

D8. PPP Preparation and Procurement

Methodology and Guidance for PPP Preparation and Procurement

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Disclaimer

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ABBREVIATIONS

CA	Contracting Authority / Entity
CBA	Cost-Benefit Analysis
EPEC	European PPP Expertise Centre
FCCL	Fiscal Commitments and Contingent Liabilities
ICU	Internal PPP Projects' Coordination Unit
ITN	Invitation to Participate in Negotiation
ITPID	Invitation to Participate in Dialogue
MoF	Ministry of Finance
NAPP	National Agency for Public Procurement
NSI	National Institute for Statistics
OJEU	Official Journal of the European Union
PIEU	Public Investment Evaluation Unit
PIMU	Public Investment Management Unit
PIN	Prior Information Notice
PPP	Public-Private Partnership
PSC	Public Sector Comparator
SEAP	Public Procurement Electronic System
TA	Transaction Adviser
VfM	Value for Money

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1. PURPOSE OF THIS DOCUMENT

1.1 Aim of this Guidance

This Guidance aims to provide public authorities and PPP practitioners throughout Romania with a concrete roadmap and methodology for preparing and procuring PPP projects. Although the concepts in this Guidance may also be applicable to concession projects, the scope of this document is limited to PPPs, given that (unlike in some other legal systems) Romanian law makes a distinction between PPPs and concessions, as described below. The framework stipulated in this Guidance is informed by PPP preparation and procurement processes and approaches in PPP markets globally and has been tailored to the Romanian PPP context.

This Guidance complements the *Emergency Ordinance No. 39/2018 on Public-Private Partnerships* (the "**PPP Law**"), as well as certain provisions contained mainly in *Law No. 98/2016 on Public Procurement* (the "**Public Procurement Law**"), in *Law No. 99/2016 on Sectoral Procurement* (the "**Sectoral Procurement Law**") and in *Law No. 100/2016 on works and services concessions* (the "**Concessions Law**"). This legal framework must be followed when preparing and procuring PPP project in all stages of maturity (*e.g.*, pre-Feasibility study, Feasibility and Substantiation study and subsequent tendering). The Guidance contains the following elements:

- An overview of the institutional framework in place for the preparation and procurement of PPP projects in Romania;
- A step-by-step process for the preparation and procurement of PPP projects in Romania (which entails the identification of potential PPP projects through the PPP Potential Scan as part of the pre-feasibility study, the preparation of the Feasibility and Substantiation study, the preparation and implementation of the tender process and the signing of the PPP contract). This includes guidance on the parties responsible for each step in the process as well as formal approvals required before proceeding to next steps in the process;
- Guidance on the role and appointment of Transaction Advisers (TA) to assist the Contracting Authority (CA) throughout the PPP preparation and procurement process.

This Guidance, however, does not replace the detailed PPP preparation and procurement work to be conducted by the CA—together with its transaction advisers / external consultants and PIMU—that shall be required for any PPP project to be tendered.

1.2 Reading guide

Chapter 2 describes the institutional framework for PPP projects in Romania, including all parties involved throughout the process. **Chapter 3** describes each step of the PPP preparation and procurement process. **Chapter 4** describes the importance of appointing Transaction Advisers to assist the CA during the PPP preparation and procurement process.

Appendices 1 and 2 provide **template outlines** for the pre-Feasibility study and the Feasibility & Substantiation study. **Appendix 3** provides a PPP preparation and procurement checklist to be followed while preparing PPP projects.

This document is the overarching guidance of a set of guidelines and methodologies that form part of the National Guidance on PPP Preparation and Procurement.

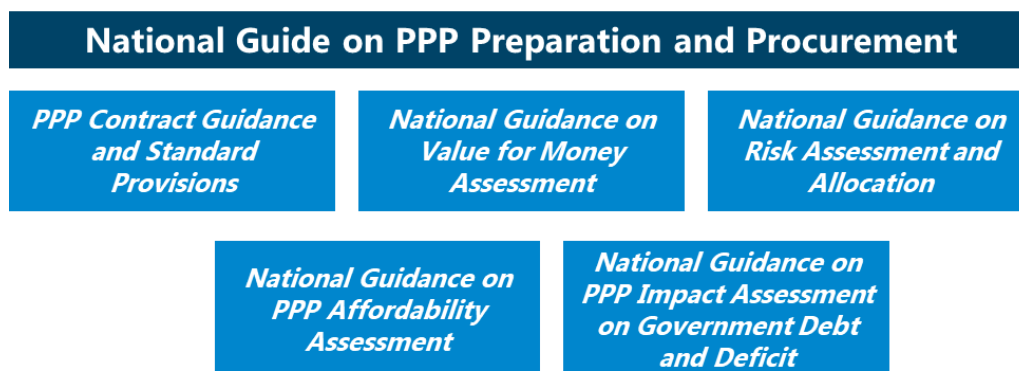
Whereas this Guidance is particularly limited to the overall steps and procedures that form the PPP preparation and procurement process, it makes references to the more detailed guidelines that provide more prescriptive methodologies to certain activities that are part of the PPP preparation and procurement process. These guidelines and activities include the following:

- The PPP Contract Guidance and Standard Provisions provide specific guidance on the drafting of a PPP contract on the basis of a set of standard provisions to be used in PPP contracts in Romania;

- The Guidance on Value for Money Assessment (VfM) provides specific guidance and methodology for the assessment of Value for Money during the preparation and procurement of PPP projects;
- The Guidance on Risk Assessment and Allocation provides specific guidance and methodology on the optimal identification, assessment and allocation of risks in PPP projects;
- The Guidance on PPP Affordability Assessment provides specific guidance and methodology on the assessment of the affordability of the proposed PPP project throughout its preparation and procurement;
- Finally, the Guidance on PPP Impact Assessment on Government Debt and Deficit provides specific guidance and methodology on the assessment of the impact of the PPP project on Government Debt and Deficit.

The Guidance should therefore be read in close conjunction with the procedures and methodology provided by these additional guidance documents (see Figure 1).

Figure 1: All guidance documentation as part of the National Guide on PPP Preparation and Procurement



1.3 Definition

1.3.1 Public Private Partnership

The term **Public Private Partnership (PPP)** in this document means: *“A long-term contract between a public authority and a private sector company for the delivery of a public infrastructure or service that is under the responsibility of a state agency which transfers substantial risk to the private party, includes the provision of private financing and includes a focus on the specifications of project outputs rather than project inputs, linked with a payment system based on long-term performance.”*¹

The Romanian legislation distinguishes between: (i) **PPPs** and: (ii) other long-term (i.e., over 5 years) contracts involving either the performance of works and the operation of the asset(s) resulting from such works, or the provision of public services. Such other long-term contracts are classified as either **Public Procurements** or **Concessions**, depending on whether a substantial portion of the operational risk is transferred to the private partner. PPPs are defined in and governed by Government Emergency Ordinance No. 39/2018 on Public-Private Partnerships (the “PPP Law”), Public Procurement contracts are governed by Law No. 98/2016 on public procurement (or by Law no. 99/2016 on sectoral procurement) and Concessions are governed by Law No. 100/2016 on works concessions and service concessions (the “Concessions law”). PPP contracts are awarded according to Law No. 98/2016 (or Law No. 99/2016) or according to Law No. 100/2016.

Whereas traditionally in other countries in Europe, no distinction is made between PPPs and Concessions (as Concessions are considered a form of PPP), the PPP Law specifically distinguishes between PPPs and other long-term contracts (such as Concessions) In order to determine if the PPP Law is applicable, the PPP law requires the

¹ Definition based on the definition of a PPP by EPEC.

Substantiation study to demonstrate that *"...more than half of the revenues to be obtained by the project company from the use of the good / goods or operation of the public service that is the object of the project come from payments made by the public partner or other public entities for the benefit of the partner public."*² The Substantiation study that determines whether a given project qualifies as a PPP or not should also determine whether the project involves the transfer of a substantial portion of the operational risk to the private partner.

If half or more of the revenue comes from payments made by users and all other conditions as set by the Concessions law are met (notably, the condition that a substantial portion of the operational risk is transferred to the private partner), the project will be defined as a Concession.

1.3.2 Procurement & Tender

Throughout this document, the terms 'procurement' and 'tender' (and all associated terms) are both used. When the term 'procurement' (or 'procurement process') is used, this refers to the entire procurement process for a PPP project (including all preparatory activities). When the term 'tender' is used, this particularly refers to the competitive award procedure launched on the market.

1.4 Sources

Material from the following guides on PPP preparation and procurement has been incorporated in this Guidance document, without further referencing throughout the document:

- EPEC, Guide to Public-Private Partnerships (2021)
- EPEC, PPP Procurement Handbook, Public-Private Partnerships in the Western Balkans (2018)

² PPP Law, Article 2

2. THE PPP INSTITUTIONAL FRAMEWORK

This chapter lists the institutions and committees involved in PPP project preparation and procurement, along with their roles and responsibilities.

2.1 Contracting Authority

The **Contracting Authority** (CA) is the public entity in charge of the PPP project. The public entities that can qualify as a Contracting Authority are those parties identified by the PPP Law, article 7: *A public partner, within the meaning of this emergency ordinance, is any of the entities that are contracting authorities or contracting entities within the meaning of art. 4 of Law no. 98/2016 on public procurement, with subsequent amendments and completions, of art. 4 of Law no. 99/2016, with subsequent amendments and completions, as well as of art. 9 and 10 of Law no. 100/2016 on works concessions and service concessions, with subsequent amendments and completions.*

The CA will be responsible for identifying projects in their sectors and developing them internally. The CA will be involved in all phases of the PPP project preparation and procurement and is responsible for hiring consultants, conducting pre-Feasibility, Feasibility and Substantiation studies for PPP projects, prepare and implement the procurement process and implement and manage the PPP contract. The PPP preparation and procurement activities will take place under the responsibilities of a dedicated Internal PPP Projects' Coordination Unit ("**ICU**") within the CA.³

While preparing a PPP project, the CA will set up dedicated bodies. See section 3.3.1 of this Guide for more background on this.

2.2 Public Investment Management Unit

The Public Investment Management Unit (PIMU) is a specialised unit within the Ministry of Finance responsible for supporting Contracting Authorities in developing PPP projects by providing specialised knowledge and expertise on PPP preparation and procurement processes.

PIMU is therefore available to provide support, in an advisory capacity, to CAs during the preparation, procurement and contract management stages of individual PPP projects, including support to reach commercial and financial close. If desired, members from PIMU can take a seat in the **Evaluation Commission**.

In addition, all preparatory and procurement documents that require Government approval and/or approval from the Ministry of Finance need to be reviewed and endorsed by PIMU before being submitted for approval. While this is not a mandatory step by law, all PPP projects that require funding contribution from the central government need to be approved through a Government Decision and therefore require the approval of the Ministry of Finance. PIMU is the specialised department within the MoF that will analyse and review the required documents for this approval procedure. Interacting and requesting input from PIMU before submitting projects for Government Approval can therefore reduce the risk that projects may require additional analysis and studies before they can be approved.

2.3 Ministry of Finance

Besides PIMU as the specialised PPP department, other departments within the Ministry of Finance (MoF) are also an important actor during the preparation and procurement of a PPP project, particularly regarding the affordability and budget availability from the conclusion of a PPP contract, especially when central government support is required for the project.

³ See article 44 of the PPP law

Throughout the preparation and procurement of a PPP project, regular interaction with the MoF is therefore required and several approvals along the way are needed to proceed with the preparation and procurement of the PPP project.

2.4 Government / Local Authorities

The Feasibility & Substantiation Study and the final PPP contract before signing must be approved by decision of the Government (in the case of projects involving the central public administration) or by decision of the relevant local deliberating authorities – local councils or county councils (in the case of projects that do not involve the central public administration)⁴. The tender documents (including the draft PPP contract, which is included in the tender documents) must be approved by the leader of the Contracting Authority⁵.

Government Decisions for Local PPP Projects that require central government support

While the institutional roles and processes for central government PPP projects as well as for local government PPP projects (without central government funding requirements) are clear (also see further on in this guidance), the process is less clear for local government PPP projects that require central government funding.

For local government PPP projects that are in need of funding from the central public administration, it is currently unclear which central government entity (entities) is (are) primarily responsible for assisting the local government in preparation and procurement of a PPP project, allocating the required funding from the central public administration and preparing and submitting the project for Government Approval.

To improve and clarify the PPP process for local government PPPs that require central government funding, it is recommended to put a mechanism in place to support projects that involve a combination of local and national funding to ensure a coordinated approach and a clear identification of, and budgeting for, the different sources of long-term funding to pay for the availability payments. While this mechanism is currently not in place at the time of publication of this guidance, discussions are ongoing to identify the appropriate mechanisms for this purpose.

2.5 NAPP

The National Agency for Public Procurement (NAPP) is responsible for making sure the procurement process of the PPP project has been prepared and implemented in line with the applicable regulations and guidelines. NAPP does not assume an active role during the preparation of the PPP procurement documents, but may perform an *ex ante* review and approval (from a quality and regulatory perspective) of the award documentation and of other procurement documents⁶ in all award procedures that it selects for this purpose⁷. This step occurs following upload of the PPP procurement documents in the Public Procurement Electronic System (SEAP) (prior to their publication to the market) and may require additional input from the Contracting Authority⁸. NAPP can also be consulted during the PPP procurement while drafting and preparing the PPP procurement

⁴ Article 17 (1) of the PPP Law.

⁵ Articles 9 (1) and 20 (1) of the annex to G.D. no. 395/2016 (for public procurement contracts), Articles 9 (1) and 22 (1) of the annex to G.D. no. 394/2016 (for sectoral contracts), Articles 9 (1) and 19 (3) of the annex to G.D. no. 867/2016 (for concessions).

⁶ The scope of the *ex ante* review is set forth in Article 6 of G.E.O. No. 98/2017.

⁷ The *ex ante* review performed by ANAP is governed by the provisions of Government Emergency Ordinance No. 98/2017 and by its application norms approved by Government Decision No. 419/2018. The selection methodology is approved by the president of the NAPP.

⁸ See Article 10 of G.E.O. No. 98/2017 for a list of the documents that must be provided to ANAP by the Public Partner if the award procedure is selected for *ex ante* review.

documentation to benefit from their technical and legal expertise related to public procurement regulation in Romania.

The NAPP also publishes standardized documents, forms, guidance materials, manuals, interpretations and other operational tools for use by public entities. Notably, the NAPP has published on its website a step-by-step guide on how to conduct a public procurement process, covering the planning phase, the tender phase (discussing each type of award procedure separately), as well as the contract management phase⁹. These tools may also be used in PPP projects to the extent that they are not incompatible with PPP legislation.

2.6 NSI

The National Institute for Statistics (NSI) is responsible for assessing the impact of the PPP project on the national debt and deficit balances in close coordination with Eurostat. Interaction with NSI happens in multiple stages throughout the PPP preparation and procurement process. These interactions are further described in this Guide.

For more information and guidance on the role of NSI in the statistical treatment of the PPP project, refer to the *National Guidance on Government Debt and Deficit Impact Assessment*.

⁹ The step-by-step guide is presented in separate sections, which may be accessed at the following weblink: <https://achizitiipublice.gov.ro/workflows/view/163>

The guide has been updated periodically by the NAPP. Nevertheless, attention should always be given to the date on which each page of the guide was last updated, as legislation may undergo frequent amendments.

3. THE PPP PREPARATION AND PROCUREMENT PROCESS

3.1 Process chart

The overall PPP preparation and procurement process is indicated in Figure 2 and consists of the following stages:

- Stage 1: PPP Project Identification and Selection:** The first stage of preparing a PPP project is identifying a project that is potentially suitable for PPP procurement, as not all projects are suitable to be delivered through a PPP. In an early-stage, projects are identified and preliminary studies (such as pre-feasibility studies) are performed. This early-stage project identification stage mainly serves to describe the economic grounds of the underlying project, in order to justify the public investment in the project. While this Guide does not focus on early-stage project identification and justification, it is important to identify the suitability of a project to be delivered through PPP procurement in this early stage of project preparation. The steps to identify PPP projects in this early stage are described in section 3.2.
- Stage 2: Preparation of a Feasibility & Substantiation Study:** Once a PPP project has been identified, the next stage consists of developing the detailed project Feasibility and Substantiation study to demonstrate the technical, legal, commercial and financial feasibility of the project as well as the affordability and value-for-money of procuring the project as a PPP. If the outcome of the study indicates a feasible project and shows that the PPP-option would be realistic and result in value-for-money, the project can be prepared for procurement in the next stage. The steps to prepare the PPP project in this stage are described in section 3.3.

- Stage 3: PPP Procurement**

If a PPP project proves feasible, the project can be formally procured on the market. This stage includes preparing a draft PPP agreement, preparing a procurement process, including all tender documentation and implementing the tender, until evaluation of all submitted bids and selection of a winning bidder. The different steps to procure a PPP project are described in section 3.4.3.3

- Stage 4: PPP Contract Signing & Financial Close**

The final stage of the PPP preparation and procurement process consists of finalizing and signing the PPP contract with the winning bidder, including supporting all processes needed to reach financial close. The different steps that are part of this final stage are described in section 3.5.

Figure 2: PPP preparation and procurement process overview

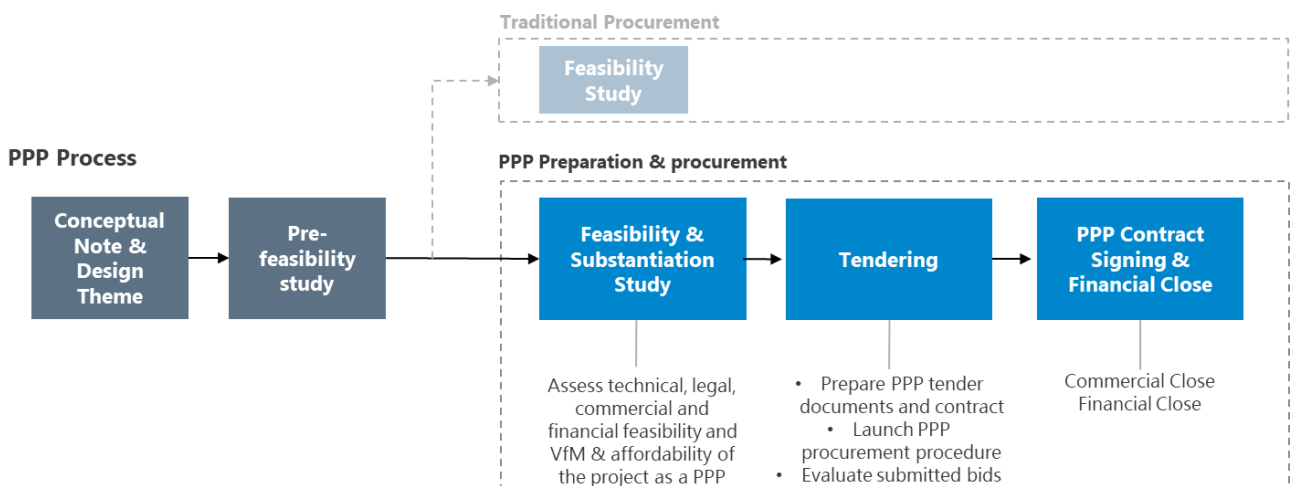
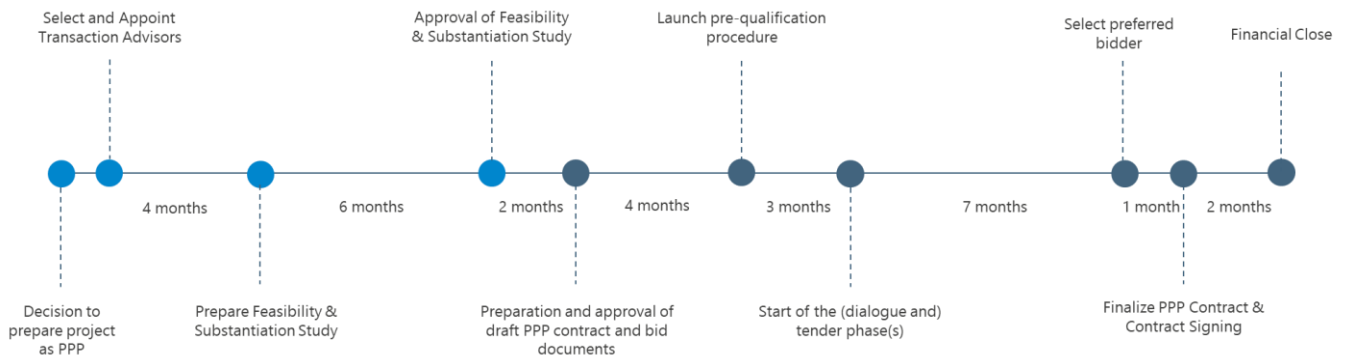


Figure 3 provides an indicative overview of the timeline required for the full preparation and procurement of a PPP project (excluding the Conceptual Note, Design Theme and Pre-Feasibility Study, since these are considered the starting point for the decision to prepare a project as a PPP or not). The preparation and approval of the Feasibility and Substantiation Study, including selecting and appointing Transaction Advisers takes approximately 12 months. If the decision is made to proceed with PPP procurement, the entire procurement process including all required approvals can run for about 17 to 18 months (or even further). However, no PPP project is the same and the timelines may differ significantly while taking into account the complexity and nature of the project as well as the experience of the Contracting Authority in preparing PPP projects.

Figure 3: Indicative timeline for PPP project preparation and procurement



3.2 Stage 1: PPP project identification and selection

As part of the general project identification and preparation procedure as defined by G.D. No. 907/2016¹⁰, a *Conceptual Note*¹¹, a *Design Theme*¹² as well as a *pre-Feasibility study* need to be prepared in most cases (except when the project forms part of a sectoral and/or national strategy, master plan or similar plan that has been approved at government level). In this stage, the basic project needs and requirements are being shaped and a preliminary assessment of the feasibility of the project is being performed.

It is also in this stage where the potential applicability of a PPP procurement for the project can be tested. Even though not all information about the project is available at this point in time, based on the basic project concept and the findings from the pre-Feasibility study, a preliminary indication on the suitability of PPP procurement can be assessed. Based on this indication, a decision can be made on whether or not to proceed with a PPP preparation process for the project or whether to prepare the project for traditional procurement.

These steps, including all government bodies involved in reviewing and approving the different components of this stage, are illustrated in

Figure 4 and further described in the sections below.

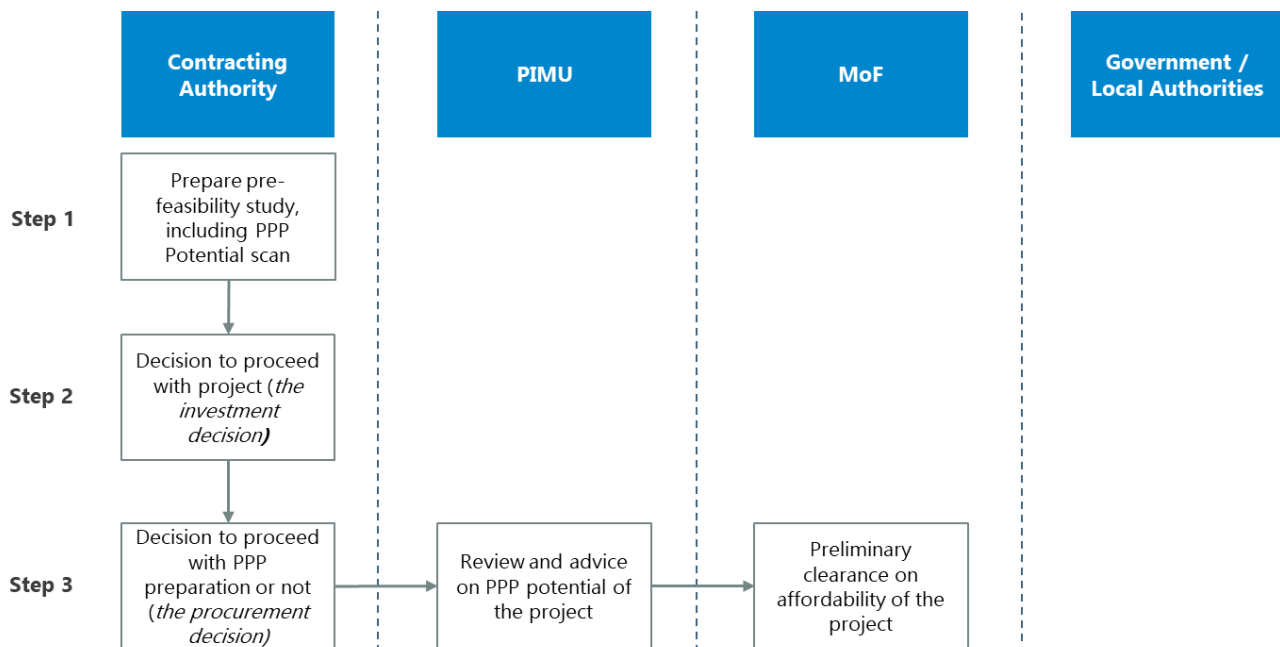
It is important to keep in mind that the exact legal requirements may vary from project to project depending on criteria such as the project's value and its sources of funding. As a result, this guidance has been prepared and should be read (unless mentioned otherwise) as referring to projects that have two common features: (i) their estimated aggregate value exceeds 100 million RON, and: (ii) they receive funding, in whole or in part, from the state budget (meaning that they are funded or co-funded by the public institutions defined as such in Article 2 para. 30 of Law no. 500/2002 on public finances). In other words, some of the steps discussed below will not apply to smaller projects or to projects that are funded exclusively from local budgets.

¹⁰ Government Decision No. 907/2016 on the stages of preparation and on the framework contents of technical-economic documentations relative to investment projects financed from public funds

¹¹ Prepared in accordance with the framework content set forth in Annex No. 1 to G.D. No. 907/2016

¹² Prepared in accordance with the framework content set forth in Annex No. 2 to G.D. No. 907/2016

Figure 4: Stage 1: PPP Project Identification and Selection Process overview



3.2.1 Step 1: Preparation of pre-Feasibility study, including PPP Potential Scan

The very first step of PPP project identification includes the preparation of the pre-Feasibility study for any project (regardless of whether this project is already seen as a PPP candidate or not). The pre-Feasibility study will be prepared by the relevant Contracting Authority. A typical pre-Feasibility study outline in accordance with Annex No. 3 to G.D. No. 907/2016 can be found in **Appendix 1**.

For projects with an expected investment size of over **€20 million**, a PPP Potential Scan is recommended to be performed as part of the pre-Feasibility study. The results of the PPP Potential Scan help determine the overall suitability of the project for PPP procurement compared to traditional procurement. While it is not necessary to prepare a PPP potential scan for *any* project, performing the PPP potential scan is required in this stage if the CA desires to further prepare the project as a PPP.

For more information and guidance on the use of the PPP Potential Scan, refer to the *National Guidance on Value-for-Money Assessment*.

3.2.2 Step 2: Decision to proceed with project

After preparation of the pre-Feasibility study (including the PPP Potential Scan), a decision needs to be made by the Contracting Authority on whether or not it wishes to proceed with the development and preparation of the project on the basis of the outcomes of the pre-Feasibility study of the project and the relevance to national strategic objectives (a general consideration that is made for all public investment projects). This decision is referred to as the **investment decision**.

3.2.3 Step 3: Decision to proceed with PPP preparation

Once the decision has been made to proceed with project preparation (e.g. the investment decision), a preliminary **procurement decision** on the potential procurement strategy for the project needs to be made. If a PPP Potential Scan was performed during the pre-Feasibility study, the scan will indicate the suitability of PPP procurement for the project. If the PPP Potential Scan indicates the potential for PPP procurement, the

contracting authority can decide at this point whether it wishes to further investigate the feasibility of procuring the project as a PPP or not. In case the PPP Potential Scan was not performed as part of the pre-Feasibility study, but the CA still wishes to further prepare the project as a PPP, the PPP Potential Scan would still need to be performed to provide insight on the PPP potential of the project. The results of the PPP Potential Scan are required before submitting the potential PPP project for subsequent approval.

If the pre-Feasibility study indicates PPP potential and the CA wishes to further explore the project as a PPP, the pre-Feasibility study needs to be submitted to PIMU for review and technical advice of the PPP-related aspects of the project (particularly the results of the PPP potential scan).

After PIMU's review, the pre-Feasibility study will then be submitted to the Public Investment Evaluation Unit (PIEU) within the MoF for a preliminary clearance on the affordability of the project. Only after the preliminary clearance of the MoF, the CA can proceed with further preparation of the project¹³. This review by the MoF and the MoF's clearance are not required for projects that are funded exclusively from local budgets.

If the decision is made to further prepare the project as a PPP, the project, including PIMU's review and opinion as well as the preliminary clearance by the MoF, then needs to be submitted for approval by the relevant ministry (in Romanian: *ordonator principal de credite*) (for projects involving the central government) / by the relevant Local Authority (for projects that do not involve the Government) to start the PPP preparation procedure (see the next stages in this Guidance document) and to allocate the necessary funds to hire Advisers to assist the Contracting Authority throughout the PPP preparation and procurement procedure. For more information on appointing Advisers, see section 4 of this Guidance.

3.3 Stage 2: Preparation of a Feasibility & Substantiation Study

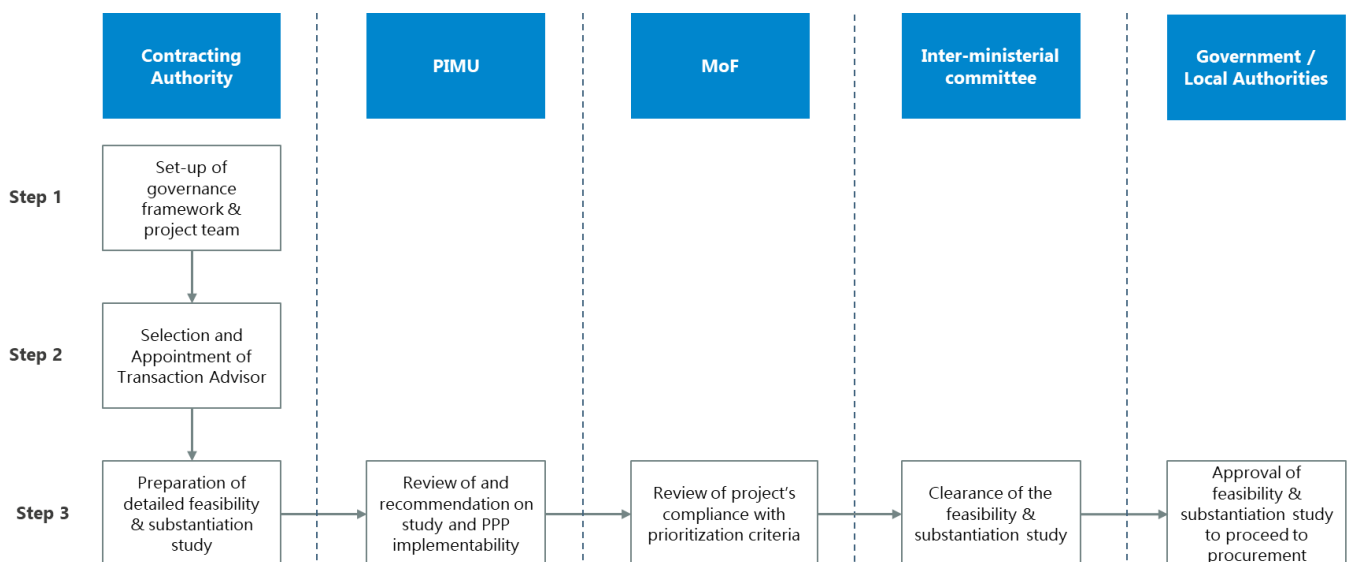
Following the decision and approval to proceed with PPP preparation of the project, the next stage consists of preparing the project as a PPP. The main objective of this stage is to assess the feasibility of the project in more detail. This not only covers the full technical, legal, commercial and financial feasibility of the project but also aims to assess potential PPP structures (including the suggested risk allocation, implied Value-for-Money, the affordability of the project as well as the impact on government debt and deficit). The results of this stage shed light on the overall feasibility of the project and the best way to procure the project and form the basis for the decision on whether or not to procure the project as a PPP.

Conducting these studies requires significant time and effort, which means a strong team and institutional set-up needs to guide the project. Investing significant time and resources in this stage of the project can help ensure high-quality project preparation and therefore increase the chances of success when the PPP is tendered on the market. After all, poorly prepared PPP projects significantly increase the risk of ending up without any bidders or of turning out to be significantly more costly than expected for the CA. It is therefore crucial to make sure the right governance structure for the PPP project preparation process is in place (see section 3.3.1) and to select experienced Transaction Advisers to assist the CA throughout the process (see section 4).

¹³ See Article 3 of the annex to Government Decision no. 225/2014.

Figure 5 provides an overview of the steps that form part of this stage of the PPP preparation process. Each step is further detailed out in the sections below.

Figure 5: Stage 2: Preparation of PPP project process chart



3.3.1 Step 1: Setting up a governance framework

The first step in the PPP preparation process for the Contracting Authority is to set up a dedicated project governance framework, composed of a project management team and a bid evaluation panel.

- The **Project Management Team** will be directly responsible for the day-to-day management of the PPP preparation and procurement process and for managing and reviewing the work of the Transaction Advisers¹⁴. The team involved in a given PPP project is designated by the Contracting Authority from among the members of the ICU and, once designated, reports to the management of the Contracting Authority. The size and complexity of the project determines the required expertise and size of the designated team. However, every project management team should be led by a project director, preferably with previous experience managing PPP project preparation and procurement. The project director should be supported by a project manager and an additional multi-disciplinary team, including technical, economic, financial, legal and procurement expertise. While the project director generally needs to be committed full-time to the preparation of the PPP project, other positions in the Project Management Team can be filled on a part-time basis by including staff from other specialised departments within the CA.
- The **Evaluation Commission** is responsible for evaluating the bids at the different stages of the procurement process (see Stage 3). It is not strictly necessary to appoint the bid evaluation panel in this

¹⁴ If the tender procedure is governed by the Concessions law (which should be deemed to also include the relevant secondary legislation), then the Project Management Team's role will include the responsibilities of the coordination and supervisory commission mentioned in Government Decision no. 867/2016.

stage of the project preparation stage¹⁵, but the ICU should identify the members of the bid evaluation panel prior to issuing the bid invitation documents. While these may include members of the ICU it is generally not good practice to include the CA's leader on a bid evaluation panel, given that the CA's leader is responsible for approving the final evaluation outcome.

3.3.2 Step 2: Selection and Appointment of Transaction Advisers

The first order of business for the Project Management Team) consists of ensuring that the CA selects and appoints a transaction advisory team. Transaction Advisers play a crucial role in designing a well-prepared and market-acceptable PPP project. Finding experienced Transaction Advisers to support the Contracting Authority throughout the entire process is therefore a crucial first step.

PIMU is available to assist the CA during the selection process for Transaction Advisers, which can be a lengthy process. More background and information on the role, selection and appointment of Transaction Advisers can be found in chapter 4 of this Guidance

3.3.3 Step 3: Preparation of detailed Feasibility & Substantiation study

The objective of the Feasibility and Substantiation study is to assess the technical, environmental, social, economic, financial and legal dimensions of the project and to assess the optimal PPP structure of the project, by looking at risk allocation, fiscal affordability, value-for-money, bankability aspects etc. This step includes the following sub-activities:

- **Preparation of the detailed Feasibility & Substantiation study¹⁶.** The detailed Feasibility and Substantiation study allows a more informed decision on the overall feasibility of the project and how the project can best be structured. Preparing the study involves a series of market consultations, to ensure that the considerations and requirements of the private sector and financiers are understood and taken into consideration, while remaining completely transparent and fair in the overall preparation and procurement process. Eventually, the study lays the foundation on which the project can be prepared for procurement.

The Feasibility and Substantiation study is a combination of the Feasibility study as required by G.D. No. 907/2016 and the Substantiation study required for PPP projects as described in G.E.O. No. 39/2018 (the PPP Law). Both studies can be prepared as an integrated study. The preparation of the study is carried out by the Contracting Authority, assisted by its Transaction Advisers. **Appendix 2** provides an overview of the required areas that need to be addressed as part of the Feasibility and Substantiation study, including references to other Guides that form part of the National Guidance on PPP Project Preparation and Procurement.

When preparing the Feasibility and Substantiation study, additional guidance will be needed on several topics. For this, refer to the National Guidance on Value For Money, Risk Allocation & Assessment, Affordability Assessment and Government Debt and Deficit Impact Assessment.

¹⁵ Nevertheless, the Evaluation Commission must be appointed prior to the opening of the bids. It is also appropriate to ensure that the Evaluation Commission's members are given sufficient time to acquaint themselves to the project documentation prior to the opening of the bids.

¹⁶ Whereas the Feasibility and Substantiation Study in this Guidance are seen as one integrated study in accordance with international good practice, under Romanian law at the time of preparation of this Guidance, these documents are currently separate studies that require separate approvals (see the applicable legislation). The process of changing this requirement and allowing for one integrated study is in progress at the time of publication of this Guidance and is expected to be finalised shortly after.

Market Sounding

Market sounding refers to the process of consulting with the market in a structured way on the potential terms of a PPP contract prior to the procurement phase. It may cover a range of issues including cost assumptions, risk allocation and potential contract clauses. Market sounding is not part of the formal procurement process – it does not involve an evaluation of bids or bidders or commitments on either side. This should be made very clear in any interaction with the market (neither is it about promoting the project, although clearly the process will raise awareness of the potential project).

Gathering feedback from the market helps to ensure that the proposed scope, cost and value-for-money assessment of the prospective PPP project are realistic; and that the terms of the draft PPP contract and the associated risk allocation are likely to be accepted by the market. An effective market sounding process ensures that when the procurement phase is launched, there is strong interest from bidders, that the project is bankable and that the actual costs and timescales are in line with the expectations around affordability and value for money.

If market sounding is not carried out, the Contracting Authority risks having to cancel the project or significantly amend the PPP contract during the procurement phase, either because the terms of the PPP contract are not commercially viable or bankable, or because the bids that are submitted do not meet the affordability or value for money tests.

The key to successful market sounding is to be as precise as possible about the issue on which the contracting authority is seeking to obtain a market viewpoint. This requires the contracting authority to be clear about the reason and context for the particular issue that requires input from the market.

Accordingly, market sounding should not be carried out too early (before the issue is properly defined) or too late (when it might be difficult to incorporate the results of the market sounding into the draft PPP contract).

Market sounding should be carefully planned. This should involve:

- identifying the key features of the project to be tested with the market (for example, the project's scale, technical and quality specifications, and risk profile);
- setting out the approach to engaging with all the relevant market players – for instance, the Contracting Authority may decide to consult with the market through an open meeting, the use of questionnaires, invitations for written submissions on specific topics or the use of meetings with individual companies (to facilitate a more open discussion); and
- making it clear to market participants that the market sounding is not part of the formal procurement process (by, for example, ensuring that the private sector participants at the market sounding are not described as 'bidders').

Market sounding should always follow the fundamental principles of non-discrimination, equal treatment and transparency – particularly where individual meetings are envisaged. The Contracting Authority should therefore ensure that effective governance arrangements are in place; that no party is given an advantage through participation in the market sounding exercise; and that the consultation is conducted with an open mind and across a wide range of private sector participants, to avoid any individual participant exerting undue influence in terms of the design of the prospective PPP project. Market sounding consultations should be conducted in a consistent way, and they should be properly documented for transparency, with clear audit trails.

While market sounding is standard for any public procurement project, for PPP projects in particular, the private sector entities that should be invited to market sounding consultations should also include **lenders and PPP equity shareholders**, along with other interested parties such as potential **construction and operations contractors**. In addition, it may be appropriate to seek the views of independent experts, specialised bodies or business organisations.

The Transaction Adviser plays a useful role in a market sounding exercise, helping to identify the private sector entities that should be invited to consultations on particular topics. In addition, Transaction Advisers can assist the contracting authority in managing the market sounding process and in obtaining and interpreting the information received.

Extract from EPEC Guide to Public-Private Partnerships (2021)

- **Review of and recommendation on the Feasibility & Substantiation study by PIMU.** In the case of projects that require central government approval (e.g., projects from the central public administration as well as projects from local public administrations that require contributions from the state budget), the CA needs to submit the Feasibility and Substantiation Study to PIMU for review and recommendations. PIMU's review and recommendations are particularly relevant with regards to PPP implementation aspects (e.g., optimal risk allocation, VfM assessment, impact on government debt and deficit, affordability aspects etc.). PIMU's recommendations can be incorporated in the final version of the Feasibility and Substantiation study before being submitted for approval. For local PPP projects that do not require central government approval, PIMU's review is not mandatory but recommended to benefit from PIMU's competences in PPP project preparation.
- **Submission of the Feasibility & Substantiation study to the MoF.** Once the Feasibility and Substantiation study have been completed, it needs to be submitted to the MoF, where the project's compliance with the prioritization criteria will be reviewed by the Public Investment Evaluation Unit and its conclusions will be submitted to the MoF's leadership¹⁷. The application of the evaluation and prioritization criteria and the review of their application by the MoF are not required for projects that are funded exclusively from local budgets.
- **Submission of the Feasibility & Substantiation study to the Inter-ministerial Committee.** Following review by the MoF, the CA needs to submit the Feasibility & Substantiation study to the Inter-ministerial Council for the Issuance of Clearances for Public Works of National Interest and Households (the Inter-ministerial Committee)¹⁸. The Inter-ministerial committee will review the project and issue their clearance on the basis of the study, PIMU's review and the review of the MoF. The Inter-ministerial Committee's clearance is not required for projects that are funded exclusively from local budgets.
- **Approval of the Feasibility and Substantiation study.** The final feasibility and substantiation study needs to be submitted for Government approval in case of central public administration projects (e.g., projects developed by the central government) or for approval by the local authorities in case of local public authorities' projects (e.g., projects developed by local authorities and municipalities). In the case of projects initiated by the local authorities that need additional support from the State budget, approval would be required both from the local authorities and the Government.¹⁹

Approval of the Feasibility and Substantiation study by the relevant authorities means the project can proceed to the next stage of project development: PPP procurement.

¹⁷ Article 6 (1) (b)-(c) of the annex to Government Decision no. 225/2014.

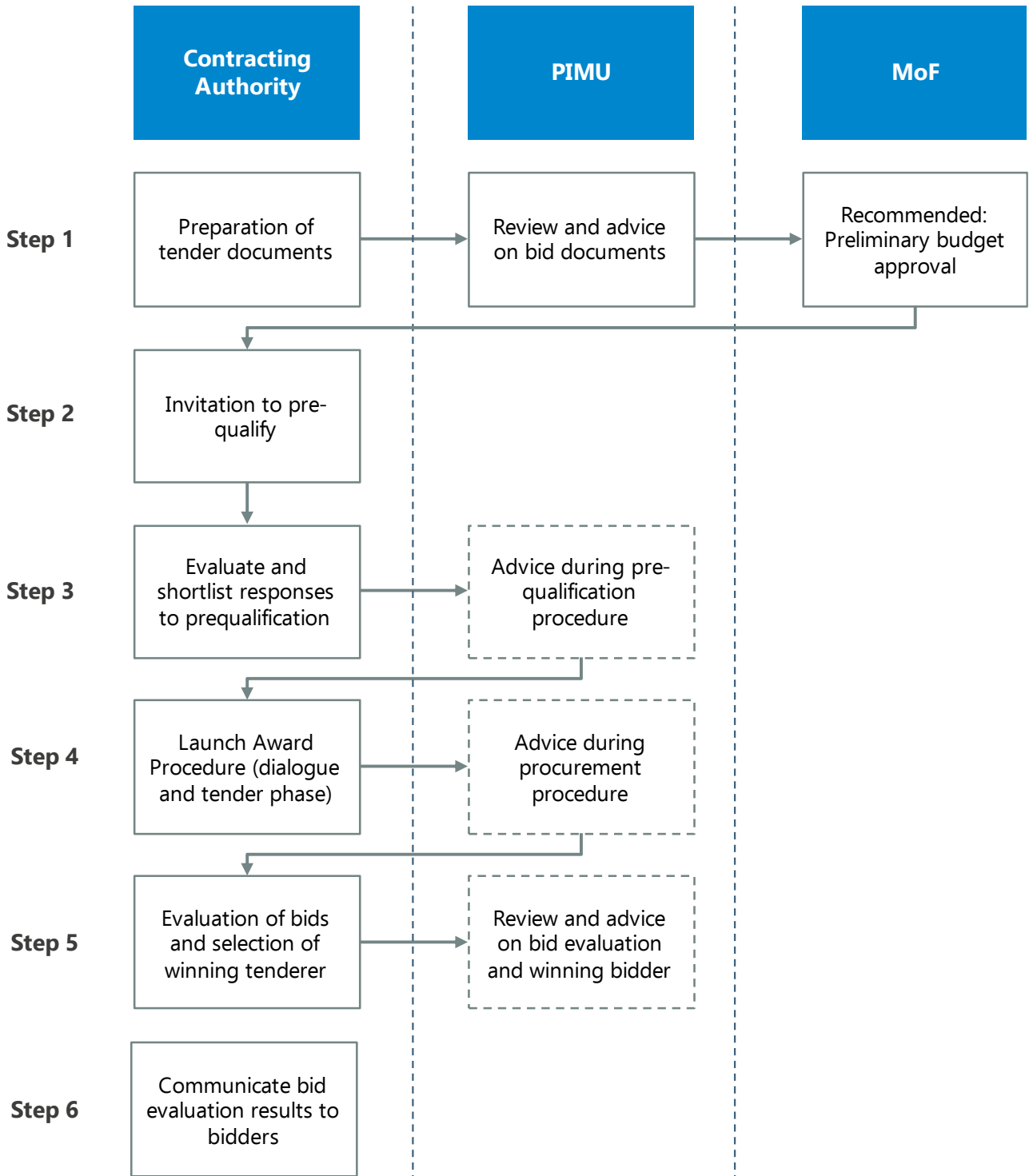
¹⁸ Article 4 (b) of the annex to Government Decision no. 225/2014.

¹⁹ For the substantiation portion of the study, see Article 17 section (1) letter (b) of G.E.O. No. 39/2018. For the feasibility portion of the study, see Article 4 letter (c) of the annex to G.D. No. 225/2014, Article 42 section (1) of Law No. 500/2002 on public finances and Article 44 of Law No. 273/2006 on local public finances.

3.4 Stage 3: PPP Procurement

Following Government approval of the Feasibility and Substantiation study, the PPP procurement process can be launched. In this stage, the tender documents, including the draft PPP agreement, will be prepared by the Contracting Authority and submitted for approval. The draft PPP agreement will be evaluated by the Contracting Authority and the Government and/or Local Authorities (as the case may be) to confirm the risk sharing arrangements vis-à-vis the approved Feasibility and Substantiation study and other aspects of the project. Once the tender documents are approved, the prequalification stage and the tender stage will be launched with the ultimate purpose to select a winning bidder. The PPP procurement stage consists of several steps, highlighted in Figure 6.

Figure 6: Stage 3: PPP Tendering Process Chart



3.4.1 Step 1: Preparation of bid documents

Before launching the formal tender stage, the Contracting Authority, supported by the Transaction Advisers, needs to prepare the relevant tender documents that form part of the tender. For the preparation of the tender documents, the applicable **award procedure** needs to be determined, as this influences the legislation governing the procurement phase (cf. PPP Law, article 25). Establishing the applicable award procedure is one of the tasks of the Project Management Team.

Selecting the applicable award procedure

PPP contracts must be awarded according to the provisions set forth by the laws applicable to public procurement (e.g. Law no 98/2016 on public procurement), to sectoral procurement (e.g. Law no 99/2016 on sectoral procurement) or to works and services concessions (e.g. Law 100/2016 on works and services concessions). The law governing the award procedure and the type of procedure that will be used are determined based on the conclusions of the Feasibility & Substantiation study, and more specifically, on whether or not a **significant portion of the economic operating risk** (as defined in Article 6 of Law no. 100/2016) is **transferred to the Project Company**. Consequently:

- If a significant portion of the operating risk is transferred to the Project Company, the PPP contract must be awarded according to the rules applicable to works and services concessions (e.g. Law no. 100/2016)
- If a significant portion of the operating risk is not transferred to the Project Company, the PPP contract must be awarded according to the rules applicable to public/sectoral procurement (e.g. Law no 98/2016 and Law no. 99/2016).

Typically in Europe, Concessions (or end-user payment PPPs, e.g. when revenues of the project are paid by the users of the infrastructure and/or service) are awarded under the concessions law whereas most Government Pay PPPs (e.g. when revenues of the project are paid by the Government) are generally procured under the public procurement law. Since it is sometimes difficult to assess whether a significant portion of the economic operating risk is transferred to the private party in a Government Pay PPP, other European Governments generally opt for the public procurement law in this case, since this law is often of higher standard and describes the procurement process in more detail.

Nevertheless, determining which award procedure needs to be followed is a project-specific activity and should be based on the information available on the project (e.g. to determine whether a significant portion of the operating risk is transferred to the private party) and can therefore not be generalised in this Guide. The Contracting Authority should seek advice and support from the Transaction Advisers for this process. In the end, affirmatively determining the applicable award procedure in this stage of the procurement process is crucial to reduce the risk that the Contracting Authority may have to rerun the procurement process or return any EU grant funding.

Once the applicable award procedure has been determined, a **procurement strategy** needs to be selected. The chosen procurement strategy influences the nature, structure and content of the tender documents.

Selecting the procurement strategy

The concessions law as well as the laws on public and sectoral procurement offer several procurement methods. These methods include the following:

- The 'open procedure' (both concessions law and public and sectoral procurement law)

- The 'restricted procedure' (only public and sectoral procurement law)
- The 'competitive dialogue procedure' (both concessions law and public and sectoral procurement law)
- The 'competitive procedure with negotiation' (only public and sectoral procurement law).

The size and complexity of PPP projects means that the Contracting Authority is usually interested in using a procedure that allows it to restrict the number of tenderers, engage in discussions with those tenderers on the details of the project, and take account of the quality of proposals as well as price. Given the time and cost involved for tenderers and for the contracting authority, this can help to ensure that bids are prepared to a high standard by a limited number of high-quality tenderers, each of which stands a reasonable chance of success.

Accordingly, the 'open procedure' is not recommended for procuring PPP projects and is very rarely used for that purpose. The 'restricted procedure' is also not commonly adopted for PPP projects. The restricted procedure requires the Contracting Authority to be highly confident, at the beginning of the procurement process, as to the conditions and specifications of the PPP contract (both in terms of what it wants and what the market can deliver), as there is no scope to amend these during the bidding process.

The recommendation is therefore to use either the 'competitive dialogue procedure' or the 'competitive procedure with negotiation', the latter only being an option in case the public procurement law or sectoral procurement law have been identified for the applicable award procedure²⁰.

Both of these procedures have two stages. The first stage is used to pre-qualify a limited number of tenderers, while the second stage is used to conduct dialogue/negotiations with those tenderers in a disciplined competitive environment.

Note: This Guide gives only general guidance on how to prepare a tender for a PPP project that uses a negotiation or dialogue process. The documents prepared by the Contracting Authority will, necessarily, be more detailed to reflect the chosen procedure and the specific process selected to implement it.

After having determined the appropriate award procedure and the procurement strategy, the Contracting Authority needs to prepare the relevant tender documents²¹ before launching the tender on the market in accordance with the applicable award procedure (e.g., Law no. 98/2016, Law no. 99/2016 or Law 100/2016).

- **Draft PPP Agreement.** The PPP agreement defines the responsibilities and proposed risk allocation between the public partner and the private partner. In this early stage of the procurement process, the Contracting Authority, supported by the Transaction Adviser, drafts an initial version of the PPP agreement on the basis of the term sheet prepared as part of the Feasibility & Substantiation study from the previous stage. The draft PPP agreement will be part of the tender documents, allowing tenderers to provide feedback on the draft contract during the tender process (either through a competitive dialogue or a competitive bid with negotiation). For the draft PPP agreement, the PPP Standard Provisions can be used as a starting point. The draft PPP agreement should only be shared with tenderers in the second stage of the tender procedure, and not as part of the pre-qualification documents.

²¹ The various documents that must be included in the tender documentation are set forth in detail by the law. For public procurement contracts, see mainly Articles 20 and 21 of the annex to G.D. No. 395/2016. For sectoral contracts, see mainly Articles 22 and 23 of the annex to G.D. No. 394/2016. For concessions, see mainly Articles 19 to 21 of the annex to G.D. No. 867/2016. These provisions are supplemented by various secondary enactments adopted by ANAP, which set forth standardized tender documentations.

For more information and guidance on the PPP agreement and the Standard Provisions, refer to the *National PPP Contract Guidance and Standard Provisions*.

- **Prior Information Notice (PIN)**²². A pre-notification to the market of the publication of the contract notice can be given optionally. While it is not mandatory, issuing a prior information notice in advance of the contract notice gives a signal to interested parties that the procurement competition will be launched shortly. It signals the planned call for competition, but without giving rise to the legal commitment that the contract notice brings. The PIN should include²³:
 - Information about the contracting authority;
 - Information on how the procurement documents will be made available or, as the case may be, on how interested parties will be able to otherwise access them;
 - A brief description of the project and of the nature and extent of activities to be undertaken by the private partner; and
 - The expected timing of the contract notice.
- **Contract/Concession Notice**. The publication of a contract/concession notice marks the official start of the tender process and gives legal effect to the proceedings that will lead to the award of the PPP contract.

This documentation will provide parties interested in participating in the tendering process for the PPP project with instructions concerning the pre-qualification phase (if the award procedure involves such a phase). These instructions are expected to include details concerning the formalities that must be complied with by the candidates, the documents that they must submit, the qualification and selection criteria and methodology and any other information needed by candidates for the purpose of the pre-qualification phase. In principle, the contract/concession notice should contain the following information²⁴:

- The contact details of the contracting authority and process for handling queries;
- Information on how the procurement documents will be made available or, as the case may be, on how interested parties will be able to otherwise access them (e.g., e-mail address, weblink, virtual or physical data rooms);
- An overview of the contract (subject matter, estimated value, estimated duration etc.);
- The estimated order of magnitude of the contract;
- The expected duration of the contract;
- The admission (or prohibition) of variant or conditional tenders;

²² The term "*Prior Information Notice*" used in this guidance corresponds to the Romanian term "*Anunț de intenție*" used in Law No. 98/2016 and to the Romanian term "*Anunț orientativ periodic*" used in Law No. 99/2016. It does not correspond to the Romanian term "*Anunț de intenție*" used in Law No. 100/2016, which refers to a mandatory notice required for certain categories of projects.

²³ For a detailed list of the information that must be included in PINs, please refer to Annex V Parts A and B of Directive No. 2014/24/EU (for public procurement contracts) and to Annex VI of Directive No. 2014/25/EU (for sectoral contracts).

²⁴ For a detailed list of the information that must be included in contract/concession notices, please refer to Annex V Part C of Directive No. 2014/24/EU (for public procurement contracts), to Annex XI of Directive No. 2014/25/EU (for sectoral contracts) and to Annex V of Directive No. 2014/23/EU (for concessions).

- The type of award procedure to be used;
- If a staged process will be used in order to gradually reduce the number of tenders (e.g., by introducing a pre-qualification stage and/or allowing the reduction of number of tenders during the negotiation/competitive dialogue phase);
- The objective qualifying criteria (and, if applicable, the selection criteria and methodology) that will be used in order to shortlist candidates to be invited to submit tenders, to negotiate or to engage in dialogue, as well as the minimum (and, where appropriate, proposed maximum) number of candidates to be selected;
- The criteria to be used for award of the contract;
- The procedure for review and body responsible for review/mediation.
- The pre-qualification questionnaire or PQQ. This is a pro-forma questionnaire document that requests the candidate to provide certain information to the public authority in a formal pre-qualification submission document
- The pre-qualification documents that must be submitted and the manner of submission;
- The deadline for submission of the pre-qualification documents;

The information provided in the contract/concession notice should be sufficiently precise to enable interested parties to identify the nature and scope of the procurement and decide whether to participate in the procurement. It is important to notice that the CA cannot change the contract/concession notice in later stages of the procurement process, which means the procurement approach and procedure needs to be prepared with great care. The legal experts that are part of the Transaction Advisers play an important role in this stage of the procurement preparation.

- **Tender documentation**

The tender documentation, which is more extensive in detail and volume than the pre-qualification documentation, will be provided to the candidates selected during the pre-qualification phase and will normally include information specific to the tender phase, such as:

- Instructions to tenderers concerning all the information they must submit, the detailed procedure for submission (including the deadlines and the forms to be used) and the rules of the competition (including the award criteria, the regime of the bid bond etc.);
- The tender book / the descriptive document, which is expected to include elements such as²⁵: *(i)* detailed information memorandum about the project, *(ii)* a summary of the key commercial principles, including the obligations of each party and risk allocation, *(iii)* detailed output specifications and the minimum required technical design and technical features, *(iv)* the level of commitment required from the candidate's lenders and investors; and
- Full draft PPP contract, specifying the mandatory clauses. Note that the full draft PPP contract should only be shared with tenderers in the dialogue/tender stage and should not be published as part of the pre-qualification procedure.

After drafting all tender documents, including the draft PPP agreement, the following steps need to take place:

²⁵ As regards the contents of the tender book / descriptive document, see Article 20 (10)-(12) of the annex to G.D. No. 395/2016 (for public procurement contracts), Article 22 (10)-(15) of the annex to G.D. No. 394/2016 (for sectoral contracts) and Article 20 of the annex to G.D. No. 867/2016 (for concessions).

- **Review of and advice on tender documents by PIMU.** PIMU will review all tender documents, including the draft PPP agreement and provide advice and recommendations based on their technical expertise to improve and finalize the documents.
- **Request preliminary budget approval from MoF on affordability.** In case the project requires central government support, the next step concerns requesting a preliminary budget opinion from the Ministry of Finance with regards to the affordability of the project on the basis of the draft PPP contract. While this is not a mandatory step in Romanian legislation,²⁶ the CA needs, according to international best practices, to be sure that the budget for the project will be available before launching the tender on the market. If a preliminary budget approval is not secured in this stage, the CA risks being faced without a budget approval after having run the full tender process. This means the CA would need to cancel the PPP project after having gone through a long preparatory process requiring significant financial resources. In addition, potential tenderers would have invested considerable time and resources in preparing offers for the project. Cancelling a PPP tender is therefore not only detrimental to the project, it can also have a negative impact on the Government's reputation with private investors and operators for PPP projects, harming the potential for other future PPP projects in the country. It is therefore crucial to make sure sufficient budget will be available for the PPP project before inviting the market to prepare offers.
- **Request final approval.** Finally, before launching the procurement procedure on the market, the leader of the Contracting Authority needs to approve the final tender documents and draft PPP contract. In the absence of legislation requiring Ministry of Finance preliminary budget approval, it is still strongly recommended that the CA checks to determine that budgetary resources are expected to be available to meet all expected PPP payment obligations as part of its approval at this stage.

3.4.2 Step 2: Invitation to pre-qualify

Following the approval of the tender documents, the formal tender procedure can be launched, by taking the following steps:

- **Publication of the Prior Information Notice (PIN).** Even though this step is optional, tender teams often need time to assemble, which makes the use of a PIN for PPPs useful in providing advance notice of the contracting authority's intentions and the opportunity the PPP presents. The PIN can already be published during the preparation of the bidding documents;
- **Publication of the Contract/Concession Notice.** The publication of a contract notice marks the official start of the procurement process and gives legal effect to the proceedings that will lead to the award of the PPP contract. The Contract/Concession Notice will be published in the Romanian Electronic Public Procurement System, in the Official Journal of the European Union (OJEU) as well as on the Tenders Electronic Daily (TED) system of the EU.

When using the competitive dialogue or a competitive bid with negotiation, the procurement process is divided into several phases, the pre-qualification phase, the dialogue phase (as the case may be) and the tendering phase. The pre-qualification procedure aims to select a limited number of tenderers, who have sufficient technical and economic capacity and capability to undertake the project.

The Contract/Concession Notice aims to invite interested parties to express interest in the project. The notice provides information on the project and invites interested parties to demonstrate their suitability to participate in the dialogue/tender stage(s). The suitability of interested parties to be invited to tender is determined from an assessment by the Contracting Authority of their responses to a list of specific

²⁶ It is recommended that the Romanian legislation be revised to contain provisions regarding obtaining a preliminary approval at this stage from the Ministry of Finance.

queries that are included in the Contract/Concession Notice. This list of queries is often called the pre-qualification questionnaire or PQQ.²⁷

3.4.3 Step 3: Evaluation of responses to prequalification and shortlist candidates

Following the publication of the invitation to pre-qualify and the closing of the deadline, the pre-qualification submissions need to be evaluated and scored by the Evaluation Commission within the Contracting Authority (supported by the Transaction Advisers). The submitted pre-qualifications will be evaluated on the basis of the pre-defined qualification and selection criteria (during step 1). The selection criteria need to be in accordance with the applicable award procedure (see above).

The evaluation of the pre-qualification submissions will result in a shortlist of qualifying tenderers. A list of shortlisted tenderers and a pre-qualification report need to be drafted by the Evaluation Commission. Additional review and recommendations can be requested from PIMU (optional) to get experienced guidance and recommendations on the pre-qualification process and the resulting shortlist.

3.4.4 Step 4: The (Dialogue and) Tender Phase(s)

After the shortlist of pre-qualified tenderers has been determined, the subsequent phase of the award procedure can be launched. This stage can be broken down into several activities:

3.4.4.1 Send Tender Invitation and Tender Documentation to shortlisted tenderers

The Contracting Authority needs to issue the Tender Invitation to all shortlisted tenderers and provide them with the Tender Documentation relevant to this phase of the award procedure. Applicants who are not successful in the pre-qualification need to be informed accordingly.

The choice of the procurement strategy determines the type of tender invitation documents that the Contracting Authority needs to prepare in order to invite the selected candidates to participate in the final phases of the procurement process. When using either the competitive procedure with negotiation or competitive dialogue procedure, the Contracting Authority issues an invitation to participate in the next phase of the particular award procedure – being, respectively, either an invitation to participate in the final phase of the competitive negotiation procedure (ITN) or an invitation to participate in the second phase of the competitive dialogue procedure (ITPID). Within the competitive dialogue procedure, the public authority also subsequently issues an invitation to submit final tenders once the dialogue is complete and has been formally closed.

3.4.4.2 Provide access to Data Room and organizing a Tenderers' Conference

The Contracting Authority needs to make as much information about the project as possible available to tenderers to facilitate the preparation of the tenders. This information needs to be placed in a Data Room. The Data Room may either comprise a physical space with hard copies of the data or, more commonly, a secure web-enabled information platform to which tenderers are granted access to electronic copies of the data. The preparation of the Data Room should take place before the (dialogue and) tender phase(s) is formally announced and should be made available upon sending Tender Invitation and Tender Documentation to shortlisted tenderers.

To introduce tenderers to the often extensive information that is available to support the tender preparation phase, the Contracting Authority may consider convening a tenderers' conference (sometime called an information day). This event usually takes place shortly after the tender documents have been issued and it allows the Contracting Authority to present the tender documents to the tenderers.

²⁷ See Chapter 3 of the *EPEC Guide to Public-Private Partnerships (2021)* for more detailed guidance and considerations regarding the pre-qualification process, including development of pre-qualification criteria and the pre-qualification questionnaire.

3.4.4.3 Organize first round of dialogue

The next step for the Contracting Authority is to organize the first round of the dialogue process. The overall objective of the Competitive Dialogue procedure is to help tenderers better understand the requirements of the CA and help the CA better understand what bidders might be able to provide. This procedure helps to make sure that the final tenders closely match with what is asked and desired by the CA. The dialogue procedure can consist of multiple dialogue rounds. The purpose of this first round is to implement improvements in the tender documentation (e.g. the draft PPP contract, the submission procedure, etc.), optimising it for all tenderers in an identical manner. The CA typically requests tenderers to prepare each dialogue round by sharing ideas, suggestions and improvements on the tender documents. The exact requests to tenderers to prepare the dialogue rounds eventually depends on the specific nature and objective of the dialogue round and should be carefully prepared with support from the Transaction Adviser.

For large projects, it is impracticable to attempt to deal with all issues associated with the contract, technical, legal, commercial and financial, in a single phase of dialogue. It is reasonable, therefore, to limit the dialogue (and information required from tenderers) during this first phase to the most important aspects and principles of the PPP contract and the project itself. No meaningful response can be required of tenderers in the subsequent phases if the basic principles are not first established and agreed.

It is good practice to agree an agenda with the tenderers for each dialogue in advance of the meeting and for any pre-meeting submission materials (including comments on the draft contract and bidding documents) to be provided in advance to the Contracting Authority. This will usually enable a more informed discussion to take place at the dialogue meeting. A written record should be kept by the Contracting Authority of the dialogue meeting, including of any agreements reached on amendments to the draft contract and project requirements.

In general, no tenderer is eliminated during this first round of dialogue where high-level principles are being addressed. This means that all the tenderers invited to the first phase of dialogue will continue to the second round, unless, of course, one or more tenderers withdraw of their own accord.

At the end of the first round, the draft contract documents may be amended to reflect the common agreements reached with the tenderers during the dialogue. This will form the basis of the dialogue in the second round.

3.4.4.4 Organize second (and subsequent) rounds of dialogue

In the second round of the dialogue, the Contracting Authority will finalise with tenderers the PPP contract and the tender documentation (excluding any award criteria) that will form the basis of their final tender. Dialogue will also continue on more detailed aspects of the project requirements, allowing the Contracting Authority to discuss with each tenderer the particulars of their unique solution. It is common to have three rounds of dialogue in total, plus or minus one depending on the complexity of the project and externalities. However, there is no formal restriction on the number of dialogue rounds the CA might require.

Care must be taken during each dialogue round to protect the confidential information associated with each tenderer and to ensure that ideas from one tenderer are neither deliberately nor inadvertently transmitted to another tenderer. The most important principles of the contract must be fully agreed and fixed before the last round of dialogue concludes.

At the end of the dialogue phase, the draft PPP contract and the provisions of the tender documents may be further amended to reflect the common agreements reached during this second (or subsequent) round of dialogue. The updated PPP contract and tender book / descriptive document produced at the end of the dialogue phase will be the basis of final tender submissions (i.e. becoming the tender PPP contract).

There may be a process of selecting a reduced shortlist of tenders based on the dialogue submission materials. Such filtering is up to the CA, but the selection must be based on the same evaluation criteria (and relative weightings) as will be used for the final tender²⁸.

3.4.4.5 Reconfirm and Update VfM and Affordability

On the basis of the updated PPP contract, an update of the VfM and affordability assessment needs to take place. During the dialogue procedure, the proposed risk allocation as well as the scope of the project might have changed. The update of the affordability assessment and the VfM assessment aim to verify the proposed PPP contract is still affordable and generating VfM.

For more information and guidance on affordability assessment and VfM assessment, refer to the National Guide on VfM assessment and the National Guide on Affordability Assessment

3.4.4.6 Invite Final Tender Submission

The final tender submission phase follows the Contracting Authority's decision to close the dialogue phase and issue of a final tender invitation document. The final tender invitation document will generally repeat many of the rules and content of the earlier tender invitation document (ITPID or ITN, depending on the procurement strategy), but modified to reflect the conclusion of the dialogue and any changes agreed to the draft PPP contract (the tender PPP contract) and confirmed by additional affordability and VfM analysis.

Tenderers must make a final tender submission in this phase. Tenders must satisfy all the minimum requirements stated in the final tender invitation document (and as previously identified in the tender invitation document). This generally requires that the final tender must be presented according to a defined format with certain minimum information to be included. If this minimum required information is absent or not in the correct format a final tender may, when submitted, be determined as incomplete and not complying with the rules and therefore may be rejected from consideration

Managing tender queries and requests for clarification

The tender invitation document should describe the arrangements for handling formal requests for clarification and queries during the tendering process. In this respect, tenderers should only be permitted to make contact with the Contracting Authority in accordance with this formal process and not through any other channel of communication.

Any request by a tenderer for clarification of the tender document should be made to the Contracting Authority using the Public Procurement Electronic System (SEAP). The timing for the receipt of any clarification should be restricted in accordance with the timetable of the tendering process, reserving the right not to respond to any request for clarification after a certain date.

The Contracting Authority should transmit a copy of the request and its subsequent response to all tenderers participating in that phase of the tendering process to ensure that all tenderers have access to the same information.

Extract from EPEC PPP Procurement Handbook (2018)

Throughout this step, the Contracting Authority can consult PIMU regularly for advice and recommendations during the entire procedure.

²⁸ The possibility to reduce the number of solutions during the negotiation or during the dialogue is provided in Article 60 (5) of Law no. 100/2016, in Articles 85 (8) and 92 (1) of Law no. 98/2016, as well as in Articles 98 (8) and 105 (1) of Law no. 99/2016.

3.4.5 Step 5: Evaluation of bids and selection of winning bidder

Once the tenders are submitted, they must be evaluated by the Evaluation Commission within the Contracting Authority in order to arrive at the selection of the winning bidder. The tender invitation documents should describe the process that the Contracting Authority will follow in its conduct of the tender evaluation process, including the arrangements for the receipt and opening of tender documents.

Good practice suggests that the financial and non-financial (i.e. technical and legal) tender information should be submitted in separate packages and should be evaluated in confidence by two separate tender evaluation teams, that are formed by the Evaluation Commission. This can help prevent accusations from unsuccessful tenderers that the financial aspect of a tender influenced the evaluation of its technical quality characteristics and so determined the award of the tender. The bid evaluation stage includes the following activities:

- Completeness and compliance check;
- Minimum requirements check;
- Qualitative (both technical and financial) assessment of proposals;

After completing the evaluation of the bids, a winning bidder should be identified, including one reserve bidder (the second ranked bidder). The project management team, supported by the Transaction Adviser, then drafts a final procedure report with all supporting scores and evaluations, including a final reconfirmation of affordability and VfM on the basis of the winning bidder's bid.

For more information and guidance on affordability assessment and VfM assessment, refer to the National Guide on VfM assessment and the National Guide on Affordability Assessment

The evaluation report needs to be submitted to the CA's leader for its review and approval (and can optionally be shared with PIMU for additional review and advice).

3.4.6 Step 6: Communicate bid evaluation results to bidders

Following formal approval and validation of the final procedure report, the Contracting Authority needs to communicate the results of the tender to all respondents. The issue of this notice is accompanied by a *standstill period* of 11 calendar days between the notification of the result of the award procedure and the signing of the PPP contract. This allows bidders the opportunity, if dissatisfied with the decision, to request a review and to consider whether to challenge the award.

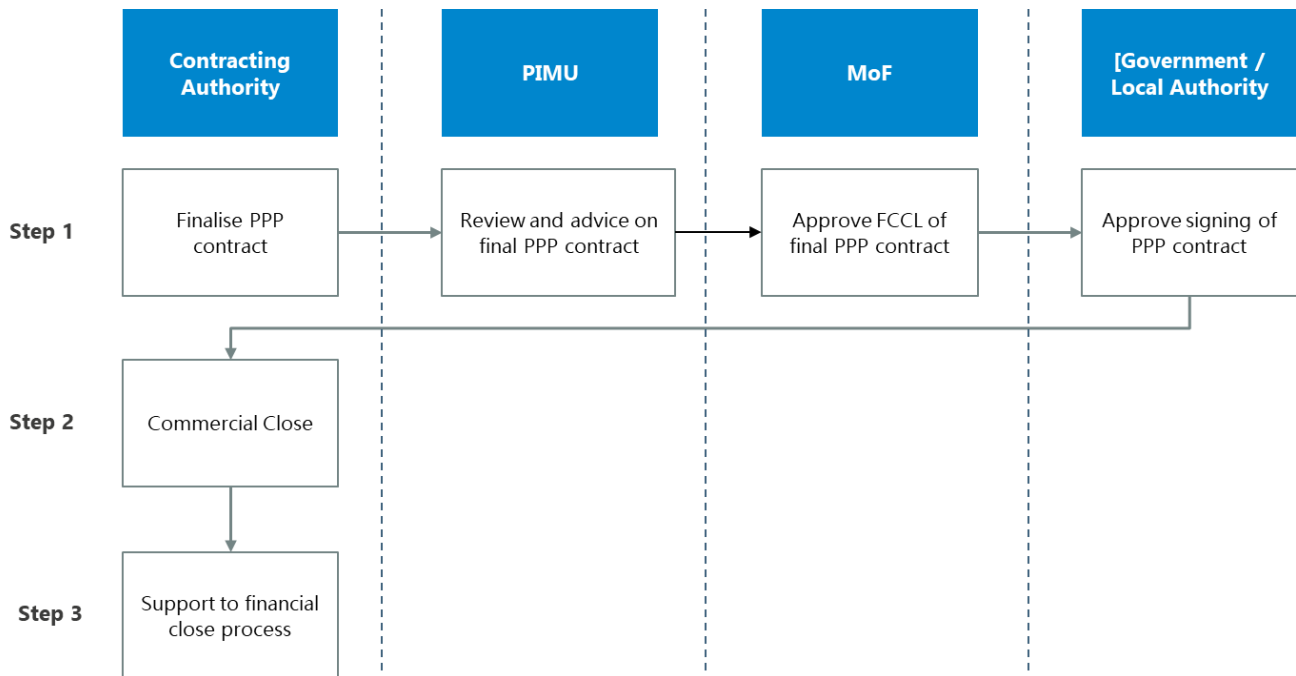
3.5 Stage 4: PPP Contract Signing & Financial Close

After formal selection and approval of the winning bidder, as well as the expiry of the legal standstill period, the final stage of the PPP procurement process starts. This process broadly includes the following steps:

- Finalising the PPP contract on the basis of final clarifications;
- Approval of the final PPP contract by the Government and/or Local Authorities;
- Signing of the PPP contract with the winning bidder;
- Support to concluding the financing agreements and reaching financial close.

This final stage is illustrated in Figure 7 and further described in the sections below.

Figure 7: Stage 4: PPP Contract Signing & Financial Close



3.5.1 Step 1: Finalise PPP Contract

Even though the material terms of the PPP contract will already have been decided during the previous stage (e.g. as a result of the final dialogue round), some final drafting of the PPP agreement is required in this stage. This includes the following activities:

- **The Contracting Authority will produce the final PPP contract that is ready for signature.** This final drafting should only concern some *fine-tuning* of the contract, including incorporation of aspects of the winning bidder's proposal. This could include for example the name of the SPV, parts of the proposal that are referenced in the contract (such as management plans, safety plans), details of the financing structure, finalisation of key dates in the contract etc. In this stage of the contract finalisation, discussions with the winning bidder may only be carried out to confirm financial commitments or other terms contained in the tender, provided this does not have the effect of materially modifying essential aspects of the tender²⁹. As the competitive tension is no longer available, modifying material terms post-bid may reduce VfM, provide an unfair advantage to the winning bidder and/or expose the process to the risk of challenge by unsuccessful tenderers.
- **The final PPP contract will be shared with PIMU for review and advice.** PIMU's experience and expertise can be useful in finalising the final contract, ensuring the contract is in line with international best practice. In addition, PIMU can assess the ex-ante evaluation of the statistical treatment of the PPP project on the basis of the Eurostat and EPEC Guidance to assess the impact of the contract on government debt and deficit. PIMU's review of the contract will be captured in a report.

For more information and guidance on the impact on the public sector borrowing capacity, refer to the *National Guidance on Impact on Debt and Deficit*

- **The final PPP contract and report from PIMU will be shared with the MoF for final approval.** In case of PPP projects that require central government support, the MoF will need to approve the FCCL

²⁹ In this respect, see the restrictions set forth in Article 93 (2) of Law no. 98/2016.

resulting from the final PPP contract to ensure the project has the necessary support from the MoF to be carried out. PIMUs report will serve as a supporting document for the final Government approval.

- **Final approval from the Government and/or Local Authorities** of the final PPP contract is needed before it can be signed with the winning bidder.

While the Contracting Authority finalises the PPP contract, the winning bidder will also have to drive several processes. These mainly include finalising the subcontract terms with principal subcontractors and completing the processes for incorporation, including ensuring all associated corporate documentation is available. Typically, the winning bidder will also advance the financing process in parallel (see Step 3 below).

3.5.2 Step 2: Commercial Close

Following approval of the final PPP contract and the finalisation of the other parallel processes, the PPP contract is ready to be signed (e.g. commercial close of the PPP contract). The commercial close process consists of the following activities:

- After the standstill period and subject to any reviews having been concluded³⁰, **the PPP contract and all associated project documents can be signed** and completed between all parties, so achieving commercial close.
- Within 30 days³¹ / 48 days³² after the conclusion of the contract, the Contracting Authority needs to publish a Contract Award Notice. The contract award notice should include the following information³³:
 - Information about the contracting authority, including contact details;
 - The nature and place of the contract and activities to be performed;
 - The value of the contract (option for lowest/highest offer considered);
 - The type of award procedure used;
 - The award criteria used;
 - Information if no award is made (discontinuation of the procedure);
 - Name of the contractor awarded the contract;
 - The date on which the contract was signed;
 - Information about subcontracting; and
 - Procedure for review (including precise details on the applicable deadlines).
- Finally, a copy of the signed PPP contract should be sent to the National Statistical Institute (NSI) for the final assessment (according to Eurostat rules) of the statistical treatment of the PPP project.

For more information and guidance on the impact on the public sector borrowing capacity, refer to the *National Guidance on Impact on Debt and Deficit*

³⁰ Articles 9 (4)-(5), 49 (6), 58 and 59 of Law No. 101/2016 must be taken into account.

³¹ If the award procedure was governed by Law No. 98/2016 or by Law No. 99/2016.

³² If the award procedure was governed by Law No. 100/2016.

³³ For a detailed list of the information that must be included in Contract Award Notice, please refer to Annex V Part D of Directive No. 2014/24/EU (for public procurement contracts), to Annex XII of Directive No. 2014/25/EU (for sectoral contracts) and to Annex VII of Directive No. 2014/23/EU (for concessions).

3.5.3 Step 3 – Support to Financial Close

Before the PPP contract can take full effect, the private partner is required to secure the final financing agreements with lenders and investors. Tenderers will have already entered into provisional agreements with lenders during the tender process and now must finalise these agreements.

The finalisation of the financing arrangements therefore takes place during and/or after the finalisation of the PPP contract. Even though the private partner drives the financial close process, the Contracting Authority might be required to provide support during the process (e.g. a direct agreement between lenders and the contracting authority is typically required, defining the rights of lenders to “step in” under certain conditions, assisting the winning bidder in ensuring all conditions precedent are met through publication of environmental approvals, permits etc.).

For more information and guidance on the direct agreement between lenders and the CA, refer to the *National PPP Contract Guidance and Standard Provisions*.

Once the final financing arrangements are agreed and all conditions precedent to the financing agreements are met by the winning bidder, the signing of the financing agreements (i.e. financial close) may take place either concurrently with the signing of the agreed PPP contract (i.e. commercial close) or consecutively. In any case, the execution of the financing agreements and fulfilment of any conditions precedent to those agreements will be a condition precedent to the effectiveness of the PPP contract.

The preference in many cases is to sign the PPP contract and the financial agreements concurrently. This has the advantage of mitigating the risk of potential unavailability of financing after the signature of the PPP contract. It also mitigates against the risk of inconsistency between the PPP contract and the financing agreements. However, the concurrent signing of the PPP contract and the financing agreements often proves ambitious and is therefore not always possible. In that case, financial close will take place after signing the PPP contract. In such case, there is typically a financial close deadline included in the PPP contract.

Setting up a Contract Management Team

Prior to the finalisation and signing of the PPP contract, the Contracting Authority should identify a contract management team (where possible to be appointed from among the members of the ICU), with a plan to transition from the Project Management Team to the Contract Management Team. To assist with this transition, the contract management team should, ideally, be involved in the final stages of the procurement phase, particularly to ensure that the PPP contract sets out clearly all the information that the project company must provide during the implementation phase for effective management of the PPP contract by the Contracting Authority.

The Contract Management Team will be subsequently responsible for preparing a Contract Management Plan, including reporting requirements for the PPP and managing the Contract.

More information on the PPP Contract Management can be found here: [Global Infrastructure Hub – Managing PPP Contracts After Financial Close, Practical Guidance for Governments Managing PPP Contracts, informed by real-life project data](#)

Based on EPEC Guide to Public-Private Partnerships (2021)

4. TRANSACTION ADVISERS

For PPP projects, it is often necessary to bring in external resources in the form of experienced Transaction Advisers that possess the skills and competences that might not be readily available within the Contracting Authority to advise on and manage the PPP preparation and procurement process.

This chapter describes the importance of appointing Transaction Advisers for the PPP preparation and procurement process, the typical roles and responsibilities of the Transaction Advisers as well as the process for appointing a Transaction Adviser.

4.1 Importance of Transaction Advisers

The importance of having a project management team with access to the knowledge of experienced advisers cannot be overstated. Generally, PPP transaction experience within the Contracting Authority is limited, especially for PPPs in nascent markets. If appropriately selected and managed, advisers can:

- Assist in the analysis and preparation of the PPP project, such as in the provision of cost data or in the value-for-money and affordability assessments;
- Optimise the terms of the PPP contract by sharing lessons learnt from other projects and by providing knowledge in regard to risk allocation, commercially realistic pricing, and financing terms;
- Increase interest from the market, by improving the credibility of, and confidence in, the contracting authority;
- Help with organising market sounding exercises prior to the procurement phase;
- Facilitate dialogue with the private sector; and
- Help manage the project during key stages of the PPP project cycle, such as the preparation phase, including drafting of Feasibility and Substantiation study and the draft PPP contract as well as the procurement phase, including assisting the Contracting Authority during the Competitive Dialogue process and the assessment of tenders.

Accordingly, the Contracting Authority may hire the services of the Transaction Adviser to support the Contracting Authority for successful PPP project implementation.

4.2 Roles and Responsibilities of Transaction Advisers

The role of the Transaction Adviser can differ depending on the complexity of the PPP project. However, in general the following activities are requested from Transaction Advisers:

- Help the Contracting Authority in preparing the Feasibility and Substantiation study, including all technical, legal, economic, environmental, social and financial components; This particularly includes the preparation of the technical output specifications, the proposed risk allocation and resulting PPP structure, the financial model, the value-for-money assessment, affordability and bankability assessments as well as the terms of the PPP contract;

When preparing the Feasibility and Substantiation study, Transaction Advisers will be required to follow additional guidance on several topics. For this, refer to the National Guidance on PPP Contracts, Value For Money, Risk Allocation & Assessment, Affordability Assessment and Government Debt and Deficit Impact Assessment.

- Assist the Contracting Authority in preparing the draft PPP agreement on the basis of the standard PPP provisions and the proposed PPP structure of the Feasibility and Substantiation study;

- Support the Contracting Authority in preparing the PPP procurement process, including preparing all necessary documentation to enable the Contracting Authority to obtain the necessary approvals and launch the formal procurement process;
- Guiding the Contracting Authority during implementing the PPP procurement process by guiding the different stages of the process, supporting the evaluation of the submitted bids and supporting the Contracting Authority until financial close;

The Contracting Authority may sometimes appoint Transaction Advisers during the project identification stage (e.g. to draft the pre-Feasibility study). If this would be the case, preparing the pre-Feasibility study can be added to the scope of the Transaction Advisers. However, often it is not (yet) known at the start of the pre-feasibility stage that the project might be procured as a PPP. This makes it difficult to request a specific scope of work for the Transaction Adviser in such an early-stage of the project.

It is therefore generally recommended to hire separate advisers for the pre-Feasibility study (if needed) and only appoint a Transaction Adviser in case the decision has been made to proceed with more detailed assessments and preparation of the project as a potential PPP. The Transaction Adviser would be responsible to assist the CA in both the preparation of the PPP project (e.g. conducting the Feasibility and Substantiation study) and the procurement of the project. By having the same team of advisers assisting the CA in both stages (preparation and procurement), consistency between the two stages can be ensured, increasing the chances of successful PPP procurement. The terms of reference for Transaction Advisers should allow the possibility to end the advisory contract after completion of the Feasibility and Substantiation Study in case the CA decides not to pursue the PPP project.

The core team of advisers will usually consist of a financial adviser, a technical adviser (including, for example, civil/structural engineering, mechanical/electrical engineering and architecture experts), and a legal adviser. Ideally, such advisers should be in place at the start of the project preparation phase (e.g. at the start of stage 2: Preparation of Feasibility and Substantiation Study). Other consultants may be required when specific issues need to be addressed by the project team such as, for example, issues regarding environmental and social impacts, regulatory risks and insurance. In certain instances, sector specialists may be required, for example, education, healthcare and waste treatment specialists. The exact nature of the broad advisory team will depend on the nature and complexity of the project

The advisers mentioned above can be procured as a team or recruited individually, in which case coordination among the team members should be ensured.

4.3 Process for appointing a Transaction Adviser

The Contracting Authority is responsible for procuring the services of the Transaction Adviser, which can be done through a competitive procurement procedure.

The terms of reference for the Transaction Adviser should clearly articulate the requirements and expectations of the Contracting Authority. This document, along with the proposal submitted by the Transaction Adviser, will form the deliverable schedule of the Transaction Adviser's contract. Hence, the clearer and precise the terms of reference, the higher the quality of bids received. While the structure of the terms of reference is relatively fixed, the content will vary depending on the nature and complexity of the project. CAs can request the support from PIMU in preparing the terms of reference for the Transaction Advisers.

APPENDIX 1: PRE-FEASIBILITY STUDY OUTLINE

This appendix provides an overview for the required content of a pre-Feasibility study. The outline is based on the requirements for a pre-Feasibility study set forth by G.D. 907.

- Description of the project, key parties and stakeholders,
- Progress of the project to date, existing studies, teams created, data gathered, interest shown by private investors, land acquired, etc.
- Needs assessment and objective of the investment
- Solutions options analysis for possible technical-economic scenarios / options for achieving the investment objective
 - a. Technical viability, including key technologies and their viability, and key challenges to be overcome;
 - b. Land requirements, status, timing, cost (and whether budget has been allocated) and action plan;
 - c. Investment requirements, including preliminary cost plan;
 - d. Revenue forecast, including sources and major sensitivities;
 - e. Financial viability, including sensitivities and a basic financial model;
 - f. Economic viability, including sensitivities and a basic assessment model;
 - g. Regulatory assessment
 - h. Preliminary social and environmental assessment
 - i. Project procurement options (including traditional procurement, PPPs etc.). The PPP Potential Scan can be used to assess the PPP potential.

For more information and guidance on the use of the PPP Potential Scan, refer to the *National Guidance on Value-for-Money Assessment*.

- Key risks, mitigation and management in a risk allocation register;
- Action plan to bring the project to the market, including costs and key government responsibilities such as land acquisition.
- Project preparedness in terms of capacity assessment and skill assessment of CA and its staff for project development, implementation and monitoring. This includes the internal organisation within the CA to take the project forward in terms of the structure and availability of members of the project management team and the project director.
- Advise on appropriate next steps for the project.

APPENDIX 2: STRUCTURE FOR FEASIBILITY STUDY & SUBSTANTIATION STUDY

This appendix provides a template structure for an integrated Feasibility and Substantiation study. The outline is based on the requirements for a Feasibility Study set forth in annex no. 4 to G.D. No. 907/2016 and on the requirements for a Substantiation Study set forth by the PPP law, all of which should be covered by the consolidated Feasibility & Substantiation Study.

While many of the components of the Feasibility & Substantiation Study have already been assessed in the pre-Feasibility Study, the Feasibility & Substantiation Study build on these preliminary assessments and provide further detailed analyses.

1. Description of the project

2. **Needs Assessment:** A needs analysis aims to identify the main infrastructure or service issues at hand, and to define the problem or needs that the project intends to address. The needs analysis shall include:

- The project's conformity to sector assessment and master plans, in line with the government's strategic and service delivery objectives;
- Demand forecasting and user projections;
- Institutional environment, including roles and responsibilities of the public and private stakeholders involved; and
- Scope of the project.

3. **Solutions Options Analysis:** This component of the study shall aim to work out all potential project solutions by covering the following:

- Technical solution, including identification and evaluation of various technical solutions;
- Output (not input) specifications, including demonstration of the technical feasibility of the solutions, and provision of inputs needed by the environmental and social impact studies; and
- Project lifecycle costs, namely an estimation of the capital investment costs and operational & maintenance costs over the life of the project.
- Potential procurement approaches for each option (e.g. a qualitative assessment of different procurement methods in light of the nature of the proposed solutions);
- Final options analysis to recommend the most efficient solution, by taking into account all technical, costing, scoping and procurement aspects.

4. **Project Due Diligence:** The Feasibility study shall undertake a detailed analysis of the preferred project solution on various dimensions of the project including:

- Legal & regulatory aspects: The study shall assess all legal aspects related to the project including use and user rights, relevant financial laws and regulations, relevant environmental and heritage laws (if applicable), tax legislations, labour legislations, foreign exchange legislations, competition legislation, building and fire codes (as applicable), zoning rights and land use regulations, list of likely project agreements, dispute settlement mechanism and legal jurisdiction, etc;
- Site enablement: It shall cover any aspects related to the enablement of the site of the project including land requirements, land valuation, land availability and title deed endorsements, zoning rights, resettlement needs (if applicable), and relocation of utilities;

- Identifying environmental, climate and disaster risk concerns: The study shall identify all site related environmental, climate and disaster risk aspects including, environmental impact assessment (EIA), and social risk assessment, climate and disaster risk vulnerability assessment, climate adaptation assessment and Preliminary Environmental and Social Impact Assessment (PESIA) report.
- Economic and social cost benefit analysis: The study shall take into account the financial cash flows generated by the project, and the direct and indirect economic costs and benefits associated with the project. Based on this, the Feasibility study shall include an economic and social cost benefit analysis, expressed using economic internal rate of return (EIRR) and the economic net present value (ENPV), which shall verify that the project has a positive economic impact on the society as a whole
- Financial Analysis and Modelling: The Feasibility study shall include financial analysis and modelling of the project covering aspects such as project financing needs, project financing sources, project funding needs, revenue requirements, revenue sources, and affordability analysis. Based on the financial analysis, the bankability of the project shall be established.

For more information and guidance on affordability analysis, refer to the *National Guidance on Affordability Assessment*

5. **Risk Assessment and Risk Allocation:** As a part of the Feasibility study, the CA shall identify and enlist all the plausible risks associated with the proposed project. For each project risk identified, the CA shall define if the risk is to be transferred to the private partner, retained by the CA, or shared between the private partner and the CA. Based on the risks identified and the optimum allocation of each risk, the CA shall prepare a risk allocation register, which shall summarize all the risks associated with the project, describe each risk, and propose whether it is transferred, shared, or retained. The risk register prepared as part of the pre-Feasibility Study can be used as a starting point for this assessment.

For more information and guidance on risk assessment and allocation, refer to the *National Guidance on Risk Assessment and Allocation*

6. **Procurement Options and PPP Structure Analysis:** The Feasibility study shall examine various options for procuring and structuring the project, resulting in the recommendation of a preferred option. The comparison shall include a traditional procurement option and one or several PPP options. Each option shall be evaluated against parameters such as Value For Money ("VFM"), affordability (for users and the public sector), fiscal impact (including any contingent liabilities), impact on public sector borrowing capacity (including an assessment of likely statistical treatment), manageability for the CA, and commercial viability as determined by preliminary market sounding amongst potential operators, developers and financiers.

For more information and guidance on Value for Money Assessment, refer to the *National Guidance on Value for Money Assessment*.

For more information and guidance on the impact on the public sector borrowing capacity, refer to the *National Guidance on Impact on Debt and Deficit*

7. **Project Agreement Terms:** If a PPP structure has been recommended, the key heads of the terms of the project agreement shall be drafted, including a minimal description of the roles and main responsibilities of the parties, and an outline of the payment mechanism. These key heads of the terms shall be compiled into a project agreement term sheet and should reflect the allocation of risks identified in the risk register.

For more information and guidance on the PPP agreement, refer to the *National PPP Contract Guidance*.

8. **Market Sounding.** A solid market sounding with potential equity investors, lenders, construction and operating companies is important to test the proposed PPP scope and structure in the market and see if there is sufficient appetite for the project to be successful as a PPP. See section 3.3.3 on more background on Market Sounding.
9. **Conclusion and next steps**
10. **Project Implementation Schedule:** The CA shall prepare a project implementation schedule detailing key roles and responsibilities of the public and private entities, and timelines for the deliverables. The project implementation schedule should also describe continuing governance arrangements within the CA both during and after the procurement process.

APPENDIX 3: PPP PROJECT PREPARATION CHECK-LIST

Throughout the preparation of the PPP project, it could be useful for Contracting Authorities to make use of the EPEC PPP Preparation Status Tool. This Excel-based check-list tool contains a set of questions that can be useful to guide the Contracting Authority in making sure the PPP project is well prepared before it launches the tender on the market.

The tool asks a set of targeted questions concerning the quality of the activities and analysis performed by the Contracting Authority throughout the PPP preparation process.

While it is not mandatory to use the tool, it is a powerful check-list for well-prepared PPP projects.

The tool is available in English and can be found here: [Link to EPEC PPP Preparation Status Tool](#).