Public-Private Partnerships

& Contract Transparency within the PPP Process

International Conference: Infrastructure Finance and Capital Markets

"Financing the infrastructure through the mechanisms of the Stock Market"

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What is PPP?

- **No universal definition**, with various terms used in various countries, e.g., joint ventures, concession agreements, "B.O.T." (Build-Operate-Transfer) and others
- Concepts differ depending on national laws

Nonetheless, there are common themes…

- Collaboration between a public (governmental) entity and the private sector
- Generally, a global series of tasks delegated to a private party allocating foreseeable risks between the public and private sectors
- Private party is financially rewarded in a manner commensurate with the achievement of pre-specified outputs
- Private party secures long-term financing for the project and the public entity reimburses the private party periodically over the life of the project
- Long-term contracts ~20-25 years
- Limited or non-recourse financing
  - often funded on a project finance basis
    - loan structure that relies primarily on the project's cash flow for repayment, with the project's assets serving as collateral
  - private party responsible for procuring financing

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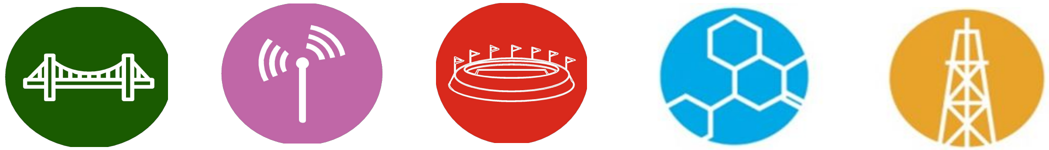
Public-Private Partnership is NOT…

- Privatisation
- Procuring/purchasing goods or services on a current basis through traditional public procurement
  - In fact, PPPs are generally public service projects which cannot be financed through traditional public procurement
- Applicable only to large infrastructure projects



Roads, Bridges, Tunnels | Telecoms | Stadiums/Arenas | Petrochemicals | Oil and Gas

  - They can also be used by small and medium-sized enterprises (SME) for the development of hospitals, housing, sports facilities, schools and dormitories, municipal water treatment facilities, small-scale energy projects, etc.

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PPP in Summary

- A contractual arrangement whereby the private party:
  - performs one of the following functions:
    - performs government functions / services;
    - develops public infrastructure; or
    - uses state property
  - assumes associated risks for the property on behalf of the government
  - finances the project
  - is reimbursed over the life of the project (through concession fees or other payments)

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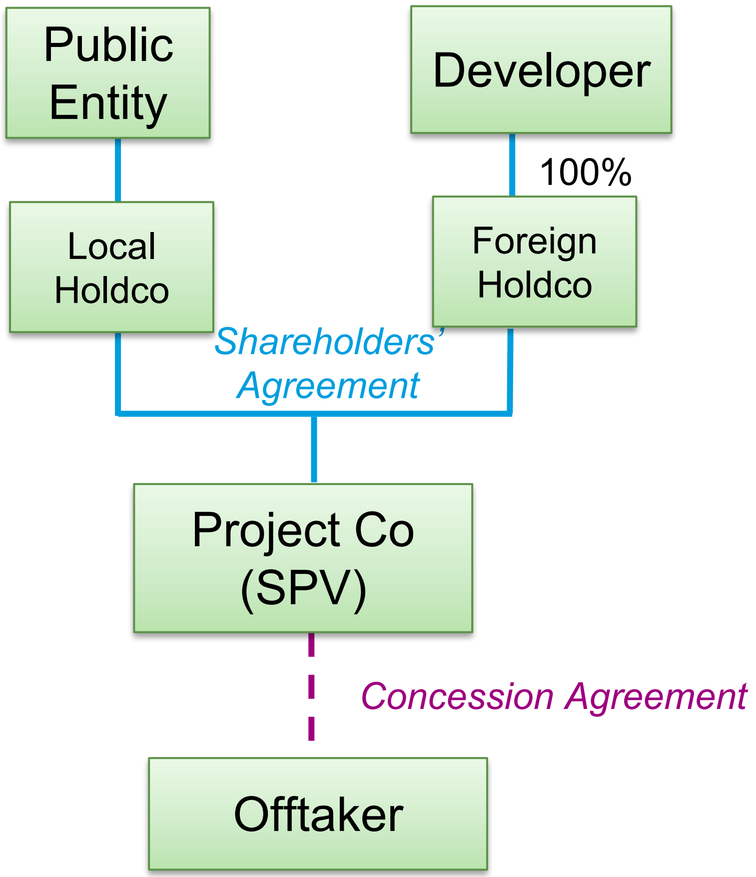
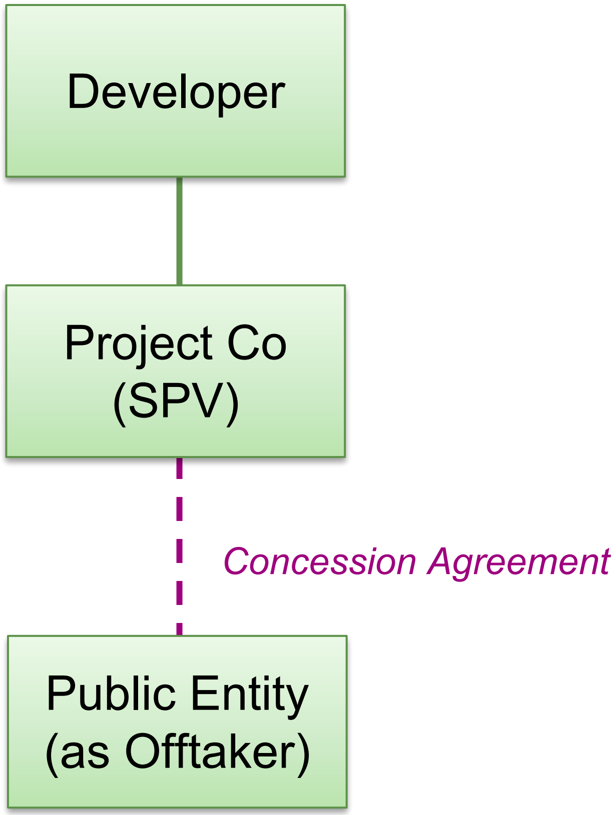
Institutional vs Contractual PPP Structures

Institutional PPP Project



Contractual PPP Project



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Different Structures Available*

NON-EXHAUSTIVE

Low private sector involvement

High private sector involvement

<table>
<tr><th>Category</th><th>Description</th><th>Advantages</th><th>Disadvantages</th></tr>
<tr><td>Service Contracts</td><td>The government pays a private operator to provide a service</td><td rowspan="3">Public Sector
▪ Maintain ownership of the entity offering the services
▪ Higher control over the service offering to the customers
▪ Short-term commitment
Private Sector
▪ Low operational and managerial risk
▪ Limited financial burden
▪ Lower demand risk</td><td rowspan="3">Public Sector
▪ High financial burden
▪ Limited transfer of operational risk to the private sector
▪ Government is involved in operations at the expense of regulation
Private Sector
▪ Short-term contract
▪ Limited financial gains
▪ Low government support</td></tr>
<tr><td>Management Contracts</td><td>The government pays a private operator to manage a facility on its behalf</td></tr>
<tr><td>Leases</td><td>The government leases the assets to a private operator in return for a fee</td></tr>
<tr><td>Concessions</td><td>The private partner is given the right to collect fees in return for construction and operational commitments for a given time period</td><td rowspan="3">Public Sector
▪ Low financial requirements
▪ Transfer of operational and managerial risk to the private sector
▪ More Government focus on regulation
▪ Better value for public funds
Private Sector
▪ Long-term contract agreement with cash flow streams
▪ Higher financial gains
▪ Access to sizable markets and new service scopes</td><td rowspan="3">Public Sector
▪ Lack of control over the service offering
▪ Loss of ownership rights in the entity offering the services
▪ Long-term commitment
Private Sector
▪ Higher investment requirements
▪ High technical and managerial risk
▪ High demand risk</td></tr>
<tr><td>Joint Ownership</td><td>The government and private sector investor(s) enter jointly into a partnership to form a company</td></tr>
<tr><td>Privatization</td><td>The government sells a facility/project entirely to the private sector, or allows the private sector to build, run, and own a facility for a certain purpose</td></tr>
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** For infrastructure development generally, not solely for PPPs*

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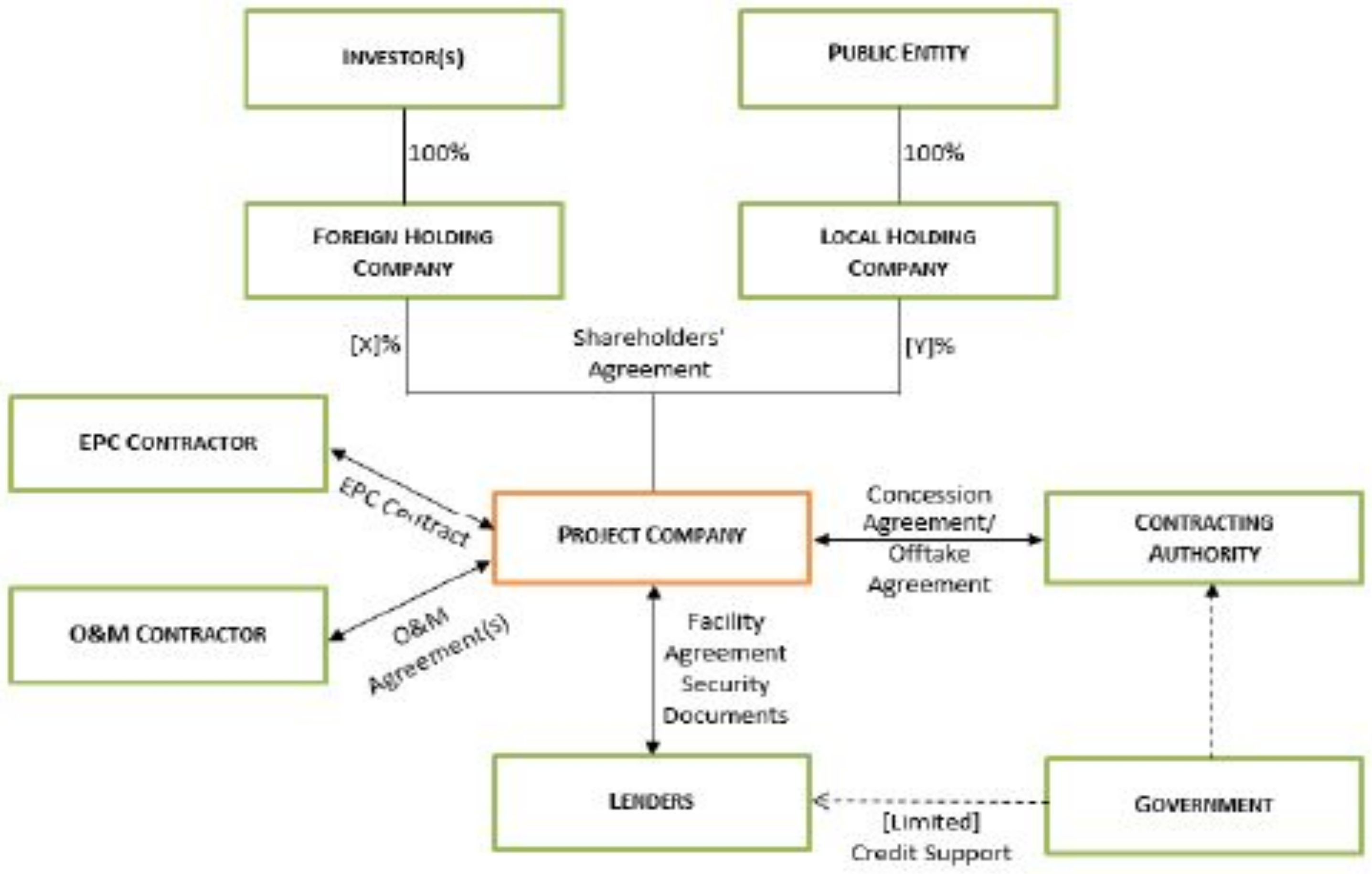
Typical PPP Structure



<u>Notes:</u>

1. *The two holding companies are an option, not essential.*
2. *X and Y vary by country. Some jurisdictions prescribe the host government's indirect stake. We have experience of this being between 40% - 60%; we have also seen a lesser percentage.*
3. *Credit support may be provided by the host government in a PPP transaction.*

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Why PPP Projects?

- Significant investment needed to improve infrastructure to underpin economic growth and development which the government cannot finance on a current basis
- Improving service delivery and reliability through:
  - enhanced connectivity and competitiveness
  - introducing private sector technology and innovation to provide operational efficiency
  - minimizing obsolescence
- Value for money
  - forcing government to look at life-cycle costs for services, and ensuring long term sustainability and maintenance of assets
  - imposing budgetary certainty by setting present and the future costs of infrastructure projects over time
  - incentivizing the private sector to deliver projects on time and within budget

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Why PPP Projects? (cont.)

- Transfer of skills and knowledge-sharing
  - way of developing local private sector capabilities
  - support sustainable growth and development

- Financing
  - conservation of state financial resources
  - leverage private funds and pool them with public resources
  - spread financing over the lifetime of the asset, relieving public budgets
  - "off-balance sheet" treatment

- Risk sharing / transfer
  - risk of delay and cost overrun transferred to the private sector
  - close scrutiny and control of private sector through contractual arrangements
  - once contract is signed, little or no political interference required

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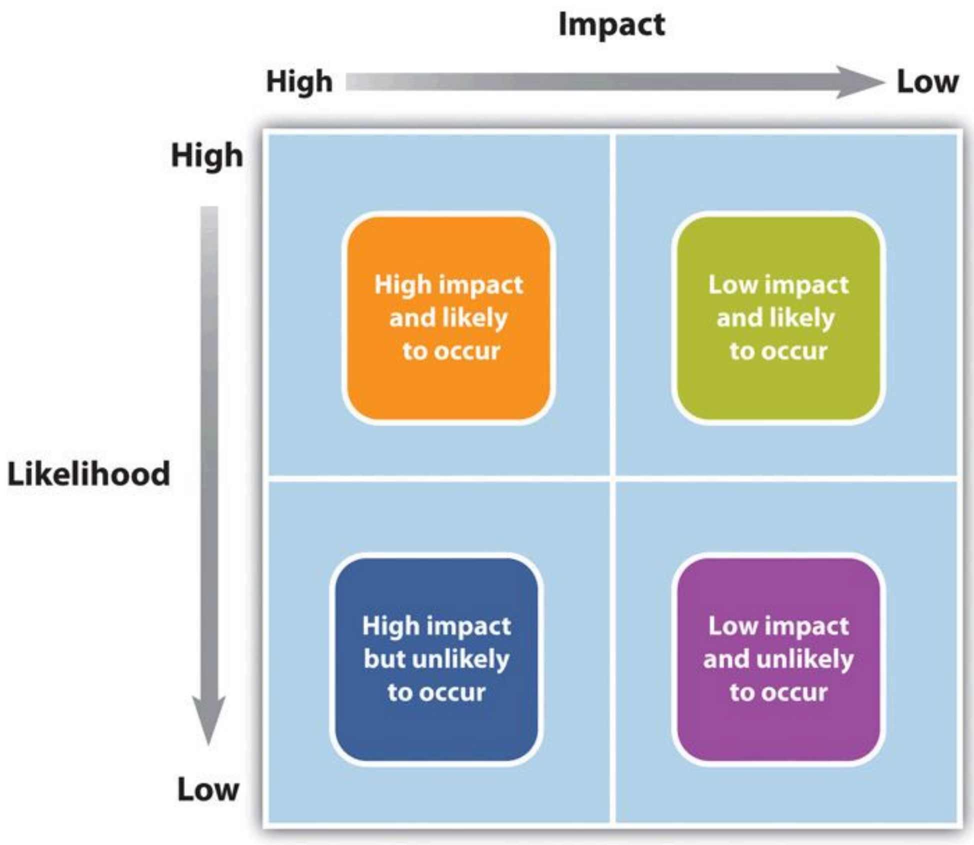
Risk Assessment and Allocation



- In a PPP after risks have been *identified* and *quantified*, they are *allocated* to the participant best able to handle the risk
- Key principle: **Risks are best allocated to 'participant best placed to handle the risk' in a cost effective way**; for example:
  - Construction/operation risks generally better handled by private sector
  - Political risk generally better handled by the Government
- Certain risks are best shared
- How? -- Risk transfer is crucial for PPP projects

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Different types of risks must be properly allocated and managed

Typical Risk Allocation Between the Different Parties in a PPP

Type of Risk	Definition	Risk Allocation: Public	Risk Allocation: Private
Demand and Revenue Risks	▪ Occur due to uncertainties regarding energy usage levels and are the product of tariff x usage ▪ Are usually regarded as the responsibility of the concession company, however, experience shows that these risks, particularly for new highways, can be too great to be borne by the concession company alone	✔	✔
Design and Construction Risks	▪ Technical risks (or construction risks) encountered during the design-construction phase result from technological choices and the sequencing of the construction program: they consist of cost overrun risks and schedule overrun risks	☐	✔
Operating and Maintenance Risks	▪ Entail risks of operating and maintaining the infrastructure such as suspension of service, failure to meet deadlines, etc.	☐	✔
Economic and Financial Risks	▪ Emanate from uncertainties concerning economic growth, inflation rates, the convertibility of currencies and exchange rates	☐	✔
Legal and Political Risks	▪ Risk due to legal changes that might affect the concession contract and the regulatory framework or due to change in political regime, political governance, government policy, and political uncertainty	✔	☐
Force Majeure	▪ Risk due to natural disasters and unforeseeable events ▪ Is normally unallocated but sometimes born by governments		

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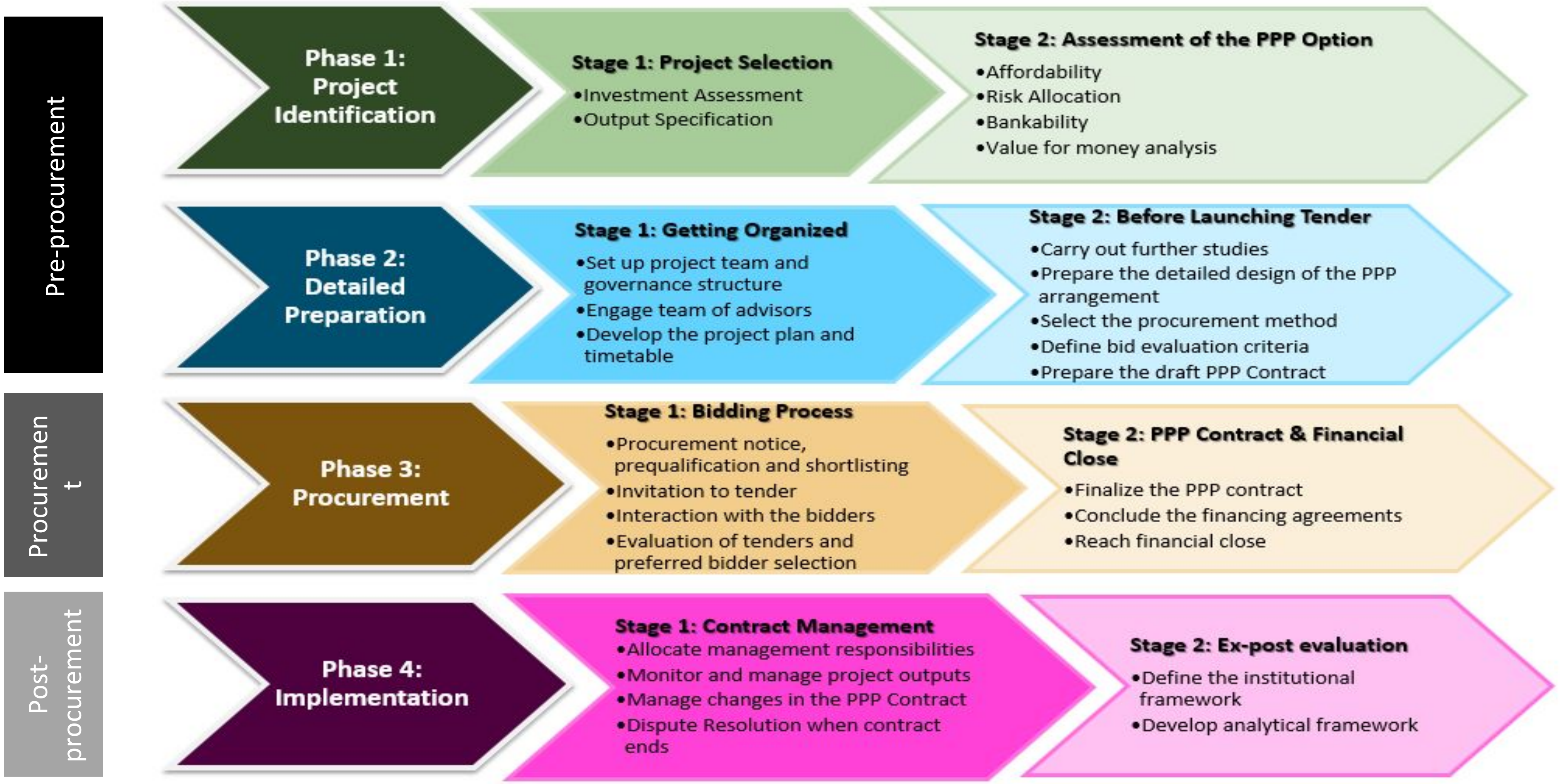
PPP Procurement Process



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General Overview of Procurement Options

	Open	Restricted	Negotiated	Competitive
Possibility to limit number of bidders	No prequalification or pre-selection is permitted. Any interested company may submit a bid.	The number of bidders may be limited to no less than five in accordance with criteria specified in contract notice (prequalification and shortlisting permitted).	The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted).	The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted).
Discussions during process	The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted.	The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted.	Negotiations permitted throughout process. Successive stages can be used to reduce the number of bidders (further short-listing).	Dialogue with bidders permitted on all aspects (similar to negotiated procedure, including further short-listing). When dialogue is concluded, final complete bids must be requested based on the solution(s) presented during the dialogue phase.
Discussions after final bid is submitted	No scope for negotiations with a bidder after bids are submitted.	No scope for negotiations with a bidder after bids are submitted.	Not relevant because the negotiations can continue until the contract is agreed. There need be no “final bid” per se.	Only permitted to clarify, fine tune or specify a bid. No changes permitted to basic features.
Basis for award	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Most economically advantageous tender

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Contract Transparency is a key element of PPP procurement

Benefits:

- Accountability incentivises public and private partner to ensure the project is managed efficiently
- Data retention improves accuracy of performance statistics
- Prevents corruption through public visibility/scrutiny of government actions
- Facilitates community and stakeholder engagement which improves the quality and delivery of projects
- Encourages foreign investment – through clear and precise legal framework (with pre-established laws) upon which investors can rely on

Achieved Through:

- PPP legislative framework – clear and concise content; and free and easy access to the relevant laws, regulations, policies and guidelines
- Public dissemination of procurement information/decisions (i.e. notices, minutes of meetings, selection of preferred bidders)
- Disclosure of PPP documentation (i.e. reports, RFQ and PPP contracts)

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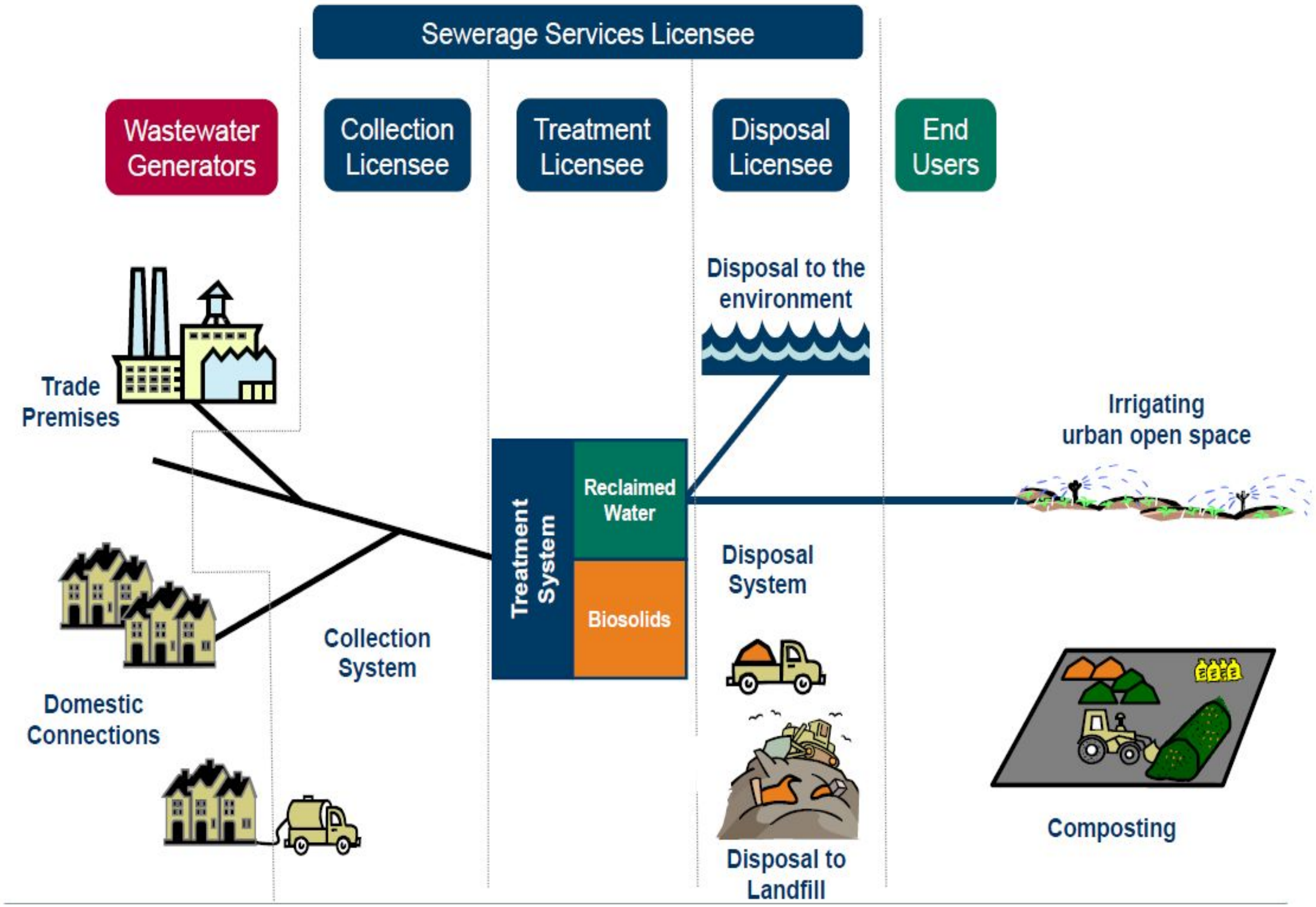
Case Study: Abu Dhabi – Wastewater Industry



- Procurement of 2 Independent Sewage Treatment Projects (ISTPs) in the Emirate of Abu Dhabi, each comprising two new sewage treatment plants:
  - ISTP1
  - ISTP2
- Key Drivers:
  - increased levels of investment required; larger works
  - desire to conserve public sector financial resources
  - increased appetite for strategic player investment/expertise
  - resulting in increased need for private participation

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Model PPP Contract: Term Sheet

Parties	• Contracting Authority: ADWEA • Offtaker: ADSSC

Corporate Structure:	• New Project Company formed to undertake the project
	• Share capital held:
	  • 60% by a newly formed company fully owned by ADWEA -- Local Holding Company
	  • 40% by newly formed company fully owned by Foreign Shareholder -- Foreign Holding Company

PPP Project:	• BOOT scheme:
	  • Project Company to construct the plants; and maintain, operate and manage the plants for the term of the project
	  • Project Company to relinquish all rights and hand back plants to Offtaker at the end of the term

Key Project Agreements:	• Sewage Treatment Agreement (STA) (i.e. "the concession and offtake agreement") • Shareholders' Agreement • Land Lease • EPC Contract • O&M Agreement
Term:	• 25 years from commercial operation (plus 2.5 years for design and construction) -- Linked to expected lifetime of asset?
Funding:	• 20% through equity contributions • 80% through debt -- "non-recourse" project financing • "Classic" project financing structure

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Model PPP Contract: Shareholders' Agreement

Parties	• Between Local Holding Company and Foreign Shareholder
Purpose:	• Sets out how Local Holding Company and Foreign Shareholder constitute, govern and manage Project Company • Sets out ownership interests in the Project Company; local law restrictions?
Term:	• Consistent with Concession Contract (the STA)
Corporate Governance:	• Composition and appointment of Board of Directors • Appointment of key management roles • Decisions requiring approval of all shareholders (e.g. contracts between affiliated parties) • Resolution of disputes between shareholders/deadlock situations

Equity Contributions:	• Minimum equity contributions
	    • Share capital
	    • Shareholders' loans
	• Timing for equity contributions
	• Repayment of shareholders' loans/dividend payment regime

Restrictions:	• Restrictions on transfer of shares at both Project Company and its shareholders' level
Other:	• Risk sharing arrangements • Assignment and step-in

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Model PPP Contract: Sewage Treatment Agreement

Parties	• Between Offtaker and Project Company
Purpose:	• Constructions, operation, and maintenance of the plants and transfer to Offtaker at the end of the term • Provision of wastewater treatment services (i.e. receive influent from Offtaker for treatment and deliver treated effluent and sludge to Offtaker, subject to strict parameters)
Term:	• 25 years from commercial operation
Pecuniary Award and Penalties:	• Offtaker to pay a tariff to Project Company -- "service payments" made up of: 1. "**Capacity payments**" -- designed to cover fixed costs of the project 2. "**Output payments**" -- designed to cover variable costs of the project 3. "**Supplemental payments**" -- designed to compensate Project Company or Offtaker for any difference between actual annual insurance costs and projected annual insurance costs; Project Company for use of back-up electricity • "All or nothing" completion requirements -- effluent, sludge, odour • Liquidated damages (LDs) regime

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Model PPP Contract: Sewage Treatment Agreement (cont.)

Financial Support:	• Payment guarantee provided by Government of Abu Dhabi in respect of Offtaker's termination payment obligations under the STA
Other:	• Other key terms include: • Minimum insurance requirements • Regulatory license requirement • “Odiferous day” regime • Termination • Handback regime, • Force majeure/events of government action or inaction

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Financing Parties

ISTP 1

- ADCB

ISTP 2

Equity Bridge Loan

- National Bank of Abu Dhabi
- ADCB
- First Gulf Bank

Long Term Loan

- BNP Paribas
- Crédit Agricole Corporate & Investment Bank
- ING Bank
- Mizuho
- National Bank of Abu Dhabi
- Natixis
- SMBC Sumitomo Mitsui Banking Corporation
- Bank of Tokyo-Mitsubishi UFJ
- ahli united bank
- MassMutual Financial Group

Refinancing

- BNP Paribas
- KFW IPEX-Bank
- National Bank of Abu Dhabi
- Natixis
- SMBC Sumitomo Mitsui Banking Corporation
- Bank of Tokyo-Mitsubishi UFJ

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PPP Financing

- PPPs require substantial and long-term investment, due to their size and complexity
  - projects are often highly technical in nature and require specialised knowledge to implement
- PPP projects are usually funded through combination of financing sources
  - the simplest example is the combination of debt and equity funding
- The availability will depend on the structure of the PPP project
  - different tiers will have different repayment profiles and rates of return
  - Different financing options are available
    - Project financing
    - Capital markets
    - Corporate financing
    - Resource-based financing
    - Host government financing
    - Other

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PPP Financing through Capital Markets

- Key Characteristics of Bond Financing:
  - Project risks > & mitigants
  - Maturity/refinancing risk
  - Pricing
  - Credit quality > enhancement
  - Transaction size
  - Nature of underlying asset
  - Deliverability and pricing uncertainties
  - Cost of carry
  - Termination provisions
  - Controlling creditor
  - Legal considerations; e.g. (*inter alia*)
    - Any recourse to sponsors?
    - Any intercreditor issues?
    - Adequacy of security?
  - Preparatory costs
  - Disclosure requirements
  - Maturity/refinancing risk

- Bond v. traditional debt financing?

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Romanian PPP Law: Reforms*

- There is no specifically designated PPP unit to manage PPP procurement
- PPPs may be procured at both national and local level. Certain "strategic" projects in may also be initiated by the National Commission of Strategy and Prognosis
- There have been a number of attempts at PPP legislative reform over the last decade
- Government Emergency Ordinance No. 39/2018 on public-private partnership ("**GEO No. 39/2018**"), is the most recent PPP legislative framework introduced by the Romanian Government
  - Intended to enable more timely implementation of PPP projects
  - It is expected that implementation norms will not need to be adopted, making the framework operational without additional action

* ***Not qualified to practice law in Romania***

Timeline

Legislative Reforms:

2010

- Law no. 178/2010 on public-private partnership

2016-2017

- Law No. 233/2016 (replacing 2010 Law)
- Modified December 2017

2018-2019

- Government Emergency Ordinance (GEO) No. 39/2018 on public-private partnership to replace 2016 Law*
- GEO No. 43/2019 (*to be approved by parliament*) to modify GEO 2018*

**** To be passed into law by parliament***

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Romanian PPP Law: GEO No. 39/2018*

Key Similarities with 2016 Law

- a SPV must be established
- the majority of the project must be privately funded
- the project must be tendered through the public procurement/services concession legislation
- the SPV may be able to collect payments/tariffs directly

Key Differences from 2016 Law

- implementation norms are not required
- an SPV no longer needs to be established as a joint stock company
- streamlined approval process
- now covers the operation of public services/ projects (not just development or expansion)
- Introduces "financial closing" as a mandatory requirement and permits the public entity to enter into direct agreements
- Special public fund to be established for financing of projects during construction (up to a cap of 25% of the investment value)

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Thank you

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