

12. Ownership of facility

In some forms of PSP/PPP, the public sector retains ownership of the facility. That is the case, for example, in the management contract, affermage, lease, and BLT models. In some other forms, ownership may vest in the private sector party for a period of time or, in some cases, permanently (e.g., BOOT, BOO, BBO).

13. Duration

There is a potentially wide range of durations for PSP transactions, depending in particular on the PSP model being applied. Models in which the private sector party has a limited financial obligation, if any at all, are likely to have a shorter duration (e.g., management, affermage and lease contracts). In other PSP models, in particular those in which there is a financing role for the private sector party, the duration is likely to be longer including to allow the operator to recoup the investment (e.g., concessions, contract). The duration of PSP arrangements involving SMEs as operators tends to reflect the extent to which the arrangement also involves financing responsibility and the shouldering of significant risk by the operator.

Apart from the type of PSP model being applied, other factors may be relevant to determining the duration of a PSP arrangement. Such other factors may include, for example, the extent of experience of operators, and the ability of operators¹³⁴.

V. PLANNING, PROCUREMENT AND IMPLEMENTATION

A. Key steps in PSP project cycle

Summarized below are the main stages and steps in the process of identifying, developing, procuring and implementing a PSP project¹³⁵.

1. Identification of PSP project

In a “top-down” scenario, this stage involves identification by the public sector entity of possible projects and development of the PSP concept. This stage may include conducting an inventory of existing infrastructure assets that might be possible candidates for PSP projects involving SMEs.

¹³⁴ For a discussion of factors relevant to duration, see Delmon, *supra*, note 94, p. 21.

¹³⁵ *PPP Reference Guide*, *supra*, note 29, pp. 69 to 72; Delmon, *supra*, note 94, concerning drafting of PPP agreements for small-scale water projects.

Box V.1 Top-down approach: Example from Mali case study

AMADER solicits bids for electrification of designated priority zones through direct competition among bidders. Projects are selected on the basis of lowest tariff. REF (Rural Electrification Fund) finances feasibility studies and puts projects out for bidding in poor rural areas, where the lowest tariff wins.¹³⁶

As part of the identification and assessment of potential PSP projects, the public sector sponsor may wish to explore the possibility of combining more than one infrastructure facility. Such clustering or aggregation (also sometimes referred to as “bundling”) may take various forms and be applied for various purposes. For example, aggregation may be applied for the purposes of making a proposed PSP project more attractive to and economically rentable for prospective private sector parties, including for the purposes of attracting potential financing, and thus actually combining operations under one contract.

Alternatively, clustering may be done merely for the purposes of conducting combined procurement proceedings for projects that will be implemented separately. It should be noted that that raises a number of issues related to procurement and implementation, concerning, for example, the pooling and disposition of revenues from the clustered facilities, capacity requirements for SMEs in the context of aggregation, and setting of tariffs.¹³⁷

Box V.2 Palestine: Regionally-operated solid waste landfill project

- The first order of business was to establish a Joint Service Council, made up of representatives from 33 municipalities, to manage the waste program on a regional level.
- Next came large-scale infrastructure improvements, investing in a sanitary landfill so waste can go to one professionally managed site rather than dozens of small, unregulated, open dumps. Investments for recycling and composting, were also included.
- With IFC support, a private company was brought in to operate the West Bank’s first professionally-run landfill.

-- Ending the Vicious Cycle of Open Dumps; Improving Waste Pickers’ Lives (WB Feature Story, 8 Nov. 2013)

However, clustering or aggregation may not necessarily be a viable or advisable approach in a conflict-sensitive environment. In communities with rival clans or groups, or in a situation where there is a dominant group that is well-to-do, there may be a tendency for the dominant clan or group to control the situation. Clustering or aggregation may thus end up deepening the wounds of the socially-excluded or minority groups. This situation will therefore call for the strengthening of capacities within the minority/marginalized group following a capacity gap analysis.

¹³⁶ ESMAP.

https://www.esmap.org/sites/esmap.org/files/2b.MALI_Rural%20Electrification%20and%20Opportunities%20for%20Gender%20Integration.pdf.

¹³⁷ An elaboration of such clustering-related issues is found in Delmon, *supra*, note 94 p. 12.

2. Pre-feasibility examination

This stage involves a preliminary examination of the basic feasibility of a possible PSP project from certain fundamental technical, financial and legal perspectives¹³⁸.

- Technical issues to be checked at this stage include, for example:
 - whether essential resources are available (e.g., this could involve checking on availability of needed natural resources such as, for a water project, whether water sources are available and of the requisite quality)
 - whether competing sources exist for the service
 - the nature of any existing assets and what investments might be required
 - availability of power sources
 - potential adverse environmental impacts
 - potential adverse social welfare impacts

- Financial aspects to be considered at this stage include, for example:
 - whether the foreseeable revenue could be expected to be sufficient to cover costs
 - affordability issues (the extent to which beneficiaries of the facility can be expected to be able to pay for the service)
 - prospective ability of operators to provide financing
 - whether subsidies would be necessary and whether financing might be available in local markets
 - application of a public-sector comparator to determine to see whether a PSP approach or a traditional public procurement approach would provide better value for money
 - applicable tax regime

- Legal issues to be screened preliminarily at this stage include, for example:
 - key relevant features of the legal landscape e.g.,
 - is there a PPP law?
 - is the legal framework for public procurement applicable?
 - Would donor procurement rules apply? (see Annex D for a table of selection methods under the new World Bank Procurement Regulations for Borrowers, including those relevant to awarding PPP contracts)

¹³⁸ For a more detailed discussion of feasibility assessment of PSP/PPP projects, see the *PPP Reference Guide, supra*, note 29, pp. 120 to 139.

- Are there environmental laws that may affect the project and the liability of the operator, including possible requirement of environmental impact assessment and any possible indemnification mechanisms that might apply?
- What are the characteristics of the ancillary legal environment that support the implementation of projects such as the one being considered (e.g., law on contract dispute settlement)?
- Are there legal or regulatory restrictions to any particular form of clustering that may be considered to structure the PSP (e.g., on cross-use of revenues from projects across community boundaries?)

Box V.3 World Bank policy on PPPs

The Bank may finance the cost of a PPP project or a contract if:

- Selection of project company is consistent with the Bank’s Core Procurement Principles, in particular use of competitive procedures for selection of the private sector partner;
- the project reflects the application of the Bank’s Anti-Corruption Guidelines; and,
- the project is consistent, as appropriate, with the requirements set out in the Procurement Regulations for Borrowers
- It is demonstrated that there is adequate institutional capacity to prepare, structure, procure and manage the PPP project
- Suitable economic and financial analysis is conducted
- Service-level output requirements are included
- A risk matrix is presented to the Bank
- The principle of performance-based payments is applied

-- Sec. 6.43 and Annex XIV, Procurement Regulations for Borrowers

- Various issues related to the identity and nature of potential parties to the PSP, for example:
 - legal responsibility of the PSP proponent as regards delivery of the service and its authority to delegate the right to exploit the infrastructure facilities and provide the service;
 - identity of the owner of the assets and related land, and what restrictions if any exist on transfer of assets and land;
 - who would need to be party to the contract;
 - in clustering or aggregation arrangements, in which more than one community is involved, how would those communities be represented among the parties to the contract? (i.e., whether each community would be a party to the contract, or whether a

- community would be designated to represent the other communities involved in the clustering arrangement)
- Regulatory aspects, for example:
 - applicable permitting requirements
 - whether affected residents are obligated to connect to the infrastructure facility
 - whether a regulatory authority has power to cut-off service for non-payment and to act against illegal connections
 - whether such powers may be delegated to the operator; in clustering arrangements
- Applicable contract law including extent of parties' freedom of contract, whether any mandatory model contract forms are applicable, and requirements for formation of contract
- Legal regime governing security interests that potential lenders may wish to take
- Applicable rules governing relationship between consumers and utilities
- Applicable procurement rules governing award of PSP contracts
- Status and fate of contracts with any existing service providers
- Any applicable tariff policy
- Locus of responsibility under any applicable environmental and health and safety legislation, and any procedures to be followed under such legislation.

The types of information derived in the preliminary feasibility examination will help the public sector party in identifying the PSP/PPP contract model to use.

3. Structure and appraise PSP

This stage involves designing the PSP structure, including risk allocation, and conducting detailed feasibility appraisal. That will include detailed technical and financial feasibility studies, though the extent and complexity of those will depend on various factors, including the nature of the PSP transaction, the experience of the contracting authority or other similarly situated bodies in establishing similar projects, the capacity and experience of prospective operators.

4. Design PSP contract

If the PSP concept has been approved following the feasibility assessment, the next stage is to formulate the contract. The contents of the contract include the essential provisions on

- performance obligations of the private sector party
- payment procedures,
- mechanisms for adjustment of tariffs,
- dispute settlement, and
- termination provisions.

Box V.4 Key factors affecting content of contract include:

- exact functions to be performed by the private sector party
- manner in which the infrastructure and its operation will be financed, and how the operator will be paid
- allocation of risk between the parties
- extent to which mandatory rules of law affect the manner in which PPP projects can be structured

The specific content of the contract is predicated on a variety of factors. Those relate to the

nature of the transaction, the commercial bargain agreed by the parties including risk allocation, the financing structure of the transaction, and the applicable legal framework¹³⁹.

5. Solicitation and contract award procedure

At this stage, the procurement strategy is defined and implemented. That includes the choice of the procurement method to be applied, the preparation of the request for proposals/bidding documents, and the solicitation, receipt and evaluation of proposals/bids, leading to the finalization and conclusion of the PSP contract.

Key issues in determining a fit-for-purpose procurement (selection) method include the following:

Solicitation of participation

This concerns in particular whether the procurement process should begin with a pre-selection (shortlisting) or pre-qualification phase. It is not unusual for procurement rules governing the award of PSP arrangements to require that PSP arrangements should commence with a filtering of potential participants. It should be noted that there is an essential difference between pre-selection (shortlisting) and pre-qualification. In pre-selection (shortlisting) the contracting authority engages in a comparative assessment of the qualifications of bidders that have expressed interest in being shortlisted, and selects a limited number of applicants that it considers the best qualified for inclusion in the shortlist. By contrast, when a procurement proceeding commences with pre-qualification, the conformity of applicants for prequalification with the pre-disclosed qualification criteria is assessed on a pass/fail basis (rather than on a comparative basis) and, in classical prequalification, all applicants that meet that pass/fail test must be admitted to the procurement proceeding.

¹³⁹ For a detailed discussion of the design of a PPP agreement, see *PPP Reference Guide, supra*, note 29, pp. 148-159.

In some procurement systems, a minimum requirement is imposed as to the number of participants or responsive bids that have to be submitted in a procurement proceeding in order for the proceeding to be deemed valid. It is important that any such rule, which does not necessarily contribute to improved efficiency in public procurement systems and is not reflected in the World Bank Procurement regulations for Borrowers, does not present an insurmountable obstacle in scenarios where – especially in an FCV or geographically remote context – only one provider may be available to supply the infrastructure services (and the contracting authority ensures that the price and other terms are reasonable and responsive to the solicitation documents).

Single-stage or two-stage bidding process

Depending upon the nature of the PSP transaction, and on the procedures called for in the rules applicable to the procurement of PSP projects, the contracting authority may (or may not) be given a choice between applying a single-stage bidding procedures, or applying a two-stage bidding procedure. In a single-stage bidding procedure, bidders simultaneously submit their technical and financial offers (perhaps in separate sealed envelopes, depending upon the procedural requirements under the applicable rules), and the contracting authority evaluates those offers and makes an award decision based on the offers applying the evaluation criteria disclosed in the solicitation documents. In such a single-stage approach the award decision may involve identifying the bidder, from among bidders that have submitted technical proposals that meet the requirements in the RFP, whose financial proposal is the most advantageous one in accordance with the evaluation criteria and methodology disclosed in the solicitation documents.

A single stage approach of that type may be deemed suitable in PSP transactions that are of a simple, straightforward and lower value nature. That is because in such cases the contracting authority is not soliciting for its consideration various possible technical and financial variants for implementing the project.

By contrast, in more complex PSP transactions, where the contracting authority is uncertain as to the technical solution to its needs and seeks the assistance of the private sector in finalizing its requirements, a two-stage bidding process would be appropriate. A typical feature of such a two-stage procedure is the issuance of a preliminary request for proposals to solicit initial proposals presenting various possible technical solutions. Following that initial stage, the RFP is finalized, and on the basis of the finalized RFP bidders present their final proposals.

In a variant of the two-stage process, in cases where the contracting authority wishes to pit various possible technical solutions in a competition against each other, only one version of the request for proposals (RFP) is issued and only one round of technical proposals are submitted. The RFP solicits technical proposals, which are then evaluated and ranked on the basis of criteria disclosed in the RFP. The bidder that submitted the highest ranked technical proposal is invited to submit a financial proposal.

Procedure for unsolicited proposals

A classic PSP/PPP issue is how a contracting authority should deal with proposals for projects that it has received without having solicited them. Issues that arise in designing a procedure for dealing with unsolicited proposals include how competition may be injected into the award process, even in the case of unsolicited proposals, and, where an unsolicited proposal is received and then subject to competition, whether the original proponent of the unsolicited project proposal is given any advantage in the competition (e.g., bonus points in the evaluation and ranking of proposals).

A variant of that type of case is the situation in which the contracting authority prepares itself for the possibility that it may receive proposals for particular types of PSP projects without specifically soliciting proposals in discrete procurement proceedings. This scenario is sometimes considered to be a “bottom-up” approach as contrasted with “top-down” scenario, in which proposals are solicited and submitted within the confines of a specific procurement proceeding (see below, sec. V.B).

6. PSP project delivery

This is the PSP contract implementation stage. In this phase, the PSP contract is implemented, including performance of the functions assigned to the operator of the infrastructure facility in which the private sector party implements the PSP contract and the public sector part monitors contract performance. This stage, also referred to as the contract management stage, lasts for the duration of the PSP project agreement. Key contract management activities include¹⁴⁰:

Table V.1

Contract management	Sample issues
Institutional and organizational arrangements	Roles of PSP contract manager, sector regulator, finance ministry, central PPP Unit
Performance and risk monitoring	Private party’s obligation to report performance data; engagement of independent experts for inspections, role of service users in providing feedback; risk management plan to manage government’s responsibilities and risks
Contract adjustments	Adjustment mechanisms may be built into PSP agreement ¹⁴¹
Management of asset and operational transitions at contract expiry	Procedures for appraising the condition and value of assets upon transfer

¹⁴⁰ For a summary of key aspects and practices of contract management in PPP transactions, see *PPP Reference Guide, supra*, note 29, pp. 178-189.

¹⁴¹ See *PPP Reference Guide, supra*, note 29, pp. 153- 154.

B. Bottom-up approach

As an alternative to “top-down” approaches to procuring PSP projects, in which the public sector party solicits proposals on the basis of project solicitation of proposals launched by that party, there is the possible practice of applying a “bottom-up” approach. The bottom-up procedure is established for dealing with proposals for projects initiated by local community authorities or by the private sector. In order to ensure transparency and competition in such cases, a procedure can be established for dealing with such unsolicited procedures. Such a procedure may include the publication of a solicitation of proposals based on a project originally proposed in an unsolicited proposal, with a time period established within which any interested providers would have to respond.

Box V.5 Example of Bottom-up approach: PCASER Program in Mali¹⁴²

1. Project promoter identifies the proposed project
2. The mayor of the locality gives a preliminary notification to the promoter
3. A Preliminary Authorization is issued by AMADER to the promoter following an examination of the proposal and the payment of a guarantee
4. A call for competition is initiated by AMADER which triggers a two-month period during which providers may submit proposals
5. The promoter prepares an electrification plan and a business proposal using financial simulation tools developed by AMADER for the free use of promoters
6. An AMADER project selection committee examines each proposal that is submitted, according to criteria including:
 - the services offered
 - conformity with technical and environmental standards
 - feasibility of implementation plan for the installation works
 - costs of equipment, installation works and utilization
 - utilization plan, including maintenance plan, billing and cost recovery approach
 - plan for recruitment and training of personnel
7. Projects selected based on ability of suppliers to develop and operate viable project with fixed investment subsidy (80%, \$500,000), and 25% average matching co-financing to local private operators
8. Negotiation of contracts with the proponents of proposals that are accepted
9. Signature of contract documents (financing agreement, Authorization Contract, contract conditions (by AMADER and the promoter)
10. Implementation of the project by the promoter under the monitoring of AMADER
11. Issuance by the Minister in charge of Energy of an Authorization for a period of 12 to 15 years

¹⁴² This description of the PCASERS program in Mali is drawn from a presentation by Alassane Agalassou of AMADER (Agence Malienne pour le Développement de l'Énergie Domestique et de l'Électrification rurale) in Maputo, Mozambique (9-12 June 2009) at a Workshop on the Electrification Initiative in Africa http://siteresources.worldbank.org/EXTAFRREGTOPENERGY/Resources/717305-1264695610003/6743444-1268073490440/4.3.REF_REA_Mali_diesel_minigrids.pdf