# Guidelines for Public Private Partnerships

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Enquiries about this publication should be directed to:

Senior Director, Infrastructure and Commercial Advice,
Chief Minister Treasury and Economic Development Directorate
ACT Government

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# Executive Summary

## 1 Introduction

The ACT Government seeks to maintain an appropriate level of investment in its infrastructure. In order to support this objective, the *Capital Framework* sets outs the approach to project delivery in the ACT. The approach encompasses investments of any type, complexity or cost through rigorous internal public sector processes for assessing proposed and new projects.

As an extension to the *Capital Framework*, the *Guidelines for Public Private Partnerships* (or "*PPP Guidelines*") provides guidelines for projects with a high-level of private sector involvement. Through these guidelines, Government aims to facilitate private sector investment in infrastructure where value for money can be clearly demonstrated by way of efficient and innovative delivery approaches.

This policy document outlines and supports a rigorous project evaluation and governance approach. This includes the competition for and awarding of contracts, by clearly articulating accountability outcomes for both the public and private sector entities involved in the process.

The Third Edition of these guidelines replaces the version released in 2016 (Second Edition). Government will review and update these guidelines to ensure the continued relevance and effectiveness of the guideline material.

## 2 Understanding PPPs

A PPP is a contract of up to 30 years between the public and private sector to deliver public infrastructure projects and related services. PPPs can be effective for projects where opportunities for significant risk transfer between the public and private sector exist and when this can be clearly defined and measured.

Typically, PPPs lend themselves well to:

- **social infrastructure and related services**, for example, hospitals, prisons, schools etc.; and
- **economic infrastructure and related services**, for example, roads, bridges, tunnels, ports, utilities, rail etc.

The *PPP Guidelines* applies to four of the delivery models in the *Capital Framework*:

- **Availability Payment PPP** – under this model, the private sector finances all or part of the upfront cost of the infrastructure and receives payment over an operating period if it meets both its service and performance obligations. Government makes this payment during the operating period to PPP Project Company ("**Project Co**") under the Availability Payment PPP model;
- **User Charge PPP** – under this model, the private sector not only finance the upfront cost of the infrastructure but they also fund the project over time through the tolls and / or other revenues that they receive from the end user. The private sector bear the demand risk associated with the receipt of those project revenues;
- **Design, Construct, Maintain, Operate** ("**DCMO**") – under this model, the private sector are contractually obliged to undertake design, construction, maintenance and operations. In this case, Project Co do not finance the upfront cost of the infrastructure; and

- **Design, Construct, Maintain** ("**DCM**") – The DCM model (or DCM LT model[1]) is similar to the DCMO model. As with DCMO, the private sector is responsible for construction and maintenance activities and they do not finance the upfront costs of the project. In contrast to DCMO, the focus of a DCM during the operations phase is on the maintenance of the new asset rather than the operation of the core public services.

This document provides guidance in relation to the project development and delivery of all four procurement models. Together they are referred to as PPPs for the purposes of this document.

## 3 Guiding Principles

The *PPP Guidelines* is underpinned by five guiding principles:

- manage the complex delivery models outlined in the *Capital Framework* to achieve commercially-driven project outcomes that benefit the ACT;
- help ensure that projects are delivered and operated in a manner that provides value for money to Government;
- manage project delivery risks effectively by providing certainty to public and private sector stakeholders involved in terms of guidance and communication in a timely manner;
- facilitate timely procurement processes and, where possible, reduce unnecessary transaction costs for both the public and private sectors; and
- recognise and adopt a 'partnership-led' approach by working in a collaborative and cohesive manner with public and private sector participants to support PPP project delivery over the long-term.

## 4 Using these Guidelines

The policies outlined in the *PPP Guidelines* are intended to work in conjunction with a range of other guidance material. This includes the broader infrastructure investment guidelines set out in the *Capital Framework*. It also includes highly detailed guidance for PPPs set out in Infrastructure Australia's *National PPP Guidelines*. The *PPP Guidelines*, assists project teams in navigating the *National PPP Guidelines* and the jurisdictional departures that outline Government's key policy and commercial positions for PPPs in the ACT.

## 5 Determining PPP Delivery

As a general guide, the PPP delivery method should be considered for any public infrastructure project that is classified as a Tier 1 project under the *Capital Framework.* In other words, any project meeting either or both a size threshold or a involving a high to medium level of risk.

The size threshold for considering PPPs is generally $100m. Projects that are below this threshold may struggle to demonstrate value for money as the transaction costs may exceed the benefit. However, as noted below, some projects may have risk or other characteristics which lend themself well to this procurement method.

[1] *The Capital Framework* uses the term DCM LT for this model – i.e. Design Construct Maintain Long-Term. Those guidelines also have a concept of DCM ST (Design Construct Maintain Short Term). The former DCM type is the focus of this analysis and is referred to as DCM in this document.

It is important to understand the project's key risks, drivers and constraints in assessing PPP suitability. These include timeframes, stakeholder commitments and market capacity. These factors lead to some larger projects being considered unsuitable and some smaller projects being determined suitable for PPP. The process for testing this involves a rigorous investigation of alternative delivery models under the *Capital Framework*, as well as involving stakeholders as early as possible in the planning process.

A PPP model tends to be suitable for infrastructure projects where there are opportunities for innovation and to transfer of risk to the party best able to manage them. PPP projects also need to have a clearly articulated and measurable project scope to be able to hold all parties accountable to the contracted arrangements.

PPP projects typically involve long concession terms and are more complex to procure and manage. Therefore, it is important to determine if there is sufficient market appetite to ensure that the public sector will be able to achieve value for money.

A key component of the value for money assessment is the Public Sector Comparator ("**PSC**"). The PSC provides a measure of the outcomes that the public sector would expect to face in delivering a project under traditional public sector delivery method.

The PSC provides a hypothetical risk-adjusted whole-of-life cost estimate to the public sector using the most efficient and non-PPP form of delivery available to it under the *Capital Framework*. The PSC will account realistically for the whole of life costs of an asset including the achievement of a satisfactory standard at the end of the proposed contract term.

## 6 Procuring a PPP Project

The procurement of a PPP project requires substantial commitment from both the public and private sectors. Government will endeavour to commit the appropriate capabilities and resources to ensure that the tender process is completed in a timely manner.

The procurement phase for a PPP project is generally divided into three stages:

- **Expression of Interest** ("**EOI**") – the first phase of a formal tendering process used to shortlist bidders to proceed to submit more detailed proposals;
- **Request for Proposal** ("**RFP**") – the main procurement phase involving the release of more detailed tender and contract material to shortlisted bidders for detailed, fully costed responses, followed by evaluation and selection of the preferred bidder; and
- **Negotiation and Transaction Phase** – the final phase of a tender process where the preferred bidder and the public sector negotiate and execute a commercially binding agreement.

The EOI and RFP stages represent key interface points in the tendering process for the identification, evaluation and selection of a private sector bidder who best delivers on the project's objectives with an intent to enter into a commercially binding agreement under a PPP arrangement. During both tender stages, there is also a need to develop and issue a number of the project documents that inform the tender process.[2]

[2] These include the specification of arrangements around the: performance regime; output specification; payment mechanism; abatement regime; provision of additional financial support; and project flexibility / expansion.

The EOI stage represents a preliminary view of the private sector's likely ability to deliver on the PPP project's objectives and it also serves to validate market interest and the degree of competitive tension to support a value for money outcome for the ACT.

The RFP stage represents a substantially more detailed process requiring further commitment in terms of time and resources from both the public and private sectors. It is in this process where a preferred bidder is selected.

It is essential to ensure that a transparent and consistent process is followed. The project team should be supported by an external probity advisor so that a robust process which treats all parties fairly is adopted.

# 7 Delivering and Managing a PPP Project

After a PPP transaction reaches contractual close, the project moves into the final two phases:

- **Project Delivery (also known as Construction Delivery or Implementation)** – this phase commences when constructions starts and goes through to commercial acceptance of the infrastructure; and
- **Project Operation (also known as Service Delivery)** – this phase covers the provision and use of the contracted services during the remaining life of the contract, including the period leading up to and after contract expiry or termination.

Significant public sector resources will be required to manage the implementation and commissioning of a PPP contract. In other words, contract management processes require the public sector to ensure that payments made to the private sector operator are matched by specific service delivery standards over time. This will be subject to performance-based abatement.

To ensure that Government retains a sensible amount of control when managing a contract, effective monitoring and reporting performance metrics and incentive frameworks will be required. As PPP contracts are inherently complex and long-term in nature, issues arising over the operations period can be better managed if there is a strong relationship between the public and private sector.

Furthermore, a PPP project will require dedicated and appropriately qualified resources, preferably those who were closely involved in identifying its need and managing the procurement. This will ensure appropriate knowledge transfer into the operations period.

Finally, contract management for a PPP project will need to be cognisant of appropriate consent processes, particularly when major decision-making milestones occur over the life of the contract.

# 8 Governance and Stakeholder Involvement

Strong governance is integral to the successful delivery of all capital projects, including PPP projects. Government established *Project Governance* guidelines[3] as part of the *Capital Framework* to ensure that it has in place the appropriate governance structures and processes for projects of this type.

[3] https://www.treasury.act.gov.au/capital-framework/prove/detailed-technical-guidance/project-governance

Central to these guidelines are the following governance objectives:

- enable integrity, transparency and efficiency across project development;
- set the strategy for the project;
- build solid project foundations that support and facilitate oversight;
- guide and monitor project delivery and performance;
- manage project risks through appropriate decision-making models and tools; and
- establish overall project accountability to ensure decision making is subject to independent and informed review and enable a forum for constructive feedback.

Creating transparency and confidence in decision-making is another key aspect of the *Project Governance* guidelines. This includes not only outlining the roles of different stakeholders but also the structure by which these stakeholders work together – i.e. through the project board, project control group, technical team, etc.

**Table 1** sets out the expected roles of each stakeholder on a PPP project. Further detail on both these roles and the aforementioned governance structures / arrangements are contained within the *Project Governance* modules of the *Capital Framework*.

**Table 1 – Involvement of key public sector stakeholders on PPP projects**

| Group / agency | Example of support provided this agency on major projects / PPPs |
|---|---|
| **Infrastructure & Commercial Advice(1)** | Advise on the financial and commercial aspects of the development, procurement and delivery of PPP projects. Advise on financial events that occur during operations (e.g. refinancing). |
| **Major Projects Canberra (Project Team)** | Accountable for the development, procurement and delivery of infrastructure projects which have been designated by the Chief Minister into Major Projects Canberra on behalf of the Sponsor Agency. They also provide various project team members on Designated Major Projects – i.e. project team lead, broader project team and specialist expertise. |
| **Sponsor Agency (Project Team)** | Responsible for the project asset once delivered. They will have responsibility for the delivery of this asset or, in the case of Designated Major Projects, be fully represented by Major Projects Canberra. In both cases, the sponsor will provide experienced staff to project team. |
| **Finance & Budget Group** | Advise on the financial aspects of policy proposals, infrastructure projects, Government expenditure, budgetary positions and financial reporting to facilitate the budget process. |
| **Economic & Financial Group** | In addition to Infrastructure & Commercial Advice's involvement, the Economic & Financial Group provides economic analysis and advice on competition policy, regulatory impacts and revenue / cost implications of proposed projects. With regard to PPP projects, they will also be involved in the development of robust financial and economic assumptions. |
| **ACT Government Solicitor** | Advise on the legal risks associated with pursuing a PPP for the project and how those risks may be managed through the legal relationship. In most instances an external law firm will be engaged as a dedicated legal advisor. |
| **Digital Data & Tech. Solutions** | Advise on Government's digital agenda and the ICT / Cyber strategic direction. They also provide technical and transaction support in relation to Government ICT. |
| **Procurement ACT** | Advise on the application of the Procurement Framework to all Government projects. They are also responsible for advising on procurement processes and applying procurement values to Government projects. |

Source: The *Capital Framework*, https://www.treasury.act.gov.au/capital-framework/about-the-framework/roles-and-responsibilities
Note: (1) Infrastructure & Commercial Advice are within the Economic & Financial Group (also described in this table).

# 1. Introduction

## 1.1 Background

The ACT Government is committed to improving the delivery of infrastructure in the Territory. The *Capital Framework* was developed in 2013, and updated in 2022, as a tool to ensure that infrastructure investments resulted in maximum public value to the community. It is intended as a set of overarching planning guidance to provide practical assistance to agencies proposing new investments. It helps shape proposals, inform investment decisions and track project outcomes.

The *Capital Framework* is supplemented by these *PPP Guidelines* for guidance on the procurement of public infrastructure involving the private sector using complex integrated delivery models. These include PPPs which involve the private sector to a greater degree than traditional delivery models such as Design and Construct (D&C).

The *PPP Guidelines* provide a transparent and guiding framework for Government to develop and deliver PPP projects. It is to be applied in conjunction with the *National PPP Guidelines*[4] and Capital Framework primarily, as well as and broader Government policies applicable to the project.

The document's main objective is to provide consistency and clarity to parties involved in a PPP project, both private and public sectors alike. In particular, how a PPP project will be identified, assessed, tendered and managed in order to meet Government's requirement for ensuring public interest, delivering value for money and achieving appropriate service delivery outcomes. Further detail on the objectives is contained in the following section.

The *PPP Guidelines* will ensure that accountability and fairness is maintained throughout the procurement and delivery process, while maximising value for money for the community and staying within Government's affordability envelope.

## 1.2 Objectives

Further to the above, the objectives of the *PPP Guidelines* are to:

- facilitate private sector investment in social and economic infrastructure, and related services where value for money for Government can be clearly demonstrated;
- encourage efficiency and innovation, where appropriate, in the provision of social and economic infrastructure, and related services;
- support rigorous evaluation and provide strong governance over the selection of projects for PPPs, including the competition for and awarding of contracts; and
- clearly articulate accountability outcomes for both Government and private sector entities.

The above objectives have been reflected through the guidelines and processes discussed in the remainder of the document.

[4] It is important to note that these national guidelines are applicable in the ACT context with only a very limited number of departures.

## 1.3 Governance and Stakeholder Involvement

Government practice requires the use of appropriate governance structures and resources. This includes the need for clarity on how the project works are allocated and approved.

The *Project Governance* guidelines and *National Partnership Guidelines*[5] set out the structure or arrangement by which a project should be delivered. This includes the different working groups, advisory bodies and decision-makers which participate in various aspects of a project. The governance structure will initially be established as part of the business case and will then change as the resourcing and approval requirements of the project evolve.

***Due to the specific nature of Designated Major Projects, the roles and responsibilities defined in their project specific governance frameworks may vary and will take precedence from those outlined in these Guidelines.***

Another key aspect of these arrangements is the range of different agencies that are involved in the development and procurement of a PPP project. This ranges from agencies that are only involved in particular phases to agencies that are comprehensively involved throughout the process.

Both types of stakeholders are identified in this section. However, most focus is placed on the following three key stakeholders:

- Infrastructure and Commercial Advice;
- Major Projects Canberra; and
- Sponsor agency.

The remainder of this section describes the roles and responsibilities of these agencies and other key stakeholders.[6] Further detail on the role of each agency and the project governance structure in which they operate is contained in the *Capital Framework*.[7]

### (a) Infrastructure and Commercial Advice

Infrastructure and Commercial Advice ("**ICA**") is a team within the Economic and Financial Group of the Treasury Stream within Chief Minister, Treasury and Economic Development Directorate ("**CMTEDD**"). ICA manage and support the policy frameworks, including this document, that enable and facilitate the delivery of major and complex infrastructure projects in the ACT.[8]

ICA is responsible for:

- providing project advice and support throughout the *Capital Framework* stages, partnering with agencies to ensure that projects provide the required evidence and analysis to justify the funding decisions of Government;

[5] https://www.treasury.act.gov.au/capital-framework/prove/detailed-technical-guidance/project-governance and https://www.infrastructure.gov.au/sites/default/files/migrated/infrastructure/ngpd/files/Volume-2-Practitioners-Guide-Oct-2015-FA.pdf (refer Section 8: Project Structure and Resources).
[6] Refer to the other agencies part of this sub-section – i.e. Finance and Budget Group, Economic and Financial Group, Digital Data and Technology Solutions and Procurement ACT.
[7] https://www.treasury.act.gov.au/capital-framework/about-the-framework/roles-and-responsibilities
[8] ICA also manage and support Government's overarching investment guidelines – i.e. the *Capital Framework* (refer Section 4.3: the *Capital Framework*).

- providing financial, technical and commercial advice on the development, procurement and delivery of PPP projects and advising on life-of-project transactions for PPP projects (e.g. re-financing);
- reviewing and updating the *PPP Guidelines,* the *Unsolicited Proposal Guidelines* and the *Capital Framework;*
- reviewing business cases for selected capital projects, focusing on their adherence to the *Capital Framework*; and
- managing the process and providing commercial support for the assessment of unsolicited proposals.

Of particular relevance here is the commercial support that ICA provides to agencies seeking to undertake and manage PPP projects. It is expected that ICA will meet regularly with the project team and will either review or approve the commercial sections of key project documents.[9] Furthermore, ICA are to be kept informed of potential life-of-project issues as they emerge.

### (b) Major Projects Canberra

Major Projects Canberra ("**MPC**") undertakes project planning, procurement, contract management and delivery oversight on behalf of Government agencies for infrastructure works.

MPC is responsible for:

- developing, procuring and delivering infrastructure projects which have been designated into MPC ("**Designated Major Projects**") on behalf of the sponsoring agency.[10] It bears budget accountability for these infrastructure projects and reports directly to the responsible Minister;
- providing procurement and contract management services to support sponsor agencies with the delivery of Government appropriated capital projects ("**non-designated projects**"); and
- supporting other sponsor agencies through the implementation of broader whole of Government policies and commitments.[11]

On PPP / Designated Major Projects, MPC will be responsible for project delivery. MPC will establish and maintain the project team with suitably qualified resources during this phase of the project (including the project lead).

### (c) Sponsor Agency

The sponsor agency is the Government body (agency or statutory body) that has responsibility for the project asset once delivered. It will have responsibility for the delivery of this asset on behalf of Government or, in the case of a Designated Projects, Major Projects Canberra will be responsible for delivery of the asset.

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[9] On an Availability Payment PPP project, the types of project documents that ICA would have input into would include the business case, procurement analysis, discount rate analysis, PSC model, PPP proxy model, risk allocation table, commercial principles, project deed, expression of interest document, request for proposal, abatement regime, evaluation plan, evaluation report, etc.

[10] As noted in the *Capital Framework*, "Designated Major Projects are typically of significant complexity and scale and therefore are usually Tier 1 projects." Based on the suitability assessment in Section 5.4, PPP projects would be expected to fall into this category.

[11] As noted in the *Capital Framework*, these broader government-wide policies include the Government Prequalification Schemes and the National Prequalification Schemes; Active Certification Policy; managing the standard suite of construction related contracts and contract creation; providing help desk and system administration of Government's Project Management and Reporting System.

On PPP projects, the agency will provide full-time resources that are key members of the project team. That project team will be supplemented by representatives from ICA and MPC to provide the leadership, skills and experience needed for the procurement and delivery phases. For designated major projects, MPC is the sponsoring agency and provides the key members of the project team which may also be supplemented by representatives in Treasury and/or other agencies.

**(d) Other Government Stakeholders**

Projects of this scale and scope rely on the involvement of multiple agencies at defined points. The project team should collaborate with each agency as appropriate.

Of particular relevance here is the support that the following agencies provide on selected tasks:

- **Finance and Budget Group (Treasury Stream of CMTEDD)** – advise on the financial aspects of policy proposals, infrastructure projects, Government expenditure, budgetary position and financial reporting to facilitate the budget process;
- **Procurement ACT (Treasury Stream of CMTEDD)** – management and support of the Procurement Framework applying to Government projects. They are also responsible for advising on procurement processes and applying procurement values on these projects;
- **Economic and Financial Group (Treasury Stream of CMTEDD)** – economic analysis and advice on competition policy, regulatory impacts and revenue / cost implications of proposed projects. With regard to PPP projects, they are also involved in the development of robust financial and economic assumptions; and[12]
- **Digital Data and Technology Solutions (Chief Digital Officer within CMTEDD)** – driving Government's digital agenda, leading the ICT / Cyber strategic direction and providing technical / transaction support in relation to Government ICT.

Further detail on the roles and responsibilities of the above stakeholders is contained in the *Capital Framework*.[13] Those guidelines also state the potential role of other agencies in legal and probity advice.

## 1.4 Structure of the Guidelines

The remaining sections of this document are structured as follows:

- **Understanding PPPs (Section 2)** – this section provides an overview of what is a PPP, how they impact on Government and recent local projects;
- **Guiding Principles (Section 3)** – this section provides the overarching rationale and principles to drive the use of a PPP for a project;
- **Using these Guidelines (Section 4)** – this section provides a description of how these guidelines fit within the wider policy framework in Government;
- **Determining PPP Delivery (Section 5)** – this section provides guidance on how PPP suitability should be determined within the *Capital Framework*;
- **Procuring a PPP Project (Section 6)** – this section provides guidance on the planning and structuring of PPP projects; and

[12] This bullet point refers to stakeholder involvement from teams in the Economic and Financial Group that are other than the ICA team.
[13] https://www.treasury.act.gov.au/capital-framework/about-the-framework/roles-and-responsibilities

- **Managing a PPP Project (Section 7)** – this section provides guidance for the delivery and operations of a PPP project in terms of contract management.

Each of these topics is discussed within the noted separate sections of this report.

# 2. Understanding PPPs

## 2.1 Overview

This section describes PPPs in terms of their strengths and weaknesses before setting out the Australian experience. This background information provides the context for the policy framework in the following sections of the guidelines.

## 2.2 What is a PPP

A PPP is a proven delivery model that has been used in Australia since 1987. The model integrates the design / construction of infrastructure with the maintenance / operation of that infrastructure. PPPs are often used to achieve better value for money by aligning the incentives of the participants and optimising the whole-of-life costs.

The *PPP Guidelines* is focused on two types of PPP:

- Availability Payment PPPs; and
- User Charge PPPs.

In addition, there are two 'other' delivery models that share many of the characteristics of PPPs. The two other models are Design Construct Maintain Operate ("**DCMO**") and Design Construct Maintain ("**DCM**"). With the exception of how the project is financed, much of the guidance material on the following pages applies to the two other models as well.

**For the purposes of this document, these other delivery models are also referred to as PPPs.**

A high-level description of all four delivery models is provided below. This includes consideration of their applicability and implementation.

### 2.2.1 Availability Payment PPPs (Model 1)

Under this model, the PPP Project Company ("**Project Co**") arranges the finance for the upfront cost of the infrastructure in return for a series of payments from the public sector over the length of the operating period (up to 30 years). These payments effectively fund the upfront and operating costs of the project. Reductions to the payments are made if Project Co does not meet its service and performance obligations over the operating period.

There are two main types of Availability Payment PPPs, which differ in the nature of the recurrent services they provide:

- **Design, Construct, Finance, Maintain** ("**DCFM**")**:** under a DCFM the provision of services are primarily 'non-core' services such as facilities management, maintenance, cleaning and security. This model was used for the ACT Law Courts redevelopment.

  Governments in other jurisdictions have also used this model to deliver projects such as hospitals, prisons, schools and courts.

- **Design, Construct, Finance, Operate, Maintain** ("**DCFOM**"): under a DCFOM, the services provided also include 'core' services of operating the project. This model is used on the

Canberra light rail project, where the Project Co operates the light rail system on behalf of the Territory.

Other jurisdictions have used DCFOM to deliver a variety of infrastructure projects.

### 2.2.2 User Charge PPPs (Model 2)

Under this model, Project Co not only finance the upfront cost of the infrastructure but they also fund the project over time through the tolls and / or other revenues that they receive from the end user. Project Co bears the demand risk associated with the receipt of project revenues over the operating period.

Governments in other jurisdictions have also procured infrastructure under User Charge PPPs (sometimes referred to as the 'Build, Own, Operate and Transfer' ("**BOOT"** model). The types of sectors where this model has been applied include toll roads, tunnels, hospital car parks, railways, ports and utilities projects.

### 2.2.3 Design Construct Maintain Operate (Model 3)

The DCMO model combines a traditional Design and Construct ("**D&C**") contract with Operate and Maintain ("**O&M**") responsibilities. 'Operate' in this context means the provision of services relating to the infrastructure, as in a DCFM Availability Payment PPP, but can also include full operation, as in a DCFOM Availability Payment PPP or a User Charge PPP.

DCMOs typically run for a shorter duration than the aforementioned PPP models. They seek to gain the benefits of the integration of D&C with O&M and can reduce whole-of-life costs through the DCMO contractor taking into account its O&M obligations over the life of the contract when designing and constructing the project assets.

Governments in other jurisdictions have used the DCMO model for projects where the private sector is unable to bear the degree of performance risk required under a PPP but the public sector still wishes to achieve some of the risk transfer benefits of a PPP. This model is also more common on projects with a relatively larger O&M spend, such as a desalination plant.

### 2.2.4 Design Construct Maintain (Model 4)

The DCM or DCM LT model[14] combines a D&C contract plus a long-term facilities management and maintenance obligation. There can be either two separate contracts with related parties (i.e. D&C contractor and facilities management contractor) or a single DCM contract with the main contractor, who in turn contracts separately for the D&C and the facilities management components. The DCM model also involves long-term contractual obligations, however these are not typically as long as the PPP models.

As with the above models, DCM has been applied to a variety of infrastructure projects across the country. In the ACT, this model was used for the University of Canberra Public Hospital and the Margaret Hendry Primary School.

[14] The *Capital Framework* uses the term DCM LT for this model – i.e. Design Construct Maintain Long-Term. Those guidelines also have a concept of DCM ST (Design Construct Maintain Short Term). The former DCM type is the focus of this analysis because of the duration of the maintenance arrangements and is referred to as DCM in this document. In addition to the construction and maintenance obligations being tied together, this model may also incorporate abatements arising from performance failures.

### 2.2.5 Other Unspecified Delivery Models

There are 'other' arrangements by which the public sector enters into long-term contracts with the private sector that do not fit into the above categories. These arrangements include the private sector party having long-term responsibility for the provision of new or upgraded facilities and the maintenance / operation of them.

Given the complex nature of these arrangements and the potential for inappropriate risk allocation, the development of these projects / transactions needs to be managed in a manner consistent with the *PPP Guidelines*. Prior to undertaking any arrangement of this type, the sponsor agency is required to seek the involvement and support of ICA.

## 2.3 Characteristics of a PPP

### 2.3.1 Overview

A defining feature of this delivery model is the private sector bearing substantial risk in relation to the fitness for purpose of the public infrastructure asset and to their long-term durability. One way of this happening is by making payments to Project Co being dependent on the performance of the asset.

The aim of a PPP is to deliver improved services and better value for money, primarily through:

- appropriate allocation of project risk to the private sector;
- encouraging innovation;
- greater asset utilisation; and
- integrated whole-of-life asset management.

The superior value for money of PPP projects over traditional delivery models frequently derives from the integration of maintenance with the project's initial design and construction.

### 2.3.2 Funding and Budget Considerations

PPPs still require the sponsor agency to have a capital budget allocation for it.[15] This ensures that:

- the agency appropriately prioritises projects in terms of their strategic importance, as all potential projects need to compete for the same finite budget funds;
- there is no bias in the selection of delivery models on the basis of their perceived budget impacts; and
- if the agency does not achieve value for money from a PPP procurement process, it can continue with the capital investment in the project under a different delivery model.

**Section 5.5.6: Budget and Accounting Treatment** provides further information on the above considerations.

### 2.3.3 Commercial Considerations

PPPs and other delivery models that involve private sector finance:

- are inherently complex;

[15] Despite the deferral of expenditure to the operating period, the project will still need to meet approval requirements both as a project and as a funding requirement. For example, the capital expenditure of a social infrastructure availability payment PPP project will still be recorded on Government's balance sheet. However, it is noted that in rare situations this may not be the case (i.e. a non-budget sector agency funding the project or making the payments).

- carry a different risk profile to that of traditional delivery models;
- have specific requirements around due diligence investigations and probity; and
- need specialist skills, particularly through their procurement and delivery phases.

PPPs can be effective for projects where:

- there are opportunities for the private sector to bear significant project risk that the public sector would bear under traditional delivery models; and
- the public sector can clearly define and measure project outputs.

### 2.3.4 Other Characteristics / Considerations

PPPs typically include:

- the private sector taking on design, construction, operation and maintenance risks and driving productivity improvements; and
- the private sector either: receiving payment from the public sector once infrastructure is available for use; or bearing demand risk for service provision through receiving payments from users (e.g. toll payments for travelling on a road).

The public sector can make a direct contribution to a PPP project through the provision of land, public sector works, risk sharing approaches and other mechanisms. **Section 6.3.7: Financial Support for the Project**, discusses this in more detail, including the likely limitations on this contribution.

The public sector would generally retain legal title to (ownership of) and ultimate control over the infrastructure asset. It normally grants Project Co a licence or lease to use this asset solely for the purposes of the project, following which it returns to the public sector at no cost. However, unlike under traditional delivery models, in a PPP contract the private sector finances the capital cost of the project's infrastructure.

Another key feature of this model is that Project Co is responsible for the condition and performance of the asset over the life of the project or concession term. As a result, Project Co typically has substantial 'economic ownership' of the infrastructure asset, in that it bears the majority of the risks and rewards of ownership. In contrast, under traditional delivery models, such as D&C, the public sector retains economic ownership of the asset as well as legal title to it.

## 2.4 How PPPs affect Government

### 2.4.1 Overview

PPPs can provide a range of benefits over more traditional procurement methods but they can also introduce issues not commonly associated with such methods.

**Table 2** provides a summary of the advantages and disadvantages. The following parts of this section describes these opportunities and challenges in further detail.

**Table 2 – Advantages and disadvantages of PPPs**

| Advantages | Disadvantages |
|---|---|
| Stronger incentives for the private sector to make efficiencies | It is more difficult to achieve flexibility and to address changing needs post financial close |

| Advantages | Disadvantages |
|---|---|
| Incentives for whole-of-life cost savings for maintenance and operations | Success relies on well-defined functional and service output specifications |
| Outcome-focused service delivery | High procurement costs for all parties |
| Optimum risk allocation to the private sector including the risk that the project is fit-for-purpose | Need for experienced procurement team |
| Delivers all aspects of the project via a single procurement process | Financial outcomes may differ from expectations |
| Provides an opportunity to develop innovative project solutions | |
| Lower long-term demand on public sector resources for procurement delivery | |

### 2.4.2 Advantages of PPPs

This sub-section provides further detail on the benefits of the PPP delivery model.

**Government can take advantage of the incentive that the private sector has to make efficiencies**

One of the key benefits from PPP delivery is the increased certainty around time, cost and quality objectives being achieved. Articulating the required outcomes in the contract,[16] will allow the private sector to maximise efficiency during all phases of development. By focusing on outcomes and leveraging financial incentives, the private sector having a strong record of on-time and on-budget delivery for these types of projects.

In addition to time and cost certainty, Project Co are required to deliver designs that meet or exceed specified requirements for the intended function or purpose of an asset. Placing consortia made up of designers, builders and operators in a competitive tender against each other can result in optimised design outcomes. Such arrangements maximise the likelihood that the solution will be innovative, efficient, buildable and deliver whole-of-life efficiencies.

**Government can effectively transfer risk to the private sector**

As PPPs are long-term contracts, the parties involved are mutually incentivised to allocate risk in a way that optimises the returns for all the parties contracted.

PPPs provide the construction, facilities management and finance industries with opportunities to profit and develop their business. These opportunities come from the bringing together of their innovation and specialist expertise[17] and result in efficiencies in the delivery of infrastructure and selected services.

Project scoping and risk assessment by the public sector in a PPP arrangement can provide greater benefits to the public sector in the long-run, due to the additional due diligence placed on these projects.

[16] This is in contrast to other procurement methods which stipulate actual designs and construction methods.
[17] This includes expertise in the risk mitigation and management aspects unique to PPP projects.

The rigour of the banks and equity providers undertaking their own due diligence will supplement this focus and contribute to more contract certainty than other delivery methods.

As PPP arrangements are more complex than other models, extra stress can be placed on management processes. This should be addressed through additional planning and effort in the project development and procurement phases of PPP projects and by supplementing public sector resources with specialist expertise.

**Whole-of-life cost savings for maintenance and operations**

The public sector can derive significant cost savings over the life of the project from the upfront planning of the project's lifecycle works by Project Co. Well-designed PPP contracts can allow for an effective transfer of the maintenance requirements to Project Co. This is especially the case for major lifecycle replacements which tend to be more costly than ongoing planned and reactive maintenance.

The allocation of long-term operation and maintenance responsibilities to Project Co creates an incentive to ensure that construction is of an appropriate quality, due to:

- Project Co bearing the risk of these cost elements over the full contract period; and
- the competitive pressure in the bid stage to minimise total project costs over the life of the asset.

In contrast, traditional delivery models usually separate the consideration of expenditure for the D&C components from that for the operations and maintenance components. In addition, due to the mechanisms for public sector budget appropriation, funding constraints for major works can increase the chances of disruption of service delivery due to the eventual maintenance works being more extensive than had the public sector undertaken them earlier.

PPPs provide a contractual mechanism to allocate the responsibility for balancing asset utilisation and service delivery to a party that is able to do so, in a sustainable and commercial manner over the life of the PPP contract.

**Outcome-focused service delivery**

The public sector can also realise the benefits in service delivery by the private sector through providing incentives for Project Co to:

- maximise the availability of the project asset, including during maintenance works; and
- fulfil its responsibilities at the required standards.

As a result, the public sector can focus primarily on core service delivery.

As Project Co for an Availability Payment PPP relies for its revenue on service availability payments from the public sector it has a strong incentive to provide superior customer service, thereby creating additional public value. A similar incentive applies to User Charge PPPs because Project Co relies on tolls or user fees from customers for revenue.

A properly structured PPP focuses on outputs rather than inputs, allowing the attention of the public sector to be on the creation of outcome-based public value it is trying to create. Although traditional delivery models also can have an outcome-focus, PPP arrangements embed whole-of-life

requirements and associated resource commitments in order to meet the specified outputs in a way that the public sector cannot typically achieve under traditional delivery models.

### 2.4.2 Potential Disadvantages of PPPs

In order to understand the appropriate circumstances for using PPP delivery and the risks that need to be managed, it is necessary to address the potential disadvantages of PPPs. This section outlines the key disadvantages of PPPs that the project team / sponsoring agency need to be aware of.

**Flexibility and adaptability are more complex to achieve**

Due to the long duration of PPP contracts, the contracting parties require a high degree of certainty of what they want from the project. For example, the public sector need to be clear on what infrastructure and services it is buying through it. Alternatively, the public sector need to determine the flexibility required and the mechanisms that need to be developed to accommodate this flexibility. In either case, the contract structures are often complex and may be less flexible to changing requirements.

If public sector requirements are not clear or change over time,[18] PPPs can be complicated to renegotiate. This is due to the difficulty with dealing with variations that can have a 'knock-on' effect on both the PPP contract and the parties involved. These issues can also apply to major expansions of PPP projects if this was not contemplated in the original transaction.

A particular characteristic of PPPs is the involvement of debt financiers. They typically provide the large majority of the finance for PPP projects and have a natural desire to ensure that Project Co is able to repay this finance, together with interest, from project revenues. Hence, they normally impose strict controls on Project Co, limiting its ability to agree to any changes in the project without their consent. They will require Project Co to receive adequate compensation for bearing any additional risks. **Section 7.2.2(d): Consent Processes**, provides further guidance in relation to the granting of consents.

**Complexities arising from changing demand**[19]

There have been several instances of User Charge PPPs in other jurisdictions experiencing financial difficulties when 'actual' demand falls short of its expected level. Generally, the public sector have limited the impact of these circumstances on users by contracting pre-determined user fees. As a result, the majority of these negative impacts generally fall upon only Project Co.

In addition, these other governments have avoided having to absorb the additional cost of providing the service if Project Co is unable to continue the PPP contract, resulting in its termination, through receiving the infrastructure asset at below its replacement cost.

The allocation of demand risk to the private sector can result either in private sector bidders requiring risk premiums or in a reduced industry appetite to participate in the project. Either factor can result in reduced competitive tension when tendering for User Charge PPP projects.

[18] For example, requirements can be 'unclear' because of a poor project scope and can 'change' as a result of rapid technological advances.

[19] This disadvantage applies to User Charge PPPs only. It does not apply to the Availability Payment PPP model.

**High procurement costs**

The more complex delivery models contemplated here involve significantly higher costs during the procurement process than do traditional models, both for the public sector and for bidders.

The private sector has 'at risk' a portion of their tender preparation costs before they are selected as the preferred bidder. These costs are material for smaller projects and can be significant for larger projects. The winning bidder then incurs further cost in addressing non-compliances identified by the project team in the final negotiation phase before executing the PPP contract and achieving contract close.

The transaction costs incurred by the public sector are also high, due to the need to employ specialist legal, commercial, financial and technical advisors and due to the duration of procurement. These costs typically are of a similar order of magnitude to those incurred by Project Co. However, subsequent public sector management costs during project delivery and operations generally are lower than under traditional delivery models, offsetting the high procurement costs.

## 2.5 The Australian PPP Experience

Governments across Australia conduct PPP procurement in accordance with the *National PPP Guidelines*. The main precedents for the *National PPP Guidelines* were similar documents published by the NSW and Victorian Governments, which in turn had as precedents the United Kingdom guidelines for the Private Finance Initiative.[20]

For a range of reasons, the states and territories have produced jurisdictional departures on certain policy and procedural matters. These reasons include legislative and regulatory differences and specific Auditor-General recommendations.

The different jurisdictions have sought to align their policies where possible. As the *National PPP Guidelines Volume 6: Jurisdictional Requirements* note, Western Australia, South Australia, Tasmania and Northern Territory do not significantly depart from the *National PPP Guidelines*. Only the governments of NSW, Queensland and Victoria have departures from the *National PPP Guidelines* in their approach.[21] These jurisdictions have more mature PPP markets than those in the rest of Australia, having applied PPPs to a number of projects before the publication of the *National PPP Guidelines*.

As the *National PPP Guidelines* further note, the PPP approach has demonstrated its ability to deliver value for money. Despite these benefits, PPPs represent a relatively small proportion of all projects undertaken by Australian Governments.[22] As noted above, the higher transaction costs on Australian PPP projects are often cited as a reason for the relatively smaller number of PPP procurements.

The *National PPP Guidelines* are examined further in **Section 4.4: National PPP Guidelines**. The guidance provided there provides an insight into the broader PPP experience and how this applies in the ACT context.

[20] http://webarchive.nationalarchives.gov.uk/20130410173120/http://hm-Treasury.gov.uk/infrastructure_public_private_partnerships.htm

[21] In many cases though, the approach in these particular jurisdictions is similar. For instance, NSW and Victoria share the same template project deed for Availability Payment PPPs.

[22] Clayton Utz (2013) *Improving the Outcomes of PPPs*

# 3. Guiding Principles

## 3.1 Overview

This section outlines the five key principles under the *PPP Guidelines*. These principles reflect the objectives from the previous versions of these guidelines.

The *PPP Guidelines* will:

1. manage the highly integrated delivery models outlined in the *Capital Framework* to achieve commercially-driven project outcomes that benefit the ACT;
2. help ensure that projects are delivered and operated in a manner that is value for money to Government;
3. manage project delivery risks effectively by providing certainty to public and private sector stakeholders involved in terms of guidance and communication in a timely manner;
4. facilitate timely procurement processes and, where possible, reduce unnecessary transaction costs for both the public and private sectors; and
5. recognise and adopt a 'partnership-led' approach by giving due consideration to input from public and private sector participants to support PPP project delivery over the long-term.

## 3.2 Principles and Approach

The above principles are to be applied in both the determination of and the delivery of PPP projects. Policy positions set out in this document have been designed to support these principles. The following sub-sections provide further context of the guiding principles at a strategic level.

### 3.2.1 Expedite Complex Procurement

The *Capital Framework*[23] defines a number of potential delivery models for capital works infrastructure projects. Four of these models are suitable for complex projects involving an extended relationship between the public and private sectors. As noted in **Section 2.2: What is a PPP**, the *PPP Guidelines* provides guidance in relation to those four models:

- User Charge PPP;
- Availability Payment PPP;
- DCMO; and
- DCM.

Each of these models systematically assign risk to the parties best able to manage them, including the provision of incentives to achieve project outcomes through the use of private financing. For these delivery models, the PPP contract covers both timely delivery and performance of the project asset and of the related services.

For these models to be delivered successfully, consideration needs to be given to service certainty, demand, functional requirements and Government's ability to carry its responsibility in concert with the private sector's obligation. Traditional delivery models are often constrained when dealing with these issues.

[23] ACT Government (2022), *Capital Framework*, https://www.treasury.act.gov.au/capital-framework

### 3.2.2 Achieve Value for Money

Demonstrating value for money is a fundamental criterion for all procurements involving the public sector. It is a requirement of the *ACT Procurement Act* (Section 22A) that Government pursue value for money when undertaking any procurement activity for infrastructure projects.

Value for money when implementing PPPs comes from, amongst other factors:

- the systematic allocation of risks to the party best able to manage it;
- achieving competitive market tension;
- realisation of innovation, productivity improvements and synergies; and
- clear evidence-based net benefits to the ACT.

To support the achievement of value for money, PPPs in the ACT will be subject to a standardised and rigorous development, evaluation and procurement process, in accordance with the *Capital Framework,* the *PPP Guidelines* and the *National PPP Guidelines*. These guidelines require the PPP model to offer better value for money than the traditional delivery model. **Section 5.5: Financial Analysis**, provides further information on these requirements.

### 3.2.3 Reduce PPP Procurement Process Risks

PPPs are inherently more complex than traditionally delivered projects due to the integration of the construction and ongoing service obligations over a long-term contract and the inclusion of private finance. As such it is important that Government provides clarity and transparency in terms of timing, decision making and scope. This is critical in terms of reducing procurement costs and inspiring confidence to private sector participants.

Clarity and transparency in terms of timing, decision making and the application of commercial principles in a manner that is practical, functional and based on market norms will be critical to creating confidence and certainty in the market's willingness to participate in a PPP. The project team will need to confirm these norms with ICA and reflect them within the commercial principles to maintain interest in the project.

### 3.2.4 Facilitate an Efficient and Timely Procurement Process

In order to run a timely and effective procurement process, it is important that the public sector seek out ways which they can reduce the time and cost associated with bid development.

This is because there is competition amongst other public sector agencies and other jurisdictions for a limited pool of private sector resources. Appropriately qualified and experienced consortia tendering for PPPs in Australia are finite and typically commit to projects in sectors where not only the return is high but also where they can spend their time most cost-effectively.

By carrying out procurement in a timely manner, the public sector can minimise the opportunity cost faced by private sector bidders when committing to a particular project, thereby increasing the attractiveness of the ACT as a market.

### 3.2.5 Adopt a Partnership Approach

The project team will work in a collaborative and coordinated way with the market to support the successful delivery of PPP projects. By adopting a partnership approach, the public sector aims to align objectives for all parties in the PPP and generate more collaborative working and cohesive outcomes from the PPP process.

Government also recognises that by increasing the scope of working together with the private sector, greater opportunities for innovation and value for money can be achieved.

# 4. Using the ACT PPP Guidelines

## 4.1 Overview

This section describes the alignment of the *PPP Guidelines* with broader policy settings and investment guidelines. It also considers how this guidance should be applied and referenced in the development, procurement and delivery of PPP projects.

In particular, this part of the guidelines provides context in relation to how the *PPP Guidelines* should interface with:

- **The *Capital Framework*** – a set of guidelines designed to ensure that Government's investment in infrastructure projects results in maximum public value to the ACT community. It provides practical assistance to agencies proposing investment projects, and to advisors assisting agencies in this process. It helps shape proposals, inform investment decisions and track outcomes and benefits; and
- ***National PPP Guidelines*** – a set of guidelines and volumes developed and maintained by Infrastructure Australia that were initially adopted nationally in 2008 based on existing jurisdictional policies and procedures. It is important to note that these national guidelines are applicable in the ACT context with only a very limited number of departures.

It is also important to note that when applying these policies there needs to be compliance and consistency with other legislation in relation to public sector delivery and the use of public sector funds (refer **Section 4.2(c): Other ACT Government guidance**).

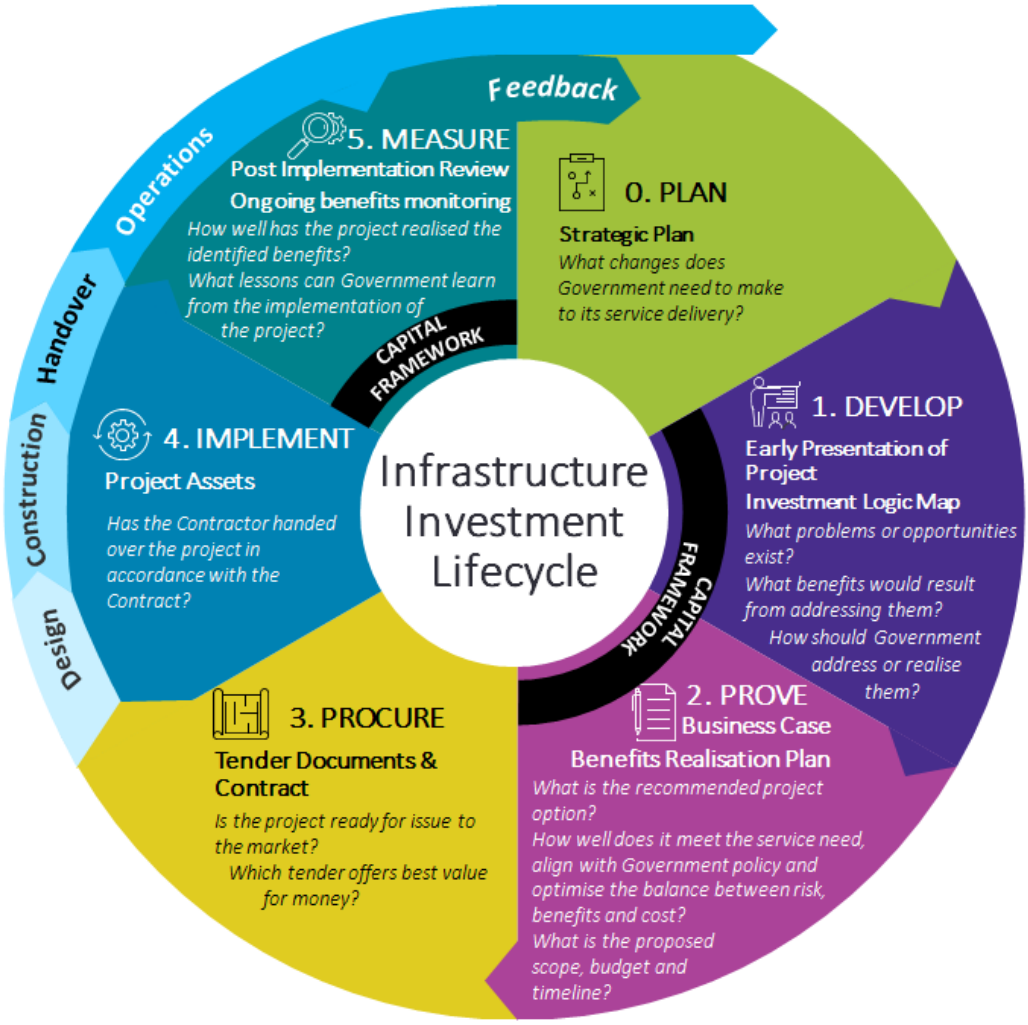
## 4.2 Framework Alignment

This section examines at a high-level the guidelines most relevant to investment decision making – i.e. the *Capital Framework*, the *PPP Guidelines* and other ACT Government guidance. The focus here is on introducing the steps associated with each. Further detail on each step is provided in subsequent sections.

### *a)* The *Capital Framework*

**Figure 1** shows the Infrastructure Investment Lifecycle in diagrammatic form, together with its alignment with the Capital Framework.

**Figure 1: The Infrastructure Investment Lifecycle and the *Capital Framework***




### *b)* The *PPP Guidelines*

The *PPP Guidelines* supports the *Capital Framework* for projects that involve a greater degree of private sector participation than under traditional delivery by using more sophisticated procurement models.

**Figure 2** shows the alignment of the *PPP Guidelines* with the Infrastructure Investment Lifecycle.

**Figure 2: Alignment of the *PPP Guidelines* with the Infrastructure Investment Lifecycle**

| | | | | | |
|---|---|---|---|---|---|
| *Capital Framework – Infra. Invest. Lifecycle* | 1. DEVELOP | 2. PROVE | 3. PROCURE | 4. IMPLEMENT | 5. MEASURE |
| *PPP Guidelines (this document)* | • Sec 5.3 Key PPP Considerations<br>• Sec 5.4 Determining PPP Delivery | • Sec 5.4 Determining PPP Delivery<br>• Sec 5.5 Financial Analysis | • Sec 6.2 PPP Planning<br>• Sec 6.3 PPP Structuring | • Sec 7.2 Contract Management | • Sec 7.2 Contract Management |

***c) Insourcing Framework***

Part 9A of the *Financial Management Act 1996* requires agencies to comply with an Insourcing Framework determined by the Chief Minister. The framework will help public sector entities assess proposals to determine the best provider of a service or works (i.e., the public sector or an external provider) to provide the best outcomes for the ACT community.

Prior to pursuing a PPP, project teams must ensure that any services or works that fall within the scope of the framework have been appropriately assessed.

For more information on the Insourcing Framework, including the scope and assessment templates, please consult the Secure Employment Team (secure.employment@act.gov.au).

***d) Other ACT Government guidance***

In their application of the *PPP Guidelines*, the project team must adhere to ACT legislation on public sector delivery: the *Government Procurement Act, 2001*; the *Government Procurement Regulations, 2007;* and, in relation to the use of public sector funds, the *Financial Management Act, 1996*.

The following sub-sections provide a brief overview of the ACT and national policy frameworks that are associated with this document.

## 4.3 The Capital Framework

The *Capital Framework* was originally developed a decade ago to support investment decision-making of any type, complexity or cost. While the policy has been updated a number of times,[24] it's focus remains on the provision of practical assistance to agencies for proposed capital projects.

The *Capital Framework* has four strategic objectives:

- determine whether investment is justified;
- optimise spending;
- develop the project such that it is ready for procurement and delivery; and
- monitor and report on the realisation of the expected benefits resulting from the project.

The *Capital Framework* comprises three of the five stages of the Infrastructure Investment Lifecycle:

- **Stage 1: Develop** – identifying the problem or opportunity that needs to be addressed and the benefits that will result; and commencing project development;
- **Stage 2: Prove** – assessing in more detail the need for investment, the benefits that will result, the options analysed and the recommended project option, and the project's scope. This stage also includes initial design development of the recommended project option to enable a robust estimate of the project's likely cost and delivery timeline; and
- **Stage 5: Measure** – assessing the project's processes and outcomes, including monitoring and reporting on benefits realisation, and feeding back lessons learnt to future projects.

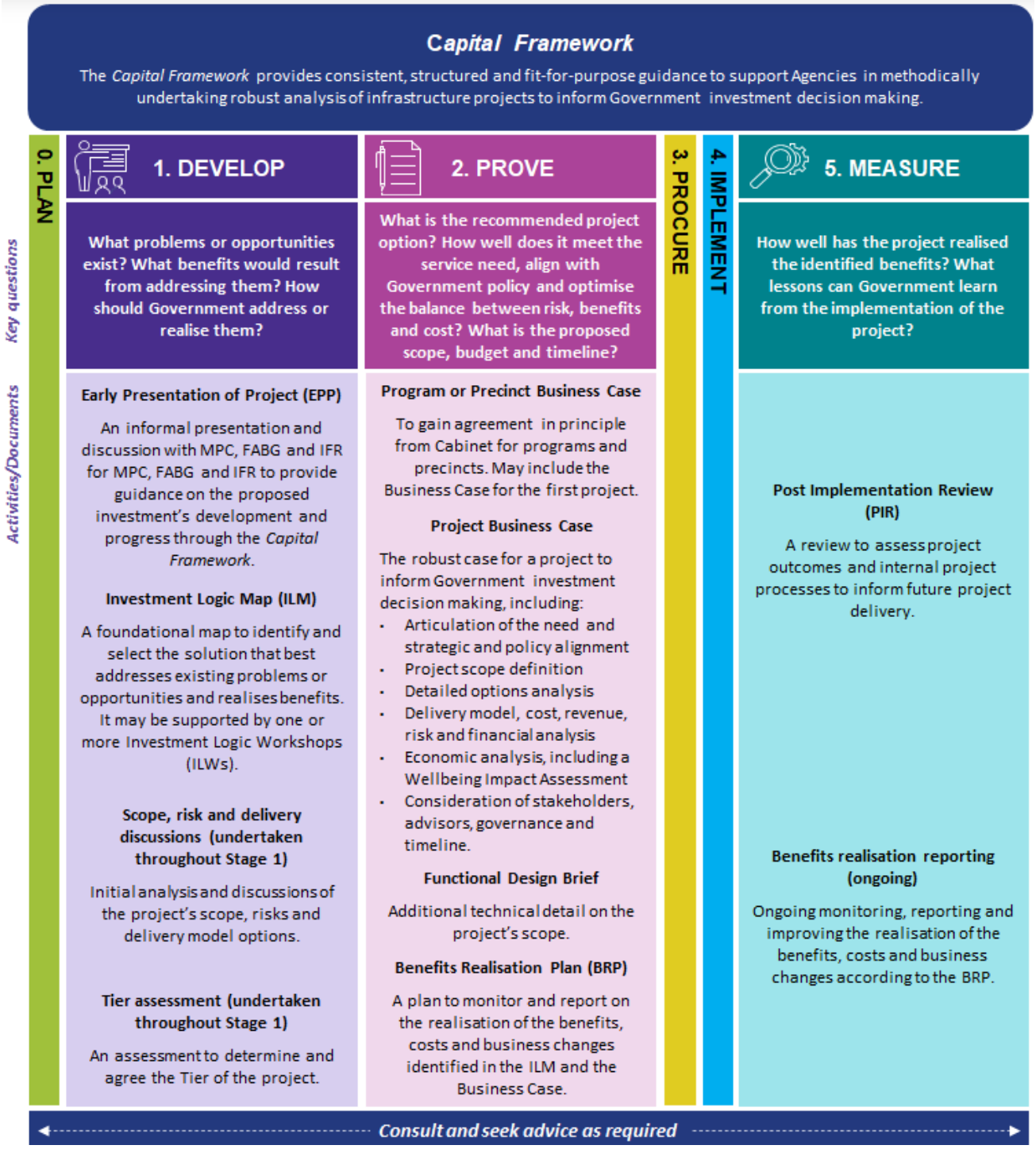
The two stages of the Infrastructure Investment Lifecycle not covered by the *Capital Framework* are considered in other investment guidelines - i.e. Stage 3: Procure and Stage 4: Implement. The other stages are largely project specific and are not considered in detail here. Further detail on those stages is available from the Procurement ACT Website[25] and the MPC Project Management Office.

[24] The most recent update of the *Capital Framework* to support investment decision making was in 2022.

[25] https://www.procurement.act.gov.au/policy-and-resources/factsheets-and-policies

**Figure 3** describes the *Capital Framework* process in more detail.

**Figure 3: The *Capital Framework* process**




The *Capital Framework* provides guidance on developing capital works projects, including templates for project business cases.

## 4.4 National PPP Guidelines

The *National PPP Guidelines*[26] contain the official PPP framework adopted by all members of the Council of Australian Governments following their initial publication in 2008. Subsequently, the *National PPP Guidelines* have been updated in 2011 and in 2015. The *National PPP Guidelines* consist of seven detailed volumes that provide the project team with detailed guidance on how to identify, assess, procure and contract for PPPs.

The *National PPP Guidelines* aim to establish a consistent national framework that facilitates improved public service delivery through private sector provision of public infrastructure and related services.

Their objectives are to:[27]

- encourage private sector investment in public infrastructure and related services where there is demonstrable value for money for the public sector;
- encourage innovation in the provision of infrastructure and related service delivery;
- ensure rigorous governance over the selection of projects for PPPs and the competition for, and awarding of, PPP contracts;
- provide a framework and streamlined procedures for applying PPPs across Australia; and
- articulate clearly the accountability for outcomes.

The *National PPP Guidelines* are comprehensive and comprise two overview documents and seven detailed volumes:

- ***National PPP Policy Framework*** – an overview document setting out policy objectives and principles for PPPs in Australia*;*
- ***National PPP Guidelines Overview*** – an overview document providing a high-level guidance of the detailed volumes;
- ***Volume 1: Procurement Options Analysis*** – provides a method to determine whether a PPP model is the appropriate procurement method to achieve the project's objectives;
- ***Volume 2: Practitioners' Guide*** – provides detailed guidance on the implementation of a PPP;
- ***Volume 3: Commercial Principles for Social Infrastructure*** – discusses a range of principles in detail to achieve a consistent and efficient risk allocation framework for the delivery of social infrastructure PPPs (typically Availability Payment PPPs);
- ***Volume 4: PSC Guidance*** – provides detailed guidance on the development of a PSC, a critical tool for assessing the value for money of a PPP;
- ***Volume 5: Discount Rate Methodology Guidance*** – describes a detailed methodology for estimating appropriate discount rates for the purposes of discounted cash flow analysis when evaluating the PSC and private sector bids;
- ***Volume 6: Jurisdictional Requirements*** – describes detailed jurisdictional departures from the National PPP Guidelines for each Australian state and territory; and
- ***Volume 7: Commercial Principles for Economic Infrastructure*** – discusses a range of principles in detail to achieve a consistent and efficient risk allocation framework for the delivery of economic infrastructure PPPs (typically User Charge PPPs).

[26] https://www.infrastructure.gov.au/infrastructure-transport-vehicles/infrastructure-investment-project-delivery/national-guidelines-infrastructure-project-delivery

[27] Infrastructure Australia (2008), *National PPP Policy Framework*

These volumes provide detailed guidance across the stages of the Infrastructure Investment Lifecycle from assessing the viability of a PPP as part of a business case (Volumes 1, 4 and 5) to the implementation of a PPP during procurement (Volume 2).

In addition, the guidelines provide commercial principles to support a project team in the formulation of appropriate contracts and practices to ensure that PPP projects meet their desired outcomes (Volumes 3 and 7).

As a result of the above, Sections 5, 6 and 7 of this report contain cross-reference tables to sections of the *National PPP Guidelines* which provide more detail on these issues. **Table 3** lists the location of these tables and the issues covered in each.[28]

**Table 3 – *National PPP Guidelines* Summary of References**

| Table No | PPP Issue | Section | Page |
|---|---|---|---|
| **Determining PPP Delivery (Section 5)** | | | |
| 6 | When to Consider a PPP | 5.2 | 31 |
| 7 | Key Considerations When Determining PPP Delivery | 5.3 | 33 |
| 9 | Determining PPP Delivery | 5.4 | 35 |
| 10 | Financial Analysis | 5.5 | 39 |
| **Procuring a PPP Project (Section 6)** | | | |
| 11 | Planning and Probity | 6.2 | 42 |
| 13 | PPP Structuring | 6.3 | 49 |
| **Managing a PPP Project (Section 7)** | | | |
| 14 | Contract Management | 7.2 | 52 |

## 4.5 Using these Guidelines for PPPs

The *National PPP Guidelines* also form the official PPP framework for the ACT Government. The project team should read this document in conjunction with the *National PPP Guidelines*.

The *PPP Guidelines* outlines the ACT Government's jurisdictional departures on key policy and commercial positions for PPPs in the Australian Capital Territory.

The remainder of this document provides guidance on the assessment of a project under a PPP delivery model and the process involved with implementing and managing a PPP project.

This information is split over three sections:

- **Section 5 (Determining PPP Delivery)** – provides additional guidance for the consideration of a PPP model under the *Capital Framework* and how the *National PPP Guidelines* should be applied accordingly;

[28] It is noted that the table numbering is not continuous below as this document uses tables to present other types of information as well.

- **Section 6 (Procuring a PPP Project)** – provides guidance for a project that has been approved as a PPP in terms of the necessary procurement and probity steps involved, including linkages to the *National PPP Guidelines* for more detailed information; and
- **Section 7 (Managing a PPP Project)** – provides guidance for a project once it has reached transaction close. Guidance is provided in terms of key policy positions on issues and / or events that occur during the delivery and operations of a PPP project.

Sections 5, 6 and 7 contain 'call-out' boxes which summarise the relevant guidance at each stage of the project – i.e. the ACT PPP Policy Principles. In some cases, the boxes also highlight jurisdictional departures from the *National PPP Guidelines* or provide further guidance to a project team seeking to undertake a PPP in the ACT.

**Table 4** provides an overview of the ACT Government's PPP Principles and when these need to be planned for and applied during the *Capital Framework* Infrastructure Investment Lifecycle.

**Table 4 – ACT PPP Policy Principles Summary**

| Box No. | PPP Principle | Section | Page |
|---|---|---|---|
| **Determining PPP Delivery (Section 5)** | | | |
| 1 | Role and Calculation of the PSC | 5.5.1 | 39 |
| 2 | Discount Rates | 5.5.2 | 37 |
| 3 | Budget and Accounting Treatments | 5.5.3 | 38 |
| **Procuring a PPP Project (Section 6)** | | | |
| 4 | Probity Focus | 6.2 | 44 |
| 5 | Output Specification | 6.3.1 | 44 |
| 6 | Interactive Tender Processes | 6.3.2 | 44 |
| 7 | Payment Mechanism | 6.3.4 | 48 |
| 8 | Definition of Abatement Regimes | 6.3.5 | 49 |
| 9 | Government Project Support | 6.3.7 | 48 |
| **Managing a PPP Project (Section 7)** | | | |
| 10 | Independent Review | 7.2.1 | 54 |
| 11 | Treatment of Refinancing Gain Share | 7.2.2 | 56 |
| 12 | Managing Interest Rate Risk | 7.2.2 | 57 |
| 13 | General Consent Process | 7.2.2 | 57 |

# 5. Determining PPP Delivery

## 5.1 Overview

This section describes Government's approach to assessing the suitability of the PPP model for major capital projects. It also outlines the financial analysis required to support this decision-making.

This section builds upon the requirements outlined in **Section 4: Using the ACT PPP Guidelines**. In other words, if a PPP model is being considered as a potential delivery approach, then the requirements of the *PPP Guidelines* and the *Capital Framework* will be relevant to determining PPP delivery.

This section also supports the following volumes in the *National PPP Guidelines*:

- *Volume 1 – Procurement Options Analysis;*
- *Volume 4 – PSC Guidance; and*
- *Volume 5 – Discount Rate Methodology Guidance.*

## 5.2 When to Consider a PPP

As a general guide, any public infrastructure project that has been identified as a Tier 1 project under the *Capital Framework*, will require PPP to be considered as a possible delivery method. In particular, the Tier 1 projects with a capital value of over $100m should be considered for PPP suitability.

There may be opportunities for implementing a PPP model on smaller Tier 1 projects where the commercial principles, project risks and operational characteristics of the project suit this delivery method. In this case, the project team should explore PPP as a potential delivery method for projects where it can demonstrate sufficient value for money.[29]

**Table 5** summarises the characteristics that may make a project suitable for PPP delivery. These characteristics form the basis of the more detailed suitability criteria shown in **Section 5.4: Determining PPP Delivery**.

[29] Noting that the relatively higher transaction and contract management costs on a PPP relative to those for traditional procurement models need to be factored into the value for money analysis.

**Table 5 – Project characteristics creating possible conditions for successful PPPs**

| Characteristic | Description |
|---|---|
| **Project involves a major capital investment** | Tier 2 and Tier 3 projects under the *Capital Framework* may struggle to demonstrate value for money, as their transaction costs may exceed their value for money benefits. In particular, Tier 1 projects with a capital value exceeding $100 million are more likely to be successful as PPPs in the absence of other strong negative characteristics. |
| **Opportunity for risk allocation to the private sector** | A defining characteristic of a PPP arrangement is the ability to allocate project responsibility and risk to the party best positioned to manage it. Achieving value for money on a PPP project requires a well-managed scope to allocate appropriate risks to the private sector. |
| **Whole-of-life cost certainty** | PPP projects can realise improved efficiencies where the full integration of planning, design, construction and ongoing service delivery (including operational, lifecycle maintenance and refurbishment) can be the responsibility of the private sector, where it can predict its cost over the project life with a reasonable degree of certainty, including an appropriate allowance for the risk of contract overruns. |
| **Long-term arrangement** | PPP arrangements tend to be more suitable for projects where the public sector is willing to contract with the private sector for the long-term. This long duration enables the benefits of efficient risk transfer and a whole life of cost approach. |
| **Clear and measurable outputs** | Projects where the project team can clearly understand the output requirements and readily measure the outputs are likely to be viable under a PPP model, as the project team can translate these measurable scope and service outputs into a performance specification within a PPP contract. Measurable outputs also allow for the structuring of payment mechanisms on the basis of these outputs and the alignment of financial incentives to key performance indicators. |
| **Innovation** | The focus in the PPP approach on output specifications and the long-term provides incentives for the private sector to develop innovative solutions in meeting these specifications to achieve value for money (in terms of asset and service design, technology and/or delivery). |
| **Market appetite** | The project needs to represent a genuine commercial opportunity to attract an appropriate number of private sector parties and allow for an effective and competitive tender process. |
| **Additional commercial opportunities** | The potential for additional commercial opportunities (e.g. food or retail outlets within public buildings) resulting from the development of the new infrastructure can enhance value for money, such as facilitating Project Co to realise additional income early in the project. However, additional commercial development, can add to the complexity of the PPP arrangement. |
| **Bundling of contracts** | A PPP arrangement can be an effective delivery model where the underlying project service or capability would traditionally depend on several separate contracts, particularly for design, construction, facilities management and maintenance. PPPs can combine related services and an asset into a single long-term contract. However, this bundling can add to complexity, particularly as it may involve an increased number of client stakeholders. |

## Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 6** identifies the sections in the *National PPP Guidelines* that are most relevant to initial high-level consideration of PPP suitability. The following sections note other sections of the *National PPP Guidelines* which are expected to be relevant to more detailed assessment.

**Table 6 – Relevant Sections from *National PPP Guidelines* – PPP Considerations**

| Volume | Section |
|---|---|
| **Volume 1 – Procurement Options Analysis** | Section 1 – Introduction; and<br>Section 2 – The Procurement Decision Methodology. |

## 5.3 Key Considerations when Determining PPP Delivery

The following sub-section outlines key considerations when determining the project scope and its viability under a PPP arrangement.

### (a) Value for money

The characteristics in **Table 5** are drivers of whether PPP is likely to deliver value for money. This includes whether the project is of sufficient scale and is long-term in nature.

It also includes whether the project's risk profile is complex and could leverage material opportunities to allocate whole-of-life risks to allow the private sector to innovate and utilise assets in a more efficient manner.

### (b) Core versus non-core services

Historically, PPP arrangements involve the bundling of 'non-core' ongoing service delivery requirements with the design and construction of the asset over the life of the contract. Government has also followed this approach on the projects that is had undertaken to date.

In other jurisdictions, PPP arrangements have seen service delivery requirements extend in scope to include 'core services' as part of the private sector's contractual obligations – i.e. services for which the public sector has historically chosen to retain responsibility and which involve activities that the public sector is directly accountable.

Although the inclusion of core services may have the potential to bring some benefit, it is highly contingent on a wide range of factors that are only applicable in a very limited range of circumstances. During the project development and assessment phase, ICA will monitor whether such circumstances are present and inform the project team if there is any particular need to explore 'alternate' service allocation arrangements.

### (c) Market capability and appetite

Government needs to understand the private sector's capacity, appetite and incentive to deliver a project as a PPP. The suitability of each delivery model to attract sufficient market interest to ensure a competitive procurement process will depend on the specific details of the project and on market circumstances at the time.

The project team can conduct a market sounding exercise to gauge market interest and the likely market response for the delivery model it is considering. This may involve discussions with financiers, PPP sponsors, contractors and facility managers to understand their capacity and interest in the project. The project team should interpret the results of a market sounding exercise with caution.

### (d) Business case

Under the *Capital Framework*, this document will include a delivery model analysis and indicate that the PPP model is the preferred procurement strategy. The project team submit the business case to its portfolio minister for consideration and approval of the Expenditure Review Committee of Cabinet ("**ERC**") and Cabinet itself.

### (e) Hybrid funding models

The standard PPP delivery model has evolved to incorporate a spectrum of arrangements where the roles of the public and private sector can vary. These are variously referred to as either hybrid models or 'complex' integrated delivery models.

As previously mentioned, some PPP projects in other jurisdictions have bundled core services with both design / construction and non-core service delivery components. This 'hybridisation' can also occur in relation to funding arrangements and payment mechanisms. That is, the extent and proportion to which the project is privately and / or publicly financed, or switches between availability and demand-driven models can vary over the life of a project.

Although the standard PPP model calls for private financing based on payments backed by the public sector over the life of the contract or the transfer of demand risk to the private sector, public sector support can be applied to address potentially higher private sector financing costs associated with project delivery and/or management. Public sector funding support may, in limited circumstances, also be considered to help address short-term concerns over the commercial viability of a project. This can take the form of a public sector contribution to the PPP or the separation of components of the project that may be directly grant funded by the public sector.

As previously noted, there may be constraints around the level of hybridisation that may be acceptable in the ACT context. These constraints are examined further in **Section 2.2**: **What is a PPP** and **Section 6.3.6**: **Financial Support for the Project**.

#### Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 7** identifies the section of the *National PPP Guidelines* which examines the challenges facing PPP implementation.

**Table 7 – Relevant Sections from *National PPP Guidelines* – PPP Challenges**

| Volume | Section |
|---|---|
| **Volume 1 – Procurement Options Analysis** | Section 1 – Introduction. |

## 5.4 Determining PPP Delivery

**Table 8** provides a template that Government entities should use to assess PPP suitability. This template is to be used in conjunction with the broader delivery model assessment required for the business case under the *Capital Framework*.[30] It is noted that the template may need to be adjusted depending on the type of project being undertaken. The project team is required to consult with ICA when adjusting the template and / or undertaking the PPP suitability assessment.

**Table 8 – PPP Suitability Assessment Template**

| Characteristic | Criteria | PPP Suitability |
|---|---|---|
| **Size / Type Threshold** | Will the capital cost of the project exceed $100 million? or is it classified as a Tier 1 project?<br>*Note: Projects with a capital cost below $100 million may struggle to demonstrate value for money or attract private sector interest, as the transaction costs may exceed the benefit.* | |

[30] https://www.treasury.act.gov.au/capital-framework/prove/business-case/delivery-model-analysis

| Characteristic | Criteria | PPP Suitability |
|---|---|---|
| | *However, some Tier 1 projects with a lower capital value and favourable risk / operational characteristics should still be assessed against the below criteria for their suitability as a PPP.* | |
| **Duration** | Is the duration of the project and the life of the asset up to 30 years?<br>*Note: Although there have been some successful technology-related PPP projects or road upgrade DBMs with shorter durations, the normal duration for PPPs is generally up to 30 years.* | |
| **Performance Based Contract** | Can KPIs for service delivery be developed?<br>*Note: Projects where the output requirements can be readily measured are more suitable for PPP delivery, as translation of these into a performance specification mechanism becomes more straightforward. Payment mechanisms include payment abatements for failure to meet KPIs.* | |
| **Bundling of Contracts** | Will the project involve a number of individual works packages or services? Is there the potential to bundle a number of individual service contracts into a single long-term contract?<br>*Note: A PPP arrangement can be an effective delivery model where the underlying project service would traditionally depend on several separate contracts. A PPP can combine these.* | |
| **Risk Transfer** | Is there potential to achieve value for money from the allocation of risk to the private sector?<br>*Note: The allocation of project risks between the public and private sectors can be a strong driver of value for money in PPPs. Typically the private sector bears more risk under a PPP.* | |
| **Public Interest** | If the project was a PPP, would the structure(s) of the contract be in the public interest?<br>*Note: An 'on-balance' determination as to whether the public interest can be adequately protected or served through a PPP model is required.* | |
| **Whole-of-life Opportunity** | Can services be bundled to create a long-term operational / maintenance opportunity?<br>*Note: PPPs can realise efficiency where the full integration of planning, design, construction and ongoing service delivery can be the responsibility of the private sector.* | |
| **Third-Party Revenue** | User Charge PPP - is there an opportunity for private sector to take demand / revenue risk?<br>Avail. PPP – can a portion of the recurrent costs be offset with ancillary revenue streams?<br>*Note: Third-party revenues can be a good source of value for money for PPP projects.* | |
| **Innovation** | Is there scope for innovation in the delivery of this project?<br>*Note: Projects that are either well-defined or complex offer opportunities for innovation.* | |
| **Strategic Alignment** | Is there a genuine opportunity to introduce a new delivery model for identified services?<br>*Note: Adopting an alternate delivery model at one location may not be suitable in the context of an agency which already has a long-term/system-wide approach to the service. However, if there is an opportunity and a benefit of the agency adopting a new model at multiple sites this may assist with achieving the necessary strategic alignment in service delivery.* | |
| **Resource Availability** | Is the public sector in a position to commit specialist resources to a PPP procurement process?<br>*Note: Additional senior resources will be required to manage tasks during the project development and procurement phases – i.e. output specifications, commercial principles, abatement regimes and spreadsheet models. These resources may also be required to spend more time than they would with traditional procurement methods.* | |
| **Market Capacity and Appetite** | If the project were a PPP, would it be likely to attract a number of competent bidders?<br>*Note: A genuine commercial opportunity is likely to attract a number of private sector parties and allow for an effective and competitive tender process.* | |

***Note:*** *Each criteria is to be assessed as either high, medium or low suitability.*

### Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 9** identifies the sections in the *National PPP Guidelines* which examine PPP suitability in further detail. That document provides background information that may be useful in applying the above criteria.

**Table 9 – Relevant Sections from *National PPP Guidelines* – PPP Suitability**

| Volume | Section |
|---|---|
| **Volume 1 – Procurement Options Analysis** | Section 3 – Delivery Model Options; and<br>Section 4 – Selecting a Delivery Model. |

## 5.5 Financial Analysis

### 5.5.1 Summary and Approach

The requirements around the financial analysis of PPP projects are comprehensively set out in the *National PPP Guidelines*. Government require the sponsor agency, MPC and their financial advisor to work closely with Treasury to meet those requirements.

This section summarises a few of the key issues from those guidelines:

- PSC Model;
- PPP Proxy Model;
- Discount Rates;
- Timing / Use of Financial Analysis; and
- Budget and Accounting Treatments.

Each of these issues are considered at a high-level in the remainder of this section.

### 5.5.2 PSC Model

The PSC is an estimate of the hypothetical risk-adjusted whole-of-life cost of the project on the assumption that the public sector delivered the output specification using a traditional delivery model (e.g. D&C model).[31]

The PSC will include estimated costs for detailed design, capital works, lifecycle maintenance and ancillary services[32] to determine the overall project cost (i.e. the 'raw' PSC). Consideration is also given to the value of the risk that the public sector will bear under the traditional delivery model (i.e. the 'adjusted' PSC).

Further details on the calculation and application of the PSC are contained within *Volume 4: PSC Guidance* of the *National PPP Guidelines*.

[31] There may be situations where other factors are relevant to the development of a PSC - i.e. the inclusion of third-party revenues in the project cash flows; or when D&C is not likely to be most suitable traditional delivery method (e.g. managing contractor or construct-only is considered the base scenario). The project team will need to consult with ICA at an early stage if these characteristics are present in the project.

[32] In some cases, third-party revenues and residual values may also be applicable to the PSC.

### 5.5.3 PPP Proxy Model

The PPP Proxy Model is also an estimate of the whole-of-life project cost, however in this case, it is an estimate based on the project being delivered as a PPP rather than through traditional delivery.

At the very minimum, this model needs to calculate the series of payments from the public sector to Project Co during the operating period based on the project cost estimates. As indicated in the *National PPP Guidelines*, this information will be used as part of the assessment process in the business case.

It is noted that the specifications for this model may vary according to the type of project. In some cases, a highly sophisticated model with financing and tax inputs will be required.[33] These requirements align with the *National PPP Guidelines*.

### 5.5.4 Discount Rates

This financial input is necessary for the calculation of the present value of the projects future cash flows. The basis of a discount rate is a combination of the time value of money and the opportunity cost of money and it may include a premium to reflect the risks relating to project cash flows.

A discount rate is a necessary input to the above financial models because it provides a consistent comparison of different cash flow profiles over time. As noted above, this is required because each of the above financial models has very different cash flow profiles. The discounting process is necessary to express the cash flows on a 'common-basis' that can be used for further analysis (refer below). The discount rate is also used to adjust the cash flows for the different risks associated with public and private sector delivery.

The calculation of suitable discount rates should be undertaken by a suitably qualified financial advisor in conjunction with ICA and the Economic and Finance Group more broadly. They should follow the process outlined in *Volume 5: Discount Rate Methodology Guidance*[34] of the *National PPP Guidelines*.

The project team should seek specific guidance from ICA when developing this assumption for the discount rate calculation.

### 5.5.5 Timing / Use of Financial Analysis

The project team and their advisors will initially develop the discount rate, the PSC Model and the PPP Proxy Model for the project business case. The business cases uses this information to indicate the viability and attractiveness of the PPP project. These models may also be updated and used for other purposes during the procurement process.

If the models are used for other processes at a later time, the discount rates may need to be updated for changes in the underlying rate assumptions. This is to ensure consistency between them

[33] In the case of the User Charge PPP delivery model, additional assumptions are required to develop the full financial viability model used as a PPP Proxy. These include assumptions around project demand, user charges and third-party revenues that would not be applicable to an Availability Payment PPP delivery model. ICA will need to be consulted in relation to these assumptions / requirements.

[34] It should be noted that the main body of the document provides the means to estimate discount rates for social infrastructure projects. Appendix D of Volume 5 (*National PPP Guidelines*) sets out the approach for economic infrastructure projects.

and the bidders' finance costs. If there are subsequent significant movements in these underlying assumptions,[35] it is appropriate to update the financial analysis again before the final decision to award the PPP contract, to ensure that the project continues to represent value for money as a PPP.

As noted in **Section 4.5: Using these Guidelines for PPPs**, Government has developed a number of policy principles in relation to the above financial analysis. The first of these principles are set out in **Box 1** and **Box 2** – i.e. the role / calculation of the PSC and the discount rate respectively.

**Box 1 – Role and Calculation of the PSC**

**ACT PPP Policy Principle**

The role and calculation of the PSC will be consistent with the approach adopted in the *National PPP Guidelines*.

The PSC will be used as a cost estimating tool for the business case. Following that, it may also be updated and used to assist in the evaluation of private sector bids.

The PSC will not be the sole metric used to determine whether PPP or a bid provides value for money.

In general, the RFP provided to bidders should disclose the PSC. This should include transferred risk, but exclude the retained risk allowance.

The PSC is a dynamic measure. The project team should update it if significant new information becomes available and to reflect changes in market discount rates.

**Box 2 – Role and calculation of discount rates**

**ACT PPP Policy Principle**

The calculation of discount rates should be consistent with the approach in the *National PPP Guidelines*.

The project team should seek specific guidance from ICA on the appropriate risk-free rate for the PSC calculation - i.e. the proxy for the yield to maturity of a long-term Government debt instrument.

The project team should generally update the various discount rates for movements in the risk-free rate to ensure consistency between them and the bidders finance costs.

### 5.5.6 Budget and Accounting Treatment

The accounting issues related to PPPs are complex and the treatments need to be developed in accordance with the relevant guidance and in conjunction with government accounting specialists.

[35] For example, movements in long-term interest rates can impact on the risk-free rate which is a key input into the discount rate calculation.

This section summarises those requirements and the approach to which the project team should be taking to budget / accounting requirements.

In 2019, the Australian Accounting Standards Board issued *AASB 1059 – Service Concession Arrangements: Grantors*.[36] These standards were taken into account when the ACT Government (Treasury) updated their own accounting guidance for PPPs - i.e. *AAPP 109 – ACT Accounting Policy Paper on AASB 1059*.[37] Both sets of guidance material cover a situation of Project Co directly providing public services. Although this situation is normally covered by these guidelines, there are circumstances in which it is not.

As a result of the above, the project team is required to consult with Treasury (Finance and Budget Group) and external specialists on the suitable accounting treatment for the project. They will need to review the likely balance sheet impact and the budget implications based on specific project / transaction characteristics to consider if other guidance is relevant.

**Box 3** outlines Government's PPP principle on the budget and accounting treatments for a project of this type.

**Box 3 – Budget and Accounting Treatments**

**ACT PPP Policy Principle**

The sponsor agency / MPC must consult with Treasury (Finance and Budget Group)[38] / ICA to assess the requirement to apply AASB 1059[39] and to formulate a suitable accounting position for each PPP.

Treasury (Finance and Budget Group) and / or ICA may indicate that the project team should seek additional external specialist advice to assist Treasury with formulating the accounting position.

There may be a requirement to re-confirm the position during subsequent stages of the procurement.

### Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 10** lists the sections of the *National PPP Guidelines* relevant to the financial analysis (**Section 5.5**). As noted above, the accounting guidance provided in the *National PPP Guidelines* has since been superseded by *AASB 1059 – Service Concession Arrangements: Grantors*. The accounting guidance in the *National PPP Guidelines* is not referenced to below for that reason.

[36] Australian Accounting Standard Board (AASB) 1059 Service Concession Arrangements: Grantors on PPPs - https://www.aasb.gov.au/admin/file/content105/c9/AASB1059_07-17_COMPoct18_01-20.pdf

[37] ACT Accounting Policy for Public Private Partnerships Financed by The Operator - Microsoft Word - AAPP 109 - ACT Accounting Policy Paper on AASB 1059 Service Concession Arrangements Grantors

[38] The sponsor agency / MPC may also be required to seek an accounting opinion from an external specialist as part of this process.

[39] Whilst AASB1059 covers the situation of Project Co directly providing particular services to the public sector over an operating phase, it may not represent the correct accounting treatment on some PPP projects. The sponsor agency / MPC may need to consult with Treasury regarding other potentially applicable accounting standards.

**Table 10 – Relevant Sections from *National PPP Guidelines* – Financial Analysis**

| Volume | Section |
|---|---|
| **Volume 4 – PSC Guidance** | Part 1 – PSC Technical Guidance; and<br>Part 2 – PSC Worked Example. |
| **Volume 5 – Discount Rate Methodology Guidance** | Section 2 – PSC Supporting Theory;<br>Section 3 – Discount Rate Methodology for PPPs; and<br>Section 4 – Specific Issues With the Use and Determination of Discount Rates. |

# 6. Procuring a PPP Project

## 6.1 Overview

This section provides an overview of the first part of the procurement phase – i.e. PPP planning and PPP structuring.

More detailed information on both aspects of this phase is available from the following volumes of the *National PPP Guidelines:*

- *Volume 2 – Practitioners' Guide;*
- *Volume 3 – Commercial Principles for Social Infrastructure; and*
- *Volume 7 – Commercial Principles for Economic Infrastructure.*

## 6.2 Planning and Probity

Once a decision has been made to procure a project by PPP, the project team need to start planning for future phases of the project. That planning can take several months to complete. As noted below, the key considerations during this phase comprise of resourcing, tender planning and probity.[40]

### 6.2.1 Resource Planning

The public sector will commit the resources necessary to develop the project structure and commercial principles.

The key resource considerations during this phase include:

- **A dedicated project team** – the complexity and scale of PPP projects will require a dedicated team-based management approach to ensure that the necessary skills and experiences are brought in when required to obtain knowledge in a cost-effective manner. Specialist expertise (e.g. commercial, legal and technical) will be required during the course of the project. The project team will need to be able to supplement its capabilities by secondments and the engagement of advisors. It is critical to identify appropriate time commitments required for specialised roles in the PPP process. MPC will lead the project team on a Designated Major Project and will engage with the sponsor agency to bring together a suitably qualified team;
- **Legal advice** - the project team will engage with the ACT Government Solicitor office to obtain advice to properly understand the legal risks associated with pursuing a PPP for the project and how those risks may be managed through the legal relationship.
- **Project plan and timetable** – the project team will prepare a clear project plan. This will not only give consideration to the tender timetable but also account for the required internal approval and review processes, planning approval processes and public consultation processes;
- **Probity plan** – a probity advisor will be appointed in the early stages of project development to support the development of a probity plan. The probity advisor will also assist in ensuring that the probity plan is followed; and

[40] ICA may co-review the plans the project team has in place for these requirements (e.g. project management plan and probity plan). MPC would also review these plans.

- **Procurement phase budget** – each project will be provided with a separate budget for the procurement phase to meet agency and third party costs to advance the project (e.g. design), including contingency and the project director has full discretion to utilise that budget in delivering the procurement outcome.

### 6.2.2 Tender Planning

Procurement for a PPP is almost always significantly more complex than when using a traditional model and include three distinct stages. Typically, project teams should allow over 18 months to complete these three stages, which are:

- **Expression of Interest ("EOI")** – the first phase of a formal tendering process used to shortlist bidders to proceed to submit more detailed proposals;
- **Request for Proposal ("RFP")** – the procurement phase involving the release of more detailed tender and contract material to shortlisted bidders for detailed, fully costed responses, followed by evaluation and selection of the preferred bidder; and
- **Negotiation and Transaction Phase** – the final phase of a tender process where the preferred bidder and the public sector negotiate and execute a commercially binding agreement.

The EOI and RFP stages represent key interface points in the tendering process for the public sector to identify, evaluate and select the bidder who best delivers on the project's objectives with an intent to enter into a commercially binding agreement under a PPP arrangement. During those tender stages, there is also a need to develop and issue the project documents described in the following section.[41]

The EOI stage represents a preliminary view of the private sector's likely ability to deliver on the project's objectives and it also serves to validate market interest and the degree of competitive tension to support a value for money outcome for the ACT.

The RFP stage represents a substantially more detailed process requiring further commitment in terms of time and resources from both the public and private sectors. It is in this process where a preferred bidder is selected and final negotiations begin before the contract is awarded and executed.

### 6.2.3 Probity Planning

This is the third key focus area in terms of planning. This sub-section summarises the requirements at a high-level. Further detail on these requirements is contained within the *Capital Framework*[42] and the *National PPP Guidelines*.[43]

Government seeks to conduct its dealings with the private sector with integrity and transparency in all matters. The solicitation, evaluation and negotiation of bids for PPP projects must be fair and demonstrate the highest levels of probity.

The *Capital Framework* indicates that the following probity principles should be applied:

- consideration of an appropriately competitive process;

[41] These include the project documents which specify arrangements around the: performance regime; output specification; payment mechanism; abatement regime; the provision of additional financial support; and project flexibility / expansion.
[42] https://www.treasury.act.gov.au/capital-framework/about-the-framework/probity
[43] *National PPP Guidelines*, Section 14 – Probity and Integrity

- fairness and impartiality;
- consistency, transparency, and accountability;
- identification and management of conflicts of interest; and
- appropriate security and confidentiality arrangements.

As a result of the above, it is essential to ensure that a transparent process is followed throughout the procurement. Government will be supported by an external probity to ensure that an appropriate and robust outcome-focused process is followed at all times. External legal probity advice is engaged through the ACT Government Solicitor's office.

The probity advisor will maintain an objective yet commercially-minded perspective throughout the tender process and provide appropriate advice to the project team (and Project Board, if present). To ensure that probity concerns are addressed as early as possible, a probity plan should be prepared by the project team / probity advisor and submitted to the appropriate governing body for approval.

**Box 4** outlines Government's PPP principle on probity for this type of project.

**Box 4 – Probity Focus**

**ACT PPP Policy Principle**

A probity advisor will generally be appointed before the EOI stage of a PPP project.

Probity advice should remain flexible and practical, as well as appropriate, fair and equitable. The probity advisor should provide advice consistent with established commercial practice with a focus on achieving an outcome that benefits the ACT, while being commercially viable for the preferred bidder, and fair for all bidders.

As noted in **Section 6.3.2: Interactive Tender Process**, sessions between the project team and bidders will need to be conducted in the presence of the probity advisor.

The project team should appoint a probity advisor with established experience in PPP processes.

### Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 11** summarises the sections of the *National PPP Guidelines* relevant to the project development phase.

**Table 11 – Relevant Sections from the *National PPP Guidelines* – Planning**

| Volume | Section |
|---|---|
| **Volume 2 – Practitioners' Guide** | Section 3 – Project Development Phase;<br>Section 14 – Probity and Integrity;<br>Section 16 – Communication;<br>Appendix C – Conflict of Interest; and<br>Appendix D – Related-party Probity Principles. |

## 6.3 PPP Structuring

Developing a suitable contract structure is another key aspect of procuring a project of this type. This will involve consideration of Government's position in relation to the following aspects of the contract / procurement process:

- output specification;
- interactive tender processes;
- performance regime;
- payment mechanism;
- abatement regime;
- risk allocation;
- financial support for the project; and
- project flexibility and expansion.

The remainder of this sub-section summarises Government's approach to PPP structuring. More detailed information in relation to PPP structuring is provided in the National PPP Guidelines (**Section 6.3.8: Project Flexibility and Expansion**, indicates the relevant sections of those guidelines).

### 6.3.1 Output Specification

The output specification is a key feature of projects adopting this delivery model. It involves the public sector specifying the project's requirements and scope as outputs,[44] rather than in terms of inputs such as a prescriptive design, required construction and maintenance methodologies, etc.

Specifying outputs generally involves setting the requirements in terms of design, functional and technical requirements during the construction and service delivery that would allow Government to meet the project's objectives.

A descriptive, or output-driven scope, is preferred, rather than prescriptive, or input-driven scope. The latter may otherwise impede value-add in terms of innovation and value for money or impact intended risk allocation from the private sector.

The output specification will reflect the broad scope of the project / Government requirement. Common errors in the development of the output specification often include a lack of consistency in quality requirements, such as the need to maintain availability, maintaining asset quality and achieving handover requirements, which require considerable lifecycle and maintenance expenditure.

An input specification may impede bidders from proposing a value-for-money solution using an innovative approach, and may result in the public sector bearing risk that it had intended to allocate to the private sector.

The project team will need to agree the output specification with relevant project stakeholders, and clearly set it out in the RFP to ensure bidders respond in an optimal manner.

**Box 5** outlines Government's PPP principle on output specifications for these projects.

[44] The requirements are specified in terms of the functions and service quality standards in order to meet the project's objectives.

**Box 5 – Project Scope and Specification**

**ACT PPP Policy Principle**

Government will endeavour to be output-focused when developing the scope for a PPP project, and subsequently its detailed specifications, to maximise the opportunity for private sector innovation and to minimise the potential for the public sector to bear project risks inappropriately.

Under the circumstances where the project has specific needs that are well understood by the public sector, then a more prescriptive or input-focused approach may be applied, in consultation with ICA.

### 6.3.2 Interactive Tender Process

Government prefers an 'Interactive Tender Process' during the procurement phase of a PPP project. It provides an opportunity for the project team and shortlisted bidders to have direct communications in a structured engagement process prior to the submission of the final RFP bid. This engagement must be informed by probity considerations to ensure that the process remains fair and unbiased.

The project team will elaborate on its expectations in response to feedback and clarification being sought by shortlisted bidders. The key objective of an Interactive Tender Process is to improve the quality of RFP bid submissions and ultimately deliver a better value for money outcome for the community.

**Box 6** outlines Government's PPP principle on interactive tendering as part of the RFP for this delivery model.

**Box 6 – Interactive Tender Process**

**ACT PPP Policy Principle**

An Interactive Tender Process is preferred for a PPP tender process. If used for a particular project, that process will generally commence during the procurement phase – i.e. when the project is out-to-market.

All interactive tendering sessions between the project team and bidders will need to be conducted in the presence of the probity advisor.

### 6.3.3 Performance Regime

Performance regimes in the PPP contract assist in driving the required behaviour and performance from Project Co to ensure that specific standards required by Government are sustained throughout the term of the PPP contract. These can be drawn from a combination of enforcement and incentive mechanisms.

The performance regime indicates the required performance standards of the various services within the project's scope. Best practice is for the public sector to specify Key Performance Indicators ("**KPIs**") to measure the achievement of the required services.

The KPIs themselves generally will follow the SMART principle:

- **S**pecific;
- **M**easurable;
- **A**chievable;
- **R**elevant; and
- **T**ime-based.

Project Co needs to have control or influence over the achievement of the KPIs, and there needs to be readily available data through the duration of the project to be able to measure Project Co's performance. The performance regime will specify the required minimum levels of the KPIs.
The number of individual KPIs should be manageable, so as not to impose an excessive administrative burden on both Project Co and the project team in monitoring performance against them.

### 6.3.4 Payment Mechanism

The payment mechanism forms the core of a PPP contract for an Availability Payment PPP. Its primary purpose is to remunerate Project Co sufficiently for it entering into a commercially binding contract and providing the service. Together with the PPP contract, the payment mechanism represents the principal means for allocating risks and providing incentives in the PPP contract, where Government makes a payment to Project Co for providing a service at an agreed standard of quality.

For most projects, performance above the required levels of the KPIs has limited value to Government. In addition, the generally fixed nature of budget funding for PPP projects means that it is difficult for the agency to pay for such over-performance. However, there may be particular projects for which Government would consider options to put a value on performance above the required level. If the project team believes that such circumstances apply, it should consult with Treasury about the funding impact and confirm the suitability of the payment mechanism with ICA.

Payments will only normally commence when Project Co has completed construction and commissioning of the project asset and commenced provision of the required services. If the project contains discrete phases, with Project Co providing services for early phases before the completion of subsequent phases, there can be partial payments for such initial services. Similarly, if Project Co takes over existing assets and provides services using those assets from the commencement of the PPP contract, there can be partial payments for such initial services. In such circumstances, the project team should consult with ICA on the appropriate level of such partial payments. In general, such partial payments ideally should be at a level that does not provide any substantive return to equity investors, to maintain a financial incentive on Project Co to complete the entire project on a timely basis.

The main part of the payment mechanism is a series of payments made to Project Co that are typically subject to partial indexation by one or more published price, cost and / or wage index.

Typically, the full payment to Project Co is subject to abatement. There may also be parts of the payment that are not subject to abatements, for example linked to:

- specific costs for which Government bears the risk, such as utility costs;

- the volumes of certain specific services; and
- pre-determined lifecycle maintenance costs (Project Co normally will bear he risks of actual costs differing from these pre-determined costs).

**Box 7** outlines Government's PPP principle on payment mechanisms for Availability Payment PPPs.

**Box 7 – Payment Mechanism**

**ACT PPP Policy Principle**

As a default position, Government will make payments to Project Co in arrears, at a contracted price over time, for the services as defined in the PPP contract.

Payments will be subject to performance-based abatements to ensure that Project Co meets specific service delivery standards over time.

The above payment mechanism relates to an Availability Payment PPP model. The payment mechanism for the User Charge PPP model are generally less extensive and prescriptive in nature.[45] For example, the payment mechanism may be limited to the specification of the charges that Project Co can levy on users, including:

- the maximum charge that Project Co can levy, which may vary by different categories of user, amount of usage, time of day, etc.; and
- the method of escalating user charges in line with inflation.

### 6.3.5 Abatement Regime

Under the Availability Payment PPP model, Government will aim to have an abatement mechanism which provides an appropriate balance between supporting appropriate service delivery through compliance with the required levels of service and avoiding being unnecessarily punitive or unreasonable.

The key aspects of this regime are likely to include abatements for unavailability and / or poor performance. The project team will determine the precise nature of these arrangements in consultation with ICA. This will be undertaken in accordance with market norms during the project development phase and documented in the commercial principles.

**Box 8** summarises Government's approach / policy principle for abatement regimes.

[45] It is noted that the user charges / revenues may be a proxy for providing high levels of service and being paid accordingly the services and the infrastructure. Note that the abatement regime is also less relevant to the User Change PPP model for the same reason.

**Box 8 – The Definition and Use of Abatement Regimes**

**ACT PPP Policy Principle**

Abatement regimes (i.e. performance-based frameworks) need to be simple, measurable and manageable. The ACT Government reserves the right to specify KPIs that reflect critical and core outcomes sought by a project.

Key performance areas to be considered include:

- availability of service;
- quality of service;
- customer experience; and
- performance incentives.

As a default position, the public sector will endeavour to be more prescriptive in the development and disclosure of an abatement regime for core performance metrics at the start of the RFP process.

### 6.3.6 Risk Allocation

The core of a PPP and one of the key principles under the *PPP Guidelines*[46] is a 'partnership-led' approach – i.e. the public sector working in a collaborative and cohesive manner with Project Co to support successful project delivery.

One facet of this partnership-led approach is the allocation of project risks to the party best able to manage them. This optimal allocation has changed over time in response to the occurrence of risk events within PPP projects in other jurisdictions, and is likely to continue to do so. In determining their initial proposed risk allocation, the project team should seek advice from ICA.

The *National PPP Guidelines*[47] provide further information on the key risk allocation issues and commercial principles that a PPP project involves.

### 6.3.7 Additional Financial Support for the Project

As noted in **Section 2.2.1: Availability Payment PPPs**, the public sector will make periodic payments over an extended period for the availability of infrastructure and performance of services under this delivery model. However in some cases, the public sector may seek to provide extra funding[48] during the initial phase of the project. The nature of those contributions would need to be assessed by ICA during the project development phase. That assessment will take into account the characteristics of the project, the effective allocation of risk[49] and the current market precedents.

User Charge PPPs have historically relied on tolls and other user charges to fund the capital, operating and financing costs of a project. However, the failures of several User Charge PPPs due to their actual

[46] See Section 3.1: Guiding Principles Overview

[47] *Volume 2: Practitioners' Guide*, provides a high-level overview of the key risk allocation issues and commercial principles that a PPP project involves; and *Volume 3: Commercial Principles for Social Infrastructure* and *Volume 7: Commercial Principles for Economic Infrastructure* provide more detailed guidance.

[48] This may also take the form of non-monetary contributions (e.g. long-term leases over project lands).

[49] This may include ensuring that Project Co maintains sufficient level of private sector debt and equity to support this.

usage being substantially less than Project Co anticipated have meant that new User Charge PPPs may not be possible, or only viable with some form of public support.[50]

In the case of both Availability Payment PPPs and User Charge PPPs, Government is unlikely to provide support in the form of:

- concessional loans;
- debt guarantees;
- operating subsidies;
- equity; and
- loans where repayment is contingent on the project achieving a pre-determined level of usage;

as these forms of support are unlikely to provide value for money.

**Box 9** outlines Government's PPP principle on capital contributions for projects of this type.

**Box 9 – Capital Contributions**

**ACT PPP Policy Principle**

Government may elect to incorporate a capital contribution into its funding profile for any prospective PPP.

Where Government elects to make a capital contribution, it will require Project Co to maintain a sufficient level of private sector debt and equity to support the effective allocation of risk to the private sector.

### 6.3.8 Project Flexibility and Expansion

Allowances may also need to be made for project requirements to change over time – i.e. if there is a need to expand the capacity of the existing PPP asset or add a new asset.

The public sector is likely to manage 'minor changes' in project scope through good-faith negotiations with Project Co. Undertaking 'major changes' to a project through the modification provisions in the PPP contract, will require complex single-party negotiations with Project Co unless the change was specifically contemplated at the origination of the contact. Demonstrating value for money in thes circumstances can be challenging.

Generally, determining whether a change is minor or major is based on whether the financial impact is either a significant proportion of the original construction cost or the net present cost of operating period payments from the public sector to Project Co.

If the project team become aware of a possibility of a major change in scope it should consult with ICA immediately and assist with the development of options to manage this. These plans may need to be presented to Government for consideration.

[50] However it is noted that extensions of existing projects (with a mature demand profile) may still be possible without a public sector contribution.

**Table 12** describes the management of and consent processes associated with minor and major changes to scope on PPP projects.

**Table 12 – Different Approaches to Managing Changes in Scope**

| Approach | Description | Comments |
|---|---|---|
| **Negotiations with Project Co** | Negotiations in good faith with Project Co, its subcontractors and its financiers. | • Flexibility over the scope of the change.<br>• These different parties have different and sometimes conflicting interests, making negotiations complex.<br>• Lack of competitive pressure.<br>• Demonstrating value for money will be difficult, even with open book pricing and benchmarking.<br>• Determine benefits and costs to public and private sector.<br>• Follow the original project risk allocation with any changes made as a result of specific project / scope changes.<br>• Cabinet or the Director General of the sponsor agency may need to authorise such direct negotiations under the *Government Procurement Regulations, 2007.* |
| **RFP Option** | The RFP and subsequently the PPP contract include an option for the potential change in scope. | • Competitive determination of the 'price' of the change, helping demonstrate value for money.<br>• 'Price' fixed in the PPP contract and a budget provision created.<br>• Requires certainty on the scope of the change within fixed bounds.<br>• Project Co is likely only to be able to commit to a fixed price for a limited period, within which the option will need to be exercised. |
| **Re-tender** | The public sector procures a new project to take over the existing project (including its financing) and undertake the change in scope. The new Project Co will pay the termination compensation due to its predecessor. | • Competitive determination of the 'price' of the change, helping demonstrate value for money.<br>• 'Price' fixed in the PPP contract.<br>• Flexibility over the scope and timing of the change.<br>• Project Co will have the advantage of incumbency, which may limit competition.<br>• Transaction costs will be significant. |

## Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 13** summarises the sections in the *National PPP Guidelines* that are relevant to the above discussion on project structuring **(Section 6.3)**.

**Table 13 – Relevant Sections from the *National PPP Guidelines* – Project Structuring**

| Volume | Section |
|---|---|
| **Volume 2 – Practitioners' Guide** | Section 6 – Negotiation and Completion Phase;<br>Section 11 – Risk Allocation;<br>Section 12 – Payment Mechanisms;<br>Section 14 – Probity and Integrity;<br>Section 16 – Communication;<br>Section 17 – Post-tender Debriefing Principles;<br>Appendix B – Example Risk Tables;<br>Appendix C – Conflict of Interest; and<br>Appendix D – Related-party Probity Principles. |

# 7. Managing a PPP Project

## 7.1 Overview

This section provides an overview of project delivery and contract management under this delivery model. In particular, it covers the principles that Government has adopted with respect to achieving a consistent and efficient risk allocation for the delivery of PPPs. These principles have been adopted based on the lessons learnt from other projects.

This section should be read in conjunction with the following volumes of the *National PPP Guidelines*:

- *Volume 2 – Practitioners' Guide;*
- *Volume 3 – Commercial Principles for Social Infrastructure;* and
- *Volume 7 – Commercial Principles for Economic Infrastructure.*

## 7.2 Contract Management

### 7.2.1 Summary and Approach

Following the close of a PPP transaction, the project team will spend the majority of their time on governance and management of the project.

There are two distinct phases of contract management activity, with specific activities associated with each. These are:

- **Project Delivery (also known as Construction Delivery or Implementation)** – this phase commences when construction starts and continues through to the commissioning and commercial acceptance of a project, where the services required by the output specifications begin; and
- **Project Operation (also known as Service Delivery)** – this phase covers the provision and use of the contracted operational services during the remaining term of the contract, including the period leading up to contract expiry or termination.

Each of these phases is examined in detail in the following two sub-sections of this document.

In general, the key point to note about effective contract management is that both the public and private sectors will require resources that are capable of managing and operating the PPP project. Preferably, this will involve a degree of continuity of resources through the key project phases (procurement, delivery and operations).

A number of commonly applied contract management practices for both phases include:

- **Contract administration** – in addition to being familiar with the technical, commercial, financial and legal aspects of the contract, the project team needs to have a close understanding of project objectives and requirements and the commercial intent of the parties involved; the operational, industrial and community issues associated with the project; and the regulatory context in which the project operates. This includes the management and administration of the payment mechanism;

- **Performance monitoring and reporting** – Project Co has full delivery responsibility, including self-monitoring and reporting, subject to review, audit and provision of ongoing detailed performance reporting;
- **Knowledge management** – this includes client and stakeholder feedback, performance monitoring and reporting, and ongoing risk management. Having an effective information management strategy customised to the individual project's needs is essential in ensuring the project team's ability to successfully manage the PPP contract. Information collected and analysed will help refine planning and management strategies over time as the project team gains a better understanding to enable it to better manage project risks;
- **Maintenance of relationships** – the project team need to maintain an appropriate and strong relationship with Project Co, to assist in the early identification and management of issues and to ensure that the obligations and benefits are delivered;
- **Change management** – given the long-term nature of PPP projects, arrangements need to allow flexibility to respond to change, supported by appropriate provisions in the contract. The processes for change are initiation, negotiation and agreement, covering the scope, quality and price response to ensure value for money is sustained. This also needs to encompass potential changes in resources, requiring the development of robust succession and handover plans, both for the project team and Project Co;
- **Contingency planning** – as a PPP project involves appropriate risk allocation between the public and private sector parties, it may not always be possible to transfer full responsibility to Project Co. As a result, Government will reserve the right to step-in and continue the supply of affected services in cases of service delivery failure, acknowledging that lenders will typically have advance step-in rights to remedy performance shortfalls prior to default;
- **Governance** – there should be appropriate governance, compliance and probity practices; and
- **Ongoing review** – The project team will continually monitor and adapt management and review processes throughout the term of a PPP contract to ensure that the sponsor agency and ICA is sufficiently informed of current and emerging risks and is able to respond early.

The remainder of this section examines a range of contract management issues during two distinct phases of the project – i.e. delivery stage and operations phase. The needs at each phases are considered in turn below.

### 7.2.1 Delivery Phase

#### (a) Summary and Approach

Depending on the nature of the asset, the delivery phase of a project generally lasts for one to five years from transaction close. A two-year construction period is typical for social infrastructure PPPs, with large scale economic infrastructure PPPs having a significantly longer construction period. Project implementation also involves further design development and the construction / commissioning of the project, followed by the commencement of operational services.

Contract management for this phase involves the assurance that the designers and builders within Project Co meet agreed upon delivery milestones, scope and quality standards and that the project itself meets the agreed construction completion requirements.

The following sub-section describes Government's position on the independent review and certification arrangements for a PPP project. Another form of independent assessment of project delivery is also considered in this sub-section – i.e. the Post Implementation Review.

#### (b) Independent Review and Certification

The provision of independent assurance services on major infrastructure projects has become a necessity in ensuring that a project is delivered efficiently and effectively in terms of fulfilling its specification and requirements as determined in the PPP contract.

Typically, the public sector will have an active monitoring role during the delivery phase despite the fact that the full design and construction responsibility rests with Project Co. However, to provide certainty that Project Co's obligations are met, an independent reviewer will be jointly appointed to report on scope, quality, program and performance. This includes site inspections and regular reporting on progress and certifying completion of the constructed assets and suitability for commencement of operational services.

**Box 10** outlines Government's PPP principle when appointing independent reviewers.

**Box 10 – Appointment of Independent Reviewer**

**ACT PPP Policy Principle**

To provide certainty that Project Co's obligations are met, an independent reviewer will be jointly appointed by Government and Project Co.

#### (c) Post Implementation Review

As part of the *Capital Framework* process, a Post Implementation Review ("**PIR**") may be undertaken / managed by ICA. The PIR will seek comprehensive feedback on the project development process in order to assess the project outcomes. Collecting and utilising project knowledge in this way can assist the public sector in optimising the delivery and outcomes on any future PPP projects. It can

also be used to assist senior officials with understanding the issues that may have arisen on the project.

A PIR of the project's development, procurement, evaluation and implementation will generally be initiated between six and twelve calendar months after commercial acceptance and operations have commenced. However, a PIR may be undertaken at a different time if required.

The PIR is part of the *Capital Framework* process and, in the context of a PPP approach, it will generally review completed projects in terms of:

- formulation, objectives and appropriateness of project scope;
- accuracy of value for money estimates and the delivery of net benefits;
- performance, including effectiveness of risk allocation;
- approval processes;
- delivery, including delivery time and budget performance;
- operations, including service delivery and financing;
- project management and procedures;
- functionality and quality of infrastructure; and
- industry, community and environmental management, including industrial relations.

Further detail on the scope of this review is contained within the *Post Implementation Review Template* updated in 2022. [51]

In addition to this review, performance and compliance will also be reviewed by the sponsoring agency and by the Project Board.

### 7.2.2 Operations Phase

#### (a) Summary and Approach

'General management' of the operations of a PPP contract will be required for the duration of the full contract term. The process involves ensuring that payments to Project Co are matched by specific service delivery standards over time, subject to performance-based abatement. It also includes ensuring that necessary asset lifecycle and maintenance obligations are met and end of contract term handover requirements are achieved.

In addition to the general management tasks, there are a number of 'financial events' that may arise over the course of a long-term contract with the private sector. These include refinancing, management of interest rate risks and consent processes for a PPP project.

The project team will need to monitor the implications of both the general management and financial events over the operations phase of the project. This involves assessing the implications of these events in terms of: value for money; costs / benefits to each party; budget impact; and change to commercial risk allocation. As issues with the above arise, the project team is required to notify ICA.

[51] https://www.treasury.act.gov.au/capital-framework/resources/measurement-and-review

The remainder of this section focuses on the management of the financial events that were noted above.

### (b) Regearing and Refinancing

As an overarching point, Government supports maintaining an optimal capital structure for PPP projects, as appropriate for the stage in the project's lifecycle and broader market conditions.

Regearing refers to altering the proportion of debt and equity in the capital structure. Regearing can result in significant financial gains for parties involved in a PPP project. Regearing will also generally result in an increase in potential termination liabilities for Government. As a result, it is generally regarded as appropriate to share financial gains between the public and private sector, with 50:50 established as the default position.

Refinancing involves a change to the terms on which debt is provided to Project Co, either initiated by Project Co as a result of favourable market conditions or material changes in the project's risk profile, or because the term of the original financing (or subsequent refinancing) is set to end. Refinancing can be undertaken in different forms including:

- a change in debt costs;
- an extension of debt tenure; and
- changes to debt covenants (e.g. financial ratios).

These changes can result in gains or losses for Project Co. The Government has no appetite for sharing refinancing risk, but expects to share in gains, with a 50:50 gain share established as the default position. The Government also has a legitimate interest in the identity and reputation of financiers (and equity partners) and may withhold its consent if these parties are not sufficiently reputable.

**Box 11** outlines Government's PPP principle on the treatment of refinancing gain share.

**Box 11 – Treatment of Refinancing and Regearing**

**ACT PPP Policy Principle**

As a default position, Government supports maintaining an optimal capital structure through regearing and refinancing arrangements proposed by the private sector provided that it share in any gains (e.g. a 50:50 gain share arrangement). The precise nature of these arrangements would need to be considered during the project development phase in conjunction with ICA.

Refinancing by way of revenue stream securitisation is also captured under this policy.

### (c) Managing Interest Rate Risks

Subject to the specifics of the project structure and financing, the default position for Government is that the risk of variations in long-term interest rates should be transferred to the private sector entity.

Interest rates, as a result of private sector financing, are typically higher to reflect a premium as a result of any systematic risks in the market. In that regard, this premium represents the additional cost the public sector is willing to pay for the interest rate risk allocation to be managed by the private sector.

The private sector may manage this risk by entering a long-term debt arrangement at financial close, the terms of which are largely determined by the project type, its risk profile and current market conditions.

Government may, under certain circumstances, be willing to bear the risk of interest rate variations. However, ICA would have to consider such arrangements and structures on a case-by-case basis.

**Box 12** outlines Government's PPP principle on managing interest rate risks.

**Box 12 – Managing Interest Rate Risks**

**ACT PPP Policy Principle**

As a default position, Government will seek financing solutions which involve the management of risks associated with long-term interest rates.

ICA can consider, on a case-by-case basis, innovative proposals that would mitigate the risks of Government being exposed to interest rate risk.

### (d) Consent Processes

As part of the contract management process, appropriate consideration needs to occur in relation to the type of 'financial events' that may arise over the course of a long-term PPP contract. These can include a major contract variation, refinancing, change of control or termination.

ICA, and in some cases the Under Treasurer, will need to consider and provide consent to these contract changes. Where appropriate, the project team should obtain advice from external advisors to provide the necessary capabilities to make an informed decision.

**Box 13** notes the PPP policy principles which outline Government's position on consent processes for refinancing, change of control and good faith negotiations.

**Box 13 – General Consent Process**

**ACT PPP Policy Principle**

ICA will have overall responsibility for reviewing the implications of 'financial events' that occur over the operations period of the project. In other words, ICA's role post project transaction close will be focused on life-of-project decision points (e.g. refinancing, change of control, enhancement negotiations and termination). ICA may take a key role in approving a refinancing or enhancement but a change of control or enhancement negotiation would require a sign off from the Under Treasurer.

### Cross-Reference Table to Further Information in the *National PPP Guidelines*

**Table 14** summarises the relevant contract management sections in the *National PPP Guidelines* during the delivery and management of a PPP project.

**Table 14 – Relevant Sections from the *National PPP Guidelines* – Delivery and Management**

| Volume | Section |
|---|---|
| **Volume 2 – Practitioners' Guide** | Section 7 – Contract Management;<br>Section 12 – Payment Mechanisms;<br>Section 14 – Probity and Integrity;<br>Section 16 – Communication;<br>Appendix C – Conflict of Interest;<br>Appendix D – Related-party Probity Principles; and<br>Appendix H – Contract Management Guidance. |


The Guidelines for Public Private Partnerships