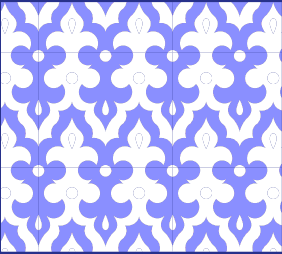


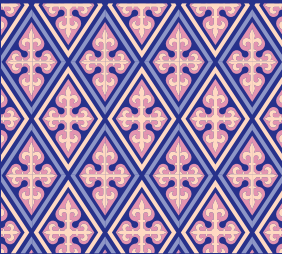


STATE OF KUWAIT  
PARTNERSHIPS TECHNICAL BUREAU



# Kuwait

**PUBLIC-PRIVATE PARTNERSHIP  
(PPP) PROJECTS**



Project Guidebook



# Kuwait

## **PUBLIC-PRIVATE PARTNERSHIP (PPP) PROJECTS**

*(in terms of Law No. 7 of 2008)*

### **PROJECT GUIDEBOOK**

State of Kuwait  
Partnerships Technical Bureau

**November 2009**

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State of Kuwait

This volume is a product of Partnerships Technical Bureau. The legislative provisions quoted in this Guidebook do not in any way substitute the original provisions, in Arabic, of Kuwaiti laws and regulations. In case of inconsistency between the legislative provisions as reported in the Guidebook and the original provisions in Arabic, the latter provisions shall always prevail.

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# Contents

Message from the Minister of Finance .....	ix
Acknowledgments .....	xi
Definitions & Acronyms .....	xiii

## **MODULE I: BACKGROUND** .....

I.1	Introduction .....	1
I.2	Salient Features of the PPP Law .....	2
I.3	Institutional Structure for PPPs .....	3
I.3.1	The Council of Ministers .....	3
I.3.2	The Higher Committee (HC) – Set up under the Provisions of Article 11 of the PPP Law and Decree No. 145 of 2008 .....	4
I.3.3	The Partnerships Technical Bureau (PTB) – Set up under Article 11 of the PPP Law and Decree No. 145 of 2008 .....	6
I.3.4	The Public Entities .....	7

## **MODULE II: INCEPTION** .....

II.1	Inception Module for Solicited Projects .....	9
II.1.1	The Role of the Public Entity at Inception .....	10
II.1.2	The Role of the PTB at Inception .....	10
II.1.3	The Role of the Transaction Advisor .....	10
II.1.4	The Process for Recruiting the Transaction Advisor .....	12
II.1.4.1	Drafting the Terms of Reference .....	12
II.1.4.2	Advertisement .....	17
II.1.4.3	Establishing the Bid Evaluation Committee and Bid Secretariat .....	18
II.1.4.4	Preparing and Conducting the Briefing Session .....	19
II.1.4.5	Receiving Bids .....	20

II.1.4.6	Evaluating Bids .....	20
II.1.4.7	Finalizing and Signing the Agreement .....	20
II.2	Inception Module for Unsolicited Proposals .....	21
II.2.1	Initial Study.....	23
II.2.2	Comprehensive Study.....	23
II.2.3	Recruitment of the Transaction Advisor .....	24
<b>MODULE III: FEASIBILITY</b>	.....	<b>25</b>
III.1	Feasibility Module for Solicited Projects.....	25
III.1.1	Pre-Feasibility Study Process.....	30
III.1.2	Feasibility Study Process .....	31
III.1.2.1	The Needs Analysis and Definition of Project Parameters/Scope.....	32
III.1.2.2	The Options Analysis .....	34
III.1.2.3	Project Due Diligence.....	35
III.1.2.4	Financial Assessment.....	36
III.1.2.5	Verifying Information and Signing Off.....	44
III.1.3	Management and Procurement Plan.....	45
III.1.4	Revisiting the Feasibility Study .....	46
III.1.5	Indicative List of Submission Requirements for the Feasibility Study Report .....	47
III.1.6	Feasibility Study Approval .....	48
III.2	Feasibility Module for Unsolicited Proposals.....	49
III.2.1	Unsolicited Proposals accompanied by Initial Study .....	49
III.2.2	Unsolicited Proposals accompanied by Comprehensive Feasibility Study .....	49
<b>MODULE IV: PROCUREMENT</b>	.....	<b>51</b>
IV.1	Link between Feasibility and Procurement Modules.....	51
VI.1.1	Detailed Understanding of all Aspects of the Project.....	51
VI.1.2	Affordability Limits .....	52
IV.1.3	Value for Money.....	52
IV.1.4	Procurement Plan .....	52
IV.1.5	Output Specifications.....	53

IV.1.6	Project Type and Participants.....	53
IV.1.7	Third Parties .....	53
IV.1.8	Funding Sources.....	53
IV.1.9	Payment Mechanisms.....	54
IV.1.10	Due Diligence by the Public Entity .....	54
IV.1.11	Risk Matrix.....	54
IV.2.	Important Considerations in the Procurement Stage.....	55
IV.2.1	Disclosure of Affordability .....	55
IV.2.2	Time Allowed to Bidders.....	55
IV.2.3	Land .....	55
IV.2.4	Existing Public Entity Assets .....	57
IV.2.5	Asset Replacement and Disposal .....	57
IV.3	Initiation of the Procurement Process: Expression of Interest .....	57
IV.4	Pre-Qualification.....	60
IV.4.1	Introduction to Pre-Qualification.....	60
IV.4.2	Important Considerations in the Pre-Qualification Stage ....	62
IV.5	Preparation, Approval, and Distribution of the Request for Pre-Qualification (RFQ) Documents .....	65
IV.5.1	Preparation of RFQ Documents .....	67
IV.5.1.1	Contents of the Advertisement of RFQ.....	67
IV.5.1.2	Contents of the RFQ Document.....	67
IV.5.2	Approval of RFQ Document .....	69
IV.5.3	Advertisement and Distribution of RFQ Document.....	69
IV.6	Receipt and Evaluation of Pre-Qualification Documents, Approval of Pre-Qualified Parties, and Communication with Bidders .....	71
IV.6.1	Receipt of Pre-Qualification Documents .....	72
IV.6.2	Evaluation of the Pre-Qualification Documents.....	72
IV.6.3	Approval of Pre-Qualified Investors.....	74
IV.6.3.1	Communicate with Bidders.....	74
IV.7	Preparation of Tender Document: Request for Proposals.....	74
IV.7.1	Preparation and Approval of Request for Proposal Documents.....	76
IV.7.1.1	Preparation of Request for Proposal document .....	81
IV.7.1.2	Contents of the RFP Document.....	81

IV.7.1.3	General Information to Bidders . . . . .	81
IV.7.1.4	Essential Minimum Requirements. . . . .	85
IV.7.1.5	Service Specifications. . . . .	86
IV.7.1.6	Standard Specifications . . . . .	87
IV.7.1.7	Payment Mechanism and Penalty Regime . . . . .	87
IV.7.1.8	Legal Requirements and Draft PPP Contract. . . . .	88
IV.7.1.9	Commitments Required from Bidders. . . . .	90
IV.7.1.10	Evaluation Criteria (in case of Competition) . . . . .	93
IV.7.1.11	Bid Formalities . . . . .	97
IV.7.1.12	Approval of Request for Proposal Document. . . . .	98
IV.7.2	Important Considerations for Managing the Bid Process . . . . .	98
IV.7.2.1	Anti-Corruption. . . . .	98
IV.7.2.2	Disclosure. . . . .	98
IV.7.2.3	Code of Conduct . . . . .	99
IV.7.2.4	Internal and External Audit . . . . .	99
IV.7.2.5	Prohibited Suppliers . . . . .	99
IV.7.2.6	Security Environment . . . . .	99
IV.7.2.7	Clarification Meetings. . . . .	99
IV.7.2.8	Bidder Notes . . . . .	100
IV.7.2.9	Changes in Consortia During Bidding. . . . .	100
IV.7.2.10	Bidder Due Diligence. . . . .	101
IV.7.2.11	Bid Validity Period . . . . .	101
IV.8	Bidding. . . . .	101
IV.8.1	Auction . . . . .	101
IV.8.1.1	Formation of an Auction Committee . . . . .	106
IV.8.1.2	Process to be followed when there is Pre- Qualification of Bidders: Two- Stage Process . . . . .	106
IV.8.1.3	Process to be followed when there is Post- Qualification: Single-Stage Process . . . . .	108
IV.8.1.4	Other Issues (common to both Pre- [Two-Stage] and Post- [One-Stage] Qualification Methods) . . . . .	110
IV.8.1.5	Awarding of Project . . . . .	111
IV.8.2	Competition . . . . .	111
IV.8.2.1	Formation of the Joint Committee . . . . .	113



IV.8.2.2	Invitation to Submit Bids .....	114
IV.8.2.3	Submission of Bids .....	114
IV.8.2.4	Evaluation of Bids .....	115
IV.8.2.5	Preliminary Work .....	115
IV.8.2.6	Detailed Analysis .....	116
IV.8.2.7	Clarifications .....	118
IV.8.2.8	Tasks of the Joint Committee .....	119
IV.8.2.9	Competition – Two-stage Process .....	120
IV.8.2.10	Stage 1 – Initial Bids .....	121
IV.8.2.11	Stage 2 – Final Bids .....	122
IV.8.3	Sale of Shares of Public Stock Company .....	123
IV.8.3.1	Incorporation of Public Joint Stock Company .....	125
IV.8.3.2	Preparation for Pre-Qualification .....	126
IV.8.3.3	Tender Process for 40 Percent Shares to the Investor .....	126
IV.9	Negotiation and Contract Signing .....	128
IV.9.1	Auction .....	128
IV.9.2	Competition .....	129
IV.9.2.1	Negotiation Methodology .....	131
IV.9.2.2	Unsuccessful Negotiations .....	132
IV.9.2.3	Successful Negotiations .....	133
IV.9.2.4	Confiscation of Initial Bond .....	133
<b>MODULE V: PROJECT IMPLEMENTATION AND MONITORING .....</b>		<b>135</b>
V.1	Contract Management Process .....	136
V.2	Performance Monitoring .....	136
V.3	The Review Process .....	137
V.4	Dispute Resolution .....	139
<b>ANNEX A: VARIOUS TYPES OF PPPS .....</b>		<b>141</b>
<b>ANNEX B: LAND VALUATION .....</b>		<b>149</b>
<b>ANNEX C: RISK MANAGEMENT IN PPPS: IDENTIFICATION, ALLOCATION AND MITIGATION .....</b>		<b>153</b>



# Message from the Minister of Finance

On behalf of the Partnerships Technical Bureau (PTB), it is my pleasure to present the Project Guidebook for the Implementation of Public Private Partnership (PPP) Projects in Kuwait.

Public-Private Partnerships in various forms and agreements are means for the State to introduce private-sector capital and expertise in sectors traditionally under public control, such as the provision of public services, without losing its supervision of output quality and tariff levels. International experience proves that PPPs introduce private-sector practices and efficiencies, promote competitive markets, and facilitate innovation, reducing costs and improving output quality while ensuring the protection of public interests.

Consistent with its strategy to promote and support increased private-sector participation in infrastructure development, the Government of Kuwait has established a PPP program. Law No. 7/2008 sets the foundation for the implementation of infrastructure PPP Projects in Kuwait. The Law combines the objective of attracting private-sector participation based on competitive and transparent rules with the social objective of ensuring that the economic benefits of private investment are shared with Kuwaiti citizens. The scope of the Law is great, applying to both infrastructure Projects for public service delivery and commercial land development Projects, thus providing many opportunities of partnerships, to the benefit of the nation's economic development and growth.

The PTB is the focal point agency of the PPP program, in charge of the financial and technical evaluation of PPP Projects. Established under Article 12 of Law No. 7/2008, it is involved in all phases of the Project, from inception to financial close.

This Guidebook, produced by PTB, is intended to inform and orient public entities and private investors in undertaking PPP Projects.

The Government looks favorably on the development opportunities that will stem from the PPP program. It is also conscious of the complexities of such Projects and the challenges that will inevitably arise. Thus, while presenting this Guidebook and striving for its broadest dissemination, the Government wishes to initiate a participatory process, involving all stakeholders, that will ensure success of the PPP program and the development of those Projects that are in the best interests of the country.

Minister of Finance  
State of Kuwait

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# Definitions & Acronyms

***Auction Committee:*** as defined in Article 2 of the Regulations issued in terms of the Law. It refers to the committee prescribed in Article 17 of the Regulations to undertake the evaluation of bids for Projects under the auction procurement methodology.

***Construction Risks:*** the risks related to the construction period for a Project. Such risk(s) can be subdivided more precisely to include risks of cost overrun, equipment supply, permitting delay, and so on.

***Contract:*** as defined in Article 10 of the Law. It is a long-term PPP agreement wherein Investors, registered as a company under Kuwait laws, receive the right from a Public Entity to finance, design, maintain, construct, and operate a Project. The Investor transfers the Project to the Public Entity at the end of the tenure of the Contract. The tenure of the Contract must be sufficient for the Investor to recover its costs and earn a reasonable return on investment.

***Design Risks:*** the risk related to the design of a Project, for example, that the Project design does not correspond to the services contractual provisions.

***End Users:*** the final users of a service. For instance, in the water sector, the end users are usually the population of a certain area connected to the water network.

***Estimated Total Costs:*** as defined in Article 2 of the Regulations issued in terms of the Law. It means the estimated costs for Project execution in its Feasibility Study approved by the Higher Committee, including, but not limited to, the cost of the land according to its market value or its usufruct rights.

**Feasibility Study:** a comprehensive evaluation study of the Project's viability, sustainability, and bankability, taking into account, but not limited to, all the financial, technical, legal, environmental, and economic issues.

**Financial Model:** part of the Feasibility Study's financial evaluation and means a set of interlinked spreadsheets intended to present the cash flow of the Project over the life of the PPP Contract. Such models must be designed in such a way that assumptions can be changed easily and sensitivities analyses on the main parameters of the Project easily conducted. A complete Financial Model would contain Project risk analysis, allocation, and costing. It would also contain the Project's financial statements.

**Guidebook:** as defined in the Article 2 of the Regulations issued in terms of the Law. It means a Guidebook prepared by the PTB pursuant to Article 12(3) of the Law that shall be approved by the Higher Committee to guide Public Entities and the local and foreign Investors interested in undertaking PPP Projects.

**Higher Committee:** as defined in Article 10 of the Law. It means the ministerial committee in charge of studying and approving Projects on State-owned property and tendering them pursuant to the provisions of Articles 4, 5, and 6 of the Law.

**Joint Committee:** as defined in Article 34 of the Regulations issued in terms of the Law. It means the committee set up to undertake the evaluation of bids for Projects under the competition procurement methodology.

**Joint Stock Company:** a company set up according to provisions of Law 15 of 1960, promulgating the Commercial Companies Law whose Articles 63–184 deal with incorporation, capital, membership, board of directors, general assembly, accounts, termination, and liquidation issues of the public stock company. The Law (Article 5) and its Regulations (Articles 46, 47, and 48) require that most Projects whose value is over KD 60 million, and all Projects whose value is over KD 250 million, must be set up



as Joint Stock Companies. It shall be considered as a Special Purpose Vehicle (SPV) for the Project.

***Internal Rate of Return/ IRR:*** the rate of return that would discount the flow of revenue generated by an investment, so that the Net Present Value/NPV of the flow is equal to zero.

***Investor:*** as defined in Article 10 of the Law. It means any local and/or foreign owned private-sector company established under Kuwaiti law that enters into Contract with a Public Entity to implement a Project pursuant to the provisions of Articles 4, 5, and 6 of the PPP Law.

***Law or the PPP Law:*** Law No. 7/2008 regulating Public Private Partnerships, amending provisions of Decree No. 105/1980 on the regulation of public domain. It has the meaning defined in Article 2 of the Executive Regulations of the Law.

***Management Control:*** in relation to any enterprise, the ability to direct or cause the direction of the business and management policies or practices of that enterprise.

***Market Value of the Project's Land or its Usufruct Rights:*** as defined in Article 2 of the Regulations issued in terms of the Law. It means respectively the market value determined under Article 6 of the Regulations for land or usufruct rights for the land on which an approved Project shall be implemented as a PPP.

***Net Present Value/NPV:*** the difference between the present value of the future revenue from the Project, and the present value of the future costs.

***Operations Risks:*** risks that relate to the operation period of a Project (as opposed to the construction period). For instance, for a road Project, the risk that the road is not finished on time is a construction risk, the risk that the road requires further maintenance than envisaged, so road availability is lower than anticipated, is an operations risk.

**Output:** in a PPP Project, it means the specification for the services to be delivered. For example, to construct a two-lane road from A to B is a Project Input; to provide the ability to transport vehicles over 20 years with a maximum capacity of 'x' is a Project Output.

**Partnership Technical Bureau/ PTB:** as defined in Article 10 of the Law. It means the technical panel in charge of studying Projects and Unsolicited Proposals referred to it by the Higher Committee.

**PPP Project:** as defined in Article 10 of the Law. It means a Project to implement an activity, targeted by the State and executed by an Investor, of a development Project of importance to the national economy on a plot of land owned by the State, utilizing it for a certain period of time, pursuant to the provisions of the PPP Law, in return for a fee due for the use of the land.

**Project Manager:** a person identified by the Public Entity who is capable of managing, and is appropriately qualified to manage, a PPP Project to which that Public Entity is party from its inception to its expiry or termination.

**Public Entity:** as defined in Article 10 of the Law. It means any Government Ministry or Department, or entity with an independent or supplementary budget that enters into Contract with an Investor to carry out a Project pursuant to the provisions of the PPP Law.

**Regulations issued in terms of the Law:** refers to the executive regulations issued in terms of the Law under the Decree No. 256/2008. The Regulations elaborate on the provisions of the Law and explain the advertising and tendering processes to be followed, as well as the principles surrounding the means by which Investors receive financial compensation for their involvement.

**RFP:** a request for proposal.

**RFQ:** a request for qualification.

***Risk Analysis:*** a process by which risks in a PPP Project are identified.

***Risk Transfer:*** a process by which such risks are shared among the relevant parties.

***Technical Specialist:*** a focal point person from the PTB, who is capable of managing and is appropriately qualified to provide technical assistance to a Public Entity undertaking a PPP Project, and to provide support to the Head of PTB in assessing the deliverables of the Transaction Advisor.

***Transaction Advisor:*** a person or persons appointed in writing by the PTB, who has or have the appropriate skills and experience to assist as consultants and advise the bureau in connection with a PPP Project, including the preparation and conclusion of a PPP Contract.

***Unsolicited Proposal:*** as defined in Article 10 of the Law. It means a comprehensive study of an unprecedented, innovative idea presented by an Investor to the Higher Committee. The Proposal includes designs of one of the Projects referred to in the PPP Law, accompanied by Feasibility, environmental, and technical studies. This facilitates taking procedural measures to evaluate the idea and studies prior to tendering the Project, pursuant to the provisions of Articles 4, 5, and 6 of the PPP Law, as the case may be, upon the approval of the Higher Committee.

***Value for Money:*** the provision of the Public Entity function or the use of State property by an Investor in terms of the PPP Contract results in a net benefit to the Public Entity and the State, defined in terms of cost, price, quality, quantity, risk transfer, or a combination thereof.



## I.1 INTRODUCTION

This Guidebook is prepared by the Partnerships Technical Bureau (PTB), Government of Kuwait, pursuant to Paragraph 3/Article 12 of Law No. 7/2008: Regulating Public Private Partnership (the “PPP Law”). The Guidebook is intended to be used to guide Public Entities and the private Investors in undertaking PPP Projects.<sup>1</sup> This Guidebook must be read in conjunction with the PPP Law, its Explanatory Note, and its Regulations.<sup>2</sup>

The users of this Guidebook should note that:

- ❑ It is difficult to make generalizations, as each Project is different, depending on sector, transaction size, target market, locations, and so forth.
- ❑ The Guidebook explains the process and some of the tools to be used for structuring and implementing PPPs. It is not the entire tool itself (which will develop by practice).
- ❑ The Guidebook will need to be complemented by relevant policy notes, implementation notes, instructions, and when the need arises, standardized contractual provisions.
- ❑ The Guidebook cannot be expected to answer all questions related to PPPs; it provides a broad conceptual framework, which is expected to become more detailed as it evolves with experience.

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<sup>1</sup> This Guidebook has been carefully prepared to reflect the disposition of the PPP Law. If it contains, whether partially or totally, any contradictions with the PPP Law, the latter will prevail.

<sup>2</sup> It is based on best practice and international experience, drawn mainly from South Africa, as well as from the UK and Australia.

- The Guidebook is drafted in a manner that is best suited to infrastructure Projects (such as utilities, transport, and the like). All of its provisions might not apply to Projects of a commercial nature (shopping malls, parking garages, and so on).

## 1.2 SALIENT FEATURES OF THE PPP LAW

The PPP Law establishes a legislative framework, built upon the principles of transparency and competitiveness, to promote and facilitate PPPs in public infrastructure and land-based development Projects in the State of Kuwait (a description of various types of PPPs is provided in annex A). PPPs can be undertaken by any Public Entity (Government Ministry or Department, or entity with an independent or supplementary budget) that enters into a Contract with an Investor (a private-sector company established under Kuwaiti laws) to implement a Project (an activity targeted by the State [such as those identified in the five-year development plan], through the execution by an Investor on land owned by the State, for a certain period of time). The focal point agency for the implementation of the provisions of the PPP Law is the Partnerships Technical Bureau (PTB), Ministry of Finance.

The salient features of the Law include:

- No public body may enter into a PPP Contract without first obtaining the approval of the Higher Committee for PPPs. PTB provides technical support to the Higher Committee in its decision making.
- The Law limits the term of the PPP Projects to 30 years. In certain cases (where proved necessary in the Feasibility study), the committee may approve a lifespan of 40 years. If the Project's bid documents do not contain a term, its lifespan will be deemed to be 25 years.
- The PPP Law also restricts the disposal or grant of any lien, mortgage, or other real rights to the subject PPP Projects.
- PPP Projects awarded prior to the PPP Law's enactment cannot be amended, extended, or renewed. Any agreement stipulating otherwise will be considered void.

- ❑ A PPP Project shall be subject to prior and subsequent review by the Audit Bureau of Kuwait.
- ❑ The State will collect a fee from the Project for use of State land.
- ❑ Two approved (by the PTB) appraisers will evaluate the land's market value and usufruct rights (rent) value and will use the lower value for assessing the value of the PPP Project.
- ❑ A Project exceeding KD 60 million must be carried out by a PPP Project company that will be a special-purpose vehicle formed as a Kuwaiti Joint Stock Company, in which up to 40 percent shares would be offered to an Investor. The majority of the remainder of the shares will be offered to Kuwaiti citizens.
- ❑ The Law allows for Unsolicited Proposals. The Proposal will be a comprehensive Feasibility Study based on an unprecedented, innovative idea. If accepted by the Higher Committee, the Project will still follow the regular procurement procedures; however, the Unsolicited Proposer will be given up to 5 percent advantage in the evaluation scores, at the discretion of the Higher Committee, should it choose to participate in the bidding.
- ❑ All companies listed on the Kuwait Stock Exchange are considered Pre-Qualified to bid for PPP Projects. Unlisted local and foreign entities will need to apply for Pre-Qualification as and when Projects are tendered, and must be approved by the Higher Committee.
- ❑ Regulations (By-Laws) supporting the PPP Law and elaborating on its provisions have been issued under Decree No. 256/2008.

### **I.3 INSTITUTIONAL STRUCTURE FOR PPPS**

The institutional structure for the implementation of PPP Projects, as presented in the PPP Law and its Regulations, consists of the following four levels:

#### **I.3.1 The Council of Ministers**

The Council of Ministers will:

- Allocate State-owned real estate, by means of a decree, to Arab or foreign diplomatic missions on a reciprocal basis, and to international and regional organizations in Kuwait upon a presentation by the Finance Minister (*as per Article 1 of the Law*).
- Be responsible for selling and/or renting State-owned movable assets by means of a decree on the recommendation of the competent line Minister, provided that its value is not greater than KD 50,000. State-owned movable assets may be disposed of free of charge by a decision of the Council of Ministers if their value is not greater than KD 50,000 (*as per Article 1 of the Law*).
- On recommendation of the Higher Committee, designate a Project valued between KD 60–250 million as a Project of “special nature.” Special nature Projects do not require the formation of a Joint Stock Company or shortlisting of bidders; instead, companies listed on the Kuwait Stock Exchange and other companies approved by the Higher Committee can compete for a PPP Project (*as per Article 6 of the Law*).
- Appoint civil servant specialists to the Higher Committee (*as per Article 11 of the Law*).

### **1.3.2 The Higher Committee (HC) – Set up under the Provisions of Article 11 of the PPP Law and Decree No. 145 of 2008**

The HC will be chaired by the Minister of Finance and will consist of (*as per Article 11 of the Law and Article 3 of Decree No. 145 of 2008*):

- Minister of Municipality
- Minister of Public Works
- Minister of Trade and Industry
- Undersecretary of Electricity and Water
- Head of the Public Authority of the Environment
- Head of the PTB
- Two experienced specialists to be named by the Council of Ministers from among civil servants



- A representative of the Public Entity responsible for the Project shall be invited to the meetings.

The HC and its PTB shall have special financial allocations as part of the Finance Ministry's budget, and its decisions shall take effect only after approval by the Finance Minister. The HC and PTB will be charged with:

- Providing final approval (based on a report by the PTB) to the Public Entities before they can enter into a PPP Contract (*as per Article 4 of the Law and Article 5 of Decree No. 145 of 2008*)
- Developing general policies and approving detailed documents for the Projects and Unsolicited Proposals of strategic and developmental importance to the national economy (*as per Article 11 of the Law and Article 5 of Decree No. 145 of 2008*).
- Referring Projects and Unsolicited Proposals to the PTB for study and preparing a report for the Higher Committee; approving Projects (based on a report by the TB) before they are advertised (*as per Article 11 of the Law and Article 5 of Decree No. 145 of 2008*).
- Determining which relevant Public Entity will take part in tendering the Project and signing the PPP Contract and monitoring the Project's implementation and operation under the Public Entity's supervision and control (*as per Article 11 of the Law and Article 5 of Decree No. 145 of 2008*).
- Giving the Public Entity the final approval for terminating the Contract for public interest (*as per Article 11 of the Law and Article 5 of Decree No. 145 of 2008*).
- Assigning a Public Entity to establish a Public Stock Company for Projects whose value is greater than KD 60 million (*as per Article 5 of the Law*).
- Seeking approval of the Council of Ministers for exemption from flotation of a Public Stock Company, instead resorting to competitive procurement for development Projects of special nature (*as per Article 6 of the Law*).
- Approving the reimbursement cost of the Feasibility Study conducted by an Unsolicited Proposer (*as per Article 8 of the Law*).
- Approving the assignment of a Contract to others, in full or part, and/or any change in the Investor's legal form (only after the designing and imple-

mentation phase, and after an appropriate operation period of no less than three years) (*as per Article 13 of the Law*).

- Authorize the Public Entity to tender the management of Projects through public auction, one year before they are accrued to the State, pursuant to the provisions of this Law (*as per Article 16 of the Law*).

### **1.3.3 The Partnerships Technical Bureau (PTB) – Set up under Article 11 of the PPP Law and Decree No. 145 of 2008**

The PTB is the focal point agency for Kuwait's PPP program. It is involved in all phases of the Project from inception to financial close. It will act as the technical secretariat to the Higher Committee and support it in all its functions and decision making. The Head of the PTB is a member of the HC (*as per Article 11 of the Law*).

Specifically, the PTB's role would be:

- To draft and/or approve the Terms of Reference of the Transaction Advisor
- To appoint a Transaction Advisor responsible for conducting the Feasibility Study and undertaking Project procurement
- To provide quality professional technical assistance to Public Entities undertaking PPP Projects throughout the PPP Project cycle in order to help them achieve a quality PPP outcome and comply with PPP Law and its Regulations
- To recommend to the Higher Committee the granting or declining of approvals, in terms of PPP Law and its Regulations
- To develop and disseminate PPP policy, guidebooks, standardization, and toolkits
- To disseminate accurate and up-to-date PPP Project information
- To build PPP capacity
- To build confidence and integrity in Kuwait's PPP market
- To assign for every PPP Project registered with the PTB a Technical Specialist, whose role will be to:

- Support the Public Entity through every step of the PPP life cycle, drawing on best practice from other Projects, and provide guidance on how the Public Entity can optimally meet the requirements of PPP Law and its Regulations
- Present a report to the Head of the PTB, at various stages of approval, for onward recommendations to the Higher Committee for approving or disapproving a Public Entity's application
- Facilitate efficient processing for approval of Higher Committee applications
- Ensure that communication among the Higher Committee, the PTB, and the Public Entity is managed professionally at all times

### 1.3.4 The Public Entities

The Public Entities will:

- Enter into PPP Contracts with local and/or foreign Investors for Projects on State-owned land after approval of the Higher Committee (*as per Article 4 of the Law*).
- Act as ex officio member of the Higher Committee when its Projects are involved (*as per Article 11 of the Law*).
- Collect a fee (rent for the use of land) from the Investors if allowable under the Contract (*as per Article 14 of the Law*).
- Monitor the performance of the Investor and settle disputes as per the provisions of the PPP Contract, or agree to settle disputes via arbitration (*as per Article 15 of the Law*).
- Tender management of Projects one year before they are accrued to the State, pursuant to the provisions of this Law, through public auction (*as per Article 16 of the Law*).



## II.1 INCEPTION MODULE FOR SOLICITED PROJECTS

The relevant Article of the PPP Law related to the Inception Phase is presented below:

Article 4:

*“ . . . a Public Entity...may not enter into a (PPP) Contract with any Investor for a Project on State-owned land . . . until after the Project has been reviewed and approved by the Higher Committee, in all its technical, financial, environmental, and any other aspects to be decided by the Committee, and approved for tendering . . . ”*

The relevant Article of the Regulations issued in terms of the PPP is presented below:

Article 3:

*“ . . . a Public Entity that wants to tender a Project under the PPP model, shall prepare, in collaboration with the PTB, a comprehensive detailed Feasibility Study in line with the requirements stated in the Guidebook (this document). This Entity shall prepare terms of reference for the study, specifying purposes and elements of the required research for the proposed Project. The PTB shall be entrusted with approving the terms, selecting consultants (Transaction Advisors) to conduct the study, and setting the terms of their recruitment. The PTB shall present to the Higher Committee the study conclusions accompanied by its recommendations on the proposed Project, in order for it to make the appropriate decision regarding tendering under PPP method.”*

This part of the Guidebook provides guidance on “start-up” issues for the implementation of the provisions of the above-mentioned Articles of the Law and the relevant Regulation.

### II.1.1 The Role of the Public Entity at Inception

In respect of a PPP, and in light of its mandate as defined in the Law and its Regulations, the Public Entity's role should be:

- ❑ To register the Project with the PTB
- ❑ To appoint a Project Manager (the Public Entity's focal point for interaction)

The Project Manager is the Public Entity's anchor and champion for a PPP Project, and should be given suitable delegations by the Public Entity for this central, driving role. The Project Manager should therefore be or become a member of the Public Entity's senior management team throughout the assignment in order to ensure thorough Public Entity buy-in and management's contribution to key Project decisions. The Project Manager should be appropriately resourced with administrative support and a suitable operating budget. He should also be given delegated authority to coordinate Project implementation and specifically to manage the Transaction Advisor along with the PTB and therein approve payments per contract provisions (where the Transaction Advisor is not appointed by PTB).

### II.1.2 The Role of the PTB at Inception

The professional staff of the PTB would have, among others, the following core functions:

- ❑ Drafting and/or approving the Terms of Reference of the Transaction Advisor
- ❑ Appointing a Transaction Advisor responsible for the conducting the Feasibility Study and undertaking Project procurement

### II.1.3 The Role of the Transaction Advisor

The Transaction Advisor is typically a team of professional consultants, from one or more firms, who work collectively under a single contract to the PTB

through a lead advisory firm.<sup>3</sup> The Transaction Advisor must be appointed by the PTB in a competitive bidding process, and should be managed on a day-to-day basis by the PTB's Technical Specialist. The Transaction Advisor does all the detailed financial, technical, and legal work leading to the successful signing of a PPP Contract. The Advisor has to be sufficiently competent to cost-effectively complete the work necessary for the Public Entity to meet the requirements of the Law and its Regulations leading up to the approval of the Project, up to and including financial closure of the transaction. The professional skills and experience of the team are typically in: Project finance, contract and administrative law, insurance, PPP procurement management, Project management, and in all technical disciplines relevant to the particular Project sector. An effective Transaction Advisor brings clear advantages to the PTB through:

- ❑ Experience from similar transactions (national and international)
- ❑ Protection against costly, avoidable mistakes
- ❑ Access to national and international best practice
- ❑ Enhancement of local and foreign Investor confidence
- ❑ An opportunity for skills development among PTB and Public Entity staff
- ❑ A single point of accountability for getting the job done well and on time

The agreement between the PTB and the Transaction Advisor should be in at least two distinct phases:

**Phase I:** to complete a Feasibility Study as per the PPP Law and its Regulations to a standard that will enable the PTB to seek Higher Committee approval (or to review and comment on an Unsolicited Proposal's Feasibility Study for Higher Committee consideration). If the Public Entity decides to proceed

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<sup>3</sup> Larger and more complicated Projects may require separate teams of Advisors for various stages of Feasibility and procurement. For instance, an urban mass transport Project may require one team to conduct traffic studies and Pre-Feasibilities and a second for the rest of the transaction. Similarly, larger Projects requiring listing on the Kuwait Stock Exchange will require one team of Advisors for conducting Feasibility studies and another for undertaking the listing and share auction.

with a PPP and Higher Committee approval is granted, the Transaction Advisor continues with Phase II.

**Phase II:** to prepare for and implement the PPP procurement process, including preparing all necessary documentation to enable the Public Entity to obtain Higher Committee approvals in terms of the Law and its Regulations.

### II.1.4 The Process for Recruiting the Transaction Advisor

The process starts with the preparation of a Transaction Advisor Bid Package by the PTB's Technical Specialist. Different components of the bid package are discussed below, in the order in which they should be prepared. Once prepared, the entire Bid Package must be endorsed by the PTB in accordance with its internal procurement system, prior to issue, as elaborated below.

#### II.1.4.1 Drafting the Terms of Reference

The purpose of the Terms of Reference is to give the bidding Transaction Advisor clear direction on what the Public Entity and the PTB want and expect. The better the information made available to bidders, the higher the bid quality will be in technical solutions and pricing; and the more precise the terms, the firmer the Project's footing will be going forward. The Terms of Reference will vary in content from Project to Project. The key sections of the Terms of Reference, with explanatory notes, are listed below:

*Background.* This section should introduce the Project as comprehensively as possible and outline:

- The State's needs (such as power generation, treated water, and so on) that led to the Project
- The legal and policy framework

It should explain and attach all nonconfidential preliminary work done to date by the Public Entity and/or the PTB.



*Scope of work.* This should clearly identify the extent and type of work for which the Transaction Advisor is being hired.

*Time-bound deliverables.* The PTB must specify here precisely what it expects the Transaction Advisor to deliver at each stage of the PPP life cycle.

*Skills and experience.* The full range of required skills (such as technical, legal, environmental, financial, and so forth) and experience (both company and individual) must be listed, emphasizing that the persons named in the bid are expected to be properly available and committed to the Project. The Transaction Advisor will need include Land Appraisers in their team from a list of approved Appraisers provided by the PTB.

*Budget for the Transaction Advisor's professional fees.* While a budget for the Transaction Advisor should be reserved during Inception, the extent of the envisaged work will only become evident during the preparation of the Terms of Reference. The work should therefore be carefully costed by the Technical Specialist at this stage, with reference to current market rates for professional services and to similar Projects that have been awarded in recent months. Having estimated the probable cost, the PTB must then decide whether or not to declare the budget limit in the Terms of Reference. This important choice should be influenced by the following considerations:

- If the *budget is declared*, the PTB is consciously focusing its bid evaluation selection on what quality of advice it can get for the budget it has—and if the bidders deem the budget to be reasonable or generous, they are likely to bid their price at the specified budget. If they deem the budget to be too low, they will either not bid, or they will bid with a higher price in the hope that the PTB will reconsider. If the budget is declared, the bid evaluation system must rest heavily on the Technical component of the proposals, and the weighting of the points should therefore be adjusted to these elements. A two-envelope system must be applied, enabling the

technically weak bids that do not meet the thresholds to be eliminated before any of the price bids are considered.<sup>4</sup>

- If the *budget is not declared*, there is likely to be a wide range of prices bid, and a common correlation between “cheap” and “technically weak.” The bid evaluation system must, in this instance, place a stronger weighting (although never more than on the technical) on the price component. The two-envelope system must be applied. Were the system not applied, the PTB would face the untenable circumstance of selecting the technically weakest, cheapest bid, which would undoubtedly result in a failed Project. While this system will push selection of the strongest technical bid, with reasonable competition for lower price, the PTB always runs the risk in this choice of facing a price for the work that it may not be able to afford.

*Remuneration system and schedule.* The Transaction Advisor should be paid on a fixed price for deliverables (not by daily rates) and their bids structured accordingly. However, larger and more complicated Projects may require flexibility, as it would be very difficult to budget or price any unforeseen tasks or the magnitude of such tasks.

Professional fees should be paid in the form of retainer fees (payable for identified deliverables at milestones in the PPP Project cycle) and a success fee payable by the Investor upon Contract signing.

Retainer fees should be payable, for example, on completion of the Feasibility Study, tender documents, draft contract, and so on to the satisfaction of the PTB. This retainer should not be linked to the attainment of Higher Committee approval, as the Public Entity may decide, for legitimate, objective reasons based on the Feasibility Study, not to proceed with a PPP—a decision which may not be reflective of the quality of the Transaction Advisor’s work, but of the objective conditions that the study exposes. The purpose of the fixed fee payment structure is to incentivize delivery at each key stage of the PPP Project cycle, and to incentivize the drive for PPP Contract closure.

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<sup>4</sup> The two-envelope system separates the technical part of the bid from the price part. Only those that meet or better the threshold scores of the former are evaluated on price.

The success fee is paid by the Investor at the time of the signing of the PPP Contract. However, in smaller Projects, this additional cost may be burdensome for Investors, as in the initial phases their cash flows are restricted. In such cases the PTB may simply call the final payment (payable on the signing of the PPP Contract) a “success fee.”

*Disbursement arrangements.* There are two options here.

**Option 1:** Out-of-pocket expenses such as travel and materials can be payable by the Public Entity as reimbursement of actual overhead costs, preapproved, with supporting invoices, and within agreed budgetary limits. The PTB can choose either to set a ceiling on these costs up front in its Terms of Reference, or to ask the Transaction Advisor to bid a ceiling in their proposals. The amount does not form a part of the bid evaluation criteria, but a ceiling sum per phase of work should become part of the agreement with the Transaction Advisor in due course. The ceiling will incentivize the Transaction Advisor to manage these costs wisely, and enables the PTB to budget properly. To keep tight control throughout the contract, these expenses will need to be preapproved by the Technical Specialist in writing each occasion, before they are incurred.

**Option 2:** The PTB can specify that disbursements must be bid by the Transaction Advisor as part of the total fixed fee. This means that the Transaction Advisor will have to calculate their anticipated overhead expenditure throughout the phases of the work when they bid. The likelihood is that they will calculate high to cover unexpected costs, which could have value-for-money implications for the PTB. The upside for the PTB in this option is that it does not have to administer disbursement approvals on a day-to-day basis.

*PTB’s management arrangements.* This must set out the reporting and decision-making arrangements under which the Transaction Advisor will be required to work, including Technical Specialists’ roles and responsibilities.

*Conflict of interest.* It must be made clear that the potential Transaction Advisor must not have any vested interest in the Project and that if they are awarded the assignment, it would preclude them advising any potential Investors.

*Bidding rules.* This sets out all rules and procedures of the Transaction Advisor bid process. The bid process should require bidders to submit a ‘technical’ bid along with a ‘price’ bid. The ‘technical’ bid would respond to the technical requirements of the Project, while the ‘financial’ bid would quote the price for the services.

*Bid submission requirements.* This explains the format in which bids are to be compiled and submitted. Importantly, all bids must be submitted in two envelopes: a technical envelope and a price envelope, allowing only those that pass the threshold scores of the former to be evaluated on price.

*Bid process.* This documents how the bid is to be conducted and includes details of the briefing session.

*Bid evaluation weightings and criteria.* This sets out the criteria by which Transaction Advisor bids will be evaluated by the PTB, and gives the weightings by which they will be scored. The bids must be evaluated on a combination of technical and price elements, as follows.

*Background and supporting documentation.* As addenda to the Terms of Reference, the Technical Specialist must collate all nonconfidential Project information that can usefully inform potential Transaction Advisors in preparing and costing their bids. This should include:

- Any initial needs assessment
- Project objectives
- Copies of relevant State Policy or Regulation
- Any preparatory studies that may have been done to date

If practical, the PTB may set up a Data Room containing background information, and give bidders the opportunity to read and photocopy any of the information contained there in preparation for their bids. The Data Room must be open and supervised by the PTB at specified times each day, from the date the advertisement is published to a few days before the closing date.

The declaration of background information as part of the Terms of Reference is important in that potential Transaction Advisors will calculate the costs of professional time needed for all possible elements of work entailed in the Project.

*Draft agreement.* In order to clearly inform bidders of the contractual terms under which the Transaction Advisor is to be hired, a draft agreement should be an attachment to the Terms of Reference. Bidders should be required to mark up this Contract and submit it as part of their bids.

Some important features of the Transaction Advisor Agreement are:

- ❑ The PTB's payments to the Transaction Advisor are linked directly to deliverables in the PPP life cycle, not to consulting hours spent.
- ❑ The Transaction Advisor must deploy for the Project the professionals who were presented in their winning bid and cannot substitute for them other than in exceptional circumstances and with the PTB's consent.
- ❑ The PTB may terminate the agreement at completion of the Feasibility Study if it decides not to pursue a PPP.
- ❑ The PTB may terminate the agreement if the Transaction Advisor fails to perform as required.
- ❑ The PTB may ask for members of the Transaction Advisor consortium to be replaced if they fail to perform.

#### ***II.1.4.2 Advertisement***

A concise but informative advertisement must be prepared for publication in the State tender bulletin, in newspapers and/or journals, and on relevant Web sites.

There are four points to highlight here:

- ❑ At least four weeks should be allowed for potential Transaction Advisors to prepare their bids. To prepare good bids, they need sufficient time to become familiar with the Project, construct consortia of professionals (often from different firms), and cost the Project as accurately as possible.
- ❑ The briefing session should be set for approximately halfway through the bid preparation period. This allows the potential Transaction Advisors to

consider the elements of the Project that need clarification for purposes of bidding, and for the bids to be completed afterwards.

- Once the advertisement has been published, the assigned Technical Specialist must be directly available via email to electronically receive and respond to administrative queries.
- The Transaction Advisor Bid Package must be available electronically from the Technical Specialist, and/or must be posted on the PTB's Web site for easy downloading. While hard copies must be available for collection at the PTB's offices, this must not be the only way for potential Transaction Advisors to obtain copies.

Once the advertisement is published, the Technical Specialist can expect to receive email enquiries. He must keep strict records of all correspondence, and no information that would be prejudicial to other parties should be conveyed to any one party exclusively—clarifications given to one bidder should generally be shared with all potential bidders (usually done via posting the clarifications on the PTB's Web site). Any substantial queries should be referred to the briefing session and answered there, where all potential Transaction Advisors will be represented, and from which the PTB's replies will be confirmed in writing to all bidders. If any telephone enquiries are received, the caller should be asked to email the query for written response. After the briefing session, the names and contact details of all bidders will be known to the PTB and all written queries must be responded to in writing. Copies of all this correspondence must go to all the registered potential Transaction Advisors. The Technical Specialist must reply to all emails the same day they are received. A deadline for receiving and responding to queries—normally 48 hours before bid submission date—must be given in the Terms of Reference section on Rules of Bidding.

#### *11.1.4.3 Establishing the Bid Evaluation Committee and Bid Secretariat*

The Bid Evaluation Committee has a key role to play in ensuring the success of the PPP, as the wrong choice of Transaction Advisor can easily make a Project unsuccessful.

The Technical Specialist should try to establish this Bid Evaluation Committee early in the process so that its members can become familiar with the Proj-

ect, the Bid Package, and the bid evaluation criteria while the bids are being prepared.

The Bid Secretariat's role is:

- ❑ To properly receive bids, separate the 'Technical' Envelopes from the 'Price' Envelopes, and lock the latter in a safe until they are called for by the Committee
- ❑ In collaboration with the Technical Specialist, to prepare the Instructions to the Bid Evaluation Committee, the Code of Conduct, and the Declaration of Interest form for the signatures of Committee members
- ❑ Consistent with the Bid Package, to prepare the scoring sheets for each bid, and the spreadsheets for scoring compilation
- ❑ To organize the venue and all logistical matters for the bid evaluation and ensure that all bid documents are delivered securely to and from the venue
- ❑ To collate the scores
- ❑ To set up the interviews with shortlisted bidders and record the proceedings

#### *II.1.4.4 Preparing and Conducting the Briefing Session*

The Technical Specialist should prepare a well-structured presentation for the briefing session for potential Transaction Advisors. The session should highlight the key features of the Terms of Reference, present the PTB's approach to the Project, and give a full picture of what the Project is likely to entail.

Attendance at the briefing session should be encouraged for any Transaction Advisor intending to submit a bid. The purpose of the briefing session is:

- ❑ To introduce the Project to potential Transaction Advisors in person, brief them verbally on the most important elements of the Bid Package, and highlight key issues and challenges of the Project
- ❑ To give potential Transaction Advisors the opportunity to meet the key Public Entity managers and ask the Public Entity and the PTB to clarify any relevant matters

- To let potential Transaction Advisors know who else is bidding for the job—this both to stimulate competitive bidding and to present opportunities for the formation of consortia
- To demonstrate the competence and commitment of the PTB
- To register all potential Transaction Advisors for the Project so that all subsequent queries received by the PTB can be answered in writing and copies sent to all parties

#### *II.1.4.5 Receiving Bids*

Bids should be officially received and registered by the Technical Specialist on or before the bid submission date, in the manner and at the place specified in the Bid Package.

On receipt, the Bid Secretariat should ensure that the Financial Envelopes of each Bid are separated from the Technical Envelopes of each Bid and that the former are locked securely in a safe until such time as the Bid Evaluation Committee calls for them to be delivered for opening or rejection.

#### *II.1.4.6 Evaluating Bids*

Bids should be evaluated by the Bid Evaluation Committee, in strict accordance with the system and criteria set out in the Bid Package. The PTB may award the agreement, within the period of the validity of bids, to the bidder who best meets the required standards of capability and resources.

#### *II.1.4.7 Finalizing and Signing the Agreement*

The Technical Specialist will meet with the lead Transaction Advisor to finalize the terms of the agreement and complete all the necessary documentation. The final terms of the agreement may not deviate materially from the original Terms of Reference or the terms of the draft agreement, taking account of the mark-up submitted by the potential Transaction Advisor as part of the bid. A bidder should not be required, as a condition of award, to undertake responsibilities for work not stipulated in the Terms of Reference.

It should be a condition in the Bid Package that the PTB reserves the right to negotiate price with the selected Transaction Advisor.



The original preferred bidder or any bidder called for negotiation shall have no rights whatsoever until the signing of the final agreement.

If the negotiations fail to result in an acceptable contract, the PTB should terminate the negotiations and invite the next ranked firm for negotiations. The original preferred bidder should be informed in writing of the reasons for termination of the negotiations. Once negotiations begin with the next ranked firm, the PTB should not reopen the earlier negotiations. After negotiations are successfully completed, the PTB should sign the agreement, and the PTB should promptly notify other bidders that were unsuccessful.

## II.2 INCEPTION MODULE FOR UNSOLICITED PROPOSALS

Instead of a solicited Project initiated by a Public Entity or the PTB, an Unsolicited Proposal can be prepared by an Investor for consideration by the Higher Committee. The Unsolicited Proposal must be a comprehensive study based on an unprecedented, innovative idea that provides a service or facility that is currently not available (or the alternate is substantially more expensive) and/or an advantage that a Public Entity or the PTB has not considered before. Unsolicited Proposals must be consistent with the State's strategic objectives as outlined in the Five-Year Development Plan.

Relevant Regulations issued in terms of the PPP Law include:

### Article 3:

*“Unless the Project Feasibility Study is pre-prepared within the Unsolicited Proposal presented by the Investor, a Public Entity that wants to tender a Project under the PPP model shall prepare, in collaboration with the PTB, a comprehensive detailed Feasibility Study in line with requirements stated in the Guidebook (this document) . . .”*

### Article 4:

*“Should the Project's Feasibility Study be part of an Unsolicited Proposal presented by a local or foreign Investor, the PTB, in collaboration with the competent Public Entity selected by Higher Committee upon recommendation of the PTB, shall examine the study thoroughly in order to verify its effectiveness. The PTB shall present the Higher*

*Committee with recommendations on the Project and its viability based on the study, pursuant to the provisions of Articles 4, 5 and 6 of the Law.”*

**Article 41:**

*“Any local or foreign Investor may present to the Higher Committee, via the PTB, with an Unsolicited Proposal of a proposed Project under the PPP model. This Unsolicited Proposal shall include a comprehensive Feasibility Study of the proposed Project, covering all technical, economic, and financial aspects of the Project and its potential impacts on the environment. However, an initial study of the proposed Project may be submitted, showing its components, and initial estimated costs and benefits, in order to obtain the Higher Committee approval to consider the Project in principle. The Unsolicited Proposer, then, shall prepare the detailed Feasibility Study.”*

**Article 42:**

*“Unsolicited Proposals, based on an initial Project study, shall be accompanied by information on the Unsolicited Proposers, their experiences and administrative, technical, and financial capabilities. When presenting the Unsolicited Proposal, the Initiator shall pay the PTB a fee, set by the Higher Committee for studying the Unsolicited Proposal.*

*If approved by the Higher Committee in principle, the PTB, in collaboration with the competent Public Entity selected by the Higher Committee, shall study the proposed Project based on the Feasibility Study, and may request further information from the Initiator or request further studies by the Initiator, as appropriate. If the proposal is based only on an initial study, the Initiator shall be asked to compile a technical, economic, and financial Feasibility Study, including the Project environmental impacts, and submit it to the PTB, which, upon reviewing the Project and the study, shall report on it, with recommendations, to the HC. Based on that report, should the HC reject the Unsolicited Proposal, the Initiator shall be informed in writing, and may not re-present it.”*

Unsolicited Proposals can be proposed to the PTB for evaluation and onward recommendations to the Higher Committee in the following two ways:

### II.2.1 Initial Study

An Initial Study of the proposed Project may be submitted to the PTB by the Unsolicited Proposer, presenting the estimated costs and benefits of the Project. The PTB will evaluate the study (details given in next Module) and recommend to the Higher Committee which relevant Public Entity would be involved. If there is merit in the Study, the Higher Committee will give its approval in principle. The purpose of the Initial Study is to consider the broad merits of the proposal before the Unsolicited Proposer has spent substantial time and resources in preparing a robust study. Once there is approval in principle, the Unsolicited Proposer will then be required to prepare a detailed and comprehensive Feasibility Study—as would be done for Solicited Projects (explained in the next Module)—that will be resubmitted to the PTB for its evaluation and recommendations to the Higher Committee. If this Feasibility Study is viable, the Higher Committee would give its approval for the Project to move to the next phase of procurement. The cost of the Feasibility Study to the Unsolicited Proposer (that the Unsolicited Proposer can claim from the successful bidder) would also be submitted by the Unsolicited Proposer along with the Feasibility Study, and the Higher Committee would approve (or disapprove) this cost, on recommendation of the PTB, along with approving or disapproving the Project (*as per Article 8 of the Law*).

### II.2.2 Comprehensive Study

A local or foreign Investor can prepare a comprehensive Feasibility Study up front for consideration by the Higher Committee via the PTB. If the Higher Committee approves this Feasibility Study, the Project moves to the next phase of procurement. As stated earlier, the cost of the Feasibility Study (that the Unsolicited Proposer can claim from the successful bidder) would also be submitted by the Unsolicited Proposer along with the Feasibility Study, and the Higher Committee would approve (or disapprove) this cost, on recommendation of the PTB, along with approving (or disapproving) the Project (*as per Article 8 of the Law*).

### II.2.3 Recruitment of the Transaction Advisor

Once the Higher Committee approves the Unsolicited Proposal, the PTB will initiate the process of the recruitment of the Transaction Advisor in the same manner as explained in section 1 above. The Terms of Reference of the Transaction Advisor will, however, be modified. In the case of Unsolicited Proposals, the Transaction Advisor will be reviewing the Unsolicited Proposer's Feasibility Study for completeness, accuracy, ease of implementation, viability, and bankability, instead of developing its own Feasibility Study. The Transaction Advisor's review would form the basis of the PTB's recommendations to the Higher Committee. As in the case of solicited bids, only if the Higher Committee approves the Feasibility Study will the Project go to the next phase of procurement, with the assistance of the Transaction Advisor.

### III.1 FEASIBILITY MODULE FOR SOLICITED PROJECTS

Relevant Articles of the PPP Law relating to the Feasibility Study include:

Article 4:

*“Upon effectiveness of this Law, a Public Entity may not enter into a Contract with any Investor for a Project on State-owned land under the PPP model, until after the Project has been reviewed and approved by the Higher Committee, in all its technical, financial, environmental, and any other aspects to be decided by the Committee, and approved for tendering . . .”*

Article 12:

*“A PTB for the Study of Development Projects and Unsolicited Proposals shall be decreed to act as a supporting board to the Higher Committee. The rank of its Head shall be decided by a cabinet decree. This PTB shall be supervised by Minister of Finance.*

*The PTB, in collaboration and coordination with Public Entities, shall carry out the following duties:*

- 1) Conduct surveys and preliminary studies to identify development Projects that may be tendered under this Law and submit them to the Higher Committee;*
- 2) Study Projects and Unsolicited Proposals referred by the Higher Committee, report its opinion, evaluate attached economic and technical Feasibility studies and make appropriate recommendations on tendering the Project pursuant to Articles 4, 5 and 6 of this Law, depending on the case;*
- 3) Prepare a Project Guidebook;*
- 4) Determine approved Project follow-up and performance evaluation methods;*
- 5) Prepare model contracts setting required terms and provisions, and submit them to the Higher Committee for approval;*

- 6) *Prepare and present an annual report on development Project for approval by Higher Committee to be presented to the Cabinet by the Finance Minister;*
- 7) *Follow up Project implementation and help remove obstacles, in collaboration with the competent entity;*
- 8) *Develop a mechanism for Unsolicited Proposal presentation, evaluation, and tendering pursuant to the provisions of this Law.”*

Executive Regulations of PPP Law relating to the Feasibility Study include:

**Article 3:**

*“Unless the Project Feasibility Study is pre-prepared within the Unsolicited Proposal presented by the Investor, a Public Entity that wants to tender a Project under the PPP model, shall prepare, in collaboration with the PTB, a comprehensive detailed Feasibility Study in line with requirements stated in the Guidebook. This entity shall prepare terms of reference for the study, specifying purposes and elements of the required research for the proposed Project. The PTB shall be entrusted with approving the terms, selecting consultants to conduct the study, and setting the terms of their recruitment. The PTB shall present to the Higher Committee the study conclusions accompanied by its recommendations on the proposed Project, in order for it to make the appropriate decision regarding Project tendering under the PPP model.”*

**Article 4:**

*“Should the Project’s Feasibility Study be part of an Unsolicited Proposal presented by a local or foreign Investor, the PTB, in collaboration with the competent Public Entity selected by the Higher Committee upon recommendation of the PTB, shall examine the study thoroughly in order to verify its effectiveness. The PTB shall present the Higher Committee with recommendations on the Project and its viability based on the study, pursuant to the provisions of Articles 4, 5 and 6 of the Law.”*

**Article 5:**

*“A Project intended for tendering under the PPP model shall fulfill the following criteria, according to the Feasibility Study:*

- 1) *Technically sound, economically feasible, and cost efficient for the State and beneficiaries;*

- 2) *Proven to be more viable using the PPP model than assigning it directly to a Public Entity. As the first would distribute investment risks—either during execution, useful-life operation or its contract—in an optimal way securing cost effectiveness and the quality of any services expected from the Project;*
- 3) *Profitable for the Investor, with investment risks at a low level that makes it acceptable and attractive to the private sector;*
- 4) *Any other standards or requirement stated in the Guidebook.”*

#### Article 6:

*“For the purpose of estimating total costs of intended Projects, the average market value of land and the usufruct rights shall be determined by at least two accredited, specialized firms, unless the PTB sees this average to be less than the fair value of land or usufruct right. In this case, the higher-value estimation of land or usufruct rights, depending on the case, as determined by the PTB and approved by the Higher Committee, shall prevail, and be regarded as the market value.”*

#### Article 7:

*“The Higher Committee shall determine the appropriate PPP model for the execution of any Project planned by a Public Entity for tendering pursuant to the Law, including any Project that requires the establishment of a Kuwaiti public stock company pursuant to under article 7 of the Law.*

*Should the estimated total costs of a Project not exceed KD 60 million, the Higher Committee shall determine whether to tender it through auction or competition. Competition shall be used to select an Investor based on the preference of offers technically, financially, and environmentally, and for any development Project of a special nature approved for tendering by the Council of Ministers under Article 6 of the Law, and whose total estimated costs do not exceed KD 250 million.”*

#### Article 41

*“Any local or foreign Investor may present the Higher Committee, via the PTB, with an Unsolicited Proposal of a proposed Project under the PPP model. This Unsolicited Proposal shall include a comprehensive Feasibility Study of the proposed Project, covering all technical, economic, and financial aspects of the Project and its potential impacts on the environment. However, an initial study of the proposed Project may be*

*submitted, showing its components, and initial estimated costs and benefits, in order to obtain the Higher Committee approval to consider the Project in principle. The Initiator, then, shall prepare the detailed Feasibility Study.”*

#### Article 42

*“Unsolicited Proposals, based on an Initial Study, shall be accompanied by information on the Unsolicited Proposers, their experiences and administrative, technical, and financial capabilities. When presenting the Unsolicited Proposal, the Unsolicited Proposer shall pay the PTB a fee, set by the Higher Committee for studying the Unsolicited Proposal.*

*If approved by the Higher Committee in principle, the PTB, in collaboration with the competent Public Entity selected by the Committee, shall study the proposed Project based on the Feasibility Study, and may request further information from the Unsolicited Proposer or request further studies by the Unsolicited Proposer, as appropriate. If the proposal is based only on an initial study, the Unsolicited Proposer shall be asked to compile a technical, economic, and financial Feasibility Study, including the Project environmental impacts, and submit it to the PTB, which, upon reviewing the Project and the study, shall report on it, with recommendations, to the Higher Committee. Based on that report, should the Higher Committee reject the Unsolicited Proposal, the Unsolicited Proposer shall be informed in writing, and may not re-present it.”*

This Module of the Guidebook provides guidance on the Feasibility phase for the implementation of the above-mentioned Articles of the PPP Law and its Regulations. Best business practice dictates that any investment or procurement decision should be backed up by a thorough Feasibility Study. Through the Feasibility Study, the Public Entity compares the possible procurement choices for a Project. The study:

- ❑ Provides information about costs (explicit and hidden)
- ❑ Allows for the identification, quantification, mitigation and allocation of risks
- ❑ Prompts Public Entities to consider how the Project will be structured
- ❑ Identifies constraints that may cause the Project to be halted
- ❑ Ensures that the Project is developed around a proper business plan



In undertaking the Feasibility Study, a comprehensive Options Analysis is necessary to ensure that the Public Entity considers all the alternatives available to it. While an Investor shall have the responsibility for the assessment of viability before a tender is submitted, including commercial risks, detailed Feasibility, and engineering parameters, the Feasibility Study should be carried out with broad functional specifications on technical matters but should place more emphasis on commercial aspects and assess the risks and regulatory and monitoring frameworks very carefully.

Similarly, the Feasibility Study should contain sufficient details of the commercial and contractual relationships between the Public Entity and the Investor. Different options or models for private sector participation shall be discussed in terms of their risk, investment and market implications to the State, Public Entity, the Investor and consumers. The following should also be addressed in the Feasibility Study, as applicable:

- ❑ Modes of private sector participation
- ❑ Project parameters and boundaries
- ❑ Regulating or not regulating the tariff, scope and quality of services
- ❑ Different tendering or selection parameters—minimum tariff, minimum subsidy, etc.
- ❑ Different revenue/profit sharing options
- ❑ Legal and regulatory framework, including any changes necessary
- ❑ Risk allocation between the public sector and the private sector

The information set out in the Feasibility Study report must be sufficiently detailed, and any assumptions made must be reasonably realistic, so as to ensure that the optimum commercial or contractual arrangements may be determined. The main purpose of the Feasibility study is to consider all factors associated with the Project, and determine if the investment of time and other resources will yield a desirable result.

In Projects involving solicitation, the PTB shall carry out or cause to be carried out (in consultation with the Public Entity) Feasibility Studies for eligible Projects (approved by the Higher Committee), prepare commercial and con-

tractual framework, prepare tender documents, and seek tenders from local and foreign Investors through transparent competitive process.

This Guidebook applies to Projects that fall within the ambit of the PPP Law. While the guidance here is being established as best practice for the infrastructure Projects, certain Projects may require specific and more special Project appraisals, including full economic cost/benefit and risk appraisals. Alternatively, there may be Projects for which certain sections of this Guidebook may not be required in the interests of costs efficiency and effectiveness. Characteristics of such Projects will evolve and be defined as the Guidebook goes through a subsequent review process.

### III.1.1 Pre-Feasibility Study Process

After the initial approval/registration of the Project by the PTB and appointment of the Transaction Advisor, the PTB and the Transaction Advisor will conduct a Pre-Feasibility Study for each Project. This Pre-Feasibility Study is a short, focused, and low-cost assessment of a Project's viability. The intention of Pre-Feasibility is to define the Project, and to collate basic information necessary for the Public Entity, the PTB, and the Higher Committee to develop a Project concept based on engineering design concept, technical and financial challenges of implementation, and expected Project outcomes and impacts. Specifically, the Pre-Feasibility analysis will:

*Determine the technical and operational parameters of the Project concept through preliminary analysis of:*

- The engineering/technical aspects of the Project
- The manageability of the operational aspects of the Project

*Determine the financial and economic parameters of the Project concept through preliminary assessment of:*

- The cost recovery/income generation assumptions of the Project
- Likely private sector interest in the Project

- ❑ The overall Project cost (capital + operations + maintenance) based on industry benchmarks
- ❑ Possible risks
- ❑ Identification of likely economic benefits generated by the Project

*Identify possible arrangements for private sector participation through:*

- ❑ Identifying the role of the Investor
- ❑ Identifying the contractual framework for the Project
- ❑ Outlining the procedure for ensuring competition in the selection of the Investor
- ❑ Identifying the legal documentation required to allow participation of local and foreign Investors

*Identify of next steps by:*

- ❑ Identifying parties responsible for completing next steps
- ❑ Determining the roles and responsibilities of involved parties
- ❑ Determining the time frame required for completing Project preparation

### III.1.2 Feasibility Study Process

Any Project, regardless of its scale and nature, can have long-term implications—with a great deal at stake once it is implemented. A Feasibility Study therefore needs to be authentic, accurate, and thorough. It should be a complete document, containing all aspects of the Project that can be appraised by the Higher Committee, Public Entity, and potential local and foreign Investors, and the basis on which the PTB and the Higher Committee would make a decision on the Project. The Feasibility Study will:

- ❑ Ensure that the Project is in accordance with predetermined needs in line with the State's/Public Entity's strategic objectives (such as provided in the Five-Year Development Plan), and is the most suitable technical solution to the needs

- ❑ Provide information about costs, and give an indication of whether these costs can be met
- ❑ Provide the economic rationale for the Project
- ❑ Allow for identification, quantification, mitigation, and allocation of risks associated with the Project throughout its Project life
- ❑ Identify, analyze, and devise a complete resettlement plan for people being affected, if any, including any relocation plans and resettlement impacts; and the corresponding instruments including compensation programs and costs, if required
- ❑ Conduct environmental assessment studies (in line with the State's environmental legislation) for the Project, and identify possible mitigation methods
- ❑ Include Project-specific land acquisition
- ❑ Consider whether or not the Project is affordable by the Public Entity in terms of its budget and/or the end user of the services
- ❑ Consider how the Project will be structured
- ❑ Contain a financial model with key investment ratios, and the capability of running scenario and sensitivity analyses
- ❑ Identify constraints which may cause the Project to be halted
- ❑ Ensure that the Project is developed around a proper business plan and has been subject to due diligence that shows it is compliant in all respects

The Feasibility Study should also include the broad design, with an appropriate level of detail that meets good engineering design and construction practices and standards as specified by the State in accordance with relevant policies and legislation.

The Feasibility Study should at a minimum contain:

#### ***III.1.2.1 The Needs Analysis and Definition of Project Parameters/Scope***

In this stage, the Transaction Advisor gathers all the available information on the Project, the Public Entity's needs, and the resources on hand for Project development and implementation, including budget. Needs analysis will comprise the following parts:

**Part 1: Demonstrate that the Project aligns with the Public Entity's objectives**

To be in a Public Entity's best interest, a Project needs to align with its objectives, policies, and priorities. This will be determined as follows:

- ❑ Step 1: Summarize the Public Entity's objectives, the State policy with respect to the Project, and so forth.
- ❑ Step 2: Discuss the following aspects of the Project:
  - How does the Project contribute to the implementation of State and Public Entity's policy?
  - What is the capacity of the private sector to deliver the Project?
  - What is the expected life of the Project—will it address the broad needs of the State over time?
  - What is the impact of the Project on the State or Public Entity's budget?

**Part 2: Specify the parameters of the Project leading to its desired objectives**

Once a Public Entity's objectives and budget are identified, the parameters of the proposed Project need to be specified. While specifying these parameters, care should be taken to ensure that inefficiencies are not subsidized and parameters identified are clear and measurable. PPPs focus on Project outputs, as opposed to the conventional procurement method, where inputs are specified. The Public Entity defines clear specifications for the Project outputs. This is done by means of the following steps:

- ❑ Step 1: Describe the objectives that the Project will meet
- ❑ Step 2: Specify the outputs required to be delivered under the Project
- ❑ Step 3: Specify the standards/specifications for outputs of the Project to ensure that the Project meets the defined objectives/expectations
- ❑ Step 4: Specify key indicators that will measure performance to allow for more accurate costing of the output specifications

**Part 3: Define the scope of the Project**

In light of the Public Entity's needs and strategic objectives, and the Project's output specifications, a brief concept note defining the proposed scope of the

Project is prepared. This concept note should be a concise outline of the Public Entity's requirements, allowing for the selection of reasonable service delivery options. While conducting the needs analysis, ensure that the following are carried out:

- Identify/devise a list of significant State assets that will be used for the Project (such as land and any equipment)
- Identify extent of existing facilities in the Project area
- Determine how the Project will complement other developments taking place in the area through review of sector master plans/studies
- Review existing land-use plans and topographical and geotechnical data for the development of Project design
- Specify environmental and social assessment work plans through description of projected work tasks
- Assess land acquisition and any resettlement requirements

### *III.1.2.2 The Options Analysis*

Options analysis provides a range of technical, legal, and financial options available for meeting Project output specifications. The various options identified are evaluated against a set criteria specific to the Project, thus allowing the ability to choose a preferred option from the available options.

The Transaction Advisor will conduct the options analysis by undertaking the following steps:

- Step 1: List all reasonable options
- Step 2: Evaluate each option in terms of its advantages and disadvantages by taking into account its:
  - Technical and financial aspects
  - Land acquisition and resettlement impacts and costs
  - Environmental impacts and costs
  - Which options are likely to attract private sector investment
- Step 3: Recommendation of the preferred option

The purpose of this analysis is to identify the advantages and disadvantages of each option and to examine its risks, benefits, and potential impacts. The analysis must cover all viable delivery options available for meeting the Public Entity's specific identified needs.

All reasonable options considered need to be evaluated clearly and with appropriate weightings of criteria. The criteria by which the Feasibility Study evaluates each option will be decided on and devised by the Transaction Advisor during the needs analysis stage, under the guidance of the PTB. The criteria may include raising private finance, speed of implementation, ease of implementation, and the like.

Once the preferred option is selected, a broad design appropriate to the complexity of the Project is prepared in order to provide sufficient information for costing, risk, and financial analysis. This design may be a preliminary design, for more complex and higher-cost Projects, or a lesser design for simpler Projects that have reliable cost data. It may be noted that this design is not to be provided in full to any private-sector bidders at this stage of bidding as it will result in the design risk remaining with the Public Entity, and may also have an adverse effect on the efficiency of private-sector design. Final design will be that of the Investor who will obtain all the necessary approvals (construction, technical, architecture, design, and so on) as required by applicable law.

### **III.1.2.3 Project Due Diligence**

At this stage of the Feasibility Study, all legal, land, site, technical, social safeguard, and environmental issues related to the preferred Project option are researched and analyzed.

The Transaction Advisor will conduct Project due diligence by undertaking the following steps:

- Step 1: *Legal issues*. All legal aspects pertaining to Project development and implementation are identified, studied and addressed.
- Step 2: *Site ownership and availability issues*. Exhaustive investigations into the status of any land claims, servitudes, long leases, and constraints, as

well as investigations into geotechnical conditions, existing contamination, utility service availability and capacity, and the environmental and heritage status of the land need to be made. The Public Entity and the PTB should be proactive in obtaining all necessary filings and approvals to avoid long delays later.

- Step 3: *Environmental Assessment*. Strategic environmental assessment is an effective instrument for integrating environmental issues into the formulation of plans to undertake the Projects. Environmental requirements for infrastructure Projects involve far more than simply making sure that there is compliance with environmental legislation. Authorization of Projects by the environmental authorities is an important step because a Project's inability to meet environmental requirements can have an adverse impact on its financing efforts. There needs to be proper and full consideration, understanding, and mitigation of the environmental risks throughout the Project's life cycle.
- Step 4: *Social Assessment*. This should include land acquisition and any resettlement of affected population, if any.

#### *III.1.2.4 Financial Assessment*

In this stage, the deliverable is a risk-adjusted financial model of the Project. This model provides analysis of the financial soundness (viability and bankability) of the proposed Project, including its fiscal sustainability based on the costs projected for adequate maintenance and operation. The model will present the cost of delivering the preferred solution/options through a PPP arrangement.

In developing the financial model, the following steps may be required:

##### *Technical definition of the Project*

Set out a technical definition of the parameters of the Project. What norms and standards will be applied? What maintenance cycles are expected?

##### *Identifying costs*

**Capital costs.** These are costs specifically associated with the development of the Project. The model should account for capital costs in the year in which they occur, including, but not limited to, the design, land (for a discussion on



land valuation issues see annex B)<sup>5</sup> and development costs, raw materials, construction, plant, and equipment. Capital costs should also account for labor and management related costs related to development and implementation of a Project, including financial, legal, procurement, technical, and Project management services. Costs pertaining to asset replacements as they occur during the Project's life should also be included. For the purpose of estimating total costs of intended Projects, the average market value of land and the usufruct rights shall be determined by at least two accredited (by the PTB) specialized firms to be hired by the Transaction Advisor with the approval of the Public Entity. Any costs related to risk mitigation, compliance with environment regulations, and resettlement of affected population, if any, need to be accounted for.

**Maintenance costs.** Maintenance costs will include the full life-cycle costs of maintaining the assets in the condition required to deliver the output specifications. It may include elements such as raw materials, tools and equipment costs, and labor costs associated with maintenance. The level of maintenance costs assumed must be consistent with the capital costs and the operating cost forecasts. Any costs related to risk mitigation related to Project maintenance need to be accounted for.

**Operating costs.** These are associated with the regular operation for the provision of services under the Project, such as staff costs (including wages and salaries, employee benefits, accruing pension liabilities, contributions to insurance, training and development, annual leave, travel, and any expected redundancy costs); raw materials and consumables; direct management costs; and insurance. Any costs related to risk mitigation and compliance with environment regulations need to be accounted for. Finally, any rent or fee for use of State land will need to be factored into the financial model (unless it is proved that it reduces Project affordability and is waived—final approval of this will be provided by the Higher Committee when it approves the Project Feasibility Study).

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<sup>5</sup> Land valuation is critical from the point of view of determining the size of the Project with regard to selection of an appropriate procurement method (discussed in the next Module). However, since the land will be provided by the State, its value should not be reflected in the Capital Cost. If a fee is charged it should be reflected in the Operational Cost of the Project.

**Identifying Project revenue.** Total cost of output specifications should be offset by the anticipated Project revenues. It should be borne in mind that forecasting potential revenues (based on demand analysis and forecast) can be a particularly difficult aspect of the model, especially where there is little or no historical data available. This element is a vital part of the Feasibility Study, and therefore steps such as involving specialist advisers and conducting market testing should be considered. Any assumptions on projected revenue must reflect the Project's ability to invoice and collect revenue. Where relevant, analysis should also be conducted on the appropriateness of fees in relation to user affordability and long-term marginal costs, operation and maintenance costs, and the effect of pricing and cost recovery policies on the financial viability of the Project.

*Note that revenue overestimation and cost underestimation are the most common failings of Feasibility studies. Carrying out scenario and sensitivity analysis is therefore an integral part of this exercise.*

**Model assumptions.** Any assumptions made regarding inflation rate, discount rate, depreciation, and budget availability must be explained in detail.<sup>6</sup>

**The Base Case model.** A discounted cash flow model must be created that takes into account the maintenance costs, operating costs, capital costs, and revenues anticipated for this Project.

**The Risk Matrix.** Constructing a risk matrix is a fundamental part of the Feasibility Study process and can be usefully integrated with the construction of the financial model. It involves the following interrelated stages:

- Identifying risks involved in the Project

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<sup>6</sup> Upon expiration of the PPP Contract, the Project (including land and buildings) must be handed back to the State without any consideration and compensation (Article 6 of the PPP Law). In other words the model will assume that there will be no 'residual' value of the Project that the State or Public Entity would owe to the Investor at the end of the term (the time of transferring the Project to the Public Entity).

- Assessing the impact of these risks
- Assessing the likelihood of these risks arising
- Calculating the value of the risks and ranges of possible outcomes
- Allocating risk to party or parties best able to manage it
- Identifying strategies for mitigating risk

It must be noted that the valuation of risks should be calculated as a separate cash flow item, and not by adjusting the discount rate as an indication of the level of risk for each Project. Principal reasons for adopting the cash-flow impact approach are that it promotes a focus on the costs of each risk and helps promote an understanding of how risk transfer can be achieved and what its financial consequences would be. In addition, different risks have different timing implications throughout the Project term (some risks may only have an impact on the initial stages, while the impact of others diminishes or escalates over the life of the Project).

An indicative list of risks is given below, categorized as “Project-related risks” and “non-Project-related risks” (for a detailed discussion, see annex C):

*Project-related Risks* (Relatively manageable by the Investor and lenders)

- Completion risk (engineering and construction cost/time cost control)
- Operational performance risk (technical and operational know-how)
- Market risk (volume and tariff)
- Financial risk (cost of financing)
- Environmental risk (past and future liabilities, Project delays, costs overruns)

*Non-Project-related Risks* (Nonmanageable or partially manageable by Investor and lenders)

- Political risk (expropriation, political violence, currency convertibility and transfer, and so on.)
- Contractual (Regulatory) risk (default on contractual obligations, such as pricing formulas)

- Macroeconomics environment risk (volatility risk, such as changes in macro balance in relatively short periods—exchange rate, inflation, and the like)
- Legal environment risk (rule of law, for example, judicial system, regulatory procedures, and arbitration)

Investors usually require the State to assume the non-Project related risks to the extent that any adverse effect from these is negated or compensated for, to bring the Investor back to its original position, that is, its position before the adverse event occurred. Some of the non-Project related risks can be shared or even mitigated by the Investor (such as exchange rate and inflation risks). However, there will be a cost for mitigating such risks; the Transaction Advisor should advise the PTB whether or not there is value for money in transferring these risks to the Investor.

*The risk-adjusted financial model.* The base case financial model is revised to include Project risks. Here the Transaction Advisor undertakes a detailed Project risk analysis exercise, covering such items as market forces; price and inflation; demand and sustainability; technology and operational risks; and measures identified to mitigate such risks. This would provide a reasonably true picture of the Project in terms of size, cost, viability, bankability, and sustainability.

*Creating the model to reflect PPP structure and sources of funding.* A proposed structure of the Project is devised, demonstrating the relationships among the Public Entity, the Investor's Special Purpose Vehicle (SPV)—set up specifically for the purpose of undertaking the Project—and lenders, shareholders, suppliers, subcontractors, and other stakeholders. This planned Project structure must incorporate the funding structure, appropriate equity returns, and the costs and key terms of debt funding (including, for instance, debt service cover ratios, if applicable). Devising the optimal capital structure for the Project is a key element in this analysis, as it directly affects the Project's bankability.

All assumptions must be clearly stated, as these will directly affect the cost of capital for the Project. It is important to examine the needs of the Project and the timeline for reaching certain financial goals in order to determine the appropriate capital structure for the business that will be conducted. The timing and

management of cash flows is critical to selecting the right type of funding and maintaining the long-term stability of the business.

It is important to note here that the Investor cannot sell or mortgage land, buildings or structures, or any other asset whatsoever, which would accrue to the State at the end of the Project (*Article 13 of the PPP Law*). This is essential from the lenders' point of view; in commercial, corporate finance deals, such as a shopping plaza, they will ask for some other kind of collateral from the Project Investors. However, the Law does allow for securitization of receivables to raise financing. (This is more relevant in financing of infrastructure Projects, such as water treatment plants).

In a Project finance structure (typical in PPP Projects), the following elements must be addressed:

- ❑ Legal and financial structure and participants: legal documentation that supports the structure.
- ❑ Ratios such as Annual Debt Service Cover Ratio (assesses the Project company's ability to service debt from its annual cash flow, and is calculated as Project operating cash flow over the year divided by Project debt service over the year. This will be determined for each Project, based on its risk assessment, but will not be less than 1.10) and on the Loan Life Cover Ratio (based on a similar calculation, but taken over the whole term of the loan (projected operating cash flow divided by debt outstanding on the calculation date and determined for each Project).
- ❑ Other analysis would include calculating the Financial Internal Rate of Return, which measures the return on investment over its life. It is the discount rate at which the Net Present Value of the Project (the value today of the sum of money due in future, taking into account the cost of money/ discount rate) is zero. The discount rate should be based on the appropriate (chosen at the time of appraisal and based on the duration of the Project) Government bond yield plus an appropriate risk margin determined by the Transaction Advisor in consultation with the PTB for each Project.

*Note: Where an Investor can sell directly to the end user, but there is little scope for competition, the Government usually regulates prices (through sector regulations or*

*via the PPP Contract). However, the challenge is to design well-functioning regulation that increases output, holds down prices, and limits monopoly profit while preserving the incentive for private firms to be more efficient and reduce costs. Of the two most common forms of regulation, rate of return regulation suffers from the problems involved in establishing appropriate cost benchmarks in a monopolistic situation. The main alternative, price regulation, caps price increases, and therefore has potential for success on both counts. Finally, profit sharing between the government and the Investor is an alternative form of regulation that preserves incentives. In PPP Projects, the PTB, with assistance from the Transaction Advisor, as part of the Feasibility Study will calculate the return on investment to be derived from the profit-sharing scheme. This will determine how the revenue will be distributed once the Project becomes operational. The Investor will be selected from the bidders who are willing to undertake the Project at a lower return on investment and a larger share of profits for the State. Where earning revenues is not the main aim of the State, profit sharing could be reflected as a lower amount of Payment that the Investor would ask from the Public Entity in cases where it is the off-taker of the Project services, or it could be reflected as lower prices charged to the end users. A competitive procurement process should be designed in a way that puts pressure on the bidders to provide the best value for money to the off-takers of its services.*

*Carrying out a Share Valuation Exercise.* The Transaction Advisor can utilize several valuation methodologies and triangulate the different approaches to determine the appropriate valuation range for shares that may be auctioned when the Joint Stock Company option for procurement (discussed in the next Module) is used. The approaches are as follows:

- Discounted cash flow, using technical assumptions
- Comparable company analysis
- Precedent transaction analysis in the applicable sector on a global basis

It is important to keep in mind that the prices are not determined randomly; disclosure may be required for all of the quantitative and qualitative factors that justify the price. It may be noted that the real test is when the Project goes to the market, as the market is the final determinant of its true value. It is also impor-

tant to note that this valuation is for an internal benchmarking exercise for the information of the Higher Committee, if so desired.

*Sensitivity Analysis.* A sensitivity analysis is necessary to determine the resilience of the model to changes in assumptions and risk components over the Project term. It will differ from Project to Project. It needs to be conducted on key cash flows and assumptions. The PTB and its Transaction Advisor should test the sensitivity of key model assumptions. Some key variables that can be relevant in a sensitivity analysis:

- Length of Project term
- Inflation rate assumption
- Construction cost
- Total operating cost
- Service demand
- Third-party revenue (if relevant and material, such as parking fees in a hospital Project)
- Financing terms

At this stage it is crucial to determine the affordability of the Project to ensure the costs the Public Entity will take on is within its budget and/or end users are willing to pay for the benefits associated with the services to be provided. If affordability cannot be demonstrated, the Public Entity may be obliged to both re-examine and modify the output specification in order to meet the affordability constraint or to consider other options. If the outputs cannot be readjusted, then either the allocated budget must be increased or subsidy provided to the users.

*Economic Assessment.* Here the Transaction Advisor calculates the incremental benefits and costs of the Project to society as a whole based on “with” and “without” Project scenarios. This will be done by estimating the expected economic benefits to be generated from the Project, such as increase in land costs, time saving, employment generation, improved public health conditions, reduced pollution, various cost saving benefits, and so forth.

*Value for Money Assessment.* Value for Money in PPPs is gained through the engagement of private sector efficiency, effectiveness, and economy, and through the appropriate allocation of risks in the Project. Factors that determine value for money include:

- ❑ Reduced whole life costs
- ❑ Better allocation of risk
- ❑ Faster implementation of the Project
- ❑ Improved quality of service
- ❑ Competitive bidding
- ❑ Incentive-based compensation structure
- ❑ Encouraging innovation
- ❑ A structure benefiting both parties
- ❑ Long-term contract: certainty of cost and revenue to parties

It is necessary to demonstrate/assess if the Project has the ability to provide value if it is procured and implemented under the PPP methodology. There are two ways in which this can be measured: Quantitative assessment and Qualitative assessment.

- ❑ Quantitative assessment: Net Present Value of the risk that is transferable to the private sector that otherwise would have been kept in the public sector Project.
- ❑ Qualitative assessment: Project has efficiencies that the private sector can provide and has provided on similar Projects; there is a suitably competitive market; risks can be transferred to the private sector; the transfer will be achieved within the costs of the PPP model.

### ***III.1.2.5 Verifying Information and Signing Off***

The Public Entity must ensure that all information used in the Feasibility Study is as accurate and verified as possible. This will call for:



- ❑ A statement from the Transaction Advisor on the reasonableness of the information collected and the process by which the information was collected
- ❑ A description of why the assumptions used in constructing the financial model are realistic and appropriate, taking into account past practice and performance, current practice, and anticipated future developments
- ❑ A record of the methodologies used for valuing various costs, including the costs of key risks
- ❑ Sign-off by each of the Transaction Advisor's consortium members that all the inputs into the Feasibility Study are accurate and verified
- ❑ Assessment of the need for guarantees and subsidies for credit enhancement of the Project (enhancing the bankability of the Project)

*Note: Subsidies, if required, will need to be structured so that they do not reduce the incentives for the Investor to be efficient and cost effective. They will need to be explicit (versus implicit budgetary support) and milestone/output-based. Sensitivity analysis can be done on the financial model to see how to minimize the amount and duration of subsidies. If upfront capital subsidy is provided during the development phase that eliminates the need for longer-term operational subsidies, that might produce more value for money. Similarly, if demand is difficult to assess or is very volatile or untested, then there may be a need for a minimum revenue guarantee. Sensitivity analysis of the financial model can reveal if there is more value for money in providing the guarantee versus the potential risk margin that the Investor may charge. All this will be done by the Transaction Advisor under PTB's supervision.*

It may be worthwhile at this stage to market-test the Project structure and financing requirements. This “reality check” may be done by obtaining feedback from potential Project participants through workshops, presentations, road shows, and so on. It should be carried out by the Transaction Advisor under the PTB's supervision.

### III.1.3 Management and Procurement Plan

The preparation of a Project Management Plan based on the packaging of the various Project components needs to be part of the Feasibility Study agreed upon by all concerned parties. The plan must include a section setting out how the PPP arrangements may be procured. The procurement procedure (auction, competition, or Joint Stock Company) is dependent on the size of the Project. The Feasibility Study will have ascertained the Project size (verified by two firms accredited by the PTB) as part of the Transaction Advisor's mandate.

The plan will refer to the next Module on Procurement and must contain at least the following:

- ❑ Project timetable highlighting the key milestones and all approvals which will be required to take the Project to implementation
- ❑ List of any potential challenges to the Project and a discussion of how these can be addressed
- ❑ Identification of all the stakeholders and the extent of their involvement in the Project
- ❑ Categories of information to be made available to bidders and how such information will be developed
- ❑ List of required approvals from all departments and agencies and a list of action items necessary for obtaining these approvals (for example, land acquisitions and environmental studies)
- ❑ Contingency plans for dealing with deviations from the timetable and budgets
- ❑ Proposed bid evaluation parameters and the process
- ❑ Appropriate quality assurance process for bid documentation
- ❑ Means of establishing and maintaining an appropriate audit trail for the bid process

### III.1.4 Revisiting the Feasibility Study

The Feasibility Study will be updated or modified when Project, external market, or macroeconomic changes occur. If at any time—after the approval of the

Feasibility Study by the PTB and the Higher Committee and before the award of the final Project Contract—any assumptions in the Feasibility Study are materially revised, including any assumptions concerning affordability and substantial technical, operational, and financial risk transfer, then the Public Entity must immediately:

- Provide the PTB and the Higher Committee with details of the intended revision, including a statement regarding the purpose of the intended revision and its impact on affordability, and on the risk transfer evaluation in the Feasibility Study
- Ensure that the PTB and the Higher Committee are provided with a revised Feasibility Study, after which the Higher Committee may decide to grant a revised approval

### III.1.5 Indicative List of Submission Requirements for the Feasibility Study Report

- Cover Letter from the Public Entity requesting approval of the Feasibility Study
- Executive Summary
- Section One:
  - Introduction
  - Project Background
  - Approach and methodology to the Feasibility Study
- Section Two: Needs Analysis
- Section Three: Options Analysis
- Section Four: Project Due Diligence
- Section Five: Financial Assessment
  - Financial model
  - Risk-adjusted financial model
  - Valuation Recommendations
- Value Assessment
- Section Six: Project Viability
- Section Seven: Information Verification

- Section Eight: Procurement & Implementation Plan (based on Project costs)
- Annex 1: Statements for Information Verification and sign off from Transaction Advisor (each consortium member)
- Annex 2: Complete financial model and assumptions
- Annex 3: Document List (listing all documentation related to the Project)
- Annex 4: All other documents that have a material bearing on the Feasibility Study and are of decision-making relevance to the Project, attached to and delivered with the Feasibility Study

#### Additional Requirements:

- The Feasibility Study must be compiled in a single report in Microsoft Word format (with relevant annexes), in both electronic and hard copy formats.
- All financial models must be in Microsoft Excel format, clearly setting out all assumptions made, sensitivity analyses carried out, and model outputs. The financial models must be sufficiently adaptable for use by others at later stages.
- The Feasibility Study must be presented with a thorough Executive Summary. The Public Entity and its Transaction Advisor may be requested to present the Feasibility Study to the PTB and/or the Higher Committee.
- The Executive Summary may also be compiled in such a manner that it can be used by the Public Entity's management for decision-making purposes.

### III.1.6 Feasibility Study Approval

The PTB shall present the Feasibility Study's conclusions and its own recommendations for the proposed Project to the Higher Committee so the Committee can decide whether or not to proceed with Project procurement.

A Project shall fulfill the following criteria, according to the Feasibility Study:

- Technically sound, economically feasible, and cost efficient for the State and beneficiaries

- Proven to be more viable implemented as a PPP than directly through a Public Entity, as the PPP would distribute investment risks—either during execution, during useful-life operation, or during its contract—in an optimal way, securing the cost effectiveness and the quality of services expected from the Project
- Profitable for the local and foreign Investors

## III.2 FEASIBILITY MODULE FOR UNSOLICITED PROPOSALS

Local and/or foreign Investors may submit Unsolicited Proposals for Projects that have unique features and/or are based on unprecedented, innovative ideas that could become a sector flagship by providing a service or facility that is currently not available (or the alternative is substantially more expensive).

### III.2.1 Unsolicited Proposals accompanied by Initial Study

The Initial Study will follow the process prescribed for a Pre-Feasibility described in the earlier sections. This will be submitted by the Unsolicited Proposer to the PTB. The Initial Study will then be evaluated by the PTB along with the relevant Public Entity selected by the Higher Committee for the proposed Project. PTB will present its analysis and recommendation to the Higher Committee for consideration.

Initial Studies must be accompanied by a nonrefundable processing fee of KD 10,000. If the Higher Committee determines that the Comprehensive Feasibility Study may be carried out by the Project's Unsolicited Proposer, it will also rule that the Unsolicited Proposer's costs for preparing the Study be reimbursed.

### III.2.2 Unsolicited Proposals accompanied by Comprehensive Feasibility Study

The Comprehensive Feasibility Study shall follow the Feasibility Study process described in earlier sections. The Unsolicited Proposal must also provide all information required for Pre-Qualification (explained in the next Module) to

demonstrate that it has the ability to undertake the Project.<sup>7</sup> It must be submitted to the PTB along with a nonrefundable processing fee of KD 10,000 before it will be considered.

The PTB, along with the assigned Public Entity within whose ambit the Project falls, will review and validate the Comprehensive Feasibility Study with the assistance of the Transaction Advisor and ensure compliance with this Guidebook's Feasibility Study processes. The PTB will present the Comprehensive Feasibility Study to the Higher Committee with its recommendations.

If the Unsolicited Proposal is approved, the PTB will then proceed with procurement for the Project as prescribed in the next Module.

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<sup>7</sup> If the Unsolicited Proposer's Comprehensive Feasibility Study is approved, the Proposer will be deemed to be Pre-Qualified to bid for the Project as prescribed in the next Module

This section details the procurement process for a PPP Project in accordance with the PPP Law, its Regulations, and international best practice. The guiding principles of a procurement process are that it be fair, equitable, transparent, competitive, and cost effective. Given that the PPP Law has been promulgated recently, it is expected that each Project will further refine the procurement process and add to the pool of best practice knowledge.

The procurement process is explained separately for various methods of procurement (auction, competition, and sale of shares) prescribed in the PPP Law.

## **IV.1 LINK BETWEEN FEASIBILITY AND PROCUREMENT MODULES**

The stronger the link between the Project's Feasibility Study and the procurement process, the greater the chances of successful closure of the Project. Therefore, before beginning the discussion on procurement issues, it is important to discuss the key outcomes of the Feasibility Study that are directly relevant to the procurement for a PPP Project.

### **VI.1.1 Detailed Understanding of all Aspects of the Project**

A detailed understanding of the Project is essential for a successful PPP procurement. A minimum requirement is that the scope of the Project is defined and linked to Public Entity's long-term objectives.

Before designing the procurement documents, it is recommended that Project objectives and scope should be restated, clearly and concisely, in terms of business outcomes supported by expected Project outputs. This statement should then serve as the introduction section in every procurement document.

### VI.1.2 Affordability Limits

The Feasibility Study should contain an analysis of the cost of the services provided by the PPP to the Public Entity (if it is buying the outputs of the Project, such as electricity) or to the end users (if they are paying for services such as tolls for the use of a road). These costs of services or payments to the Investor must be affordable, meaning that they are within the Public Entity's budget, or that the end users are willing to pay cost recovery tariffs for the services provided by the Project.

The affordability limit should be considered while preparing the procurement documents. If during the procurement process (especially during the bidding), the affordability limits are breached (that is, bids are higher than the affordability limit), revision of the Feasibility Study or the procurement documents will be required. In both instances, the PTB will seek fresh approvals from the Higher Committee.

### IV.1.3 Value for Money

Value for money is both qualitative and quantitative, and will have been discussed in the Feasibility Study. It is important that the procurement documentation:

- Sets out information to bidders that makes the value-for-money drivers identified by the Public Entity absolutely clear. They need to be identified as priorities whether they are, for instance, design efficiencies coupled with reduced operating costs in a hospital Project or the risk of technology refreshments in an information and communication technology Project. Setting out these drivers is not prescriptive, but must encourage bidders to offer their best value-for-money solution in a way that enhances these drivers.
- Encourages private sector innovation through competition.

### IV.1.4 Procurement Plan

The Feasibility Study is accompanied by a procurement plan that sets out timelines, processes, and strategies. The procurement plan should be regularly updated throughout the procurement phase.



### IV.1.5 Output Specifications

The Public Entity's required outputs of the Project were clearly specified in the Feasibility Study phase. Stressing the link between the Feasibility Study and procurement, and particularly the link between affordability and specification, the output specifications must form the basis of the Project's specifications in the tender documents.

### IV.1.6 Project Type and Participants

The Feasibility Study will have identified the Public Entity's view of the financial structure best suited to the Project's characteristics, as well as its likely participants. This would include essential information on raising debt and equity and on the types of participants, including sponsors, subcontractors, lenders, or third party investors. Importantly, when preparing the Feasibility Study, the Transaction Advisor will have tested the market's appetite for the Project and for some of the specific Project risks.

### IV.1.7 Third Parties

All third parties to agreements (that is, parties other than the Investor and Public Entity) whether they are land owners (State, municipalities, and/or other Public Entities), users, or other parties, must be identified before procurement. The procurement process must include the signing of third-party agreements (such as a fuel supply agreement in a power generation Project) at the appropriate times.

### IV.1.8 Funding Sources

Procurement documentation is dependent on identifying possible funding sources during the Feasibility Study. The source(s) of funding is closely linked to the type of Project and its probable participants. To a large extent, the source(s) (for example, lenders, specialized funds) dictates the terms of the PPP Contract. Some Projects are suited to on-balance-sheet treatment, others to high levels of

limited recourse debt requiring high levels of due diligence. Limited recourse debt is best used in Projects whose size justifies the cost and time involved.

#### **IV.1.9 Payment Mechanisms**

Where relevant, the procurement documents must clearly set out the payment mechanism. Payment to the Investor can be from Unitary (off-take) Payments from the Public Entity, user fees, or a combination of the two. Each has different characteristics. Unitary Payments from the Public Entity provide greater certainty than user fees because they do not have an inherent demand or collection risk. They also allow the Public Entity to manage performance better by making deductions for nonperformance by the Investor. User fees are susceptible to demand and collection risk. They generally lead to keen consideration by bidders, and in some cases to an underwriting of demand risk by the State.

#### **IV.1.10 Due Diligence by the Public Entity**

Project due diligence is crucial to successful procurement. The results cover, among other things, existing assets, land ownership, rights and conditions, environmental scoping, heritage issues, and staff. Procurement for a PPP cannot proceed until due diligence is complete, as any single issue can destroy or at best delay the Project. Nearly all PPPs involve the use of immovable property. Of all the items for which there needs to be certainty before procurement, land is the most important. It is also critical to identify ground conditions on “greenfield” (new) Projects, and conditions of existing assets on “brownfield” Projects (existing, operational, and being handed over to the Investor for improvements, expansion, and so on). Due diligence on the land must be complete before approval of the Feasibility study.

#### **IV.1.11 Risk Matrix**

The risk matrix from the Feasibility Study must be continually updated during procurement. Each risk is tracked in terms of where it is dealt with in the procurement documents and how bidders deal with it in their proposals.

## IV.2 IMPORTANT CONSIDERATIONS IN THE PROCUREMENT STAGE

Prior to the start of the procurement stage, it is important that various important issues (described in detail below) be discussed and so that the tender documents (RFQ and RFP) can be designed accordingly.

### IV.2.1 Disclosure of Affordability

A statement of affordability sets out the amount of money the Public Entity is willing to pay (capital contributions and Unitary Payment) or the amount the end user would be willing to pay (or can afford to pay). Disclosure of affordability to the bidders has both advantages and disadvantages; the decision should be made on a case basis after careful consideration. The single greatest benefit of disclosure is that it reduces the risk of unaffordable proposals, encouraging bids that are focused on achieving maximum value for money. In the absence of a common understanding of the affordability constraints, bids will be extremely varied and evaluation will be difficult. The disadvantages of disclosure are obvious: competition on price is limited.

### IV.2.2 Time Allowed to Bidders

There is a direct correlation between the time allowed for preparing bids and the quality of the bids. Bidders should therefore be given adequate time to conduct their due diligence, prepare all required documentation for Pre-Qualification, prepare proposals, and coordinate with financial institutions and subcontractors so the quality of the proposals is higher and the Project more likely to be successful.

Although the PPP Law and Regulations have specified certain minimum timeframes, they do not prohibit a longer timeframe. Decisions in this regard should be made on a case basis.

### IV.2.3 Land

The PPP Law is centered on the development of land through PPP Projects. According to the Law:

- No Public Entity may enter into a PPP Contract involving State-owned land without first obtaining the approval of the Higher Committee (*Article 4 of the PPP Law*). Given the scarcity of land, the Government would like to manage land use prudently and make it available to Projects that are consistent with its strategic objectives and have economic and social benefits.
- Upon expiration of the PPP Contract, the Project (including, but not limited to, land and buildings) must be handed back to the State without any consideration and compensation (*Article 6 of the PPP Law*). In other words, there will be no residual value of the Project that the State or Public Entity will owe to the Investor at the end of the term (the time of transferring the Project to the Public Entity).
- The Investor cannot sell or mortgage land, buildings or structures, or any other assets that must be transferred to the State at the end of the Project (*Article 13 of the PPP Law*). This is critical from lenders' point of view; they will ask for some other kind of collateral from the Project Investors (in commercial, corporate finance Projects such as a shopping plaza). However, the Law does allow for securitization of receivables to raise financing (more relevant in Project financing for infrastructure Projects such as a water treatment plant).
- The State will collect a rent fee from the Project company for use of State-owned land for the Project (*Article 10(1) of the PPP Law*). This fee will be factored into the financial model.

The Feasibility phase will have involved exhaustive investigations into the status of any land claims, servitudes, long leases, and constraints, as well as investigations into geo-technical conditions, existing contamination, utility service availability and capacity, and the environmental and heritage status of the land. The Public Entity and the PTB should be proactive in obtaining all necessary filings and approvals to avoid long delays later. Land issues are also at the forefront of the bidders' minds: they want certainty about their use of the land over the period of the PPP. The information in all cases should be given to bidders in the tender documents, but may not be warranted.

#### IV.2.4 Existing Public Entity Assets

In cases where existing Public Entity assets are to be incorporated into the PPP Project, bidders should be provided access to all information on the assets, including their condition and their maintenance records. Existing Public Entity assets are a separate risk category, and bidders may be unwilling to accept performance and availability risk if they do not have access to detailed information on which to base their due diligence.

#### IV.2.5 Asset Replacement and Disposal

Upon expiration of the PPP Contract, the Project should be handed over to the Public Entity without any consideration and compensation (*Article 6 of the PPP Law*). The Investor cannot sell land, buildings, structures or any other assets which must be transferred to the State at the end of the Project (*Article 13 of the PPP Law*). However, during the life of the Project, there could be assets that would need to be replaced and disposed of to ensure that the Project operates efficiently. It is also the responsibility of the Investor that upon expiry of the Contract, the Project (including all assets) should be in a “good state, ready for investment” (*as per Article 16 of the PPP Law*).

Bidders should therefore be required to provide clear schedules for asset replacement and disposal. This would not only help in the future management of the PPP Contract, but would also allow the Public Entity to understand the basis for the Investor’s use of assets when evaluating proposals.

### IV.3 INITIATION OF THE PROCUREMENT PROCESS: EXPRESSION OF INTEREST

The relevant Article of the Law is presented below:

Article 4:

[The tender] “. . . shall be advertised in broadcasting outlets, the official gazette, and at least two Kuwaiti Arabic language dailies, at least two months before inviting

*potential Bidders to obtain bidding documents. The advertisement shall include a short description of the Project, its targets, terms and duration of Contract, in accordance with the provisions of this Law . . .”*

The relevant Article of the Regulations is presented below:

**Article 8:**

*“Upon approval by the Higher Committee for tendering a Project and the tendering method pursuant to the Law and the provisions of these Regulations, the PTB shall advertise the tender in broadcasting outlets, the official gazette, and at least two Kuwaiti Arabic dailies, at least two months before inviting Bidders to obtain auction or competition documents. The advertisement shall include a summary of the Project, its goals, and terms and duration of Contract, in accordance with the provisions of law.”*

This part of the Procurement Module deals with the announcement of intention of the Government to tender the Project through a request for an Expression of Interest or EOI. The EOI can be advertised only after:

- Acceptance of an Unsolicited Proposal in the case of an Unsolicited Proposal and approval of tendering and method of tendering (*Articles 4, 7, 42, and 43 of the Regulations issued in terms of the PPP Law*)
- Approval of the Feasibility in the case of a Solicited Proposal and approval of tendering and method of tendering (*Articles 3 and 7 of the Regulations issued in terms of the PPP Law*)

A request for EOI is used to establish the level and type of interest of potential Investors in a particular Project. The advantage of an EOI is that the Public Entity and the PTB can make an informed decision, based on likely market interest, as to whether to proceed with a Project. An EOI should be more than a public advertisement calling for responses. Ideally, it should include an Information Memorandum along with the advertisement. Although the Transaction Advisor would have conducted soft marketing as part of the Feasibility Study to gauge the level of interest of potential Investors, the EOI should be widely advertised. This will ensure that it comes to the attention of potential Investors and also ensure trans-

parency. Both the request for EOI and the Information Memorandum should be prepared by the Transaction Advisor, reviewed by the Public Entity, and approved by the Technical PTB. The request for EOI is to be advertised by the PTB in:

- Broadcasting outlets
- The official gazette
- At least two Kuwaiti Arabic language dailies

For some Projects, it would be appropriate to place the advertisement in reputable international newspapers or magazines with wide circulation. This will attract international investors. The PTB should make a decision in this regard, taking into consideration the advice of the Transaction Advisor.

The advertisement should include:

- Short description of the Project
- Objectives of the Project
- Terms and duration of the Contract

It should also explain how to obtain a “Request for EOI and Information Memorandum” and any other information on or clarification of the timing and manner of submitting the EOI. It should be visible for at least two months before inviting potential bidders to obtain a Request for Proposal (RFP).

The Request for EOI and the Information Memorandum should include:

- Background and aims of the Public Entity and the Project
- Reference to the PPP Law, its Regulations, and the Guidebook
- References to more detailed sources of information, if any
- Expertise sought from the local and foreign Investors
- Information that respondents must supply
  - Legal status of respondent
  - Respondent’s profile and contact details
  - Respondents’ reasons for interest in the Project
  - History of involvement in similar Projects (locally and internationally)
  - Comments on the proposed PPP

- Process to be followed in the EOI and subsequent communication with respondents with timelines
- Appropriate disclaimer of Public Entity liability and reservation of rights

This document does not include the same detail as a Request for Qualification (RFQ). The emphasis is on providing information to potential Investors, not on soliciting full bids or proprietary information from private parties. Obtaining the Information Memorandum or Submission of an EOI should preferably be without a charge or with minimal charges.

A list of parties that have submitted EOIs should be prepared after the last date on which EOIs could be submitted. The names of the parties may be announced in the press and published on the PTB Web site. All parties should be sent acknowledgement letters.

## IV.4 PRE-QUALIFICATION

### IV.4.1 Introduction to Pre-Qualification

Relevant Articles of the PPP Law which stipulate that a bidder should be Pre-Qualified in order to participate in the bidding, whether through auction, competition, or sale of shares are as follows:

Article 5 (a):

*“ . . . Forty percent of shares shall be offered by the assigned entity in an open auction among companies listed on the Kuwait Stock Market and other companies approved by the Higher Committee for participation.”*

Article 6:

*“For companies (listed on Kuwait Stock Exchange or approved by the Higher Committee) to participate in PPP Projects, they must meet the minimum capital requirements for listing on the stock exchange.”*

The relevant Regulations issued in terms of the PPP Law include:



**Article 12:**

*“In case of Projects selected by the Higher Committee for tendering through auction or competition, with estimated total costs not exceeding sixty million Kuwaiti Dinars, or development Projects decreed by the Council of Ministers for tendering through competition, with estimated total costs not exceeding two hundred and fifty million Dinars, the Higher Committee shall conduct a pre- or post-qualification of companies unlisted on the Kuwait Stock Market or foreign companies wishing to take part in the auction or competition, so as to verify their ability to execute the Project and fulfill all contractual obligations in case of awarding.”*

**Article 46:**

*“In case of the incorporation by a Public Entity assigned by the Higher Committee pursuant to Article 5 of the Law to carry out a Project, the Higher Committee shall select unlisted companies, including foreign companies eligible under applicable laws, to participate with companies listed on the Kuwait Stock Market through an open auction to purchase the offered shares. This selection shall be based on a pre-qualification of unlisted companies under Article 12 of these Regulations regarding the advertisement of the invitation to apply for pre-qualification, and Articles 14 and 15 of these Regulations, subject to the special nature of the offering process instead of tendering the Project.”*

**Article 43:**

*“... If the Project is tendered in a Competition, the Unsolicited Proposer shall be regarded as Pre-Qualified to compete, if the information be presented, in addition to any other information requested by the PTB, prove his ability.”*

It is clear from a review of the above Articles of the PPP Law and the Regulations issued in terms of the PPP Law that in all size and types of Projects, and in all forms of tendering, only Pre-Qualified parties can participate in the bidding (with companies listed on the Kuwait Stock Exchange deemed to be Pre-Qualified in all cases). Therefore, Pre-Qualification is to be conducted only for local companies not listed on the Kuwait Stock Exchange and for foreign companies.

The Regulations also stipulates that in the case of an Unsolicited Proposal, where the Project is approved by the Higher Committee to be tendered in a

competition, the Unsolicited Proposer would be regarded as Pre-Qualified if the information provided proves his ability.

The basic objective of Pre-Qualification is to ensure that parties entering the bidding have the ability, technically and financially, to implement the Project effectively and efficiently and to fulfill all contractual obligations. The Pre-Qualification process also:

- Sets out the rules of participation in the procurement process clearly
- Disseminates information on the Project
- Gives guidance on the expected kinds of participants in the bidding consortia
- Gathers information from bidding consortia that is verifiable and can be evaluated

#### IV.4.2 Important Considerations in the Pre-Qualification Stage

Following are some important issues that the Public Entity and the PTB need to consider while initiating the Pre-Qualification process:

##### *Number of Pre-Qualified Bidders*

To ensure successful bidding and implementation of the Project, the number of Pre-Qualified bidders should be neither very low (one or two) nor very high (six or more). A low number is a disadvantage, as competition for the Project is greatly reduced. A high number reduces the chances a bidder will be successful, reducing in turn the level of interest among Pre-Qualified bidders.

Having only one Pre-Qualified bidder does not mean that bidding cannot be conducted. It may, however, be an indication that the Project has not been well structured or conceived, in which case, the PTB should follow the guidance below:

- Ascertain the likely reasons for the limited interest, and revisit the RFQ documentation and the Feasibility Study to see what assumptions could be revised to increase market interest. Any changes in the Feasibility Study must be evaluated for changes in affordability, value for money, and risk transfer.

- ❑ Obtain revised approval from the Higher Committee if any changes to assumptions in the Feasibility Study are made.
- ❑ Carry out a second Pre-Qualification exercise if the Project assumptions have been changed and if a revised approval from the Higher Committee has been obtained.
- ❑ If the Feasibility Study is not revised, carry out the Pre-Qualification exercise again, with a wider circulation to attract a suitable number of bidders.

*Investors eligible to participate in bidding consortia (other than listed companies on the Kuwait Stock Exchange)*

**Private Investors:** All private local and foreign Investors (including companies listed on the Kuwaiti Stock Exchange, those not listed, and foreign companies) that have not been blacklisted by the Kuwaiti Government (including Ministries, Departments, or Public Entities) or that have not been found guilty in a court of law for fraud or corruption-related crimes should be eligible to participate in the Pre-Qualification process.

**Not-for-profit entities:** Not-for-profit organizations are established under different laws in various jurisdictions and are called by various names, including company, trust or association of persons, and so on. Usually their income or assets are not distributable to its members or office bearers. These organizations are not ideal as Investors or operators on a PPP Project, as their funding is usually dependent on various donors or Government(s).

**Public Entities:** The basic aims of PPP Law are to benefit from private sector innovation, expertise, efficiency, and financing; to share sharing risks between the public and private sector; and to linking private sector remuneration with its performance. In principle, therefore, the use of Public Entities as financiers, equity participants, or subcontractors runs contrary to the principle of risk transfer in a PPP. Agreements formed between Public Entities are not PPPs, but some other form of procurement. International best practice regards participation by Public Entities in an Investor consortium to a PPP as anticompetitive and as skewing the risk profile of the Project for the Government.

However, there might be situations where a Public Entity that is a financial institution has a role to play in financing PPPs. They may have greater risk tolerance than private sector financial institutions and be able to provide longer-term debt, for example. It is also possible that a Public Entity can participate as a subcontractor. However, it should be ensured that no single bidder has an unfair advantage over others. All other forms of Public Entity participation should be explicitly excluded in the RFQ.

**Conflict of interest:** The principle regarding conflict of interest is that all real or potential situations of conflict of interest should be strictly avoided. Conflict of interest could, for example, arise from the following, hence, the restrictions and constraints noted:

- *Transaction Advisor, Public Entity, PTB, and Higher Committee.* All members of the Transaction Advisor, Public Entity, PTB, or Higher Committee are prohibited from participating in, advising or having any interest in any bidding consortium. Doing so will nullify the process of the bidding.
- *Consortium members.* Article 16 of the Regulations issued in terms of the PPP Law states that: “. . . no entity may join more than one applying consortium without permission from the PTB . . .” No member (Investor, Investor’s financial advisor, lender) of any consortium should be a member of, or in any way participate or be involved in (directly or indirectly), another consortium at any stage of the procurement process. However, the restriction can be lifted for:
  - Any specialist supplier, if the restriction leads to a severely limited number of consortia
  - Any noncore service provider or general supplier that is not a consortium member
  - Any commercial entity whose role is strictly limited to lending money or advancing credit to the bidding consortium
- *Advisors and lenders:* To prevent conflict or potential conflict of interest among Project advisors, lenders, and sponsors, no advisor to any consor-

tium, or member of a consortium should fulfill the role of arranger, underwriter, or lead bank to the consortium.

## IV.5 PREPARATION, APPROVAL, AND DISTRIBUTION OF THE REQUEST FOR PRE-QUALIFICATION (RFQ) DOCUMENTS

Relevant Articles of the Regulations issued in terms of the PPP Law state that:

### Article 13:

*“The competent Public Entity, in collaboration with the PTB, shall prepare pre- or post-qualification documents for bid submission by unlisted Kuwaiti companies or foreign companies, including instructions for qualification applicants, information about the Project intended for tender through auction or competition alongside Kuwaiti listed companies, in addition to information and documentation required from potential qualifiers. These documents shall be presented to the PTB for approval and referral to the Higher Committee for final approval. Unless the Higher Committee sees a need for post-qualification, the PTB shall advertise the invitation to apply for pre-qualification. The advertisement shall include the following:*

- 1) *A short description of the Project, indicating site, objectives, whether it needs to offer services, and terms and duration of Contract under the Law;*
- 2) *Area of allocated land and basic price or usufruct rights, and a list of any other assets to be provided by the Public Entity or any other State entity, stating any concession fees the Investor may have to pay and how to determine them;*
- 3) *How to obtain pre-qualification application documents, including the entity from which these documents may be obtained, which is the PTB;*
- 4) *Any required fees for obtaining pre-qualification application documents, as decided by the Higher Committee;*
- 5) *How to apply for pre-qualification, and where (the PTB headquarters). The Higher Committee may decide to accept applications via electronic means.*
- 6) *Deadline for applying, which shall be no less than sixty days from the date of publishing the pre-qualification advertisement in the official gazette. Advertisements inviting unlisted and foreign companies to apply for pre-qualification shall*

*be publicized through broadcasting outlets, the official gazette, at least two Kuwaiti Arabic dailies, and, if deemed necessary, in some specialized international newspapers and magazines.”*

#### Article 14:

*“Taking into consideration the special nature of the intended Project, pre-qualification documents for unlisted companies on the Kuwait Stock Market and foreign companies shall include the following:*

- 1) Instructions for pre-qualification applicants, indicating ways of preparing and submitting applications;*
- 2) Detailed description of the tendered Project, including site, nature, main components, and any special expertise required for implementation;*
- 3) General information on the Project’s area, its characteristics, and available services;*
- 4) Area of land allocated for the Project, its basic price or usufruct rights, a list of any other assets to be provided by the Public Entity or any other State entity, stating any fees to be collected and ways of calculation, and any land rent fees the Investor may have to pay;*
- 5) Any required services to be provided through the Project, and its specifications;*
- 6) Method of calculating fees to be paid to the Investor in return for any services required, by the Public Entity and/or the beneficiaries;*
- 7) Evaluation criteria for qualification applications, pursuant to article 15 of these regulations, and their relative weight;*
- 8) Deadline date and hour for receiving qualification applications, in case of pre-qualification;*
- 9) Any further information relevant to the nature of the Project and its tender procedure, taking the Guidebook’s instructions into consideration;*
- 10) A detailed list of information to be provided by qualification applicants in order for them to meet qualification criteria and requirements, with forms to be filled for this purpose, and a list of documents to be presented.”*

## IV.5.1 Preparation of RFQ Documents

The RFQ document must allow bidders to present appropriate information about themselves. It must also clearly set out the RFQ evaluation criteria and processes. Any special requirements of the Public Entity must be clearly stated, and particular RFQ provisions must be developed for each PPP. The RFQ document, including its advertisement, should be prepared by the Transaction Advisor, reviewed by the relevant Public Entity, and approved by the PTB.

### *IV.5.1.1 Contents of the Advertisement of RFQ*

The advertisement of RFQ should include the following information:

- ❑ A short description of the Project, indicating site and objectives
- ❑ Terms and duration of Contract
- ❑ Area of allocated land and basic price or usufruct rights
- ❑ A list of any other assets to be provided by the Public Entity
- ❑ Any rental fees for land the Investor may have to pay and how to determine them
- ❑ How to obtain Pre-Qualification application documents from the PTB
- ❑ Any required fees for obtaining Pre-Qualification application documents
- ❑ How to apply for Pre-Qualification
- ❑ Deadline for applying

### *IV.5.1.2 Contents of the RFQ Document*

The RFQ document should include the following information:

- ❑ Disclaimer
- ❑ Terms and conditions of issuance of the RFQ
- ❑ Purpose of issuing the RFQ
- ❑ Outline of the contents of the RFQ
- ❑ Information about the Project
  - Detailed Project description, background and overview, including site, nature, main components, and any special expertise required for implementation

- General information on the Project's area, its characteristics, and available services
- Land issues including area of land allocated for the Project, its rent or usufruct rights
- A list of any other assets to be provided by the Public Entity or any other State entity, stating any fees to be collected and ways of calculation
- Defined performance parameters
- Defined legal requirements and statutory regulations related to the PPP
- Identified financing requirements and issues
- Identified revenue parameters, as available
- Summary of the envisaged risk transfer
- Public Entity requirements for consortium membership
- Any concession fees the Investor may have to pay
- Method of calculating fees to be paid to the Investor by the Public Entity and/or the beneficiaries (or calculation of tariff to be paid by end users) in return for any services delivered
- Procurement process
- Stages and timelines
- Clarification processes and briefing notes
- Changes to the composition of consortia
- Participation in more than one consortia
- Bid bond
- Instructions to respondents
  - Format of submissions, including compulsory forms of response
  - Manner, date, and time of submission
  - Late submissions
  - Status and composition of respondents
  - Disclosure of legal processes underway that affect bidding consortia
  - Grounds for disqualification
  - Public Entity contact details
- Information required about bidders
  - Consortium capability and strength
  - Proposed consortium composition and structure with roles of the members clearly spelled out



- Current workload of consortium members
- Skill and experience of relevant organizations and subcontractors in Projects of a similar nature
- Strength of covenant among consortium members, subcontractors, and lenders
- Financial and market standing
- Equity, ownership, and directorship
- Capacity to deliver
- Commitment and capacity to meet Project timetable
- Ability to raise debt and equity and to provide security
- Project management capability
- Risk management capability
- Demonstration of understanding key Project demands/complexities
- Previous relationship(s) with the Government
- Quality assurance systems
- Approach to the PPP and integration of deliverables
- The evaluation process
  - Methodology
  - Evaluation criteria

### IV.5.2 Approval of RFQ Document

The RFQ documents prepared by the Public Entity (through the Transaction Advisor) in collaboration with the PTB should be submitted to the PTB for approval and referral to the Higher Committee for final approval.

### IV.5.3 Advertisement and Distribution of RFQ Document

After approval of the RFQ document, the advertisement of the RFQ should be distributed by the PTB through the following:

- Broadcasting outlets
- The official gazette
- At least two Kuwaiti Arabic dailies

- Reputable and specialized international newspapers and magazines, if deemed necessary

The advertisement of RFQ may also be published on the Web sites of the Public Entity and the PTB. Press statements can also be issued. The timeframe for applying for Pre-Qualification shall not be less than sixty days from the date of publishing the Pre-Qualification advertisement in the official gazette.

In addition to advertisement, the parties who had submitted EOIs must also be asked in writing to obtain and submit Pre-Qualification Application Documents. An open briefing session for potential bidders to introduce the Project and to stimulate private sector interest may also be conducted. Any such public briefings should be careful not to present any information not contained in the RFQ document. Depending on the size of the Project, local and international road shows may also be conducted to stimulate private sector interest.

The fee for obtaining the Pre-Qualification application documents is to be decided by the Higher Committee, which can determine the fee amount with reference to the following:

- The cost of printing the Pre-Qualification application document
- The cost of developing the Pre-Qualification application document
- The cost of evaluating the Pre-Qualification documents submitted

In order to encourage many parties to obtain the Pre-Qualification application documents, the fee for obtaining the Pre-Qualification application documents is usually kept low; the cost of printing is a good reference for setting it. However, an additional fee may be charged for submitting Pre-Qualification documents, which could be decided with reference to the cost of evaluating them. In addition to reimbursing the expenses of the Public Entity/Technical PTB, this would ensure that only serious bidders submit Pre-Qualification documents.

## IV.6 RECEIPT AND EVALUATION OF PRE-QUALIFICATION DOCUMENTS, APPROVAL OF PRE-QUALIFIED PARTIES, AND COMMUNICATION WITH BIDDERS

Relevant Regulations issued in terms of the PPP Law are provided below:

### Article 15:

*“The competent Public Entity, in collaboration with the PTB, shall assess pre-qualification applications submitted by unlisted and foreign companies, based on the factors required for pre- or post-qualification, depending on the case, and the relative weight of each factor as stated in qualification documents. No other criteria or relative weights may be applied except the above-mentioned, which shall include the following, subject to the special nature and tendering method:*

- 1) *General experience in works execution management or actual execution over the past five years or other period of time, as decided by the Higher Committee;*
- 2) *Experience in execution management or execution of Projects similar in size, type, and complexity of the tendered Project, in addition to experience in managing, operating, and maintaining such type of Projects over the past five years or other period of time, as decided by the Higher Committee;*
- 3) *Availability of efficient administrative and technical capabilities to design, execute, operate, and maintain the tendered Project;*
- 4) *Ability to provide equipment and installations needed for Project execution, either directly or by proxy, and provide equipment and installations needed for Project operation and maintenance, in light of information provided by the applicant showing equipment and installations, owned by the applicant or planned to purchase or lease;*
- 5) *Financial adequacy and ability to secure necessary funding;*
- 6) *Any other criteria approved by the Higher Committee upon recommendation of the PTB, taking into account the competent Public Entity’s opinion.*

*The competent Public Entity, in collaboration with the PTB, shall report on the assessment of pre-qualification applications and its conclusions, for the PTB to submit*

*to the HC, accompanied by appropriate recommendations, for endorsement of Pre-Qualified unlisted or foreign companies.”*

#### Article 16:

*“Consortiums made of several entities may, with the PTB’s approval, apply for pre- or post-qualification, in which case it shall provide information and documentation needed for qualification as a consortium and as separate entities. No entity may join more than one applying consortium without permission from the PTB.*

*On assessing consortium applications, qualifications and capabilities of each member shall be considered separately, then as a whole to decide if, together, they meet qualification criteria and requirements.”*

### IV.6.1 Receipt of Pre-Qualification Documents

The Public Entity should receive all the Pre-Qualification application documents without opening the envelopes and promptly update the list of applicants. Prior to the last date of submission of documents, the Transaction Advisor, the Project Manager, and the PTB’s Technical Specialist may also call private parties who submitted EOIs or showed interest in the Project to invite them to submit Pre-Qualification application documents.

Once the last date of submission of Pre-Qualification application documents has passed, the final list of parties that have submitted the documents should be made public through press statement and Web site updates by the PTB. Pre-Qualification application documents should be opened in the presence of the Project Manager and the Technical Specialist, and the contents of the documents recorded.

### IV.6.2 Evaluation of the Pre-Qualification Documents

The competent Public Entity, in collaboration with the PTB, shall assess Pre-Qualification applications based on the criteria, methodology, and relative weight of each factor as stated in the RFQ. Evaluation criteria must be based on the information requested from the bidders and must be included in the RFQ

to focus Investor responses and eliminate unnecessary information. The evaluation should be done in three steps:

*Completeness evaluation:* The Transaction Advisor should prepare a checklist of documents required to be submitted in the RFQ and should note for each applicant whether all documents required have been submitted in the manner prescribed.

*Disqualification evaluation:* The Transaction Advisor should prepare a checklist of reasons for disqualification as described in the RFQ document and should note whether any applicant is subject to disqualification.

*Qualification evaluation:* The Transaction Advisor should prepare an evaluation Form for each applicant showing categories and subcategories of various evaluation criteria. The detailed criteria will vary from Project to Project. The evaluation could be done either qualitatively, using “good,” “adequate,” or “poor” for each category and sub-category, or quantitatively, by allocating numbers from 1 to 10 for each category and subcategory. Each category could also be given a relative weight according to its importance in the overall Project.

The main areas for evaluation would be following:

Categories and subcategories
Respondent's capability and strength
Proposed respondent composition and structure
Skill and experience of relevant organizations and key subcontractors: <ul style="list-style-type: none"> <li>• Design</li> <li>• Construction</li> <li>• Operations</li> <li>• Maintenance</li> <li>• Advisors</li> <li>• Suppliers</li> </ul>
Strength of covenant between relevant organizations and key subcontractors and respondent
Financial and market standing

### Categories and subcategories (continued)

Ability to raise debt and equity and to provide security

#### Deliverability

Commitment and capacity to meet Project timetable

Project management capability

Current workload of consortium members

Quality assurance systems

Risk management capability

#### Project awareness

Demonstration of understanding of key Project demands and complexities

Each Evaluation category would be assigned appropriate weighting on a Project-to-Project basis.

### IV.6.3 Approval of Pre-Qualified Investors

The Pre-Qualification evaluation conducted by the Public Entity (assisted by the Transaction Advisor and in collaboration with the PTB, should be submitted along with recommendations to the Higher Committee for Pre-Qualification or disqualification of any bidder.

#### IV.6.3.1 *Communicate with Bidders*

After the Higher Committee approves the Pre-Qualification of bidders, the Public Entity should inform both the unsuccessful and Pre-Qualified bidders in writing, and publicly announce the Pre-Qualified bidders, as soon as possible.

## IV.7 PREPARATION OF TENDER DOCUMENT: REQUEST FOR PROPOSALS

The relevant Articles of the PPP Law are provided as follows:

**Article 4:**

*“Upon effectiveness of this Law, a Public Entity or company running State-owned real estate may not enter into Contract with any Investor for a Project on State-owned property under PPP model. . . . The Project shall then be tendered in an open tender or competition, as the case may be, provided that the deadline for bid submission shall be no less than 90 days from the date of tender.”*

**Article 5:**

*“If the total estimated cost prescribed in the Project’s Feasibility Study, approved by the HC for tendering under Article 4, is in excess of 60 million Kuwaiti Dinars, including the lesser of the estimated market value of the Project’s land or the estimated market value of usufruct rights, to be decided by at least two accredited firms, the Higher Committee shall assign a Public Entity with establishing a public stock company for this Project, instead of tendering it in an open auction or competition. Its shares shall be distributed as follows:*

- a) Forty percent (40%) of shares shall be offered by the assigned entity in an open auction among companies listed on the Kuwait Stock Market and other companies approved by the HC for participation. The auction shall be awarded to the highest Bidder over the share’s nominal value in addition to the incorporation fees, if applicable . . .”*

**Article 6:**

*“In exemption of the previous two articles, the Council of Ministers may, upon a proposition by the Higher Committee, issue a decision for cause offering development Projects of special nature, whose total costs estimated in the Project’s Feasibility Study do not exceed 250 million Kuwaiti Dinars, including the estimated market value of the Project’s land or the estimated market value of usufruct rights, as determined by at least two accredited firms, for competition among companies listed on the Kuwait Stock Exchange and other companies approved by the Higher Committee for participation . . .”*

**Article 8:**

*“Should the Unsolicited Proposer participate in the tendered Project with its bid satisfying all requirements, it shall have a preference of up to five percent (5%) less than the best bid.”*

Relevant Regulation issued in terms of the PPP Law are provided as follows:

Article 7:

*“... Competition shall be used to select an Investor based on the preference of offers technically, financially, and environmentally, and for any development Project of a special nature approved for tendering by the Council of Ministers under article 6 of the Law, and whose total estimated costs do not exceed 250 million Kuwaiti Dinars.”*

A review of the above Articles of the PPP Law and the Regulations issued in terms of the PPP Law reveal the following:

- ❑ No Contract for a PPP Project on State-owned property can be entered into without tendering which includes auction and competition.
- ❑ In cases where the estimated total cost of a Project is less than KD 60 million, the Project can be tendered either through auction or competition to be decided by the Higher Committee.
- ❑ In cases where the estimated total cost of a Project is between KD 60 million and KD 250 million and the Project is a development Project of special nature (proposed as such by the Higher Commission and approved by the Council of Ministers), the Project would be tendered through competition.
- ❑ In cases where estimated total cost is more than KD 60 million, a public Joint Stock Company is to be established for the Project, 40 percent of whose shares would be tendered in an open auction.
- ❑ In Unsolicited Proposals, if the Unsolicited Proposer participates in a tendered Project, it shall have a preference of up to five percent (5%) over any other bids.
- ❑ Competition shall be used to select local and foreign Investors based on the relative strength of their technical, financial and environmental offerings.

#### IV.7.1 Preparation and Approval of Request for Proposal Documents

Relevant Regulations issued in terms of the PPP Law are provided as follows:



**Article 9:**

*“The competent Public Entity shall prepare the documents for auction or competition, as decided pursuant to the Law. The documents shall be prepared in collaboration with the PTB and submitted to the Higher Committee for approval, and shall include instructions for Bidders and bid application form.”*

**Article 10:**

*“Instructions for Bidders shall include:*

- 1) Bid preparation instructions and place of submission in sealed envelopes to the PTB. However, with the approval of the Higher Committee, application may be submitted through secure electronic means;*
- 2) Deadline date and hour for bid submission;*
- 3) Amount of initial bond by check or a letter of guarantee issued or certified by a licensed bank in Kuwait, and written in a certain format indicated in the instructions;*
- 4) Required bid validity period;*
- 5) Stating the Kuwaiti Dinar as the official currency to be used in bids;*
- 6) Documentation and information needed from a bidding consortium, including a certified copy of its formation contract, stating the name of the authorized signatory and his delegation document;*
- 7) Amount of performance bond required from the successful Bidder, which shall be paid by a letter of guarantee issued or certified by a licensed bank in Kuwait, indicating bond format, submission deadline after bid acceptance, and validity period;*
- 8) A statement indicating whether the Project is initiated by a national or foreign Investor and accepted by the Higher Committee, and the percentage specified by the Committee as a preference margin for the Initiator;*
- 9) A statement of bid evaluation criteria and relative weights, in case of a competition;*
- 10) Any other elements deemed necessary or appropriate to complement the instructions.”*

**Article 11:**

*“Considering the Project nature, tender method, and the way of implementation, the bid invitation documents shall include the following main elements:*

- 1) *Detailed information available on the Project, including specifications, different components, initial quantity estimations if applicable, site, and the geographical area in terms of characteristics and available services;*
- 2) *Services to be provided by the Project, their specifications, quality and quantity, and Project performance indicators;*
- 3) *Area of land allocated for the Project, its basic price or usufruct rights, a list of any other assets to be provided by the Public Entity or any other State entity, stating the charges, if any, to be collected and way of calculation, and any land rent fees the Investor may have to pay;*
- 4) *Whether the Feasibility Study of the tendered Project has been conducted by an Unsolicited Proposer and accepted by the HC, and the amount due to the Unsolicited Proposer, as decided by the Committee, that shall be paid by the successful Bidder to compensate the Unsolicited Proposer.*
- 5) *The proposed Contract form, indicating terms of Contract between the Public Entity and the Investor, and its duration pursuant to the provisions of the law. In case of competition, it shall indicate which terms of Contract are open to negotiation, if any.*
- 6) *Elements to be included in bids, in case of competition, under article 31 of these regulations.”*

#### Article 31:

*“Subject to the nature of the Project and proposed implementation method, under a PPP model, any bid to execute a Project tendered through a competition shall include the following:*

*I: A technical bid indicating the following:*

- 1) *The proposed technical means to provide any public service required in line with the tender documents or to achieve any other objectives of the Project as stated in such documents;*
- 2) *Arrangements to design the Project, execute construction works, and provide necessary tools and equipment;*
- 3) *The proposed timetable for Project execution;*
- 4) *Administrative and technical staff to execute and operate the Project;*

- 5) *The proposed technical methods to operate the Project;*
- 6) *Information confirming the capability to provide any service required through the Project, in terms of specifications, standards, quality and quantity;*
- 7) *Information regarding the observation of environmental and safety rules and standards, in designing, executing, and operating the Project;*
- 8) *The Bidder's world technical and scientific quality standards;*
- 9) *Any other elements deemed appropriate by the Higher Committee, upon the recommendation of the competent Public Entity and the PTB, to be included in the bid's technical data . . .”*

*II: A financial bid, which shall include, depending on the Project nature, all or part of the following:*

- 1) *Detailed information on Project design and construction costs, and annual operation and maintenance costs;*
- 2) *Financing arrangements for all stages of the Project;*
- 3) *Expected annual revenues from services provided by the Project, indicating proposed fees to be collected over the duration of the Contract, or the amount to be paid by the Public Entity in return for such services;*
- 4) *Expected financial performance of the Project, including expected cash inflows over Project or Contract duration;*
- 5) *Amounts to be paid to the State for land allocated to the Project or usufruct rights, and to the competent Public Entity or any other State-owned entity for assets allocated by any of them to be used in the Project, and to the competent Public Entity for legal rights to carry out the Project, either as a specified sum or a percentage of earned profits;*
- 6) *Any other financial data deemed appropriate by the Higher Committee, upon recommendation of the competent Public Entity and the PTB, to be included in financial bids.”*

#### Article 34:

*“... Bids shall be evaluated and compared based on criteria and relative weights stated in the tender documents, including evaluation of required technical and financial elements. The technical evaluation shall also include the following, as may be appropriate:*

- 1) *Technical safety factors observed in the offer, including use of proven technologies;*
- 2) *Observation of environmental preservation standards;*
- 3) *Ease of Project operation, without or with minimal, easily surmountable complications;*
- 4) *Quality of services, installations, and facilities to be provided by the Project, their conformity with specifications and performance indicators required in tender documents, and measures to maintain that quality;*
- 5) *Cost effectiveness of services, installations, and facilities to be provided by the Project, depending on the offer, as compared to the financial bid.”*

**Article 35:**

*“Subject to the Project’s nature, criteria for financial bid evaluation shall, in general, include the following:*

- 1) *Costs of Project design, execution, construction, operation, maintenance, and financing;*
- 2) *Time-table of Project execution, and its cost effectiveness;*
- 3) *Current service fees, prices, or estimated costs expected to be shouldered by beneficiaries of any services or products provided by the Project for the duration of its Contract;*
- 4) *Amounts to be paid by the competent Public Entity to the executing Investor over the duration of Contract in return for services provided by the Project;*
- 5) *Financial subsidy from the competent Public Entity over the duration of Contract, if applicable;*
- 6) *Amounts to be paid to the State by the executing Investor over the duration of Contract for land usufruct rights, or to the competent Public Entity or any other State-owned entity for assets provided by either entity for use in Project execution and operation, and also any amounts to be paid by the Investor for conceding to him the right to execute and operate the Project, whether a fixed amount or a percentage of the Investor’s expected profits.*
- 7) *The Bidder’s proposals on any terms subject to negotiation as stated in tender documents, and its financial implications.”*

#### *IV.7.1.1 Preparation of Request for Proposal document*

The Public Entity (with the assistance of the Transaction Advisor) should develop the Request for Proposal (RFP) based on the Feasibility Study, in consultation with the PTB.

The draft RFP document should also include a draft PPP Contract.<sup>8</sup> The Public Entity can highlight the areas where bidders are being asked to provide input. Feedback from bidders can be both oral and written, though written is preferred. To extract value from the process and not compromise procedural fairness, bidder interaction must be well structured and must not compromise confidential bidder information. Bidder interaction will normally involve a Bidders' Conference attended by all Pre-Qualified bidders and as one-on-one meetings between each bidder and the Public Entity as well. All conferences and meetings must be conducted according to predetermined, written rules, and must be recorded.

The Public Entity should be careful not to tailor the RFP to the inputs of any single bidder. It may also be noted that no bidder is likely to share proprietary or confidential information at this stage; the bidder interaction should therefore focus on areas of interest to all bidders. The focus should be on getting useful information; feedback should not be used to evaluate bidders.

All feedback must be considered against the Public Entity's position, which is based on the Feasibility Study. Feedback that is common to all bidders should be given more weight than isolated feedback. Feedback from a full consortium of lenders, equity sponsors, and subcontractors should also be given more weight. Record of the source of feedback and the Public Entity's reasons for including or excluding particular feedback should be carefully kept. For transparency and credibility reasons, general feedback given to one of the bidders should be communicated to all the others.

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<sup>8</sup> In some infrastructure Projects there will be several draft contracts. For instance, in power generation Projects (Independent Power Producers or IPPs) the draft PPP Contract (usually called a Power Purchase Agreement) will be accompanied by a Fuel Supply Agreement (whereby the fuel supplier will undertake to provide fuel of certain quality and quantity over a period time to ensure uninterrupted power generation).

#### ***IV.7.1.2 Contents of the RFP Document***

The RFP needs to be an effective two-way communications tool between the Public Entity and the bidders. Therefore, the RFP must communicate Project data and the Public Entity's requirements to bidders, and set out how bidders must communicate their proposals to the Public Entity. An overview of the RFP contents is below. The contents will have to be customized on a Project basis, especially considering the Project might be tendered through auction, competition, or auction of shares of a public stock company.

#### ***IV.7.1.3 General Information to Bidders***

*Explanation of Project.* The RFP must communicate the background of the Project, detailed information available, including specifications, components, initial quantity estimates, if applicable, site information, and the characteristics and available services in the geographical area. (as per Para 11 (1) of the Regulations). The RFP must also communicate the Public Entity's desired and envisaged outcomes for the Project.

*Land and Assets Details.* The RFP must clearly state the area of land allocated for the Project, its basic price or usufruct rights, a list of any other assets to be provided by the Public Entity or any other Public Entity, stating the charges to be collected, if any, and method of calculation, and any concession fees the Investor may have to pay (as per Para 11 (3) of the Regulations).

*Disclosure of Unsolicited Proposal.* The RFP must clearly state whether the Project is being procured as a result of Solicited or Unsolicited Proposal, must identify the Unsolicited Proposer if applicable, and must state that the Feasibility Study has been conducted by the Unsolicited Proposer and has been accepted by the Higher Committee.

The RFP must also disclose the amount due to the Unsolicited Proposer (cost of Feasibility Study plus 10 percent) payable by the successful bidder, in case the Unsolicited Proposer is unsuccessful (as per Article 11 (4) of the Regulations). The RFP must also disclose the percentage (up to 5 percent) approved by the Higher Committee as a preference margin for the Unsolicited Proposer (as per Article 10 (8) of the Regulations).

*External framework.* This should explain the regulatory, physical, political, and social environment in which the Project is to take place. This includes:

*Project framework.* This sets out the Public Entity's view of what the PPP is and how it may be structured (note that the PPP involves more than just the Project, as it includes relationships among parties.) Without being prescriptive, the Project Framework sets out the Public Entity's view of the envisaged kinds of contracting parties. These will differ according to the anticipated type of PPP and its envisaged financing structure.

*Project assets.* Core Project assets must remain unencumbered for the term of the Project and thereafter (as per Article 13 of the PPP Law). Any Project assets that may be used by the Investor for security should be specifically listed as such.

The Public Entity must ensure that the RFP identifies all Project assets or categories of assets that the Public Entity will require at the end of the Project term, so that this can be taken into account by the bidders in their assessment of the security package and the calculation of their bid prices.

*Procurement framework and timelines.* Here one must outline the procurement processes and timelines. Governing legislation and regulations should be spelled out, with a statement on the Project's compliance with these requirements to date. The processes must be comprehensively described, including any parallel processes, such as securing approvals and consents.

*Instructions to Bidders.* Provide a formal list of requirements that all bidders must comply with. Noncompliance must have implications for the acceptability of the bid. Advise bidders of:

- ❑ Submission requirements: time, date, manner, and place of submission (*as per Articles 10(1) and 10(2) of the Regulations*)
- ❑ Limitations on or specifications for the composition of the bid consortium

- ❑ Consortium change requirements: a notice of any change is required and the Public Entity usually reserves the right to reevaluate the consortium's Pre-Qualification
- ❑ Other requirements relating to submission of proposals
- ❑ Site visit arrangements
- ❑ Who bears the costs of submissions
- ❑ Confidentiality issues
- ❑ Bid bonds – check or Letter of Guarantee issued or certified by a prime bank in Kuwait and written in a certain format (*as per Article 10(3) of the Regulations*)
- ❑ Bidder warranties relating to misrepresentation of any kind
- ❑ Grounds for disqualification (defining noncompliant behavior)
- ❑ Required bid validity period (*as per Article 10(4) of the Regulations*)
- ❑ Statement that bids should be in Kuwaiti Dinars (*as per Article 10(5) of the Regulations*)
- ❑ Documentation and information needed from a bidding consortium (*as per Article 10(6) of the Regulations*)
- ❑ Amount of performance bond required from the successful bidder (*as per Article 10(7) of the Regulations*)
- ❑ Other Project-specific requirements

*Requirements related to third parties.* It is very likely that the PPP will involve third parties, for example, a municipality or utility provider. Third party relationships require communication among related parties during bidding, and a clear, specific third-party agreement after all issues are decided. Bidders should be apprised of these requirements, with examples, preferably, of the type of agreement to be drafted.

*Data room.* Each Project should have a data room where all the information bidders need is available. The Public Entity/PTB should make available as much information as possible to facilitate the bid process, but should not warrant the information; rather, all information should be verified by the bidders. This is a crucial element of risk transfer and has implications for the PPP as a whole. RFP provisions for the data room should be carefully drafted (a) to make it clear that



there are no warranties on the information unless the Public Entity has made a decision to the contrary based on a careful consideration of value for money, and (b) to set out the rules of access.

*Environmental impact assessment (EIA) data.* Provide data, with appropriate indemnities, for all EIA processes carried out, and set out the requirements for the work to be performed by the Investor.

*Bidder due diligence.* The importance of bidder due diligence before bid submission cannot be overstated. Any unverified assumptions by a bidder at submission stage will delay financial closure and may well jeopardize the entire procurement process. Since very little, if any, Public Entity information is warranted by the Public Entity, bidders' due diligence must be thorough and must include a host of technical, financial, and legal due diligence. This will require bidders to make site visits, which must be allowed. The time required for bidder due diligence should be included in the procurement plan.

*Quality management.* In any PPP, all stakeholders have a vital interest in the quality of the service to be provided. Specifically, the Public Entity retains overall responsibility for the service delivered through the PPP; the potential Investor relies on the quality of products and services provided by consortium members, personnel, subcontractors, and suppliers to meet the specifications; lenders need assurance that the service will be sufficient to continuously earn the unitary payment or user charges (and by so doing, service their debt); and the users of the service must be provided with quality that meets their requirements.

*Important definitions.* The RFP must clearly list all the definitions used throughout the documents. This is to ensure clarity and to set clearly defined benchmarks. The definitions must be the same as those used in the draft PPP Contract.

#### **IV.7.1.4 Essential Minimum Requirements**

What is the minimum that can be expected from a bid for it to meet the pre-defined Project objectives established in the Feasibility Study? There will be minimum requirements for at least the following:

- ❑ *Technical* (for example, essential components making up the life cycle of the service, and minimum operational requirements)
- ❑ *Legal* (for example, Public Entity requirements for the types of participant in the consortium, bidder details, term sheets or draft first-tier sub-contracts, and a markup of the PPP Contract indicating deviations and explaining the reasons for the deviations)
- ❑ *Financial* (for example, demonstration of affordability, risk assumption, funding by Investor, loan term sheets, and minimum insurance requirements)
- ❑ *Price* (for example, unitary payment/tariff/user charges, share purchase price, and so on)

These minimum requirements will establish what constitutes a compliant bid. Bids that do not meet them should be rejected in the evaluation process. However, the requirements must not stifle innovation or be so onerous that otherwise-solid bids are eliminated unnecessarily early.

#### **IV.7.1.5 Service Specifications**

These specifications are a further refinement of the services determined in the Feasibility Study. All the outputs required to provide the service must be specified. These service specifications will form the basis of service level agreements (SLAs), which are schedules to the PPP Contract and specify the services to be performed by the Investor (or in particular circumstances, by the Public Entity). At the RFP stage, there should be draft SLAs for all service elements. Some will be blank because the bidders are required to populate them in accordance with the service specifications; the remainder will be set out by the Public Entity. The latter category will typically allow bidder variation, unless that particular requirement is set as an essential minimum requirement (*as per Article 11(2) of the Regulations.*)

There are at least four ways to specify the PPP services and facilities.

*Input specifications.* Nearly all projects will have some input specifications. It is essential to identify these up front and classify them separately in the RFP, because where the Public Entity has specific requirements for a facility

that it will take over at the end of the Contract, it may require a particular part of the Project to be created in a specific way. Input specifications must be kept to a minimum, as they may affect operational efficiency or seriously affect the design of the facility. All inputs create constraints on bidders, so one must carefully consider their appropriateness before including them in an RFP.

*Expressed as outputs.* Services and facilities specifications are generally expressed as outputs and outcomes. For example, in a hospital PPP, “the provision of five patient trolleys and two porters with eight-hour shifts in a 24-hour service” is changed to “the movement of patients as scheduled or requested by the hospital’s clinical staff between beds, wheelchairs, trolleys, and tables, and between wards and departments, with 24-hour availability.” This specification is backed by information on the Public Entity’s requirements for patient numbers so bidders can plan and cost the required service.

*Conditions of asset specifications.* The condition and value of assets at the end of the Project term is of great importance to the Public Entity. As the assets will revert to the Public Entity, they must be in a specified condition, which dictates replacement and maintenance cycles as well as financial assumptions such as depreciation. The condition is always expressed as “remaining life” or “already utilized life,” as determined by industry norms or as agreed between the Public Entity and the Investor in the PPP Contract.

#### **IV.7.1.6 Standard Specifications**

The RFP must apply objective standards that are measurable and consistent with best practice, making extensive use of specifications applicable to all standard components of the Project. These could be construction specifications and standard operational requirements (ISO, for example). Select appropriate standards with care: How applicable are they to the Project? How are they used in the industry? Are they appropriate?

#### *IV.7.1.7 Payment Mechanism and Penalty Regime*

In cases where the State or a Public Entity is buying services from the Project and is paying a unitary payment,<sup>9</sup> the RFP must be issued with a payment mechanism, which includes at least the following:

- A single, indivisible unitary payment for full availability and performance of the services
- An appropriate indexation to respond to inflation
- A mechanism for penalizing partial or complete failure of the availability and performance of the service, by means of penalty deductions
- No limit to deductions for nonavailability
- A mechanism for dealing with changes to service requirements

The payment mechanism in case of user charges would include:

- User charges for different categories and classes of Services
- An appropriate indexation
- A mechanism for penalizing partial or complete failure of the availability and performance of the service
- A mechanism for dealing with changes to service requirements

#### *IV.7.1.8 Legal Requirements and Draft PPP Contract*

These are all the key commercial and performance requirements necessary for sign-off that the consortium has the legal status and capacity to fulfill, including:

- Shareholding agreements
- Corporate governance requirements
- Full disclosure of the consortium makeup, including lenders, sponsors, and parent companies

The RFP must include a draft PPP Contract (and related agreements, such as the Power Supply Agreement in a power generation Project) that allows for highly

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<sup>9</sup> Sometimes also referred to as a 'Performance and Availability Payment,' or an "off-take" payment.

structured bidder input. The draft Contract and related agreements should be developed carefully, considering international best practice (*as per Article 11(5) of the Regulations*).

*Note: It is becoming common practice to develop common Standardized Contractual Provisions in PPP Contracts. The common provisions in most PPP Contracts are on issues such as: warranties, indemnities, service commencement, land issues, relief events, compensation events, force majeure, payment mechanism, termination, step-in rights, and so on. The objectives of Standardization include the promotion of a common understanding of the technical, operational, and financial risks that are typically encountered in PPP Projects, a common understanding of how such risks must be transferred or shared among the parties involved in the delivery of PPP Projects, a consistent approach to risk transfer and sharing and value for money across PPP Projects and a reduction of the time and cost of negotiation of the parties involved in a PPP Project. Key issues that are not subject to standard treatment (either because of sector-specific requirements or because of specific circumstances affecting a particular PPP Project) are usually identified in the Standardized provisions but are not given detailed consideration.*

*The PTB will be developing Standardized Contractual Provisions for Kuwait in terms of the PPP Law. This will be done in a consultative manner with relevant stakeholders from the public and private sectors. As explained above, these will not be complete template contracts that are ready for signatures; Project and sector-specific issues will still need to be developed. Draft Contracts that will accompany RFPs will be developed on the basis of these Standardized Contractual Provisions with due consideration of all issues relevant to a PPP Project. Once the PPP program takes root in Kuwait, the PTB intends to prepare sector specific standardizations.*

In particular, the Public Entity should consider the following issues:

- When the RFP is being prepared and at the bid evaluation stage, whether any additional warranties should be sought. For instance, additional warranties may be required from the Investor in connection with any intellectual property included in the Project assets (for instance, when the

Investor is required to provide an Information and Communications Technology system in a hospital).

- The various kinds of liabilities against which the Public Entity should seek to be indemnified.
- Whether there are any other circumstances peculiar to the proposed Project which would justify the Public Entity giving indemnities to the Investor.
- Whether the Public Entity should reserve the right to control employees of the Investor (if it does so, it must disclose its control requirements in the RFP).

The Public Entity's requirements to use intellectual property during any Public Entity step-in period after the termination of the PPP Contract should also be specified in the RFP where appropriate.

#### *IV.7.1.9 Commitments Required from Bidders*

The more and the better quality the information in the RFP, and the clearer the PTB and the Public Entity are about what they expect to see in bidders' proposals, the higher the quality of proposals should be.

This section is the crux of the RFP; it sets out the information required from bidders. Bidders must be required to provide information on all aspects of their bid, including legal, technical, and financial aspects. The RFP must clearly ask for at least the following information and commitments from bidders:

*All technical aspects, including all relevant service details.* Bidders should be required to prepare the SLAs that will be part of the PPP Contract. Where the Public Entity has not specified SLAs as essential minimum requirements, they must respond to the service and standard specifications in the RFP. To simplify the process of preparation, the SLAs should be in prescribed schedules to the draft PPP Contract as well as in the main body of the bidders' proposals. The form and substance of the SLAs will vary from Project to Project, but the Public Entity and its Transaction Advisor must take great care in developing service specifications into their final form in the PPP Contract.

*Level of funding commitment.* Who will provide the private finance? How firm is the commitment to fund debt and equity? The level of funding commitment is determined by the quality of the RFP. An RFP that meets the requirements of this Module, based on a robust Feasibility Study, should be able to attract fully underwritten bids. Proposals that are noncommittal on funding will result in protracted negotiations.

*Corporate governance commitment.* The Investor's commitment to corporate governance should be demonstrated with a presentation of a detailed corporate governance plan.

*Financial and Project structure.* The RFP must require bidders to submit financial models that allow the Public Entity to thoroughly interrogate the proposal in detail. The response from bidders will depend on the nature of their approach to funding. Corporate finance will be provided from the balance sheet of a private company, while Project finance involves limited-recourse debt funding to a special purpose vehicle. Regardless of the differences, the Public Entity needs enough information to be able to analyze the funding structure and to determine whether or not it can be provided and sustained throughout the Project. The Project participants, all forms of funding, and all terms and conditions of funding, are crucial. Bidders must demonstrate in their bids how the interest rate risk will be managed by means of hedging arrangements and how their interest rate hedging arrangements, if any, will achieve value for money.

*Security requirements.* The Public Entity should clearly stipulate the type as well as the amount of any security it will require from the Investor, and request that each bidder cost this security as a separate component of its total bid price. This should include security against late service commencement and for maintenance obligations.

*Contents of the financial models.* Critical information is contained in bidders' financial models; the RFP should specify the format in which this information is to be shown in order to allow the Public Entity to compare a bidder's model

with its and other bidders' Feasibility Study models. The checklist below needs to be carefully refined for each Project.

The model must:

- ❑ Be presented in electronic and hard copy formats and be compatible with a specified software program. It should be accompanied with a thorough and detailed explanation of the model and how to operate it. It should also disclose clearly all macro, micro, and general assumptions.
- ❑ Have a base date as specified in the RFP—as the value of money changes, the RFP must set a specific point in time which is common to all bids.
- ❑ Be presented on a monthly basis for the development period, and thereafter on a semiannual basis. Annual summaries are to be provided for each year through to the period of the PPP Contract.
- ❑ Present all required data in nominal, real, and net present value (NPV) terms (using the discount rate required in the RFP).
- ❑ Provide the bidding consortium structure, or corporate Project structure, in detail.
- ❑ Provide a detailed source and application of a funds table for the Project, including capital expenditure, total operating and maintenance (including replacement) costs, and a detailed breakout of all revenue assumptions and calculations, whether from unitary payment or through user charges.
- ❑ Provide details of amounts to be paid to the State for land allocated to the Project or usufruct rights or any other State-owned entity for assets allocated by any of them to be used in the Project, and to the competent Public Entity for legal rights to carry out the Project, either as a specified sum or a percentage of earned profits.
- ❑ Provide the funding structure of the Project, including types and proposed levels of debt and equity; a funding plan and funding assumptions schedule identifying all sources, amounts, and application of finance; conditions, terms, base costs, margins, and fees. Provide the likely equity input of each member of the consortium, with the percentage of total equity it represents. Equity and shareholders' loan details must include the source of funds, amount of funds shareholders are prepared to commit, and the timing of their contributions. Alternatively, in a corporate finance struc-



ture, a full set of financial statements for the companies providing funding must be provided.

- Provide the cost of debt in a Project finance structure or a ring-fenced corporate finance structure, clearly detailing the level of fees and margin, the basis for and factors comprising these fees based on and what went into them, including a debt schedule for each credit facility, including a draw-down schedule, interest paid, fees, and repayment schedules.
- Provide the basis and costs of proposed interest rate hedging arrangements.
- Provide the inflation assumptions.
- Identify any foreign-denominated goods or service and provide the foreign currency exposure, hedging strategies, and exchange rate computations.
- Provide the basis for capitalization of interest.
- Provide a comprehensive and detailed explanation of all tax treatments assumed in the model.
- Provide all the key output ratios and return categories.
- Provide balances of all reserve accounts and insurance structures.
- Forecast balance sheets, profit and loss, and cash flow statements.
- Calculate the net present value (NPV) of real revenues using the discount rate required in RFP.
- Calculate projected internal rate of return (IRR) before financing and tax, in both real and nominal terms.
- Calculate real and nominal return on equity as compensation to reflect the base case return on equity for the entire duration of the PPP Contract.
- Conduct sensitivity analysis of capex, opex, interest rates, grace periods of principal repayment, maturity of debt, inflation, devaluation of Kuwaiti Dinars and currency treatment.
- Indicate the basis and cost of risk pricing.
- For Project finance PPPs, the model must also set out debt to equity ratio, annual debt service cover ratios (DSCR), loan life cover ratio (LLCR), and Project life cover ratio (PLCR) (explained in the Feasibility Module).

#### **IV.7.1.10** *Evaluation Criteria (in case of Competition)*

Give broad categories of evaluation rather than detailed scoring methodologies and point allocations, since those lead to proposals being tailored to the evalu-

ation, not to the best value for the Project. The number of points allocated to each category or subcategory should not be disclosed in the RFP. The process and evaluation methodology should, however, be set out so that bidders have the assurance of an auditable process with checks and balances (*as per Article 10(9) of the Regulations*).

The RFP should specify that the technical and price elements of the bid will each be scored out of 100 points. The scores achieved will be calculated into the bidder's overall score, using the following formula:

$$A * (\text{technical score}/100) + B * (\text{price score}/100) = C$$

*where:*

- A is the weighting for technical (between 50% and 70%)
- B is the weighting for price (between 30% and 50%), and
- C is the total score achieved by the bidder

For the purposes of applying this formula, “technical” refers to all Project factors under evaluation other than the price. The alternative technical and price weightings will vary from Project to Project, determined during the Feasibility Study and preparation of procurement documents. In all cases, the technical bid should carry more weighting than the price bid.

Minimum evaluation categories under the technical and price elements are set out below. Suggestions are given for further subcategories that need to be refined on a Project basis. The evaluation will also consider the overall integrated solution offered by each bid.

## Technical

### *The development phase*

- Extent, quality, safety, cost effectiveness, functionality, and innovation of designs (*as per Article 31(I-2) of the Regulations*)
- Level of design and robustness of cost estimates (*as per Article 31(I-2) of the Regulations*)

- ❑ Impact on social and biophysical environment (*as per Article 31(I-7) of the Regulations*), and compliance with environmental legislation
- ❑ Deliverability and time schedules (*as per Article 31(I-3) of the Regulations*)
- ❑ Integration of design, development, and operations with a clear commissioning program (*as per Article 31(I-1) of the Regulations*)
- ❑ Quality management systems proposed by the bidders (*as per Articles 31(I-6) and (I-8) of the Regulations*)

#### *The delivery phase*

- ❑ Extent to which proposed performance targets and measurement systems exceed minimum specifications
- ❑ Operating methodology (*as per Article 31(I-5) of the Regulations*)
- ❑ Quality and type of proposed services to end users
- ❑ Extent to which asset management and maintenance philosophy support the Project objectives
- ❑ Quality of proposed management structure, staffing, systems, and practices (*as per Article 31(I-4) of the Regulations*)
- ❑ Quality of safety plans, including use of proven technologies (*as per Articles 31(I-7) & 34 (1) of the Regulations*)
- ❑ Integration of PPP with existing services
- ❑ Quality of management system proposed by the bidders (*as per Articles 31(I-6) and (I-8) of the Regulations*)
- ❑ Compliance with environmental legislation (*as per Articles 31(I-7) & 34 (2) of the Regulations*)
- ❑ Compliance with Public Entity's monitoring and reporting requirements
- ❑ Ease of Project operation, without or with minimal, easily surmountable complications (*as per Article 34(3) of the Regulations*)
- ❑ Quality of services, installations, and facilities to be provided by the Project, their conformity with specifications and performance indicators required in tender documents, and measures to maintain that quality (*as per Article 34(4) of the Regulations*)

## Legal solution

- The robustness of the bidders' SPV structures: are bidders' responses or representations in the proposal reflected in their structures and shareholders' agreements? The evaluation would include the level of commitment to and the undertakings of each consortium member to the consortium, and the equity participation of each member.
- Mark-up of the draft PPP Contract (and other relevant contracts, for instance, fuel supply contract in a power Project) and its risk impact.

## Financial solution

- Total Project cost in relation to the affordability constraints of the PPP
- Realism of operating and capital expenditure, including an assessment of whether the quality management systems have been costed in the financial model
- Cost effectiveness of services, installations, and facilities to be provided by the Project, depending on the offer, as compared to the financial bid (*as per Article 34(5) of the Regulations*)
- Robustness of the financial proposals, including their sensitivity to changes in operating and maintenance costs, currency fluctuations, inflation, interest rates, and cash flow profiles
- Robustness of the funding structure
- Level and nature of equity in the funding structure
- Level of commitment demonstrated by the debt and equity providers and the terms and conditions linked to the provision of this funding
- Level of risk assumed, and deviation from the terms of the tender documentation
- Cost, level, and nature of insurance cover proposed
- Risk allocation: the risk profile proposed by bidders in their proposals will be tested in relation to:
  - The nature and extent of the risk
  - The likelihood of risk

- Passing down of the risk and obligations assumed by the to the other key contractors

**Price:** Price (or Financial Bid) is distinct from Financial Solution, which is part of Technical Bid. Financial Solution (explained above) is related to how and on what terms the Investor is going to raise funds, the appropriateness of cost assumptions, and the quality of financial risk mitigation strategies.

However, the Price or Financial Bid broadly refers to the cost of the Project to the State (including the Public Entity or any other organ of the State) and the users. It includes the fee for land usage rights and subsidies. The PPP Regulations require that price or Financial Bid be taken into account as a distinct element in the evaluation of bids, including the following:

- End-user prices/tariffs expected to be shouldered by beneficiaries of any services or products provided by the Project for the duration of its Contract
- Amounts to be paid by the Public Entity to the executing Investor over the duration of the Contract in return for services provided by the Project
- Financial subsidy from the Public Entity over the duration of the Contract, if applicable
- Amounts to be paid to the State by the executing Investor over the duration of the Contract for land rent (usufruct rights), or to the Public Entity or any other State-owned entity for assets provided by either entity for use in Project execution and operation, and any amounts to be paid by the Investor for conceding to him the right to execute and operate the Project, whether a fixed amount or a percentage of the Investor's expected profits

**Overall integrated solution:** In practice, there will be a different sub-evaluation team (consisting of the PTB, Public Entity, and Transaction Advisor personnel) who will be conducting due diligence in their specific areas (technical, legal, financial, and so on) and providing inputs to the formal evaluation structures to allow them to take more informed decisions. However, at the end of the process there must be one overall coordinator who must ask the question “Do all the components of the proposal add up to a single integrated solution capable of delivering value for money to the Public Entity?” In other words, is what is be-

ing said in the technical section properly costed in the financial section? Is the risk structure that the bidder says he is undertaking properly reflected in the legal (contract mark-up) section?

#### **IV.7.1.11 Bid Formalities**

Spell out all bid formalities, including:

- ❑ The time, place, and manner of bid submission (proposals for large Projects may take up substantial space and separate secure facilities may be required for submitting bids) (*as per Articles 10(1) and 10(2) of the Regulations*)
- ❑ How proposals will be opened
- ❑ Bid bonds requirements (*as per Article 10(3) of the Regulations*)
- ❑ Period required for bid validity (*as per Article 10(4) of the Regulations*)
- ❑ Formal processes for communication with bidders
- ❑ The Public Entity's reservation of the right to terminate the process, including the right to terminate negotiation with the preferred bidder if it is unlikely that an agreement will be concluded, in which case negotiations with other bidders may begin. In addition, the Public Entity should state that it is not bound to enter into a Contract with any bidder
- ❑ Reservation of the Public Entity's right to conduct a two-stage process

#### **IV.7.1.12 Approval of Request for Proposal Document**

The complete set of RFP and draft PPP Contract documentation must be submitted by the PTB to the Higher Committee for approval. None of these documents may be distributed to Pre-Qualified bidders until such approval has been obtained.

## **IV.7.2 Important Considerations for Managing the Bid Process**

### **IV.7.2.1 Anti-Corruption**

Due to their size and complexity, PPPs are at considerable risk of being affected by corrupt activity, or at least by the perception that corrupt activity is present. The Public Entity and PTB officials must sign off on an anticorruption policy for the

Project, with clear requirements and processes for dealing with such activities. The procurement plan and the bid processes must have the built-in safeguards of disclosure, a code of conduct, structured oversight, and internal and external audit.

#### ***IV.7.2.2 Disclosure***

All members of the Project team (Public Entity and PTB officials) directly involved in the Project, and the bid evaluation panel, including the Transaction Advisor, must disclose any potential conflict between their personal and family interests and those of the Project. This disclosure must be evaluated by the Head of PTB. An appropriate response must be formulated and implemented, such as removal of the official from any position where the conflict of interest could affect a decision.

#### ***IV.7.2.3 Code of Conduct***

All the Public Entity's and PTB's Project team members, including the Transaction Advisor, and all members of the evaluation panels, must sign a code of conduct that requires compliance with a range of ethical requirements in the best interests of the Project. All Pre-Qualified bidders must also sign a similar code of conduct, developed by the PTB.

#### ***IV.7.2.4 Internal and External Audit***

Provide for an internal and external audit of the bid process against the procurement plan. This is particularly relevant when proposals are being evaluated. The emphasis should be on compliant processes.

#### ***IV.7.2.5 Prohibited Suppliers***

The Government of Kuwait should maintain a list of prohibited suppliers of goods and services. These blacklisted companies are not allowed to compete for Government business, including PPPs, for prescribed periods of time.

#### ***IV.7.2.6 Security Environment***

Include in the procurement plan a security plan to prevent all forms of industrial espionage. The plan should include protection of document confidentiality, secure meeting rooms, and the like.

#### *IV.7.2.7 Clarification Meetings*

As part of the bid process, it is advisable to hold bidder clarification meetings during their preparation of proposals. These will help bidders achieve clarity on issues in the RFP, and the Public Entity and PTB to gauge bidder participation and commitment. These meetings should be scheduled well in advance, should allow for one-on-one meetings with bidders, and include a formal process for recording all such meetings and confirming points made during the meetings. Any information provided to one bidder that is not specific to his proprietary technical solution must be shared with all bidders. A level and transparent playing field must be assured at all times.

#### *IV.7.2.8 Bidder Notes*

Formal correspondence between bidders and the Public Entity and PTB must always be in writing. Answers to bidders on confidential questions related to their proprietary technical solutions should be provided only to that bidder; all other answers should go to all bidders, together with the question. Bidders' notes are also used to communicate decisions or confirm points from clarification meetings, and any changes in the RFP.

#### *IV.7.2.9 Changes in Consortia During Bidding*

In many instances, consortia formed in response to an RFQ change during the bidding stage. This is more acceptable to the Government than a complete withdrawal of a consortium, provided the consortium maintains its strength at least to the same level as before the change. A consortium change is never allowed without written consent from the PTB, and the substance of a bid already submitted is never allowed to change.

The process should be set out in the RFP, as described:

- The consortium advises the PTB of the proposed change, in writing, with full details of the reason for the change, the parties involved, and the impact on the consortium.
- The Public Entity, in collaboration with the PTB, applies the same RFQ evaluation criteria to reassess the consortium, using (where possible) the same evaluation processes. The required standard is that the changed con-



sortium should score at least the same number of points as it scored during Pre-Qualification.

- The PTB shall then report on the Pre-Qualification of the changed Consortium, with recommendations to the Higher Committee for approval. If approved, the PTB advises the consortium in writing.
- If not approved, the Public Entity advises the consortium in writing and may give it a certain amount of time to propose an alternative. Failing this, the consortium is disqualified.

#### **IV.7.2.10 Bidder Due Diligence**

Bidder due diligence requires time, access to the Project site and existing facilities, and the products of the Public Entity's own due diligence (given without warranty). Communication protocols for due diligence must be defined in the RFP. These must specify how and when communication and access occurs. Where access is restricted, this must clearly be stated.

#### **IV.7.2.11 Bid Validity Period**

Bidders will set a bid validity period on their proposals. The Public Entity should suggest such a period in the RFP.

## **IV.8 BIDDING**

### **IV.8.1 Auction**

The relevant Articles of the Regulations issued in terms of the PPP Law are provided below:

Article 17:

*“The Higher Committee shall form an Auction Committee to tender any Project approved for tendering through an open auction, whose estimated total costs do not exceed sixty million Kuwaiti Dinars. The quorum for the Committee meetings shall be met with the majority of members in attendance. In the event of equal votes, the chairman's side shall prevail. A representative of the competent Public Entity shall be invit-*

*ed to attend the committee meetings and take part in its deliberations, without having a voting right.”*

#### Article 18:

*“In the event of tendering a Project whose estimated total costs do not exceed sixty million Kuwaiti Dinars, the PTB shall, upon approval of the bidding documents by the Higher Committee, invite companies listed on the Kuwait Stock Market, and Pre-Qualified unlisted or foreign companies, to present their bids, based on these documents. The invitation shall show the following:*

- 1) How to obtain bidding documents, including the entity from which these documents may be obtained, which is the PTB;*
- 2) Any fees required for obtaining the above-mentioned documents;*
- 3) Deadline date and hour, which shall be no less than ninety days after the date of the invitation, to be advertised in broadcasting outlets, the official gazette, and at least two Kuwaiti language dailies.”*

#### Article 19:

*“Should no pre-qualification be held for unlisted and foreign companies, the PTB, in collaboration with the competent Public Entity and upon the approval of tender documents by the Higher Committee, shall advertise the tender through an open auction, subject to a post-qualification, based on information and documents they are required to attach to their bids. The advertisement shall show the following:*

- 1) A short description of the Project, its objectives, and terms and duration of Contract, pursuant to the provisions of the Law;*
- 2) Area of land, and its basic price or usufruct rights as a minimum opening price;*
- 3) How to obtain bidding documents, including post-qualification documents for unlisted and foreign companies, and the entity from which these documents may be obtained, which is the PTB;*
- 4) The fees required for obtaining the above-mentioned documents;*
- 5) How and where to submit bids, which shall be in sealed envelopes each containing two closed and sealed envelopes, one for the bid and the other for qualification applications from unlisted and foreign companies. Each envelope shall be marked to indicate contents, name and address of Bidder. Envelopes shall be deposited with*

*the PTB. With the approval of the Higher Committee and under the procedure it may set, bids may be submitted via secured electronic means.*

- 6) *Deadline date and hour, which shall be at least ninety days after the date of advertisement publication in the official gazette.”*

#### Article 20:

*“Unless bidding documents prescribe submission via electronic means, bids shall be submitted using official forms issued by the PTB, and shall be the exclusive right of the entity that obtained it from the PTB, whether directly or by proxy, and may not be transferred to any other entity. Bids shall be submitted in official envelopes provided by the PTB and sealed with red wax. Envelopes may not carry the sender’s name or any indicative marking, except the two envelopes containing the bid and qualification application from unlisted and foreign companies, which shall be contained in a larger sealed envelope.*

*A Bidder shall present with his offer, or in advance if bidding is required via electronic means, the initial bond stated in the tender documents, in the form of a certified check or a letter of guarantee issued or certified by a local bank. The letter of guarantee shall be valid for the period specified in the above-mentioned tender documents, unconditional, and payable on demand. Upon awarding and signing of the Contract by the successful Bidder and presentation of the final bond, the initial bonds shall be returned to the other Bidders. Any bid shall be in the official currency of Kuwait. In case of discrepancy between the value in letters and that in figures, the higher value shall prevail.”*

#### Article 21:

*“Any Bidder may modify his offer before the deadline stated for bid submission by submitting a modified offer using official documents in a new envelope obtained from the PTB, unless the tender documents require submission via electronic means. The new offer shall be marked as a modified one, and submitted using the same stated submission method. Offers may not be modified, either by lowering or increasing them, after the stated deadline.”*

#### Article 22:

*“Auction offers shall be presented to the PTB, which, unless submission is required in the tender documents through electronic means, shall make necessary arrangements to receive the sealed envelopes containing the offers and safely keep them until the pre-*

*scribed opening date. Envelopes may only be opened in the session of the Auction Committee convened for this purpose.”*

**Article 23:**

*“Unless bids are submitted, according to the instructions, through an electronic means, the envelopes shall be opened in an open session on a date to be set by the Auction Committee and attended by a majority of its members. A representative of the competent Public Entity, appointed by it, shall be invited to the session, as shall be all those who obtained the tender documents from the PTB, according to its records. If the legal quorum of this session is not met, bids shall not be opened, and an official report on the condition of bids and their seals shall be prepared and signed by all attending members. The session shall be postponed to the earliest possible date.”*

**Article 24:**

*“Subject to the provisions of the previous article, if unlisted and foreign companies have been pre-qualified, the Auction Committee shall open all bids in the specified session, and value of each bid shall be read out loudly and written in a prepared table, taking into consideration any modified offers submitted by Bidders under Article 21 of these regulations, ignoring the replaced offer.*

*Should no pre-qualification be conducted for unlisted and foreign companies, and bids are not electronically submitted, as may be required, envelopes containing qualification bids presented by such companies shall be opened, keeping the other envelopes sealed and secured. The session shall be postponed to a date to be determined after the evaluation of qualification applications pursuant to the provisions of article 15 of these regulations and the endorsement by the Higher Committee of the qualification results. An open session of the Auction Committee shall be held pursuant to the provisions of the previous article, where only the envelopes containing offers presented by listed and qualified companies shall be opened and processed as prescribed in the first paragraph of this article. Envelopes containing offers of unqualified companies shall be returned to senders unopened, and bids unaccompanied by the required initial bond shall not be considered and shall be set aside.”*

**Article 25:**

*“Should a single bid be received or other bids are invalid for violation of a tender condition, the Auction Committee shall report the issue to the PTB’s head for submission,*

*with any recommendations, to the Higher Committee which shall decide whether to accept the single offer or re-tender the Project with or without modifications, it may deem necessary, to the tender documents.”*

**Article 26:**

*“Should two bids be received, and each of them is deemed by the Committee as valid, the committee shall consider whether there is a preference margin for one of the Bidder, being the Initiator of the tendered Project. The Committee shall apply this margin and put the Bidders in order accordingly, prepare a report on the bid opening results to the PTB head, who shall present them with recommendations to the Higher Committee for it to take a decision.”*

**Article 27:**

*“Should two equal bids offer the highest value, the two Bidders shall be offered the opportunity to outbid each other, by presenting a higher offer in a sealed envelope, if bids were not electronically submitted, by a date to be set by the Auction Committee. These bids shall be kept by the PTB and processed pursuant to the provisions of Article (22) of these Regulations. The two bids shall be opened in an open session of the Auction Committee to which the two Bidders shall be invited to attend, where value of each offer shall be read out loud, and the Committee shall prepare an official report to the PTB head for submission, with any recommendations, to the Higher Committee which shall decide on the issue. If the two new offers are equal, a draw shall be made between the two Bidders, and the committee shall report the results to the PTB head for submission, with any recommendations on the awarding, to the Higher Committee which shall decide on the issue.”*

**Article 28:**

*“Awarding shall, in all cases, be subject to the approval of the Higher Committee which may endorse any recommendation referred to it on awarding, or decide, upon the recommendation of the PTB, to reject all bids and cancel the auction, or it may decide to re-tender the Project. Upon the approval of awarding by the Higher Committee, the PTB shall notify the successful Bidder in writing, and inform the Public Entity in writing in order for it to enter into Contract with the successful Bidder.”*

The auction process is most suited for commercial Projects such as shopping malls and parking garages. The competition process (described in a later section) will be adopted for infrastructure projects such as power generation, transport (urban mass transport, roads, and so forth), desalination plants and wastewater treatment plants. The emphasis in an auction process is to make sure qualified, financially strong Investors with the necessary technical capability, experience, and background bid on Projects. Detailed technical solutions are left to the Investors, as they will base them on commercial considerations and their target market. The objective of the State is to maximize its revenues through a competitive price bid, and to ensure that the Project is returned to the State in reasonable condition. The auction process involves the following.

#### *IV.8.1.1 Formation of an Auction Committee*

Where the estimated total costs of the Project do not exceed KD 60 million, an Auction Committee should be formed by the Higher Committee to oversee the tendering of Projects through open auction. Although the Regulations are silent regarding the membership of the Auction Committee, it would be appropriate to include the following as the members:

- Representative of the PTB (Chair)
- Representative of the relevant Public Entity
- Representative of the Kuwait Investment Authority

The quorum for the committee meetings shall be met with the majority of members in attendance. In the event of equal votes, the chair's side shall prevail (*as per Article 17 of the Regulations*).

#### *IV.8.1.2 Process to be followed when there is Pre-Qualification of Bidders: Two-Stage Process*

The EOI will follow the same process as described in the earlier section for all potential Investors. This will be followed by the RFQ process for companies not listed on the Kuwait Stock Exchange and foreign companies, if any. Again, the process will be similar to the one described previously.

**IV.8.1.2.1 Invitation to Submit Bids.** After the approval of the Higher Committee, the PTB shall invite companies listed on the Kuwait Stock Exchange and Pre-Qualified unlisted or foreign companies to present their bids in response to the bidding documents.

The requirements in the bid documents will be far less demanding than those required in the RFP process described in the earlier section. They would contain:

- The background, objectives, and term of the Project
- The broad requirements of the Project
- Area of land, and its basic price or usufruct rights as a minimum opening price
- The bidding procedure (including bid fee), timetable, and bid submission procedure<sup>10</sup>
- A draft PPP Contract

The invitation should be advertised in broadcasting outlets, the official gazette, and at least two Kuwaiti language dailies. The last date for submission of bids should not be less than ninety days from the date of the invitation. The invitation should disclose the following:

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<sup>10</sup> Detailed description as given in the Regulations is as follows:

- Bids shall be submitted in official envelopes and using official forms issued by the PTB in the Bid Documents and sealed with Red Wax (as per Article 20 of the Regulations).
- Envelope containing the bid and qualification application shall be contained in a larger sealed envelope (as per Article 20 of the Regulations).
- Bid can only be submitted by the entity that obtained the Bid Documents from the PTB, whether directly or by proxy, and can not be transferred to any other entity (as per Article 20 of the Regulations).
- Bids should be accompanied with the initial bond stated in the Bid Documents, in the form of a certified check or a letter of guarantee issued or certified by a local bank, which shall be valid for the period specified in the Bid Documents, is unconditional and payable on demand (as per Article 20 of the Regulations).
- A Bidder may submit the initial bond as required in the Bid Documents in advance if the bidding is to be conducted via electronic means (as per Article 20 of the Regulations).
- All bids shall be in the official currency of Kuwait, i.e., Kuwaiti Dinars and in case of discrepancy between the value in letters and that in figures, the higher value shall prevail (as per Article 20 of the Regulations).

- How to obtain bidding documents
- Any fees required for obtaining the bidding documents
- Deadline date and hour for submitting bids (*as per Article 18 of the Regulations*)

**IV.8.1.2.2 Receipt and Evaluation of Bids.** The Regulations also give detailed guidance regarding the procedure for receipt and opening of bids in an auction, which is summarized as following:

- The PTB shall make necessary arrangements to receive the sealed envelopes containing the offers and safely keep them until the prescribed opening date (*as per Article 22 of the Regulations*).
- The sealed envelopes containing the bids shall be opened in an open session on a date to be set by the Auction Committee and attended by a majority of its members. The value of each bid shall be read out loud and written in a prepared table (*as per Articles 23 and 24 of the Regulations*).
- A representative of the competent Public Entity, appointed by it, shall be invited to the session, in addition to those parties who obtained the tender documents from the PTB (*as per Article 23 of the Regulations*).
- Bids unaccompanied by the required initial bond shall not be considered and shall be set aside (*as per Article 24 of the Regulations*).
- If the legal quorum of this session is not met, bids shall not be opened, and an official report on the condition of bids and their seals shall be prepared and signed by all attending members and the session shall be postponed to the earliest possible date (*as per Article 23 of the Regulations*).

#### **IV.8.1.3 Process to be followed when there is Post-Qualification: Single-Stage Process**

In cases where Pre-Qualification has not been conducted, the PTB, in collaboration with the Public Entity, should advertise the tender subject to a Post-Qualification.

The advertisement should be placed in broadcasting outlets, the official gazette, and at least two Kuwaiti language dailies; the last date for submission of



bids should not be less than ninety days from the date of the invitation. The advertisement shall state the following:

- ❑ A short description of the Project, its objectives, and terms and duration of Contract
- ❑ Area of land, and its basic price or usufruct rights as a minimum opening price
- ❑ Procedure for obtaining RFQ and bid documents and fee required
- ❑ Procedure related to submission of bids<sup>11</sup>
- ❑ Deadline date and hour for submitting bids.

Any bidder may modify his offer before the deadline stated for bid submission by submitting a modified offer using official documents in a new envelope obtained from the PTB. The new offer shall be marked as a modified one, and submitted using the same stated submission method (*as per Article 21 of the Regulations*).

Immediately after the expiry of last date for submission of bids, the list of bidders should be made public to ensure transparency.

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<sup>11</sup> Detailed description as given in the Regulations is as follows:

- Bids shall be submitted in official envelopes and using official forms issued by the PTB in the Bid Documents and sealed with Red Wax (as per Article 20 of the Regulations).
- Envelopes may not carry the sender's name or any indicative marking, except the two envelopes containing the bid and qualification application, which shall be contained in a larger sealed envelope (as per Article 20 of the Regulations).
- Bid can only be submitted by the entity that obtained the Bid Documents from the PTB, whether directly or by proxy, and can not be transferred to any other entity (as per Article 20 of the Regulations).
- Bids should be accompanied with the initial bond stated in the Bid Documents, in the form of a certified check or a letter of guarantee issued or certified by a local bank, which shall be valid for the period specified in the Bid Documents, is unconditional and payable on demand (as per Article 20 of the Regulations).
- A Bidder may submit the initial bond as required in the Bid Documents in advance if the bidding is to be conducted via electronic means (as per Article 20 of the Regulations).
- All bids shall be in the official currency of Kuwait, i.e., Kuwaiti Dinars and in case of discrepancy between the value in letters and that in figures, the higher value shall prevail (as per Article 20 of the Regulations).

**IV.8.1.3.1 Receipt and Evaluation of Bids.** The following procedure would be adopted:

- The envelopes containing Qualification documents shall be opened, keeping the envelopes containing bids sealed and secured (*as per Article 24 of the Regulations*).
- The session of the Auction Committee shall be postponed to a date to be determined after the evaluation of qualification applications and approval by the HC of the qualification results (*as per Article 24 of the Regulations*).
- An open session of the Auction Committee shall be held, where only the envelopes containing offers presented by listed and qualified companies shall be opened (*as per Article 24 of the Regulations*).
- Envelopes containing offers of unqualified companies shall be returned to senders unopened (*as per Article 24 of the Regulations*).

**IV.8.1.4 Other Issues (common to both Pre- [Two-Stage] and Post- [One-Stage] Qualification Methods)**

**IV.8.1.4. Only One Valid Bid.** In cases where only one bid is received or other bids are invalid, the Auction Committee shall report this to the Head of the PTB who will submit the report with his recommendation to the Higher Committee. The Higher Committee shall decide whether to accept the single offer or re-tender the Project with or without and modifications to the RFP (*as per Article 25 of the Regulations*).

**IV.8.1.4.2 More than One Bid in Unsolicited Proposal.** In case where two valid bids are received, the Auction Committee shall consider the preference margin of the Initiator. The Auction Committee shall apply this margin and put the bidders in order accordingly. The Auction Committee shall prepare a report on the bid opening results to the Head of the PTB, who shall present them with recommendations to the HC for it to make a decision (*as per Article 26 of the Regulations*).

**IV.8.1.4.3 More than One Highest Bid.** In a case where two equal bids offer the highest value, the two bidders shall be offered another opportunity to outbid each other in the following manner:

- Another date shall be set up by the Auction Committee for presenting a higher offer in a sealed envelope.
- Revised bids would be received by the PTB and opened in an open session of the Auction Committee and the remaining steps would be conducted in accordance with usual procedure.
- However, if the two new offers are again equal, a draw shall be made between the two bidders, and the Auction Committee shall report the results and their recommendations on awarding to the PTB Head for submission to the HC, which shall decide on the issue (*as per Article 27 of the Regulations*).

#### **IV.8.1.5 Awarding of Project**

All awarding shall be subject to approval by the Higher Committee. The Higher Committee may:

- Endorse the recommendation of PTB for awarding the Project
- Decide, upon recommendation of PTB, to reject all bids and cancel the auction
- Decide to re-tender the Project

Upon the approval of awarding by the Higher Committee, the PTB shall notify the successful bidder in writing, and inform the Public Entity in writing so it may enter into Contract with the successful bidder (*as per Article 28 of the Regulations*).

#### **IV.8.2 Competition**

The relevant Regulations issued in terms of the PPP Law are provided below:

Article 32:

*“For Projects whose total estimated costs do not exceed sixty million Kuwaiti Dinars and approved for tender through a competition by the Higher Committee, the PTB shall, upon preparing tender documents and getting them approved by the Higher Committee, invite all companies listed on the Kuwait Stock Exchange and other*

*Pre-Qualified companies to present their bids after obtaining tender documents from the PTB. For Projects whose total estimated costs do not exceed two hundred and fifty million Kuwaiti Dinars and are approved for tender through a competition by the Council of Ministers, the PTB shall invite companies listed on the Kuwait Stock Exchange and other Pre-Qualified companies to present their bids after obtaining tender documents from the PTB. In either case, documents shall be provided to competitors for fees set by the Higher Committee. The invitation to bid, in either case, shall state the deadline date and hour for bid submission, which shall not be less than ninety days after the invitation is published in broadcasting outlets, the official gazette, and at least two Kuwaiti Arabic dailies.”*

#### Article 34:

*“The PTB and the competent Public Entity shall form a Joint Committee to study and evaluate submitted bids, and compile a report on the process. If needed, the Joint Committee, with the approval of the PTB and the Public Entity, may hire consultants to assist in performing its tasks. Bids shall be evaluated and compared based on criteria and relative weights stated in the tender documents, including evaluation of required technical and financial element. The technical evaluation shall also include the following, as may be appropriate:*

- 1) Technical safety factors observed in the offer, including use of proven technologies;*
- 2) Observation of environment preservation standards;*
- 3) Ease of Project operation, without or with minimal, easily surmountable complications;*
- 4) Quality of services, installations, and facilities to be provided by the Project, their conformity with specifications and performance indicators required in tender documents, and measures to maintain that quality;*
- 5) Cost effectiveness of services, installations, and facilities to be provided by the Project, depending on the offer, as compared to the financial bid.”*

#### Article 35:

*“Subject to the Project’s nature, criteria for financial bid evaluation shall, in general, include the following:*

- 1) Costs of Project design, execution, construction, operation, maintenance, and financing;*

- 2) *Time-table of Project execution, and its cost effectiveness;*
- 3) *Current service fees, prices, or estimated costs expected to be shouldered by beneficiaries of any services or products provided by the Project for the duration of its Contract;*
- 4) *Current amounts to be paid by the competent Public Entity to the executing Investor over the duration of Contract in return for services provided by the Project;*
- 5) *Current financial subsidy from the competent Public Entity over the duration of Contract, if applicable;*
- 6) *Current amounts to be paid to the State by the executing Investor over the duration of Contract for land usufruct rights, or to the competent Public Entity or any other State-owned entity for assets provided by either entity for use in Project execution and operation, and also any amounts to be paid by the Investor for conceding to him the right to execute and operate the Project, whether a fixed amount or a percentage of the Investor's expected profits.*
- 7) *The Bidder's proposals on any terms subject to negotiation as stated in tender documents, and its financial implications."*

**Article 36:**

*"The Joint Committee formed by the PTB and the competent Public Entity under the first paragraph of Article 34 to study and evaluate bids may request clarifications from Bidders regarding obscure points in their offers, and may meet them for this purpose . . ."*

**Article 37:**

*"Bidders shall be ranked according to their score in bid evaluation, subject to the approval of the PTB . . ."*

The competition method will follow these steps:

**IV.8.2.1 Formation of the Joint Committee**

The PTB and the Public Entity would form a Joint Committee for the evaluation of bids. The composition of the Committee could be as follows:

- Representative of the PTB (Chair)
- Representative of the relevant Public Entity
- Representative of the Ministry of Finance

- Representative of any other relevant Government Entity

The quorum for the committee meetings shall be met with the majority of members in attendance. In the event of equal votes, the Chair's side shall prevail.

According to the Regulations, the Joint Committee is authorized to hire consultants to assist it in evaluations, if needed. (As stated in the section on the Inception Phase, it is recommended that the same Transaction Advisor hired for the Feasibility Study undertake consulting for this Phase as well) (*as per Article 34 of the Regulations*). The TORs of the Transaction Advisor hired during the Inception Phase would include assistance in evaluation of bids. It is unlikely that any additional consultants would be required for the evaluations.

#### **IV.8.2.2 Invitation to Submit Bids**

After completion of Pre-Qualification and approval of RFP by the Higher Committee, the PTB shall invite all companies listed on the Kuwait Stock Exchange and Pre-Qualified parties to submit their bids.

The invitation should be advertised in broadcasting outlets, the official gazette, and at least two Kuwaiti language dailies; the last date for submission of bids should not be less than ninety days from the date of the invitation. Bidding documents would be available for a fee (*as per Article 32 of the Regulations*).

#### **IV.8.2.3 Submission of Bids**

Although the Regulations do not prescribe the manner of submission of bids for competition, they give detailed instructions for submission of bids for auction. These instructions, where applicable (and with slight modifications), can be applied here.<sup>12</sup>

<sup>12</sup> These would be as follows:

- Bids shall be submitted to the PTB in official envelopes and using official forms issued by the PTB in the RFP and sealed with Red Wax.
- Envelopes may not carry the sender's name or any indicative marking, except the two envelopes containing the Technical and Financial Bids, which shall be contained in a larger sealed envelope.
- Bid can only be submitted by the entity that obtained the RFP from the Technical PTB, whether directly or by proxy, and can not be transferred to any other entity.

The PTB shall make necessary arrangements to receive the sealed envelopes containing the bids. Immediately after the expiry of last date for submission of bids, the list of bidders should be made public to ensure transparency.

#### **IV.8.2.4 Evaluation of Bids**

In competition, the evaluation of bids is more complicated than for auction, as it involves evaluation of both Technical and Financial Bids. In order to make the evaluation process efficient, it is important that the evaluation criteria and processes are established before Bidders submit proposals, that the evaluation teams and committees are appointed in writing, and that all declarations and codes of conduct are signed.

It is recommended that first, various subcommittees (reporting to the Joint Committee), with members specialized in the relevant fields, conduct a detailed technical evaluation of the Technical Proposal (including Technical, Legal, and Financial Solutions) and the Price/Financial Proposal. Thereafter, all of the subcommittee technical evaluations should be brought together and the bidder's proposed integrated solution should be evaluated by the Joint Committee. Once the Joint Committee has finalized its evaluation and bidders are ranked according to their score, a detailed report should be submitted to the PTB for approval (*as per Article 36 and 37 of the Regulations*).

#### **IV.8.2.5 Preliminary Work**

Before beginning the detailed technical evaluation, preliminary work needs to be done to establish what bids to take forward in the evaluation:

- 
- Bids should be accompanied with the initial bond stated in the RFP, in the form of a certified check or a letter of guarantee issued or certified by a local bank, which shall be valid for the period specified in the RFP, is unconditional and payable on demand.
  - All bids shall be in the official currency of Kuwait i.e. Kuwaiti Dinars and in case of discrepancy between the value in letters and that in figures, the higher value shall prevail.
  - Any Bidder may modify his bid before the deadline stated for bid submission by submitting a modified offer using official documents in a new envelope obtained from the PTB. The new offer shall be marked as a modified one, and submitted using the same stated submission method.

**IV.8.2.5.1 Check for Completeness.** Completeness refers to whether the bidder has submitted all required documents. All of these formalities should have been set out clearly in the RFP. Each RFP requirement should be listed, with a reference to its place in the RFP and its description.

**IV.8.2.5.2 Check for Compliance.** Compliance refers to whether the bidder has met the essential minimum requirements set out in the RFP. Use the same format as for bid completeness. Great care must be taken to ensure that the essential minimum requirements are fully met.

### **IV.8.2.6 Detailed Analysis**

The bids that are deemed to be complete and compliant are then subjected to detailed analysis by the separate subcommittees.

**IV.8.2.6.1 Technical Solution.** The bids will be evaluated by the relevant subcommittee on the basis of the following checklist:

- ❑ Is the Project deliverable?
- ❑ Will the required outputs be achieved?
- ❑ Do the design, development, and operational elements confirm that the service specification is an accurate reflection of the Public Entity's needs?
- ❑ Does the bidder commit to meeting applicable standards specifications, such as ISO?
- ❑ Are the requirements of the Regulations met (*according to Article 34 of the Regulations*)? These include:
  - Technical safety factors/use of proven technologies
  - Environment preservation standards
  - Ease of Project operation, without or with minimal, easily surmountable complications
  - Quality of services, installations, and facilities to be provided by the Project, their conformity with specifications and performance indicators required in tender documents, and measures to maintain that quality



It is not possible to suggest or prescribe a scoring methodology for the technical evaluation, other than that the ratings for all the technical criteria should be applied to predetermined weightings. This means that each technical evaluation will generate:

- ❑ A weighted score
- ❑ A report on the number of “inadequate” ratings. This means that a weighted score that has some overall respectability does not disguise a number of inadequacies.
- ❑ Issues requiring resolution

**IV.8.2.6.2 Legal Solution.** There are two tasks in the legal evaluation:

- ❑ Legal due diligence on the bidding consortium, its structure, legal status, and the status of its individual firms (including any record of insolvency or crime)
- ❑ Evaluation of the marked up draft PPP Contract:
  - Capturing all marked up amendments to the PPP Contract
  - Assessing the markup against the risk matrix prepared in the Feasibility Study
  - Capturing the value-for-money implications that were determined in the Feasibility Study, and commenting on them

In neither of these two tasks is the output necessarily a score. In fact, it can be highly misleading to calculate a score for legal compliance or PPP Contract markup. The legal evaluation is focused instead on presenting notes requiring resolution and updating the Public Entity’s risk matrix for each bidder, in conjunction with the financial evaluation team.

**IV.8.2.6.3 Financial Solution.** The financial evaluation of a bid is complex. It requires a complete understanding of the Project costs over its whole term, the structure of the bidding consortium and its funding, and, most importantly, the key value-for-money deficiencies or additions in each bid. The financial sub-

committee thus requires inputs from the technical and legal teams in assessing or identifying the following:

- ❑ Affordability
- ❑ Certainty of Project costs (development and operational)
- ❑ Certainty, nature, and costs of funding
- ❑ Project participants and overall structure
- ❑ Items omitted by bidders from the financial model
- ❑ Project value for money
- ❑ Project bankability, which is a function of the consortium's composition, structure, risk distribution, and funding plan

The financial team must then:

- ❑ Produce a composite score for financial evaluation
- ❑ Produce a series of notes showing matters that need resolution

**IV.8.2.6.4 Price.** Price or Financial Bid is distinct from Financial Solution, which is part of Technical Bid. However, the Price or Financial Bid broadly refers to the cost of the Project to the State (including the Public Entity or any other organ of the State) and the users. It includes the fee for land usage rights and subsidies.

In PPPs, price is closely linked to qualitative elements. The RFP will have prescribed the form in which price is to be presented, but the price offered by the bidder must be scrutinized with the financial solution evaluation before price points are allocated. The PPP Regulations require that price or Financial Bid be taken into account as a distinct element in the evaluation of bids that include elements described in the section on RFPs.

#### **IV.8.2.7 Clarifications**

The Evaluation Committee may request clarification from bidders regarding obscure points in their offers, and may meet them for this purpose (*as per Article 36 of the Regulations*).

The PPP procurement process allows for clarification during evaluation so that the evaluation reflects a full understanding of each proposal. The requirement of fairness and transparency means that any form of change to a bid or negotiation with individual bidders during the evaluation process is prohibited. The line is easily crossed if the term “clarification” is not defined and the process for clarification not clearly set out.

Clarification must involve written questions and responses. The questions must refer to a specific element of the proposal and must not solicit any change in the proposal. The response must be vetted before being accepted as a clarification. If the response sets out a change in the proposal, it must be set aside and its contents ignored. In such a case, or if the response does not resolve the matter on which clarity was sought, then the interpretation of the response that results in the lowest score, or the production of an evaluation note for that element of the evaluation, should be used.

#### ***IV.8.2.8 Tasks of the Joint Committee***

Each subcommittee would prepare a report on its technical evaluation and submit it to the Joint Committee. The work of the subcommittees would be disjointed without the Evaluation Committee’s hands-on role. The Joint Committee’s role is to:

- ❑ Accept bids as complete and compliant
- ❑ Coordinate the subcommittees during their analyses, through regular meetings
- ❑ Approve all correspondence and direct communication with bidders on clarification matters
- ❑ Receive the analysis reports from the subcommittees and interrogate these until the Joint Committee is satisfied that each report is fully substantiated
- ❑ Evaluate the overall integrated solution for the Project, taking into account all sub-committee reports
- ❑ Score the overall integrated solution, and provide notes to be resolved before entering into a PPP Contract
- ❑ Compile the total Project evaluation notes and reports into a single recommendation on process and outcome

**IV.8.2.8.1 Ranking of Bidders.** Once the Joint Committee has completed its evaluation, including scoring of the bidders, a full report along with summary should be prepared and submitted to the PTB for approval (*as per Article 37 of the Regulations*).

#### **IV.8.2.9 Competition – Two-stage Process**

The relevant Regulations issued in terms of the PPP Law are as follows:

##### **Article 33:**

*“The Higher Committee may, upon recommendation of the PTB, decide to tender a Project in a two-stage process in exceptional cases of Projects tendered through competition where it is not practically possible for the competent Public Entity to accurately determine Project specifications, standards, performance indicators, financial arrangements, or the appropriate terms of Contract. In such cases, the following procedure shall apply:*

- 1) In stage 1, initial bids shall be invited on Project specifications, standards, performance indicators, financing arrangements, terms of Contract, or other factors initially specified in the initial tender documents. Bidders shall propose optimal solutions to achieve Project objectives and its final preparation for execution. Entities mentioned in the previous article shall be invited to present these initial bids under the provisions of that article in terms of paying a fee for tender documents, bid submission deadline, and publication of the invitation to bid.*
- 2) The competent Public Entity, in collaboration with the PTB, may request clarifications from any initial Bidder or hold meetings with him in order to clarify any points in his bid. The entity shall record minutes of all questions and answers, and any deliberations.*
- 3) Upon the reception, examination, and study of the initial bids, the competent Public Entity, in collaboration with the PTB, shall review the Project specifications, standards, performance indicators, financing arrangements, terms of Contract, and other factors stated in the initial tender documents, with a view to make appropriate modifications in light of initial bid examination, so as to prepare new documents for the final tender under Article (11) of these regulations. The Public Entity shall compile a report on these modifications and refer it to the PTB for submission to the Higher Committee for approval.*

- 4) *In stage 2, upon the approval of the Higher Committee as prescribed in the previous paragraph, competitors shall be invited to submit final bids based on the new documents containing unified specifications of the Project, as well as standards, performance indicators, financing arrangements, terms and duration of Contract, and any other elements, pursuant to the provisions of the Law.”*

In exceptional circumstances, where large and complex Projects are to be tendered through competition and where it is not practically possible for the competent Public Entity to accurately determine Project specifications, standards, performance indicators, financial arrangements, or the appropriate terms of the Contract, a two-stage competition process may be appropriate.

Most Projects will not need this process and the decision to pursue it should not be taken lightly. The bidding process is expensive for the private sector, delays are costly for the local and foreign Investors, and even more costly for the State, as development of the Project and delivery of services are delayed.

In most cases, the need for a two-stage competition would be identified in the Feasibility Study, which would also include the Procurement Plan. If the PTB believes that two-stage competition is necessary, based on the Feasibility Study, it should so recommend to the Higher Committee. If satisfied, the HC may decide to tender the Project in a two-stage process.

In terms of inviting EOIs and conducting Pre-Qualification of interested parties, the two-stage competition is the same as the processes described earlier.

#### **IV.8.2.10 Stage 1 – Initial Bids**

In stage 1, initial bids shall be invited from Pre-Qualified Bidders and companies listed on Kuwait Stock Exchange, which shall be made the basis for developing the final RFP. The Initial RFP will be developed by the PTB in collaboration with the Public Entity. The PTB shall invite local and foreign Investors to submit their initial bids. The invitation should be advertised in broadcasting outlets, the official gazette, and at least two Kuwaiti language dailies; the last date for submission of bids should not be less than ninety days from the date of the invitation. Bidding documents should be available for a fee from the PTB.

The RFP for initial bids should be similar in format and contents to the final RFP, although much more concise, except in areas for which the PTB needs

proposals from bidders in order to develop the final RFP. The RFP for initial bids would clearly state that a two-stage competition is being conducted and that the proposals submitted would not be used to evaluate the bidders, only to make appropriate modifications and finalize the RFP. The areas in which the Public Entity needs input from the bidders should also be clearly stated. Some of these might be:

- Project specifications
- Technical standards
- Performance indicators
- Financing arrangements
- Term of the Contract

Although the Regulations have not prescribed the manner of submission of bids for a two-stage competition, they give detailed instructions (suitable here as well) for cases of submission of bids for auction.

The PTB shall make necessary arrangements to receive the sealed envelopes containing the bids. Immediately after the expiry of last date for submission of bids, the list of bidders should be made public to ensure transparency.

Bidders should submit their initial proposals providing options, explanations, and optimal solutions to the specifically requested information in the initial RFP.

The PTB may request clarifications from any initial bidder or hold meetings with him in order to clarify any points in his bid. It shall record minutes of all questions and answers, and any deliberations.

The PTB, in collaboration with the Public Entity, would amend, expand, and finalize the RFP after examining the initial bids and clarification notes. The final RFP would be prepared in full detail as described in the Competition section. The Public Entity would submit the final RFP, along with a report explaining the process, results, and modifications, to the PTB, which would submit the final RFP along with the report and recommendations to the Higher Committee for approval.

#### ***IV.8.2.11 Stage 2 – Final Bids***

After approval by the Higher Committee, the parties that have submitted initial bids shall only be invited to submit final bids in accordance with the final

RFP. All other processes and steps described in the Competition section would be conducted.

### IV.8.3 Sale of Shares of Public Stock Company

The relevant Article of the PPP Law is provided below:

Article 5:

*“If the total estimated cost prescribed in the Project’s Feasibility Study, approved by the Higher Committee for tendering under Article 4, is in excess of 60 million Kuwaiti Dinars, including the lesser of the estimated market value of the Project’s land or the estimated market value of usufruct rights, to be decided by at least two accredited firms, the Committee shall assign a Public Entity with establishing a public stock company for this Project, instead of tendering it in an open auction or competition. Its shares shall be distributed as follows:*

- a) Forty percent (40%) of shares shall be offered by the assigned entity in an open auction among companies listed on the Kuwait Stock Exchange and other companies approved by the Higher Committee for participation. The auction shall be awarded to the highest Bidder over the share’s nominal value in addition to the incorporation fees, if applicable.*
- b) Ten percent (10%) of shares to the successful Bidder on a fifty percent (50%) discount off the average total highest price awarded, referred to in item (a) of this article, over the share’s nominal value in addition to the incorporation fees, if applicable, upon completion of the auction procedures. Should the successful Bidder, for any reason, relinquish the right to this percentage, or part of it, or should no one submit a tender, these shares shall be tendered pursuant to the provisions of the previous item.*
- c) Fifty percent (50%) of shares shall be offered to Kuwaitis in a public offering, each according to the number of shares subscribed for. If the shares are oversubscribed, each subscriber shall be awarded an equal number of shares. If shares offered are not covered in full, the remainder shall be publicly auctioned pursuant to the provisions of item (a) of this article.*

*In all cases, the Government may always allocate up to twenty percent (20%) of shares to Government entities, to be equally deducted from percentages prescribed in items (a) and (c) of this article.”*

The relevant Articles of the Regulations issued in terms of the PPP Law include:

**Article 46:**

*“In case of the incorporation by a Public Entity assigned by the Higher Committee of a company pursuant to article (5) of the Law to carry out a Project, the Higher Committee shall select unlisted companies, including foreign companies eligible under applicable laws, to participate with companies list on the Kuwait Stock Exchange through an open auction to purchase the offered shares. This selection shall be based on a pre-qualification of unlisted companies under article (12) of these regulations regarding the advertisement of the invitation to apply for pre-qualification, and articles (14) and (15) of these regulations, subject to the special nature of the offering process instead of tendering the Project.”*

**Article 47:**

*“The incorporating Public Entity assigned to offer shares through an open auction shall determine, with the approval of the Higher Committee and upon recommendation of the PTB, the minimum share price and initial bond to be paid by Bidders. Offered shares may be tendered through open auction under article (5) of the Law as a single lot or several lots, subject to the decision of the Higher Committee upon recommendation of the PTB.”*

**Article 48:**

*“Tendering shares through open auction shall be conducted under a procedure approved by the Higher Committee. Auctioning may be conducted in a single or multiple open sessions, as appropriate, in one or more rounds until awarding is complete, or electronically where only permitted companies may submit and register bids with the competent governmental entity, without disclosing the source of a bid to other Bidders, while allowing all Bidders to monitor procedures until the final awarding after a round or more.”*



Large PPP Projects are to be implemented by incorporating a public Joint Stock Company and then selling its shares through auction. The intention of the Law is to create wider ownership in larger Projects, while giving the Investor management control of the Joint Stock Company and the Project.

Briefly, the PPP Law and its Regulations state that if the total estimated cost of the Project according to the Feasibility Study is more than KD 60 million,<sup>13</sup> the Higher Committee may assign a Public Entity to incorporate a public stock company for the Project. The process of inviting Expressions of Interest and Pre-Qualification (all companies currently listed on the Kuwait Stock Exchange will be deemed Pre-Qualified) would be conducted as discussed in earlier sections, except that a clear disclosure would be made regarding the method of procurement. The bidding would be held for up to 40 percent of the shares of Joint Stock Company through open auction. Fifty percent of the shares would be offered to the Kuwaitis in a public offering. The remaining 10 percent of the shares would be offered to an Unsolicited Proposer (if any) at a 50 percent discount. Where no Unsolicited Proposers are involved, these shares could be offered to the Investor (on top of the 40 percent allocated shares).

#### *IV.8.3.1 Incorporation of Public Joint Stock Company*

Once the Higher Committee has approved the Feasibility Study, it will assign a Public Entity to incorporate a Joint Stock Company that will serve as the Special Purpose Vehicle (SPV) for the Project.

The Public Entity would initiate the process of incorporation of a public stock company according to provisions of Law 15 of 1960 promulgating the Commercial Companies Law (the “Companies Law”), whose Articles 63–184 deal with incorporation, capital, membership, board of directors, general assembly, accounts, termination, and liquidation issues of the public stock company.

The Public Entity would prepare the Articles of Incorporation (that may have provisions to give management control to the Investor) and the policy of the public stock company according to Article 70 of Law 15 of 1960 and apply for a cabinet decree for incorporation according to Article 71 of Law 15 of 1960. The

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<sup>13</sup> However, the Higher Committee may decide not to go the Joint Stock Company route for Projects whose cost is between KD 60 million and KD 250 million.

decree incorporating the company would be published in the official gazette according to Article 74 of Law 15 of 1960. Officials of the Public Entity would initially be the subscribers and directors of the Joint Stock Company.

The authorized capital of the SPV will be dictated by the size of the company as reported in the Feasibility Study. Initial paid-up capital should be the minimum required as per the Companies Law. At this point, the SPV is 100% owned by the Public Entity responsible for incorporating.

#### ***IV.8.3.2 Preparation for Pre-Qualification***

Pre-Qualification of companies not listed on the Kuwait Stock Exchange will be carried out in the same manner as described in the competition process earlier.

#### ***IV.8.3.3 Tender Process for 40 Percent Shares to the Investor***

*Preparation of RFP.* The Technical section of the RFP document will be prepared in a similar fashion to that in the competition process. The Financial section will include requirements for bidding the Unitary (Off-Take) Payment in cases of Projects where the Public Entity is buying the service, or the tariff (in unregulated sectors) where the consumers are paying for the services. There will also be a Price section of the RFP that will provide the process of the shares auction.

The RFP will also include: the draft PPP Contract (and other relevant contracts, if applicable); a copy of the Shareholders Agreement that will allow management control to be given to the Investor; and copies of the Articles and Memorandum of Association of the SPV. The weighting process for the Technical bid and the Financial bid will be similar to that in the competition process (proportionately). There will, however, be additional weighting provided for the price bid (with the highest price Bidder to obtain the highest score, and others scored proportionately). The weighting for price will vary from Project to Project.

*Submission of the Technical Proposal and Financial Proposals.* The bidders will be required to submit Technical and Financial Proposals in sealed envelopes on the day of auction. This will include a marked-up copy of the PPP Contract (and other relevant contracts, if applicable), as well as a marked-up copy of the Shareholders Agreement.

*Auction of 26–40 percent of Shares to the Investor.* Although the Law allows for 40 percent of the shares to be sold to the Investor, in some larger Projects, the Higher Committee may allow for only 26 percent of shares to be auctioned. This would reduce the Investor's financing requirements and still give it more than one-fourth ownership. The remaining shares can be held by the sponsoring Public Entity, at least initially. The floor price for the shares offered will be the nominal value. Bidding will continue till the highest price is received (this may take several rounds).

*Bid Evaluation and Negotiation.* Bid evaluation and negotiation will be conducted in a manner similar to the competition process. The Investor obtaining the highest score will be the successful bidder, and will then enter into negotiations. Once the negotiations (on the same basis as under the competition procurement method discussed in the next section) are complete, the successful bidder will sign the PPP Contract (and other relevant contracts, if applicable). The bidder will submit the amount due according to his bid. The portion equivalent to the nominal value of the shares will be used to capitalize the SPV, while the amount over and above the nominal value will be paid to the State. At this point, the shares of the Bidder–Investor will be listed as per the requirements of the Companies Law. The SPV then moves to financial close with the lenders.

*Sale of 10 percent of 10 percent Shares.* After auction of shares to the Investor, another 10 percent of shares would be offered to the successful bidder at a 50 percent discount. If there is an Unsolicited Proposer who fails to become the successful bidder, he will be offered these shares at a 50 percent discount, calculated by applying 50 percent to  $\{(Average\ total\ highest\ price\ awarded)\ minus (share's\ nominal\ value\ plus\ incorporation\ fees)\}$ .

*Public Offering of 50 percent of shares.* The remaining 50 percent of shares of public stock company would be offered to Kuwaiti citizens in a public offering. The public offering would be conducted in accordance with provisions of Law 15 of 1960 and Kuwait Stock Exchange regulations.

If the share offering to Kuwaiti citizens is undersubscribed, the remaining shares would also be auctioned as per the process adopted for auction of 40 percent of shares.

*Allocation of 20 percent of Shares to Public Entities.* The PPP Law stipulates that the Government may decide to allocate up to 20 percent<sup>14</sup> of shares of public stock company to Public Entities. In this case, the shares offered to all others listed above will be reduced proportionally.

## IV.9 NEGOTIATION AND CONTRACT SIGNING

### IV.9.1 Auction

Final negotiation would be limited to issues related to technical issues in regard to the implementation of the successful bidder's Project specifics. Once all documents are finalized, they will be presented to the Higher Committee for approval. Upon approval by the Higher Committee, the PTB would notify the successful bidder and inform the Public Entity in writing to proceed with signing of the Contract (*as per Article 28 of the Regulations*).

The Public Entity shall invite the successful bidder to sign the Contract and pay the required Performance Bond by a date to be specified (*as per Article 29 of the Regulations*). If the successful bidder submits the Performance Bond to the Public Entity and signs the Contract, the Project is procured successfully and all the Bid Bonds of the other bidders should be returned (*as per Article 20 of the Regulations*).

However, in case of withdrawal or failure to sign the Contract and/or pay the required Performance Bond, the Bid Bond of the successful bidder would be confiscated. The Public Entity would inform the PTB and the PTB would prepare a report with recommendations for the Higher Committee whether to re-

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<sup>14</sup> Total combined shares of the Public Entities could be as much as 34 percent, if only 26 percent are offered to the Investor.

tender the Project or award the Project to the next highest bidder (*as per Article 29 and 30 of the Regulations*).

## IV.9.2 Competition

The relevant Articles of the Regulations issued in terms of the PPP Law include:

### Article 37:

*“Bidders shall be ranked according to their score in bid evaluation, subject to the approval of the PTB. The competent Public Entity, in collaboration with the PTB, shall invite the highest Bidder to negotiate on the final Contract, but they may not negotiate terms stated in the tender documents as non-negotiable. The committee formed under the first paragraph of article (34) of these regulations for evaluating bids shall carry out negotiations with the Bidder invited to negotiate, and shall report on the results to both the Public Entity and the PTB for submission to the Higher Committee.”*

### Article 38:

*“Should the PTB and the competent Public Entity find out that the negotiations with the highest Bidder would not lead to a final agreement on the Project Contract, the PTB shall consult the Higher Committee, and, upon its approval, shall inform the concerned Bidder that negotiations are intended to be terminated unless he presents a final written offer including the best he can make within a reasonable period of time to be agreed upon by the Public Entity and the PTB. Should the PTB and the Public Entity conclude that the resulting offer is unsatisfactory, or the Bidder fail to meet the specified deadline, the negotiations with the Bidder shall, with the approval of the Higher Committee, be terminated, and other Bidders invited, one by one, according to their scores, to negotiate until a final agreement is reached with one of them on Contract terms and provisions, or all offers are rejected. Terminated negotiation may not be resumed with any Bidder, and no negotiations may be conducted concurrently with two or more Bidders.”*

### Article 39:

*“In the event of reaching an agreement on the Contract with the highest Bidder or any of the other Bidders respectively under the previous article, the PTB shall report to the*

*HC for its approval, upon which it shall inform the competent Public Entity to invite the selected Bidder to sign the Contract, after obtaining any other approvals required under applicable laws and regulations.”*

**Article 40:**

*“The competent Public Entity may confiscate the initial bond in any of the following cases:*

- 1) The Bidder withdraws or modifies his offer after deadline of bid submission and before expiration of bid validity;*
- 2) The Bidder fails to respond to the Public Entity’s invitation to negotiate his offer within 14 days from the date of invitation;*
- 3) The Bidder fails to sign the Project Contract within 14 days from the date of invitation;*
- 4) The Bidder fails to present the Contract performance bond or any other securities required in the tender documents within 30 days from the date of inviting him to sign the Contract, or fails within that period of time to meet any preconditions stated in the tender documents regarding the signing of Contract.”*

Once the PTB has approved the ranking of bidders based on the report of the Public Entity, the highest bidder shall be invited by the Public Entity, in collaboration with the PTB, for negotiations. The negotiations would be conducted by the Joint Committee and its results be reported to both the Public Entity and the PTB.

Negotiations are an integral part of the procurement phase. They are a process, not an event. Successful negotiations culminate in the awarding of the Contract, concluding the procurement phase, and starting implementation.

The Public Entity and the Investor have different perspectives on the negotiations stage. The Investor wants to reduce risk and increase its margins, while the Public Entity wants to reduce its costs and maximize the value of the services provided through the PPP. The output of the negotiations must be a PPP Contract with all ancillary agreements containing the service level agreements and payment mechanism, if applicable.

### *IV.9.2.1 Negotiation Methodology*

#### *Preparatory work*

- ❑ Outline the objectives of the negotiations
- ❑ Prepare a schedule for starting and concluding the negotiations within the bid validity period.
- ❑ Establish a negotiation team, which in this case would be the Joint Committee.
- ❑ Strategize: anticipate the Investor's positions and its interests.
- ❑ Design a detailed negotiation plan, predefine certain positions (fallback, alternative and no-go positions) and review RFP to identify items stated as non-negotiable.

#### *Initial contact*

- ❑ Invite the bidder, in writing, to a meeting.
- ❑ Specify the issues to be discussed, the Evaluation Committee's suggested approach to resolution, and any additional information required.
- ❑ Provide the date, time, location, and expected duration.
- ❑ Request the names and positions of each person on the bidder negotiation team.

#### *Engagement*

- ❑ Begin the first negotiation meeting by making opening statements and introductions, and by clarifying roles and responsibilities.
- ❑ Create a climate of trust and cooperation.

#### *Ongoing management*

- ❑ Continually define issues and set an agenda for each meeting.
- ❑ Identify shared, compatible, and conflicting interests.
- ❑ Jointly refine agendas to include action items and keep the meetings on track. Each meeting should focus on interests rather than positions or personalities.
- ❑ Carefully manage the tracking of evolving documentation:
  - Appoint an assigned drafter.

- Track, number, and date changes on every document negotiated.
- Keep the main draft in read-only format and create password access to documents.

#### *Achieving resolution*

- Generate options for settlement.
- Concentrate first on common and easily resolved issues to establish a collaborative process.

#### *Formal settlement*

- Record details of negotiated points and resolutions.
- Agree on how any potential conditions precedent can be minimized.
- Agree to the required follow-up in contract management (of outstanding issues that do not affect negotiated settlement) and the timeframe.
- Establish a preliminary schedule for signing the PPP Contract.

Every negotiation is different. There are different people involved and perhaps different cultures and risks. A good negotiation process should be customized for each particular negotiation's unique needs.

#### **IV.9.2.2 Unsuccessful Negotiations**

The Joint Committee should report to the PTB and the Public Entity that negotiations with the highest bidder did not lead to a final Contract. The PTB should report this to the Higher Committee, outlining the negotiation process, the key unresolved issues, and recommendations on the way forward, including giving a final formal chance to the highest bidder.

After approval by the Higher Committee to give a final chance to the highest bidder, the PTB shall inform the bidder that negotiations are intended to be terminated unless he presents in writing the best and final offer achievable within a reasonable period of time to be agreed upon by the Public Entity and the PTB.

If the bidder fails to submit this revised offer within the specified time, or if the PTB and the Public Entity conclude that the resulting offer is unsatisfactory, the PTB should report this to the Higher Committee, with recom-



mendations to terminate the negotiations and invite the next ranked bidder to negotiations. On approval by the Higher Committee, the PTB shall inform the highest bidder that the negotiations are terminated.

The Public Entity, in collaboration with the PTB, shall then invite the next ranked bidder to negotiations and the process shall begin again. If negotiations with the next ranked bidder are also unsuccessful and terminated following the process explained above, the next bidder in ranking would be invited for negotiations. This would continue until a final Contract is reached or negotiations with all bidders are terminated.

Terminated negotiation may not be resumed with any bidder, and no negotiations may be conducted concurrently with two or more bidders.

#### ***IV.9.2.3 Successful Negotiations***

In cases where negotiations with the highest or any other bidder are successful, the PTB shall report to the Higher Committee the details of the bidding process, evaluations of the bids received, the negotiations, and the final terms and conditions agreed on with the bidder, with a recommendation that approval for signing the Contract be given.

The Public Entity shall inform the bidder of approval by the Higher Committee and invite the bidder to:

- Sign the Contract within 14 days
- Submit the performance bond within 30 days.

#### ***IV.9.2.4 Confiscation of Initial Bond***

The Public Entity may confiscate the initial bond in any of the following cases:

- The bidder withdraws or modifies his offer after the deadline for bid submission and before the expiration of bid validity
- The bidder fails to respond to the Public Entity's invitation to negotiate his offer within 14 days from the date of invitation
- The bidder fails to sign the Contract within 14 days from the date of invitation

- The bidder fails to present the contract performance bond or any other securities required in the tender documents within 30 days from the date of inviting him to sign the Contract, or fails within that period to meet any preconditions stated in the tender documents regarding the signing of a Contract (*as per Article 40 of the Regulations*)

Relevant Articles of the Law relating to Project Implementation and Monitoring are presented below:

### Article 11:

*“... the Higher Committee shall be charged with:*

- 3) Determining the competent Public Entity to take part in tendering the Project and signing the Contract and to monitor the Project’s implementation and operation under its supervision and control, pursuant to the provisions of Articles 4, 5 and 6 of this Law, as the case may be.*
- 4) Giving the Public Entity the final approval for terminating the Contract ...”*

### Article 12:

*“... The PTB, in collaboration and coordination with Public Entities, shall carry out the following duties ...”*

- 5) Prepare a Project Guidebook;*
- 6) Determine approved Project follow-up and performance evaluation methods;*
- 7) Prepare contract models setting required terms and provisions, and submit them to the Higher Committee for approval;*
- 8) Prepare and present an annual report on development Project for approval by Higher Committee to be presented to the Cabinet by the Finance Minister;*
- 9) Follow up Project implementation and help remove obstacles, in collaboration with the competent entity;”*

### Article 15:

*“Projects and Contracts shall be subject to the provisions of this Law and its Regulations, and the provisions of applicable laws in the State of Kuwait, provided they are not contrary to the provisions of this Law. The Contract shall regulate settlement of any*

*disputes over interpretation or application. The contracting Public Entity and the Investor may agree to settle disputes through arbitration.”*

Article 17:

*“All Project Contracts shall be subject to the pre- and post-controls of the State Audit Bureau.”*

## V.1 CONTRACT MANAGEMENT PROCESS

Achieving a Project’s objectives depends on both the public and private sectors executing their respective duties under the Project Contract. This Contract governs the relationship between the Investor and the Public Entity until the expiry of the Contract’s term. Its terms provide for the competences, obligations, and responsibilities of the parties to the Contract. It is therefore important to understand the relationships among all parties, as each may have individual goals that could affect consistency of delivery if not managed properly.

The Contract Management role commences on the award of the Contract and extends to the end of the operating period. Contract Management structures should be put in place at the procurement stage to ensure that those involved are familiar with the details of the Project and the Project Contract. A full-time Contract Manager must be appointed by the Public Entity to lead this process. This should be a well-rounded person with experience in PPP Projects. His principal responsibility will be to monitor the Project’s outcomes, outputs, service levels, schedules, and risk allocation. He must have sufficient budget to establish a Project Management Unit (PMU) consisting of qualified and experienced staff and equipment. He should have clearly defined roles and authority to manage the PMU and monitor the progress of the Project.

## V.2 PERFORMANCE MONITORING

The Contract Manager’s focus during the construction phase will be on monitoring quality and timescales during the development of the Project. During the

operational phase, he will focus on ensuring the availability of the asset, compliance with appropriate environmental standards, authorization of payments (if any), dispute resolution mechanisms, management of change, and the hand-back of the asset at the end of the Contract period. In the event of underperformance, there should be provisions for payment penalties, and ultimately for the termination of the Contract.

The performance measurements as stated in the Contract should be objective and measurable. The Contract should define:

- ❑ Detailed Key Performance Indicators (KPIs) that set the standard of performance required
- ❑ The method of monitoring and measuring performance against the defined KPI
- ❑ What performance information will be required, how it is to be collected, and by whom
- ❑ The State's rights to carry out audits or spot checks, where the SPV will self-monitor performance against contracted requirements
- ❑ When performance measurement will commence
- ❑ How the results of the performance measurement will be reported and acted upon
- ❑ The consequences of poor performance and repeated poor performance

### V.3 THE REVIEW PROCESS

The Project will be subject to independent reviews and submission of reports to relevant institutions. Some of the required reviews and reports include:

Title	Timing	By whom
Final Audit Report	End procurement	State Audit Bureau
Project Close-Out Report	Financial closure	Public Entity / PTB
Post-Project Review	End construction	Independent Auditor or State Audit Bureau
Final Accounts	After all claims have been resolved and payments made post-construction	Preferably an Independent Auditor
Performance Reviews	Within one year of commencement of service and thereafter at agreed intervals.	Public Entity

*The Final Audit Report (FAR):* The FAR should be compiled by the State Audit Bureau of Kuwait as soon as possible, but not later than six months after the award of the Contract. The Report should contain:

- ❑ A brief outline of the Project
- ❑ A list of Project stakeholders and participants and their respective responsibilities
- ❑ A checklist of the documents produced and of the key events and decisions during the Project
- ❑ Details of the procurement process
- ❑ Cost estimates at various stages in the Project and the final Contract price

*Project Close-Out Report (PCR).* Approval of the PCR indicates an understanding and formal agreement that the Project is ready to reach financial close. By signing this deliverable, each party agrees that all administrative, financial, and logistical aspects of the Project should be concluded, executed, and documented as described herein.

*Post-Project Review (PPR).* The PPR should be produced within six months of the completion of construction of the works. It should be prepared by a person (an Independent Auditor who can be the Process Auditor for the Project, where

one is appointed) not directly involved in the management of the Project. The purpose of the PPR is to provide details of the final costs (with estimates of claims outstanding) and an assessment of the performance of the different parties to the Project.

The PPR should include the following:

- A brief description of the Project
- An outline of the Project history with key decisions/events highlighted
- A variance analysis of the final outturn costs of the Project compared against initial estimates and the final Contract price
- An analysis of the time taken to complete different stages of the Project compared with projections

*Final Accounts.* Final Project Accounts follow resolution of any outstanding claims and the making of final payments. The figures should be used by the Public Entity to update the variance analysis in the PPR and will also be used by the PTB for reporting purposes.

## V.4 DISPUTE RESOLUTION

The legal basis for the settlement of disputes is an important issue in PPP Projects. Private parties (Investor, lenders, and contractors) feel encouraged to participate in such Projects when they are confident that any disputes can be resolved fairly and efficiently. A wide range of dispute settlement mechanisms should be available in order to avoid court cases that may be lengthy and costly. It is important that the settlement mechanisms are consistent with international practices, particularly when large-scale investments from the foreign private sector are expected.





At the center of every PPP lies a Contract defining the nature of the partnership between the private and the public sector. These can take very different forms and range from a fairly simple contractual arrangement such as the supply a specific service (garbage collection, for example) to complex arrangements to design, construct, operate, maintain, finance, and provide an infrastructure service (a new airport, for instance). Each form corresponds to a given set of Public Sector objectives/priorities; an important part of the PPP design is to ensure that such objectives are identified and that the best structure is selected, then adapted to fit the specifics of the Project. Provided below are some of the common structures in PPPs:

- **Service Contracts:** With a service contract, the Public Entity retains ownership and control of all assets and properties. It awards to a private party the right and obligation to perform specified service(s) for a relatively brief period, typically one to three years. The private party may be required to furnish equipment and fixtures (such as construction equipment, tools, or computers) to perform the service during the tenure of the contract, but is not expected to invest in assets.
- **Management Contracts:** A management contract generally transfers more risk to the private party than a service contract. It passes more managerial decision-making authority to the private party over a broader range of services. This gives the private party a greater degree of responsibility and control over public facilities and more interaction with the Public Entity than would be the case with a simple service contract. The private party is not expected to invest in facility improvements, but may be responsible for specified levels of routine or preventive maintenance. Management contracts are usually awarded for 3–5 years.

- **Lease:** A public facility leasing arrangement, to be considered a public-private partnership, is a contractual mechanism whereby a private sector service provider becomes the asset manager of an existing publicly owned facility or acquires land for its own exploitation. Under this arrangement the private leaseholder, or operator, pays a specified lease payment to the Public Entity and operates the facility or develops the land. The operator collects the authorized tariff from the users and earns profits generated by increased operating efficiencies. The private party is generally not expected to invest in facility improvements (unless it is land development), but may be responsible for specified levels of routine and periodic maintenance. A lease contract can be anywhere between 5–15 years.
- **Standard International BOT variants:** These are contractual arrangements whereby the private party undertakes the financing and construction of a given infrastructure facility, as well as its operation and maintenance, to achieve specific outputs, outcomes, and service levels prescribed by the public sector.<sup>15</sup> The private party usually transfers the facility to the public sector at the end of the fixed term. Normally, when the public sector simply provides land and does not specify outputs, such a transaction is considered more of a lease (such as described above) than an international BOT. The common variants of this type of PPP scheme are:
  - **Build-operate-and-transfer (BOT).** This is a contractual arrangement whereby the private party undertakes the financing and construction of a given infrastructure facility, as well as its operation and maintenance. The private party operates the facility over a fixed term, during which it is permitted to charge facility users' appropriate tolls, fees, rentals, and charges (but not exceeding those proposed in its bid or as negotiated and incorporated in the contract) to enable it to recover its investment objective and its operating and maintenance expenses. The private party transfers the facility to the Public Entity at the end of the fixed term. Conditions are sometimes included in the PPP Contract to

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<sup>15</sup> Such international BOTs are only a subset of PPP arrangements. Their characteristics are such that they are well suited to deal with the construction of infrastructure and the provision of services from infrastructure-related assets.

ensure skills transfer to local operators to enable them to take over the service after this period.

- **Build-lease-and-transfer (BLT)**. This contractual arrangement authorizes a private party to finance and construct an infrastructure or development facility. Upon its completion, it would turn the facility or infrastructure over to the Public Entity concerned. This is done through a lease arrangement for a fixed period, after which the Project facility is automatically transferred to the concerned Public Entity.
- **Build-own-and-operate (BOO)**. This contractual arrangement authorizes a private party to finance, construct, own, operate, and maintain an infrastructure or development facility. It allows the private party to realize investment objectives and recoup operating and maintenance costs. This is done mainly through collecting tolls, fees, rentals, or other charges from users. The private party that owns the assets of the facility is fully responsible for its operation and may assign management of operation and maintenance to a facility operator. Unlike with a BOT, the ownership of the facility does not revert to the Public Entity at the end of the contract period.
- **Build-transfer-and-operate (BTO)**. This contractual arrangement entails the Public Entity contracting out the construction of an infrastructure facility to a private party. The contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the Public Entity. The private party, however, operates the facility to specified standards on behalf of the Public Entity under the terms of the agreement.
- **Rehabilitate-operate-and-transfer (ROT)**. This is a contractual arrangement whereby an existing facility is turned over to the private party to renovate, remodel, refurbish, or rehabilitate, and to operate and maintain for a franchise period. At the expiry date, the ownership of the facility is returned to the Public Entity.
- **Rehabilitate-own-and-operate (ROO)**. This entails an existing facility being turned over to the private party to renovate, remodel,

refurbish, or rehabilitate, and to operate and maintain in perpetuity, provided the operator is not in violation of its franchise.

- **Design, Finance, Build, Operate, and Transfer (DFBOT).** Here the Public Entity defines the service or output required and invites tenders for the complete design, financing, and construction of an infrastructure facility by a private party that builds the facility, assuming responsibility for cost overruns, delays, and specified performance risks. The private party will subsequently operate the facility to specified standards on behalf of the implementing agency under the terms of the agreement and eventually return the asset to the concerned public sector agency.
- **Concession:** A concession is a long-term contractual arrangement similar to DFBOT whereby the private party completely takes over all aspects of management and operations of an existing facility from a Public Entity. This includes maintenance, specified rehabilitation, and capital investment in facility upgrades and enhancements, as well as raising capital for such upgrades and enhancements. The private party pays agreed concession fees to the Public Entity for the rights attending the concession. The Public Entity may also require a share of profits from its partner.

Table 1 summarizes the different types of PPP arrangements, while table 2 summarizes the contractual roles and responsibilities of the private party under these contracts.

Increasing Risk Transfer and Control to Private Sector

Option	Asset ownership	Operations and maintenance	Capital investment	Commercial risk	Duration
Service Contract	Public	Public and private	Public	Public	1–3 years
Management Contract	Public	Private	Public	Public	3–5 years
Lease	Public	Private	Public	Shared	5–15 years
Build-Operate-Transfer Variants	Private	Private	Private	Private	15–30 years
Concession	Public	Private	Private	Private	15–30 years

Type of contract	What the Private Party usually receives	Nature of Private Party performance	Examples
Service Contract	A fee from the Public Entity for performing the service	A definitive, often technical type of service	Bill collection; facility repairs and maintenance
Management Contract	A fee from the Public Entity for the service and a performance-based incentive	Manage the operation of a Public Entity service	Regional water supply management
Lease	All revenues, fees, or charges from consumers for the provision of the service; the service provider pays the Public Entity rent for the facility	Manage, operate, repair, and maintain (and maybe invest in) a municipal service to specified standards and outputs	Existing water or power facilities

*Continued on next page*

**Table (2): Summary of Contractual Arrangements under PPPs (cont.)**

Type of contract	What the Private Party usually receives	Nature of Private Party performance	Examples
Build-Operate-Transfer	The Public Entity usually pays the service provider on a unit basis	Construct and operate, to specified standards and outputs, the facilities necessary to provide the service	Building, construction and maintenance of regional schools, prisons, or hospitals
Concession	All revenues from consumers for the provision of the service; the service provider pays a concession fee to the Public Entity and may assume existing debt	Manage, operate, repair, maintain, and invest in public service infrastructure to specified standards and outputs	New airport or seaport facilities, toll road, or bridge

Selection of one structure over another depends on various factors, such as:

- *Readiness of the sector/nature of the service:* At times, certain activities are not properly “ring-fenced” in terms of organization, staffing, budgeting, tariff setting, and revenue collection. For instance, a water and sanitation function within a city may be part of the city’s development authority and not run as a cost center. Decisions on planning and investment are taken arbitrarily and tariff setting might be ad hoc and include politically motivated decisions. In such an instance, it may not be possible to structure a concession up front, as the commercial viability of the concession could not be ensured, making it difficult or impossible to determine the true cost of service provision, of investment requirements, and of certainty of revenues. As a transition to a full concession, certain improvements and efficiencies can still be brought about by means of a service contract, for instance, by outsourcing bill collection and/or a management contract to bring in better commercial/organizational skills.
- *Maturity of the market:* Where financial markets are deep and efficient, and there is a pool of experienced private parties, it is easier to allocate

substantial financial, technical, and operational risk to private parties. In new PPP markets, the scope of private investment is sometimes limited by the capacity of the market.

- *The country track record:* Private parties are willing to accept more risk without charging high risk premiums (cushion margins over and above reasonable profits for unforeseeable events) when there is a successful track record of similar deals in the past.
- *The creditworthiness of the Public Entity:* If the Public Entity is a State enterprise that is making losses, private parties would either be reluctant to enter into a contract with them or may demand a higher risk premium or a specific credit enhancement. For instance, if there is, it would be easier for a well-run water utility with a healthy balance sheet to enter into a take-or-pay agreement (payment for output capacity, irrespective of whether it is utilized, ensuring a steady cash flow for the private party) under a BOT arrangement for a water treatment plant or a concession of an existing plant.
- *Value for money:* Risk must be borne by the party best able to manage it. In some cases, transferring risk that can be better managed by the public sector than the private party, or transferring risks to private parties in cases where the probability of the risk materializing is very low, may not represent value for money. For instance, transferring operations and maintenance risk under a BOT to the private party for a backup water reservoir dam may not be value for money. In such a case, a turnkey construction contract may be a better option.
- *Affordability:* Public Entities' unpredictable budgets may affect their ability to enter into certain kind of contracts. For instance, it may prohibit a water utility from entering into a take-or-pay arrangement with a private treatment plant concession, perhaps forcing it to enter a management contract instead. On the other hand, large upfront capital costs may prevent a Public Entity from building a hospital using its own budget, and may force it to consider a BOT with a capacity payment spread over several years. The term of the contract is also directly linked to the size of the up-front investment and the time it will take the private sector to recoup it and along with reasonable returns.





Article (50) of the PPP Law states:

*“Fees collected by the competent Public Entity from the Investor for any physical assets provided for use in the Project, and any concession fees, shall be subject to the following general rules:*

- 1) Fairness of fees collected, taking into account the opportunity cost, and whether it was fully considered in determining service fees to be collected by the Investor;*
- 2) Level of average financial revenues expected from the Project, according to the Feasibility Study, making this one of the main factors in determining fees to be collected by the competent Public Entity from the Investor;*
- 3) Type of the Project, nature of services provided, and the relative balance between fees collected by the competent Public Entity from the Investor and service prices.”*

The need for appraisals arises from the heterogeneous nature of property as an investment class: no two properties are identical, and all properties differ from each other in their location, which is one of the most important determinants of their value.

### **Special Considerations**

The treatment of land as an asset should be dealt with on a case basis depending on the length of tenure and nature of the service involved in a PPP Project. Given the shortage and the high value of land in Kuwait, it makes sense to maximize land utilization. Each case should be examined on its own merits, taking into account the zoning of the site, any related restrictions on development, and the type(s) of users under the PPP Project. Some of the issues worth considering are:

1. Where an Investor has been granted a right to use land, he will have the right to use the land/facilities for the duration of the PPP Contract; however, provision should be incorporated in the grant for reversion of the land to the State upon expiry or early termination of the Contract, or in the event of cessation or diminution of purpose for which the land is granted.
2. While an Investor is not permitted to sell, sublet, otherwise dispose of, or reduce the economic value of land without the approval of the State, the latter should impose a resumption provision in the grant of the land so the Investor will not benefit from any compensation upon the State's resumption of the land.
3. The mode of payment for the land will depend on the circumstances of each case. If the Public Entity invites the Investor to provide no more than it would have itself provided, there is little point in charging a lump sum premium, as this will artificially inflate the Contract price. If, however, the Investor is allowed or encouraged to provide revenue-generating services, the State needs to consider how to ensure that it receives its fair share. This might involve a lump sum premium, revenue sharing, profit sharing, or the cross-subsidy of loss-making services that the Investor must provide. As a general point, these arrangements should be as transparent as possible. If there are cross-subsidies, for example, the extent of the subsidy should be determined.

Property valuation will be performed by appraisers certified by the PTB. If the appraiser's opinion is based on market value, then it must also be based on the highest and best use of the property. There are several types of value sought by an appraisal. Some of the most common are:

1. **Market Value.** The price at which an asset would trade in a competitive setting. Investment Valuation Standards (IVS) define Market Value as: "... the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing wherein the parties had each acted knowledgably, prudently, and without compulsion."

2. Value in use. The net present value (NPV) of the cash flow that an asset generates for a specific owner under a specific use. Value-in-use is the value to one particular user, and is usually below the market value of a property.
3. Investment value. The value to one particular Investor, usually higher than the market value of a property.

## Price versus Value

It is important to distinguish between market value and price. A price obtained for a specific property under a specific transaction may or may not represent that property's market value. It is the task of the appraiser to judge whether a specific price obtained under a specific transaction is indicative of market value.

## Scope of work for Land Appraisers

The minimum standards for scope of work must take into account:

- Expectations of the private Investors
- Examples of similar Projects
- Detailed physical survey to determine exact area of land
- Legal due diligence verifying title of the land
- The realizable value of the land, considering relevant zoning regulations, if any, and whether it can only be used for the purpose(s) for which it was originally acquired/allocated
- The value/cost of any existing infrastructure or development considering its age, condition, and useful life
- Any encumbrance/liabilities if any against the property
- The realizable value of the property, which may be used as reference price for sale of the property
- The rates (with rationale) to be applied to ascertain land value



### Introduction

Allocation of risk is a key aspect of infrastructure Projects, and misallocation of risk is one of the leading causes of disputes. Such misallocations increase Project costs and reduce the efficiency of service delivery.

Risk is another word for the “Volatility of Outcomes.” Risk analysis is an analysis of the probability that events do not occur as planned and a measure of the severity of the consequences of such failure. As such, risk is the potential that the outcomes of a Project do not reflect the expectations held by participants when they agreed to participate.

The perception of the importance of various risks will vary according to the participants. For the Investor, risk is measured in both relative and absolute terms to determine the level of investment return required to justify undertaking that risk. Risk is measured in relative terms because the Investor is global in scope, with investment opportunity available around the world. Risk measurement is also absolute, because the Investor will compare the absolute level of the risk to the risk tolerance acceptable to shareholders (owners). As a rule, the Investor will not accept a risk where adverse consequences will fundamentally damage or weaken the organization, but will focus its resources in those jurisdictions that provide the greatest rewards within acceptable levels of risk.

### Risk Management

Risk management is the process of systematic identification and quantification of risk, followed by the implementation of appropriate strategies to eliminate or minimize risks and where possible, to reduce the consequence of a risk event occurring.

*Fundamental to the risk management process is the clear identification of each possible event that could result in a Project failing to perform to the level of initial expectation.* Once identified, each risk must be quantified, mathematically where possible, by determining the probability of occurrence and the level of financial consequences in the event such an event would occur. Based on this information, it is possible to develop appropriate management and risk mitigation strategies. It is important to note that the occurrence of a risk event will have differing consequences on each Project participant; for instance, completion delay would mean delay in services to the Public Entity, delay in compensation (along with penalties) to the Investor, and delay in repayment to the lenders.

While risk is frequently considered at the macro level, the risk management process requires that each risk event be broken down to the smallest controllable element, or subrisk, that requires the implementation of an appropriate strategy. For example, it is not reasonable to consider completion risk as the failure of the Project construction company to complete the Project. It is necessary to break this risk into a multitude of subrisks relating to the cause of the failure. For example, completion failures can result as a consequence of “permit risk” resulting from the failure of the Project to achieve the correct permits; “environmental risk” resulting from the failure of the Project to obtain environmental clearance “insolvency risk” resulting from the financing collapse of the selected constructor; or “related infrastructure completion risk” if, for instance, the Project relies on the completion of additional infrastructure by the State (access road to the airport, for instance).

Risk management is not risk elimination, and risk mitigation will not eliminate the total consequence of a risk event. Risk will always remain an integral part of the development process. *Risk management seeks to control and minimize risk to a level that is acceptable to all Project participants.*

## **Risk Allocation**

Risk allocation is the process of allocating the responsibility of managing a particular risk or subrisk to a particular participant and agreeing on how the consequences of the failure of the participant to effectively prevent the risk event will be distributed. Risk is allocated through the contractual arrangements entered into by the parties to the Project. Investor participants will seek compensation

for each risk accepted through the required investment rate of return combined with adjustments to the Project financing structure (that is increased Project equity and/or reduced debt term).

The key objective of risk allocation is to achieve the most efficient allocation of risk among parties and thereby achieve the most efficient financial structure providing the lowest possible cost to the Project for risk. To achieve this objective, the principle that should guide risk allocation is: *Risk should be allocated to the party best able to manage, control, and mitigate risk.*

In general “Project-related risks” should be allocated to the Investor and “non-Project related risks” should be allocated to the State. However, some of the non-Project related risk, such as exchange-rate risk can be shared if there are well developed financial markets in the country where the Project is located. Sometime hedging through financial markets is not value for money.

There is a third category of risk, called force majeure risk. Force majeure events include those very limited events which are out of the control of both parties and which, if they continue for a certain period of time, can result in the termination of the contract (for other “out of control” events, monetary compensation or extension in time may work).<sup>16</sup> It should include only those events that are likely to have a material adverse consequence on either party and which are uninsurable (events such as war, civil war, terrorism, nuclear contamination, and chemical or biological contamination). As these events are beyond the control of both parties the consequences must be shared.

In addition, the State must realize that the Investor has absolute limitations on tolerance to risk. That is, some risk classes that cannot be accepted under any reasonable conditions. This leads to a second key principle of risk allocation: *Risk should never be allocated to a party unable to bear the consequence of the risk.*

The Investor achieves commercial success through economic results that exceed expectations. To achieve success, *Investors have developed expertise in risk management and will seek to enter into Projects where their expertise can be applied.* Equally, Investors will seek to avoid risks over which no influence can be exerted. A typical risk allocation matrix is given below as an illustration and may vary from Project to Project and sector to sector.

<sup>16</sup> National Treasury Standardized Public Private Partnership Provisions, Government of South Africa, 2004.

Generic Risk Allocation Reference Matrix				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
1	<b>Availability Risk</b>	The possibility that the Services to be provided by the Investor do not meet the output specifications of the Public Entity	<ul style="list-style-type: none"> <li>• Clear output specifications</li> <li>• Performance monitoring</li> <li>• Penalty deductions for nonperformance</li> </ul>	Investor
2	<b>Completion Risk</b>	The possibility that the completion of the development work required for a Project may be (i) delayed so that the Project operations cannot commence at the scheduled service commencement date, or (ii) delayed, unless greater expenditure is incurred to keep to the scheduled service commencement date, or (iii) delayed because of variations	<ul style="list-style-type: none"> <li>• Special insurance (Project delay insurance), if available</li> <li>• Appointment of an independent certifier to certify the completion of the Works</li> <li>• Liquidated damages, construction bonds, and other appropriate security from the Investor to achieve completion, unless caused by the State</li> <li>• Relief event (extension in commencement date)</li> </ul>	Investor, unless delay caused by the State (including Public Entity) Variations
3	<b>Cost Over-Run Risk</b>	The possibility that during the design and construction phase, the actual Project costs will exceed projected Project costs	<ul style="list-style-type: none"> <li>• Fixed price construction contracts</li> <li>• Contingency provisions</li> <li>• Standby debt facilities/additional equity commitments, provided that these commitments are made up front and anticipated in the financial model of the Investor's proposal</li> </ul>	Investor
4	<b>Design Risk</b>	The possibility that the Investor's design may not achieve the required output specifications	<ul style="list-style-type: none"> <li>• Clear output specifications</li> <li>• Design warranty</li> <li>• Consultation with and review by Public Entity (but review must not lead to input specifications by PTB)</li> </ul>	Investor

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NO. CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
4 <b>Environmental Risk</b>	The possibility of liability for losses caused by environmental damage arising (i) from construction or operating activities (see operating risk) during the Project term, or (ii) from pre-transfer of land activities, whether undertaken by the Public Entity or a third party and not attributable to the activities of the Investor or the Subcontractors	<ul style="list-style-type: none"> <li>• Thorough due diligence by the bidders of the Project site conditions</li> <li>• Independent surveys of the Project site commissioned by the Public Entity at its cost</li> <li>• Public Entity indemnity for latent pre-transfer environmental contamination, limited by a cap for a specified period</li> <li>• Remediation works to remedy identified pre-transfer environmental contamination as a specific Project deliverable</li> <li>• Independent monitoring of remediation works</li> </ul>	In relation to (i), the Investor  In relation to (ii), the Public Entity, but Public Entity's liability to be capped (subject to VFM considerations)
6 <b>Exchange Rate Risk</b>	The possibility that exchange rate fluctuations will affect the envisaged costs of imported inputs required for the construction or operations phase of the Project	Hedging instruments (e.g., swaps)	Investor
7 <b>Force Majeure Risks</b>	The possibility of the occurrence of certain unexpected events that are beyond the control of the any party (whether natural or "man-made"), which may affect the construction or operation of the Project	<ul style="list-style-type: none"> <li>• Define "force majeure" narrowly to exclude risks that can be insured against and that are dealt with more adequately by other mechanisms such as relief events (extension of time)</li> <li>• Relief events</li> <li>• Termination for force majeure</li> </ul>	If risks are insurable, they are not force majeure risks and are allocated to Investor

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Generic Risk Allocation Reference Matrix (cont.)				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
7	<b>Force Majeure Risks</b> (cont.)			If risks are not insurable, risk is shared insofar as Public Entity may pay limited compensation on termination
8	<b>Inflation Risk</b>	The possibility that the actual inflation rate will exceed the projected inflation rate—a risk more apparent during the operations phase of the Project	<ul style="list-style-type: none"> <li>Index-linked adjustment to off-take payments or user charges</li> </ul>	Public Entity bears risk of inflationary increases up to the limit of the agreed index; increases in excess of this are for the Investor
9	<b>Insolvency Risk</b>	The possibility of the insolvency of the Investor	<ul style="list-style-type: none"> <li>SPV structure to ring-fence the Project cash flows</li> <li>Security over necessary Project Assets</li> <li>Limitations on debt and funding commitments of the Investor</li> </ul>	Investor

Continued on next page

NO. CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
9	<i>Insolvency Risk (cont.)</i>	<ul style="list-style-type: none"> <li>• Reporting obligations in respect of financial information and any litigation or disputes with creditors</li> <li>• Public Entity has right to terminate the PPP Agreement</li> <li>• Substitution of Investor in terms of the Direct Agreement between the lenders and Public Entities</li> <li>• Substitution of the Investor with a new Investor if there is a liquid market and the re-tendering procedure is followed</li> </ul>	
10	<i>Insurance Risk</i>	<p>The possibility (i) that any risks that are insurable as at the signature date pursuant to the agreed Project insurances later become uninsurable or (ii) of substantial increases in the rates at which insurance premiums are calculated</p>	<p>In relation to (i), if investor caused the uninsurability or, even if it did not, but Investor cannot show that similar businesses would stop operating without the insurance in question, then Investor bears the risk,</p>

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Generic Risk Allocation Reference Matrix (cont.)				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
10	<b>Insurance Risk</b> (cont.)			otherwise, risk is shared between Investor and Public Entity  In relation to (ii), the Investor (unless caused by Public Entity variations)
11	<b>Interest Rate Risk</b>	Factors affecting the availability and cost of funds	<ul style="list-style-type: none"> <li>Hedging instruments (e.g., swaps)</li> <li>Fixed rate loans</li> </ul>	Investor
12	<b>Latent Defect Risk</b>	The possibility of loss or damage arising from latent defects in the existing facilities included in the Project assets, if being provided by a Public Entity	<ul style="list-style-type: none"> <li>Wherever possible, design and construction of the facilities must be performed or procured by Investor</li> <li>If, however, Project involves takeover by Investor of existing facilities, then bidders must undertake thorough due diligence of these facilities to uncover defects</li> <li>Procedure for and cost of remediation of such discovered defects can then be pre-agreed with the Investor</li> <li>Reporting obligation on Investor to promptly disclose discovered defects</li> </ul>	If Investor (or any of the subcontractors) designs and constructs the facilities, the Investor

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NO. CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
12	<b>Latent Defect Risk</b> (cont.)		If not, then Public Entity, but only if there is no or insufficient insurances available to mitigate this risk and if Public Entity's liability is capped (subject to VFM considerations)
13	<b>Maintenance Risk</b>	<p>The possibility that (i) the cost of maintaining assets in required condition may vary from the projected maintenance costs, or</p> <p>(ii) maintenance is not carried out</p>	Investor

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Generic Risk Allocation Reference Matrix (cont.)				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
14	<b>Market Demand or Volume Risk</b>	The possibility that the demand for the services generated by a Project may be less than projected (whether, for example, because the need for the services ceases or decreases, or because of competitors entering into the relevant market, or because of consumer opposition to the outsourcing of the services)	In an off-take payment-type PPP, payment must be paid based on availability	In relation to an off-take payment funded Project, the Public Entity  In relation to a user-charge funded Project, the Investor
15	<b>Operating Risk</b>	Any factors (other than force majeure) affecting the operating requirements of the Project, including projected operating expenditure and skills requirements, for example, labor disputes, employee competence, employee fraud, technology failure, environmental incidents and any failure to obtain, maintain, and comply with necessary operating consent	<ul style="list-style-type: none"> <li>• Clear output specifications</li> <li>• Penalty regime and performance monitoring</li> <li>• Adequate operations &amp; maintenance contract</li> <li>• Substitution rights</li> <li>• Special insurance</li> </ul>	Investor

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NO. CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
16 <b>Planning Risk</b>	<p>The possibility that the proposed use of the Project site in terms of the PPP Contract and, in particular, the construction of the Facilities on the Project Site will fail to comply with any applicable laws relating to planning, land-use or building (for example, any town-planning or land-zoning scheme) or any Consent required pursuant thereto, or that any such consent will be delayed or cannot be obtained or, if obtained, can only be implemented at a greater cost than originally projected</p>	<ul style="list-style-type: none"> <li>• Public Entity must identify at the Feasibility phase any macro-level planning consents not required for the detailed design and construction proposal for the Project, such as land-use and zoning consents which must be obtained before Project is put to tender</li> <li>• Investor must identify all planning consents required for the Project having regard to its design and construction proposal and must make adequate provision in its works program for such consents to be obtained</li> <li>• Relief event for delays in Investor obtaining consents but only if the delay is not attributable to the Investor</li> </ul>	<p>In relation to any land-use and zoning consent, the Public Entity, unless Project site selection is Investor's responsibility</p> <p>In relation to any building consent or other design or construction specific planning consent, the Investor</p>
17 <b>Political Risk</b>	<p>The possibility of (i) unforeseeable conduct by the Public Entity/State that materially and adversely affects the expected return on equity or debt service or otherwise results in increased costs to the Investor, or</p>	<ul style="list-style-type: none"> <li>• Limit risk to unforeseeable conduct for which there is no other relief in the PPP Contract and to expropriating actions</li> <li>• Distinguish between general and discriminatory unforeseeable conduct</li> </ul>	<p>In relation to discriminatory unforeseeable conduct and expropriating</p>

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Generic Risk Allocation Reference Matrix (cont.)				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
17	<b>Political Risk</b> (cont.)	<p>(ii) expropriation, nationalization, or privatization (collectively, “expropriating actions”) of the assets of the Investor</p> <p>This risk overlaps with some financial risks (e.g. tax rate change risk).</p>	<ul style="list-style-type: none"> <li>• In relation to discriminatory unforeseeable conduct, special compensation</li> <li>• In relation to expropriating actions, termination and compensation</li> </ul>	<p>actions, the Public Entity/ State</p> <p>In relation to general unforeseeable conduct, the Investor</p>
18	<b>Regulatory Risk</b>	<p>The possibility that consents required from State authorities will not be obtained or, if obtained, can only be implemented at a greater cost than originally projected</p>	<ul style="list-style-type: none"> <li>• During Feasibility phase of the Project, a legal scan undertaken by the Public Entity to identify all such consents</li> <li>• Implementation by the Public Entity of an intergovernmental liaison process with responsible State authorities before the procurement phase</li> <li>• Due diligence by Investor to identify the Consents required for its operating requirements</li> <li>• If possible under applicable law and if practical, obtain all such consents before the signature date</li> </ul>	<p>If any such consent (other than those relating to Investor’s operating requirements) can be obtained before the signature date and they are capable of transfer to the Investor, the Public Entity</p>

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NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
18	<b>Regulatory Risk</b> <i>(cont.)</i>			In relation to the Investor's operating requirements, the Investor
19	<b>Residual Value Risk</b>	The risk that the Project assets at termination or expiry of the PPP Contract will not be in the prescribed condition for hand back to the Public Entity	<ul style="list-style-type: none"> <li>• Obligations on Investor to maintain and repair</li> <li>• Audit of Project assets towards the end of Project term</li> <li>• Security by the Investor in favor of the Public Entity, e.g., final maintenance bond or deduction from off-take payment</li> <li>• Reinstatement obligations on Investor</li> </ul>	Investor
20	<b>Resource or Input Risk</b>	The possibility of a failure or shortage in the supply of the inputs or resources (for example, coal or other fuels) required for the operation of a Project, including deficiencies in the quality of available supplies	<ul style="list-style-type: none"> <li>• Supply contracts for supply of total Project requirements, such as take-or-pay contracts</li> <li>• Relief events but only if failure or shortage not attributable to the Investor</li> </ul>	Investor, unless inputs are supplied by the Public Entity
21	<b>Subcontractor Risk</b>	The risk of subcontractor (first-tier and below) defaults or insolvency that may arise at the construction and/or operations phases of the Project	<ul style="list-style-type: none"> <li>• Subcontractors must have expertise, experience and contractual responsibility for their performance obligations</li> <li>• Replacement Subcontractors to be pre-approved by the Public Entity</li> <li>• Due diligence by Public Entity must include review of first-tier Subcontracts to confirm the pass-through of risks down to the first-tier Subcontractors</li> </ul>	Investor

Continued on next page

Generic Risk Allocation Reference Matrix (cont.)				
NO.	CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
22	<b>Tax Rate Change Risk</b>	The possibility that changes in applicable tax rates or new taxes may decrease the anticipated return on equity	<ul style="list-style-type: none"> <li>If change arises from discriminatory unforeseeable conduct, then special compensation</li> </ul>	In relation to tax increases or new taxes arising from discriminatory unforeseeable conduct, the Public Entity, otherwise, Investor
23	<b>Technology Risk</b>	The possibility that (i) the technology inputs for the Project may fail to meet the required output specifications, or (ii) technological improvements may render these technology inputs out-of-date ("technology refresh or obsolescence risk")	<ul style="list-style-type: none"> <li>Obligation on Investor to refresh technology as required from time to time to meet the output specifications</li> <li>Penalty deductions for failure to meet output specifications</li> </ul>	Investor

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NO. CATEGORIES	DESCRIPTION	MITIGATION	ALLOCATION
24	<b>Utilities Risk</b>	The possibility that (i) the utilities (e.g., water, electricity, or gas) required for the construction and/or operation of a Project may not be available, or (ii) the Project will be delayed because of delays in relation to the removal or relocation of utilities located at the Project site	Investor, unless Public Entity is the responsible Utility
		<ul style="list-style-type: none"> <li>• Emergency back-up facilities, e.g., generators</li> <li>• Emergency supply contracts</li> <li>• Special insurance (Project delay or other business interruption insurance)</li> <li>• Provision by the Public Entity of off-site connections</li> <li>• In the case of (i), relief event for off-site interruptions in the supply of utilities (unless attributable to the Investor)</li> <li>• In the case of (ii), relief event for delays in the removal or relocation of utilities (unless attributable to the Investor)</li> </ul>	<p>In the case of (i), even if Public Entity is not the responsible Utility, Public Entity may share in this risk in circumstances where insurance is not available or unaffordable, but only if this will ensure better VFM</p>

