

Terms of Reference – Checklist of Potential Tasks for Legal Advisers to the Government for the Development of a PPP transaction in the Transport Sector

The following sets out the areas of scope of work for terms of reference (ToRs) to appoint legal advisers to assist the Government in the preparation of a public-private participation transaction (PPP) in the transport sector.

The following issues will need to be addressed when considering the type of services that the Government may wish to receive from the legal service providers. It should be noted that some of these services may be provided by the Government's legal department or from the Attorney General. The legal skills required to undertake many of these tasks are highly specialized and therefore the Government's legal function may not be in a position to provide the kind of advice required by the Government.

The Government may wish to appoint a combination of local and international legal advisers. The use of international legal advisers is often necessary to satisfy international investors or financiers when accessing the international financial markets.

1. Project feasibility

Where the Government has already obtained advice from technical or financial advisors on the type of PPP project to be adopted, the Government may wish the legal service providers to review the approach to be adopted and to advise on the legal implications of the chosen approach, for example:

- Review of risk allocation assumptions to assess whether those risks can legally be allocated to the private sector (e.g. land acquisition, collection of tariffs from individual consumers and safety monitoring).
- Review of project assumptions and whether they are legally viable, e.g. management of staff rights and benefits and whether there might be legal limitations to how staff can be treated.
- Assess the financial management and accounting structures proposed to identify efficiency gains available through other structural mechanisms, e.g. taxation of revenues and accounting methods for depreciation of assets.
- Identify licensing, permitting and other legal risks that need to be addressed and allocated under the chosen approach.
- Identifying other contractual and commercial relationships in the sector or related to the sector and how those relationships will interface with the PPP project.

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- Assess risk management structures for potential efficiency gains through alternative structures or modifications.
- Ensuring all necessary approvals and permissions are obtained for PPP processes before commencement of tender process, in particular to allow the relevant Government entity to sign the tender documents and the PPP contract.
- Confirming legality of budgeting assumptions and the management of revenue flows (e.g. are there restrictions on the use of monies collected for use with public services).
- Assessing risk allocation approaches to ensure that they correspond with private sector appetite and lender requirements. This should be done before bidding to avoid failure of the bidding process and the costly and reputationally damaging recommencement of the tendering process.
- Assessing chosen approach to PPP and whether any aspect of that approach will conflict with available or required procurement, contracting and financing structures.
- Assessing Government role in the proposed PPP project, whether that role corresponds with the Government's legal obligations, maintains sufficient power to protect the Government's interests and corresponds to the proposed corporate structure of the project vehicle and how in practice the Government role will be established in the project vehicle (e.g. voting rights, pre-emption rights, golden shares and the protection of minority shareholders)
- Developing and providing detail to the legal architecture and design of the transaction, identifying e.g. the (i) type of PPP contract to be used (e.g. concession, BOT or management contract) (ii) investment commitments to be required, their nature and management, (iii) investment plan, how, where and when investments will be made (iii) type of public sector support required, including terms and conditions and (iv) corporate structure for the investment and commercial management including nature of the SPV holding the concession, etc.

2. Tender

The Government would like the legal service provider to advise on the tender process. This is likely to include many or all of the following tasks:

- Advice on applicable procurement requirements
- Advice on mechanisms to maximize competition while avoiding unrealistic bids and project vulnerability from overly aggressive bidding.

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- Reviewing information to be provided by the Government to bidders to manage liabilities
- Designing pre-qualification procedure
- Drafting pre-qualification documentation
- Assisting with the implementation of the pre-qualification procedure
- Assisting with the assessment of pre-qualification applications
- Designing tender procedure
- Assisting the Government in its assessment of different key aspects of the tender procedure, for example deciding whether and to what extent to accept variant bids and non-conforming, how many bidders must bid before the process is valid, what rules to set in relation to the assessment of bids (scoring regimes, timing of bids and rejecting of excessively low bids) and how to maximize competition without sacrificing quality of bids.
- Drafting tender documentation
- Drafting the PPP contract that implements the chosen PPP approach, explaining to the Government whether and to what extent certain provisions could be amended without disturbing the key risk allocation goals of the Government.
- Assisting with the implementation of the tender procedure, including responding to bidder queries, managing bidder conferences and responding to communications with bidders to manage Government liabilities.
- Assisting with the assessment of tender applications, identifying variant bids and their viability.
- Assisting with process for selection of preferred bidder and the relationship with second and third place bidders, including managing bid bonds and on-going discussions to prepare for the eventual withdrawal of the preferred bidder.
- Negotiations with the preferred bidder to reach agreement on the PPP contract.

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3. Implementation of the PPP contract

Once agreement is reached on the PPP contract, the Government will need to implement that contract, achieving financial close and then monitoring the project as it is implemented. This may involve additional services from legal service providers.

- Reviewing proposed sub-contracts, in particular with the construction contractor and operator, to the extent forms of these contracts have not been included in the PPP contract or the tender documents.
- Advising on proposed changes to the agreed form sub-contracts.
- Review of preferred bidder satisfaction of the conditions precedent to the PPP contract, often including the validity of licenses and permissions obtained by the preferred bidder, formation of corporate vehicles in the form required, financial close of the project financing, and implementation of the commercial requirements for performance of the project.
- The above will normally involve a second set of negotiations with the lenders arguing similar points as those raised by the preferred bidder during the tender process and new issues often focused on financial covenants and protections. This may involve extended discussions of Government financial participation to protect the lenders from specific risks. The legal service providers should be involved in these discussions.
- Review and negotiation of the financial documentation which will often have a direct effect on the rights and obligations of the Government.
- Legal opinion that transaction is binding on its terms.
- Legal opinion on security and financial management structure.
- Legal opinion on revenue structure and current regulatory mechanism.

4. Advice re. Financing Instruments for Project

The Government may need to obtain debt or provide a loan to the project company or to provide some other financial instrument (e.g. guarantee or subsidy) to make the PPP project financial viable or more cost effective. Then Government may want advice on structuring of such instruments, their drafting, negotiation and implementation (e.g. setting up trusts and escrow accounts, arrangements with security sharing and management and other aspects of financial management and ensuring compliance with financial covenants). The scope of input from the legal advisor will depend on the nature of the financial obligations undertaken by the Government.