and approval.

7.6.7 Early termination and compensation and change in circumstances – Article 7G+

[Include further separate provisions as needed to clarify or authorize in legislation how particular PPP contractual risk allocation agreements and related actions can be implemented. Drafting should be tailored to the specific jurisdiction and its existing legal framework and subject to applicable approvals. Consider also Article 7A (Section 7.6.1) in this context.] See Sections 7.4.5, 7.4.7 and 7.4.8.

7.6.8 Language of documentation – Article 7H

The PPP Agreements shall be in *[state language(s) and, if more than one, which prevails in the event of any inconsistency]*.

Tie in with any existing laws and relevant approval processes.

Contract Management



8. CONTRACT MANAGEMENT

8.1 Introduction

Contract management is the process of managing, monitoring and administering the PPP Contract and related documentation from contract signature through to the end of the contract and handback of the asset to the Contracting Authority. Governments need to ensure that an effective and proactive contract management framework is adopted by Contracting Authorities to ensure that the asset/service is delivered in accordance with the carefully agreed contractual terms. Failure to do so not only undermines the contract but can also cause disruption to services and potentially cost both contracting parties and end users money, time and convenience, as well as adversely affect the long-term availability of the asset and the partnership relationship between the public and private sector parties. Contract management is also key in ensuring the Contracting Authority can collate project information not only for its own purposes, but also to comply with requirements to provide data to other government bodies that monitor and audit PPP programs, as well as to meet transparency and disclosure obligations.

There are essentially two arms of contract management from the Contracting Authority's perspective – first, establishing agreed processes with the Private Partner in the PPP Contract itself and, second, establishing internal processes which enable it to meet those PPP Contract processes as well as its wider reporting and data collection obligations. The overarching PPP legal framework must require Contracting Authorities to implement a comprehensive contract management structure which ensures both aspects are addressed and also mandates the development of relevant policy and guidance.

Guidance is provided on the extent to which aspects should be addressed in primary legislation or secondary instruments. The sample drafting in this Chapter focuses on the key requirements recommended to be included in the primary legal instrument as regards Contracting Authorities' internal PPP contract management procedures and the delegated responsibility for developing corresponding policy and guidance. Where the underlying detail of certain elements is more appropriately addressed in secondary instruments, the primary legal instrument should provide for appropriate delegated powers to effect this.

8.2 Guiding principles and objectives

In order to institute and regulate an effective contract management structure, the PPP legal framework should address the key guiding principles and objectives set out below.

8.2.1 Effective implementation of PPP Contract

Signing the PPP Contract and associated documents is the climax of the procurement process but is the first step in delivering the project. To ensure that all the energy and cost invested by government in the development and procurement stages is worthwhile, it is essential that project implementation is effectively managed so that the Contracting Authority receives what it has contracted for and also complies with its own contractual obligations throughout the construction, operation and asset handback stages.

This requires both a clear process in the PPP Contract itself and also a clear management and approvals structure within government for monitoring, managing, administering and enforcing the PPP Contract. Roles and responsibilities within the Contracting Authority and wider government need to be clearly delineated and appropriately allocated and resourced through the whole life of the project. For example, the process for notifying and accepting commencement of operation of a project asset must be clear in the PPP Contract and the Contracting Authority's contract management team must have people and processes in place to commence the next stage. In the case of a new school, for example, the team will need to carry out necessary checks, mobilize teaching staff and ensure parents and pupils are informed.

8.2.2 Effective performance monitoring and reporting

At the PPP Contract level, performance monitoring and reporting can be key to certain contractual processes, such as payment mechanics and default provisions. They also act as an early warning system of potential problems with performance capacity or quality or asset management, enabling the Contracting Authority to engage with the Private Partner at an early stage where appropriate. An important example of this as governments seek to achieve net zero and meet other E&S goals is the management and monitoring of climate-related targets and key performance indicators. Effective performance monitoring processes are therefore key in supporting delivery of policy objectives.



8.2.3 Data collection and sharing

From the public sector's perspective, effective data gathering and reporting through contract management structures informs overarching policies and service capacity and enables procurement by PPP to be audited and compared with other forms of infrastructure procurement. It also enables the Contracting Authority to meet disclosure and transparency obligations which in turn foster accountability and deter corrupt practices.

8.2.4 Change management

Given the long-term nature of a PPP project, during its life there are likely to be changes which occur to the external environment or within the project itself. These will generally fall within contractual change mechanisms (such as change in law, force majeure, variations, etc.), but may occasionally be entirely outside the contemplation of the PPP Contract (as has been the case in some projects in respect of the Covid-19 pandemic and impact). An effective contract management framework must include appropriate processes – both in the PPP Contract itself and in the management teams delivering it – for identifying and dealing fairly and satisfactorily with the risks, opportunities and decisions that may arise from potential changes. [See Section 8.3.10.](#)

8.2.5 Building partnership relationship

Establishing a good working relationship and collaborative approach between the Contracting Authority and its private sector counterparties builds a strong partnership and contributes to the long-term success of the project. Good contract management can help achieve and benefit from this and also ensures the Contracting Authority is able to anticipate potential areas of contention and be better prepared for any disputes which may arise (and to resolve them in accordance with the contractual dispute resolution processes).

8.2.6 Alignment with existing laws and regulations

The PPP legal framework for managing PPP projects needs to be appropriately aligned with existing legal frameworks to ensure that there are no conflicts or ambiguities, for example, in terms of laws which may have an impact on the operation of contract management processes. Examples include procurement law (e.g. which may be relevant in the context of material changes to contractual terms or scope), approval of fiscal matters or environmental regulation. This is an area that will need ongoing awareness through the life of the project, particularly if the wider legal framework continues to evolve.

8.3 Contract management framework

This Section gives an overview of the contract management structure that should be put in place under the PPP legal framework and the key considerations involved. The detail of these matters is recommended to sit within secondary instruments while primary legislation should be limited to setting out overarching *requirements*.

Further guidance on these matters is available in the footnoted resources.⁸⁷

8.3.1 Overview of contract management structure

In order to deliver the objectives outlined in [Section 8.2](#), a PPP legal framework should require the implementation of a clear contract management structure on every PPP project. This should encompass:

(a) PPP Contract processes

- The PPP Contract should contain obligations on both the Contracting Authority and the Private Partner to comply with relevant processes. This is key to enable the government to manage the PPP Contract and ensure the contractual agreement is being delivered. Provisions should include monitoring performance and asset condition, reporting, disclosure and communication between the contracting parties, placing clear obligations on the Private Partner, and set out clear dispute resolution provisions.

(b) Internal Contracting Authority/public sector processes

These include:

⁸⁷See [The World Bank, 2017. Public-Private Partnerships Reference Guide Version 3](#) and [Global Infrastructure Hub, 2019. Managing PPP Contracts After Financial Close: Practical guidance for governments managing PPP contracts, informed by real-life project data.](#)

- day-to-day management of the PPP Contract: this typically happens at the Contracting Authority level through a contract management team (led by a project director), following guidance issued by a supervisory body (e.g. the PPP Unit).
- management of key decisions (including as part of the contractual dispute resolution process): involving relevant senior management in the Contracting Authority, and/or other approval bodies (as set out in law or governed by policy).
- clear internal roles and obligations for the Government Entities involved to ensure the contract management structure is adhered to.

At a macro level, the PPP legal framework should have, or link into, a system of oversight of government projects generally. This is a different type of contract management/review and can take various forms, typically carried out by an independent industry regulator, national audit office and/or public accounts body.

The Table below highlights the issues that governments have encountered when an effective contract management structure is not in place:

Challenges to be addressed by an effective contract management structure	
<ul style="list-style-type: none"> • Vision, values and strategic objectives of the Contracting Authority not being communicated to and shared with the Private Partner, leading to underperformance by the Private Partner. 	<ul style="list-style-type: none"> • Lack of capability within the contract management team
<ul style="list-style-type: none"> • Lack of clarity on roles and responsibilities within the Contracting Authority's contract management team 	<ul style="list-style-type: none"> • Inadequate stakeholder engagement
<ul style="list-style-type: none"> • Lack of clear and sufficient delegation of authority to the contract management team to make timely and informed decisions without continuously seeking approvals from other relevant government agencies 	<ul style="list-style-type: none"> • Lack of an effective performance management framework
	<ul style="list-style-type: none"> • Ineffective systems and processes

Source: Global Infrastructure Hub, 2018. Managing PPP Contracts After Financial Close, chapter 2.1.1.

8.3.2 Responsibility for developing contract management tools

Implementing an effective and coherent contract management process which is consistent across a Contracting Authority's PPP program requires detailed consideration and development of policies. Governments should mitigate this burden on Contracting Authorities by using the PPP legal framework to mandate the development of contract management policies and guidelines which the Contracting Authority is required to follow in implementing its own policies. Adopting a consistent approach will also help maintain continuity, transparency, accountability and efficiency in the management of PPP projects across the government's PPP program.

The responsibility and power to develop and promulgate contract management policies and guidance and to require Contracting Authorities to implement them should be clearly allocated to the body responsible for supervising the country's PPP program. This is often the role that a PPP Unit will have and this delegated power should sit in primary legislation if the existing legal framework does not provide for such delegated responsibility.

The law should but not be overly prescriptive or detailed on the content or format of the policies and guidelines (or the means of requiring implementation) – this will allow for flexibility in their scope and initial and ongoing development as policies develop and lessons are learned through the lifecycle of the PPP program. In compiling the list of items to be included, governments should consider any specific needs they have and ensure that there is no conflict with existing guidelines or with powers held by other departments. Existing governmental management and approval processes should also be taken into account. The policies should: (i) allow the Contracting Authority⁸⁸ an appropriate level of flexibility in how it develops them into its own internal policies (reflecting the nature of the Contracting Authority and the number and type of projects that will be procured); (ii) be periodically reviewed by the responsible body (e.g. the PPP Unit); and (iii) be capable of being amended and refined as data is collected and market and best practice evolves.

The format of such policies and guidance can vary but governments may want to consider requiring them to sit clearly within a comprehensive "manual", so that Contracting Authorities can identify clearly what they need to comply with. [See Section 8.5.1, Article 8A](#) for sample legislative drafting.

Benchmark Examples		
In 2019, the Dubai Department of Finance established a PPP Unit which is responsible for developing PPP policies and guidelines to standardize processes for Contracting Authorities, providing final approval of business cases for projects as defined in the PPP Law No. 22 of 2015 and supporting the Contracting Authorities during all phases of the PPP project. ⁸⁹	In Cambodia in 2017, the central PPP Unit was established within the Ministry of Economy and Finance, tasked with promoting, coordinating and managing PPP projects in an innovative and effective manner to support the economic growth of the country. The CPU's mandate is split into four divisions (i) policy and knowledge management; (ii) project development; (iii) project delivery and monitoring; and (iv) general affairs. ⁹⁰	In South Africa , the national PPP Unit and the relevant provincial PPP Units are also responsible for supporting the Contracting Authority with the contract management for the various PPP Contracts.

The policies that the Contracting Authority then develops and implements should in turn allow for flexibility in how they are applied to each individual project, according to the nature and complexity of the project, the level of stakeholder involvement and the project risk allocation. These policies too should be kept under review and be capable of development as the Contracting Authority accrues practical experience and knowledge, and to take into account changes in supervisory body guidance and policy.

Key considerations regarding development of policies and guidelines	
<ul style="list-style-type: none"> Flexibility to adapt to change Opportunity to delegate responsibility for various functions Adoption of best practice 	<ul style="list-style-type: none"> Defined lines of authority, communication and process for approval Frequent and continual review and update of policy Clear and methodical approach to decision-making

⁸⁸Contracting Authority in this context also means a "department/ministry" which oversees the procurement of more than one project or a portfolio of projects.

⁸⁹[Government of Dubai, n.d. Public Private Partnerships \(PPP\).](#)

⁹⁰[Ministry of Economy and Finance Cambodia, General Department of Public-Private Partnerships.](#)

It is key that PPP contract management policies and guidance materials at government and then Contracting Authority levels are in place prior to the commencement of a PPP procurement program as they impact the content of the PPP Contract and the relationship between the public and private sector parties, as well as being key to facilitating a smooth transition within the Contracting Authority between procurement and construction phases.




8.3.3 Obligation to implement policy and guidance

The Contracting Authority should be required by law to implement and adhere to policies and guidelines developed by the PPP supervisory body in accordance with its delegated responsibility and governments should consider how to enforce compliance (e.g. by approvals only being granted if compliance can be demonstrated: for example, prior to approval of contract signature or of certain subsequent requested changes; or by internal sanctions being levied).

This obligation should sit in primary legislation if the existing legal framework does not already provide for it (but note that "mandatory" adoption may also be achievable through the "soft law" approach described in [Chapter 1 Guiding Principles, Section 1.5.1](#). See [Section 8.5.3, Article 8C](#) for sample legislative drafting.

8.3.4 Overview of contract management tools

The types of contract management tools and templates that a government should require the PPP supervisory body/PPP Unit to develop to assist Contracting Authorities include:

1. **Risk Allocation Matrix** – setting out the government’s preferred position on risk allocation under the PPP Contract, to act as a checklist and guide to ensure the appropriate level of risk is being assumed by the Contracting Authority not only during procurement but through the life of the project (e.g. in discussions relating to contractual changes). This may be done in the form of a template PPP Contract and/or additional guidelines, and may also include risk allocation papers or matrices developed in the appraisal process which informed the Contracting Authority's selection of PPP as the procurement method and also its approach to the PPP Contract. This is a more static record – see [point \(4\) "Performance Management Guidance"](#) below for an active risk management tool. See [Chapter 7 PPP Agreements and Chapter 4 Project Origination and Appraisal](#). 
2. **Contract Management Team guidelines** – setting out details on establishing a contract management team, including as regards: (i) resourcing (timing, skill set, number, location and expertise); (ii) funding/budgeting; (iii) responsibilities (including implementing the tools mentioned in this Section); (iv) regularity of meetings; and (v) training. See [Section 8.3.6](#).
3. **Decision Making/Approval Matrix** – setting out details of the Contracting Authority personnel and other Government Entities that must be consulted with or grant approval for the different types of decisions involved in management of a PPP project (including under the contractual dispute resolution process). See [Section 8.3.10](#).
4. **Performance Management Guidance** – setting out a template and/or principles from which the Contracting Authority can develop a detailed process diagram and management matrix outlining the typical performance management processes, government monitoring and reporting requirements, common contingencies and method for responding to change in respect of the PPP Contract, including how to establish risk registers (i.e. active risk management tools for tracking how the contractual relationship is being implemented against the risk allocation set out in the PPP Contract). Monitoring and reporting procedures should address resourcing needs, reporting format and frequency, reporting bodies, method and responsibility for processing and evaluating data, and data retention and information security policies. Due to their bespoke nature, detailed templates are likely to be more appropriately developed at sector-specific level than at PPP Unit level. 
5. **Contract expiry/handback guidance** – setting out clear processes and guidance for the Contracting Authority on how to prepare for the asset and service provision returning to it on contract expiry. See [Section 8.3.9](#) for more detail.
6. **Training and guidance** – covering the aspects above, as well as certain topical matters from time to time. Areas include: change management (including compliance with procurement and other laws; wider impact on the government’s PPP portfolio and standard risk allocation; and exposure to dispute risk); market developments; monitoring and reporting; communications; contract enforcement and risk management; contract expiry and asset handover; how to leverage the expertise of external 

consultants (i.e. law firms, insurance advisors and technical consultants); and understanding the contractual impact of anticipated changes in law or unexpected events (such as new E&S legislation, particularly as regards climate change, or the Covid-19 pandemic).

These tools should assist the Contracting Authority develop its own bespoke and project-specific tools and practical checklists of actions required, including tools to ensure key dates and decisions are diarized and anticipated so as to facilitate effective day-to-day management.

8.3.5 Relationship between PPP Contract management processes and internal public sector processes

Typically, the PPP Contract will contain a framework within which the parties communicate and through which the Private Partner reports to the Contracting Authority on various project matters (including performance). Many of the contractual provisions will envisage exchanges and communication obligations between the parties, particularly where contractual change mechanisms are invoked.

Day-to-day operational and relationship management matters are typically dealt with in the first instance through nominated representatives of each party under the PPP Contract. These representatives can be key in establishing the long-term partnership that should exist between the parties for the life of the PPP project and for their understanding of the history of the project as it develops. They should be of a sufficiently senior level on each side to command credibility with the other party.

For more material matters (such as resolving preliminary disputes, agreeing key changes or periodically overseeing project progress), more senior representatives of the parties may be specified in the contractual process. For example, the PPP Contract may establish a "PPP contract management board" and/or a "senior partnership board" made up of appropriately senior members of key project stakeholders, with a focus, respectively, on contract performance and long-term partnership.

Representatives from relevant Government Entities must be appointed to fulfil the roles required by the PPP Contract, and the internal contract management structure that the Contracting Authority establishes must support the efficient working of these agreed contractual processes. For example, if the Contracting Authority's decision-making/approval matrix requires that a material matter must be approved by a particular Government Entity (such as the Ministry of Finance or the PPP Unit), internal processes must ensure that such approval is provided within a timeframe that enables the Contracting Authority to comply with the response timeframes specified under the PPP Contract. It is good practice to establish regular communication between relevant Government Entities so that decisions are not thrust upon entities with short notice. Contract reporting on a periodic basis can assist (and, for example, the PPP Unit can act as a supervisory/coordinating body). Detailed requirements should be set out in secondary instruments and policy (taking into account criteria such as the entities involved and the nature of the project). Conversely, the Contracting Authority must ensure that it agrees response timeframes under the PPP Contract that it is capable of meeting, taking into account the approvals that will be required to be obtained internally and the Government Entities involved.

In terms of the contract management processes needed in the PPP Contract, it is recommended that the detail is set out in PPP Contract guidance which the Contracting Authority is required to follow. Such guidance must provide sufficient flexibility to enable the Contracting Authority to agree a contractual process that fits with the nature of its particular project and the approval parties involved. [See Chapter 7 PPP Agreements](#) for more detail on how governments should approach PPP Contract guidance generally.

8.3.6 Contract management team guidelines

Contract management guidelines should provide for a Contracting Authority's contract management structure to consist of a contract management team (e.g. led by a project director) which reports to a senior board or particular officers. It may also include reporting to a board made up of other government stakeholders, and/or to the PPP supervisory body/PPP Unit. This will depend on the decision-making/approval matrix for each project. [See Section 8.3.10](#).

The type of considerations that need to be taken into account in formulating a contract management team include the following set out in the Table below:

Requirements for the Contract Management Team	
<ul style="list-style-type: none"> • Project specifics – the governance structure of the team and the skillset/competencies of its members should be appropriate for the project and its requirements. The project may require more active or passive monitoring depending on the specifics. 	<ul style="list-style-type: none"> • Early engagement – the team must be set up before financial close (if not already involved in the procurement process) and all the structures/procedures should be in place, ready for the transition to commencement of the contract (and e.g. start of the construction phase).
<ul style="list-style-type: none"> • Project-appropriate size – the size of the team should be based on the project (i.e. level of complexity and obligations, risks retained by Contracting Authority, sector and level of involvement of external resources). 	<ul style="list-style-type: none"> • Continuity – a plan for staff turnover should be in place to ensure there are adequate procedures for continuity of knowledge, and to avoid over-reliance on single individuals. Training should be aimed at helping ensure continuity after any handover.
<ul style="list-style-type: none"> • Defined responsibilities – clear responsibilities must be allocated for overseeing the various stages of the project, and clarity provided on the specifics of the various roles. The team leader will typically act as the Contracting Authority’s primary representative on the project. 	<ul style="list-style-type: none"> • Ongoing team monitoring – the team structure should be evaluated and adjusted on an ongoing basis, with procedures in place to ensure this happens.
<ul style="list-style-type: none"> • Training – initial and ongoing training should be provided and required to be undertaken, to ensure those involved have the relevant expertise required for the role. Key skills required are: communication, negotiation, change management, financial competence and analytical skills. 	<ul style="list-style-type: none"> • Mitigating political risk – the team should be set up in a way that mitigates the risk of a change in government and/or policy.
<ul style="list-style-type: none"> • Stakeholder and government relationships – team members should establish good working relationships with key stakeholders, and effective communication channels with other relevant government departments and regulators. 	<ul style="list-style-type: none"> • Recording data – a clear written record of all matters relating to the contract must be maintained, for reference as well as for audit purposes, data management and in case of disputes.
<ul style="list-style-type: none"> • Performance monitoring – team members should be equipped to understand the monitoring reports and interpret data to ensure there is adequate performance and asset condition monitoring throughout the project. 	

Some of the key aspects and responsibilities that contract management policy should encompass are highlighted in sample legislative drafting in [Section 8.5.1, Article 8A](#).

8.3.7 Early engagement and continuity

Contract management requirements must be considered by the Contracting Authority early on in the project development process to ensure that the team will be appropriately resourced at the required time and that sufficient budget has been allocated to enable the required resources to be obtained.

Continuity of the project team through the PPP project cycle is highly desirable. Having the contract management team assist in the procurement phase engages and incentivizes the team to ensure that: (i) the PPP Contract (and other

PPP Agreements) can be easily implemented, managed and monitored from contract signature onwards; and (ii) the processes provided in the PPP Contract (and other PPP Agreements) to be followed upon the occurrence of certain events (such as compensation events, force majeure and disputes) are clear, comprehensive and easily implemented. This level of engagement and continuity also ensures that the contract management team are familiar with the project and the PPP Contract from day one of it coming into effect.

While continuity and a one-team approach to contract management is the desired goal, it is not always possible to ensure or implement such a structure due to various reasons, primarily resourcing and budget. In such cases, best practice is to provide for an effective and comprehensive handover from the procurement team to the contract management team prior to contract close.

8.3.8 Training

It is crucial to the successful management of a PPP project that the contract management team and any government employees engaged in the delivery of PPP projects undertake frequent and focused training to build their expertise. See Section 8.3.4 point (6) (Training and guidance) above for examples. Projects and teams will benefit through the sharing of knowledge and lessons learnt and training will facilitate consistency in the management of PPP projects and the adoption of applicable contract management policies across both the Contracting Authority's portfolio of projects and the government's wider PPP program.

8.3.9 Managing and resourcing asset handback

At the end of the contract term, the project assets will typically be handed over to the Contracting Authority. The PPP Contract will set out what condition the assets should be in, whether a payment should be made on asset handover, whether the Private Partner must provide some form of indemnity as regards asset condition and how such matters will be determined. The process to handover should start sufficiently early before the PPP Contract is due to expire so that there is time to carry out relevant surveys and necessary remediation works and to understand what significant works are still anticipated. The Contracting Authority also needs to ensure that it has a clear plan for service delivery/asset management after expiry.

This is a key stage in ensuring that risk allocation and VFM is realized as originally contracted. By engaging early, lenders will also have an interest in ensuring the Private Partner meets its obligations and funding and financial incentives still remain (e.g. through project reserves and future contractual payments to the Private Partner). The timing will depend in part on the nature of the Project and the relevant handback terms regarding asset condition but the process should start several years before expiry. UK government guidance suggests expiry and transition planning should commence at least seven years before the expiry date.⁹¹

It is critical that the contract management team is appropriately resourced to participate effectively in this process and to ensure a seamless handover to the Contracting Authority or other incoming third-party service provider. The Contracting Authority must also ensure it has sufficient resources and capabilities in place for taking over or transitioning actual operation of the asset (including taking on employees from the private sector parties, where appropriate).

Central guidance and support on these aspects is critical (e.g. from a PPP Unit), especially where Contracting Authorities and government as a whole may have a large number of PPP projects coming to an end at a similar time.

It is only by initiating early work to understand the contract, the underlying assets and services, handback considerations and the likely future requirements that an authority can establish the relevant timeline for a PFI contract expiry project.

[UK Government, Infrastructure and Projects Authority, 2022. Preparing for PFI Contract Expiry: Practical guidance for contracting authorities on managing expiry and service transition](#)

Benchmark Example

⁹¹[UK Government, Infrastructure and Projects Authority, 2022. Preparing for PFI Contract Expiry: Practical guidance for contracting authorities on managing expiry and service transition.](#)

The UK Infrastructure Projects Authority has bolstered its personnel resources in order to assist Contracting Authorities with the large number of PPP projects due to expire over the next few years and has published specific practical guidance on preparing for PFI (PPP) contract expiry as referenced above.

8.3.10 Decision-making/Approval matrix and approval thresholds

A clear delineation should be made between the decision-making powers of the contract management team, PPP Unit and other senior representatives or stakeholders by creating a "Decision Making/Approval Matrix" for each project (based on guidance developed by the supervising body/PPP Unit as described in [Section 8.3.4](#)). This matrix should establish the level of approval required for all types of decision and, additionally, whether "inform and consult" obligations are needed. Decisions to be considered range from the minor to the material, including: day-to-day contract management matters; construction and operation decisions (e.g. extension of time requests and minor scope variations); implementation of change mechanisms; proposed minor or material amendments to the PPP Contract; and material events (e.g. refinancing, termination of the PPP Contract and material change in scope or pricing – including, for example, due to external events not contemplated by the contract).

The requirement for such matrix should be mandated by law. While it is recommended that the detail of such matrix is not prescribed in law, governments should consider when establishing the PPP legal framework whether responsibility for certain types of decisions should be specifically allocated in law. Governments should consider the following factors by reference to the types of decisions on material events or changes that could be needed (as outlined in below).

Pros and cons of allocating decision-making roles in PPP law rather than policy/guidance	
Advantages	Disadvantages
<ul style="list-style-type: none"> • Uniformity and certainty – builds investor confidence if approval structure works • Greater government control over the instances in which material changes can be made to the PPP Contract • Promotes impartiality and transparency as the law applies to all PPP projects 	<ul style="list-style-type: none"> • Rigid and no scope for selective application depending on the scale or nature of the project • Unlikely to capture all nuances or circumstances • More difficult process to amend the PPP law to adapt to changes in best practice and the market • Potential for increased administration and delays • Undermines investor confidence if approval structure unworkable

Thresholds for approval levels should be determined by the materiality of the relevant matter. Day-to-day decisions regarding the management of the PPP Contract should remain with the contract management team, while decisions regarding more material events or changes to the PPP Contract should require higher approval authority. This may involve senior Contracting Authority personnel and/or other Government Entities (such as the PPP supervisory body/PPP Unit or Ministry of Finance), depending on the nature and impact of the decisions involved. Factors such as the complexity of a matter and its financial impact (e.g. on pricing or government contingent liabilities) will determine the approval level required. [See Chapter 5 Approvals](#).

When assessing the appropriate thresholds for approvals (whether included in primary law or secondary instruments), considerations should include (i) whether the change or event is addressed through a contractually agreed mechanism or sits outside the PPP Contract, and (ii) whether it:

- exceeds a certain percentage of the value of the PPP Contract or other minimum amount;
- results in a substantial addition to (or reduction in) works or services to be provided by the Private Partner under the PPP Contract, e.g. by reference to a percentage or hard-wired value;
- is a public interest issue or could adversely affect the Contracting Authority's reputation (this is more qualitative in nature);

- (d) is by its nature a key issue, such as acceptance of construction completion, agreement to a refinancing or termination of the PPP Contract;
- (e) has a material adverse climate change-related or other E&S effect; and/or
- (f) increases the Contracting Authority's liability under the PPP Contract directly (e.g. through service payments or capital contributions) or indirectly (e.g. through contingent liabilities) or otherwise constitutes a material change in risk profile (which, for example, may impact government accounting treatment for the project).



Governments should bear in mind that setting out approval thresholds in primary law can be prescriptive and difficult to amend, which can cause problems if the thresholds are not sufficiently defined or are set too low to enable effective contract management (for example, if they are tied to figures or contract values which do not reflect the development of the PPP Contract, or require higher level approval for changes which are not material in the overall context of the project). Balanced against this, however, is that safeguards need to be built into the PPP legal framework to ensure that PPP Contracts are not re-opened or re-negotiated lightly, whether as part of a change mechanism or otherwise, or as a result of opportunistic behavior from either party.

A PPP project that is designed and procured according to best practice should not require the PPP Contract to be re-opened unless exceptional unanticipated circumstances arise. This is because the PPP Contract should have been fully scoped by the Contracting Authority and should also include change management mechanisms which have factored in agreed risk allocation in respect of events and changes (such as force majeure, changes in law and proposed variations), as well as effective dispute resolution processes.⁹² Widespread renegotiations can undermine market confidence in PPP programs and expose governments to criticism if the competitive benefits and risk allocation established through initial procurement are lost or undermined.

It is important to note that neither party is obliged to agree any changes to the PPP Contract which are not contemplated within it (except to the extent contractual mechanisms require); indeed, doing so will likely affect the carefully balanced risk allocation agreed under the original PPP Contract. On this basis, if the Private Partner is not entitled to relief in respect of a change or event then the Contracting Authority is not obliged to engage in negotiations to agree different terms. However, governments should be mindful that in limited exceptional circumstances (e.g. as a result of a wholly unanticipated event) it may be in a Contracting Authority's interest to consider discussing changes to the PPP Contract if continuation of the relevant service or asset is no longer viable through no fault of the Private Partner. Any such negotiations must be subject to strict approvals.

Broadly speaking, it is recommended practice that any decision which materially affects the PPP Contract risk allocation or financial structure (i.e. pricing or other financial liability of the Contracting Authority) should by law require approval of the Ministry of Finance. This is because of the impact on the Project's fiscal sustainability and the government's contingent liabilities and reflects the similar requirement for Ministry of Finance approval at key stages of the project during appraisal and procurement. *For further discussion of the Ministry of Finance's role and fiscal matters, see [Chapters 3 Institutional Framework, 4 Project Origination and Appraisal and 5 Approvals](#).*

⁹²See [The World Bank, 2019. Guidance on PPP Contractual Provisions](#) for further guidance on contractual mechanisms and processes.

Benchmark Examples


In **Chile**, regulations specify that Ministry of Finance approval is required for renegotiations over 20% of approved capital value. Any 'material' amendment is to be approved by its National Treasury.

Competent authorities in **Vietnam** are mandated to decide to modify a project's investment policies if the project's objectives, location, scale or type of contract is changed, and the total investment is increased by 10% or more, or the value of state capital invested in the PPP project is increased, due to certain events.

In **South Africa**, any 'material' amendment is to be approved by the National Treasury.

See [Chapter 3 Institutional Framework and Chapter 5 Approvals](#) for further discussion on approvals and approval bodies. See [Section 8.5.2, Article 8B](#) for sample drafting where the delineation of decision making power is to be formalized through primary PPP legislation.

8.3.11 External audit functions and transparency and disclosure

As highlighted above, one of the contract management team's responsibilities is to ensure adequate monitoring and reporting of relevant aspects of the PPP Contract. This is not just for the purposes of managing the contract but also to enable government to carry out periodic overarching auditing to assess whether the PPP Project and PPP program are meeting their objectives. In mature economies, a national independent audit office is usually tasked with evaluating and reporting on the performance of a PPP project or PPP program at certain intervals (after signature of the PPP Contract(s)). The audit is a different form of performance monitoring to the role carried out on a daily basis by the Contracting Authority and its purpose is to check compliance of the project with various indicators (including financial, E&S and regulatory) and this role is critical for fostering accountability amongst stakeholders. Depending on the audit office's capacity, it may select a sample of projects to audit, with the outcomes potentially triggering further government review of, or adoption of improved practices in relation to, a wider range of projects. In developing economies, the audit office may have more of a legal due diligence role in relation to the PPP Contract and PPP Agreements. 

Some countries (for example, in the EU) may also have a national statistical authority responsible for ensuring compliance with required statistical reporting of government debt and deficit levels.

The Contracting Authority must ensure that it is able to provide the information required by such bodies, and PPP guidance produced by the PPP Unit or PPP supervisory body should be designed to facilitate compliance. The particular detail and focus of the requirements and oversight function will depend on the individual jurisdiction.

The PPP legal framework should therefore require that the PPP Contract defines the extent of the Private Partner's obligation to provide the Contracting Authority or an audit/regulatory agency (as appropriate) with reports and other information on its operation for a) contract management purposes and b) compliance with general laws on transparency, disclosure and data provision. As regards the latter, if the existing legal framework does not adequately address the level of disclosure and reporting required to meet the recommended international standards to which governments should aspire in implementing PPP Projects, it is recommended that key obligations and requirements at both public and private sector level are included in primary legislation, with specific detail provided in secondary instruments and guidance. See [Chapters 1 Guiding Principles, 3 Institutional Framework, 6 Procurement and 7 PPP Agreements](#) for related discussion.

For more information, see the [World Bank's A Framework for Disclosure in Public-Private Partnerships, 2015](#) and [the World Bank's Guidance on PPP Contractual Provisions, 2019 Chapter 10 Confidentiality, Disclosure and Transparency](#).

See [Section 8.5.3, Article 8C](#) for sample legislative drafting of Contracting Authority obligations.

8.4 Toolkit for implementing contract management framework

This Section sets out practical considerations and tools to support the implementation of the aspects discussed above.

8.4.1 Checklist of considerations

In determining the appropriate PPP legal framework for implementing the contract management objectives and processes outlined in this Chapter, the following checklist should be considered:

Processes	<ul style="list-style-type: none"> → Distinguish between contract management processes: <ul style="list-style-type: none"> ○ within the PPP Contract itself (which fall under Chapter 7 PPP Agreements); and ○ internally within the Contracting Authority/government and which need to be in place to deliver obligations under the above as well as for wider government purposes
Responsibility	<ul style="list-style-type: none"> → What is the best means of ensuring appropriate and consistent contract management in PPPs on the government side throughout project lifecycles? → Who is best placed to develop and deliver guidance on contract management and expiry (and monitor compliance)?
Requirements	<ul style="list-style-type: none"> → Is a clear obligation on Government Entities to deliver/comply with the required approach needed? → Are any specific provisions required (e.g. in relation to establishing bodies for data reporting/monitoring in relation to PPPs etc.)?
Approvals	<ul style="list-style-type: none"> → Are there particular circumstances that should require specific approvals before the Contracting Authority can proceed? → Do these need to specifically set out in the primary instrument? → What are the appropriate thresholds for approvals? → Should power be given to a relevant Government Entity to adapt/develop certain related criteria?

8.4.2 Summary of appropriate implementation instruments

The Table below summarizes this Chapter's guidance on whether primary legislation or secondary instrument is suggested for implementing the relevant aspects of the PPP legal framework.

Contract Management	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> • Obligation on Contracting Authority to establish and comply with contract management policies/processes/manual based on required terms described (in outline) and related manual/policies issued as below. <i>[Tie in to obligations under Chapter 3.]</i> • Description of provisions to be included in contract management policies • Grant of authority/responsibility to the relevant Government Entity (or PPP Unit): 	<p>Implementation of responsibilities/delegated authority via relevant instruments (including development and promulgation of more detailed contract management policies and guidelines and monitoring of compliance); Guidance on relevant matters.</p>

Contract Management	
Primary Instrument	Secondary Instruments
<ul style="list-style-type: none"> to issue (and amend) contract management manual/policies and guidance (including as regards expiry/handback) based on required terms described: and to monitor compliance <p>(and/or delegate powers to do so).</p>	
<ul style="list-style-type: none"> Requirements and obligations in relation to data provision, reporting and disclosure (in outline). <i>[If not already covered in the law/existing laws.]</i> Grant of authority/responsibility to the relevant Government Entity (or PPP Unit) to provide further detail (and/or delegate powers to do so). 	<p>Implementation of responsibilities/delegated authority via relevant instruments. Guidance on relevant matters.</p> <p>To include detail on the specifics of the reporting obligations, and timing and content.</p> <p><i>[If not already covered in the law/existing laws.]</i></p>
<ul style="list-style-type: none"> Specific circumstances that constitute a material decision/change in relation to the PPP Agreements for which Contracting Authority must obtain prior approval from the specified Government Entity; (and/or delegate responsibility for such approval). 	<p>Detailed guidance on relevant events and how to seek approval.</p> <p>Implementation of responsibilities/delegated authority via relevant instruments, if applicable.</p>

8.5 Sample drafting

The sample drafting below focuses on the core provisions that are recommended to be addressed in the primary legal instrument as set out in [Section 8.4.2](#). The underlying detail of certain elements is typically more appropriately addressed in secondary instruments (e.g. legislation, policy or guidance materials) – where this is the case, the primary legal instrument should provide for appropriate allocation and delegation of powers and responsibilities.

8.5.1 Contract Management – Article 8A

1. [A contract management manual][Contract management policies and guidance] for Contracting Authorities on internal processes for managing PPP Contracts shall be developed and issued by the *[insert relevant authority/PPP Unit]* and updated from time to time. *[It/These]* shall set out the general rules applicable to Contracting Authorities governing the management and supervision of a PPP Project throughout its life and shall include, without limitation:
 - (a) guidelines for establishing and maintaining a contract management team and structure;
 - (b) a mechanism for the evaluation and monitoring of the performance and implementation of the PPP Project;
 - (c) a mechanism to manage the implementation of the PPP Contract (including payments, scope variations and other changes);
 - (d) an authority approval/decision matrix specifying which government parties need to be informed, consulted with or grant approval for decisions relating to the ongoing management of the PPP Contract and PPP Project;
 - (e) guidelines on preparing for expiry of the PPP Contract; and

See Section 8.3.4 for further guidance on the types of contract management policy recommended to be developed and Section 8.3.2 for drafting considerations. This drafting sets out the basic guidelines and mechanisms to include. An increase in the level of detail in this provision may reduce flexibility to make appropriate amendments as experience and practice develop.

- (f) requirements for periodic progress reports, data provision and information disclosure in respect of the PPP Project, including in relation to amendments to the PPP Contract and sustainability, social and environmental targets and key performance indicators.

[The [contract management manual][contract management policies and guidance] will form part of the PPP Manual.]

Include/adapt depending if a PPP Manual is to be implemented.

8.5.2 Approval of material decisions and changes – Article 8B

1. The Contracting Authority shall require the approval of the [relevant authority/PPP Unit] prior to any amendment or decision being made under or in relation to the PPP Contract that:
 - (a) results in changes which exceed [insert fixed value]/ [percentage]% of the original base case value of the PPP Contract immediately prior to the change; or
 - (b) substantially changes the scope of works or services to be provided by the Private Partner under the PPP Contract, [provided that no such approval will be required if such amendment is necessary and not contrary to public interest]; or
 - (c) results in termination of the PPP Contract; or
 - (d) results in the Contracting Authority's liability under the PPP Contract in any circumstance exceeding [insert]% of its liability envisaged [in the original base case][at contract signature]; or [See Article 8B.1(a) above re interim changes.]
 - (e) is in respect of a public interest issue or could materially adversely affect the Contracting Authority's or government's reputation; or
 - (f) has a material adverse climate change-related or other environmental, social or sustainability effect; or
 - (g) is in respect of a matter under the PPP Contract or related documentation which by its nature is material to the PPP Contract or related documentation (including refinancings of the Project by the Private Partner) or which materially changes the risk profile of the Project; or
 - (h) [insert any other cases].

Consider whether drafting should allow for changes from time to time to the base case or set whole life limit based on day 1 base case; and whether different thresholds are appropriate for contracts of very different size.

If a proviso is appropriate, it should be "provable" and not able to be used as a means of bypassing necessary approvals or procurement principles; consider scope of "substantially" and any existing definition of "public interest".

8.5.3 Compliance with contract management manual – Article 8C

A Contracting Authority must comply with the [contract management manual/contract management policies and guidance] referred to in Article 8A unless the [relevant authority/PPP Unit] permits it to do otherwise on reasonable grounds.

Tie in to Contracting Authority obligations (see Article 3A (Section 3.5.1)) and adapt according to intended purpose (i.e. whether this manual is intended to apply only to PPP policy and implementation guidance (e.g. contract management policies and detailed provisions for items set out in outline in primary legislation; or to include materials relating to PPP Contract guidance and model contracts etc).

8.5.4 Data provision, reporting and disclosure – Article 8D

1. A Contracting Authority shall prepare [quarterly][regular] progress reports throughout the performance of a PPP Contract and submit the reports to the [PPP Unit/relevant authority].
2. Such progress reports shall include:

- (a) a summary of any milestones achieved and any obstacles hindering performance (together with proposed appropriate solutions to remove such obstacles), and summary information on key performance indicators, performance failures and performance assessments (including annual audit reports and independent performance assessment by *[the relevant specialist/independent engineer]*, if any, and any other performance report available on the Project since the previous report);
- (b) a summary of any proposed amendments requiring decision or approval under Article 8B and recommendations as to the appropriate decision and any key information in respect of the Project or the parties involved; and
- (c) any information required to be disclosed by the Contracting Authority or the *[PPP Unit/relevant authority]* in respect of the Project since the previous report.
3. A Contracting Authority shall collate and submit *[insert relevant data required]* in respect of a PPP Project to *[specify supervisory body]* in accordance with the time periods set by *[that body]*.
4. A Contracting Authority shall comply with all applicable information disclosure obligations.

This type of provision to be added as needed, unless covered through contract management policies and obligations to adopt and comply with those, or existing government reporting framework.

Drafting to be adapted to conform with local regimes.

Drafting to be adapted to conform with local regimes.

Appendix A



APPENDIX A

ADDITIONAL ONLINE RESOURCES

These resources are for reference only.

Always check with the relevant jurisdiction for currently applicable PPP laws.

Asian Development Bank. What bidding procedures are used by ADB-financed projects?:
<https://www.adb.org/business/how-to/what-bidding-procedures-are-used-ADB-financed-projects>

Asian Development Bank, 2006. Workshop Report, Facilitating Public-Private Partnership for Accelerated Infrastructure Development in India:
<https://www.adb.org/sites/default/files/project-document/66596/39659-ind-tacr.pdf>

Australian Government. National Guidelines for Infrastructure Project Delivery, Australian Government, Public-Private Partnerships, National PPP Policy and Guidelines:
<https://www.infrastructure.gov.au/infrastructure-transport-vehicles/infrastructure-investment-project-delivery/national-guidelines-infrastructure-project-delivery>

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971. Ramsar Convention:
<https://www.ramsar.org/document/copy-of-the-convention-copy-certified-by-unesco>

European Commission. Regional policy good practices. Separate technical and financial offers:
https://ec.europa.eu/regional_policy/sources/good_practices/GP_fiche_21.pdf

European Commission Directorate-General Climate Action, 2011. Non-paper Guidelines for Project Managers: Making vulnerable investments climate resilient:
<https://climate-adapt.eea.europa.eu/metadata/guidances/non-paper-guidelines-for-project-managers-making-vulnerable-investments-climate-resilient/guidelines-for-project-managers.pdf>

European Commission Directorate-General Regional Policy, 2003. Guidelines for Successful Public-Private Partnerships:
https://ec.europa.eu/regional_policy/sources/docgener/guides/ppp_en.pdf

European PPP Expertise Centre, 2021. EPEC Guide to Public-Private Partnerships:
<https://www.eib.org/en/publications/epec-guide-to-public-private-partnerships>

European PPP Expertise Centre, 2014. Establishing and Reforming PPP Units: Analysis of EPEC Member PPP Units and lessons learnt:
<https://www.eib.org/en/publications/epec-establishing-and-reforming-ppp-units>

Equator Association, 2020. Equator Principles, EP4:
https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf

Global Infrastructure Hub, 2018. Managing PPP Contracts After Financial Close, Practical guidance for governments managing PPP contracts, informed by real-life project data: https://content.gihub.org/live/media/1465/updated_full-document_art3_web.pdf

Global Infrastructure Hub, 2019. PPP Risk Allocation Tool 2019 Edition:
<https://www.gihub.org/resources/publications/ppp-risk-allocation-tool-2019-edition/>

G20 (Japan presidency), 2018-2019. Principles for Quality Infrastructure Investment:
https://www.mof.go.jp/english/policy/international_policy/convention/g20/annex6_1.pdf

Inter-American Development Bank, 2017 Caribbean Public-Private Partnerships (PPP) Toolkit:
[https://publications.iadb.org/publications/english/document/Caribbean-Public-Private-Partnerships-\(PPP\)-Toolkit-Developing-Infrastructure-and-Improving-Service-Delivery.pdf](https://publications.iadb.org/publications/english/document/Caribbean-Public-Private-Partnerships-(PPP)-Toolkit-Developing-Infrastructure-and-Improving-Service-Delivery.pdf)

Inter-American Development Bank, 2020. Climate Resilient Public Private Partnerships: A Toolkit for Decision Makers:
<https://publications.iadb.org/en/climate-resilient-public-private-partnerships-a-toolkit-for-decision-makers>

Inter-American Development Bank, 2020. Improving Climate Resilience in Public Private Partnerships in Jamaica:
<https://publications.iadb.org/publications/english/document/Improving-Climate-Resilience-in-Public-Private-Partnerships-in-Jamaica.pdf>

International Monetary Fund, 2020. Well Spent: How Strong Infrastructure Governance Can End Waste in Public Investment:

<https://www.imf.org/en/Publications/Books/Issues/2020/09/03/Well-Spent-How-Strong-Infrastructure-Governance-Can-End-Waste-in-Public-Investment-48603>

Organisation for Economic Co-operation and Development, 2017. Getting Infrastructure Right, A framework for better governance:

<https://www.oecd.org/publications/getting-infrastructure-right-9789264272453-en.htm>

PPP Knowledge Lab:

<https://pppknowledgelab.org>

Republic of South Africa, National Treasury PPP Unit, 2004. Public Private Partnership Manual, National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act:

<https://www.gtac.gov.za/wp-content/uploads/2022/03/GTACs-Public-Private-Partnership-Manual.pdf>

Singapore Ministry of Finance, 2012. Public Private Partnership Handbook, Version 2:

<https://www.mof.gov.sg/docs/default-source/policies/procurementprocess/ppphandbook2012.pdf>

UK Government, Infrastructure and Projects Authority, 2022. Infrastructure Business Case: International Guidance:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062669/Infrastructure_Business_Case_International_Guidance.pdf

UK Government, Infrastructure and Projects Authority, 2022. Preparing for PFI Contract Expiry: Practical guidance for contracting authorities on managing expiry and service transition:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1057589/IPA_Guidance_-_Preparing_for_PFI_Contract_Expiry.pdf

United Nations, 2015. Transforming our world: the 2030 Agenda for Sustainable Development:

<https://sdgs.un.org/2030agenda>

United Nations Commission on International Trade Law, 2019. UNCITRAL Legislative Guide on Public-Private Partnerships:

<https://uncitral.un.org/en/lqppp>

United Nations Commission on International Trade Law, 2019. UNCITRAL Model Legislative Provisions on Public-Private Partnerships:

<https://uncitral.un.org/en/mlpppp>

United Nations Economic Commission for Europe, 2007. Guidebook on Promoting Good Governance in Public-Private Partnerships:

<https://unece.org/info/Economic-Cooperation-and-Integration/pub/2097>

United Nations Economic Commission for Europe. Public-Private Partnerships:

<https://unece.org/ppp>

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Appendix B



APPENDIX B

EXAMPLE FRAMEWORK OF A PPP LAW

PPP Law Part and Article	Guidance Sample Drafting reference	
	Section	Article
Part 1: Definitions		
Part 2: Scope and Application of the Legal Framework		
Article 1 Public Private Partnership <i>[if not covered in Definitions]</i>	2.6.1	2A
Article 2 Objectives of the Law – Preamble	2.6.2	2B
Article 3 Scope of Application <i>[including as regards existing Projects]</i>	2.6.3	2C
Article 4 Sectors and Excluded Projects	2.6.4	2D
Article 5 Relationship with Other Legislation <i>[including any repeals]</i>	2.6.5	2E
Part 3: Institutional Framework		
Article 6 Contracting Authority <i>[including engaging advisers]</i>	3.5.1	3A
Article 7 Ministry of Finance	3.5.2	3B
Article 8 Establishment of the PPP Unit	3.5.3	3C
Article 9 Role of the PPP Unit	3.5.4	3D
Article 10 PPP Manual <i>[if needed]</i>	3.5.5	3E
Article 11 Establishment of PPP Data Center <i>[if applicable]</i>	3.5.6	3F
Part 4: Project Origination and Appraisal		
Article 12 Origination and Appraisal Processes/Definitions	4.6.1	4A
Article 13 Project Origination	4.6.2	4B
Article 14 Factors to be considered in origination and appraisal processes	4.6.3	4C
Article 15 Mandatory consideration of PPP	4.6.4	4D
Article 16 Credit Support <i>[if applicable and see Article 30]</i>	4.6.5 <i>[and/or 7.6.6]</i>	4E/7F
Part 5: Approvals		
Article 17 In-Principle Approval	5.5.1	5A
Article 18 Final Approval	5.5.2	5B
Part 6: Procurement		
Article 19 Procurement Procedure [and Eligible Bidders]	6.6.1	6A
Article 20 Transparent and Credible Procurement	6.6.2	6B
Article 21 Pre-qualification of Bidders	6.6.3	6C
Article 22 Evaluation of Bid	6.6.4	6D
Article 23 Announcement of Preferred Bidders	6.6.5	6E
Article 24 Modification or Cancellation of Tender	6.6.6	6F
Article 25 Challenges to the Tender Process	6.6.7	6G
Article 26 Unsolicited Proposals	6.6.8	6H
Part 7: PPP Agreements		
Article 27 PPP Contract	7.6.1	7A

Article 28	Governing Law, Dispute Resolution and Waiver of Sovereign Immunity	7.6.2	7B
Article 29	Local Content	7.6.3	7C
Article 30	Security Interests and Financier Step-In	7.6.4	7D
Article 31	Contracting Authority Step-In	7.6.5	7E
Article 32	Credit Support <i>[if applicable and see Article 15]</i>	7.6.6 <i>[and/or 4.6.5]</i>	7F/4E
Article 33(+)	Early termination and compensation and change in circumstances	7.6.7+	7G+
Article 34	Language of Documentation	7.6.8	7H
Part 8: Contract Management			
Article 35	Contract Management	8.5.1	8A
Article 36	Approval of Material Decisions and Changes	8.5.2	8B
Article 37	Compliance with Contract Management Manual	8.5.3	8C
Article 38	Data Provision, Reporting and Disclosure	8.5.4	8D
Part 9: Miscellaneous			
Article 39	Repeals <i>[if not covered fully in Article 5]</i>	[2.6.5]	[2E]
Article 40	Publication and Commencement	n/a	