A Guide to the PPP Procurement Process

INTRODUCTION

This guide sets out the practice which is to be adopted by the Government of Malta, acting through the Director General Contracts of the Ministry of Finance, in awarding contracts under its Public-Private Partnership Programme. In terms of Regulation 47(9) of the Public Procurement Regulations 2005, the Director General Contracts will effectively advise the appointment of an ‘ad hoc’ committee with responsibility for conducting the competitive dialogue procedure.

It addresses the process to be followed in the procurement by the Public Administration (the Authority) in terms of Legal Notice 177 of 2005 and exposes some of the issues that may arise during that process. The selection process is set out as a series of stages which represent milestones and/or decision points.

This guide presupposes that the majority of procurements will be classified as complex and so be properly procured in accordance with LN 177 of 2005 relating to the Public Procurement Regulations, 2005 under the “Competitive Dialogue” procedure. There may however be projects which because of their specific features, may be procured under the “Negotiated” procedure.

In any such case the steps of the procurement will be similar except that the discussions at the final tendering stages will have more latitude for direct financial negotiation. Experience from other countries indicates that the “open” procedure is not appropriate for PPP procurement.

Guidelines for an outline business case for public-private partnership investment setting out the framework are also incorporated in this guide. A business case template is attached to steer ministries and other Government entities in a systematic and structured approach that sets out the key elements for investment decision making.
<table>
<thead>
<tr>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Foreword</td>
<td>3</td>
</tr>
<tr>
<td>The Stages to the PPP Procurement</td>
<td>4</td>
</tr>
<tr>
<td>1.1 Preparing for the Procurement</td>
<td>4</td>
</tr>
<tr>
<td>1.1.1 Appointment of Advisors</td>
<td>5</td>
</tr>
<tr>
<td>1.1.2 Choosing and validating the procurement procedure</td>
<td>5</td>
</tr>
<tr>
<td>1.1.3 The procurement issues</td>
<td>5</td>
</tr>
<tr>
<td>1.1.4 Timetable</td>
<td>6</td>
</tr>
<tr>
<td>1.1.5 Prior Information Notice (PIN)</td>
<td>6</td>
</tr>
<tr>
<td>1.1.6 The Information Memorandum</td>
<td>6</td>
</tr>
<tr>
<td>1.1.7 Output Specifications</td>
<td>7</td>
</tr>
<tr>
<td>1.1.8 Value for Money Benchmark</td>
<td>7</td>
</tr>
<tr>
<td>1.1.9 Pre-Qualification Questionnaire</td>
<td>7</td>
</tr>
<tr>
<td>1.1.10 The Contract Notice</td>
<td>7</td>
</tr>
<tr>
<td>1.2 Pre-qualification</td>
<td>8</td>
</tr>
<tr>
<td>1.3 Short listing and preparing the tender documentation</td>
<td>8</td>
</tr>
<tr>
<td>1.3.1 Evaluating the proposals</td>
<td>9</td>
</tr>
<tr>
<td>1.3.2 Preparing the Invitation to Tender (ITT)</td>
<td>9</td>
</tr>
<tr>
<td>1.3.3 Revisiting the VFM Benchmark</td>
<td>10</td>
</tr>
<tr>
<td>1.4 The tenders</td>
<td>10</td>
</tr>
<tr>
<td>1.4.1 Clarification meetings</td>
<td>10</td>
</tr>
<tr>
<td>1.4.2 Preparing for the competitive dialogue</td>
<td>11</td>
</tr>
<tr>
<td>1.4.3 Receipt of the tenders</td>
<td>11</td>
</tr>
<tr>
<td>1.4.4 Checking for completeness</td>
<td>11</td>
</tr>
<tr>
<td>1.4.5 The competitive dialogue</td>
<td>12</td>
</tr>
<tr>
<td>1.4.6 Verifying affordability and value for money</td>
<td>13</td>
</tr>
<tr>
<td>1.4.7 Requests for BAFOs</td>
<td>13</td>
</tr>
<tr>
<td>1.5 Evaluation of the BAFOs, confirmation of affordability and value for money</td>
<td>13</td>
</tr>
<tr>
<td>1.5.1 Affordability and value for money</td>
<td>14</td>
</tr>
<tr>
<td>1.5.2 Appointing the preferred bidder</td>
<td>14</td>
</tr>
<tr>
<td>1.6 The preferred bidder</td>
<td>14</td>
</tr>
<tr>
<td>1.7 The Public Private Partnership</td>
<td>15</td>
</tr>
<tr>
<td>1.8 Monitoring</td>
<td>15</td>
</tr>
<tr>
<td>2.0 Outline Business Case Guidelines for Public-Private Partnership Investment</td>
<td>16</td>
</tr>
<tr>
<td>2.1 The need for and the nature of the proposed investment</td>
<td>16</td>
</tr>
<tr>
<td>2.2 Alternative options for investment and why the PPP route is proposed</td>
<td>17</td>
</tr>
<tr>
<td>2.3 The risks and implications of the project as a PPP investment</td>
<td>17</td>
</tr>
<tr>
<td>2.4 Estimates of annual cost and considerations of affordability</td>
<td>18</td>
</tr>
<tr>
<td>2.5 Timing and preparedness for PPP procurement</td>
<td>18</td>
</tr>
<tr>
<td>3.0 The Value for Money Concept</td>
<td>19</td>
</tr>
<tr>
<td>3.1 Affordability and Value for Money</td>
<td>19</td>
</tr>
<tr>
<td>3.2 Estimating VFM - Risk, Tax and Timing</td>
<td>20</td>
</tr>
<tr>
<td>3.3 The Project Board and achieving VFM</td>
<td>20</td>
</tr>
<tr>
<td>Annex - Business Case Template</td>
<td>21</td>
</tr>
</tbody>
</table>
Public Private Partnerships (PPPs) are fast becoming a global phenomenon. A wide variety of arrangements between public authorities and private contractors are referred to as PPPs. In practice, these imply a method of acquiring public services that see the private contractors being engaged to take the risks they are best equipped to manage - those relative to investment and operations. Concurrently, the public sector relinquishes its former role of service provider to concentrate on determining levels of public services and to ensure their timely delivery under contractual conditions that generate efficiency gains.

In Malta, we have experimented with PPPs over the past few years and a number of projects have been undertaken in varying areas which have included landscaping and embellishment; homes for the elderly; search and archiving system at the Public Registry and street lighting provision. While the outcomes have been generally positive in terms of value added and experience gained, they were basically input-based projects that were managed on an ad hoc basis and the process relating to project implementation remained largely unstructured.

In February this year, the Ministry of Finance was authorised by Cabinet to give new impetus to the process and place it at the heart of government’s investment thrust over the coming years. To this effect, in recent months, significant capacity building has been taking place. A PPP Unit has been established within the Ministry and has been tasked with taking the process forward. The Unit is seeking to develop an environment that facilitates the emergence of suitable PPP projects. It has been working closely with experts in this area to draft guidance material and contractual models that will serve as standards for good practice process implementation. At the same time, in conjunction with the Ministry of Health it has embarked upon a pilot project - the procurement of a Home for the Elderly at Mellieha - which will provide it with an element of learning by doing.

This first guidance manual, which I have the pleasure of introducing, maps out the various stages that make up the PPP procurement process. It dwells in depth on the rules and practices underpinning the ‘competitive dialogue’ procedure which has been incorporated into the revised version of the Public Contracts Regulations that came into effect under Legal Notice 177 of 2005. In establishing the ‘competitive dialogue’ procedure as the accepted method whereby to undertake the procurement of particularly complex contracts, the EU has effectively recognized the ever-increasing relevance of PPPs as a preferred option by governments everywhere and has sought to provide a better defined legal framework within the context of which major projects of this nature can be procured.

I am confident that in the very short term recourse to PPP methods for the undertaking of major projects will be increasingly resorted to by line ministries and public sector entities. In so doing, I have no doubt that they will find this manual a useful tool to help them on their way up the learning curve.

Meanwhile, apart from being readily available to help out to elaborate further on anything that is contained in this manual, the PPP Unit will be following up to disseminate the PPP process as widely as possible across the entire public sector. Information sessions are planned for the major stakeholders and more in depth training will be given to other offices in line ministries/public entities who are expected to be more directly involved in the PPP process.

I firmly believe that we have embarked upon a process that will enable us to reap rich dividends in the form of better service delivery and increased value for money. I look forward to your contribution in this respect. It will doubtlessly be crucial to the success of this initiative.

The Hon. Tonio Fenech
Parliamentary Secretary in the Ministry of Finance
The Stages to the PPP Procurement

STAGE 1

1.1 Preparing for the procurement - after the project has received sanction to proceed into procurement.

A PPP procurement is an elaborate and methodical process which from first advertisement to final contract signature will last between twelve and twenty-four months. To achieve these timescales it is essential that the procurement team is properly structured and resourced from the outset. The team should comprise:

• A Project Board or Committee which will receive reports and be vested with the authority to ratify or reject proposals and recommendations brought to it by the Team Director or the evaluation panel.

• An Evaluation Panel that comprises some or all of the team and other experts as appropriate. The Evaluation Panel will assess submissions from tenderers at various stages of the process against pre-determined criteria. As a panel it would not enter into direct discussions with any of the bidders.

• A Negotiation team responsible for the competitive dialogue (negotiations).

• A Project Director who is responsible on a full-time basis for managing and co-ordinating the procurement process. As well as a secretariat, the Project Director will be supported by the following:
  - Technical expert(s) with knowledge and experience of the facilities to be sourced.
  - Public service expert(s) from the service that will be the ultimate client in the transaction.
  - Legal counsel experienced in PPP and project finance transactions.
  - A PPP expert from the Ministry of Finance PPP Unit.

In most cases some of the expertise required by the team will be outsourced.

At this stage the appropriate time commitment must be secured from those concerned and a realistic budget agreed to cover the fees and expenses of advisors.

Composition of the project procurement team. The team should comprise:

• A Project Board
• An Evaluation Panel
• A Negotiation Team
• A Project Director (to be appointed by and representing the Contracting Authority)
• PPP Unit member
• Internal technical advisors
• External advisors (if required)
1.1.1 Appointment of Advisors
For those services which are to be outsourced, external advisors might be appointed. As the fees charged by external advisors will be a heavy burden on the procurement team’s budget, a competitive selection should be undertaken. Advisors should be chosen on a basis which balances expertise, experience and cost. International experience has proven that appointments should be against well-defined terms of reference in order to contain costs and avoid duplication of effort.

1.1.2 Choosing and validating the procurement procedure
Once the team is established, its first task is to determine the procurement procedure to be adopted.

PPPs do not lend themselves to procurement by open tender. In most cases the “Competitive Dialogue” will be appropriate since the PPP projects are complex in that they involve the coming together of many elements and because at the outset the Authority is not in a position to dictate the optimum blend of inputs that will best satisfy its requirements in output/functional terms. However, in exceptional circumstances the “Negotiated Procedure” may be preferred.

The Competitive Dialogue Procedure as well as the Negotiated Procedure constitute exceptional procedures - the open and restricted procedures being the norm.

The Competitive Dialogue Procedure, in terms of Regulation 47 of LN 177/2005 may only be used “in the case of particularly complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract”.

The Negotiated Procedure, in terms of Regulation 38 may only be used “in exceptional cases, when the nature of the works or the risks attaching thereto do not permit overall pricing”.

From the above it is clear that the Competitive Dialogue Procedure may be used in a far wider variety of contracts than those in which the Negotiated Procedure may be applied.

If there are realistic grounds to believe that the procedure opted for could be challenged, legal opinion should be sought, before the decision is confirmed and the procurement launched.

1.1.3 The procurement issues
A decision should be made at the outset as to whether a two or three stage selection process is envisaged. This should depend on the depth of the market for providing the PPP services, which are the subject of the procurement. This decision should be informed by any prior market sounding carried out at the earlier project development stage.

A two-stage process will involve choosing a shortlist of prospective tenderers directly from the responses to the initial advertisement. A three-stage process involves sifting the original responses down to a long list of prospective bidders from which the shortlist is then appointed. The notice should signal what process is envisaged but also reserves the possibility of passing directly to a shortlist if the responses do not warrant the intermediate stage.

Long and short lists
The reason for a three-stage approach is to contain the eventual shortlist to no more than four, preferably three bidders who are required to put in full technical and economic proposals. The tenders required are very detailed and require a considerable investment of time and money. Private companies will not, nor can they be expected, to make that investment unless they have a reasonable chance of being awarded the contract.

From the viewpoint of the procuring authority, it is very difficult in practical terms to manage a process to a reasonable timescale if too many detailed tenders require dialogue and evaluation. The field has to be narrowed down.
**Bidders’ Conference**

Depending on the level of market sounding undertaken during the project development phase, it is frequently advisable to hold a conference or seminar which all interested parties can attend. At the conference the procuring Authority presents the project and takes questions in open forum. Questions and answers should be minuted and subsequently circulated to all attendees.

The appropriate time to hold such conferences can vary depending on the nature of the project. If the project is one where it is difficult to determine in advance the precise scope, is in any way open ended or is one which is novel and the private contractor reaction uncertain, it may be advisable to hold a conference prior to the commencement of formal procurement. The invitees can be selected from companies that have registered their interest in response to a Prior Information Notice (see below).

If the project is clearly scoped however, it is more appropriate to hold such a conference after the initial applicants have received and had time to assimilate the contents of the Information Memorandum (see below).

---

**1.1.4 Timetable**

Once the team is assembled and the procurement procedure and method is settled, a full detailed timetable should be drawn out for the whole planned procurement process through to contract signature. This timetable should set out not only milestones but all necessary inputs from those involved in the procurement and should enable the Project Director to determine the involvement of external advisors.

A typical competitive dialogue procurement procedure includes the following stages:

- Despatch of contract notice to OJEU
- Publication of contract notice
- Briefing Session
- Deadline for pre-qualification submissions
- Approval and publication of shortlist of bidders
- Issue Invitation to Tender (ITT)
- Receive proposed solutions
- Competitive Dialogue
- Request for best and final bid (BAFO)
- Adjudicate
- Approval of preferred bidder
- Contract Award
- Commencement of Works

**1.1.5 Prior Information Notice (PIN)**

If the response to the project by the Private Sector is uncertain, consideration should be given to publishing a PIN in the Official Journal. The PIN alerts the market to the existence of the project, but does not constitute a part of the actual procurement process.

**1.1.6 The Information Memorandum**

Before preparing the advertisement for the Official Journal and local publication, a project Information Memorandum should be prepared. This memorandum will represent the “descriptive document” referred to in the procurement regulations and will be sent to all respondents to the advertisements.
The Information Memorandum should explain the project in sufficient detail, together with the method of selection, to enable contractors to decide whether they wish to bid. There are certain formal requirements in the procurement regulations that the memorandum should cover, and it should anyway include:

- The scope of the project and the broad technical requirements expressed in output terms. Clear mention should be made to the level of likely overall investment required of the prospective partner, the timescale for the procurement, the PPP nature of the eventual contract and the term of the contract.
- The proposed selection process should be described (2 or 3 stage) and the responses required at each future stage.
- Under the heading of “economically most advantageous”, the selection criteria at each stage should be clearly explained.
- The Planning stages should be explained and the Planning consents which are to be the responsibility of the eventual partner made clear.
- The contents of the Expressions of Interest solicited in response to the Memorandum should be clearly set out with deadlines for responses. If a three stage process is envisaged, it should be made clear that in the first instance respondents only need to prove their good standing, financial and technical competence to undertake the project.

### 1.1.7 Output Specifications

The Output Specifications is the basis on which the contracting authority states in output terms what is needed to achieve from the facilities and services to be provided. It should dictate the bidders’ response to the Invitation to Tender (ITT).

The first step in preparing an output specification is the determination of the institution’s present and future service requirements. The next step is to identify the outputs required to deliver the service and the minimum standards for these outputs. The output specification should detail what needs to be achieved not how it is to be achieved, and should be measurable against performance criteria.

### 1.1.8 Value for Money Benchmark

In determining value for money, a value for money benchmark (public sector comparator) is developed and compared with the predicted costs for the private sector performing the service. The VFM benchmark represents the full costs to the contracting authority of delivering the required service according to the specified outputs via the preferred solution option using conventional public sector procurement. The benchmark is adjusted according to risk, using the public sector as supplier of the service.

### 1.1.9 Pre-Qualification Questionnaire

The Pre-Qualification Questionnaire (PQQ) contains a series of detailed questions which are designed to probe applicants’ technical capability, capacity and financial strength in order to determine whether they can deliver the Project.

Applicants are required to submit data in the specific formats, covering specified periods and in sufficient depth. The failure to provide information required in the right form and depth (after a reminder has been issued) should merit rejection.

### 1.1.10 The Contract Notice

Once all of the above have been completed, the Contract notice in the prescribed form should be published locally and in the Official Journal. This starts the formal procurement process.
1.2 Pre-qualification

On receipt of the Expressions of Interest, the responses should be evaluated against the pre-qualifying criteria set out in the memorandum. These criteria represent tests of good standing (probity), technical competence and financial strength or capability. The tests are independent of each other. The test of probity is an absolute test; the other tests are relative to the size and complexity of the project. If applicants have provided the requested financial and/or technical references, these should be taken up.

At this stage of pre-qualification, submissions are likely (and should be welcomed) from individual entities that would only appear to be competent to provide directly some of the service package required or who obviously would be intending to sub-contract elements of the services. Such submissions should not be rejected unless the service offering is very narrow compared with the overall requirements. It may be appropriate when rejecting such applications to notify the applicant that they might consider joining a larger consortium (without indicating which).

Once the evaluation of the responses is completed the applicants should be notified as to whether their candidacy is to be taken forward and should be informed of the other successful candidates at this stage. Applicants who are rejected should be given reasons for the rejection. Applicants who can only perform part of the services, but who are nonetheless accepted should be informed that their application is only being taken forward on the basis that they will form part of a consortium of qualified applicants, probably offering their services as a sub-contractor. If the number of successful applicants exceeds four, a further round of selection will be required to arrive at the shortlist of tenderers who will be invited to submit a full proposal. This stage is described below, but of course may be omitted if only a small number of applicants pass the pre-qualification stage.

1.3 Short listing and preparing the tender documentation

Whereas the process of pre-qualification concentrates solely on the good standing and general competence of applicants, short listing should be a test of specific competence in respect of the subject matter of the project. It is a competitive stage designed to compare rival submissions and to select the best three.

This intermediate step requires those tenderers that have been pre-qualified to focus on the project and to make a further submission to prove their specific resolve, commitment and approach to the project. This will not involve a costed submission at this stage. The proposals will be made on the basis of the Information Memorandum and, possibly further detail about the services required, the opportunity to offer variant proposals and the proposed commercial terms. The selection criteria at this stage should be repeated. However, the extra detail provided should be totally consistent with the description of the requirements as originally advertised and set out in the Information Memorandum.

It may be appropriate to hold a bidder's conference at this stage (see above). The timing should be such as to have allowed the pre-qualified tenderers to absorb any further information supplied but be early enough before the deadline for submissions.

Those tenderers being asked for project specific proposals should be informed of the timetable and content of responses. The contents should cover the following:
• Their design approach to the project.
• How their company/consortium would be organised to offer the whole service package.
• How they will ensure that the required facilities and services would remain functional and cost-effective over the project life.
• How they would propose to finance the project.
• A commentary on the outline commercial terms and risk allocation.
• Any proposed variant the tenderer wishes to propose.

If a bidder conference has been held it is not normally advisable to offer and engage in one-to-one exchanges until a shortlist has been drawn up. If a meeting is offered to a given tenderer, a similar offer should be made to the other candidates. At any such meetings tenderers should indicate any proposals they regard as confidential. It should be made clear that any points of general clarification will be circulated to all candidates.

1.3.1 Evaluating the proposals
The responses to the request for project specific proposals should be evaluated on their particular merits in respect of the project. There should be no reference to the initial criteria of general competence and financial strength on which the long list was drawn up unless new facts come to light. Evaluation should be against the criteria specified for this short listing stage. Since no financial detail will have been provided by tenderer at this stage, a scoring matrix will need to be devised that properly reflects the weightings the Evaluation Panel has previously determined for the elements of the responses. When the selection is made and ratified by the Project Board, all tenderers should be informed of the results and the scoring of the submissions disclosed to all tenderers.

1.3.2 Preparing the Invitation to Tender (ITT)
The ITT should be finalised and ready for issue following the short-listing procedure. This will involve considerable input from all members of the project team and their advisors. The ITT should clearly reflect the description of the project as set out in the original advertisements. It should be informed by the responses to the Information Memorandum, for instance by defining more precisely the service package or by re-allocating certain risks tenderers appear reluctant to bear. However the ITT should not be biased in favour of any particular tenderer or their proposed technical solution. The ITT should contain all the information and instructions necessary for the short listed tenderers to prepare a full technical and financial bid. This would include:
• A full draft contract based on the standard model contract as tailored for the circumstances of the project. Inter alia this will cover the key elements of the future contractual relationship, the terms of the contract, the commencement of service and what events trigger rights of early termination and what the financial and other consequences are of termination. It will also address how future changes to the contract services will be agreed and priced.
• A fully developed output specification covering all the services required.
• Detail of the standards and service levels the services should meet.
• The proposed payment mechanism.
• The proposed performance and penalty regime.
• Contract monitoring and management arrangements.
• A format for the financial model which calculates the proposed charge and which the tenderer must submit as part of the bid.
• A risk matrix which identifies the technical, commercial and other risks for the successful delivery of the project and allocates those risks between the parties.
• The parameters within which variant bids are acceptable to the authority (see below).
• Detail of the financing commitment required from the tenderer's funders.
• Proposals for the “Direct Agreement” (see below).
• Information about site availability, existing plans and designs and the planning considerations.
• Full detail of what the response to the ITT should contain.
• The evaluation criteria, which must be entirely consistent with those first published.
• A description of the “Competitive Dialogue” process to be followed with protocols on communication and the passing of information.
• A detailed timetable to contract signature.
The Direct Agreement

It is an essential feature of PPP contracting that the Government neither directly nor indirectly guarantees the PPP partner’s financing or banking arrangements. If the prospective partner is proposing a project finance structure whereby the counterparty to the PPP contract is a special purpose project company which raises limited recourse finance, it is conventional to enter into a direct agreement with the funders. Under such an agreement, which takes a standard form, the client authority accords the funders rights in circumstances of potentially catastrophic service failure to take control of the project company and to appoint new sub-contractors to replace those in default (step-in right).

Variant bids*

The ITT should clearly set out the parameters for variant bids. A variant bid is an optional bid lodged together with the full standard bid which may widen (but not reduce the scope) of the services offered. A variant bid may propose alternative commercial terms which the tenderer believes can offer better value for money to the authority.

* Regulation 46 of LN 177/2005 provides as follows:
1. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.
2. The contracting authorities shall state in the contract documents the minimum specifications to be respected by the variants and any specific requirements for their presentation. They shall indicate in the tender EU contract notice if variants are not permitted. Only variants meeting the minimum specifications laid down by the contracting authorities shall be taken into consideration.
3. In the procedures for awarding public supply or services contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

1.3.3 Revisiting the VFM Benchmark

Before issuing the ITT the original benchmark costings should be updated to reflect any development in the project’s scope or movement in costs since project inception. Calculations should be re-worked to establish that the likely levels of the bids will be within affordability limits. If it appears that there have been adverse movements such that the project risks breaching affordability limits, a re-scoping exercise should be carried out and the ITT should reflect this new revised scope.

The Direct Agreement

It is an essential feature of PPP contracting that the Government neither directly nor indirectly guarantees the PPP partner’s financing or banking arrangements. If the prospective partner is proposing a project finance structure whereby the counterparty to the PPP contract is a special purpose project company which raises limited recourse finance, it is conventional to enter into a direct agreement with the funders. Under such an agreement, which takes a standard form, the client authority accords the funders rights in circumstances of potentially catastrophic service failure to take control of the project company and to appoint new sub-contractors to replace those in default (step-in right).

1.4 The tenders

Each candidate on the shortlist should be sent the full ITT. This stage involves tenderers in a considerable investment of time and cost. A period of between two and four months is necessary for tenderers to formulate fully their proposals.

1.4.1 Clarification meetings

Prior to each candidate preparing their submissions, each should be offered a number of meetings. Such meetings are designed to allow the tenderers to clarify aspects of the ITT, to test technical proposals and to discuss the commercial issues. The purpose of the meetings is to ensure that candidates fully understand the contents of the ITT and what is expected of them, so that they eventually submit acceptable bids. Candidates may also take this opportunity to test the acceptability of variants or novel approaches to service provision.
These meetings should be minuted and where a point of clarification is made or a solution rejected, this should be communicated to all tenderers.

1.4.2 Preparing for the competitive dialogue

The period when the Authority enters into a parallel competitive dialogue with the short listed tenderers is the most intense of the whole selection process and necessitates close project management. Diaries must be cleared so that those involved in the dialogues and the evaluation can dedicate the necessary time. The responses to the ITT will be contained in several volumes and the procurement team will have considerable information to absorb and to compare. The individual roles played by members of the procurement team will need to be well defined and co-ordinated. It is very unlikely that this dialogue stage will be completed in less than four months.

1.4.3 Receipt of the tenders

The tenders when submitted will comprise several volumes:

Commercial
- A commentary on the contract terms and proposals for amendments.
- A response to the proposed payment mechanism.
- A response to the proposed performance and penalty regime.
- A response to the proposals for performance monitoring and contract management.
- A commentary on the risk matrix and insurance arrangements.

Technical
- Developed technical designs, to the level specified in the ITT.
- A detailed method statement of how services will be delivered post-construction.
- Detail of how performance will be recorded and reported.

Organisation and funding
- The tenderer will set out the structure of the consortium and/or sub-contracting arrangements through which the partner responsibilities are to be delivered. The response should make clear which companies will be taking technical responsibility for each element of the project.
- The tenderer will explain how they propose to finance the project and will supply commitment from funders.
- If a project finance model is to be followed, funders will comment on the “direct agreement” proposal.

Price and financial model
- The tenderer will set out the price by way of monthly charge from service commencement date relating the price to the payment mechanism.
- The price will be supported by the financial model which will make clear the financial assumptions and parameters that underpin the bid. The financial model, when agreed, will be annexed to the contract and will form the mechanism for calculating price changes pursuant to service changes and eventually compensation payments in certain circumstances of early termination.

Variants
- If the ITT signalled that variant bids would be acceptable, one or more variant bids, in addition to the full standard bid, documented to the same level as the standard bid is required.

1.4.4 Checking for completeness

When the ITTs are received, the first task of the procurement team is to check for the completeness and compliance of the submissions:
- If a tenderer has clearly failed to respond to parts of the ITT, or has changed substantially the output specification or rejects the PPP risk-sharing basis to the contract or in any other way
Confidentiality

It is a core principle of PPP procurement and the “Competitive Dialogue” procedure that each tenderer's solution remains confidential to that tenderer. The Authority should not divulge elements from one tender to another tenderer.

1.4.5 The competitive dialogue

The competitive dialogue procedure should be well structured and follow protocols set out in the ITT. The dialogue will involve the exchange of information both in writing and orally during meetings. All meetings should follow an agenda and be minuted by the authority, with all matters of substance clearly recorded and agreed with the tenderer concerned.

The purpose of the dialogue is as follows:
• To clarify the tenders so the exact content of the proposals is clear and unambiguous.
• To establish that the technical proposals are sound and practicable and that by implementing them, there is no reason to believe that the output specifications could not be fully met. It is most certainly not the objective to lead all tenderers to a common solution or to impose a preferred solution.
• To address the tenderer's commentary on the commercial aspects of the contract.
• To address the tenderer's proposed price and to explore the relationship between the risks and the price offered.
• To discuss the deliverability of the project with regard to the tenderer's structure and proposed financing.

It may be appropriate to disclose to tenderers elements of the authority's costings as incorporated in the benchmark comparator.

Although it is permitted under the procurement regulations {Section 47(8) of LN 177/2005} it would not be the authority's interest to specify prices globally, but it is frequently helpful to indicate what value is attributed to certain key risks (based on the VFM Benchmark) and to discuss alternatives for the allocation of those risks.

Confidentiality

It is a core principle of PPP procurement and the “Competitive Dialogue” procedure that each tenderer's solution remains confidential to that tenderer. The Authority should not divulge elements from one tender to another tenderer.

The dialogue with each tenderer will be carried out over a number meetings and iterations. A strict timetable should be observed and issues should be addressed at meetings that concentrate on different elements of the tender.

At the end of the dialogue phase each tenderer should be in a position to revise their original submission to reflect the discussions. The revisions should incorporate:
• Changes to their technical proposals to correct weaknesses perceived by the Authority.
• Changes to the allocation of risks.
• Any improvements to the tenderer's structure and organisation or enhanced commitment of funders as a result of concerns of the Authority.
• Modifications to any variant bid arising from the dialogue. If a proposed variant is unacceptable, the tenderer should be informed accordingly during the dialogue.
• Modified pricing in view of the Authority's commentary on risks and other features of the submission.
1.4.6 Verifying affordability and value for money
One critical check that should be made at this phase is whether the tenders are broadly affordable and appear to offer value for money as indicated by the VFM Benchmark comparator. Value for money can be addressed during the dialogue phase by exploring re-allocations of the risks between the parties. If there appears to be a large affordability gap, a further analysis should be carried out to identify the reason for the discrepancy. The Authority must arrive at a view whether the benchmarking exercise has genuinely under priced the engineering and the costs of service provision or whether due to collusion or otherwise there has been a market failure:
- If there has been a market failure, the procurement may have to be abandoned.
- If the pricing gap results from an identifiable and limited part of the services, the Authority should consider excluding those services from the transaction.
- If the VFM Benchmark costings have underestimated construction or other capital costs, the Authority should consider reducing the scale of the project, so long as public service objectives can still be met.

If either of the latter two is to be adopted, the options should be presented to the tenderers equally, discussed during the dialogue phase and the final offers compiled in the light of changes of scale or scope.

1.4.7 Requests for BAFOs
Once this dialogue phase is concluded in accordance with the timetable, tenderers should be given a reasonable time to revise and re-submit their tenders as “best and final offers” (BAFOs).

STAGE 5

1.5 Evaluation of the BAFOs, confirmation of affordability and value for money
The object of this stage is to determine which of the tenders is the most economically advantageous to the Authority. The judgment will be made on a balance of price, the risks assumed and any other criteria that may have been signalled to tenderers in the Information Memorandum and the ITT. All previous stages of the process will have been aimed at establishing a level playing field, so that by BAFO all tenderers should be making proposals that are satisfactory in all major commercial and technical respects. This being the case, in most cases, the price offer will be overwhelmingly the deciding factor. If the Authority is minded to accept a higher price for a proposal that exceeds the required standards or specifications, it must be able to justify that decision on the basis of criteria disclosed to the tenderers.

The process on receipt of the BAFO is similar to that on receipt of the original tender. All submissions should be checked for completeness and compliance. It is appropriate to revert in writing to tenderers for clarification and the correction of omissions or small omissions. When all the BAFOs are in their final form, the evaluation can commence. This should be structured, well documented and proceed by logical steps.

Deliverability
Each tender should be closely examined to confirm the deliverability of the proposals. The evaluation panel must be confident that the proposals as to the organisation and structure of the tenderer and the availability of and commitment of finance are sufficiently secure. Any tender that fails this examination should be rejected.

Commercial
It should be clear from the BAFO that the tenderer is prepared to enter into a PPP transaction on terms acceptable to the Authority with minimal further discussion or amendment.
**Technical specifications**
The BAFO should be examined to identify changes made to the technical specifications as a result of the dialogue to ensure acceptability. If the Authority is not convinced that the technical solutions proposed are capable of guaranteeing the delivery of the services sought to the correct standards over time, the tender should be rejected.

**Price, the financial model and risk evaluation**
Only when each BAFO has satisfied the scrutiny above should it be subject to financial evaluation.

This evaluation will have two components:
- The model should be checked to ensure that the price is properly generated from the assumptions and any inconsistencies between prices stemming from the application of indices or the incidence of payments corrected for. The prices should then all be expressed in Net Present Value terms using a discount rate that will have been disclosed to tenderers in the ITT.
- The prices should be subject to an adjustment to reflect the differences in the assumption of project risk and to reflect features of individual BAFOs that add value from the perspective of the Authority.

As a result of this exercise the BAFOs should be ranked according to which is the most economically advantageous offer. It is critical that the process is approved by and the result endorsed by the Project Board.

**1.5.1 Affordability and value for money**
Before appointing the tenderer who has proposed the best BAFO as “preferred bidder”, one final check should be made to ensure that the best BAFO is affordable and offers value for money.

If there is still a significant gap, the Authority may decide to abandon the procurement but relaunch a new procurement on a “negotiated” basis with the tenderer whose bid was most acceptable. If this course of action is being considered legal opinion should be sought.

**1.5.2 Appointing the preferred bidder**
If the best BAFO passes the tests of affordability and value for money, the tenderer should be appointed the “preferred bidder” and proceed to the final stage of the procedure. If the Authority has any concern that this tenderer might for any reason be unable to enter into the contract or may be tempted to revise its terms, the Authority may request of the second best tenderer, provided their BAFO is acceptable, to keep their offer open for a limited period pending the successful conclusion of the contract.

Tenderers whose BAFOs are rejected should be informed and reasons given why they were not preferred. Any request for a de-briefing meeting should be accommodated.

**1.6 The preferred bidder**
By this stage the competitive process is at an end and both parties should work on proceeding to contract signature as swiftly as possible on the basis of the documentation tabled and discussed during the dialogue phase.

Emphasis should be on settling any minor outstanding contractual details in a non-conflictual spirit, obtaining formal approvals and final planning and preparing the detailed design drawings.
consistent with the accepted design proposals. At this stage, the financing documentation will also need to be put in place (including the Direct Agreement) and the preferred bidder will need to formalise the hierarchy of sub-contracts that will flow down from the main agreement.

If staff are to be transferred to the tenderers organisation as a result of the PPP, the full formalities should be observed, and appropriate consultation and presentations should be carried out.

The Authority should be making the necessary arrangements to ensure that from contract start date, it has in place the necessary expert competence, versed in the detail of the PPP, to ensure good and efficient monitoring of the partner performance in delivering the services.

This stage should be targeted to take no longer than three months and contract signature should lead directly to the commencement of construction/operations.

The preferred bidder should be made aware that no further discussions of commercial substance are anticipated at this stage, and if they attempt to modify the transaction they may be asked to stand down in favour of the reserved bidder.

When all documentation is finally agreed and ready for signature, both parties should agree on how the press and general public are informed about the new Public Private Partnership.

**STAGE 7**

1.7 **The Public Private Partnership**

The process of PPP procurement requires concerted effort that may last up to two years or longer, but the real hard work starts after the contract is signed. However good the contractual and other documentation, there will be many issues that will arise both shortly after and during the course of the contractual relationship which will need to be handled in a fair and co-operative spirit.

If the long-term relationship is to succeed and the PPP to provide the benefits desired, both parties need to manage very professionally their inputs into the contract (including especially the ongoing monitoring and improvement of performance). Where disagreements arise they should be handled sensitively and respect the intention and spirit which the transaction is to embody.

**STAGE 8**

1.8 **Monitoring**

While it is clear that ownership and responsibility has to be exercised by the contracting authority throughout the project, adequate resources must be in place to exercise monitoring effectively from day one of the contract.

The level of monitoring should be based on a risk assessment of the contractor’s role in delivering the agreed services and the contractor’s ability to deliver under the terms of the contract.

While the contractor has responsibility to perform under the terms of the contract, the contracting authority has responsibility for reasonable and necessary monitoring of the contractor’s performance. Effective contract monitoring can assist in identifying and reducing fiscal or programme risks as early as possible, thus protecting both public funds and the clients being served.
2.0 Outline Business Case Guidelines for Public-Private Partnership Investment

The Outline Business Case is an integral part of the investment decision making process. It is a systematic and structured approach that sets out key elements for investment decision making.

It aims at:
• Demonstrating that the project is in line with agreed strategy and that it meets business and service requirements;
• Providing the necessary support and justifications for the proposed project;
• Providing a realistic assessment;
• Allowing ministers decide if the project should proceed as advised.

Managing the Outline Business Case Project

The outline business case involves a complex range of skills and expertise which are time consuming. It is therefore imperative that from the very outset:
• The participation and responsibilities of key personnel carrying out the appraisal are clearly defined;
• Key participants must dedicate sufficient time for the Project.

Time well spent during the initial phases will subsequently save on time during the later stages.

Key Aspects that need to be addressed

The following five key areas set out the framework underpinning an Outline Business Case:
1. The need for and the nature of the proposed investment;
2. Alternative options for investment and why the PPP route is proposed;
3. The risks and implications of the project as a PPP investment;
4. Estimates of annual cost and considerations of affordability;
5. Timing and preparedness for PPP procurement.

2.1 The need for and the nature of the proposed investment

This first section should clearly make the case for a capital investment project. It should:
• Explain the strategic context and the agreed present policy objectives of the sponsoring ministry or agency;
• Define the scope of the project;
• Define clearly the objectives of the project;
• Define the performance standards;
• Provide an overview of what the project entails. Explain whether new assets are to be provided or whether the existing facilities are to be upgraded. Indicate which services would be appropriate to package with the investment component and explain why;
• Discuss the project within the context of other competing priorities;
• Set out the needs and/or service deficiencies that the project is aimed to address, the urgency and timescales;
• Explain what the consequences are of not addressing those deficiencies (“the do-nothing option”);
• Explain why those deficiencies cannot be more economically addressed by increasing recurrent expenditure;
• Set out what has determined the scale of the project and the implications of a smaller or less capital intensive solution;
• Summarise the conclusions of any feasibility studies;
• Explain how the project would contribute to wider government policies and/or the objectives of other ministries (environmental impact, job creation etc.)

2.2 Alternative options for investment and why the PPP route is proposed
This section should address how the project is likely to be dealt with under the traditional procurement method and hence the expectations and justifications for choosing the PPP route. Considerations should include:
• Previous experience of any similar projects under conventional procurement (especially performance shortfalls, cost or time overruns);
• The level of investment required at the outset and how it is likely to be funded under a PPP;
• The required performance standards, how these will address the projects objectives and how they will be measured;
• The flexibility required of both assets and services over time;
• Whether any technology that will have to be deployed is subject to rapid change or is in restricted supply;
• Whether any user charges are to be levied, and if so explain how they will they be set and collected;
• The proposed term of the PPP contract and the relative advantages/disadvantages of shorter or longer terms;
• The reasons to believe that there will be a good competitive response to a PPP approach, possibility of issuing a Prior Information Notice (PIN).

2.3 The risks and implications of the project as a PPP investment
This section should consider the obstacles the project may face if the PPP approach is to be adopted. The risks inherent in the project need to be highlighted and allocated between the parties. Issues to address include:
• The availability of land and what would be the appropriate basis to make land available;
• Planning considerations. What stage if any has the planning reached and what are the future planning hurdles and the likely reaction of the Malta Environment and Planning Authority (MEPA) to the project?
• The existence of designs and whether they could be adopted by the partner;
• Any special environmental, traffic, heritage or archaeological constraints;
• The reaction of stakeholders, the press and the public;
• The clear definition of the services to be outsourced and those to be retained and an explanation of how the interfaces are to be defined and managed;
• If the PPP facility forms part of a larger network of similar facilities, how service interfaces will be addressed;
• The numbers and grades of staff to be transferred to the PPP partner, on what proposed basis and with what constraints;
• The likely reaction of the Unions;
• The operational risks the private partner is to assume.
2.4 Estimates of annual cost and considerations of affordability
Despite the desirability of the project's concept, it is essential that the project is taken forward solely on the strength of its affordability and value for money. By the time actual procurement goes ahead, a detailed exercise will need to be carried out to establish a Value for Money benchmark. At the initial business case, there needs to be sufficiently robust estimates to indicate that costs and benefits are in line and that the project will be clearly affordable.

The start point for establishing affordability and Value for Money tests is the Reference Project. This represents a clear costed exposition of the assets and services that constitute the project and is compiled on the assumption that the project will be designed and delivered by traditional methods. At the first Business Case stage the elements should be stated in sufficient detail to have confidence in the estimates generated.

2.5 Timing and preparedness for PPP procurement
When making the case for a PPP project, it is important to address the demands such a procurement process makes on the sponsoring authority. The business case should therefore set out:
• The procurement structure (board, project team, evaluation panel);
• Required input from the PPP unit, after prior consultation;
• Required input of external advisors;
• The budget for the procurement;
• The timescale from preparation, to procurement, to start of works, to initial delivery of service.
3.0 The Value for Money Concept

Value for Money (VFM) in PPP contracting is akin to the notion of value used in everyday language. Any experienced purchaser of an asset that is to maintain performance levels over a protracted period, recognises the trade-off between initial cost, future repair and maintenance costs and overall reliability. Similarly, if services are being sourced there is a clear relationship between cost and the quality, reliability and, flexibility of those services. Historically, and for reasons connected with transparency, annual cash budgets and periodic budget squeezes, public authorities developing investment projects have felt obliged to opt for what superficially appears the lowest cost option. All too often the result has been a sad sequence of cost and time overruns, shabby construction, poor subsequent maintenance, very expensive periodic refits and an overall decline in service levels. In many cases the construction industry has responded to this approach by the client by bidding low but seeking to recoup margins on the change orders that flow from inadequate initial design specification.

PPP contracting addresses this pattern of project failure by basing the contracts on certain key principles:

• The public authority specifies its needs in terms of outputs, performance levels and standards over the extended term of the contract.
• The PPP contractor provides the full technical package of inputs that meet the outputs and accepts the inherent technical and commercial risks.
• The PPP contractor finances the necessary investment, so has “capital at risk”.
• The PPP contractor only receives payments when the project enters its operational phase and those payments are spread evenly over the contract period.
• If performance levels or standards fall short of what is specified, payments are reduced to compensate the authority for the shortfall.

The effect is that the public authority achieves the outputs and quality of service it stipulates over the long term within pricing parameters known and settled at the contract date.

The VFM question for the authority breaks down into two parts:

• Which bid offers the best value (which may not be the cheapest, if bidders have priced risks differently)?
• Does the best bid propose a better financial outcome for the public sector for the services at the contracted standards than would have been achievable under more traditional procurement methods?

3.1 Affordability and Value for Money

VFM is not the sole economic hurdle for project investment, whether by conventional or PPP procurement. A proposed project must also be affordable and the two concepts must be clearly distinguished.

• Affordability flows from a limitation of financial resource, the need to prioritise and the political judgment as to what proportion of the available resource can be committed to any project and resultant services.
• Affordability requires the matching of resource availability and expenditure over time. Thus a project may be unaffordable as a single one-time capital disbursement, but affordable if the costs, even higher costs, are defrayed over a longer time period.
• Affordability does not imply that a project is offering good VFM, nor is a good VFM project necessarily affordable.
• Affordability applies to all the costs that the public authority will incur as a result of the project, not just the charges made by the PPP contractor. VFM only applies to the price of the service package offered by the PPP contractor.

Even if affordability and VFM are clearly distinguishable concepts, there is a critical interdependency. Firstly, each is calculated from the same basic inputs as to scope, scale, costs and risks of the project. Secondly, no public authority should enter procurement for a PPP project if its business case analysis indicates that even a VFM PPP offer, coupled with the risks and costs retained by the authority, would be unaffordable.

3.2 Estimating VFM - Risk, Tax and Timing
Assessing VFM involves adjusting project cost estimates for three factors to arrive at comparable values.

Risk
PPP contracts allocate project risks between the public authority client and the contractor. The authority should achieve the best value when each is responsible for those risks it can best manage and/or mitigate. There are various categories of risk including technical, commercial, operational, financial and regulatory. For each project, potential risks have to identified, their likelihood of occurrence assessed, their potential impact and cost of rectification estimated and their aggregate financial consequences attributed to the parties to the contract.

Tax
For a proper comparison to be made between the PPP option and conventional procurement, allowance should be made for the different tax flows to the government that result from the different methods of procurement. This will involve looking beyond the net cash outflows under the alternative scenarios of the project.

Timing
The third factor that needs to be corrected for is the different points in time that outflows of payment occur under PPP and conventional procurements. The latter involve large early outflows during construction and commissioning and lower flows during the operational phase with periodic cost spikes when major refurbishment is carried out. PPPs are characterised by an even outflow of monthly payments, solely during the operational phase. To compare these different patterns of cash outflows over time, the flows need to be discounted to a common point in time, normally the contract date applying a discounted cash flow (DCF) calculation. The PPP Unit at the Ministry of Finance should be contacted for the discount rate to be used.

3.3 The Project Board and achieving VFM
The task of the public authority client in a PPP project is to achieve proper VFM. This will depend upon a procurement process expertly managed to ensure that the best bid is identified and that the contract determines the optimal balance of risk and responsibility between the client and the contractor. During the procurement process, this is the role of the Project Board supported by the Project Team and the Evaluation Panel. After the contract is signed, the client must exercise diligent monitoring of the contractor’s performance and bring a clear and rational approach to the management of service changes, so that the VFM identified at contract signature is properly delivered during the operational phase of the project. The PPP contract represents the rulebook for a long-term and exclusive commercial relationship. The benefits of that relationship, however, will only accrue if both parties bring a positive and collaborative approach to the management of that relationship.
ANNEX

Business Case Template

Section 1

The need for and the nature of the proposed investment

☐ Overview of project

☐ Explain how this fits within the strategic context and agreed present policy objectives of the Ministry

☐ Scope of project

☐ Project’s objectives

☐ Project priority

☐ Summarise the conclusion of any feasibility studies carried out

☐ Explain how the project would contribute to wider government policies / objectives of other Ministries
<table>
<thead>
<tr>
<th>Options for investment and why the PPP route is proposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Previous experience of similar projects dealt with under the traditional procurement method (esp. performance shortfalls, cost or time overruns)</td>
</tr>
<tr>
<td>☐ Level of investment required from the outset</td>
</tr>
<tr>
<td>☐ Required performance standards and how they will be measured</td>
</tr>
<tr>
<td>☐ Is technology to be deployed subject to rapid change or is restricted in supply?</td>
</tr>
<tr>
<td>☐ Is the Ministry contemplating any user charges? If so, how will they be set and collected?</td>
</tr>
<tr>
<td>☐ Can the private partner utilise the asset to generate third party income?</td>
</tr>
<tr>
<td>☐ The proposed term of the project. Will shorter or longer terms be considered?</td>
</tr>
<tr>
<td>☐ Reasons to believe why there will be a good competitive response to the PPP approach</td>
</tr>
</tbody>
</table>
### Risks and Implications of Project as a PPP Investment

- **Is land available? Under what conditions?**
- **Any planning considerations? Do you envisage any MEPA restrictions to the project?**
- **Do you envisage any environmental, traffic, heritage, archaeological or other constraints?**
- **Are designs available?**
- **What is the likely reaction of stakeholders, the press and public to the project?**
- **Provide a clear definition of the services to be retained by the contracting authority and those that will be transferred to the PPP partner. How services interfaces will be addressed?**
- **Proposed number and grades of staff to be transferred to the PPP partner. On what proposed basis and with what constraints?**
- **What is the likely reaction of unions?**
- **What is the proposed distribution of risk between the contracting authority and the private contractor?**
Section 4

Estimates of annual cost and considerations of affordability

☐ Provide sufficiently robust estimated costs to indicate that costs and benefits are in line and that the project will be clearly affordable

☐ What will be the estimated cost of the project had it be designed and delivered by traditional methods? Include assumptions used to generate estimates

Section 5

Timing and preparedness for the PPP procurement

☐ What procurement structure is being envisaged? (project board, evaluation panel etc)

☐ Required input from PPP Unit during the process after prior consultation on project

☐ Required input of any external advisors

☐ Budget for the procurement

☐ Proposed timescale from initial preparation, to procurement, to start of works to initial delivery of service