Policy Framework for Public Private Partnership (PPP) in Ireland

Project Implementation in the Local Government Sector

November, 2003

Foreword

Public Private Partnerships have an important role in the Government’s investment plans for public infrastructure and services. The aim of this document is to assist local authorities through the various steps involved in ensuring that suitable projects are chosen, that they are properly assessed, that the appropriate sanctions and approvals are obtained and that the project is managed in an efficient and effective manner.

The PPP model should only be used where it is appropriate and where it can deliver value for money. Typically, a PPP approach should be considered where there are major and complex capital projects with significant ongoing maintenance requirements. It should be used where the private sector can offer innovative design, management skills and risk incentivised expertise that can bring substantial benefits. The PPP model should not be used where the transaction costs of pursuing PPP are disproportionate compared to the value of the project or where fast-paced technological change makes it difficult to establish requirements in the long-term.

Under the PPP model contractors enter into long-term contracts and take responsibility for the quality of service they provide. To ensure the success of a project, there needs to be optimal sharing of risk between the public and private sector, with each partner retaining the risk which they are best placed to manage. The success of PPP arrangements depend in large measure on the continued engagement of both the public authority and the private contractor in a real partnership to deliver quality services to the public.

PPPs must deliver value for money. Enhanced competition, innovation, optimal risk transfer, the use of whole life costing, improved asset maintenance are some of the benefits of the PPP approach. But these potential benefits cannot be taken for granted and must be demonstrated in each case. A robust and transparent process for assessing the VFM of each project is therefore essential to underpin the case for PPP.

In order to assist in the assessment of what projects are cost effective the government, at the start of 2003, established the National Development Finance Agency [NDFA]. The NDFA provides financial advice to public bodies entering into PPPs. Its functions include assessing the optimal financing for major infrastructure projects set out in the National Development Plan and other infrastructure priorities.

This document seeks to bring together policy guidelines and regulatory requirements from a number of different sources. Guidelines issued by the Department of Finance on the carrying out of PPP projects refer to project Sponsoring and Sanctioning bodies. In the context of this document, local authorities are Sponsoring Authorities and the Department of the Environment, Heritage and Local Government is the Sanctioning Agency.
The means of procurement and the stage or stages at which the approval or sanction of the Department is required vary from sector to sector. Local authorities must ensure that the necessary approvals have been obtained before proceeding to procurement, such as:

- **Project approvals** - to obtain funding under a national investment programme, to proceed to tender or construction, to the form of contract or tender documentation, to sanction variations and cost increases and to the financial arrangements underpinning the project.

- **Approval to set up companies** - State Authorities (PPP Arrangements) Act, 2002 and/or sectoral legislation.

Throughout this document reference is made to other, more detailed, guidance that should be consulted by anyone engaged in managing a PPP project. The most important of these documents are:


- *Framework for PPPs [2001]*: Agreed with the Social Partners under the Programme for Prosperity and Fairness and published by the Department of Finance.

- *Interim Guidelines for the Provision of Infrastructure and capital Investments through PPPs [2003]*: Procedures for the assessment, approval, audit and procurement of projects issued by the Department of Finance.

In January 1999, the DoEHLG established a dedicated Public Private Partnership Unit to promote and facilitate the development of PPP in the sectors for which the Department has responsibility. Further advice on PPP matters can be obtained by contacting the Unit at 8882000 / pppunit@environ.gov.ie.

Information on PPP projects, together with a range of supporting guidance and technical notes, can be found on the official government PPP website ([www.ppp.gov.ie](http://www.ppp.gov.ie)). For the local government sector there is also an online forum where participants can access information on previous projects, take part in discussions and make contact with other local authority staff engaged on PPP work.
PART 2

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1. Introduction to Public Private Partnerships

A Public Private Partnership is a partnership between the public and the private sectors for the purpose of delivering a project or a service traditionally provided by the public sector. Rather than simply providing an up-front asset to the specifications of the public sector, the private sector can be responsible for various elements of the project including designing, building and financing the asset, operating and maintaining the asset, and providing a long term service relating to the asset. This arrangement involves a transfer of risk to the private sector, and allows the local authority to draw on economic and other resources that might not have been otherwise available. In short, the public sector specifies the service outputs required and the private sector proposes the best means to achieve these objectives.

There are a range of contractual forms associated with PPPs. The most common in Ireland are:

- **Outsourcing and Service** contracts are a PPP relationship between the public and private sectors for the provision of a service and/or function for 5 or more years.

- **Design, Build & Operate** contracts are where the facility is financed and owned by the public partner. The private sector contractor designs and builds the facility to meet local authority requirements and is also responsible for operating and maintaining the facility for a predefined period, at the end of which the facility is transferred back to the public sector partner.

- **Design, Build, Operate & Finance** contracts are where the private sector contractor is responsible for the designing, building, operating and financing of the asset. The private partner recovers its costs out of annual payments from the public sector and after a predetermined period the facility commonly reverts back into public sector ownership. The private sector recovers its costs out of payments from the public sector.
Concession Contracts are the same as DBOF contracts except that the private partner recovers its costs through direct user charges or through a mixture of direct user charges and public subventions.

Joint Ventures are arrangements or companies through which private and public sector bodies come together in a long term relationship to achieve an agreed set of objectives. Aspects of the project such as finance, operation, ownership, design and build are set out in the JV arrangement or based on the shareholders agreement for the JV Company. A JV arrangement is typically used in commercial or semi-commercial enterprises where profit sharing is favoured.

The general vires for local authorities to enter into PPPs can be found in the State Authorities [PPP Arrangements] Act, 2002. Local government legislation, and specific legislation dealing with housing, waste management and water services also contain provisions that support the use of PPP contracts.


There are also provisions within the Planning and Development Act, 2000 that can be used to help implement PPP projects. Specifically, S49 provides for the use of supplementary levies to underpin PPP projects and Sections 4 and 179 allow private companies to enter into agreements with local authorities and use the procedures available to local authorities to obtain planning consents.
2. Steps in a Public Private Partnership

All public projects must go through a number of steps which serve to ensure that the project is properly examined and assessed, that the necessary statutory and administrative approvals are obtained and that the procurement process is carried out in an efficient manner.

Although not all projects go through exactly the same process, the following diagram provides a route map for a typical PPP project undertaken by a local authority.

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**Stages/Phases**

- **Project Identification**
  - Local authority will undertake feasibility study or equivalent to determine the need for the project and outline the potential costs / benefits.
  - In most cases the approval of the Department will be required to proceed. The project may need to be included in a investment programme or sanction obtained to raise a loan. The NDFA will need to be consulted on major [≥€20 million] projects.

- **Options Appraisal**
  - Based on the PPP Assessment report submitted by the local authority a decision is made on the approach to procure the project. If the PPP route is chosen the Department will appoint a Process Auditor [major projects] for the project and approve the local authority to proceed with the preparation of contract documents, the obtaining of any required statutory consents and the securing of any land or wayleaves required.

**Decisions/Approvals**

- **Initial project approval**
  - The local authority and their advisers prepare an outline design for the project [including where required an Environmental Impact Assessment] and carry out a PPP Assessment where this approach is considered a likely option.

- **Investment Programme**

- **Approval as PPP Project**

- **Appointment of Process Auditor**
Statutory Process

The local authority is responsible for preparing the project to go to procurement. This includes ensuring that the various planning and land acquisition and access consents are obtained. The scheduling of the statutory process phase may vary from project to project and also be undertaken in parallel with other activities.

Pre-Procurement

Usually in parallel with undertaking the land acquisition and planning requirements on a project, the local authority and their advisers prepare the tender documentation. For PPP projects, a Public Sector Benchmark (PSB) study must also be undertaken.

Approval to proceed to procurement

The Department approves the project to go to procurement and sets an Affordability Cap on the project based on the PSB.

Setting an Affordability Cap

The local authority takes the project through the procurement process. Once this is done a Tender Recommendation Report is submitted to the Department.

Approval to go to construction

Based on the Tender Recommendation Report the Department approves the project to go to construction.

Procurement II

The contractor commences construction with the local authority managing the contract, making stage payments and monitoring progress.

Construction

Variations involving cost escalation may need to be referred to the Department.

Operation

In due course and subject to satisfactory performance the local authority signs off on the commissioning of the works and the operational contract commences.

Application

The performance of the project will be reviewed at a number of points during the contract and by different parties.
3. Project Identification

3.1 Needs Assessment/Outline Business Case

The local authority is responsible for the initial identification of the project. This may be based on a specific needs assessment or arise out of a regular review of investment opportunities and programme requirements.

Once the need or opportunity has been clearly identified it is up to the local authority to carry out an initial study into the scope and nature of the proposed project. Whether it is called a Feasibility Study, an Outline Business Case or some other term the broad intent is the same. In their initial appraisal of the project the local authority should:

- establish the business need,
- appraise the options for the delivery of the asset or service and
- prepare an initial estimate of costs and benefits.

It is essential to establish the business case for the project before coming to any conclusion about the possible use of a PPP approach. A PPP is only one of a number of ways in which a project can be delivered. It is sometimes the case, however, that even at this early stage the potential for use of a PPP [perhaps based on experience with other similar projects] is already evident. If this is the case then this should help inform the local authority in the way they approach the project and in their choice of external advisers.

On the basis that the potential for the use of a PPP approach is under active consideration for the particular project the local authority may wish to:

- undertake some market soundings especially if it is an unusual project which has not been brought to the market before,
- apply to the Department for a grant under the PPP Grant 'seed fund' Scheme [applies to projects outside of main investment programmes up to end of 2004]
- apply to the Department to include the project under one of the infrastructure investment programmes,
- seek initial approval from the Department to advance the project setting out the basis upon which it is to be funded. Approval of the Department will be needed to the raising of any loan finance and the advice of the Department [and the NDFA for major projects] will be required to determine the appropriate government accounting treatment for the project and if it can be allowed to proceed within Department of Finance approved financial envelopes.
3.2 Informal Market Assessment

Once the need for the project has been established or a business opportunity identified, the local authority must look at the possible solutions that would meet the objectives of the project. If this includes the possibility of involving a private partner the local authority may need to establish if there would be any market interest in the project.

Market Soundings

To measure the interest and capabilities of potential partners, the local authority would examine areas such as financial standing, technical capacity, management expertise and private sector experience in the area. For the project to be attractive to the private sector it should be large enough to encourage economies of scale so that the private partner can recover costs and make a profit. It will also depend on the bankability of the risk transfer proposed, along with the cost, length and complexity of the tender process. In order to hear the views of the private sector on a proposed project and to determine the potential for a PPP, the local authority should hold informal market soundings.

The informal market soundings will usually consist of meetings with the private sector, either individually or collectively. The project will be presented to a cross section of the private sector including those involved in construction, service and finance, and opinions will be expressed and discussed on all areas of the project. After the informal market sounding the local authority should have a clearer idea of whether the private sector is capable of providing the service/asset in a PPP and if there is a sufficient level of interest among the private sector to tender for such a project.

It is important that no sensitive information is divulged by either side at this stage in the process, and that no commitments are entered that would compromise the procurement of the project. This informal market sounding is merely to give the local authority an indication of the market, including whether there is likely to be a reasonable amount of competition for the project, and it should not give those involved in the discussions an unfair advantage over other potential bidders.

Market sounding may be carried out at any stage in the project prior to the commencement of procurement. For larger projects it may be necessary to undertake a more formal exercise to test the state of the market during the Options Appraisal Stage.

3.3 PPP Proposal

At the end of this stage the local authority should know if the project is to be considered as a potential PPP. If this is the case then the project will be classified as a 'PPP Proposal'.
4. Options Appraisal

If the local authority decides to initiate the project (after receiving any necessary approvals from the DoEHLG) the next stage will be the Options Appraisal Stage.

External technical, legal and financial advice is generally required on PPP projects. This will usually involve the local authority in appointing a Client Representative (which can be a consulting engineering firm or multi-disciplinary team depending on the size and scope of the project) which will be responsible for organising all aspects of the planning of the project.

As its name suggests, the option appraisal stage will examine the various options for carrying out the proposed project. If the preferred approach is a Public Private Partnership, the next steps would be decide what form of PPP to adopt, how the risks will be transferred between the public and private sectors and the procurement procedure to be followed when choosing a private partner. The option appraisal will involve a project appraisal, PPP assessment [including stakeholder consultation], statutory process assessment and a procurement procedure selection.

4.1 Project Appraisal

The Project Appraisal stage will result in an outline design / preliminary report, which will identify suitable options to meet service objectives and select the preferred option. The option chosen will depend on what best meets the strategic objectives and at the same time provide affordability and value for money. Technical consultants are usually appointed to undertake this stage and the appraisal will consist of constraint studies and preliminary reports which may include economic evaluations, cost estimates, outline requirements, site or route selection and environmental impact statements. This follows the traditional or conventional process. If PPP is perceived as a likely and affordable option then the contracting authority must prepare a PPP Assessment Report.
4.2 PPP Assessment

The PPP Assessment should help the local authority decide if the project in question is a potential PPP project, and if so what form of PPP is most appropriate. It will also determine the optimum allocation of risk between the public and private sector and the procurement procedure to be used. When preparing a PPP Assessment report full account should be taken of precedent reports in the same areas. The factors which will influence the outcome of the PPP assessment are:

- The nature of the project
PPP arrangements are not suitable in all cases. A proper assessment, taking into account the nature of the project and any precedent projects that are known, must take place to confirm suitability or otherwise. As investment programmes progress it will become easier to determine the scope for PPP arrangements across the different sectors.

- The allocation of risks
The local authority needs to assess the scope for transferring project risks to the private sector. If there is only limited scope then the prospects for a PPP are correspondingly diminished. The aim remains the optimal transfer of risks.

- Speed of Delivery
The impact of using a PPP model on the project schedule needs to be carefully considered. Certain aspects of the project delivery may be speeded up by PPP but this must be balanced against the greater complexity of the contract and the time needed to procure it.

- Commercial Viability / Bankability
If the project requires private finance to pay for it, the local authority needs to be confident that the market is willing to provide the investment needed. This requires consideration of the likely profitability of the venture but, for the local authority, also of the competitive environment within which procurement is to take place.

4.2.1 - Stakeholder Consultation
It is essential that persons and bodies that will be affected by the project should be consulted at an early stage and their views reflected in the PPP Assessment Report.

What is meant by Stakeholder:
- employees and trade unions or other employee representatives
- the general public, lobby groups, service users or their associations and public representatives.
Public Consultations
Existing legislation provides for public consultation in a number of areas - such as Planning and Roads legislation. Projects in the roads, water, waste and other sectors must be fully compliant in relation to these public consultation requirements.

The stakeholder consultation envisaged for PPP projects is in addition to the existing statutory processes.

Guiding Principles in relation to Stakeholder Consultation for a PPP project
In selecting, developing and implementing PPP projects, the economic, social and environmental concerns of those directly affected at both national and local level should be taken into account along with the statutory rights and legitimate economic interests of Stakeholders.

- the maximum level of information possible is made available to stakeholders in an accessible form
- the relevant stakeholders are informed of the existence of the Public Private Partnership project as soon as it is proposed; and
- systems are put in place at a local level to ensure that stakeholders are kept informed of significant developments throughout the process.

Insofar as it is possible, the involvement and co-operation of employees, trade unions and other local interests should be secured in advance of the procurement of a Public Private Partnership project. Stakeholders must not only have their statutory rights protected but also their legitimate economic interests taken into account.

Employee and Trade Union Consultation
The process of employee and trade union notification and consultation should commence as early as practicable, but in any event prior to the publication of any advertisement in the Official Journal of the European Communities.

An initial explanation of the project and the objectives that justify its development and procurement on the basis of a PPP should be made available upon request.

PPP Assessment Report
Consideration of stakeholder issues is a fundamental part of the PPP Assessment Report. Stakeholder issues should distinguish between those affecting employees and those affecting the general public.

In preparing a PPP Assessment Report, local authorities should identify issues which might impact on project delivery and develop an approach to deal with them. Details of consultations held should be outlined in summary in the Report, together with the proposed approach to stakeholder consultation during the course of project development.
Structures for Consultation

The Framework for PPP agreed by the Social Partners states ‘Existing structures and agreements should be used to ensure extensive consultation and open communication in respect of PPP projects’.

The full extract from the Framework in relation to Consultation with Stakeholders follows:

Extract from Framework for Public Private Partnerships 'Working Together for Quality Public Services' paragraph 7. Consultation with Stakeholders

7.1 Stakeholders include employees and their trade unions, the public, the people who will use the assets and services provided, local community groups and sectoral interest groups. In selecting, developing and implementing PPP projects, the economic, social and environmental concerns of those directly affected at local level should be taken into account along with the statutory rights and legitimate economic interests of stakeholders in line with the NESC recommendations.

7.2 Existing structures and agreements* should be used to ensure extensive consultation and open communication in respect of PPP projects. Public service employees should be informed at the earliest possible stage of proposals for the introduction of PPPs and of significant developments throughout the process. They should also have the opportunity to contribute positively to the development of projects, building on progress in the development of workplace partnerships under the PPF. The partnership approach should be maintained throughout the project’s lifetime.

7.3 All parties to a PPP arrangement should have regard to appropriate industry norms in terms of pay and conditions and of prevailing national and/or industry-wide agreements including health and safety regulations. Such an approach should be consistent with protections provided under the Transfer of Undertakings (Protection of Employees) Regulations and the Acquired Rights Directive. PPPs should be approached on the basis that no less favourable terms than the Transfer of Undertaking Regulations apply.

* i.e. formal Partnership agreements and fora established under the Programme for Prosperity and Fairness (e.g. Public Transport Partnership Forum, Health Services Partnership Forum and the Local Authority Partnership Fora).

PPP Project Liaison Officer

To facilitate the consultation process envisaged it is desirable that Local Authorities give consideration to the designation of
an official as PPP Project Liaison Officer. It is envisaged that this official would be the first point of contact between the Local Authority and employees and their trade union representatives at both local and national level on PPP projects.

The Project Liaison Officer's functions would include advising of new PPP projects and reporting on the progress of existing projects, promoting co-operation in the successful development of PPP projects, and addressing potential difficulties as they arise. It is suggested that the Project Liaison Officer could be drawn from the Corporate Services Division of the Local Authority on the basis that they would be familiar with developments in the various PPP projects in the Authority across all sectors.

Given that specific expertise relating to any particular project would lie elsewhere within the Local Authority structure, the Project Liaison Officer would also redirect specific queries to the appropriate official of the Local Authority overseeing the project. This would ensure that such queries could be comprehensively addressed and that relevant information could be exchanged.

It is recommended that any such exchange of information would be routed via the Project Liaison Officer to facilitate their overall knowledge of the issues raised, thereby assisting them in the identification of any problems that might arise. Depending on the level of PPP activity, it is not envisaged that the role of Project Liaison Officer would need to be a full-time position.

Transfer of Undertakings (Protection of Employee) Regulations

The Framework for PPPs agreed by the Social Partners in May 2001 states clearly and unequivocally that 'All parties to a PPP arrangement should have regard to appropriate industry norms in terms of pay and conditions and of prevailing national and/or industry-wide agreements including health and safety regulations. Such an approach should be consistent with protections provided under the Transfer of Undertakings (Protection of Employees) Regulations and the Acquired Rights Directive. PPPs should be approached on the basis that no less favourable terms than the Transfer of Undertaking Regulations apply'.

In order to ensure the implementation of the above Regulations and the protection of the rights of employees, employers are obliged to:

- inform employees of the reasons for any transfer and the legal, economic and social implications of the transfer in good time before the transfer takes effect and
- consult with employees as to any new measures proposed with a view to seeking agreement

The main provisions of the Regulations can be summarised as follows:

- the rights and obligations of the Contracting Authority (the transferor) arising from a contract of employment or from an employment relationship which existed at the date of the transfer are, by reason of the transfer, automatically transferred to the Contractor;
- the transfer of an undertaking, business of part of a business does not constitute grounds for the dismissal of an employee by either the Contracting Authority or the Contractor. Such dismissals are prohibited except where there are economic, technical or organisational reasons entailing changes in the workforce;
• if a contract of employment or an employment relationship is terminated because a transfer involves a substantial change in working conditions which would operate to the detriment of the employee concerned, then the employer is regarded as having been responsible for termination of the employment.
• the rights of the employee that existed prior to the transfer are preserved after the transfer. The Contractor is obliged to honour all entitlements and will be bound by all collective agreements applicable at the date of transfer regardless of whether or not it had notice of such obligations or commitments, with the exception that it is not obliged to continue to provide pension benefits nor to observe the terms of any collective agreements concerning such benefits. However, the Contractor is obliged to ensure that pension rights are protected, although an Irish court has not yet clarified the precise meaning of this requirement– in practice liability may be apportioned by way of reciprocal indemnities.

Where a Public Private Partnership project is likely to involve the transfer of a large number of employees, the Contracting Authority should also consider the following actions:
• a copy of the Invitation to Tender or Invitation to Negotiate should be made available to employees and trade unions after it has been issued to tenderers; and
• tenderers should be provided with timely and accurate information in relation to the numbers, composition and terms and conditions of employees who could potentially transfer to the Contractor.

After a Public Private Partnership project has been awarded to the preferred tenderer, it is recommended that employees and trade unions are informed at the earliest point possible of any contract provisions that impact upon them.

Further information
- PWC Guidance Note Consultation 8 - Stakeholder
- A Policy Framework for Public Private Partnership Projects in the Water Services Section - DOEHLG August, 2001
- Public Private Partnerships in the Water Services Sector - Technical Note No. 2 - Preparing a PPP Assessment Report - DOEHLG August, 2001
- Framework for Public Private Partnerships agreed by the Social Partners (May, 2001)
- Briefing note No. 12 - Consultation with Stakeholders - DOEHLG August, 2002

Further information on the contents of the PPP Assessment Report are contained in Appendix IV.
4.3 Risk Assessment and Allocation

At various points during the project the local authority and there advisers will need to consider the key risks associated with the project and who is best able to manage them. One of the aims of PPP is to transfer risks to the private sector contractor [the Contractor] but one should not seek to maximise risk transfer but rather allocate risks to the party best able to manage them.

A Preliminary Risk Assessment is carried out at the Options Appraisal stage and will be reviewed periodically after this. The final allocation of risk between the parties should be reflected in the tender documents and in the final contract agreement.

### Typical Allocation of Risk in a PPP Project

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<th>II. Allocation</th>
<th>III. Comment</th>
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<tr>
<td>Planning risk</td>
<td>May be retained by Contracting Authority for pilot projects. However, there may be occasions when transfer in whole or part is appropriate or unavoidable.</td>
<td>Further advice is provided in the separate Guidance Note entitled Statutory Process Assessment.</td>
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<tr>
<td>Design and construction risk</td>
<td>Transferred to Contractor through payment mechanism.</td>
<td>Contractor bears risk of cost and time overruns. Contracting Authority retains risk of changes to Output Specification.</td>
</tr>
<tr>
<td>Operating risk</td>
<td>Transferred to Contractor under DBO, DBOF and Concession contracts through payment mechanism.</td>
<td>Deductions are made from payments for failure to meet service requirements.</td>
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<tr>
<td>Demand risk</td>
<td>Often retained by Contracting Authority or shared. May be transferred under DBOF and Concession contracts where the Contractor can control demand and forecast revenues with reasonable certainty.</td>
<td>An example of demand risk transfer is when the Contractor recovers its costs through user charges (e.g. road tolls).</td>
</tr>
<tr>
<td>Residual value risk</td>
<td>Retained under DB and DBO contracts. May be transferred under DBOF and Concession contracts to ensure fitness for purpose throughout the duration of the contract.</td>
<td>Contractor carries residual value risk if asset not automatically transferred to Contracting Authority at end of contract.</td>
</tr>
<tr>
<td>Other financial risk</td>
<td>Often transferred (or shared) under DBOF and Concession contracts.</td>
<td>An indexation mechanism may be used.</td>
</tr>
<tr>
<td>Legislative risk</td>
<td>Often retained (or shared). Government is often best placed to control regulatory and legislative risks.</td>
<td>Key issue is whether the regulatory or legislative change is discriminatory in respect of the specific project or sector.</td>
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4.4 Statutory Process Assessment

The statutory process involves obtaining the necessary permissions to undertake a project in accordance with law and regulations, to ensure that the project is carried out in an orderly manner and that its impact on the public and individual interest is taken into account. Statutory requirements could include obtaining planning permission or the preparation of an Environmental Impact Statement (EIS).

All statutory processes allow for public consultation, followed in some cases by a Public Inquiry. A Public Inquiry involves the appointment of an inspector who will investigate the scheme, and hear the opinions of those for and against the project. On the basis of the investigation, the inspector will submit a report on the outcome of the Inquiry to the relevant authority (e.g. the Department of Environment, Heritage & Local Government or An Bord Pleanala). The outcome of the statutory process could be obtaining statutory approval, obtaining approval but subject to conditions, or the refusal of permission.

The statutory process gives rise to significant risks including:

- Consent refused; or
- Consent granted, but
  (a) the process took longer than expected;
  (b) the process cost more than expected;
  (c) consent is subject to a number of conditions.

- Risk of legislation changes leading to additional statutory process approvals

One of the principles of Public Private Partnership is that risk should be allocated to the best party able to manage it, and therefore any allocation of statutory risk to the private sector partner should only be considered if it offers greater efficiency and improved value for money. As part of the PPP assessment, risks should be identified and assessed and the nature of the project should determine whether some, all or none of the statutory risks could be transferred to the private partner.

While there are some areas where the transfer of risk might not be possible (e.g. only the local authority would have the power to implement the statutory process for the compulsory purchase of land) transfer of risk to the private sector may be considered for the following:

- The private sector partner is capable of completing the statutory process in a faster, cheaper and more reliable manner;

- Transfer of risk is unavoidable as specific details of the project may be needed in order to achieve statutory approvals and these details may not be...
known until the tenderer is selected and the project details are decided upon;

- If a project is particularly innovative it might not be appropriate for the local authority to obtain statutory approvals that will leave insufficient scope for innovation.

The statutory process assessment will consist of the following steps:

I. IDENTIFICATION OF RISKS

The local authority should identify the main activities and risks associated with the statutory process for the project concerned, and these should be listed in sequential order in the form of a risk allocation matrix.

II. ALLOCATION OF RISKS

At this stage the local authority will assess the statutory risks and allocate them to the most appropriate sector. In many circumstances the local authority will be in a better position to manage the statutory process risk due to its role in the provision of public services, its legislative and regulatory authority, its statutory responsibility and its familiarity with the process. However, there are situations where it may be preferable to transfer the risks to the private sector, while still making the experience and expertise of the public sector available where necessary.

The private sector may be more capable of managing the statutory processes and risks in areas where they have greater resources (e.g. skill and expertise) available and the transfer of the risk could also incentivise the private sector partner to complete the process in a faster, cheaper and more reliable manner. Additionally, since a PPP often requires a Contractor to operate and maintain an asset for a number of years (rather than just build it) there is an incentive for a private partner to reduce the whole life costs of a project. This can be achieved through introducing new technology and exploiting economies of scale, and transferring statutory process risks to the Contractor provides them with greater scope for this type of innovation.

When transferring statutory risks to the Contractor, the local authority should consider private sector interest in managing such risks and the resultant costs of the transfer. The private sector interest in managing the risks can be measured through market testing and precedent reviews. If it is found that the private sector is not interested in accepting a risk over which it has little or no control, it is likely to overprice the risk, which
leads to a lower value for money overall. The costs of transferring risks to a private partner are likely to be lower in certain circumstances, for example if the site is in ownership of the local authority and the proposed development will not alter existing use, the project will improve conditions of an existing facility or where the project has the support of the general public.

III. IDENTIFICATION AND SELECTION OF OPTIONS

The completed risk allocation matrix will present the optimum allocation of statutory risk between the local authority and the Contractor and will correspond to either a full retention of risk by the local authority or transfer (full or partial) of risk to the private partner. A full retention of risk will give the private partner less opportunity to innovate, but the views of the private sector can be solicited during the statutory process (however some private sector companies may be reluctant to aid this process where they are not guaranteed the end contract). Where risk is fully or partially transferred to the private sector, the Contractor’s exposure to risk can be limited by the following:

<table>
<thead>
<tr>
<th>Caps</th>
<th>If the statutory process results in variations in the project details the Contractor would only be responsible for the resultant cost to a defined level (Cap)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long Stop Dates</td>
<td>If the Contractor has not received the required statutory approvals by this date, the contract can be terminated with appropriate conditions to compensate the Contractor.</td>
</tr>
<tr>
<td>Payment of Design Fees</td>
<td>The local authority could underwrite some or all of the fees associated with the statutory process, and would then pay these fees to the Contractor in the event of the statutory process failing.</td>
</tr>
</tbody>
</table>

If the local authority decides to transfer all or some of the statutory risks, the PPP procurement process should be completed and the partner selected prior to, or during, the statutory process. Alternatively, where the statutory process risk is to be retained by the public sector, the PPP procurement process will follow the statutory process. There may be a strong case for the use of the Negotiated procedure (see Section 6.1) when transferring risk, as it may difficult for tenderers to cost such a project without negotiation.
4.5 Procurement Procedure Selection

The purchasing of works, services and supplies by contracting authorities are governed by the EU and Irish Public Procurement rules. Contracts, which exceed a specified EU threshold are subject to EU Directives, and even where these directives are not directly applicable the general principles of the Treaty of Rome apply.


The basic principle of government procurement is that a procedure based on competitive tendering should always be used, except in exceptional circumstances. Every effort should be made to ensure adequate competition, and the contracting authority should aim to receive at least three realistic tenders in each case. In evaluating tenders, the contracting authority may decide which bid to accept based on either the lowest suitable tender or the most economically advantageous tender. If the Contracting Authority intends to use the latter method, it must state in the contract documents or in the award notice, which of the criteria it intends to apply to the award and if possible in order of their importance. The procedures used for competitive tendering will be the open procedure, where all interested parties may tender, or the selective procedure, where only short-listed firms who meet the pre-qualification criteria are invited to tender.

4.5.2 EU Procurement : Principles.

There may be instances where there is no strict requirement for local authorities to apply the EU rules to the selection process of a partner. However the principles derived from the EU treaties will apply and the local authorities should consider these when undertaking the procurement:

<table>
<thead>
<tr>
<th>Transparency</th>
<th>Procurement should be carried out with a degree of transparency.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal Treatment</td>
<td>All tenderers should be treated in an equal manner.</td>
</tr>
<tr>
<td>Mutual Recognition</td>
<td>Mutual recognition of technical specifications, educational qualifications etc across the member states.</td>
</tr>
</tbody>
</table>
Proportionality

Requirements must be proportional to the needs to be met.

4.5.3 EU Procurement: Directives

The EU public procurement market is a fundamental part of the Single Market and is governed by rules intended to remove barriers and open up competition between the member states. Once transposed into law, EU directives have a legal force in Ireland and therefore must be followed by contracting authorities where applicable. All contracts fall into one or other of the 4 following categories:

<table>
<thead>
<tr>
<th>Works¹</th>
<th>Building and civil engineering works.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplies</td>
<td>Procurement of products.</td>
</tr>
<tr>
<td>Services</td>
<td>Provision of services including engineering, architectural and other professional services.</td>
</tr>
<tr>
<td>Utilities</td>
<td>Covers contracts in the water, energy, transport and telecommunications sectors</td>
</tr>
</tbody>
</table>

Each category has a threshold above which the relevant Directive will apply. Thresholds are calculated every two years and last one came into effect in January 2002.

Further details on the EU procurement processes and of the thresholds that apply are set out in Appendix V.

¹ The Works, Supplies and Services Directives are collectively known as the ‘Classic Directives’.
4.6 State Aid

An important reason for being fair and open in the selection of a private partner is to ensure that the PPP does not contain a state aid element.

According to Article 87 of the EC Treaty, "any aid granted...which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the common market".

Therefore, a local authority should be careful to ensure that any financial aid given in the event of a Public Private Partnership does not constitute State Aid under EU regulations. As the application of rules can be complex, legal advice on state aid issues should be taken in any case where uncertainty exists.

State Aid

In order for a measure to be deemed to contain state aid, all of the following must apply:

1. The measure distorts or has the potential to distort competition.
2. The advantage must be granted by the state or through state resources.
3. The measure must affect competition and trade between the Member States.
4. The measure should favour certain undertakings or the production of certain goods.

State aid occurs when the public sector partner confers a financial advantage on the private sector partner that would not normally be received in the normal course of business. This can be direct aid (e.g. a government subsidy) or a more indirect aid (e.g. a deferral of tax).

Any potential state aid activity must be notified to the Commission and must receive prior approval before being put into effect.

While the general principle of the EU is that state aid is prohibited, there are several exemptions to this principle. Aids listed under Article 87(2) of the Treaty are considered compatible with the common market, while aids listed under Article 87(3) may also be compatible. Therefore aid to promote the economic development of areas with economic and social problems may be compatible with the common market.

The implications of State Aid in forming a PPP should be considered on a case-by-case basis. The first test (that the measure distorts or threatens to distort competition) could be important as benefits may accrue to the private sector partner or the ultimate customer. To reduce the danger of inappropriate state aid the local authority should use a fair and open procurement process, thereby reducing the likelihood of distorting competition. To avoid possible aid to the ultimate customer the end service/product should be sold at a fair and commercial price. In the event of a local authority forming a Joint Venture company, possible aid the to the newly formed Joint Venture company can be avoided by ensuring that any assets transferred from the public sector to the new company are fairly valued.
4.7 Project Approval

Before a project can proceed to procurement as a PPP the approval of the Department must be obtained.

Approval of the project by the Department [for reporting purposes the project will henceforth be referred to as an 'approved' PPP project], subject to what ever conditions may apply, authorises the local authority to proceed to prepare the documentation and to obtain the necessary consents to enable the project to go to procurement.

At the same time as approving the project, for major infrastructure investments, the Department will appoint a Process Auditor, reporting to the Secretary General of the Department, to monitor and certify compliance with procedures.

The Process Auditor

Every major PPP project will have a Process Auditor [PA] appointed to it who will attend Project Board meetings and will certify that all the necessary procedures in the management of the project have been complied with. The PA operates in an independent capacity and reports to the Secretary General of the Department. The PA must be given access to all key documents on the project. Further details on the responsibilities and functions of the PA can be found in PPP Technical Note No. 3 : The Role of the Process Auditor, issued by the Department.

Upon receipt of the approval to proceed with the project the local authority should undertake the following actions:

- appoint [or re-appoint] the external advisers to the project – the Client Representative
- establish [if this has not already been done] a Project Board chaired by the local authority, and including representatives from the external advisers, the Department and the NDFA [if involved]. The Process Auditor will also attend Board meetings. The purpose of the Board is to oversee the management of the project, it is not a formal decision making body.
- for very large projects with multiple clients / stakeholders it may be necessary to also set up a Project Steering Group. All major interests, including if requested the Department of Finance, will be represented on the Steering Group which will ensure that all parties are kept fully informed of developments and that the views of the different parties are fully known to the Project Board.
- update or prepare the business plan for the project, including a detailed schedule for the implementation of the project.
4.8 Management Systems

The local authority is responsible for the efficient management of the project. Before proceeding further with the project the local authority, in consultation with the Process Auditor, should take stock of the systems in place for managing the project.

The key points to be addressed are:

- organisation structure: The responsibilities of the participants on the project should be clearly set out. Most PPP projects will have a dedicated Project manager and it will be his/her responsibility to ensure that there is a proper record of all the key events / decisions.

- procedural rules: The smooth running of the project is greatly assisted if the ‘housekeeping’ rules e.g. organisation of meetings, recording of decisions, management of documentation, change control systems, sign-off etc., are properly laid out,

- project schedule: An implementation plan setting out the project tasks and dates for completion is an essential part of good project management. It is a requirement that such a plan be produced and forwarded to the Department as soon as possible after the receipt of project approval. The implementation plan should also identify any risks to the schedule.

- cost estimates: A robust, detailed and up to date estimate of project costs is essential to the proper running of the project. Any significant changes in cost estimates should be recorded and notified to the Project Board and to the Department.

The project manager [or the external advisers] should ensure that the management systems as set out above are properly documented. A project control document [referred to as a Project Initiation Document in the PWC Guidelines] should be prepared and maintained through the life of the project. An examination of this document will be an essential part of any subsequent audit of the project.
5 Statutory Process [and Pre-Procurement]

During this phase of the project the local authority will ensure that the various steps that are needed to prepare the project to go to procurement are carried out.

These steps can be broken down under the following headings:

- securing of public approvals / consents,
- acquiring of land and/or access to land as required
- the preparation of contract documentation
- the development of the Public Sector Benchmark
- further market soundings [if needed]
- pre-procurement notices.

5.1 Statutory Process

A PPP project does not differ from any other project in its requirement to obtain planning and other statutory consents. While it is usual in PPP projects for the public authority to obtain the necessary consents before commencing procurement, this is not always the case. The Statutory Process Assessment should have determined the extent, if any, to which statutory process risk is to be transferred to the private sector.

Where the local authority has decided to obtain the necessary consents these must be secured before the project can proceed to procurement. Confirmation of this in writing, setting out the details of the consents acquired, must be provided to the Process Auditor before this phase of the project can be counted as complete.

5.2 Land issues

Where the project requires that the local authority acquire land or access to land, legal title or legally binding commitments must be obtained before the project can proceed to procurement. Confirmation of this in writing, setting out the details of the issues involved, must be provided to the Process Auditor before this phase of the project can be counted as complete.

In some projects a transfer of property or land from a public authority will form part of the contract. Where this land is not being offered as part of a competitive procurement process a valuation of the property or land must be obtained.
5.3 Preparation of Contract Documentation

The local authority is responsible for preparing the tender / contract documents for the project and should be aware of Departmental guidance on contract conditions and instructions to tenderers. The development of standard conditions of contract is part of the ongoing work of the Department and over time it is expected that an increasing part of the PPP programme will be subject to standard conditions and procurement procedures.

FIDIC ‘New Yellow’ Book*

An example of the development of standard contract conditions has been the creation of new model contract for DBO waste-water treatment works based on the FIDIC ‘New Yellow’ Book. This model sets out the responsibilities of the different parties to the contract and conditions covering, *inter alia*, service delivery, delays, changes in law, change procedures, dispute resolution, residual risk value, contract termination, ‘step-in’ rights, compensation, insurance and warranties.

Although not all contracts take the same form, the main documents that will be required by the local authority are:

- the project agreement, that sets out the respective rights and obligations of the local authority and the Contractor,

- the instruction to tenderers, setting out the conditions that must be complied with by the bidders during the procurement process,

- the technical requirements, including the output specification and the technical and service requirements.

- Collateral Warranties and Direct Agreements, the former between the local authority and individual sub-contractors and design teams and the latter between the local authority and the private sector financiers [if any].

In broad terms during the contract preparation phase the local authority will have to decide on such matters as procurement management, the output specifications, risk assessment, payment mechanisms, key contractual issues and accounting treatment. There are PWC Guidance Notes under each of these headings.

5.4 Financial issues

The funding of the project, whether from EU, national or private sources, is something that should be known at this stage. Details need to be finalised before proceeding further. For major projects this will involve discussions with the NDFA. Associated matters that need to be addressed are the tax and accounting treatment of the project.

* This model is currently being pilot tested.
5.5 The Public Sector Benchmark

Before going to procurement the local authority must prepare a Public Sector Benchmark [PSB] for the PPP project. The PSB provides an estimated cost of the project were it to be carried out by traditional means. It is an important part of the process for ensuring value for money and as a tool for helping analyse the financial calculations behind the proposals from the bidders for the PPP contract.

The PSB contains commercially sensitive material and should be kept confidential to the Project Board. The PSB Report must be sent to the Department and the local authority and must await receipt of the Affordability Cap for the project, which is based on the PSB before commencing the procurement process.

The Public Sector Benchmark

The requirement for a PSB is set out in the Interim Guidelines issued by the Department of Finance. The PSB is defined as a comprehensive, detailed risk adjusted costing of the project elements using conventional procurement over the whole life of the project. ...The PSB focuses on whole life costs over the contract term and provides a detailed cost valuation of all risks (transferred and retained) associated with the project.  

5.6 Pre-procurement notice

The local authority may issue a Prior Indicative Notice in the Official Journal of the EU [OJEC] at the start of the budgetary year to advertise the total procurement that the local authority intends to procure in the subsequent year (a PIN expires after 12 months). This is not a commitment and no prior approval of the Department is required.

5.7 Approval to commence procurement

Before commencing procurement proper the local authority will be required to obtain the approval of the Department to proceed together with the Affordability Cap for the project set by the Department. The Affordability Cap is the absolute limit on the outturn capital cost 3 and if at any point in the procurement process it becomes evident that the Affordability Cap is likely to be exceeded then the local authority must immediately inform the Department where a decision will be made, in consultation with the local authority, on the future of the project.

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2 Interim Guidelines for the Provision of Infrastructure and Capital Investment through PPPs, p13.
3 Ibid, p14
6. The Procurement Procedure

**ADVERTISE**
1. Place PIN in OJEC
2. Place RFT/ Contract Notice in OJEC
3. Place other advertisements

**PREQUALIFICATION**
(restricted and negotiated procedures only)
1. Develop prequalification criteria
2. Receipt of Requests for Prequalification
3. Shortlist potential tenderers
4. Issue Invitation to Tender (ITT) (or an Invitation to Negotiate (ITN) depending on the procedure)

**TENDER EVALUATION**
1. Establish evaluation criteria
2. Receipt of Tenders / Proposals
3. Evaluation of Tenders / Proposals
4. BAFO Stage [negotiated procedures only]
5. Negotiations
6. Tender Recommendation Report

**CONTRACT AWARD**
1. Award Contract
2. Debrief unsuccessful tenderers
3. Place Award Notice in OJEC.
6.1 EU Public Procurement Procedures

Depending on the nature and size of the project, the local authority will be required to follow the procedures set out in the relevant EU Public Procurement Directive. There are three main procedures:

**Open Procedure** A single step process where all potential bidders are asked to submit tenders. Not generally used with PPP contracts.

**Restricted Procedure** A two stage process whereby shortlisted bidders are asked to submit tenders.

**Negotiated Procedure** A two stage process whereby shortlisted bidders are asked to submit tenders except that the procedure gives the local authority the opportunity to negotiate the terms of the final contract with selected contractors before awarding the contract. This procedure may only be used in a limited number of circumstances and local authorities need to be sure of their legal grounds before using this procedure.

Once the local authority has chosen under which directive and according to which procedure to procure the contract, it can then proceed to issue the required notices and draw up the criteria for short-listing and for assessing the submitted tenders.

Further details on the EU Procurement Directives are contained in Appendix V.

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**Consolidated EU Procurement Directive**

The EU is close to agreement on the consolidation and updating of the Public Procurement Directives. Apart from streamlining the procedures and bringing them together under a single document, the new directive will facilitate electronic tendering, allow for the use of environmental factors as part of the award criteria and will introduce new procedures, 'competitive dialogue'. This last provision is of particular relevance for PPP projects as it allows for negotiation with bidders on design and other contract conditions prior to the submission of a final bid. At the time of writing the new directive has not been approved.
6.2 National Procurement Procedures

Because of their size it is unlikely that many PPP projects will come under the various thresholds that mean that the EU public procurement procedures must be used.

Where the estimated cost of projects is below the EU thresholds, national procurement rules still apply as well as the principles in the EC Treaty on fair competition.

6.3 General

Local authorities should be aware that procurement can be an expensive process for the bidders and all reasonable steps should be taken to limit these costs. At all stages the local authority should operate with the backing of legal input from advisers experienced in public procurement.

The Irish Public Sector Procurement Portal (www.etenders.ie) should be used in conjunction with OJEC\(^4\) for advertising tenders. A short notice in local or national newspapers is normal.

6.4 Tender Recommendation Report

Once the local authority has completed the evaluation of the tenders [and has finalised negotiations where the negotiation procedure is used], a Tender Recommendation Report [TRR] should be prepared and submitted to the Department.

The TRR should include the following elements:
- a short account of the procurement process,
- a list of all the companies who submitted expressions of interest and tenders,
- the evaluation and award criteria used,
- the basis for the decision to shortlist,
- the basis for the recommendation of the award of the contract,
- a short note on any issues of general significance that arose during the course of the procurement.

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\(^4\) The website was developed as an interim measure to publish public sector procurement opportunities as part of the Government Action Plan 'Implementing an Information Society in Ireland'.
7.0 Construction and Operation

7.1 Approval to proceed to construction

The approval of the Department will be required to proceed to construction of a PPP projects. In making its decision the Department will consider:

- the Tender Recommendations Report
- where a PSB/AC has been set, the cost of the project as set out in the TRR compared to the PSB/AC
- the compliance certificate* from the Process Auditor

The Department will consider and confirm the policy and economic justification for the project. It will also need to be satisfied that the proper procedures have been used in the procurement of the project and that there is funding of the project within the Department's and Department of Finance's investment programmes / financial envelopes.

On the basis that the Department is satisfied on the above counts, an approval to proceed with the construction of the project will be issued to the local authority.

7.2 Contract Award

It will be up to the local authority to complete any outstanding arrangements [e.g. warranties, insurance] and to award the contract.

Once the contract is signed it becomes the responsibility of the contractor to deliver the project on time and within budget. At the same time the local authority must continue to manage the contract and ensure that the requirements as set out are met.

The work of the local authority can be viewed under two headings:

- **Contract Management**, to ensure that the roles and responsibilities of each party are understood and fulfilled according to the provisions of the project agreement.
- **Performance Management**, which forms part of the contract management function, is the day-to-day assessment of the service provided.

* See Technical Note 3: The Role of the Process Auditor
### 7.2.1 Contract Management

The role of the Contract Management team is to monitor the service delivery and assess the performance of the project relative to the standards specified in the project agreement. The team should ensure the provision of a quality service to the end of the operating period by spot-checking and monitoring performance throughout the life of the project. An important element of contract management is to ensure that the level of risk transfer that was specified in the project agreement is adhered to; if risk passes back to the Contractor during the construction and/or operating period optimum value for money may not be achieved. Failure of the Contractor to comply with standards could result in enhanced monitoring, proposals for rectification or payment deductions.

The role of Contract Manager is an important one, as he or she will be the formal point of contact between the local authority and the private partner for the duration of the construction and operational phases. The job of Contract Manager can be a full-time one, depending on the size and complexity of the project, and the local authority should ensure that sufficient administrative support and technical, legal and financial advice are provided as necessary. The size and composition of the project team will depend on the nature of the project.

The contract management role commences at the award of contract stage and extends to the end of the operating period (i.e. for the remainder of the duration of the PPP project). The Contract Management structures should be put in place at the procurement stage of the project, to ensure that those involved are familiar with the details of the project and the project agreement. It will also give the Contract Manager the opportunity to influence the project agreement, to ensure that contract monitoring and auditing processes are clearly defined and directly support the principles underlying the charging or payment mechanisms. As far as possible the Project Management and Contract Management functions should overlap to ensure continuity, and in some cases the Project Manager might be appointed as the Contract Manager also.

During the construction phase the team’s function will be to monitor the development of the facility, in terms of both quality and timescales. During the operational phase the team’s concerns will include the availability of the asset, the provision of services in accordance with the Output Specification, compliance with appropriate environmental standards, authorisation of payments, dispute resolution mechanisms, the management of change and the hand back of the asset [where this is provided for] at the end of the contract period. In the event of underperformance, there should be provisions for payment penalties and ultimately for the termination of the contract by the local authority.
During the construction phase the Contract Management team will generally be led [or at least involve] the technical advisers to the project [Client Representative]. The Client Representative role may extend into the immediate period after commissioning of the works to ensure that performance standards are being met, but as soon as possible after the commencement of service the local authority should assume full responsibility for the management of the contract. This does not preclude the local authority seeking assistance from external advisers from time to time as particular issues arise.

7.2.2 Performance Management

Key to the successful management of any PPP contract is the setting up of monitoring and control systems to ensure that the performance standards set out in the contract are met.

In some sectors [e.g. Water Services] there may already be a standard Performance Management System [PMS] that can be used by the local authority. In other cases systems will have to be put in place for the individual project. Such systems will need to detail the procedures for reporting and auditing purposes and to deal with health and safety and emergency arrangements.

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Performance Management System [PMS] for Service Phase and Operational Contracts in the Water Sector. [Sept 2002]

The PMS developed by the Water Services National Training Group [WSNTG] for PPP projects within the water sector sets out the detailed procedures for dealing with all aspects of the day to day running of the works / plant, the reporting arrangements, including the forms to be used and how these should be completed, how to register accidents and other events, what measures should be in place to deal with emergencies, the setting up of a complaints register and so on. Although designed for use in water services, the PMS provides a useful model for other sectors seeking to put in place systems for performance management.
8. REVIEW OF PPP PROCESS

It is a standard part of each PPP project that the whole process, from the project identification through to the operational phase and hand-back of the asset should be subject to formal review.

Project review is intended to:

- help public sector managers engaged in future PPP projects,
- provide data on costs as an input to assessments [Public Sector Benchmarks] of subsequent PPP projects,
- provide the public authorities with information on the economic benefits, or otherwise, of the PPP approach over alternative procurement approaches.
- identify strengths and weaknesses in the systems in place for managing PPP projects.

8.1 The Review Process

Because of the length of time before a PPP project can be said to be completed, there are a number of studies at different stages in the process.

The required review studies are:

<table>
<thead>
<tr>
<th>Title</th>
<th>Timing</th>
<th>By whom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final Audit Report</td>
<td>End procurement</td>
<td>Process Auditor</td>
</tr>
<tr>
<td>Post Project Review</td>
<td>End Construction</td>
<td>Independent or PA</td>
</tr>
<tr>
<td>Final Accounts</td>
<td>After all claims have been resolved and payments made post-construction</td>
<td>Client Representative</td>
</tr>
<tr>
<td>Performance Reviews</td>
<td>Within year of commencement of service and thereafter at agreed intervals.</td>
<td>Local authority</td>
</tr>
</tbody>
</table>
8.1.2 Post Project Review [PPR]

The PPR should be produced within six months of the completion of construction of the works. The PPR should be prepared by a person [who can be the Process Auditor for project where one is appointed] not directly involved in the management of the project. The purposes of the PPR is to provide details of the final outturn costs [with estimates where claims are still outstanding] and an assessment of the performance of the different parties to the project.

The PPR is likely to be compiled from material supplied by the Client's Representative, the local authority and the Department and to have regard to the FAR produced by the PA [where available]

The PPR should contain the following:
- a brief description of the project,
- an outline of the project history with key decisions /events highlighted,
- a variance analysis of the final outturn costs of the project compared against initial estimates, the PSB, Affordability Cap and the Final Contract price. [Note the figures in the variance analysis are to be updated by the Department when the Final Accounts are completed]
- an analysis of the time taken to complete different stages of the project compared with projections,
- the extraction of selected costs for the Department's database of costs on PPP projects [selected programmes]

8.1.3 Final Accounts

Final project accounts following resolution of any outstanding claims and the making of final payments. The figures should be used by the Department to update the variance analysis in the PPR.

8.1.4 Performance Reviews

Reports detailing the performance of the plant/works against the output requirements set out in the contract. Summary details of any contract variations, cost increases or financial penalties should be included. The first performance review should be sent to the Department within one year of the commencement of the service and thereafter at intervals to be agreed with the Department.

8.2 Termination of Contract

The Department should be informed immediately if the contractor issues a notice of termination of the contract and the Department should be informed in advance before the local authority issues a notice of termination.
9. EXPIRY OF CONTRACT

For most PPP projects that include an operational phase (e.g. DBO, DBOF, Concession), the asset will revert back to the local authority at the end of the contract. The conditions governing the hand-back will be set out in the original contract and are designed to ensure that the asset is handed back in good condition and fit for continued service.

If the hand-back of the asset leads to any liabilities the local authority should allow for these, and a decision should be made regarding the future of the service. If the local authority decides to continue providing the service in partnership with the private sector, and unless there is a provision in the original contract for an extension of time, a new procurement exercise must be organised.

The employees of the facility should also be consulted and their rights under TUPE *considered before any decisions are made about the long term future of the service.

*Transfer of Undertakings (Protection of Employees) Regulations.
Appendix I  The PPP Grant Seed Fund Scheme

This Fund for local authorities was launched in December, 1999. The funding available is €5.078m. The Fund will end in December, 2004.

The reason for setting up the Fund was the considerable potential for developing PPPs in other areas such as leisure facilities, alternative energy, car parks, urban development, environmental initiatives, etc.

Further information:
This Circular gave details of the setting up of the Fund and the conditions applying to it. Funding was to be confined to projects outside of the mainstream investment programmes. Grants from the Fund were to be used to meet the start-up costs of projects such as feasibility studies, planning and design costs, preparation of business plans, independent advice etc. Projects had to be considered to be commercially viable. Assessment of projects was to be based on criteria of importance of services/assets provided for the community, commercial viability, value for money, innovation and replicability.

This Circular notified local authorities that the Fund had been extended for a further two years until the end of 2004. Some changes were also made to the conditions applicable to the Fund. The level of grant aid which was previously available of 100% was reduced to 40% to 60% depending on the merit of the proposal. The Circular also stated that priority for funding would be given to priority sectors such as housing and urban renewal, new and innovative projects outside categories approved to that time, applications from local authorities who had not previously submitted applications and applications for the 'start-up' phase of projects.

The purpose of this Circular was to remind local authorities interested in making applications under the Fund of the conditions attached and to encourage them to start work on preparing necessary material in support of applications as the Fund would be expiring at the end of 2004.
Appendix II The duties and functions of the NDFA

National Development Finance Agency Act, 2002

The National Development Finance Agency (NDFA) was established on 1 January, 2003 under the National Development Finance Agency Act, 2002. The main functions of the NDFA are to:

- provide financial advice to State Authorities, including local authorities, to assist in the evaluation of financial risks and costs of infrastructure projects and to facilitate them in availing of the best financial package for each project. The NDFA will also advise on project insurance costs.

- assess the optimal financing for major infrastructure projects as set out in the National Development Plan and other infrastructure priorities.

- raise finance for projects (including PPP projects) where this could be more cost effective than private funding and where, in the case of conventionally procured capital projects, there are clear financial benefits in using Agency funding over Exchequer funding; and

- create special-purpose companies that can raise project finance with guarantees, raise revenues from projects with user charging and receive land or other property assigned or transferred from local authorities for use in financing infrastructure projects.

The legislation establishing the NDFA places a number of obligations on local authorities. In instructions issued by the Department of Finance these obligations are to be seen as follows:

- For all major projects and grouped projects with capital costs estimated to exceed €20 m, to seek the advice of the Agency on how best to finance the project as soon as practicable before commencement of the project;

- For projects where local authorities intend to appoint financial advisers, to ask the NDFA to act as financial adviser. Where the NDFA agrees to act as
financial adviser to a project, they would expect to be represented on the Project Board and to have access to all relevant correspondence and documentation:

• For projects involving the use of private finance, to provide the NDFA with the opportunity at an early stage of reviewing the financing options, including where appropriate, providing the funding itself.

Further Information:
- Interim Guidelines issued by the Department of Finance on 7 July, 2003 i.e Procedures for the Assessment, Approval, Audit and Procurement of Projects’

Memorandum of Understanding between the Department of the Environment, Heritage and Local Government and the NDFA

The purpose of the Memorandum of Understanding is to document the modus operandi between this Department and the NDFA in relation to financing for public investment projects.

Paragraph 7 of the Memorandum outlines the circumstances in which this Department will seek advice on the best financing approach for major capital projects, on its own behalf and on behalf of local authorities and other bodies under its aegis for the following:

• All projects with a capital value of €20 million or more.
• Groups of projects with a capital value exceeding €20 million.
• Capital Programmes containing projects or groups of projects valued at more than €20 million.

Projects will be referred to the NDFA for financial advice as soon as practicable after they have been approved to proceed to procurement. Paragraph 9 of the Memorandum outlines when it is appropriate to seek such advice in the water services, waste, local government and housing sectors and for relevant capital programmes.

Projects, groups of projects and programmes will be submitted to the NDFA by the Department [IPPP Section]. If local authorities approach the NDFA directly, the NDFA will inform this section accordingly.
The type of material to be submitted to the NDFA in support of a request for advice is outlined in Paragraph 12 of the Memorandum.

The Memorandum also provides (Paragraph 13) that the NDFA may, on request, provide advice on the development of Public Sector Benchmarks.

Paragraphs 14 to 19 of the Memorandum deal with issues of Financial Consultants/Insurance Brokers, including situations where local authorities have project teams in place already which include financial consultants or external advisers providing a range of information, including financial information.
A PPP Assessment Report should contain the following Sections:

I. **EXECUTIVE SUMMARY AND MAIN CONCLUSIONS**
This should be one to two pages in length and be written as a releasable document that should not contain any confidential or commercially sensitive information.

II. **INTRODUCTION AND SCOPE OF ASSESSMENT**
A short outline of the nature of the project, the scope of the PPP assessment and the key issues to be addressed.

III. **INITIAL OUTPUT SPECIFICATION**
An initial output specification defines the services and outputs required by the local authority. For traditional projects the Contracting Authority and its' advisors prepare detailed specifications that describe the works required for a particular service, but for a PPP the focus is on the objectives rather on the means of achieving these objectives. The output specification should be flexible enough to allow innovation in asset design and service delivery, and therefore achieve the best possible value for money. The output specification should be developed from material gathered from the project appraisal stage (implementation plan) and the objectives should be specific, measurable, achievable, realistic and time-bound. A more developed output specification should be included in the tender documents during the procurement stage.

IV. **VALUE FOR MONEY (VFM) ASSESSMENT**
The value for money assessment is crucial, as the PPP should only be carried out where it is expected to deliver greater VFM than if the project was procured in the traditional way. The factors that will determine VFM should be identified and then each PPP option should be assessed in relation to its potential to deliver VFM in relation to these factors. Such factors may include:

- Reduced whole life costs
- Better allocation of risk
- Improved quality of service
- Speed and ease of implementation

A precedent review examines the experience of similar projects both nationally and internationally that have been procured using a PPP approach, and the local authority should look at the overall savings achieved through the use of PPP, as well as identifying particular aspects of the project that might be improved upon and thus provide a greater potential for VFM. Informal market soundings, where agreed with the Department, may also be used to assess VFM.

This assessment should conclude with the most appropriate form of PPP to deliver VFM, along with the parameters that should be used to assess VFM at the procurement stage.

The development of a Public Sector Benchmark (PSB) is required to allow the Sponsoring Agency to validate the continuation of the procurement process. The PSB should consist of a comprehensive, detailed risk adjusted costing of the project elements using conventional procurement over the whole life of the project. This is similar in many ways to the Detailed Appraisal in the Guidelines for Capital Appraisal, however, the PSB focuses on whole life costs over the contract period and provides a detailed cost valuation of all risks (transferred and retained) within the project.
The Sponsoring Agency/Project Board and its advisors compile the PSB which is derived from
detailed output specifications. If necessary, a shadow bid may be used to assist in the
determination of project cost. While it may not be possible to estimate all costs to a high
degree of certainty, it is essential that a best estimate is made and supplied to the
Sanctioning Authority for use in setting an Affordability Cap (see below). Upon receiving the
PSB the Sanctioning Authority should compare it with the Preliminary Assessment outcome
and satisfy themselves that the benefits of proceeding with the project outweigh the costs.
Once agreed, the Public Sector Benchmark does not change throughout the procurement
process. The Department of Finance Public Private Partnership Unit will provide more detailed
guidelines on the structure and variables (e.g. the discount rate for the PSB). In addition the
NDFA may also on request provide advice on the development of PSBs for Projects on behalf
of the sponsoring body.

V. PRELIMINARY RISK ASSESSMENT
A risk is any factor, influence or event that can become a potential threat to the successful
completion and operation/maintenance of a project. The consequences of risks can be
measured in terms of cost, time or quality and the degree of risk transfer will depend on the
nature of the project. The preliminary risk assessment will identify and quantify the key risks
associated with the project and will determine the optimal allocation of risk between the
sectors.

Carrying out a preliminary risk assessment should include the following steps:

- Identify the main risks associated with the project, by analysing the experience of any
  previous projects of a similar nature and by conducting a workshop involving all the relevant
  sections within the local authority to ensure that all key issues are highlighted;
- Develop a risk matrix for the project, concentrating on major risks only and include an initial
determination of the proposed allocation of risks;
- Prepare a plan for the management of risks that will be retained by the local authority, this
  does not need to form a part of the PPP Assessment Report;
- Assign monetary values to the main risks, a general estimation of the costs is sufficient at
  this stage.

A major part of the preliminary risk assessment involves consideration of the statutory
process risks - see Section 4.3 of this document.

VI. BANKABILITY ASSESSMENT
A PPP assessment should include an assessment of project's ability to attract private finance
where needed. The providers of finance will look favourably on characteristics such as
bankable and secure cash-flows, opportunity to innovate and appropriate risk transfer. This
assessment will generally be based on precedent review and where agreed with the
Department, market soundings.

Optional Market Consultation
The EU Procurement Directives provides for an optional Market Consultation Procedure in
order to establish whether the market has an interest in, and the capacity to deliver, the
proposed PPP project. This exercise does not commit the State Authority to the procurement
of the project. Market consultation may be needed to:

- identify or clarify suitable options or solutions;
- determine the bankability of, and the market interest in the proposed project;
- evaluate the risks that will be transferred; and
- assess the private sector's willingness to accept the required degree of risk transfer.
Market evaluation may begin when it has been decided that the project will be procured by means of a PPP arrangement. It must end when a call to competition is published after which time no market consultation may be undertaken. As noted earlier the project advisors will provide specific advice on this.

VII. LEGAL VIABILITY ASSESSMENT
Any legal issues that need to be addressed before entering into a PPP arrangement should be examined at this stage. While the State Authorities (Public Private Partnership Arrangements) Act, 2002, provides the legal certainty as to the powers of State Authorities to enter into PPP arrangements and form joint venture companies, additional legal issues should be considered.

These issues could include the implications of entering a PPP for existing employees of the local authority and the ability of the private partner to introduce user charges on a public service.

The conclusion of this element of the report should highlight any legal difficulties which would preclude or delay the advancement of the project using PPP arrangements, and where appropriate advise on any steps which could be taken by the local authority to manage this process.

VIII. STAKEHOLDER CONSULTATION
In the development of a PPP project the economic, environmental and social concerns of all those directly affected (the 'stakeholders') should be taken into account. Stakeholders will include employees and their representatives, the general public, service users, lobby groups and public representatives. Structures should be put in place to ensure extensive consultation and open communication between the local authority and stakeholders, while taking care not to divulge commercially sensitive information that will give an unfair advantage to competing tenderers. The local authority must pay attention to the Freedom of Information Acts, 1997 and 2003, which state that members of the public should have access “to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies”. The local authority should also consider the commercial reality; that a Contractor is unlikely to complete a PPP transaction if there exists the potential for future industrial relations issues or public dissent.

The Framework for PPPs agreed by the Social Partners states that all parties involved in a PPP must have regard to the appropriate industry norms in terms of pay and conditions, and of prevailing national and/or industry-wide agreements including health and safety regulations. It also states that PPPs should be approached on the basis that the European Communities (Safeguarding of Employer’s Rights on the Transfer of Undertakings) Regulations, 1980 & 2000 apply, which allow for protection of employment terms and conditions, and information and consultation.

As outlined in the Department of Finance Framework for Public Private Partnerships, which was launched in November 2001, “all parties to a PPP arrangement should have regard to appropriate industry norms in terms of pay and conditions and of prevailing and/or industry-wide agreements, including health and safety regulations. Such an approach should be consistent with protection provided under the Transfer of Undertakings (Protection of Employees) Regulations and the Acquired Rights Directive. PPPs should be approached on the basis that no less favourable terms than the Transfer of Undertakings Regulations apply.”

In the light of the foregoing, it is recommended that existing structures and agreements, such as those established under the Programme for Prosperity and Fairness, and its successor, "Sustaining Progress", should be used to ensure extensive consultation and open
communications in respect of PPP projects. Employees and trade unions should be kept informed by the local authority from the outset of the progression of a PPP, particularly where there are issues regarding the transfer of staff from the Local authority to the private sector operator. Similarly, they should be advised of significant developments throughout the process. The opportunity should also be afforded to them to contribute positively to the development of projects, particularly where they would have had direct input into/experience of the delivery of the service in question prior to its development as a PPP project. This approach can assist in contributing to the development of workplace partnerships under the Programme for Prosperity and Fairness and Sustaining Progress. This partnership approach should be maintained throughout the project’s lifetime.

To facilitate the consultation process outlined in the previous paragraph, it is desirable that Local Authorities give consideration to the designation of an official as PPP Project Liaison Officer. It is envisaged that this official would be the first point of contact between the Local authority and employees and their trade union representatives at both local and national level on PPP projects. The Project Liaison Officer’s functions would include advising of new PPP projects and reporting on the progress of existing projects, promoting co-operation in the successful development of PPP projects, and addressing potential difficulties as they arise. It is suggested that the Project Liaison Officer could be drawn from the Corporate Services Division of the Local authority on the basis that they would be familiar with developments in the various PPP projects in the Authority across all sectors. Given that specific expertise relating to any particular project would lie elsewhere within the Local authority structure, the Project Liaison Officer would also redirect specific queries to the appropriate official of the Local authority overseeing the project. This would ensure that such queries could be comprehensively addressed and that relevant information would be routed via the Project Liaison Officer to facilitate their overall knowledge of the issues raised, thereby assisting them in the identification of any problems that might arise. Depending on the level of PPP activity, it is not envisaged that the role of Project Liaison Officer would need to be a fulltime position.

IX. INDICATIVE IMPLEMENTATION PLAN

After considering all forms of PPP, the assessment should conclude with a summary of the main findings, the comparative benefits of a conventional and PPP procurement and a recommendation on the preferred form of PPP. By examining initial output specification, value for money, preliminary risk, bankability and legal viability the local authority should be in a position to measure and weight the costs and benefits associated with each form of PPP. Additionally the optimum scope for the PPP project should be determined, i.e. the size of the project and the geographical area it will cover, the range of services covered and the bundling of projects. When determining the preferred PPP option and the optimum scope of the project the local authority should be mindful of VFM considerations.

The Indicative Implementation Plan should include conclusions of the Statutory Process Assessment and the Procurement Assessment, along with the organisational structures that should be established to manage procurement and a timetable with target completion dates.
EU Procurement: Principles are discussed in Section 4.5.2 of this document (Transparency, Equal Treatment, Mutual Recognition and Proportionality).

EU Procurement: Directives are referred to in Section 4.5.3 (Works, Supplies, Services, Utilities).

EU Public Procurement procedures (Open, Restricted, Negotiated) are referred to in Section 6.1 of this document.

**Time Scales for EU Procurement Procedures**

- For the open procedure the time limit for the receipt of tenders\(^5\) from the date of the dispatch of the notice to the date of the receipt of tenders should not be less than 52 days\(^6\);

- For the open procedure (Works & Services Directives) the time limit for the receipt of tenders from the date of the dispatch of the notice to the date of the receipt of tenders should be reduced to 36 days where the local authority has included the tender in a PIN at least 52 days and at most 12 months before the contract notice;

- For the restricted and negotiated procedures the time limit for the receipt of requests for participation from the date of the dispatch of the notice should not be less than 37 days;

- For the restricted procedure the time limit for the receipt of tenders from the date of the dispatch of written invitations to tender should not be less than 40 days;

- For the restricted procedure (Works & Services Directives) the time limit for the receipt of tenders from the date of the dispatch of written invitations can be reduced to 26 days where the local authority has included the tender in a PIN at least 52 days and at most 12 months before the contract notice;

- Provided they have been requested in good time, contract and support documentation should be sent out to suppliers 6 days after the application;

- Provided it has been requested in good time, additional information should be sent out to suppliers not less than 6 days before the closing date;

- Where contract documents, supporting documents or additional information are too bulky to be supplied within the said time limits, or where tenders cannot be realistically provided without an on-the-site inspection of the documentation or a visit to the site, the time limits should be extended accordingly;

- Where the tender is urgent (e.g. in the event of a natural disaster) the time limits can be shortened according to the directives;

\(^5\) The minimum acceptable format for the receipt of tenders is written, delivered by hand or mail. The contracting authority can specify additional formats.

\(^6\) Calendar days
• For the Works Directive, the contract award notice should be sent at the latest 48 days after the award of the contract.

Thresholds for EU Procurement Directives

The thresholds for the local authority as a contracting authority, for contracts covered by EU Directives and the GPA are as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Notice</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Works</td>
<td>PIN &amp; Contract Notice</td>
<td>€6,242,028</td>
</tr>
<tr>
<td>Supplies &amp; Services</td>
<td>Contract Notice</td>
<td>€249,681</td>
</tr>
<tr>
<td>Supplies &amp; Services</td>
<td>PIN</td>
<td>€750,000</td>
</tr>
<tr>
<td>Utilities (Works)</td>
<td>PIN</td>
<td>€5,000,000</td>
</tr>
<tr>
<td>Utilities (Works)</td>
<td>Contract Notice</td>
<td>€6,242,028</td>
</tr>
<tr>
<td>Utilities (Supplies &amp; Services)</td>
<td>PIN</td>
<td>€750,000</td>
</tr>
<tr>
<td>Utilities (Supplies &amp; Services)</td>
<td>Contract Notice</td>
<td>€499,362</td>
</tr>
</tbody>
</table>

There are slight differences between the thresholds for contracts covered by the EU Directives and the GPA, which are the vast majority of contracts, and those that are covered by EU Directives only. The principal exceptions are for service contracts of public bodies for research and development and for certain telecommunications services, as well as contracts of entities in certain utility sectors. Further information on current thresholds can be found on the public procurement website [www.etenders.gov.ie](http://www.etenders.gov.ie) (under Public Procurement News)

A contract could come under various categories such as a works contract, a services contract, a supplies contract or a contract awarded by a utility. The local authority should simply define the project and then follow the suitable Directive if the contract amount is higher than the threshold. However, the determination of the category may not be so easy where there is a mixture of objectives involved and where elements of public works, supplies and services are incorporated. For example, there may be a situation where a local authority wishes to procure a private partner to build and operate a swimming pool. The building of the pool would constitute a works contract and the operation of the pool would constitute a services contract. In order to determine which Directive should be followed the local authority should establish whether the works are incidental to the services, by determining what is the main object of the contract and what makes up the predominant value of the contract.

It is also possible that a contract will be a concession contract. A concession contract is where the recovery of expenditure will be through user charges, and since the contractor receives no guarantee of return from the local authority, he or she will bear the risks associated with this recovery of expenditure. Special rules apply in the works Directive for a works concession, however services and utilities concessions are not subject to EU Directives (although the Treaty of Rome and the Green Book will still apply).

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7 Government Procurement Agreement of the World Trade Organisation.
8 There are two types of services: Part A (Priority services) which are subject to the full set of procurement rules and Part B (non-Priority services) which are only subject to rules on technical specifications and post award notices.
The local authority will receive requests for participation in response to the contract notice entered in OJEC. Predetermined prequalification criteria should be used to assess the requests for participation and an invitation to negotiate sent out the successful candidates. For the negotiated procedure the contracting authority is allowed to limit the number of applicants invited to negotiate to three [and normally would not seek tenders from more than four]. The successful applicants submit their indicative bids, and one or more of the bidders are chosen to negotiate contract details.

Negotiations can take a number of different forms. The local authority may decide on a preferred bidder based on the indicative bids and seek to negotiate a final contract with this bidder. In other cases the local authority may prefer to enhance the competitive nature of the process by negotiating with two bidders following which both will submit final offers [Best and Final Offers – BAFO]. Other negotiating approaches are possible but great care must be taken to treat everyone fairly and make sure all understand the procedures being used in advance.