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The Impact of Government Organization on PPP Projects

How are PPP Projects Approved, Awarded, Monitored and Regulated by the Government?

The interface between the government and the service provider is key to the success of PPP projects. Government involvement is important both at the planning and design phase and the implementation and monitoring phase and it should be determined early on which public entities are required to be/ should be involved in the different phases of the project.

Inefficient organization can result in increased costs to the project, and a lack of definition and transparency in government processes can increase uncertainty for investors and developers and multiply costs or delay or halt projects.

Some of the main issues to consider are set out below:

- ❑ **Which Public Entities Need to Be Involved in the Approval Process for the Project?**
- ❑ **Does the Awarding Authority Have the Right to Award the Project?**
- ❑ **What is the Legal Standing of the Awarding Authority?**
- ❑ **What Regulatory or other Contract Monitoring Mechanisms Are in Place/ to be Put in Place?**

Which Government entities/ departments need to be involved in the approval process for the project?

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At the outset the approval chain and process should be established so as to avoid delays and re-engineering of the project:

- Which authorities/ ministries are involved in the decision making process (this may include different levels of government, possibly central, provincial and local (with potential for different rules and requirements at each level))?
- Which entity or entities has the power to award the contract? Government contracts may be vested or shared with a ministry different from the authority responsible for the sector covered by the infrastructure project, such as the finance ministry.
- Other ministries or entities may need to be involved in approving the project, even if it is not the formal signatory of the project. For example, projects over a certain size may require cabinet approval.
- Where government support such as a guarantee is to be sought for the project, relevant approval processes will need to be followed.

It may be helpful to entrust a central unit within the host country's administration with the overall responsibility for formulating policy and providing practical guidance on privately financed infrastructure projects. For more on this, click on the [UNCITRAL Guidance on Privately Financed Infrastructure Projects](#). Links to a number of these centralized units can be found at [World Bank Institute PPPI Global Portal](#).

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Does the Awarding Authority Have the Right to Award the Project / Is there an Ultra Vires doctrine?

Does the public body that is to be the awarding authority have the power to delegate the duties and rights to deliver the services?

Limitations on scope of delegation - does the law prohibit delegation of certain powers or responsibilities of the government to a third party entity, particularly a private sector entity, but even to a state or municipal authority. An example of this is the power to charge consumers for services and the power to enforce payment - delegation of these powers to the private sector may be prohibited at law. In such a case it may be possible to design the project to accommodate such a restriction, such as having the service provider act as the government authority's agent in bill collection rather than on its own behalf.

Ultra Vires - the doctrine of Ultra Vires generally applies to the acts of public bodies, whose powers are laid down by statute or legal act. The public body will have the power to enter into arrangements only as specified in its constitutive statute and these arrangements will only be valid if they relate to functions that the body is authorized, expressly or impliedly, to perform.

Limitations on powers of awarding authority - there is a growing trend towards decentralization of the duty to deliver services

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services in developing countries to state and local authorities where duties and powers are delegated from the national authority to a state or local authority. It is important to check the document or act delegating authority to ensure that it has power itself to outsource to a third party, being a private sector entity. If there is no such power vested then the municipality has to either approach the authority from which it has derived authority for clarification/ amendment of the delegated powers or ensure that the scope of activities being outsourced is within the constraints of the legislation.

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What is the legal standing of the Awarding Authority?

The following issues need to be considered in relation to the awarding authority:

- Is this a legal entity?
- Can it be bound by contract? If so, will it be subject to private law or to administrative law (in civil law systems there is likely to be a specific body of administrative law enforced by administrative courts).
- Can the awarding authority be sued or does it have sovereign immunity? If the awarding authority is part of the government, it may have immunity from prosecution and so it may be necessary for such entity to specifically confirm that it will not be bound by sovereign immunity. Click on [Checklist on Sovereign Immunity](#) for more information.
- Even where the awarding authority is not subject to immunity, it is likely to be subject to administrative law rather than private law enforceable by the administrative courts. The remedies for enforcement against the awarding authority may be limited (in terms of standard of proof required to show negligence on the part of the awarding authority, for example, and the forms of redress available against the authority). The private party may therefore seek to ensure that dispute resolution is through arbitration.
- Are the powers and duties of the authority whose services are being outsourced clearly identified?
- Does the authority actually have title in the assets that are proposed to be transferred?
- Is there any other entity/ authority that may have competing claims to the powers/ duties/ assets?
- Is there a neighboring authority with a competing interest in an asset, for example a reservoir supplying the areas of each authority? Is the law clear on the relationships involved?
- Has the awarding authority taken all steps to authorize the signatory to enter into the project agreement - even if permitted by law to enter into the arrangements contemplated, parties will need to check that the authority taken all steps required by its own constitution, such as board meetings, etc. to be able to enter into the arrangements and to empower the signatory of the agreement to enter into it on behalf of the authority.

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What Regulatory or other Monitoring Mechanisms Are in Place/To Be Put in Place?

Where a service is outsourced to the private sector through a PPP arrangement, the government will still need to be actively involved in the implementation of the project and monitoring performance of the operator. The following issues need to be considered in relation to the ongoing regulation and monitoring of the project:

- Is there a regulator in place or to be put in place to monitor the service provider once the project has been implemented?
- If not, what entity is to monitor performance of the operator? Is this to be established by the contract? Will the awarding authority or other entity carry out this task? Will there be sufficient resource remaining within the awarding authority following letting of the contract to monitor the operator's performance? If not, can such monitoring be sub-contracted out?
- If there is to be a regulator, what are the powers of the regulator? Monitoring and supervising performance and costs only, or to include powers and duties such as tariff setting, enforcement of operator performance, etc.
- Are the powers of the regulator consistent with the terms of the contract? In particular, if the regulator has the power to set tariffs, is there any link required between the levels of the tariffs and the contract? What happens if the regulator does not increase tariffs to levels that correspond with the return set out in the contract?
- Is there a contractual or other relationship between the regulator and the service provider?
- Is the regulator adequately staffed to perform its duties?
- What is the relationship between the regulator and the Government – i.e. is the regulator to be independent or part of Government, can his decisions be overturned by Government?
- Is there a mechanism for the service provider to appeal against decisions of the regulator?

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For more on this, click on [Regulation on public-private partnerships](#).

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