



An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform

Guidelines for the use of Public Private Partnerships (PPP)

December 2019

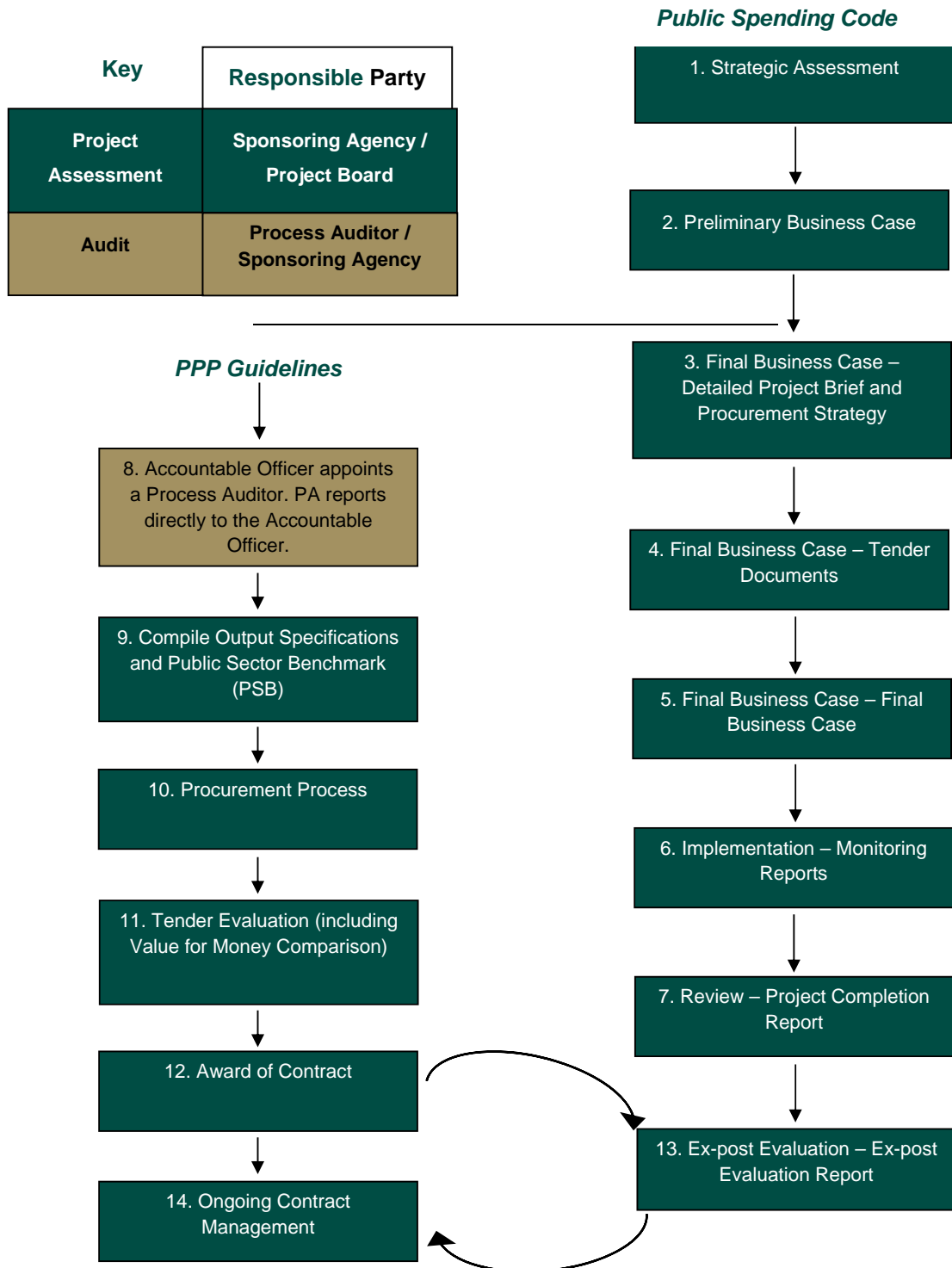
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PPP Procurement Steps within the Public Spending Code framework



Section 1 Introduction

1.1 Background and Other Relevant Guidelines

These Guidelines update and replace the Guidelines published by the Department of Finance in July 2006 and reflect changes in policy on PPP Procurement, in the light of practical experience gained in delivering PPP projects and other relevant developments, including:

- the consolidation of a range of guidance material from a number of sources, including the Capital Appraisal Guidelines 2005 and subsequent related advice notes, to constitute “The Public Spending Code – A Guide to Evaluating, Planning and Managing Public Investment” issued by the Department of Public Expenditure and Reform in September 2013 and revised in October 2019, which now brings together all previous advisory material on procurement procedures consistent with national and international best practice, and which applies to all capital expenditure proposals, including PPPs;
- changes in relation to the responsibilities of Ministers under the Ministers and Secretaries (Amendment) Act 2011;
- the Public Investment Management Assessment of Ireland, undertaken in 2017 by the IMF;
- the Report of the Inter-Departmental / Agency Group on its Review of PPPs, published in August 2018;
- the National Development Plan 2018-2027, published by the Government in February 2018; and
- the review of the Public Spending Code published by the Department of

Public Expenditure and Reform in 2019.

These updated PPP guidelines should also be read in conjunction with the Framework for Public Private Partnerships, EU and national procurement rules and guidelines, the CBA Guide to Economic Appraisal published alongside the revised Public Spending Code, the State Authorities (Public Private Partnership Arrangements) Act 2002, the National Treasury Management Agency (Amendment) Act 2014, on-going communications from the PPP Policy Unit of the Department of Public Expenditure and Reform and other relevant legislation and guidelines.

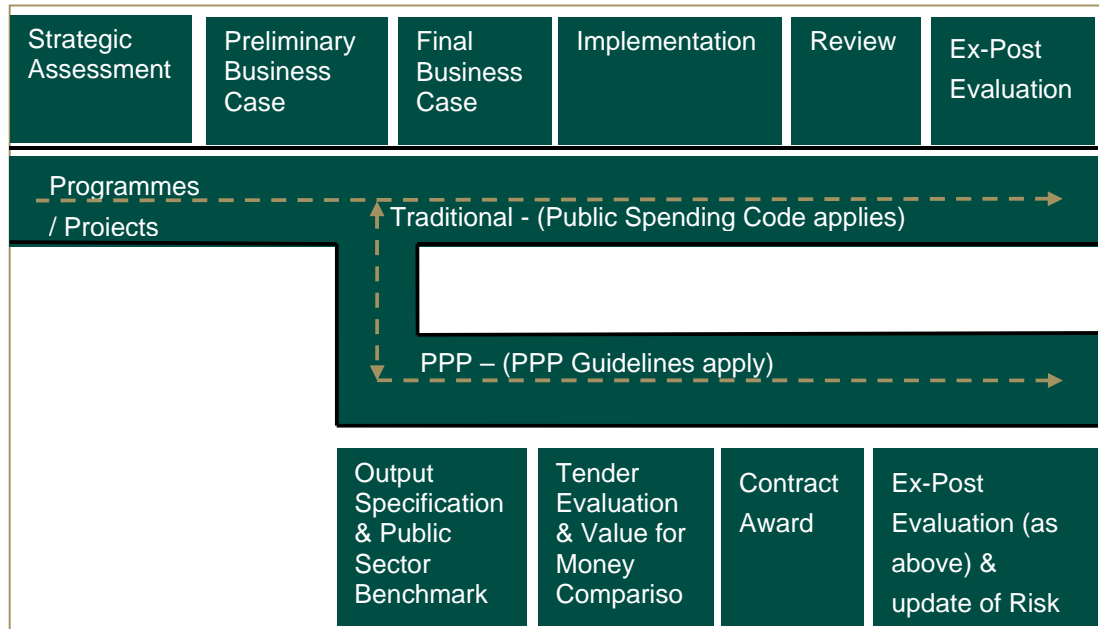
As further experience is gained in developing PPPs, further updating of existing guidance may again be necessary.

1.2 Scope

The Public Spending Code sets out the major stages that must be undertaken for the evaluation and procurement of all public infrastructure projects. However, some of the steps followed in PPP procurement, differ from those set out in the Public Spending Code; see diagram on page 3 and summary diagram at Figure 1.

The Central PPP Unit issues PPP specific policy guidelines and, in addition, may issue more detailed technical notes on individual steps specific to the PPP process.

Figure 1: Traditional and PPP Procurement Stages – Summary



In practice, many PPP projects may not be wholly procured as a PPP, but rather may include elements that are procured using traditional procurement means¹. For example, the land required for the project is usually procured directly (or compulsorily purchased) by the Sponsoring Agency² itself and enabling works often undertaken, using traditional procurement methods, and not procured as part of the PPP under the actual PPP contract. Any elements of a PPP project that are procured separately from, and outside of, the PPP contract itself are not covered by these Guidelines, but are subject to the mainstream requirements of the *Public Spending Code*.

There are a number of different types of PPP projects, including:

- a) Projects financed by the private sector and remunerated by deferred annual payments (unitary payments) from the Exchequer (e.g., Design, Build, Operate & Finance or DBOF; Design,

Build, Operate, Maintain and Finance or DBOMF);

- b) Projects partly or fully financed by the private sector and remunerated by user charges, mainly in the roads area (DBOF with a Concession to levy user charges for a period);
- c) Projects without private financing and remunerated directly by the Exchequer (e.g., Design, Build and Operate or DBO);
- d) Projects funded from State Authorities' own resources, mainly in the local authority area (e.g., Design, Build & Operate / Maintain).

However, for the purposes of these Guidelines, PPPs are generally considered to mean projects in category (a) and (b) above, whereby the asset is funded and constructed by the private partner, following which it is made available for public use and is paid for by the State

¹ "Traditional procurement means" is the realistic, public sector alternative to procuring the project using a PPP

arrangement, employing the normal procurement method used in the relevant sector.

² For definition see Glossary of Terms in the Appendix.

and/or users over an extended period (typically 20-25 years), after which the asset comes into State ownership. In the meantime, the PPP is regarded as 'off balance sheet' from a General Government perspective, which means that the initial capital cost of the project does not impact on the General Government Balance (GGB) over the construction period, nor does the debt associated with the project impact on General Government Debt (GGD). Rather, the cost of such projects is spread over the lifetime of the projects, by way of annual unitary payments.

Some PPP projects are stand-alone in that they relate to one particular project – for example the National Conference Centre. Others may involve the procurement of a number of separate, but related, projects as part of a PPP bundle, e.g. schools, primary care centres, courthouses. Recent PPPs have been structured as part of a PPP Programme, announced in phases, where a number of PPP procurements are run in parallel.

1.3 Responsibility for Implementation of Guidelines

As in the case of the application of the *Public Spending Code*, when applying these PPP guidelines it is the responsibility of each Approving Authority³ to draw up / update (as appropriate) its own procedures applicable to its area of control based on, and consistent with, the principles set out in this document (and as may be revised over time). Each Approving Authority should also ensure that bodies under its aegis follow the procedures laid down by it. If there is an intermediary body between the Approving Authority and the Sponsoring Agency, it is the responsibility of the Approving Authority to define clearly the roles and responsibilities of any such intermediary body in regard to the

³ For definition see Glossary of Terms in the Appendix

appraisal, assessment and management of PPP projects, within the corporate governance framework put in place for the project, consistent with these guidelines.

1.4 Role of Government and Ministers in relation to the Appraisal, Approval, Audit, Procurement and Delivery of PPP Projects.

These guidelines are intended to assist Ministers and their officials in carrying out their responsibilities and functions in regard to the, appraisal, approval, audit, procurement and delivery of PPP projects. However, in arriving at policy decisions on either investment programmes or individual projects, Ministers have to take all relevant factors into account – the economic costs and benefits associated with programmes or projects may not be the only relevant factors. Nothing in these guidelines should therefore be taken as precluding Government or Ministers under the delegated sanction arrangements set down by the Minister for Public Expenditure and Reform from deciding to approve projects independent of the detailed application of these guidelines. Such decisions still require Departments to ensure that best practice is followed as regards public financial procedures generally, in terms of ensuring that necessary terms and conditions are applied to secure full accountability and transparency for the funds concerned.

1.5 Stakeholders in the PPP Procurement Process

PPP projects involve the coming together and interaction of a number of interests and parties. It is a condition of the agreed *Framework for Public Private Partnerships*⁴ that the Sponsoring Agency should consult with relevant stakeholders at appropriate points throughout the procurement process. “*Stakeholders*

⁴ Available at www.ppp.gov.ie.

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” (see paragraph 7.1 of the Framework for Public Private Partnerships).

Guidelines for State Authorities undertaking PPP Projects on *Stakeholder Consultation for Employees and their Representatives*⁵ were issued in January 2005. It is important that State authorities familiarise themselves with the relevant guidelines on Stakeholder Consultation and apply them in an appropriate manner. As stated in the *Guidelines for Stakeholder Consultation for Employees and their Representatives*, the aim of employee consultation is to provide a process for meaningful two-way communication between State Authorities and employees and their representatives, in the course of which relevant issues arising in connection with PPP projects are signalled, communicated and discussed.

Section 7 of the Framework for Public Private Partnerships states that “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.”

Primary responsibility for ensuring stakeholder consultation takes place rests with the Sponsoring Agency. However, it

is open to employees to have the issue of stakeholder consultation in a particular project raised at the appropriate Partnership level, i.e., workplace partnership committees, etc.

Section 2.3 and 2.4 of the *Stakeholder Consultation Guidelines* outline the ‘Principles of Consultation’ and ‘Approach to Consultation’ and all State Authorities must be fully familiar with these.

It is also important that the Sponsoring Agency consider any policy issues that may emerge during the process of consultation – see section 1.13.

1.6 PPP Oversight – PPP Steering Committee

The inter-Departmental PPP Steering Committee, chaired by the Department of Public Expenditure and Reform, monitors and oversees progress on the current (and future) pipeline of PPP projects at all procurement stages. Where significant delays, or impediments to project delivery, are being encountered on a particular PPP project, the PPP Steering Committee may be able to assist in resolving the issues, drawing on the previous experience of the members of the Committee in delivering PPPs. This may include escalating issues for consideration by the relevant Minister(s).

The PPP Steering Committee also acts as a centralised forum for discussion on topical PPP specific items and potential learning points across Departments and Agencies, based on actual experience with PPPs.

⁵ Available at www.ppp.gov.ie.

1.7 Best Practice in PPP procurement: separation of Appraisal / Approval / Audit / Procurement / Delivery Functions

The PPP procurement process is comprised of separate but interrelated elements, ranging from the initial assessment of a proposal and consideration as to whether it is suitable for procurement as a Public Private Partnership, to final approval of a contract and ongoing contract management. In the context of any PPP project, there are four distinct strands or functions: the project appraisal function, the approval function, the procurement and delivery function, and the audit function. Best practice would require an appropriate separation of functions between these strands.

The parts played and the responsibilities borne by the various bodies involved in the PPP procurement process will vary depending on the nature of the project/programme, e.g. a Department might be the Approving Authority for one project while in others it might be the Sponsoring Agency. Also, a Department/Agency may carry both the Sponsoring Agency and Approving Authority functions through separate divisions of work within the organisation. This would entail an internal separation at the level of that Department/Agency, between those who propose expenditure and those who sanction it.

1.8 Project Appraisal Function

The Sponsoring Agency is responsible for assessing and appraising projects, which involves a Strategic Assessment and completion of a Business Case (in accordance with the *Public Spending Code*), for providing the Approving

Authority with the necessary information to perform its approval function and also for:

- finalising any policy issues involved (see section 1.13);
- assessing the suitability of the project for procurement as a PPP, with the assistance of the NDFA (from both a facilities and services perspective);
- assessing the costs and benefits of the project;
- at a later stage in the process, compiling the detailed Output Specifications for the project and the associated Public Sector Benchmark (PSB) or agreeing the PSB if compiled by the NDFA on behalf of the Sponsoring Agency; and
- the ex-post evaluation.

1.9 Approval Function

This should be carried out as a separate function from project assessment and by a different Agency/Department/Section, i.e. the “Approving Authority”. It involves the decision on whether a project should proceed to a Business Case (where this would involve significant cost) and, following the Business Case, deciding whether the project should be approved and whether it is suitable for procurement as a PPP⁶. The NDFA must be consulted as part of this process. Under a delegated sanction from the Department of Public Expenditure and Reform, a Department may have the authority to sanction projects itself, provided that they are acceptable in principle and provided that the cost of any enabling works, the VAT payment payable on handover of the project to the Department, and the construction cost⁷ of

⁶ Suitability or otherwise of a project for procurement as a PPP is assessed by carrying out a PPP Procurement Assessment – see section 2.2.

⁷ The ex-VAT cost of creating or renovating the asset, including the cost of labour, materials, etc, and also

including the time-bound and project specific cost of external experts or consultants associated with and necessary for the delivery of the asset, but excluding the cost of public servants who are involved in the process of planning, approving or procuring the project.

the project over the construction phase can be accommodated within the Sponsoring Agency's approved multi-annual Capital expenditure allocation⁸, and also subject to any other general conditions of sanction. The Approving Authority may also specify other conditions, such as an overall budget limit for the project (see section 2.3).

In a PPP project, approval to proceed with a project carries with it approval for the appointment of client advisors in respect of non-financial advice to assist the Sponsoring Agency in the planning / implementation of the project. The NDFA is the sole financial advisor for the Sponsoring Agency and where other financial, risk and/or insurance advisors are required, these must be appointed by the NDFA. (As all PPPs are now also procured by the NDFA on behalf of the Sponsoring Agency, with the exception of transport related PPPs, the appointment of most specialist client advisors tends to be handled by the NDFA on behalf of the Sponsoring Agency).

The Sponsoring Agency needs to be in a position to assure the Approving Authority that:

- the project should be approved, on the basis of the assessment undertaken;
- all policy issues involved are clear and fully agreed, and the project is suitable for procurement as a PPP;
- there is no conflict with public sector numbers or HR policy or any other general policy;

- the scope / specifications are clear and agreed, and conform with sectoral norms;
- the capital cost⁹ of the project (both PPP and non-PPP elements) over the construction phase¹⁰ can be accommodated within the approved multi-annual Capital Allocations of the Sponsoring Agency;
- a PSB (for the PPP element) will be set before issue of tender documentation; and
- sites are in their ownership with title demonstration / ability to confer licence on PPP Co.¹¹

1.10 Procurement and Delivery Function

PPP projects must be procured in line with all regulatory and EU procurement requirements in regard to tendering and bid evaluation (see section 3 for further details on procurement requirements).

In general, the procurement and delivery function is the responsibility of the Sponsoring Agency within the terms of the sanction received from the relevant Approving Authority (see section 2.3), with the NDFA undertaking the actual PPP procurement / delivery on behalf of the Sponsoring Agency in the case of non-transport PPPs. (Transport Infrastructure Ireland is responsible for the procurement of all transport related PPPs that fall under its legislative remit).

Once a project is approved for procurement by PPP, it is handed over to the NDFA who will be responsible, as agent for the Sponsoring Authority, for the procurement through contract close stage

The position taken in relation to assumed inflation in the calculation of the final cost should be clearly stated.

⁸ This does not apply to PPPs announced under Phases 2&3 of the Government's stimulus PPP Programme.

⁹ See footnote 7.

¹⁰ Does not apply to PPPs announced under Phases 2&3 of the Government's stimulus PPP Programme.

¹¹ See section 1.16 for further information in relation to the PPP Co.

to turnkey stage within the parameters laid down by the relevant Sponsoring Agency (which should include any conditions of sanction imposed by the Approving Authority for the project) and for handing the project back to the Sponsoring Agency after construction is complete – under supervision of a Project Board chaired by the Sponsoring Agency or Approving Authority up to handover to the NDFA for procurement and, following handover, co-chaired by the Sponsoring Agency / Approving Authority and the NDFA, with the NDFA taking the role of lead co-chair. As lead co-chair, the NDFA will be formally accountable for the project, including reporting on progress, etc., under the co-chair governance arrangement, until the point of hand-back to the Sponsoring Agency at turnkey stage.

1.11 Audit Function

There is a particular audit requirement in regard to PPP which is additional to the requirements outlined in the *Public Spending Code*, i.e. the appointment of a Process Auditor. A Process Auditor must be appointed for all PPP projects. This appointment must take place as soon as a decision is taken to proceed with a project on a PPP basis. The role of the Process Auditor is to support the Accountable Officer by checking, on his/her behalf, that the proper procedures and processes have been followed. (See Appendix 1 for further details of the Process Auditor's role). This role is distinct from that of the Project Manager, referred to in section 2.4.

1.12 Steps in PPP Procurement

Each of the separate PPP functions outlined above contains specific steps which must be followed in the correct sequence, as outlined in the diagram on page 3, in order to ensure the development of a robust, including financially robust, value for money project and the smooth

operation of the overall process. These steps are set out in detail in section 2.

1.13 Policy Issues

PPP procurement is complex and the associated bidding costs may be high. In this light, in the interest of both the public and private sectors, it is imperative that, **before** projects proceed into the procurement phase, all material policy issues, (e.g., issues impacting on Public Sector Numbers or HR policy) which could give rise to delays or impediments to further progress on a project, are identified and addressed up front. Where a PPP may involve transfers of staff to a PPP company, it is vital that all aspects of such transfers have been fully examined and that positions have been adopted on all staffing issues arising before the project proceeds to the procurement phase. Departments should avail of their in-house expertise on HR issues. If necessary, Personnel and Remuneration Division of the Department of Public Expenditure and Reform will assist with general HR policy issues, including pensions. Projects should not be handed over to the NDFA to be procured until all policy issues or issues that could materially impact the project's delivery are identified and resolved.

1.14 Affordability

The issue of affordability is fundamental to the proper planning / appraisal / approval of any project. PPPs typically give rise to a 25-30 year repayment mechanism. At a macro level, therefore, it is vital that some control mechanism is in place to ensure that PPP projects are "affordable" in the longer term, taking account of other budgetary demands.

In the case of unitary payment funded PPP projects, the setting of agreed 5-year Exchequer Capital Allocations for all Departments (set out in the National Development Plan and which will be rolled

forward annually at Budget time to include a new 5th year), and the approach of notionally charging the capital costs of PPP projects against these Exchequer Capital Allocations of the relevant Departments over the construction period (as if they were being procured with Exchequer funds – thus ensuring neutrality in terms of choice of procurement option) provides an overall control mechanism to ensure that investment in PPPs is sustainable and affordable at a macro and Departmental level. At individual project level, the issue of affordability is addressed in the context of the specific multi-annual Capital Allocations approved for the Sponsoring Agency, and by the setting of a project budget and the compilation of a PSB.

An Approving Authority should not allow a project to proceed unless it is satisfied that the overall cost of the project as a whole, including both PPP and non-PPP elements, can be accommodated as above, within the agreed multi-annual Capital Allocations available to the Sponsoring Agency¹².

1.15 Value for Money

The overarching consideration in the procurement and delivery of every public investment project is the achievement of value for money for the Exchequer. In the context of a PPP project, as indicated earlier, there may be additional costs associated with a project that are not covered by the PPP process itself (e.g. the cost of land or enabling works), but that will nevertheless contribute to the overall cost of the project. As a result, there are two different levels at which “Value for Money” (or VfM), needs to be considered:

- (i) the **overall** VfM of the project – i.e. does the project as a whole offer good value for money, and
- (ii) the VfM of **the PPP contract** – i.e. do the aspects of the project that are being procured by **PPP** represent good value for money, particularly when compared with the cost of achieving the same objective by traditional procurement (as represented by the Public Sector Benchmark (PSB)).

VfM testing under (a) above is a test that should apply to all public expenditure on an ongoing basis (to be managed by the Approving Authority/Sponsoring Agency) and should take account of overall project costs, including any elements of the project that are not to be procured under the PPP contract itself. However, this overall value for money test is much wider than, and should not be confused with, the VfM test for the PPP approach itself – the objective of which is to ensure that using the PPP approach compares favourably with the alternative cost of using traditional procurement means to achieve the same result as the PPP contract.

As these Guidelines are PPP-specific guidelines, they are only concerned with the PPP-specific VfM tests. However, Sponsoring Agencies should continue to monitor both PPP and non-PPP costs associated with any PPP project in accordance with the *Public Spending Code* and the value for money requirements, and should be satisfied that, in the wider value for money consideration of the project (taking both PPP and non-PPP elements into account), the project continues to represent value for money. If at any stage in the process it is found that serious additional costs have arisen, whether in relation to the PPP or non-PPP element of

¹² Where a PPP is funded, or part-funded, by user charges, the amount of the investment that is so funded can be discounted when charging the cost of the project to the Sponsoring Agency's Capital Allocation.

the project, a revised business case should be undertaken, having regard to the increased costs. Where such a revised analysis is carried out and the project is either no longer affordable or the best value option, the Approving Authority should be consulted to determine whether the project should be terminated and the resources diverted to more worthwhile projects.

With regard to the PPP-specific VfM tests, four formal VfM tests should be carried out during the PPP procurement process at the following points:

- (i) the first VfM test at PPP Procurement Assessment – a test carried out to determine whether, and in what form¹³, a PPP arrangement has the potential to offer the best value for money solution for the procurement, by reference to a number of criteria (see section 2.2);
- (ii) the second VfM test at completion of the PSB – to determine whether, in light of the quantifications in the PSB, the conclusion reached in the PPP Procurement Assessment still holds;
- (iii) the third VfM test at Tender Evaluation stage - to compare the highest ranking bid against the PSB, allowing for the differing impact of taxes, etc., to assess whether the highest ranking bid offers a potential value for money solution; and
- (iv) the fourth VfM test at or around Financial Close – a final test carried out to assess the impact of any changes in price (including changes in interest rates and/or discount rates) when compared against the PSB.

¹³ For example, Design Build and Operate (DBO), Design Build Operate and Finance (DBOF), Concession, etc.

1.16 Special Purpose Vehicles (SPVs)

Because of the integrated nature of many PPP projects, a number of different private sector parties can be involved in the delivery of the project over its lifetime. The norm would be for these parties to form a consortium. On award of a PPP tender, best practice would require that this consortium would form a financially robust Special Purpose Vehicle (SPV), i.e., a PPP Co. The arrangement would be expected to facilitate mitigation of interface risk in a project, i.e. it should help ensure that a problem arising in the delivery of one aspect of the project would be addressed by the consortium as a whole and that such a problem would not compromise the ability of other service providers in the PPP arrangement to meet their contractual commitments. Such an arrangement should allow the Sponsoring Agency to have a single point of contact with the private sector for the delivery of the project and its services.

In addition, this approach would be consistent with taxation guidance regarding PPPs and would facilitate achieving the objectives set out in Section 1.18 (Tax and PPPs).

1.17 Use of Licences in PPP projects

Departments and agencies pursuing PPP projects should ensure that the private sector is given a licence to enter and occupy land rather than a lease. The licence will allow the PPP Co. to fulfil its obligations to deliver the facilities and services. Licences do not convey any proprietary interest in land and Landlord and Tenant legislation does not apply. Also, paragraph XVIII of the Corporation Tax guidelines¹⁴ on PPPs is predicated on

¹⁴ Central Guidance on Corporation Tax Treatment of PPP arrangements – available on www.ppp.gov.ie.

the use of licences rather than leases for PPP contracts.

1.18 Tax and PPPs

1.18.1 VAT and Corporation Tax Declaration

Bidders should be asked to provide confirmation that they are aware of and have constructed their bids on the basis of the published tax guidelines on Corporation Tax and on VAT in PPP projects.

Where bidders advise that they will not be within the charge to Irish Corporation Tax and/or that they will be paying Corporation Tax in another jurisdiction, the Irish Revenue Commissioners should be advised, accordingly.

VAT and Corporation Tax are specifically addressed in the Value for Money Comparison (VfMC) exercise because the treatment of these taxes may differ as between traditional procurement and procurement through a PPP. Other taxes, such as employer taxes, are generally paid on the same basis regardless of whether it falls to the public sector or the private sector to pay them.

1.18.2 VAT on Construction

The Sponsoring Agency should be aware that the VAT liability arising on the construction of the PPP asset arises at the time the construction services are completed, unless payment or part payments for those services were made prior to that date. This is the case whether that liability rests with the PPP Company or with the Sponsoring Agency under the reverse charge mechanism. As the VAT on the construction services supplied to the Sponsoring Agency will have been paid up front, that portion of the “unitary payments”, subsequently payable, which relates to the

provision of those construction services, will not attract any additional VAT liability.

When this approach is taken in a given project, the cost and the timing of the upfront VAT-related payment has to be factored into the overall project budget.

The VAT position in relation to any other goods or services provided to the Sponsoring Agency, whether paid for by way of the “unitary payment” or otherwise, should be examined on an individual basis.

1.18.3 Identification of impact of taxation payments and / or material tax reliefs

Bidders should be asked to declare and clearly identify, in a tab in their financial model, taxation payments (such as VAT and Corporation Tax) and material tax reliefs applicable to their bids (based on self-declaration) and should be advised that these will be used to assess the potential of the highest ranking bid received to offer value for money for the Exchequer when compared to the PSB (see section 2.8.2 Value for Money Comparison (VfMC) exercise).

It should be noted, however, that under Revenue guidance, the issue of capital allowances should not arise where a consortium adopts the preferred structure of forming a Special Purpose Company for the purposes of the Public Private Partnership arrangement (see section 1.16 - Special Purpose Companies). In this context, Sponsoring Agencies and bidders should also note the provisions of section 1.17 - Use of Licences in PPPs and published guidance on the treatment of VAT and Corporation Tax in PPPs.

1.18.4 Treatment of Taxation and Material Tax Reliefs

The general principles which apply in relation to the treatment of taxation are as follows:

- (i) The gross cost of tenders (i.e. “price” including VAT but disregarding the Exchequer impact of VAT, Corporation Tax or material tax reliefs) should be taken into account when evaluating the cost of the project for affordability purposes against the overall budget for the project.
- (ii) However, in evaluating bids against each other no competitive advantage should be given to a tenderer who may not be subject to VAT, or who may be subject to a VAT rate lower than our national rate. (This would also apply to traditionally procured projects.) Bids must, therefore, be compared on a VAT-exclusive basis.
- (iii) The cost of a bid included in the Value for Money Comparison (VfMC)

exercise should reflect the cost net of VAT and Corporation Tax (as outlined at section 2.8.3). Similarly, to allow for a like-with-like comparison, the cost of the PSB included in the VfMC should reflect the cost net of VAT.

- (iv) Material tax reliefs (tax expenditures) attaching to the highest ranking bid should be added to the Exchequer cost of the highest ranked bid in the VfMC exercise as outlined in section 2.8.4.

1.19 Glossary of Terms

A glossary of terms relating to the PPP procurement process is attached at Appendix 1¹⁵. For ease of reference, and consistency, the terminology used is, as far as practicable, the same as that used in the *Public Spending Code*.

¹⁵ For a definition 'Representative' (in terms of stakeholder consultation) see footnote 2 on page 4 of the *Stakeholder Consultation Guidelines*.

Section 2 - Guidelines on the Steps Involved in the PPP Procurement Process

2.1 Strategic Assessment and Preliminary Business Case (prior to choice of PPP or Traditional Procurement)

In preparing the assessment, the Sponsoring Agency should refer to Chapters 3 and 4 of the *Public Spending Code*

2.2 PPP Procurement Assessment

As part of the Business Case, the Sponsoring Agency should determine the most appropriate procurement mechanism. While the majority of public capital investment projects to be delivered under the NDP will be procured using direct Exchequer funding, the NDP envisages that the use of alternative delivery mechanisms, such as PPP, will continue to feature as a minority procurement option within the overall level of public capital investment – essentially on a similar basis as heretofore. Accordingly, delivery of projects by alternative mechanisms such as PPP, using private finance, should continue to be considered within the suite of delivery mechanisms available for appropriate projects of scale, having regard to Government policy on the use of such mechanisms (as set out in the NDP and PPP Review published in 2018) and the Sponsoring Agency's current and/or existing use of PPP.

In the case of projects (or project bundles) costing c€75 million or more, as part of the project appraisal the option of procuring the project by PPP should be considered by the Sponsoring Agency, having regard to the overall policy approach to the use of PPPs, as referenced above, and taking account of any other PPPs already being pursued by the Sponsoring Agency. This is particularly relevant in the case of a

project which has the potential to generate significant third party income e.g. by way of user charges.

If a PPP approach is being considered, a PPP Procurement Assessment should be carried out. The PPP Procurement Assessment addresses a number of key issues in detail, some of which are:

- Is the project of sufficient scale and risk/operational profile to justify a PPP approach, and to carry the high transaction costs that will be involved?
- Does the project have the potential to deliver value for money if procured as a PPP?
- Which form of Public Private Partnership would provide the greatest potential to deliver value for money for the Exchequer?
- Has the Sponsoring Agency the statutory power or *vires* to enter into a PPP arrangement – is it listed in the Schedule to the State Authorities (Public Private Partnerships) Act, 2002 or does its governing legislation give it the power to enter into PPP arrangements?
- Does it have the credit standing to enter into a PPP arrangement?
- Is there potential for third party income which could significantly reduce the level of Exchequer funding required?
- Are all policy issues relevant to the project clear and fully agreed?

- Has site ownership and ability to confer a licence on PPP Co. been established?
- Are the technology and other aspects of the sector stable, and not susceptible to fast-paced change?
- there is no conflict with public sector numbers or HR policy or any other general policy;
- the scope / specifications are clear and agreed, and conform with sectoral norms;

The NDFA will provide financial, insurance and risk analysis advice to State Authorities in order to assist in determining the most appropriate procurement mechanism. The NDFA may, if requested by the State Authorities, provide technical, design and construction advice. Detailed factors to be taken into consideration in the context of a PPP Procurement Assessment are listed in the Central Guidance Note no.6 “Assessment of Projects for Procurement as a Public Private Partnership” (November 2006).

2.3 Approval to Proceed

Following appraisal of the proposed project, the Sponsoring Agency should approach the Approving Authority for approval to proceed with the procurement of the project as a PPP. In deciding whether to grant approval, the Approving Authority must take account of the priority of the proposed project in the context of the Authority’s overall programme of expenditure, within the available multi-annual Capital expenditure allocation(s). If the Approving Authority is satisfied that:

- the project should be approved, on the basis of the appraisal undertaken;
- all policy issues involved are clear and fully agreed, and the project is suitable for procurement as a PPP;

- the capital cost¹⁶ of the project (both PPP and non-PPP elements) over the construction phase can be accommodated within the approved multi-annual Capital Allocations of the Sponsoring Agency; and
- a PSB (for the PPP element) will be set before tenders are issued

the Sponsoring Agency may be authorised to proceed with procuring the project as a PPP.

In accordance with best practice, when approving a PPP project the Approving Authority should convey its approval subject to an overall project budget, to include both PPP and non-PPP elements of the project, based on the estimated costs for the project itself and for project planning, etc., which will have been produced at Business Case stage and on which the proposal to the Approving Authority will have been based. Approval should also be subject to ongoing compliance with the other conditions set out above. The Approving Authority may also impose additional conditions relevant to individual projects or sectors, if it considers this appropriate.

Approval to proceed will carry with it the approval to appoint non-financial client advisors – see section 1.9.

In PPP procurement, at this point the Sponsoring Agency has full authority to proceed to procurement (via the NDFA

¹⁶ See footnote 7.

for non-transport PPPs), including the award of the PPP contract, subject to compliance with the conditions attached to the approval. If any of these conditions are breached, the Sponsoring Agency/NDFA will have to revert to the Approving Authority for revised approval (see section 2.6.7).

2.4 Establishing Project Management Structure

Once approval to proceed has been received for a particular project, the Sponsoring Agency should, in accordance with the *Public Spending Code*, decide on the appropriate management structure for overseeing the project. This will normally involve the appointment of a Project Board to manage the procurement of the project. The Project Board should be chaired by the Sponsoring Agency or Approving Authority up to the point of handover to the NDFA for procurement. After handover of the project to the NDFA for procurement, the Project Board should be co-chaired by the Sponsoring Agency/Approving Authority and the NDFA, with the NDFA taking the role of lead co-chair. As lead co-chair, the NDFA will be formally accountable for the project, including reporting on progress,

etc., under the co-chair governance arrangement, until the point of hand-back to the Sponsoring Agency at turnkey stage.

The project management structure will be formalised and documented in the project's Corporate Governance document. This document details the extent of the responsibilities of the Approving Authority, Sponsoring Agency and the NDFA in respect of the project's procurement.

As part of these arrangements, a Project Manager should be appointed by the

Sponsoring Department or Agency. The person to be appointed to the role should be a senior official, including at MAC level in Departments or at management level in Agencies, where appropriate. The Project Manager should be assigned personal responsibility for monitoring progress on the project and for reporting progress and issues arising to the Project Board.

Regular reports should be submitted to the Project Board on how projects are progressing. If adverse developments occur the progress report should include recommendations to address the situation, including, where warranted, project termination.

Note: At this point in the procurement process these PPP-specific guidelines depart from the procedures for traditional / Design Build (DB) procurement set out in the *Public Spending Code* (as illustrated in Figure 1 on page 5). Sections 2.5 to 2.9 set out procedures to address the specific nature of PPP procurement.

2.5 Appointment of Process Auditor

When approval to proceed with a project has been secured by the Sponsoring Agency, a Process Auditor should be appointed for the project – see section 1.11.

2.6 Compiling Output Specifications and the Public Sector Benchmark (PSB)

2.6.1 Output Specification

At this stage, the Sponsoring Agency should proceed to draw up detailed Output Specifications for the project, similar to the "Project Brief" envisaged for traditionally procured projects in the *Public Spending Code*, but focusing on outputs rather than inputs.

2.6.2 Public Sector Benchmark

The Public Sector Benchmark (PSB) must be compiled at this point and is derived from the detailed Output Specifications. The PSB should be a comprehensive estimate of the cost (including risk valuations) of procuring those elements of the project that the private sector is to be invited to tender for in the PPP contract. It should be based on the whole life cost to the Sponsoring Agency of procuring (those elements of) the project using traditional procurement, and should include risks. This will build on the costings used in the Preliminary Business Case carried out under the *Public Spending Code* (section 2.3). As stated earlier, the PSB does not include any costs (or risks) which will be borne directly by the Sponsoring Agency irrespective of the procurement method used, and which are therefore not part of the PPP contract. In this way, the PSB will serve as a direct, like-with-like comparator for the private sector bids and, at evaluation stage, will form the basis for the value for money assessment of the highest ranking bid (see section 2.8.2).

Risk, in particular, is a core component of the PSB. The feasibility of a PPP depends to a large degree on the extent to which risk transfer can be achieved. Transparency in the identification, pricing and treatment of risk within the PSB (and VfM documentation) is therefore critical.

There is a significant body of work required to develop benchmarks and costings for operations, maintenance and lifecycle costs in the PSB, based on historic data. This could include a selective review of risk materialisation on previous projects, to help validate risk quantification and to ensure that project risks are not double-counted. This will ultimately involve a degree of evaluation and ex-post evaluation work (which is required in any event under the public spending code).

In accordance with previous C&AG findings, good practice, and experience gained in procuring PPPs to date, the PSB should be calculated as a value range, rather than a point estimate. In establishing the PSB value range, best and worst case scenarios should be considered, as well as sensitivity analysis. The final PSB value range should also be subject to a formal 'reasonableness test' by the Sponsoring Agency, as a reality check on the assumptions and calculations in the PSB.

Using a value range in this way for the PSB, as opposed to a single point estimate, avoids placing an undue emphasis on the PSB as a 'pass/fail' test in the 3th and 4th VfM tests, particularly when the NPV differences can be marginal and when the outcome of the comparison is highly sensitive to individual variables (such as individual cost components or assumptions about risk transfer). The PSB should be a decision aid and not the decision itself.

The use of scenario analysis, sensitivity checks and reasonableness checks will also provide greater transparency to support procurement recommendations. It will also make it easier for Sponsoring Agencies/Approving Authorities to critically review work done by outside consultants.

This will help avoid the perception that a project can only go ahead if the PSB is less cost effective than the PPP option. There should be clarity about the reasons why policymakers have decided to pursue the PPP option and where the potential efficiencies arise.

It should also be clear whether or not the PSB represents a realistic and feasible option or a notional counterfactual which will not be implemented in the event that the project fails the PSB test. In particular, it should be explicit as to whether or not the

PPP option is being pursued because it is the only affordable option.

The PSB should include VAT where this would be payable by the Sponsoring Agency in any event were the project procured traditionally. This is necessary for budgetary purposes - to establish the full cost of the project to the Sponsoring Agency, in the context of the overall budget limit approved for the project. However, since the evaluation of the highest ranking bid against the PSB will be done on a VAT-exclusive basis, the VAT costs should be identified separately in the calculation of the PSB, to facilitate comparison with the tenders on a VAT-exclusive basis.

Where a PPP is being procured by the NDFA on behalf of the Sponsoring Agency, the PSB should be compiled by the NDFA, with input from the Sponsoring Agency, and then formally recommended to the Sponsoring Agency for approval. However, the PSB remains the responsibility of the Sponsoring Agency and must be agreed by the Sponsoring Agency before tender invitations are issued.

2.6.3 Iterative Process

Finalising the Output Specifications and the associated PSB will usually involve an iterative process, as the costing associated with the first draft of the output specifications may prove to be higher than the Sponsoring Agency had originally budgeted for. This may require a re-assessment of requirements (output specifications) and a consequential reduction in the estimated PSB and estimated unitary charges.

2.6.4 Net Present Value in the PSB

In order to take full account of costs which occur at different points in time, the final PSB value range should be expressed in

Net Present Value (NPV) terms, thereby reflecting the 'time value of money'. The NDFA will provide financial, risk and insurance advice to the Sponsoring Agency in calculating the PSB and will undertake the NPV calculations, including advising on the appropriate discount rate to be used for each project. They are to be the only advisors to the State Authority in regard to these matters. The Central PPP Unit issued guidelines in February 2006 on "*Discount Rate Principles in Public Private Partnership Capital Investment Projects*"¹⁷.

2.6.5 Hypothetical Public Sector Cost

In circumstances where there is an absence of suitable data on traditional procurement costs, a hypothetical Public Sector Cost may be used to assist in the determination of the PSB. 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 in order to ensure that the PSB associated with the final Output Specifications is consistent with the overall budget approved by the Approving Authority for the project.

2.6.6 Finalisation of the Output Specification / PSB

As a general rule, the Output Specifications and associated PSB should be finalised and should be up to date before any tender invitations are issued. This is important in order to ensure that, when costed, the final output specifications being issued with the tender invitations are considered to be capable of being delivered within the available budget for the project, and also because failure to do so could result in tenderers supplying bids that are based on inaccurate or out of date Output Specifications. Also, making significant changes after tenderers have commenced preparing their bids can result in additional costs for all tenderers and may

¹⁷ Available at www.gov.ie

infringe EU procurement procedures. However, in the case of an approved programme of similar projects, involving similar output specifications, it may be agreed with the Approving Authority and/or the Department of Public Expenditure and Reform that the Sponsoring Agency may commence the early stages of the procurement process in parallel¹⁸ with the compilation of the PSB in the second and subsequent projects in the programme – in the light of the experience gained in compiling the original PSB for the initial project.

Once the PSB has been finalised, the second formal Value for Money test (as indicated in section 1.15) should be carried out to determine whether, in the light of the quantifications in the PSB, the conclusion reached in the PPP Procurement Assessment continues to be valid.

The Approving Authority and / or the Sponsoring Agency will be required to confirm the affordability of the Project at this stage. Notwithstanding the above, there may be exceptional situations where some information critical to the finalisation of the PSB may not be available up to the time of issue of the tender invitations, with the result that it would not be possible to produce a final, robust PSB at this stage, in accordance with normal practice. In these exceptional circumstances, subject to the Accountable Officer being satisfied that there are sufficient grounds to depart from the general rule and delay finalisation of the PSB, this may be permitted **provided that the PSB is actually finalised, and supplied to the Approving Authority, prior to receipt of the tenders.** This is imperative as the key test of value for money in PPP procurement is the comparison of the highest ranking bid with the PSB. The agreement of the

Accountable Officer to depart from the general rule in this regard, and the rationale for so doing, must be recorded in writing and maintained on file.

The finalisation of the Output Specifications, associated PSB and confirmation of affordability, for each project will be a matter for the Sponsoring Agency, within the approval / delegated sanction granted to them by the Approving Authority. Provided that the terms of that approval / delegated sanction are not breached, it will not be necessary to seek further specific approval from the Approving Authority for the detailed Output Specifications or PSB for individual projects. However, the PSB should be supplied to the Approving Authority when finalised, for information.

2.6.7 Breach of Conditions of Approval / Sanction for a Project

If at any stage it appears to the Sponsoring Agency that any conditions attached to the Approving Authority's approval are likely to be breached, the Approving Authority must be notified and advised of the reasons for the potential breach. On receipt of the notification the Approving Authority must, following receipt of the views of the Sponsoring Agency, either:

- decide that the PPP procurement continues to offer value for money (subject to the overall cost continuing to be capable of being met within the approved multi-annual Capital expenditure allocations of the Sponsoring Agency); or
- decide to terminate the whole procurement process and abandon the project; or
- require the Sponsoring Agency to

specifications are broadly similar, thus facilitating a parallel approach in the second and subsequent projects.

¹⁸ Paralleling is only permitted **after** the tender responses for the initial project have been received, **and** where these tenders indicate that both the public and private sector costings derived from the output

revert to a non-PPP option; or

- refer the matter to the relevant Minister or to the Government, for decision.

If at any stage it appears to the Sponsoring Agency (whether directly or as advised by the NDFA) that the **cost** of the project may cause the Sponsoring Agency's approved Capital Allocation for any given year to be exceeded, this must be reported to the Approving Authority who must immediately inform the Department of Public Expenditure and Reform.

2.6.8 Revisions to the Output Specifications / PSB

As a general rule, no changes should be made to the Output Specifications / PSB once they have been finalised. However, having been finalised, it may emerge that some changes need to be made to some of the costings underpinning the PSB in the light of new information available. Where factors external to the Sponsoring Agency (e.g. An Bord Pleanála) cause, or direct to be caused, changes to the project specifications which have a material impact on that project, a change to the PSB may be permitted, where this is considered to be necessary. However, if any such changes are contemplated, the cost implications and effects on the timing of the project would have to be fully appraised before changes are made. Material changes to the PSB may also require a review of both the original business case and the approval to proceed with the project, as changes in the original specifications may affect the project's viability. It will also be necessary to consult with the Approving Authority if the changes would alter the approval obtained on the basis of the original proposal or result in a breach of any of the conditions of approval.

If, in the exceptional circumstances outlined above, changes to the finalised

Output Specifications / PSB are unavoidable after the tender invitations have issued, a detailed audit trail of any such changes must be maintained by the Sponsoring Agency / NDFA, as appropriate, together with a clear rationale for each change required. This should be available to the Approving Authority. If any such changes are made, the modifications in the Output Specifications must be communicated to the participating tenderers without delay.

However, the PSB/Output Specifications **must be finalised before tenders are received and no changes made thereafter**, other than for technical matters such as changes to the discount rate as advised by the NDFA.

2.6.9 Publication of the PSB

The PSB contains commercially sensitive information in relation to the methodology used for costing public sector projects and for the pricing of risks by public sector bodies. Current policy is that the final PSB, or any elements thereof, is **not made public during the tendering process**, on the basis that revealing the amount that the State may pay for a service may give tenderers an opportunity to increase their asking price above what they might otherwise seek. This is also relevant where the Sponsoring Agency intends to procure further similar projects in the near future (e.g. subsequent project bundles as part of an ongoing PPP programme).

However, following the completion of the construction phase, once an appropriate period of time has elapsed and the commercial sensitivity of the information on the project is no longer an issue (having regard also to any other similar PPP projects which may be in pre-procurement), the PSB should be made public. The NDFA should be consulted in relation to the format in which the PSB and related financial information on the project

should be published, and may assist in preparing a suitable statement on the PPP for publication. However, in publishing the PSB, the details of how it was calculated, and in particular the individual risk valuations included in its calculation, must **never** be disclosed.

2.6.10 Detailed Technical Note on Compilation of the PSB

The Central PPP Unit issued a separate more detailed technical note on the structure and variables for the PSB in January 2007: *Technical Note on the compilation of a Public Sector Benchmark for a Public Private Partnership Project*.¹⁹ This Technical Note should be read in conjunction with these Updated PPP Guidelines, and in particular the changes introduced in relation to the PSB in this latest guidance. The Technical Note will be refreshed to take account of these changes in due course.

2.6.11 Handover to the NDFA

A PPP Project is handed over to the NDFA for procurement and delivery, by the Sponsoring Agency, by way of a Letter of Handover from the Accounting Officer of the Sponsoring Agency, copied to the Process Auditor. The letter should specify the parameters within which the Sponsoring Agency requires the project to be procured and delivered. Such parameters would include, inter alia:

- the output specifications for the project, PSB, timetable for procurement, etc;
- the corporate governance arrangements under which the NDFA will procure and deliver the project;

- the documentation to be supplied by the NDFA to the Sponsoring Agency when the NDFA hands the project back to it;
- confirmation that investigation of site title is complete and site boundaries are as required by the Sponsoring Agency. Where the registration of land is not complete or other title issues exist the letter shall state that this is the responsibility of the Sponsoring Agency; and
- confirmation that the Sponsoring Agency has the legal vires to sign the PPP contract or permit the NDFA to sign as agent on its behalf.

The project management structure from that point is formalised and documented in the project's Corporate Governance document, as outlined in section 2.4. This document details the extent of the responsibilities of the Approving Authority, Sponsoring Agency and the NDFA in respect of the project's procurement.

It is acknowledged that the NDFA will be required to engage with the Sponsoring Agency in advance of Handover, to assist in the initial activities including: site selection / appraisal, procurement of advisors, etc.

2.7 Procurement Process

2.7.1 Going to market

It is imperative that all relevant criteria that will apply in the tendering process are signalled up front. The procurement process is commenced by requesting expressions of interest from the private sector. In general, this is followed by a pre-qualification evaluation and the issue of a tender invitation to consortia selected in accordance with the relevant criteria. The general rule is that the procurement

¹⁹ Available at: <http://ppp.gov.ie/wp-content/uploads/2014/03/Technical-Note-on-the->

[compilation-of-a-Public-Sector-Benchmark-for-a-PPP-Project.doc](#)

process **must not** commence before the Output Specifications and PSB have been finalised / agreed by the Sponsoring Agency. That said, it is acknowledged that with the Sponsoring Agency's agreement certain pre-procurement activities, such as expressions of interest / PQQ, may be required to progress in advance of the output specifications / PSB being finalised, to safeguard the overall procurement programme. Also, as indicated in section 2.6.6, in the context of an approved programme of similar projects the early stages of the procurement process may be commenced in parallel with the compilation of the PSB. However, in all such cases, the PSB should be finalised before the tender invitations are issued, or, in the case of the exceptional circumstances outlined at section 2.6.6, must be finalised at the very latest before the tenders are received.

2.7.2 Communication with market and EU Procurement Procedures

Under EU procurement law, the nature and level of communication permissible with bidders / potential bidders will be determined by the procurement procedure chosen. The choice of procedure should be made on advice from the Sponsoring Agency's / NDFA's legal advisors, as appropriate.

The PSB should be finalised before any tender-related communications with the private sector are commenced. Earlier communication with the market to determine their interest in delivering a project may only occur in circumstances as outlined in section 3.1 – dealing with optional market consultation. Communication with the market will be subject to the terms of the EU regulations governing the procurement procedure selected. As indicated previously, current policy is that the final PSB, or any elements thereof, should **not be made public** in any communication with the market during procurement.

2.8 Tender Evaluation

In any procurement competition, all of the tenders received are first examined to determine whether they are compliant with the rules of the competition. The basis on which “compliance” will be determined should be clear and transparent and signalled in the tender documentation.

2.8.1 Detailed Evaluation of Tenders which have been deemed “suitable in principle”

If a tender meets the considerations for compliance, including any relevant budgetary considerations, it should then be considered “suitable in principle”. Such a tender will then be evaluated, scored and ranked according to the published Evaluation Criteria.

The Sponsoring Agency / NDFA will have identified the most appropriate evaluation criteria for the project and these will have been made available to tenderers in line with the requirements within the Directives. These criteria must be used to evaluate the compliant tenders, with a view to scoring and ranking them. Any necessary adjustments should be made to ensure that the same base date, discount rate, inflation assumptions, etc., are used in the evaluation of all tenders. In scoring and ranking the competing tenders, to identify the most economically advantageous tender, the preponderance of the marks to be awarded for **price/cost** under the evaluation criteria should relate to the price/cost to the Sponsoring Agency, exclusive of VAT.

The highest ranking bid following this evaluation stage should be evaluated against the PSB in the third Value for Money Comparison.

2.8.2 Value for Money Comparison (VfMC) exercise

Having identified the highest ranking bid received, the next step is to examine the “value for money” of that bid. “Value for money” will be determined by reference to the overall impact of the highest ranking bid on the Exchequer as compared to the impact on the Exchequer of the PSB. This is done in the Value for Money Comparison (VfMC) exercise.

It is important that, in carrying out this exercise, there is a ‘like with like’ comparison of the highest ranking bid against the PSB. This will require more than a simple comparison of the ‘bottom line’ figure for this bid against the value range of the PSB. Any necessary adjustments should be made to ensure that the same base date, discount rate, inflation assumptions, etc., are used in the comparison. The information required for the completion of this exercise should be readily available in the PSB and in the financial model provided by the tenderer who submitted the highest ranking bid.

The final recommendation on whether to proceed with the project as a PPP should be based not purely on the quantitative results of the VfMC test, but should be a balanced and detailed recommendation based on:

- Ongoing viability of the project;
- Continued suitability of the project as a PPP;
- Rationale based on affordability;
- VfM based on comparing the highest ranking bid with the PSB value range, based on probabilities; and
- The wider merit of the project (socio-economic costs and benefits). If the costs or benefits of the project as originally assessed in the business

case are found to have changed significantly, a revised business case should be undertaken. If the result of such an updated analysis shows the project is either no longer affordable or the best value option, the Approving Authority should be consulted to determine whether the project should be terminated and the resources diverted to more worthwhile projects.

It should also be noted that the VfMC exercise presents an opportunity for greater transparency in relation to the drivers of VfM on capital projects, under the main recurrent cost headings, on a nominal as well as an NPV basis. As indicated in section 2.6.2, risk transfer is one of the key determinants of VfM in a PPP project, and so any clarity that can be provided in relation to the identification, pricing and treatment of risk in the VfM documentation will be of assistance in terms of planning future PPP projects. In order to exploit this opportunity, a good understanding of the PSB and its role is required among all stakeholders, including sufficient expertise within the Sponsoring Agency/Approving Authority to properly interrogate the PSB – particularly for those sectors which are more likely to undertake PPPs on a regular basis. Departments and agencies should seek to ensure that their staff are appropriately trained to fulfil this role.

2.8.3 Treatment of VAT and Corporation Tax in the VfMC

As referred to in section 1.18, to analyse the impact of the cost of the highest ranking bid on the Exchequer, the value of VAT and Corporation Tax receipts associated with that bid should be subtracted from the overall cost of the bid in the VfMC, i.e. the cost included should reflect the cost net of VAT and Corporation Tax. Similarly, the value of VAT included in the PSB should be deducted from the overall cost of the PSB.

2.8.4 Treatment of Material Tax Reliefs in the VfMC

As stated in section 1.18, bidders should be asked to declare and clearly identify, in a tab in their financial model, the impact of material tax reliefs applicable to their bids (based on self-declaration). As tax expenditures can impact significantly from a public sector cost perspective on the overall value for money offered by bids, the value of the reliefs must be taken into account as part of the analysis of cost to the Exchequer of the highest ranking bid in the Value for Money Comparison exercise. In general, in order to analyse the Exchequer impact of the highest ranking bid, the value of the material tax reliefs declared should be added to the cost of that bid in the VfMC.

2.8.5 When the highest ranking bid does not compare favourably with the PSB

It is possible that, having carried out the VfMC exercise, the PPP approach may be found to be more costly than using traditional procurement methods, i.e. the highest ranking bid does not compare favourably with the PSB. If this happens, it should be referred to the Approving Authority and the appropriate Minister / the Government by the Sponsoring Agency. The Minister for Public Expenditure and Reform should also be advised of the situation.

It may be considered that there are factors that would justify continuing with the PPP procurement despite the outcome of the VfMC exercise. As indicated in section 2.6.2, the comparison with the PSB in the VfMC exercise is not a 'pass/fail' test, and the final recommendation on whether to proceed with a project as a PPP should be

based not purely on the outcome of the VfMC exercise, but should be a balanced and detailed recommendation. The VfMC exercise has a particular quantitative focus; the relevant Minister / the Government may be of the opinion that there are other relevant considerations that justify awarding the contract to the highest ranking bidder. The Sponsoring Minister will refer the matter to Government for decision, unless the Minister for Public Expenditure and Reform agrees that this is not necessary or appropriate.

In such an event, if there are general implications for the use of PPP for the type of project, the use of the PPP approach in future similar projects should be carefully reviewed by Sponsoring Agency and subject to the approval of the Approving Authority and, if necessary, referred to the relevant Minister – see section 2.11.3.

2.8.6 Where the highest ranking bid does compare favourably with the PSB

If the highest ranking bid compares favourably with the PSB and the terms of the Sponsoring Agency's delegated sanction are adhered to and the cost of the project is consistent with the available multi-annual Capital expenditure allocations of the Sponsoring Agency,²⁰ the Sponsoring Agency / NDFA may then move to award the contract to the tenderer who submitted the highest ranking bid.

2.9 Contract and Financial Close / Award of Contract

When all issues are agreed, the signing of the contract marks the point where the public sector outturn costs²¹ are set and sealed for the duration of the contract, and also marks the commencement of the construction process. Before signing the

²⁰ See section 2.6.7 *Breach of Conditions of Approval / Sanction for a Project*.

²¹ The public sector outturn costs here relate to the cost of the services to be provided by the private sector under the contract. Other project related costs such as

the costs associated with compulsory purchase orders and planning risks are retained by the public sector and not included within this figure.

contract, the fourth (and final) formal Value for Money test should be carried out to assess the impact of any changes in price (including any change to the reference interest rate(s) and/or discount rate(s) or the effect of any proposed changes in the contract terms). Subject to the contract continuing to offer value for money, the contract may be signed.

File copies of the documentation should be provided to the Sponsoring Agency, Approving Authority, the Process Auditor, and the NDFA (when it is procuring a project on behalf of a Sponsoring Agency). If requested, the documentation should also be made available to the Department of Public Expenditure and Reform and the C&AG.

2.10 Handback

When the NDFA has completed the procurement and delivery of a project to "turnkey" stage, and the Sponsoring Agency is satisfied that the project has been procured as agreed prior to handover of the project to the NDFA, the project will be handed back to the Sponsoring Agency. The NDFA will then assist the Sponsoring Agency in assuming the contract management function, or it may be agreed that the NDFA, in consultation with the Sponsoring Agency, will undertake the contract management function on an ongoing basis, on behalf of the Sponsoring Agency.

2.11 Project Review and Ex-Post Evaluation

Projects should be reviewed and a Project Completion Report should be conducted to assess whether the business case, management procedures, operational performance and initial benefits have been realised, as specified in the *Public Spending Code*. The project should also be subjected to an Ex Post Evaluation after sufficient time has elapsed, to determine if

the benefits and outcomes have materialised in line with procedures set out in the *Public Spending Code*.

2.11.1 Updating Cost Database

Each Sponsoring Agency should maintain a cost database which should be used when benchmarking costs for future projects and in the compilation of future Public Sector Benchmarks. The ex-post evaluation exercise should be used to inform and update this database with the latest available information.

If further information on actual outturn costings becomes available during the life of a contract, then the Sponsoring Agency's cost database should be updated to reflect such actual costings, provided that they are verifiable and realistic. This approach should ensure that the cost database for each Sponsoring Agency will continually reflect current market conditions.

2.11.2 Risk Database

In addition, each sector should maintain a **sector-specific risk database**. A central risk database by project will also be maintained by the NDFA. The ex-post evaluation exercise should be used to inform and update the sectoral risk database (and, if applicable, the NDFA database) with the latest available information.

2.11.3 Future Strategy based on Experience of Projects

In the event of a decision being taken to proceed with a project as a PPP, despite the cost being higher than the PSB after completion of the Value for Money Comparison, the Sponsoring Agency should also evaluate whether it is appropriate to proceed with any similar planned projects as PPPs in the future, or whether it would be more appropriate to

revert to the traditional procurement approach for any such future projects. Any decision to proceed with the PPP approach in these circumstances should be taken by the Approving Authority and may involve seeking Ministerial / Government approval, as appropriate.

2.12 Ongoing Contract Management

PPP contracts will include clauses that link payment to performance of specific obligations under the contract. In order to ensure that the full benefit is derived from these clauses, it is essential that the performance of the private sector partner is constantly monitored over the contract term and that these clauses are invoked, as appropriate. It is recommended that responsibility for this ongoing monitoring of the contract be assigned to a nominated party, who should be identified sufficiently in advance of Service Commencement. The Sponsoring Agency should ensure that adequate qualified resources are available for the contract management throughout the project lifecycle

Where the contract has been negotiated by the NDFA, on behalf of the Sponsoring Agency, the Sponsoring Agency will be responsible for the management of the project after hand back but should make appropriate arrangements with the NDFA to ensure a smooth transition and to ensure that the Department has sufficient familiarity with the obligations under the contract to put in place adequate long-term monitoring procedures. Typically, the NDFA assists the Sponsoring Agency for a six-month transition period post construction completion.

Alternatively, this role of managing a PPP contract, over the lifetime of the contract, may be undertaken by the NDFA on behalf of a Sponsoring Agency by agreement between both parties. This function may be undertaken by the NDFA in respect of any PPP contract, irrespective of whether

the project was originally procured by the NDFA or not.

It may be necessary, as a result of a change mechanism in a contract or other contractual requirements (such as pre-payments or refinancing), to renegotiate certain elements of a contract during its life, and to determine the resulting Exchequer / Sponsoring Agency implications. The NDFA must be consulted should this arise, and will advise the Sponsoring Agency in relation to any financial, risk or insurance implications of modifications to the contract terms.

2.13 Refinancing

The issue of restructuring the financing for a project may arise during or after the construction phase, when many of the project/construction risks will either have not materialised or will have been managed out of the project, and/or the project may have been constructed below the anticipated cost. All PPP contracts / project agreements must include a clause requiring the private sector partner to obtain the public sector partner's consent (which cannot be unreasonably withheld) prior to initiating any such restructuring / refinancing of the funding (or part thereof) within the project. Consent in such cases may be withheld where the refinancing would have an adverse impact on the Sponsoring Agency or on the performance of the project.

The NDFA must be consulted on all aspects of any proposed restructuring / refinancing (including discount rates), in order to ensure that the integrity of the project is maintained (i.e. that cover ratios, debt, equity levels, etc. will not be adversely affected by the refinancing exercise).

The Sponsoring Agency should be entitled to a share of any refinancing gains, on the

basis of one or other (but not both) of the following approaches:

- a one-third share of the total refinancing gains;

or

- the share of the refinancing gains that result from direct identifiable

actions of the Sponsoring Agency or Government.

This is consistent with current Eurostat rules on the State's entitlement to share in the rewards of a PPP without resulting in the asset being classified to the Government's balance sheet.

Section 3 – General Procurement Issues

NOTE: This is not a statement of National or EU Procurement Law but a general information note. In summary form, Contracting Authorities must satisfy themselves in each project that the procedures are in accordance with National and EU procurement requirements.

3.1 Communication with Market and EU Procurement Procedures

Prior communication with suppliers and expert bodies is allowed before the start of a procurement process to inform suppliers and to enable the authority to seek advice in the planning and conduct of the procurement procedure²². Greater use of this option has the potential to encourage SME access and to improve value for money outcomes. It can also help define the requirements by informing the business case and helping to identify or develop the contract requirements, their feasibility and the overall approach. Crucially, it can provide insights about the capacity of the market to deliver on the requirements and the risks involved. It may reduce procurement timescales by minimising the dialogue needed during the formal procurement process and reduces the need for complex and sometimes costly procedures such as competitive dialogue. Overall, it has the potential to drive a more responsive market and allows suppliers to ask questions and raise queries at an earlier stage in the process.

Critically, any communication must be conducted in such a way to avoid any potential distortion of competition or violate the transparency and non-discrimination principles. For example, it would be important not to use technical specifications supplied by individual economic operators.

²² This is similar to Recital 8 of the Directive 2004/18/EC which provided that "Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or

3.2 EU Procurement Rules

The full terms of the EU procurement Directives will apply to the vast majority of PPP contracts. The use of competitive tendering is a basic principle of all Government procurement procedures and should always be used even where the provisions of the Directives do not currently apply unless there are acceptable and clearly justifiable circumstances. The public procurement procedures adopted in such cases must respect the principles of the EU Treaties on which the public procurement Directives are based, i.e. equality of opportunity, non-discrimination, transparency, mutual recognition, proportionality, right of establishment and freedom to provide a service, and this implies appropriate advertising and the award of contracts on an open and transparent basis.

The EU procurement Directive was revised and transposed into Irish law by the European Communities (Award of Public Contracts) Regulations 2016 (the 2016 Regulations). There are five award procedures that contracting authorities may utilise when awarding contracts under the 2016 Regulations as follows:-

1. Open Procedure under which all those interested may respond to the advertisement in the OJEU by submitting a tender for the contract (Regulation 27);

accept advice which may be used in the preparation of specifications, provided however, that such advice does not have the effect of precluding competition"

2. Restricted Procedure under which a selection is made of those who respond to the advertisement and only those selected are invited to submit a tender for the contract (Regulation 28);
3. Competitive Dialogue Procedure can be a multi-stage procedure under which a selection is made from those who respond to the advertisement and the contracting authority enters into dialogue with those selected to develop one or more suitable solutions for its requirements. The contracting authority may reduce the number of solutions throughout the dialogue and then invite tenderers to tender on the basis of the specified solution(s). The 2016 Regulations provide greater flexibility than the 2006 Regulations to use the Competitive Dialogue procedure (Regulation 30)
4. Competitive Procedure with Negotiation under which a selection is made from those who respond to the advertisement and only those selected are invited to submit an initial tender for the contract. The contracting authority may then open negotiations with tenderers to seek improved offers. The procedure is comparable in certain respects to the negotiated procedure with prior publication of a contract notice under the 2006 Regulations although there is greater flexibility under the competitive procedure (Regulation 29); and
5. Innovation Partnership Procedure under which a selection is made from those who respond to the advertisement and the contracting authority negotiates with

tenderers/partners to submit ideas to develop innovative works, supplies or services aimed at meeting a need for which there is no suitable existing 'product' on the market. The contracting authority is allowed to partner with one or more economic operators (Regulation 31).

Contracting authorities have a free choice between the open and restricted procedures. The competitive dialogue procedure and the competitive procedure with negotiation are available only where certain grounds exist²³, including where the needs of the contracting authority cannot be met without adaptation of readily available solutions or the works/supplies/services include design or innovation solutions. A negotiated procedure without prior publication may only be used in the limited circumstances set out in in Regulation 32²⁴. Under this exceptional procedure, the contracting authority may approach one or more suppliers in relation to the award of a new contract. One of the permitted circumstances is where, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular supplier²⁵.

Contracting authorities using the restricted procedure, competitive dialogue procedure and the competitive procedure with negotiation must aim to select a number of suppliers sufficient to ensure genuine competition. Provided there are sufficient suitable candidates, the 2016 Regulations require a minimum of five for the restricted procedure, and three for competitive dialogue and competitive procedure with

²³ See Regulation 26(3)(a)(i)-(iv) &(b)

²⁴ See Regulation 32(2) – the listed circumstances include (a) where no suitable tenders/requests to participate have been submitted in response to an open or restricted procedure; (b) where works/supplies/service can be carried out only by a particular supplier for certain of the reasons listed in Regulation 32(2)(b); (c) for additional deliveries in

certain limited circumstances; (d) where there is extreme urgency arising from events *unforeseeable* by and not attributable to the contracting authority; (e) where the products involved are manufactured purely for the purpose of research, experimentation, study or development

²⁵ Regulation 32 of the 2016 Regulations

negotiation

Sponsoring Agencies / Project Boards or the NDFA, as appropriate, should seek legal advice on the most appropriate procurement mechanism for each project or any aspects of procurement where there is doubt.

3.3 Right to Terminate

The Sponsoring Agency or the NDFA, as appropriate, have the right to terminate contracts in certain circumstances “under conditions determined by the applicable national law”. This is given effect by Regulation 73 of the 2016 Regulations which requires contracting authorities to include certain termination provisions in all contracts which are awarded under the 2016 Regulations.

3.3.1 Grounds for Contract Termination

The following are the grounds for contract termination:

- (i) The contract has been subject to substantial modification that constitutes a new award under Regulation 72; if the modification goes beyond what is permitted then the authority must run a new procurement procedure for award of the new contract.

- (ii) The contract is terminated if it is discovered after the contract award that the contractor should have been excluded under the mandatory exclusion provisions pursuant to Regulation 57(1) or (2) - e.g. as a result of conviction for corruption.

Where the CJEU has declared that there was a serious infringement by the contracting authority of its obligations and accordingly the contract should not have been awarded to the contractor²⁶.

3.4 Statutory Approval

Many projects require statutory approvals, e.g. Environmental Impact Statements, Oral Hearings, Ministerial Approval. These are obtained at various stages in the procurement process. Undertaking statutory approval procedures must be preceded by the determination of the overall Project Budget by the Sponsoring Agency and receipt of approval from the Approving Authority to proceed with the procurement of the project. Where the Government has already approved a programme of projects, the statutory approvals process required for that project may commence before, or in parallel with, its procurement.

²⁶ Regulation 73(c) of the 2016 Regulations

Section 4 – Implementation of these Guidelines – Issues and Implications

4.1 Timescale and Implementation

These guidelines have immediate effect and, where possible, should apply to existing PPP projects as well as to any new projects.

4.2 Delegated Sanction

Arrangements are currently in place to facilitate a structured approach to planning Departmental capital investment programmes on a multi-annual basis, in the context of the National Development Plan 2018-2027. The Minister for Public Expenditure and Reform will continue to evaluate the mix of Exchequer funded and PPP projects within the NDP on an ongoing basis.

4.3 General Government Balance

In March 2016, Eurostat published new guidelines to clarify the accounting treatment of PPP projects for the purposes of determining the impact in terms of the General Government Balance (GGB), following the implementation of ESA 2010. This guidance included a number of changes compared with the previously understood position, and in particular increased the emphasis on rewards in the PPP classification decision.

This guidance was subsequently clarified in a further Guide to the Statistical Treatment of PPPs, issued jointly by Eurostat and the European PPP Expertise Centre (EPEC) on 29 September 2016.

In general, the position is that the assets of privately financed PPP projects will be **off balance sheet in the National Accounts**²⁷ (and therefore the construction costs will *not* affect the GGB up-front over the construction period) **provided that the private sector partner carries the Construction risk and also either the Demand or the Availability risk, and also provided that the private sector partner also benefits from the majority**²⁸ **of the rewards from the project.**

Where a PPP is classified as off-balance sheet in General Government terms, the **unitary payments under the PPP will count as GGB expenditure in the years in which they are incurred** over the life of the contract. The same treatment applies to projects where the contract is similar to an operating lease.

It should be noted, however, that the 'off balance sheet' status of a project is not the primary driver for pursuing PPP. The main driver for PPPs is value for money for the Exchequer.

²⁷ This accounting treatment relates to Ireland's National Accounts for Maastricht purposes, rather than to Departmental Appropriation Accounts

²⁸ In some instances, if the Government is entitled to 'any part of the profit accruing' this is sufficient to

render PPP assets as government assets.

Appendix 1 – Glossary of Terms

Accountable Officer

The Accountable Officer is the person within an organisation to whom the authority to sanction expenditure has been delegated. In this document, the term ‘Accountable Officer’ refers both to ‘Accounting Officers’ in Government Departments and other ‘Accountable Officers’ who are not Department officers – such as CEOs of semi-state bodies/agencies. The term ‘Accounting Officer’ has a specific reference in regard to the officer personally charged with signing the Appropriation Account for a Department and who is accountable to the Public Accounts Committee therefor.

Central PPP Unit

The role of the Central PPP Unit in the Department of Public Expenditure and Reform is to contribute to the development of national policy on PPPs and to support Ireland’s PPP process through the development of best practice guidelines and streamlining processes.

National Development Finance Agency (NDFA)

The National Development Finance Agency (NDFA) was established on 1 January 2003 to advise State Authorities on the optimal financing and associated risk management of public investment projects. Since 2003 the role of the NDFA has been significantly expanded leading to its current mandate (as set out at section 26(1) of the *National Treasury Management Agency (Amendment) Act 2014*), namely:

a) *to provide advice to any State authority of what, in the opinion of the Agency,*

are the optimal means of financing the cost of public investment projects in order to achieve value for money,

b) *to provide advice to any State authority on all aspects of financing, refinancing and insurance of public investment projects to be duly undertaken by means of public private partnership arrangements or within the public sector,*

c) *to enter into a public private partnership arrangement with a view to transferring the rights and obligations under such an arrangement to any State authority,*

d) *to act as agent for any State authority in connection with the entry or proposed entry by that State authority into a public private partnership arrangement, or*

e) *to enter into any arrangement or contract to procure as agent for the Minister for Education and Skills any public investment project in relation to a school, educational facility or other building or structure, including the financing, management, design and construction of such building or structure, as that Minister may from time to time designate.’*

In performing its duties, the NDFA is required to have due regard to the guidance and directions issued by the Ministers for Finance and Public Expenditure and Reform in relation to the financing and procurement of public investment projects.

In addition, the National Development Finance Agency guidelines issued by the Department of Public Expenditure and Reform permit the NDFA to: ‘*Manage fulfilment of the contract (design, construction, fit out) to “turnkey stage” ready for occupation/use and then hand back the project/contract to the Sponsoring*

Agency and, where requested by the relevant Minister, continue to administer the PPP project contract beyond the turnkey stage to the expiry of the PPP contract’.

The NDFA is the financial advisor to State Authorities, Agencies and Departments. The NDFA’s advice should, in general, be sought and at an early stage on;

- (i) all PPP projects; and
- (ii) all projects with a capital value exceeding €100 million.

The NDFA is also available to provide financial advice on projects below this €100 million threshold as appropriate.

Process Auditor

The Process Auditor supports the Accountable Officer’s responsibility for the project by checking on his/her behalf that the proper procedures and processes, as agreed in the Procurement Process Checklist at the commencement of the process, have been followed. He/she is appointed by, and reports directly to, the Accountable Officer. The aim is for the Process Auditor to identify any issues of material concern for the Accountable Officer and so minimise the need for the detailed involvement of the Accountable Officer in the procurement process for each project – unless a material concern arises. Generally, the Process Auditor’s responsibilities in the PPP procurement process run from the Preliminary Appraisal stage to Contract Close unless suitable alternative arrangements for process audit are in place. The Ex-Post Evaluation stage and ongoing contract management are outside the remit of the Process Auditor. The Central PPP Unit’s *Guidelines for the Reporting Arrangements, Role and Function of a Process Auditor in a Public*

*Private Partnership Project*²⁹ should be consulted in this regard.

Project Board

The Project Board will be appointed by the Sponsoring Agency to oversee the execution of the Project. The group may include a representative from the Approving Authority. During the Assessment Stage of the Project it will be chaired by a representative of the Sponsoring Agency or Approving Authority but, following handover to the NDFA for procurement and delivery, it will be co-chaired by the Sponsoring Agency/Approving Authority and the NDFA, with the NDFA taking the role of lead co-chair.

Project Manager

At project level for all major capital projects, an individual project manager must be appointed who is responsible for managing and monitoring project progress and for reporting project to a Project Board. The person to be appointed to the role should be a senior official, including at MAC level in Departments or at management level in Agencies, where appropriate.

PPP Steering Committee

The PPP Steering Committee is an inter-Departmental group comprising those Departments and Agencies involved in procuring PPP projects. It is chaired by the Department of Public Expenditure and Reform and also includes representation from the Department of Finance and the Department of the Taoiseach. The Committee monitors and oversees all PPP procurements, including plans for future PPP procurements, with members providing updates on progress by sector at each meeting. It also acts as a forum for discussion on topical PPP specific issues

²⁹ Available on www.ppp.gov.ie.

and potential learning points for future procurements based on actual experience of delivering PPPs across a range of sectors.

Approving Authority

As stated in the *Public Spending Code*, the Approving Authority³⁰ is normally the Government Minister, Department or public body with sectoral responsibility for implementing Government policy and for providing public financial assistance for capital programmes/projects in the relevant sector. The Approving Authority is responsible for approving in principle the capital projects to be funded with public assistance and the conditions under which a project may proceed through the stages of development to ultimately becoming fully operational. It is also responsible for paying the public assistance to the Sponsoring Agency and for ensuring the project's delivery as approved.

The Approving Authority may be the Government, the Department of Public Expenditure and Reform, a line Department, a local or regional authority or its management, or the Board of a State Agency. The level at which sanction is required for a project will depend on the scale of the proposal, the complexity of the issues, whether or not policy changes are involved and whether there are delegated sanctions in place.

In the context of the Programme approach which has now been adopted in relation to capital expenditure across Government Departments, involving agreed multi-annual capital expenditure allocations, and broad delegated sanction arrangements, responsibility for selecting and approving individual projects has now been largely delegated to line Departments - subject to the agreed multi-annual capital expenditure allocations not being

exceeded and compliance with the general conditions of sanction. As a result, the Approving Authority for most new projects will tend to be the relevant line Department, under the general delegated sanction arrangements for capital expenditure, provided that the proposed project can be funded from within its agreed capital expenditure allocations. However, in the case of (a) very large projects, (b) projects that add significantly to current costs, or (c) projects that cannot be accommodated within the existing Capital expenditure allocations, the Approving Authority would be likely to be the Government.

Sponsoring Agency

The Sponsoring Agency, as stated in the *Public Spending Code*, has overall responsibility for proper planning and management of projects. It must obtain the necessary approvals from the Approving Authority and ensure that the project proceeds along the lines approved by the Approving Authority. It may be a Government Department, local authority, or other State body or agency.

The Sponsoring Agency is responsible for all aspects of the appraisal and assessment of the project, for ensuring that national and EU procurement procedures are followed, and for ongoing contract management.

In some instances the Sponsoring Agency and the Approving authority, in relation to individual projects, may be the same. All projects will, however, be part of a multi-annual programme or business plan which will have been appraised by a parent Department and/or Board of the company. Individual projects will still have to be appraised and approved in accordance with these guidelines with internal approval processes substituting for an external

³⁰ Public Spending Code Page 14, Section 2.1.2.

Approving Authority.

Traditional Procurement

Under traditional procurement methods the Sponsoring Agency tenders for the design and build (D&B) of an asset to be built, for example, a school or road. Once the project has been completed the Sponsoring Authority assumes responsibility for its continuing operation and maintenance. The risk elements of the project rests with the Sponsoring Authority.