

Public-Private Partnerships:
A Canadian Guide

June 2001

Partnerships

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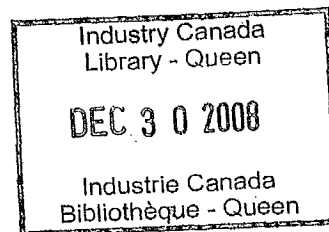


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A guide for practitioners of public-private partnerships (P3s) which represents the best experiences and practices of those currently engaged in P3 activity



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Service Industries

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Preface

This document is the culmination of the work of staff in the Service Industries Branch of Industry Canada, to prepare a guide for practitioners of public-private partnerships (P3s) which represents the best experiences and practices of those currently engaged in P3 activity.

The guide is one part of a series of tools developed by Industry Canada to facilitate public-private partnering in Canada.

While it is not designed to be prescriptive, readers will note that several themes do reoccur throughout: the need for a clear and clean process; the need for good communications throughout the process; and the need for all involved to get past their misconceptions and use each others strengths to help governments carry out their mandates.

The guide draws extensively on material and similar guides published in Canada, the United Kingdom and Australia.

Industry Canada would like to acknowledge the following sources of information and express our gratitude to their respective authors for permission to use their material throughout this guide:

- ▶ **Strategic Public-Private Partnering - A Guide for Nova Scotia Municipalities** - published under the auspices of the Canada/Nova Scotia COOPERATION Agreement, 1996.
- ▶ **Public Private Partnership - A Guide for Local Government** - published by the Ministry of Municipal Affairs, Government of British Columbia, May, 1999.
- ▶ **Guide on the Establishment of Public Private Infrastructure Partnerships** - published by the Ontario Superbuild Corporation, Government of Ontario, August, 2000.
- ▶ **Best Practices Review of Public-Private Partnerships** published by the Crown Investments Corporation of Saskatchewan, October, 2000.
- ▶ **The PFI Report** in association with HM Treasury Taskforce, available at : <http://www.treasury-projects-taskforce.gov.uk>

1. INTRODUCTION

Across Canada and around the world, governments are searching for new ways to efficiently deliver services and to develop and maintain the infrastructure that allows economic development and ultimately contributes to a healthy quality of life. Increasingly, they are turning to public-private partnerships (P3s) to do so.

Public-private partnerships are arrangements between public and private sector entities for the purpose of providing public infrastructure and related services. They are characterized by the sharing of risk and reward between the partners.

Public-private partnerships are in use across the world and in several instances (some well known, some not) in Canada. They are not limited to any level of government or any one type of infrastructure or service. Whatever the reason for the partnership, the common theme in all P3s is that they bring together the strengths of both the public and private sectors, using the innovative capacities of private enterprise to create efficiencies that allow government to free up public funds for more core economic and social programs.

It is important to remember that a public-private partnership may not always be the best option for delivering a public service or infrastructure. Governments should not assume that public-private partnerships provide “easy outs” to difficult servicing issues. They should also be aware that, in the mind of the private sector partner, any increased risk should result in higher rewards and that the negotiation of contracts may require a high degree of expertise.

Therefore, government should undertake a cautious approach and examine all relevant factors and issues when considering this type of arrangement.

The following discussion provides an overview of some of the potential benefits and risks associated with public-private partnerships.

1.1 What Are the Potential Benefits and Risks of Public-Private Partnerships?

Potential benefits include:

Cost savings

With public-private partnership, governments are able to realize cost savings not only for the construction of capital projects but more importantly in the operation and maintenance of services. For example, construction cost savings can often be realized by combining design and construction in the same contract. The close interaction of designers and constructors in a team can result in more innovative and less costly designs. The design and construction activity can be carried out more efficiently, thereby decreasing the construction time and allowing the facility to be put to use more quickly. Overall costs for professional services can be reduced for inspections and contract management activities. As well, the risks of project overruns can be reduced by

design-build contracts.

Cost savings can also be realized by government in the operation and maintenance of facilities and service systems. Private partners may be able to reduce the cost of operating or maintaining facilities by applying economies of scale, innovative technologies, more flexible procurement and compensation arrangements, or by reducing overhead.

Risk Mitigation

With public-private partnership, government can share risks with a private partner. Risks include cost overruns and the possibility or the risk that revenues may not be sufficient to pay operating and capital costs.

Improved service levels or innovations

Public private partnerships can introduce innovation in the way that service delivery is organized and carried out. It can also introduce new technologies and economies of scale that often reduce the cost or improve the quality and level of services.

Enhancement of revenues

Public private partnerships may set user fees that reflect the true cost of delivering a particular service. Public private partnerships also offer the opportunity to introduce more innovative revenue sources that would not be possible under conventional methods of service delivery.

Other economic benefits

Increased involvement of government in public-private partnerships can help to stimulate the private sector and contribute to increased employment and economic growth. Local private firms that become proficient in working in public-private partnerships can "export" their expertise and earn income outside of the region.

Potential Risks:

As with conventional forms of service delivery, there are potential risks associated with public-private partnerships. Governments can reduce or eliminate the risks by understanding and addressing them through well-conceived negotiations and contractual arrangements. Again, the involvement of stakeholder groups can play a key role in mitigating risks, which include:

Loss of control by government

Public-private partnerships, by their nature, involve a sharing of decision-making between the partners. This may lead to concerns about who controls the delivery of services. The issue of control needs to be addressed at the time the project is defined and kept in mind when the contract is negotiated. In the final analysis, government has the authority and responsibility to establish servicing standards and to ensure that the public interest is protected.

Increased user fees

When establishing user fees for services, not all governments consider the "true" costs of providing services. The costs of overhead or depreciation of assets are, for example, sometimes

not included in the pricing of individual services. The delivery of services through public-private partnerships requires pricing policies and fees to reflect *all* relevant costs. This can have the effect of increasing user fees for specific services.

Managing public controversy over increased fees or developing complex policies for staging fee increases can be a difficult aspect of using public-private partnerships for certain services.

Political risks

Few governments have extensive experience with public-private partnerships. Such inexperience combined with government and stakeholder unfamiliarity with public-private partnerships may result in higher political risks. Moreover, even though collective agreements and labour laws may apply to public-private partnership arrangements, there could be adverse reaction from labour unions or government staff.

Accountability issues

With public-private partnerships, the lines of accountability for the provision of services are less clear to the public than under conventional service delivery. This may result in public criticism of the partnership arrangement and the private partner, or require increased involvement of the government in ensuring compliance and responding to public demands.

Unreliable service

Private partners may suffer labour disputes, financial problems or other circumstances that may prevent them from honouring their commitments.

Lack of competition

Competition among private partners to secure the right to enter into a public-private partnership is an important benefit for government. Competition leads to innovation, efficiency and lower costs. governments may not be able to benefit from public-private partnerships if there are only a limited number of potential private partners with the expertise or ability to respond to a request for proposals.

Bias in the selection process

As with conventional forms of service delivery, there is always the potential for government to be accused of bias in selecting proponents. This may be more prevalent with public-private partnerships given that "low bid" may not always win the contract if the government has established other criteria (e.g., value for money). The potential for accusation of bias can be reduced through well-developed policy and procedures, and by ensuring transparency in dealing with potential private partners.

1.2 Common Misconceptions About Public-Private Partnerships

Given the numerous forms of public-private partnership potentially available to government, there is some confusion as to what constitutes a public-private partnership. Public private partnerships are often not considered due to erroneous information based on misconceptions. The most common of these misconceptions are:

Public-private partnerships are the same as privatization

Only one form of public-private partnership, known as Build-Own-Operate (BOO) can be described as coming close to privatization. All other forms require an ongoing partnership between the private and public sectors. Even BOO involves a form of partnership in that the public sector can place conditions and regulations on the private partner. One of the key reasons for considering public-private partnership is the ability to introduce competition in the provision of government services, either between private firms or between the private and public sectors. In many cases, full privatization merely transforms a public monopoly to a private monopoly, without necessarily any of the the benefits of public-private partnership.

By entering into a public-private partnership, government loses control over the provision of services

By entering into a public-private partnership, government does **not** give up its ability to implement its policies or regulate the provision of services. The government establishes the ground rules and has the ability to shape the public-private partnership to reflect its own objectives, policies and regulations. It can be argued that the government actually has more control, in that it has well-defined contractual remedies in a public-private partnership arrangement that it may not have with its own management and staff.

Public-private partnerships apply only to infrastructure projects

Public private partnerships can be an effective and innovative way of delivering a range of government services and facilities. While large infrastructure projects tend to capture the most public attention, public-private partnerships can also be used to deliver services that do not involve capital projects. Examples include provision of data services, refuse collection and road maintenance.

The principal reason for governments entering into public-private partnerships is to avoid debt

The principal reasons for government becoming involved in public-private partnerships are to benefit from increased efficiency, shorter implementation time, greater innovation and ultimately better value in the delivery of services brought about by increased competition. The ability to finance a project so that the debt is "off book" should not be the prime motivation for entering into a public-private partnership, because the government and the ultimate users of the service are still responsible for servicing the debt in one way or another. The emphasis should be on structuring creative and cost-effective ways of delivering services, not on creative accounting.

The quality of service will decline under public-private partnerships

Quality of service does not depend on whether the service is delivered in a traditional manner or through public-private partnerships. The government has the ability to stipulate the quality of service to be provided and ensure it can enforce provisions of the contract dealing with quality control. The nature of public-private partnerships suggests that the quality of service will not only be maintained, but enhanced. It is in the private partner's interest to invest in the service, become more efficient, enhance the quality of service to attract more customers or provide additional services to customers.

Government staff will lose under public-private partnerships

Both union and non-union staff sometimes fear public-private partnerships because of potential job loss or reduced wages and salaries. Any public-private partnership agreement will need to reflect the labour laws of the province and existing collective agreements. The labour representatives should be invited at an early stage of the process to discuss options for service delivery.

Most partnership agreements that have been negotiated in Canada require the private partner to take on public staff and guarantee job security and salary levels. Any changes in staffing levels are generally consistent with labour contracts and occur through attrition rather than layoffs. Many of the benefits of public-private partnerships, such as increased efficiency and higher quality of service, would not have been accomplished without the skills and know-how of former employees of government. Reasons for increased productivity include increased investment in employees through training, technology transfer and skill diversification.

The cost of service will increase to pay for the private partner's profit

Governments sometimes resist public-private partnerships because they believe that the cost of providing the service will increase to reflect the profits the private partner must realize to stay in business. While the private partner will need to make a profit, the profit must be earned within the existing or a lower price for the service. Presumably, the government would only enter into a public-private partnership if the price of providing a given service were lower than if provided by the government, or if a higher level of service could be provided for the same price by the private partner. (Assuming that the government is not subsidizing the cost of providing the service.) The private partner's profit can be realized through increased productivity or expansion of service, not through higher prices.

Government can finance the cost of services at a lower cost than the private sector

Governments can often finance projects at a lower cost than the private sector can. However, if a P3 project is well constructed, the additional risk premium charged to finance the project privately should be quite small. Moreover, the objective of government should be to focus on the overall advantages of the public-private partnership arrangement. Having the private sector take on the financing risk will drive innovation.

There are only two partners in a public-private partnership

From the narrow perspective of the public-private partnership contract, there are only two partners. In reality, though, there are additional parties whose interests must be taken into account and who need to be on board as "partners" for the public-private partnership to succeed. These include the customers of the service as well as the employees who will operate or deliver the service. Public private partnerships cannot succeed without the support of the end user of the service or the agreement of those who will ultimately deliver the service. A four-way partnership is required to successfully move service provision from the public sector to a partnership arrangement.

1.3 When should government consider a P3 approach?

Public private partnerships are a suitable method of delivering most services commonly provided by government and are generally applicable to most components of service delivery.

Application of public-private partnerships to various types of government services

The types of services that could be provided through public-private partnerships will vary from government to government based on the policies of their Councils or Boards. Generally, most services provided by government could benefit from bringing the strengths of the private and public sectors together. Public-private partnerships may be less suitable for government services to which access cannot be restricted, such as services with "public good" characteristics, including bylaw enforcement, environment protection and social services). They may also be less suitable for essential services (such as policing, fire protection and other emergency services. Government officials and public groups tend to be more receptive to the provision of more specialized recreation facilities, solid and liquid waste management or utilities through public-private partnerships.

Types of service that lend themselves to public-private partnerships

Public private partnership is an appropriate mode of delivering a wide range of services, including

- Project design
- Project management
- Construction and procurement
- Financing
- Operations and management
- Maintenance
- Marketing of services
- Communications

When to partner with the private sector

Governments can consider partnerships with the private sector where any of the following circumstances exist:

- The service or project is a new one that cannot be provided with the financial resources or expertise of the government alone;
- A private partner would reduce the cost and/or increase the quality or level of service from that which the government could provide on its own;
- A private partner would allow the service or project to be implemented sooner than if only the government were involved;
- There is support from the users of the service for the involvement of a private partner.

2. DEVELOPING A P3 PROJECT TEAM and P3 POLICY

2.1 The team

The nature of public-private partnership projects calls for the formation of a dedicated team of individuals capable of identifying, evaluating and implementing P3 projects. The rationale for a team approach, the expertise required and the mandate for a P3 Project Team are outlined in this unit.

2.1.1 Rationale for a team approach to P3 projects

In order to prepare itself for the unique nature and requirements of public-private partnerships, governments must identify who, within its organization, will have the responsibility, authority and accountability for decisions with respect to P3 projects.

A committee or team should be established which, in general, will focus its efforts on undertaking the following responsibilities:

- Consulting with political decision makers, staff, unions, the public, and the private sector to define preferred partnership structures, acceptable levels of risk and minimum service requirements;
- Establishing a P3 policy outlining the general practices to be followed in evaluating and implementing partnerships. The policy should reflect the findings of the consultation process;
- Providing a single point of entry for the private sector to approach government with P3 initiatives;
- Developing and managing a communications strategy to educate staff and the public on the benefits of P3s. It should lay out, in detail, how the government plans to ensure service quality and continuity and how it will deal with existing employees;
- Identifying and evaluating existing and future P3 opportunities—this responsibility includes evaluation of P3 proposals from staff and the private sector;
- Allocating responsibility for individual P3 proposals to project teams and providing support as required;
- Ensuring that P3 initiatives receive an appropriate level of review, in a timely manner, and are conducted according to the P3 policy;
- Reviewing the project team's conclusions and making recommendations to the political

decision makers whether or not to proceed with P3 contract negotiations;

- Reviewing draft P3 contracts and making recommendations to the political decision makers to approve or modify contracts;
- Ensuring that the private partner complies with contract provisions.

The committee/team should be provided with a mandate from the political decision makers to fulfil each of these responsibilities. (Much of this mandate can be included in the P3 policy).

2.1.2 Committee/team structure and membership

(NB. the term "P3 Team" can also be used interchangeably with P3 Committee or other names; however, for clarity, the term P3 Committee will be used hereafter in this document)

The structure of the P3 Committee will depend on the size of the implementing government body and resources available to it, the size of the project and, in some ways, its commitment to public private partnering.

Governments have a number of options in choosing who in the organization will be responsible for public-private partnerships. To the greatest extent possible, the options and choices should reflect the present organizational structure and decision-making process for service delivery.

Any of the following options could be undertaken:

- Create a special or select committee to deal exclusively with P3s. This committee may include councillors, staff, members of the public, and the private sector;
- Expand the role of an existing committee, such as Corporate Services or a Standing Committee, to include responsibility for P3s;
- Delegate responsibility for P3s to a staff department such as Finance, Planning, Engineering, or Public Works.
- Hire new staff, with direct responsibility for P3s which will report to one of the above.

In short, government should choose the Committee structure best suited for its own circumstances.

In order to fulfil its responsibilities, the P3 Committee must include members with a variety of skills, including tangible skills, such as finance and law, and less tangible ones, such as creativity, entrepreneurship, and insight into the market-place. Depending on the size of the government

organization, it may not have many of the areas of expertise required for a public-private partnership. In such cases, it is important to secure trusted advisors from outside of the organization. The types of expertise required for a public-private partnership include but are not limited to:

Knowledge of
Contracts and contract law
Procurement process & specifications / contract management needs
Risk management techniques and contingency planning
Terms and conditions of individual contracts
The need to forecast future demand
Government accounting and financial management
Relationship management
Abilities
To identify the principal demand and cost drivers for each service
To produce and implement plans for managing relationships with suppliers
To analyze the contract management environment and adopt the appropriate style
To apply contract management procedures and techniques
To manage relationships successfully
Individual Qualities
Ability to work as a member of a team
Effective interpersonal skills
Forward looking and pro-active approach.
Positive and practical attitude to change and innovation
Ability to work reliably under pressure and prioritize competing demands

One of the most important considerations for government is the development of a leader within the organization who has the ability to understand and manage the complexities and dimensions of public-private partnerships. While many other types of expertise can be secured from outside the organization, the development of leadership for public-private partnerships must come from within the organization.

2.2. The policy

“When handled well, P3 can work to the mutual advantage of users of public services, the taxpayers and companies seeking new business opportunities. However, the challenge is considerable. Only by setting out clear priorities and establishing a user-friendly framework within which both the public and private sectors are happy to operate, can the government make P3 work as well as it should.”

Source: the U. K.’s Treasury Taskforce Guidance statement re PFI within the wider policy context, Article 3.03. (P3 has been substituted for the term PFI referring to the U.K.’s Private Finance Initiative)

A policy for P3 is necessary for two key reasons:

- First, to provide a “road map” to guide all stakeholders in the effective identification, evaluation and implementation of P3 projects, and outline the process to be followed.
- Second, to enable government to communicate its position on public-private partnership to other interested parties, including potential partners, labour unions, other interest groups and the public.

2.2.1 Establishing the policy framework

Who should be involved with making the policy?

Developing consensus with key stakeholders on policies and procedures at the outset will allow individual initiatives to be evaluated on their own terms, rather than on overall ideology or policy.

Government may wish to involve various stakeholders in the preparation of their public-private partnership policies and procedures, as well as in individual projects or service delivery initiatives and organizational changes.

Two key stakeholders for the development of the policies are, of course, the ultimate consumers of the service and the elected officials who represent government. But it is important to remember that stakeholders may also include such groups as government staff and organizations such as unions, private sector organizations and other interest groups with a stake in the outcome of such policies and procedures.

Consultation is a very important part of this stage as the P3 policy should reflect not only the goals of the government but also the concerns and aspirations of its beneficiaries. It is the goal of the consultation process that the end users will understand and accept P3 as an option in their

community. This is key to the success of the policy and ultimately any partnership.

In addition to allowing you to gather useful information for the P3 policy, the consultation process will also be a useful means of communicating the government's reasons for exploring the benefits of P3 , encouraging 'buy in' by staff and the public.

It is important to remember that those most affected are more likely to support a P3 policy if they have participated in its development. Communicating openly and discussing the options available to employees (and their unions) may minimize some of their fears, for example those associated with a possible change in service delivery. Therefore, you should make every effort to ensure that the end users have an opportunity for input into the process.

2.2.2 What are the elements of a P3 policy?

At the core of the policy are the fundamental ethics of consistency, clarity, fair dealing and care for the use of public dollars. The policy must be open and adaptable and it should be sensitive to the real interests of the community it is designed to serve.

In general, a solid P3 Policy consists of the following parts:

- Introduction
- Guiding principles
- Communications strategy
- Human resources strategy
- The P3 process and procedures

The content will depend on the specific goals and objectives of the government and the results of its consultation with all stakeholders. The following discussion is intended as a guide :

Introduction

This part of the policy provides specific policy statements to address the issues raised during the consultative process. These policy statements must be specific if they are to impact negotiations of P3 projects, yet be flexible enough to allow innovation and creativity on the part of the private partner.

This introduction section should include the following elements:

- Purpose of the policy
- Government's definition of P3
- Benefits accruing to the community from P3
- Components of service provision eligible for P3

- Forms of P3 permitted
- Eligible private partners

Guiding Principles

Experience suggests that the guiding principles will address the following concerns and issues (Adapted from Strategic Public Private Partnering - A Guide for Nova Scotia Municipalities):

Accountability for the level and quality of services	Final responsibility will remain with the implementing government, even when services are outsourced; this may involve maintaining some level of in-house expertise.
Legislative and regulatory requirements	They will be met. Note that, in certain cases, legislation and regulations may have to be amended in order for a partnership to succeed.
Provisions for existing employees	This may include first consideration for public employees by the private partner, alternative positions within the government, severance packages, etc.
Competition	P3s will be considered when there are adequate opportunities for competition.
Transparency of the process	To maintain public trust and ensure fairness, all parties must be willing to expose their proposals to public scrutiny
Due diligence	The government will not enter into any agreement without fully checking all facts.
Cost to government and “value for money”	Not only that the P3s must reduce the cost to government of delivering a service but also that such costs will take into full account all risks associated with providing the service over the life of the project. This generally involves the use of a Public Sector Comparator. <i>(See more in section 3)</i>
Risk allocation	The goal is the optimum allocation of defined risk, rather than maximizing risk transfer.
Economic opportunities and other implications	Will a P3 result in economic growth or will it merely displace smaller firms and transfer public expertise?

Communications strategy

If a P3 is to succeed, it needs to have communications strategies in place at various points in its life cycle. The strategies must address both internal and external audiences.

Internal audiences - includes employees and government players who need to understand the rationale behind P3s and their impact on government finances, personnel, and service delivery.

External audiences - members of the public who may be affected by changes in service delivery, who need to be assured that the P3 arrangement is in the community's best interest and who need to understand the benefits they will receive.

Of course, the service being partnered will determine the level and type of communication required but regardless of the project, the communications strategy should clearly indicate the circumstances where public input will be sought. This should be done long before a P3 begins.

When the agreement is signed there has to be open and effective communication between all members of the public-private partnership.

Human resources strategy

Human resource issues may prove to be the most contentious of the entire P3 process and should never be overlooked or pushed aside until later.

Employees of the government may be the ones most affected by the P3, as their jobs may be transferred from the public to the private sector, changed or eliminated.

A human resources strategy can help address these concerns and allay the fears of employees by, for example:

- Requesting that affected government employees have right of first refusal for positions within the P3;
- Ensuring succession rights of unions are transferred to the private partner;
- Investigating options such as encouraging employees to bid on the contract themselves (and giving them the tools to do this);
- Transferring employees within the government and minimizing layoffs ;
- Arranging buyouts and early retirement.

P3 Process and Procedures

It is important that stakeholders have at least some understanding of the P3 process. Guidance material may be useful.

Any discussion of policies and procedures should address the following:

- How many stages are to be undertaken within the P3 process? In the U.K. for example, a 14 stage “Step by Step Guide to the Procurement Process” was used to guide P3 projects?
- Who are the key persons, committees and stakeholders involved in the various stages of the P3 process? (describe their roles and responsibilities)?
- What are the key decisions required at various stages in the process and who has the power to make those decisions?
- How will such issues as the briefing of bidders and the resolution of conflicts be handled (give detailed procedures)?
- How and when will stakeholder groups be involved in the process? This may include requirements for notification and advertising and information disclosure.
- How will projects be evaluated? (note that criteria may change for each project).
- How will the “paper flow” be managed? (note that this may be dictated not only by current government regulations on such issues as privacy and access to information but also by issues of company confidentiality and security).
- How will project performance be monitored? For example, what will be the benchmarks and how frequent will reports be expected?
- What procedures will be used to deal with unsolicited proposals? In a study completed for the Crown Investments Corporation of Saskatchewan, an innovative approach was described :

“government receives an unsolicited proposal. It asks industry whether there is additional interest for the project and the industry is given a specified time period to respond (short time frames of up to 30 days were cited). If there is no interest shown by others then the government deals only with the proponent of the unsolicited proposal. If there is interest shown by others then the project goes out for a general proposal call (always assuming that the government thinks that it is a good idea to start with). All other aspects of the selection and decision criteria would remain the same.” *from Best practices Review of Public-Private Partnerships, October, 2000 Crown Investments Corporation of Saskatchewan)*

3. CHOOSING THE BEST P3 MODEL

3.1 Which form of public-private partnership to use

Public private partnerships can vary in: the degree of risk allocated between the partners, the amount of expertise required on the part of each partner to negotiate contracts and the potential implications for ratepayers.

The scale below depicts the risk increasing for the private partner and diminishing for the public partner as you move to the right:

	<i>Risk Allocation</i>						
	Public Partner						Private Partner
Type of Agreement	Operations & Maintenance	Developer Financing	Turnkey	Lease/Purchase	Build Transfer Operate	Build Own Operate Transfer	Privatize Build Own Operate

(adapted from: *Strategic Public-Private Partnering - A Guide for Nova Scotia Municipalities*, p. 9)

Governments can enter into partnering agreements that are broadly defined and can include various forms of public-private partnership.

The allocation of risk between the partners is a key consideration that affects various other aspects of partnership agreements, including rewards, investments and responsibilities. The tables entitled “*Types of Public-Private Partnerships*” which follow, provide an overview of the more common forms of public-private partnership, starting with those that transfer the least amount of risk to the private partner.

Type of P3 & Features	Government Applications	Advantages	Disadvantages
1. Operations and Maintenance			
The government contracts with a private partner to operate and maintain a publicly owned facility.	A broad range of municipal services including water and wastewater treatment plants, solid waste removal, road maintenance, parks maintenance/ landscape maintenance, arenas and other recreation facilities, parking facilities, sewer and storm sewer systems.	potential service quality and efficiency improvements cost savings flexibility in structuring contracts • ownership vests with government	<ul style="list-style-type: none"> • collective agreements may not permit contracting out • costs to re-enter service if contractor defaults • reduced owner control and ability to respond to changing public demands

Type of P3 & Features	Government Applications	Advantages	Disadvantages
2. Design-Build			
The government contracts with a private partner to design and build a facility that conforms to the standards and performance requirements of the government. Once the facility has been built, the government takes ownership and is responsible for the operation of the facility.	Most public infrastructure and building projects, including roads, highways, water and wastewater treatment plants, sewer and water systems, arenas, swimming pools and other government facilities.	<ul style="list-style-type: none"> • access to private sector experience • opportunities for innovation and cost savings • flexibility in procurement • opportunities for increased efficiency in construction • reduction in construction time • increased risk placed on private sector • single point accountability for the owner • fewer construction claims 	<ul style="list-style-type: none"> • reduced owner control • increased cost to incorporate desirable design features or change contract in other ways once it has been ratified • more complex award procedure • lower capital costs may be offset by higher operating and maintenance costs if life-cycle approach not taken
3. Turnkey Operation			
The government provides the financing for the project but engages a private partner to design, construct and operate the facility for a specified period of time. Performance objectives are established by the public sector and the public partner maintains ownership of the facility.	This form of public-private partnership is applicable where the public sector maintains a strong interest in ownership but seeks to benefit from private construction and operation of a facility. This would include most infrastructure facilities, including water and wastewater treatment plants, arenas, swimming pools, golf courses and government buildings.	<ul style="list-style-type: none"> • places construction risk on the private partner • proposal call can control design and location requirements as well as operational objectives • transfer of operating obligations can enhance construction quality • potential public sector benefits from increased efficiency in private sector construction • potential public sector benefits from increased efficiency in private sector operation of the facility • construction can occur faster through fast-track construction techniques such as design-build 	<ul style="list-style-type: none"> • reduced government control over facility operations • more complex award procedure • increased cost to incorporate changes in design and operations once contract is completed • depending on the type of infrastructure, financing risk may be incurred by the government type of P3
4. Wrap Around Addition			
A private partner finances and constructs an addition to an existing public facility. The private partner may then operate the addition to the facility for a specified period of time or until the partner recovers the investment plus a reasonable return on the	Most infrastructure and other public facilities, including roads, water systems, sewer systems, water and wastewater treatment plants, and recreation facilities such as ice arenas and swimming pools.	<ul style="list-style-type: none"> • public sector does not have to provide capital funding for the upgrade • financing risk rests with private partner • public partner benefits from the private partner's experience in construction • opportunity for fast-tracked construction using 	<ul style="list-style-type: none"> • future facility upgrades not included in the contract with the private partner may be difficult to incorporate at a later date • expense involved in alteration of existing contracts with the private partner • perceived loss of control

Type of P3 & Features	Government Applications	Advantages	Disadvantages
investment.		techniques such as design-build <ul style="list-style-type: none"> ◦ flexibility for procurement ◦ opportunities for increased efficiency in construction ◦ time reduction in project implementation 	<ul style="list-style-type: none"> • more complex contract award procedure
5. Lease- Purchase			
<p>The government contracts with the private partner to design, finance and build a facility to provide a public service. The private partner then leases the facility to the government for a specified period after which ownership vests with the government. This approach can be taken where government requires a new facility or service but may not be in a position to provide financing.</p>	<p>Can be used for capital assets such as buildings, vehicle fleets, water and wastewater treatment plants, solid waste facilities and computer equipment.</p>	<ul style="list-style-type: none"> ◦ improved efficiency in construction ◦ opportunity for innovation ◦ lease payments may be less than debt service costs ◦ assignment of operational risks to private sector developer ◦ improve services available to residents at a reduced cost ◦ potential to develop a "pay for performance" lease 	<ul style="list-style-type: none"> • reductions in control over service or infrastructure
6. Temporary Privatization			
<p>Ownership of an existing public facility is transferred to a private partner who improves and/or expands the facility. The facility is then owned and operated by the private partner for a period specified in a contract or until the partner has recovered the investment plus a reasonable return.</p>	<p>This model can be used for most infrastructure and other public facilities, including roads, water systems, sewer systems, water and wastewater treatment plants, parking facilities, government buildings, airports, and recreation facilities such as arenas and swimming pools.</p>	<ul style="list-style-type: none"> ◦ if a contract is well structured with the private partner, the municipality can retain some control over standards and performance without incurring the costs of ownership and operation ◦ the transfer of an asset can result in a reduced cost of operations for the government ◦ private sector can potentially provide increased efficiency in construction and operation of the facility ◦ access to private sector capital for construction and operations ◦ operational risks rest with the private partner 	<ul style="list-style-type: none"> • perceived or actual loss of control • initial contract must be written well enough to address all future eventualities • private sector may be able to determine the level of user fees, which they may set higher than when under government control • difficulty replacing private partner in the event of a bankruptcy or performance default • potential for government to reemerge as the provider of a service or facility in the future • displacement of government employees • labour issues in transfer of government employees to the private partner

Type of P3 & Features	Government Applications	Advantages	Disadvantages
7. Lease-Develop-Operate or Buy-Develop-Operate			
<p>The private partner leases or buys a facility from the government, expands or modernizes it, then operates the facility under a contract with the government. The private partner is expected to invest in facility expansion or improvement and is given a specified period of time in which to recover the investment and realize a return.</p>	<p>Most infrastructure and other public facilities, including roads, water systems, sewer systems, water and wastewater treatment plants, parking facilities, government buildings, airports, and recreation facilities such as arenas and swimming pools.</p>	<ul style="list-style-type: none"> • if the private partner is purchasing a facility, a significant cash infusion can occur for the government • public sector does not have to provide capital for upgrading • financing risk can rest with the private partner • opportunities exist for increased revenue generation for both partners • upgrades to facilities or infrastructure may result in service quality improvement for users • public partner benefits from the private partner's experience in construction • opportunity for fast-tracked construction using techniques such as design-build • flexibility for procurement • opportunities for increased efficiency in construction • time reduction in project implementation 	<ul style="list-style-type: none"> • perceived or actual loss of control of facility or infrastructure • difficulty valuing assets for sale or lease • issue of selling or leasing capital assets that have received grant funding • if a facility is sold to a private partner, failure risk exists--if failure occurs, the government may need to reemerge as a provider of the service or facility • future upgrades to the facility may not be included in the contract and may be difficult to incorporate later
8. Build-Transfer-Operate			
<p>The government contracts with a private partner to finance and build a facility. Once completed, the private partner transfers ownership of the facility to the government. The government then leases the facility back to the private partner under a long-term lease during which the private partner has an opportunity to recover its investment and a reasonable rate of return.</p>	<p>Most infrastructure and other public facilities, including roads, water systems, sewer systems, water and wastewater treatment plants, parking facilities, government buildings, airports, and recreation facilities such as arenas and swimming pools.</p>	<ul style="list-style-type: none"> • public sector obtains the benefit of private sector construction expertise • public sector obtains the potential benefits and cost savings of private sector operations • public sector maintains ownership of the asset • public sector ownership and contracting out of operations limits any provincial and federal tax requirements • public sector maintains authority over the levels of service(s) and fees charged • compared to a Build-Operate-Transfer model, avoids legal, 	<ul style="list-style-type: none"> • possible difficulty in replacing private sector entity or terminating agreements in event of bankruptcy or performance default

Type of P3 & Features	Government Applications	Advantages	Disadvantages
		<ul style="list-style-type: none"> regulatory and tort liability issues • under <i>Occupiers' Liability Act</i>, tort liability can be avoided • government control of operational performance, service standards and maintenance • ability to terminate agreements if service levels or performance standards not met, although facility would continue to permit repayment of capital contributions and loans and introduction of new private partner • construction, design and architectural savings, and likely long-term operational savings 	

9. Build-Own- Operate-Transfer

<p>The private developer obtains exclusive franchise to finance, build, operate, maintain, manage and collect user fees for a fixed period to amortize investment. At the end of the franchise, title reverts to a public authority.</p>	<p>Most public infrastructure services and facilities, including water and wastewater systems, recreation facilities, airports, government administration and operations buildings, parking facilities and solid waste management facilities.</p>	<ul style="list-style-type: none"> • maximizes private sector financial resources, including capital cost allowance • ensures the most efficient and effective facility is constructed, based on life-cycle costs • allows for a private sector operator for a predetermined period of time • the community is provided with a facility, without large up-front capital outlay and/or incurring of long-term debt • all "start-up" problems are addressed by the private sector operator • access to private sector experience, management, equipment, innovation and labour relationships may result in cost savings • risk shared with private sector 	<ul style="list-style-type: none"> • facility may transfer back to the public sector at a period when the facility is "work" and operating costs are increasing • public sector loses control over the capital construction and initial mode of operations • initial contract must be written sufficiently well to address all future eventualities • the private sector can determine the level(s) of user fees (unless the public sector subsidizes use) • less public control compared to Build-Transfer-Operate structure • possible difficulty in replacing private sector partner or determining agreements if bankruptcy or performance default
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Type of P3 & Features	Government Applications	Advantages	Disadvantages
10. Build-Own-Operate			
<p>The government either transfers ownership and responsibility for an existing facility or contracts with a private partner to build, own and operate a new facility in perpetuity. The private partner generally provides the financing.</p>	<p>Most public infrastructure and facilities, including water and wastewater systems, parking facilities, recreation facilities, airports, government administration and operations buildings.</p>	<ul style="list-style-type: none"> • no public sector involvement in either providing or operating the facility • public sector can "regulate" the private sector's delivery of a "regulated/ monopolistic" service area • private sector operates the service in the most efficient manner, both short-term and long-term • no public sector financing is required • income tax and property tax revenues are generated on private facilities, delivering a "public good" • long-term entitlement to operate facility is incentive for developer to invest significant capital 	<ul style="list-style-type: none"> • the private sector may not operate/construct the building and/or service "in the public good" • the public sector has no mechanism to regulate the "price" of the service, unless it is a specifically regulated commodity • the good/service being delivered is subject to all federal, provincial and municipal tax regulations • no competition, therefore necessary to make rules and regulations for operations and to control pricing

3.2 Evaluation criteria for selecting the right projects

This section provides a framework for the public sector in selecting the right projects to pursue using a P3 approach. The framework can be used by both the private and public sectors in assessing public sector projects. It is by necessity general in nature and must be tailored to the specific context of a specific project.

A series of six criteria describe the conditions to be used to pick a project which is a viable candidate for a public-private partnership approach. The six criteria are:

- Financial -** Is it likely that a partnership between government and the private sector will be able to carry out the project under financial terms which are acceptable?
- Technical -** Is it reasonable to expect that a technical solution to the project can be found using a P3 approach?
- Operational -** Are there operational hurdles that prevent a P3 approach from being used?
- Acceptability -** Will the public accept the involvement of the private sector in implementing the project?
- Implementation -** Are there implementation barriers that prevent the use of P3 approach?
- Timing -** Are there time constraints that would pre-empt consideration of P3 procurement?

In general, any project which adequately meets the above criteria would be a suitable candidate for P3 and represents a project in which the public sector is likely to achieve the benefits of P3 procurement.

Within each of the six criteria, there are specific questions that can be used to help determine whether it makes sense to pursue a P3 project.

3.2.1 Financial criteria

Generally, completion of a project using P3 will have different costs than if the project were to be undertaken using a conventional public sector implementation process. These differences relate primarily to the role that the private sector partner is being asked to play, the risks that are being transferred to the private sector partner and the returns the partner is expected to receive from the project.

Preliminary cost-benefit analysis

Ideally, the government will enter into a P3 to achieve one or more of the benefits outlined in the “benefits” section. In many cases, such benefits can be achieved only by incurring new costs. If the benefits of partnering outweigh the costs, a sound business case likely exists. The purpose of the preliminary cost-benefit analysis is twofold:

- To establish the benchmark cost of providing the service in-house;
- To determine whether the potential benefits of partnering outweigh the costs.

Benchmark costs may be fully developed to provide a shadow bid. Another advantage of determining benchmark costs is that it provides insight into the government’s current approach to providing the service. The benchmarking exercise may assist managers in finding ways to increase efficiency without resorting to a P3. This is one reason why benchmarks should be calculated prior to the implementation phase.

The public sector benchmark is frequently referred to as the Public Sector Comparator (PSC). The following section on the PSC has been extracted from the Best Practices Review of Public-Private Partnerships conducted by the Crown Investments Corp. of Saskatchewan:

3.2.1.1 The Public Sector Comparator

The PSC is a means of comparing costs of providing a service under a public ownership model versus a private ownership model. The PSC should be the existing public sector costs for providing the required service or program. It is expressed in net present value terms and is based on previous public sector methods of providing the specified output. (*Statement from Transferring Risk in Public/Private Partnerships - Province of Nova Scotia- Department of Finance - Discussion Paper*). The PSC should take into account risk factors such as construction overrun and labour shortage that would be encountered by the public sector in providing the output.

For example if in past construction projects there is a 10% cost overrun, then this should be factored into the construction costs. It is extremely important that all costs, be they direct or indirect, and including administrative overhead costs, be taken into account.

The Basis of the Comparator

The PSC should take into account all relevant costs, including administrative overhead to the public sector partner. These costs typically include:

- Capital costs such as purchase, construction, project management, and professional fees;
- Operating and maintenance costs (repairs & maintenance, staffing, and insurance) over the life of the project; and

- Administrative overhead costs.

The costs that these risks represent must be factored into the PSC model. Typically this is done by analysing historical costs of each risk and incorporating it into the calculation. For example, if a government entity has traditionally experienced 10% cost overruns on similar projects, it should incorporate a 10% cost overrun into the PSC.

The Complexity of the PSC

The PSC should be completed before bids are received from prospective private sector partners.

The complexity of the discounted cashflow analysis and resulting PSC should reflect the expected complexity of bids from prospective partners. No more changes/refinements should be made to the PSC when the costs of making such refinements outweigh the benefits.

The PSC should not be changed during the selection process unless such changes cause a material impact to the PSC.

Although the first few versions of the PSC are constructed using broad in-house estimates, in some jurisdictions the final version is often constructed with the assistance of professionals from various fields to ensure an independent third-party validation.

Disclosure to bidders

Although maintaining an open policy is desirable, the public sector should not sacrifice its bargaining position for the sake of openness by disclosing the PSC value or other critical ancillary information.

The PSC document

It is often beneficial to construct a "PSC Document" which provides qualitative data including an overview of the project, a risk matrix showing the various sources of risks and associated costs, a sensitivity analysis, and the discounted cashflow analysis.

A robust PSC document allows easy qualitative comparisons between the PSC document and the bid.

Limitations of the PSC

The PSC is essentially a quantitative measure of all costs. It should not be the sole test of whether to accept or reject a P3 initiative.

Several qualitative factors such as risk transfer, service quality, and other wider policy objectives

that are not included in the PSC must be considered, particularly when the cost reflected in the bids are close to the PSC.

Is the project, or can it be, financially viable on a stand-alone basis?

The private sector requires as a condition precedent in partnering with government that the expected financial return of the project reflect the success of the partner's efforts. This includes consideration of:

- Market demand
- Pricing risk
- Revenue risk
- Capital costs
- Operating risk
- Financing costs
- Legislative risk
- Other factors affecting financial performance of a business

In general, the private sector's primary motivation in any such venture is to earn a return commensurate with the risks it undertakes and its performance on the project. Can an effective risk management/allocation approach be developed that fairly and efficiently allocates each risk to the party best able to manage it?

Many P3 projects can be made financially self-sufficient from the private sector perspective (without the need for government support mechanisms). However, experience has shown that a significant number of P3 projects require some form of government support. This support can be any of a range of options including, for example: financing with recourse to crown credit, subsidies, the payment of a portion of the project's cost (e.g. land acquisition), and revenue guarantees.

The feasibility analysis should also consider private sector financing, including recourse to a parent company. In any case, a critical factor in screening a potential P3 project requires the public sector to carry out a thorough business case analysis of the project from its own perspective as well as from the private sector perspective.

Is it possible to define an equitable and appropriate rate-setting mechanism?

Potential bidders (and lenders) need to be assured that there are appropriate mechanisms in place to adjust the pricing to reflect changes in parameters, such as general inflation, the cost of specific inputs and interest rates. An appropriate rate-setting mechanism addresses the previous issue of a project's financial self-sufficiency as well as the public acceptability of the project (i.e., prevents the private partner from misusing or abusing a position of privilege). Can a rate setting approach be developed that is sufficiently robust and predictable to incite bidders to bid and the partner to behave appropriately?

3.2.2 Technical criteria

Does the project have any inherent technical constraints that are unsolvable by a private partner?

That is, are there unresolved technical considerations (i.e., design and construction considerations) that would prevent potential bidders from delivering the required product or service. Such technical restrictions must be resolved by government before the project will be considered as a feasible and attractive opportunity by the private sector. Of course, these considerations might also prevent a project from proceeding using conventional procurement. Similarly, are there any technical risks that might render the project impossible to implement?

Can government develop appropriate technical specifications for the project?

Often, the inadequacy of technical specifications is not discovered until bids have been received, or worse, until after the deal has been signed. Similarly, unforeseen circumstances could arise that were not provided for in the initial project definition. Incomplete and/or inappropriate technical specifications for inputs or outputs may understate the full cost of the project or may make operational requirements unachievable.

Can appropriate mechanisms be established to monitor partner performance?

Can appropriate quality assurance and quality control measures be implemented to assure government that the project, as implemented, will meet the technical, operational and other requirements? At what cost?

3.2.3 Operational criteria

Can government develop appropriate operating standards for the project?

Identifying and articulating operating and maintenance standards is an important component of the detailed project plan. The standards need to consider both the inputs into the project as well as the outputs generated by the project. The former include all relevant elements within the control of the public sector agency (or for which the public sector agency is best able to assume the risk) that feed into the project. The latter include all relevant elements within the control of the private partner that flow from the project. Inaccurate or incomplete operating specifications may lead to costly amendments to the legal agreements or sub-optimal operation and maintenance of the asset, potentially reducing the residual value of the asset at reversion. Can appropriate standards be developed and communicated?

Are there any operational issues that cannot realistically be addressed by a private partner?

Are there unresolved operational considerations that would prevent potential bidders from delivering the required product or service at an appropriate cost? An example of this type of operational consideration: changes in legislation dealing specifically with the project. No

reasonable developer would “bet the farm” on a project in which an adverse change in, say, environmental regulations could result in insolvency. Such operational restrictions must be resolved by government before the project will be considered as a feasible and attractive opportunity by the private sector. What are the operating risks in this regard and how can they be allocated and managed?

Can the private partner be held accountable for appropriate performance?

Can mechanisms be put in place as incentives for the private partner to continue to operate and maintain the asset appropriately? This concern is particularly acute near the end of the contract term. It is also particularly pertinent to operational considerations, as it is most typically during operations that accountability for performance is measured and regulated.

3.2.4 Acceptability criteria

Is the public-at-large willing to accept a P3 approach and the involvement of the private sector in the project?

Although, arguably, elected officials can be considered as a proxy for the public-at-large, in certain instances the public has successfully overturned the decision of government. If, for example, a public sector body ran a proposal call and selected bidders to establish a certain infrastructure project, it is possible that the project

could fail to come to fruition because it lacked community support. Risks associated with public acceptance, and specifically the ability of the public to materially impact a project, are not generally risks that private sector developers are well equipped to manage.

Are elected officials willing to accept a P3 approach?

In assessing the opportunity presented by a P3 project, potential bidders look for tangible signs that the project, and use of P3 procurement, have strong political commitment and support.

A half-hearted or disorganized P3 project, or unclear political signals, will undermine a government’s ability to muster future private sector interest in P3 opportunities. This issue arose for example when a large municipality which decided to seek proposals for the operation of a public facility, received bids from potential private sector partners, analysed the responses and identified the preferred bidder; then the Councillors decided to debate the question of whether the idea of involving a private sector operator should be pursued at all. In other words, are the elected officials willing to accept the reduction in direct control in a P3 approach?

Are other stakeholders willing to accept a P3 approach and the involvement of the private sector in the project?

Where a government product or service is an integral component of a larger system, acceptance of other stakeholders within that system must be considered. For example, although the provision of land ambulance services may represent a viable opportunity for a P3, its success or failure would be contingent on the support of, for example, community-based hospitals and the regional medical profession.

Is government staff willing to accept a P3 approach and the involvement of the private sector in the project?

Staff acceptance of P3 procurement is likely to be high for government products and service that have traditionally been contracted out. Staff acceptance of P3 procurement is likely to be less widely accepted for government projects that have in the past been provided by government employees. In the latter case, concerns over job security and the disruption to the normal work environment may generate substantial resistance from government staff. Similarly, are the senior staff willing to accept the reduction in direct control implicit in a P3 approach? If there is a lack of commitment to the project at the senior staff level, this will pose a significant challenge to the success of the P3 project.

3.2.5 Implementation criteria

Is it possible to generate meaningful competition in a P3 procurement?

In general, is there an adequate pool of private sector bidders who would be interested in and capable of pursuing the opportunity? For example, does one potential bidder have some inherent perceived or real advantage that would effectively discourage other potential bidders from pursuing the opportunity? If so, a "standard" competition method of procurement would be inappropriate. Benefits may still flow from a P3, but they would be procured through direct negotiation.

Is the project free of jurisdictional or liability issues that prevent a public body from using a P3 approach?

Various projects that might be pursued using a P3 process are governed by a web of legislative, regulatory and policy constraints that might preclude a P3 approach. In the United States, for example, federal airport operating subsidies are contingent on public ownership and control of the facility. Before pursuing a P3, the public body must satisfy itself that it has the necessary legal authority to pursue the project in that manner.

Can an internal project champion be found?

P3s require substantial time, effort and skill to coordinate the input and support of elected officials and staff from within many departments. Failure to identify and empower a strong project champion is an all too frequent contributor to an unsuccessful P3 process. Conversely, the support and stewardship of a strong project champion can go a long way to overcoming many seemingly overwhelming barriers. This applies not only during project development, but during implementation and operation as well.

In general, accessing the required expertise from within a government agency staff to develop and implement a P3 proposal has proven to be a significant challenge. Most government agencies have not organized themselves and have not developed appropriate policies and procedures to be able to carry out P3 projects effectively.

Can the project champion access the resources necessary to be a competent partner?

A substantial up-front and ongoing effort is required to muster an effective P3. The project champion has to act as an overall project manager, coordinating the detailed work of a range of specialists while anticipating the requirements of outside stakeholders. No one can do it alone; all successful project champions have had the support of a strong Project Team. The Project Team may include a mix of government staff and external advisors.

Can a successful transition plan be developed?

Some P3s involve the transfer of ongoing operations from government staff to a private partner. The risk of an unsuccessful transfer may outweigh the expected benefits of using P3 procurement. This has proven to be a real issue when the transition involves the transfer of large numbers of government employees to a private partner, requiring all of the various labour and union issues to be addressed successfully.

3.2.6 Timing criteria

Are the time lines adequate to develop operating specifications?

Identifying and articulating operating specifications are important components of the detailed project plan. Inaccurate or incomplete operating specifications may lead to costly amendments to the agreement or sub-optimal operation and maintenance of the asset, potentially reducing the residual value of the asset at reversion, if applicable.

3.2.7 Private sector interest

A final hurdle involves examination of the general marketability of each project. Marketability, in this sense, refers both to the ability and level of interest among private vendors to provide the service as well as to the conditions of the market for the service (i.e., demand, price, long-term outlook, scale of the project). Not to be forgotten is an approach to employees, with a suggestion that they too might form a private company to bid on the P3. This may be defined as 'managed competition'. However, if employee ownership is an option:

- The bidding process must be fair, in that the employees should not have preferential access to internal information—they should have the same access that the private sector proponents have;
- The employees' proposal must calculate costs the same way that a private sector proponent would—including such things as overhead, depreciation of facilities and equipment, salaries, benefits, etc.

The objective of any private sector firm is to invest its resources (time and money) in a way that allows it to earn a reasonable rate of return on that investment. The magnitude of the required return is a function of the risk that the investor must assume.

If the risk to the private firm is too high, it may require a level of compensation (either in the

form of increased user fees or guarantees) that offsets the intended benefits of the partnership. If the government is unwilling or unable to provide this compensation, there may be little or no interest from the private sector in providing the service.

The government may wish to gauge private sector interest prior to investing the time and resources required to implement a partnership opportunity.

Private sector interest can be measured in a number of ways including:

- Various financial analyses specific to the service, including simple cash flow analysis to determine the net cash flow required by a private partner, and how this net cash flow requirement can be achieved - is it through the introduction of user fees or increased tax rates ?
- Overlay of a capitalization rate on net operating income/against asset valuation;
- Issuing a *Request for Expressions of Interest*—this document would detail the broad objectives of the desired partnership and the risks the municipality is willing to share;
- Seeking advice from other government jurisdictions that have partnered similar activities, and
- Seeking advice from consultants.

If the private sector does not show sufficient interest in providing a particular service, the government may either change the scope of the project (i.e., reallocate risks or increase compensation) or eliminate it from further consideration for P3. Services where there is an adequate level of private sector interest (i.e., two or more interested and qualified proponents) will proceed to the implementation stage .

4. DEVELOPING THE IMPLEMENTATION PLAN

4.1 Establishing the project schedule

Before requesting proposals, the project team should establish the schedule for the project or servicing initiative as well as establishing key milestones. The schedule should clearly reflect the government's own time frame for completion of the project or initiation of a service.

The implementation schedule should include the following key milestones, each of which is related to a specific element of the proposal process:

4.1.1 Activities to be carried out by government in requesting and evaluating proposals

- Securing required approvals prior to the proposal call (e.g., by the “political” office)
- Selecting the evaluation team drafting and advertising the Request for Expressions of Interest (RFEI) /Request for Qualifications (RFQ) :

An RFEI is used when the government has a general idea of what it hopes to achieve through a public-private partnership, but does not know how to achieve the end goal. In this case, the government is looking to the private sector for innovative and cost-saving ideas before drafting the Request for Proposals.

An RFQ is used when the project goals are well-defined by the government but there is some uncertainty as to whether there are any private sector partners who may be interested and have the skills to undertake the initiative.

- Drafting and advertising the Request for Proposals (RFP)
- Evaluation of the RFP
- Information meetings with proponents
- Public meetings
- Selection and notification of successful partner
- Debriefing of unsuccessful proponents

4.1.2 Activities related to negotiation of contract

- Selection of negotiating team
- Drafting and finalization of Memorandum of Understanding
- Public process including advertising, notification, disclosure of agreements, counter petition process and assent of electors

- Preparation of contract documents
- Ratification of draft contract
- Securing of financial approvals (e.g. political decision makers, regulatory agencies)

4.1.3 Project rollout

- Project/service initiation
- Construction milestones (if applicable)
- Completion of construction (if applicable)
- Commissioning of service

4.2 Establishing an implementation team

The first step to implementing a public-private partnership is the establishment of a project team. The project team will be responsible for the public-private partnership from its planning stage, through the development of a Request for Proposals (RFP), to the award and completion of a contract. Finally, the team could also be involved in monitoring the performance of the private partner.

Note, however, that the project team should not be directly involved in the selection of the successful proponent. This issue is discussed later in this guide in the section on *selecting a preferred partner*.

The project team should consist of government staff with a direct interest in the project. The leader of the project team should be someone who has a thorough understanding of public-private partnerships and the process to be followed. It is also important to have someone as part of the team who has a thorough understanding (technical or otherwise) of the service to be delivered.

In some cases, it may be beneficial for the government to engage expertise from outside the government to lead the process. This ensures that the individual responsible for the public-private partnership has an arm's length relationship to the government with no bias. It is important for the government to ensure that this person and the project team have the necessary authority to undertake the project. Lack of authority will delay completion and can lead to a lack of respect and confidence on the part of the private sector.

Requirements for establishing the project team include:

- A project manager must be chosen to lead the team.
- The necessary technical expertise must be available to guide the project team. This becomes extremely important for the government and the private sector in the development of the RFP, evaluation criteria and negotiation of the public-private partnership later on in the process.

- All project team members must be able to devote enough time to the project to guarantee that it stays on track.
- There must be no conflicts of interest on the part of any members of the project team.
- A communications protocol and the reporting relationships with senior government staff and the Council or Board must be established.

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The type of outside technical advisors required throughout the process must be determined.

N.B. The Canadian Council on Public-Private Partnerships (or C2P3, the non-profit organization whose mandate is to promote P3 use in Canada) indicates that acquiring the services of outside technical advice is a best practice for government looking to enter into a public-private partnership, for a number of reasons:

- *Consultants can offer arm's length advice. A consultant cannot become a potential partner placing a bid on the project after the RFP has been developed; therefore the advice should come with no vested interest;*
- *Outside technical advisors can keep the government apprised of the evolving legal, financial, policy and other aspects of public-private partnerships. This type of expertise may not be available from within a government;*
- *Strong outside advisors can assist the government in the development of the RFP and in the negotiation process. This brings credibility to the government's commitment to the public-private partnership;*
- *Technical advisors can ultimately save the government time and money due to their expertise in these types of arrangements. They know what to watch for in developing an RFP as well as in contract negotiations. This expertise helps lead to respect and a balanced negotiation situation that can often lead to the "best deal" for a government with a private sector partner.*

4.3 Ensuring stakeholder involvement

One of the more important considerations the project team must address is the preparation of a well-conceived consultation program with key stakeholders. The potential for successful implementation of a public-private partnership is greatly diminished if such a program is poorly conceived and executed.

The benefits of involving the stakeholders early, as well as throughout, the process are many:

- The fear of change and the unknown can be managed by providing an open, transparent process where stakeholders are involved in a meaningful way;
- The public-private partnership proposal can be shaped to better meet the needs of the end users as well as to reflect the concerns of other stakeholders;
- Innovative and cost-effective ideas and concepts may be identified in the course of the consultation program;
- The "other" partners—namely the end users and those involved in providing the service—are brought into the process, and their objectives, concerns and needs can be identified and addressed in the public-private partnership.

As is the case in every stage of the P3 process, the project team should prepare a consultation and communications strategy that involves all of the key stakeholders at appropriate times in the process.

The strategy should facilitate two-way communication between the government and the affected stakeholders. Various methods of disseminating information and receiving responses should be provided in the strategy.

The strategy should include the following:

- Objectives of the consultation and communications strategy;
- Identification of key stakeholder groups and their interests in the project/servicing initiative;
- The key milestones in the project/servicing initiative where consultation and communication is required or desirable;
- The time frame and points in the process where the involvement of various stakeholders is required;
- The overall approach and methods to be used for informing the stakeholders as well as receiving input from them;
- The involvement of the media in the communications process;
- How statutory requirements will be met, including notification, advertising, disclosure of agreements.

The extent of the consultation program should reflect the scope of the project and the existing or expected interest in it by stakeholder groups. Larger, more controversial projects should be accompanied by an extensive consultation program that incorporates a variety of approaches and methods over an extended period of time. Smaller or less controversial projects may not require the same level of effort.

Stakeholders should be involved as early as possible in the process to avoid difficulties at later stages.

5. SELECTING A PREFERRED PARTNER

NB: The following section is taken almost entirely from Public-Private Partnership - A Guide for Local Government (published by the Ministry of Municipal Affairs, Government of British Columbia, May, 1999.) This guide contains what is perhaps the best basic overview of the P3 partner selection process. The full guide can be found at: www.marh.gov.bc.ca/LGPOLICY/MAR/P3/index.htm

The purpose of this chapter is to outline the steps in selecting the preferred private partner. The selection of a *preferred* partner is basically the commitment to enter into negotiations with one party.

The steps required to select the private partner include:

- Issuing a Request for Expressions of Interest (RFEI) or Request for Qualifications (RFQ)
- Evaluating the RFEI and RFQ submissions
- Issuing a Request for Proposals (RFP)
- Evaluating the RFP submissions
- Selecting the preferred partner

5.1 Documenting and recording the selection process

It is imperative when seeking a qualified private sector partner that government accurately document and record the selection process. At the minimum, this documentation and recording of proceedings in the selection process should include:

- The names of all respondents to a Request for Qualifications (RFQ), a Request for Expressions of Interest (RFEI) and a Request for Proposal (RFP);
- Reasoning behind the elimination of potential partners at each stage of the evaluation process;
- Minutes of all meetings;
- A review of how each of the bidder's submissions was compared and evaluated at the RFQ, RFEI and RFP stages of the process;
- All information that was disclosed in response to questions or requests for information from potential partners and how the requests were handled;

Maintaining these documents and records is essential as it ensures that the selection process was fair, open and transparent. Not only does this build trust with the private sector for future partnership opportunities, but also confidence from constituents who will be the end users of infrastructure or services provided by the public-private partnership.

5.2 Issuing a Request for Expressions of Interest (RFEI) and Request for Qualifications (RFQ)

Once it is determined that a project or servicing initiative could be attractive to both the private and the public sector, the government must undertake a process of determining a suitable partner. In these situations, the government may wish to consider issuing an RFEI or RFQ or both.

Generally, the main difference between the two processes is that the RFEI can be used as an information-gathering tool prior to drafting an RFP, whereas an RFQ is used to shortlist qualified private sector partners.

Depending on the nature of the project, a combined RFEI and RFQ can be used to achieve both the goals described above.

The RFEI or RFQ process is important for government because it can serve to screen potential partners. In many situations, it would be extremely time-consuming and costly for governments to evaluate all proposals received after an RFP. The RFEI or RFQ process allows the government to narrow the field prior to issuing an RFP to the selected potential partners. These processes may also allow the government to prepare more insightful RFP documents that will be beneficial to both the potential partners and to the achievement of the government's goals.

The screening process also reduces the cost of bidding for it spares many private sector parties the expense of preparing a full proposal. If three bidders are chosen and issued an RFP, the selected private sector bidders are much more likely to invest time, resources and innovation into preparing a proposal than if ten proponents are selected. A select few bidders at the RFP stage gives those preparing proposals a reasonable chance of being selected. The RFQ process is much shorter than preparing a full RFP and can save considerable financial and time expenditure for those respondents that are not selected.

5.2.1 Drafting and content of the RFEI or RFQ

Following consultation between the government and experienced professional advisors, the RFQ or RFEI can be drafted. Generally, these documents include:

- The government's objectives in seeking a public-private partnership
- A description of the existing service and the budget framework (if applicable)
- The nature of the proposed partnership
- The contribution and expectation of the skills the preferred partner will bring to the partnership
- Mandatory submission requirements and instructions to respondents

- The evaluation scheme including weightings, points or other considerations that will be applied to each element of the evaluation
- The full extent of the selection process, including timetables

5.2.2 Advertising the RFQ or RFEI

The RFQ and RFEI should be as widely advertised as possible. This will encourage participation in the process and ensure fairness and equity. Advertising can be conducted through a number of media, including print, the Internet, professional journals and personal contact.

The advertisement of the RFQ or RFEI should include:

- a brief description of the project
- the role that will be played by the successful private sector partner
- the number of companies that will be shortlisted and receive the request for proposals
- the location and deadline for submissions
- the expected format of submissions
- a contact name
- an address where the full rfei/rfq document can be obtained

As a general rule, potential partners in the process should have between 30 and 60 days from the date of the advertisement to prepare their submissions.

5.2.3 Submission Requirements

To ensure quality and to reduce the time required in the evaluation process, submissions from interested parties need to be kept brief. Generally, they should include the following information:

- A clear understanding of the scope of the project and the government's needs;
- A profile of the potential partner making the application (if the partner is to be a consortium formed for the purpose of providing a proposal, each person or firm in the consortium should provide information on its principal business and the length of time that it has been in operation);
- The identification of the contact person for the private partner;
- A statement of financial stability (that can be evaluated on a pass/fail basis);
- A statement of financial capability including access to capital (debt and equity);

- A statement of performance capability that includes an overview of overall experience, experience in similar projects, senior management expertise, expertise of those staff members who will work on the project, ability to obtain necessary resources, references, and in the case of an RFEI, the methodology for the project.

A rule of thumb would be a maximum of 15-30 pages for an RFEI or RFQ depending on the scale and complexity of the project

5.2.4 Communication with Applicants

In order to encourage participation in the RFEI or the RFQ, the government should be clear in its intentions. The government should also be prepared to provide clarification and answers to any questions from bidders. In the interest of fairness and consistency, when information is provided to one potential bidder, the same information should be provided to all potential bidders. In order to limit contact with the project team, one team member should be assigned the responsibility of providing information to all parties.

5.3 Evaluating the RFEI and RFQ Submissions

In cases where an RFEI is used, the evaluation procedure will differ from that of evaluating an RFQ. When an RFEI has been used, the government's project team may wish to hold meetings with potential partners who have submitted an expression of interest. The main reason behind these meetings is to bring all information forward, enabling the draft of a detailed RFP. Following these meetings, potential partners may all be allowed to respond to an RFP. Conversely, the government may choose to use evaluation criteria to screen the submissions to the RFP and only permit a select few potential partners to respond to the RFP.

5.3.1 Criteria

Generally, if an RFQ has been used, the government has a detailed understanding of the goals that need to be achieved in the project. Once the RFQs have been received, the project team may use its established criteria to begin evaluating the proposals.

5.3.2 Process and decision making

Perhaps the simplest part of the decision-making process is ensuring the potential partners have included all mandatory requirements listed in the Request for Qualifications. If the submission does not contain all elements, it may be disqualified in this first phase. The project team may also decide to contact the potential partner to ask why a requirement was omitted. When this courtesy is extended to one submission, it should be extended to all in the interest of fairness.

In the second phase, all submissions can be ranked on the pass or fail questions such as financial stability. If the submission fails any of these tests, it may be disqualified.

The proposals that have not been disqualified in the first two phases will be evaluated by the criteria set out in the RFQ or RFEI. Members of the project team may score the projects individually, then aggregate the scores, or they may score each project together by consensus.

As set out in the RFEI or RFQ, a specific number of the highest ranked submissions will be shortlisted to receive a Request for Proposals.

In order to ensure that the competition is perceived as being fair and transparent, meetings with unsuccessful proponents should be held on request to discuss why they were not shortlisted. This session is important as it provides access and answers to questions for unsuccessful applicants, as well as providing them with a better understanding of the process for the next time the government issues a RFEI or RFQ. It will also improve the quality of submissions received by the government in the future as more participants will have a greater understanding of the process and its requirements.

5.4 Issuing the Request for Proposals (RFP)

A major reason for considering public-private partnerships is that the competitive marketplace can bring operating efficiency, innovation and cost savings to a project. The goal of government in issuing an RFP for a public-private partnership is to provide clear guidelines for submissions resulting in innovative and cost-efficient proposals.

In an RFP, there must be a balance between flexibility and the need to fulfill mandatory requirements. An inflexible RFP stifles private sector creativity and may also reduce potential cost savings. An overly flexible RFP may yield innovation and cost savings but may not satisfy the specific requirements of the government. Regardless of how inflexible or flexible RFP documents are, private sector faith in a potential partnership is diminished substantially by a poorly constructed RFP. This may in turn limit quality participants from responding to the RFP.

A good RFP is one where the specific requirements of the government and areas where innovation is encouraged are clearly outlined. This type of RFP helps the private sector achieve the goal of developing a quality proposal incorporating innovation and cost-saving measures while also satisfying the goals and objectives of the government. Clarity in purpose and attention to detail from the outset of the RFP process will make the entire public-private partnership process run smoother.

5.4.1 Drafting an RFP

Much like an RFEI or RFQ, professionals with experience in public policy and process, engineering, finance, accounting and law, among other disciplines, should be retained to assist the government in drafting an RFP.

A two-stage process can often facilitate the drafting of an RFP. For example, the potential partners may have expressed innovative or cost-saving ideas in the RFEI process. The government project team can use these ideas to develop the RFP, provided that they are not protected or proprietary.

If an RFQ has been used to shortlist qualified candidates, the government should already have a strong indication of the information required to draft the RFP. This information would include goals, how goals are to be achieved, budgets, and cost savings and efficiencies expected to occur through the public-private partnership.

The RFP document should contain at least the following, where applicable:

- Introduction
- Description of the proposed relationship between the government and the selected partner
- Proposal format and mandatory submission requirements
- Detailed description of risks the government will not assume under any circumstances, as well as how the risks will be shared in general
- Explicit performance specifications, standards and expectations of both the potential partner and the government
- Design and construction requirements
- Management and operating requirements
- Proposed business plan
- Detailed financial information and a proposed financing plan and pro forma for the project
- Transfer plan for any capital assets including a description of a proposed lease
- Limitations on mortgaging and assigning rents or any other rights
- Legal considerations
- Considerations for employees who may be displaced by a partnership
- Permit requirements
- Proposal evaluation criteria

- Proposal evaluation process
- Form of discussions permitted between the government and potential partners in relation to their proposals prior to selection of a preferred partner
- Bonding requirements
- Contract award process
- Process for measuring performance
- Statutory requirements the government must comply with relating to disclosure of intentions, counter petition and assent of electors
- Deadlines for preparation and delivery of submissions
- Communication channels—the means by which potential partners may seek clarification of the RFP document
- The identity of a government officer who is authorized to discuss and present information to prospective partners
- Appeal and rights of review
- Restrictions of potential partners to discuss the RFP with third parties
- Appendices (with other relevant information, such as labour contracts and the government's policies with respect to public-private partnerships)

Some of the information provided by bidders will be subject to copyright or may be proprietary information. As such, the RFP should expressly state the treatment of such information by the government. Bidders should also be advised of the application of privacy laws and access to information laws.

Generally, depending on the scale of the project, potential partners are given 45 to 90 days to present their submissions. If it is a large-scale project (e.g., a major sewer system or water treatment facility), the period to receive submissions can be extended at the discretion of the government. The government should consider extensions to the deadline only in extreme cases. As in the case of disclosure of information, if an extension is granted to one potential partner, it should be extended to all potential partners.

5.4.2 Advertising

If a one-stage RFP process is being used (i.e., no RFQ or RFEI), the advertising methods discussed for an RFEI and RFQ would also be sufficient for an RFP. The government may wish to advertise more broadly through print media in a larger geographic area to attract more interest and potential partners in a one-stage project, especially if the project is large in scale.

If a two-stage process has been used (i.e., an RFQ or RFEI), the government has likely already shortlisted candidates to receive the RFP. This can be beneficial to both the public and private sector proponents. In this case, extensive advertising is not required, as the RFP is only distributed to shortlisted candidates.

5.4.3 Items to Keep in Mind

In both a one-stage and two-stage process, it is important to record and keep track of all potential partners who have received the RFP and have access to information contained in it.

If the RFP document contains information that may be sensitive to the government, circulation can be restricted to a limited number of members in each bidding firm.

In any event, a thorough log should be kept of all activity and correspondence related to the project.

5.4.4 Submission Requirements

Requirements for a one-stage process

If the government has opted to use a one-stage selection process, it is possible that a number of detailed and complex proposals will be received. Evaluating these proposals is a difficult and time-consuming task. In order to establish an initial screen of submissions, information that is required in an RFQ process should be included in the mandatory requirements for the RFP.

These elements would include:

- A profile of the potential partner making the application (if the partner is to be a consortium formed for the purpose of providing a proposal, each person or firm in the consortium should provide information on its principal business and the length of time that it has been in operation);
- A statement of financial stability (that can be evaluated on a pass/fail basis);
- A statement of financial capability, including access to capital (debt and equity);

- A statement of performance capability that includes an overview of overall experience, experience in similar projects, senior management expertise, expertise of those staff members who will work on the project, ability to obtain necessary resources, and references.

If the information provided in this initial portion of the proposal is not satisfactory to the project team, potential partners can be eliminated. This initial screening will save time and allow the project team to give their full evaluation attention to fewer potential partners. The submissions in the one-stage RFP process will also have to include the requirements listed in the following section on two-stage processes.

Requirements for a two-stage process

In a two-stage process, the RFQ or RFEI is used to shortlist potential partners. Only the selected partners will be issued the RFP document. As such, information that is required in the RFQ or RFEI need not be included in the RFP requirements.

The information required in all submissions will vary depending on the needs and requirements of the project and of the government. The RFP must stipulate the format of the proposal and each submission should be submitted in that format. This will enable the project team to evaluate the proposals in an "apples to apples" comparison. If all submissions are received in the same format, a "checklist" scoring system can be used for each component, which will reduce the time required to evaluate the submissions.

The submissions should generally include the following:

- A covering letter signed by the principals of all firms that make up the potential partner's team
- A table of contents
- An executive summary of the submission
- Identification of the potential partners, including the names of all firms involved in the submission and the legal structure between them
- Details mentioned previously, if this is a one-stage RFP process.
- For infrastructure projects, a *design and construction plan*, including: design work; timeframes and timetables; permit requirements; power requirements; provisions for expanding and modifying the proposed infrastructure; details on commissioning
- A *management plan*, including: operations; treatment and development of operating manuals; maintenance; compliance with existing regulations; staffing & training of staff ; accounting,

reporting and auditing procedures; proposed relationship with government staff

- A *business plan*, including: partnership structure; duration of the proposed partnership; ownership (present and future); terms of payment; maintenance costs; reserves that need to be kept by the private partner; risk management, including that of force majeure; risk transfer from the government to the private sector partner; economic benefits to the government
- A *financial plan*, including: detailed cost schedule; financial structure; potential partner's sources of funding ; expectation of funding from the government in terms of equity or annual operations how improvements, upgrades and modifications will be financed; pro forma financial statements
- For infrastructure or service delivery partnerships where user fees will be a source of revenue, a *detailed year-by-year description of future user fees*
- *Tax expectations*, including: tax deductions; capital cost allowance; transfer to the public sector partner; GST & PST; land transfer tax; property and business tax
- *Legal arrangements*, including: legal structure of the partnership between firms or persons in a consortium; proposed legal structure between potential partner and government; special terms and conditions that will be required; compensation if project is cancelled by government; compensation if project is cancelled by potential partner; dispute resolution mechanisms; indemnities

5.4.5 Using a two-envelope system

Project teams may wish to use a *two-envelope system* in the evaluation of an RFP. The first envelope would contain all required submission contents except for the financial plan. The second envelope would contain the financial plan. Project teams have used this system in the past to avoid being swayed mainly by the financial aspects of the project. While these aspects are extremely important, proposals must also be evaluated on technical merit, including innovation, value engineering and cost savings components.

The two-envelope system can also be used as an added screen in evaluating the proposal. If the proposal meets the technical criteria established by the project team, then the second envelope detailing the financial plan can be opened and evaluated. If the proposal does not meet the technical criteria, the project team can be spared the time-consuming task of analyzing the financial plan.

5.4.6 Circulating a draft RFP

It is in the government's interest to circulate a draft request for proposal to shortlisted proponents.

This will enable the prospective private partner and government to:

- Discuss requirements that may appear unclear or ambiguous;
- Resolve other issues that may result in the private partner misunderstanding the government's objectives

5.4.7 Communicating with proponents

As mentioned previously, a carefully developed and clear RFP document is important not only for future contract negotiations, but also for building the trust of the private sector. A well-developed RFP document will demonstrate to the private sector that the government is serious about the partnership and has the ability to complete the transaction.

A solid RFP that clearly states the intentions and requirements of the government in a public - private partnership can reduce the amount of questions received by the project team from proponents. However, this does not mean that questions will be eliminated altogether. *There are a number of considerations for communications with proponents.*

These considerations include:

- Should the project team hold a meeting of potential partners who have received the RFP? This forum would allow proponents' questions to be addressed.
- Should background information be provided to all potential partners? If this is too costly, should the government consider charging a fee for the information or developing a background information centre where proponents may view relevant background information. An option would be to develop a virtual project background room on the Internet where all background information would be available to project proponents who would be issued a password to gain access to the Internet site.
- Submissions from the potential partners may contain large quantities of sensitive financial or other privileged information. How will the government ensure a commitment to confidentiality regarding the materials that are received? This will affect trust in future RFP processes.
- Who will be the contact person? All potential partners could be required to receive information from the contact person only, which might limit lobbying efforts. It can also ensure that all information will come from one person. This person will be responsible for disseminating the information to all potential partners.
- What format will information provided by the contact person should be in? In most cases, a written format is preferable as it ensures that all proponents receive exactly the same information.

- Will the project team should consider having a "black out" on proponents' contact of government staff and elected officials? In this instance, proponents would face disqualification for contacting any party other than the designated contact person.

5.5 Evaluating the Request for Proposals (RFP)

As evaluations and negotiations are most often closed to the public, it is at this stage that claims of favouritism, patronage politics and other general abuses of the process may occur. The Canadian Council for Public-Private Partnerships notes that the process must be fair, open and transparent.

This does not mean that the public becomes involved in evaluation and negotiation. Rather, the government's project team must establish an evaluation process that is perceived to be fair and free of favouritism. Many governments have established a selection panel to evaluate the proposals that is separate and independent from the project team and the government.

5.5.1 Developing Evaluation Criteria

Evaluation criteria can vary depending on the type of project and end users. Evaluation criteria can include the following:

- Proposed solution to the needs of the government (Has innovation been incorporated in the proposal? If so, is it valuable to the process?)
- Previous experience of the potential partner;
- Commitment of the proposed partner to achieving a solution that will benefit all parties;
- Understanding of the needs of the government;
- Management capacity of the potential partner;
- Compliance with the non-negotiable requirements of the government;
- Staff capability;
- Financial stability of the potential partner;
- Financial capability and ability to deliver infrastructure or services;
- Government priorities;

- Government policies;
- Proposed solutions for dealing with labour unions and government employees affected by the arrangement;
- Legality of the proposed solution;
- Likelihood that the potential partner can achieve the proposed solution;
- Final basis for making the decision, including value for money and life-cycle costs.

5.5.2 Appointing a Selection Panel

There are a number of different ways that a selection panel may be appointed. This is at the discretion of the project team and the government. However, an evaluation panel can be established to ensure the integrity and fairness of the evaluation process.

In all cases, there should be a close examination of all members of the independent evaluation panel to ensure that no conflict of interest situation will arise. To help government avoid or mitigate charges by the public of an unfair process, the following people should *not* be included on an independent selection committee:

- Any individual or committee members that will make the final decision;
- Members of the project team (whenever possible);
- Any professionals who have assisted the government in the preparation of RFQ, RFEI or RFP documents;
- Anyone who will be involved in the administration of the project.

5.5.3 The Evaluation Process

In a one-stage proposal evaluation, the same process that is used in a RFEI or RFQ evaluation may be used.

- Proposals are evaluated for their mandatory requirements. If any of these requirements have not been met, the potential partner can be eliminated from the shortlist;
- Proposals that do not adequately and clearly demonstrate financial or managerial capability or previous experience can also be eliminated, further reducing the shortlist.

Once the proposals have been through these two screens, a shortlist will have been created. The proposals that remain can then be evaluated based on the criteria set out in the RFP.

In a two-stage proposal evaluation, all of the submissions will have been received from participants who have been shortlisted through the RFEI or RFQ process. As such, all proposals will be evaluated.

Oral Presentation

If an oral presentation is required as part of the RFP process, it should be stated in the RFP requirements. The oral presentation can be beneficial for both the proponent and the evaluation panel. It allows proponents to clearly express the ideas in their proposal and to gauge the sentiments of the evaluation panel. And it allows the evaluation panel to ask questions of the potential partners. For this reason, oral presentations are strongly recommended.

If possible, all potential partners should be given the opportunity to present on the same day. The time allotted for presentations and question-and-answer sessions will vary depending on the complexity of the project, but once determined, should be the same for all proponents. Generally, if there are more than five short listed proponents, it is advisable that the presentations be limited to one hour.

Also, if possible, video-tape the oral presentation and question-and-answer sessions. All verbal agreements or commitments made in the presentation and question-and-answer session become a part of the proposal.

Site Visit

A site visit with each potential partner may be warranted. This may help the evaluation panel gain a full understanding of the mechanics of the project and the ability of the proponent to complete it.

Analysis and Ranking of Proposals

Usually, the analysis and ranking of proposals can be effectively accomplished through the use of a standardized checklist. If all proposals are submitted in the same format, the checklist becomes an even more effective comparative and analytic tool. It should be noted that the assumptions of the potential partners should be the same in order to make an effective comparison. This is especially important when the financial plan is being examined. Assumptions such as future interest rates and inflation should be taken into account and brought up to a standardized level to make a sound comparison of all proposals.

The selection panel can score the potential partners in a number of ways:

Individual Member Scoring

Each member of the selection panel is presented with a checklist. The member then scores each of the evaluation criteria for all proposals. At the end, the scores from all members are added up for each proposal. The proposal with the highest score becomes the preferred partner. Instead, the selection panel may rank the proposals. Each member's ranking score would be added and the potential partner with the best score would be the preferred partner. Both scoring systems can also be applied to oral presentations.

Scoring by Consensus

In this method, only one evaluation score is generated by the entire evaluation panel, through a process of developing consensus in the evaluation. The total score would include points awarded for the presentation and for answers to panel questions. Again, the team with the best score would become the preferred partner. It is appropriate to divide responsibilities for evaluating the proposals based on expertise of the members of the evaluation team. For example, the technical components could be reviewed by members of the team with technical expertise, while the financial and business components be reviewed by those with financial and business expertise.

5.6 Compensating Unsuccessful Proponents

When a project is delivered using a method such as the traditional tender method, private sector bidders are usually willing to submit proposals at their own cost. This is because the design work, standards and specifications have already been determined by the government.

As the amount of work required to submit a proposal increases, the private sector bidders are more likely to request an honorarium from the public sector owner as partial compensation for their costs in creating a complete proposal. Honoraria, when paid, are generally paid only to unsuccessful proponents.

Some advantages of paying an honorarium include increasing the likelihood of:

- Receiving better quality submissions;
- The public sector partner clearly 'owning' the proposal contents;
- Waivers being signed by proponents on receipt of payment not to instigate any future legal action with regards to the project's procurement process

Paying honoraria also demonstrates to prospective private partners that the government is committed to the project.

Some disadvantages of paying an honorarium include:

- Negative public opinion about paying the private sector for preparing bids
- The fact that acceptable submissions might well have been received even without payment.

The issue of paying honoraria should be addressed in the government's policy statement on public-private partnerships.

6. NEGOTIATION AND LEGAL ISSUES

This chapter looks at the legal issues and items that must be dealt with in a P3. It is imperative that all of the parties prepare and carry out negotiations with a view to completing the project successfully and achieving a win/win situation. Everyone is responsible for helping to focus negotiations and contract development so as to adequately address the real and potential risks inherently associated with this type of complex endeavour; thus, a thorough risk analysis must be undertaken by all of the parties. There are many legal issues that must be addressed and numerous contracts to prepare.

N.B., Much of the information contained in this chapter is based on the results of the *Report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its thirty-third session*

6.1 Negotiations

Once the selection team has chosen the preferred private partner, the public -private partnership agreement must be negotiated. This section contains guidelines for:

- Reaffirming government objectives
- Establishing a negotiating team
- Determining the type of agreement and what it should include
- Dddressing labor law and statutory regulations

These guidelines should be taken into account in negotiating the partnership agreement.

6.1.1 Preparing for the Negotiations

The results of the evaluation process should be presented to political body for a decision prior to the start of contract negotiations with the successful applicant. The following guidelines should be taken into account in the negotiation of a public -private partnership.

Government Objectives

Government objectives should be reaffirmed, including:

- Ensuring the agreements contain all necessary controls over quality, excellence and effectiveness of the service or facility, since these matters generally cannot be regulated unilaterally by the government after the long-term agreements are made;
- Clearly allocating the risks between the government and the private partner;

- Ensuring the combination of benefits afforded by the public-private partnership will be better than if only the government provided the facility or service (e.g., cost, service, implementation time);
- Ensuring the public is protected in the event the private partner becomes insolvent, bankrupt or walks away during the term of the agreement;
- Ensuring the government is obtaining value for money the consideration provided by the government must be balanced by the benefits received by the community;

Establishing a Government Negotiating Team

It is important to have a leader or point person to lead the negotiations. There can only be one leader, so the other side does not "divide and conquer" and so that one individual takes responsibility and accountability for the process and results. This person leads the preparation and the negotiations.

Team members are necessary for conferencing before and during negotiations, taking notes, providing specialized advice (e.g., financial calculations during negotiations) and having knowledge of the documents as the negotiations progress.

The negotiating team must prepare by establishing objectives, strategically planning, ascertaining the facts and conducting due diligence regarding the private partner. Such strategic planning deals with long-range objectives and is more important than tactics.

First, it is important to establish objectives as opposed to simply positions. These objectives must be based on the strong commitment of the team, be the result of significant preparation, have the support of the government elected body and be realistic in light of the powers of the government. When these have been outlined, tactics can then be planned to achieve public sector objectives and strategies. All strategies and tactics should be vetted with the government elected body so there are no surprises.

It is important to find out about the private party that is partnering with the government. Information may be obtained from discussions with junior members of other negotiating teams or other representatives of the private partner, investor newsletters, financial statements, banks, contractors with the other party, other governments and in some cases, the proceedings of tribunals (e.g., Utilities Commission).

If the private party contacts the government during the negotiations, it is important to listen but provide no information. Identify the strengths and weaknesses of each side in the negotiations and try to ascertain what is the least-cost alternative, least-worth alternative and bottom line of the private partner.

Objectives to be Achieved During the Negotiation Process

There are a number of objectives to be achieved during the negotiation process. These include:

- Identifying responsibilities of the respective public and the private partners
- Setting out the legal liabilities of the respective public and private partners
- Identifying clear standards of performance, goods to be delivered, services performed and delivery or performance dates
- Ensuring control of costs, quality, service, deadlines, safety, community relations, compliance and operating/maintenance requirements
- Balancing risks and benefits between the public and private partners (e.g., financial savings, return on investment, increased service)
- Contingency arrangements if the private partner is dissolved, bankrupt, contravenes the agreement or agreements, or if the partnership is dissolved
- Identifying mechanisms for monitoring performance, quality of service and other government objectives
- Establishing conflict resolution mechanisms
- Providing a buy-back clause to permit the government to reacquire the service or facility

6.2 Contract Building Blocks

Depending on the nature of the public-private partnership, there may be a need to negotiate a number of agreements, including:

- A development agreement that defines the successful proponent's obligations and rights regarding the design and construction aspects of the projects;
- A management and operations agreement that defines the successful proponent's obligations and rights regarding the management and operations of the facility;
- A transfer agreement, which may be required where an interest in property is being transferred. Some forms of public-private partnership may involve more than one transfer (e.g., transfer to private partner at outset and transfer back to government at the end of the term).

In addition to the types of agreements that relate to specific aspects of the public-private partnership, there are also different types of contracts relating to how payment is determined. Options include:

Contract	Typical Use
Fixed price	Used when management and operation of a facility or service is comparatively simple, predictable and certain. The details of the work must be prescribed in the standards, specifications and drawings attached to the contract. There must also be performance measurement mechanisms built into the agreement. Governments use fixed price contracts to take advantage of the private partner's experience and expertise at a competitive price.
Unit price	Relates consideration to units of service or materials. The standards and specifications identify the level of service or description of materials. Governments use these contracts for service, operating or maintenance agreements, or a combination of these. In this type of contract, the government is able to benefit from a competitive price.
Cost-plus fee	Used when the scope of the work or service is not well-defined at the outset, for example, if new or untried technology will be installed or if the quantity of the work or service is not known at the outset. Normally, the private partner negotiates a fee or profit margin while the government controls all other costs directly. Governments benefit because the private partner can provide unique expertise or experience.
Phased	Used as an alternative to a cost-plus fee contract in the case of a complex facility development or where the proposed facility or service has not been well-defined. The private partner agrees to a fixed price or unit price, combined with details of work to be performed at each phase.

6.3 Labour Law Issues

Before the P3 agreement is negotiated, it is necessary for the government to address labour law issues. These issues include:

- Successorship for union members
- Honouring "contracting out" provisions of collective agreements
- Determining whether any staff will be relocated to the private partner
- Dealing with the treatment of individual employees at the end of the contract term

Statutory Authority

Before completing negotiations, it is important to ensure that the elements of the arrangements are authorized by a statute or regulation, and that nothing contemplated in the arrangements is prohibited by statute or regulation.

6.4 Agreement Contents Checklist

While each agreements relating to a public- private partnership arrangement is different, some items should be considered for inclusion:

- A description of the project (including information on the scope of the project), deliverables, the term and the effective date of the agreement;
- Payment provisions, including the time, amount and currency;
- Identification of the private partner's management team, including:
 - identification of key individuals and covenants relating to their participation
 - identification of the contract manager
 - provisions for the replacement of key individuals or contract managers
 - requirements for private partner representatives, officers or employees to be on site or in the community
- Administrative relationships of the parties, including:
 - identification of the parties' contract manager
 - clarification as to whether the government may inspect, attend on the site, monitor, measure results or otherwise administer the terms and conditions of the agreement
 - a review process, pursuant to which the parties assess performance
 - schedules of meetings and who should attend, in relation to contract administration
- Transfer, lease, licence or use of government premises or facilities, including responsibilities for insurance, liability, security, operation and maintenance;
- Allocation of revenue from services or facilities;
- Acceptance of deliverables;
- Contract revision arising from material change (e.g., changes in technology, equivalent materials, applicable laws, acts of God or other unforeseen circumstances);
- Lending, borrowing and financing arrangements, including payments, rates, security and notice;
- Indemnity, release and insurance provisions;
- Due diligence of the parties;
- Applicable manuals, including their preparation, approvals and amendment;
- Risk management strategy, including risk allocation, guarantees and warranties;

- Dealing with statutory and regulatory requirements;
- "Re-openers" to deal with major change;
- Process, including approvals, related to engaging subcontractors or other private partners;
- Termination provisions, including:
 - business failure
 - insolvency or bankruptcy
 - breach of contract
 - major change, including provision for re-entry or buy-back by the government, transfer to another private partner or shutting down the project
- Labour relations provisions, including:
 - successor rates
 - wage and benefit guarantees
 - dealing with the cost of staff reduction
 - treatment of employees on contract termination
 - relocation of identified employees to the private partner
 - Workers' Compensation Board provisions
 - employment equity, if applicable
 - fair wages, if applicable
 - local preference for hiring
- User fees regulation
- General matters, including:
 - conflict or dispute resolution mechanisms, such as commercial arbitration, alternate dispute resolution or other remedies or recourses
 - confidentiality and privacy, subject to the Freedom of Information and Protection of Privacy Act
 - force majeure
 - notices where information is to be sent and conditions governing transfer of information between or among the parties
 - termination provisions that identify which clauses survive termination
 - clarification that the contract is governed by the laws of the specific province and Canada
 - establishment of a contract amendment process
 - clarification that the set of agreements constitutes the entire agreement between the parties and supersedes any prior communications
 - identification of how rights may or may not be waived or acquiesced to during the term
 - publicity

- ownership of intellectual property, facilities or new technologies developed

6.5 Setting the Negotiation Framework

The Project Team and the preferred bidder will need to work together to set terms for negotiations. Such terms typically include the following:

- A timetable for the negotiation;
- A clear definition of negotiating issues;
- A clear authority to make decisions on behalf of their organizations;
- A method of recording all matters agreed on throughout the negotiation process and for controlling the drafts;
- A process for resolving any conflicts.

6.6 Managing Risk

Prior to beginning negotiations it is incumbent on all parties to understand the risks involved and properly allocate those risks to the required parties.

NB. Much of this material relating to the legal issues affecting has been taken from the *Report of the United Nations Commission on International Trade Law on the work of its thirty-third session (UNCITRAL)*.

An analysis of risk allocation among partners, as compared to risk assignment under traditional procurement methods, will assist in determining the relative merits of a P3 proposal. Risk Analysis is an integral part of the value for money determination.

The objective of the risk analysis is to:

- Identify all significant risks;
- Estimate the probability that each event will occur;
- Estimate each event's economic (or other) impact on the project;
- Determine how best to manage, avoid, or pay for each event's consequences; and
- Determine whether risk transfer to the private sector is optimal and appropriately reflected in the project costs.

Whichever risk analysis methodology is used, it should be documented and consistently applied.

The notion of "project risks" refers to those circumstances which, in the assessment of the parties, may have a negative effect on the benefit they expect to achieve with the project. While there may be events that would represent a serious risk for most parties (for example, the physical

destruction of the facility by a natural disaster), each party's risk exposure will vary according to its role in the project.

6.6.1 Risk Allocation

The expression "risk allocation" refers to the determination of which party or parties should bear the consequences of the occurrence of events identified as project risks.

The party bearing a given risk may take preventive measures with a view to limiting the likelihood of the risk, as well as specific measures to protect itself, in whole or in part, against the consequences of the risk. Such measures are often referred to as "risk mitigation".

For example, a project company will carefully review the reliability of the equipment suppliers and the technology proposed. The project company may require its equipment suppliers to provide independent guarantees concerning the performance of their equipment.

The supplier may also be liable to pay penalties or liquidated damages to the project company for the consequences of failure of its equipment. In some cases, a more or less complex chain of contractual arrangements may be made to mitigate the consequences of a project risk. For instance, the project company may combine the guarantees provided by the equipment supplier with commercial insurance covering some consequences of the interruption of its business as a result of equipment failure.

Some typical classes of risk include:

Project disruption caused by events outside the control of the parties

The parties face the risk that the project may be disrupted by unforeseen or extraordinary events outside their control, which may be of a physical nature, such as natural disasters, or the result of human action, such as war, riots or terrorist attacks.

Project disruption caused by adverse acts of Government ("political risk")

The project company and the lenders face the risk that the project execution may be negatively affected by acts of the contracting authority, another agency of the government or the host country's legislature.

Such risks are often referred to as "political risks" and may be divided into three broad categories :

- "traditional" political risks (for example, nationalization of the project company's assets or imposition of new taxes that jeopardize the project company's prospects of debt repayment and investment recovery);
- regulatory risks (for example, introduction of more stringent standards for service delivery or opening of a sector to competition) and

- "quasi-commercial" risks (for example, breaches by the contracting authority or project interruptions due to changes in the contracting authority's priorities and plans)

In addition to political risks originating from the host country, some political risks may result from acts of a foreign government, such as blockades, embargoes or boycotts imposed by the governments of the investors' home countries.

Construction and operation risks

The main risks that the parties may face during the construction phase are the risks that the facility cannot be completed at all or cannot be delivered according to the agreed schedule (completion risk); that the construction cost exceeds the original estimates (construction cost overrun risk); or that the facility fails to meet performance criteria at completion (performance risk).

Similarly, during the operational phase the parties may face the risk that the completed facility cannot be effectively operated or maintained to produce the expected capacity, output or efficiency (performance risk); or that the operating costs exceed the original estimates (operation cost overrun). It should be noted that construction and operation risks do not affect only the private sector. The contracting authority and the users may be severely affected by an interruption in the provision of needed services. The government, as representative of the public interest, will be generally concerned about safety risks or environmental damage caused by improper operation of the facility.

Commercial risks

"Commercial risks" relate to the possibility that the project cannot generate the expected revenue because of changes in market prices or demand for the goods or services it generates. Both of these forms of commercial risk may seriously impair the project company's capacity to service its debt and may compromise the financial viability of the project.

6.6.2 Contractual Arrangements for Risk Allocation and Mitigation

It follows from the above that the parties need to take into account a wide range of factors to allocate project risks effectively. For this reason, it is generally not advisable to have in place statutory provisions that limit unnecessarily the negotiators' ability to achieve a balanced allocation of project risks, as appropriate to the needs of individual projects. Nevertheless, it may be useful for the government to provide some general guidance to officials acting on their behalf by, for instance, formulating advisory principles on risk allocation.

One such principle is that specific risks should normally be allocated to the party best able to assess, control and manage the risk. Additional guiding principles envisage the allocation of project risks to the party with the greatest ability to diversify the risks or to mitigate them at the lowest cost. In practice, however, risk allocation is often a factor of both policy considerations (for example, the public interest in the project or the overall exposure of the contracting authority

under various projects) and the negotiating strength of the parties. Furthermore, in allocating project risks it is important to consider the financial strength of the parties to which a specific risk is allocated and their ability to bear the consequences of the risk, should it occur.

It is usually for the project company and its contractors to assume ordinary risks related to the development and operation of the infrastructure. For instance, completion, cost overrun and other risks typical of the construction phase are most often allocated to the construction contractor or contractors through a turnkey construction contract, whereby the contractor assumes full responsibility for the design and construction of the facility at a fixed price, within a specified completion date and according to particular performance specifications.

The construction contractor is typically liable to pay liquidated damages or penalties for any late completion. In addition, the contractor is also usually required to provide a guarantee of performance, such as a bank guarantee or a surety bond. Separate equipment suppliers are also usually required to provide guarantees in respect of the performance of their equipment. Guarantees of performance provided by contractors and equipment suppliers are often complemented by similar guarantees provided by the concessionaire to the benefit of the contracting authority.

Similarly, the project company typically mitigates its exposure to operation risks by entering into an operation and maintenance contract in which the operating company undertakes to achieve the required output and assumes the liability for the consequences of operational failures.

In most cases, arrangements of this type will be an essential requirement for a successful project. The lenders, for their part, will seek protection against the consequences of those risks, by requiring the assignment of the proceeds of any bonds issued to guarantee the contractor's performance, for instance. Loan agreements typically require that the proceeds from contract bonds be deposited in an account pledged to the lenders (that is, an "escrow account"), as a safeguard against misappropriation by the project company or against seizure by third parties (for example, other creditors). Nevertheless, the funds paid under the bonds are regularly released to the project company as needed to cover repair costs or operating and other expenses.

6.7 Risk strategy

A risk management strategy is essential so that the chief negotiator for the government knows what is negotiable, what is non-negotiable, and the reasonable amount of risk the government is willing to take. The strategy contains three parts.

First, the government identifies what can possibly go wrong, and the causes and the results. Then it needs to test potential combinations of loss exposures and determine the impact of these events on design, the construction process, service delivery, partners, and financing.

Secondly, it should evaluate the risks to determine the cost of the losses. By developing a list of best to worst case scenarios, the government can determine the probability of when and the type of losses which might occur. If any of those incidents does occur, then it can forecast the impact on the financial status of the project, on the private partners or on their financial backers.

The final part of the risk management strategy is to plan to negotiate the contract so that risks are avoided, the chances of the identified events occurring have been minimised, and determine if the government will retain or bear the risk, or transfer it to another party, either the private partner or a commercial insurer.

Ideally, the government and the private partner should exhibit a willingness to be ready to develop and consider innovative solutions to deal with any differences between the RFP and the winning proposal.

There may be an occasion when tradeoffs may have to be made on lesser items, in order to reach agreement on a major element in the contract. The government should know before-hand what it is and isn't willing to ease back on.

6.8 Dispute Management

Commonly used methods for preventing and settling disputes

The following chart sets out the essential features of methods used for preventing and settling disputes and consider their suitability for the various phases of large infrastructure projects, namely, the construction phase, the operational phase and the post-termination phase. Although the project agreement usually provides for composite dispute prevention and dispute settlement mechanisms, care should be taken to avoid excessively complex procedures or to impose too many layers of different procedures.

Note: The following is intended to inform legislators about the particular features and usefulness of these various methods. It should not be understood as a recommendation for the use of any particular combination of methods.

Method	Advantage	Disadvantage	Expected Results
Early warning	<p>Early warning provisions may be an important tool to avoid disputes. Early warning provisions are useful throughout the duration of an infrastructure project. Under early warning provisions, if one of the parties to a contract feels that events that have occurred, or claims that the party intends to make, have the potential to cause disputes, these events or claims should be brought to the attention of the other party as soon as possible.</p>	<p>Sanctions can make this method costly to one of the parties</p>	<p>Can avoid disputes</p>
Partnering	<p>The object of partnering is to create an environment of trust, teamwork and cooperation among all key parties involved in the project. Partnering relationships are defined in workshops attended by the key parties to the project, and usually organized by the contracting authority, where a mutual understanding of the concept of partnering is established, goals for the project for all the parties are defined and a procedure to resolve critical issues quickly is developed.</p>	<p>If a solution is not reached within a given time-frame, the issue is raised to the next level of management.</p>	<p>Avoids disputes and helps build trust</p>

Method	Advantage	Disadvantage	Expected Results
Facilitated negotiation	The parties appoint a facilitator at the commencement of the project. His function is to assist the parties in resolving any disputes, without providing subjective opinions on the issues, but rather coaxing them into analyzing thoroughly the merits of their cases.	Non-binding	Aids the parties in the negotiation process
Mediation and conciliation	<p>Conciliation differs from negotiations between the parties in dispute (in which the parties would typically engage after the dispute has arisen) in that conciliation involves independent and impartial assistance to settle the dispute, whereas in settlement negotiations between the parties no third-person assistance is involved.</p> <p>The conciliation procedure is usually private, confidential, informal and easily pursued. It may also be quick and inexpensive.</p>	Non-binding may be complex	Can help to avoid costly and lengthy disputes. Can be kept private, and be based on neutral UNCITRAL conciliation rules
Non-binding expert appraisal	This procedure is useful where the parties have difficulty in communicating because their positions have become entrenched, or where they do not see clearly the weaknesses of their positions or the strengths of the other party's positions.	Must use an expert trusted by all parties	Serves as a "reality check" showing the contesting parties what the possible outcome of the more expensive and usually, slower binding procedures such as arbitration or court proceedings would be.

Method	Advantage	Disadvantage	Expected Results
Mini-trial	After the submissions, which are typically to be made within predetermined time periods, the executives enter into a facilitated negotiation procedure with the assistance of a neutral person, to try to reach an agreement taking advantage of the issues that have been elucidated during the "trial".	Can be complex and somewhat costly procedure	The purpose of the mini-trial is to inform senior executives of the issues involved in the dispute and to serve as a reality check of what the outcome of a real trial might be.
Senior executive appraisal	The senior executive appraisal tends to be less of a strong reality check than the non-binding expert appraisal and therefore less likely to motivate difficult decisions in the absence of commercial pressure to do so.	Sometimes will not be enough to motivate difficult decisions	Can avoid costly disputes and be organized quickly
Review of technical disputes by independent experts	Independent experts have often been used for the settlement of technical disputes under construction contracts, and the various mechanisms and procedures developed in the practice of the construction industry may be used, mutatis mutandis, in connection with privately financed infrastructure projects.	In P3 the issues are often more complex than those found in the construction industry, and therefore, it may be hard to find an expert	Avoids disputes and may help narrow issues, even if the dispute is not fully settled

Method	Advantage	Disadvantage	Expected Results
Dispute review boards	Proceedings before a dispute review board can be informal and expeditious, and tailored to suit the characteristics of the dispute that it is called on to settle. The appointment of a dispute review board may prevent misunderstandings or differences between the parties from developing into formal disputes that would require settlement in arbitral or judicial proceedings.	Difficult to constitute a committee that can deal with all the issues in dispute	A well constituted board can bring prestige and influence, and can help induce a settlement
Non-binding arbitration	This procedure is sometimes used when less adversarial methods such as facilitated negotiation, conciliation or dispute review board procedures have been unsuccessful. Non-binding arbitration is conducted in the same manner as binding arbitration, and the same rules may be used except that the procedure ends with a recommendation.	Non-binding and will leave parties with the leeway to continue disputes	Can help avoid costly and lengthy arbitration and litigation

Method	Advantage	Disadvantage	Expected Results
<p data-bbox="186 250 326 277">Arbitration</p> <p data-bbox="186 348 443 629">*For more information about the International Centre for the Settlement of Investment Disputes http://www.uncitral.org/english/sessions/unc/unc-33/acn9-471-7.pdf pages 11-12 para. 30-38 (http://www.worldbank.org/icsid/)</p>	<p data-bbox="467 250 789 899">Arbitration is preferred by private investors and lenders, in particular foreign ones, since arbitral proceedings may be structured by the parties, so as, to be less formal than judicial proceedings and better suited to the needs of the parties and to the specific features of the disputes likely to arise under the project agreement. Arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings.</p>	<p data-bbox="820 250 1141 343">Can be costly and difficult for the relationship between the parties</p>	<p data-bbox="1170 250 1417 582">Very common method for commercial dispute resolution. Usually much faster and less costly than court proceedings, and provides a final resolution, without appeal</p>

Method	Advantage	Disadvantage	Expected Results
Judicial proceedings	The courts are familiar with the law of the country, which often includes specific legislation directly applicable to the project agreement. Furthermore, the contracting authority and other governmental agencies of the host country that might be involved in the dispute, may prefer local courts because of the familiarity with the court procedures and the language of the proceedings. It may also be considered that, to the extent project agreements involve issues of public policy and the protection of public interest, state courts are in a better position to give them proper effect.	Judicial proceedings can be disruptive to business relation between the parties. They are usually lengthy and costly.	When it is unavoidable it will bring a dispute to final resolution, once all recourses are exhausted

6.9 Assignment of the Concession

Concessions are granted in view of the particular qualifications and reliability of the concessionaire and in most legal systems they are not freely transferable. The purpose of these restrictions is typically to ensure the contracting authority's control over the qualifications of infrastructure operators or public service providers.

Some countries have found it useful to mention in the legislation the conditions under which approval for the transfer of a concession prior to its expiry may be granted, such as, for example, acceptance by the new concessionaire of all obligations under the project agreement and evidence of the new concessionaire's technical and financial capability to provide the service. General legislative provisions of this type may be supplemented by specific provisions in the project agreement setting forth the scope of those restrictions, as well as the conditions under which the consent of the contracting authority may be granted. However, it should be noted that restrictions typically apply to the voluntary transfer of its rights by the concessionaire; they do not preclude the compulsory transfer of the concession to an entity appointed by the lenders, with the consent

of the contracting authority, for the purpose of averting termination due to serious default by the concessionaire.

6.10 Transfer Of Controlling Interest In The Project Company

The contracting authority may be concerned that the original members of the bidding consortium maintain their commitment to the project throughout its duration and that effective control over the project company will not be transferred to entities unknown to the contracting authority. Concessionaires are selected to carry out infrastructure projects at least partly on the basis of their experience and capabilities for that sort of project.

Contracting authorities are therefore concerned that, if the concessionaire's shareholders are entirely free to transfer their investment in a given project, there will be no assurance as to who will actually be delivering the relevant services. Contracting authorities may draw reassurance from the experience that the selected bidding consortium demonstrated in the pre-selection phase and from the performance guarantees provided by the parent organizations of the original consortium and its subcontractors. In practice, however, the reassurance that may result from the apparent expertise of the shareholders in the concessionaire should not be overemphasized.

Where a separate legal entity is established to carry out the project, which is often the case, the backing of the concessionaire's shareholders, should the project run into difficulties, may be limited to their maximum liability. Thus, restrictions on the transferability of investment, in and of themselves, may not represent sufficient protection against the risk of performance failure by the concessionaire. In particular, these restrictions are not a substitute for appropriate contractual remedies under the project agreement, such as monitoring of the level of service provided or termination without full compensation in case of unsatisfactory performance.

In addition to the above, restrictions on the transferability of shares in companies providing public services may also present some disadvantages for the contracting authority.

There are numerous types of funding available from different investors for different risk and reward profiles. The initial investors, such as construction companies and equipment suppliers, will seek to be rewarded for the higher risks they take on, while subsequent investors may require a lesser return commensurate with the reduced risks they bear. Most of the initial investors have finite resources and need to recycle capital in order to be able to participate in new projects. Therefore, those investors might not be willing to tie up capital in long-term projects. At the end of the construction period, the initial investors might prefer to sell their interest on to a secondary equity provider whose required rate of return is less. Once usage is more certain, another refinancing could take place.

However, if the investors' ability to invest and re-invest capital for project development is restricted by constraints on the transferability of shares in infrastructure projects, there is a risk of a higher cost of funding. In some circumstances it may not be possible to fund a project at all, as

some investors whose involvement may be crucial for the implementation of the project may not be willing to participate. From a long-term perspective, the development of a market place for investment in public infrastructure may be hindered if investors are unnecessarily constrained in the freedom to transfer their interest in privately financed infrastructure projects.

For the above reasons, it may be advisable to limit the restrictions on the transfer of a controlling interest in the project company to a certain period of time (for example, a certain number of years after the entry into force of the project agreement) or to situations where such restrictions are justified by reasons of public interest.

One such situation may be where the concessionaire is in possession of public property or where the concessionaire receives loans, subsidies, equity or other forms of direct governmental support. In these cases, the contracting authority's accountability for the proper use of public funds requires assurances that the funds and assets are entrusted to a solid company, to which the original investors remain committed during a reasonable period.

Another situation that may justify imposing limitations on the transfer of shares of concessionaire companies may be where the contracting authority has an interest in preventing transfer of shares to particular investors. For example, the contracting authority may wish to control acquisition of controlling shares of public service providers to avoid the formation of oligopolies or monopolies in liberalized sectors. Or it may not be thought appropriate for a company that had defrauded one part of government to be employed by another through a newly acquired subsidiary.

In these exceptional cases it may be advisable to require that the initial investors seek the prior consent of the contracting authority before transferring their equity participation. It should be made clear in the project agreement that any such consent should not be unreasonably withheld or unduly delayed. For transparency purposes, it may also be advisable to establish the grounds for withholding approval and to require the contracting authority to specify in each instance the reasons for any refusal.

The appropriate duration of such limitations—whether for a particular phase of the project or for the entire concession term—may need to be considered on a case-by-case basis. In some projects, it may be possible to relax such restrictions after the facility has been completed. It is also advisable to clarify in the project agreement whether these limitations, if any, should apply to the transfer of any participation in the concessionaire, or whether the concerns of the contracting authority will focus on one particular investor (such as a construction company or the facility designer) while the construction phase lasts or for a significant time beyond.

6.11 Construction Works

Contracting authorities purchasing construction works typically retain extensive monitoring and inspection rights, including the right to review the construction project and request modifications to it, to follow closely the construction work and schedule, to inspect and formally accept the

completed work and to give final authorization for the operation of the facility. On the other hand, in many privately financed infrastructure projects, the contracting authority may prefer to transfer such responsibility to the concessionaire.

Instead of assuming direct responsibility for managing the details of the project, the contracting authorities may prefer to transfer that responsibility to the concessionaire by requiring the latter to assume full responsibility for the timely completion of the construction. The concessionaire, too, will be interested in ensuring that the project is completed on time and that the cost estimate is not exceeded, and will typically negotiate fixed-price, fixed-time turnkey contracts that include guarantees of performance by the construction contractors.

Therefore, in privately financed infrastructure projects it is the concessionaire that for most purposes performs the role that the employer would normally play under a construction contract. For these reasons, legislative provisions on the construction of privately financed infrastructure facilities are in some countries limited to a general definition of the concessionaire's obligation to perform the public works in accordance with the provisions of the project agreement and give the contracting authority the general right to monitor the progress of the work with a view to ensuring that it conforms to the provisions of the agreement. In those countries, more detailed provisions are then left to the project agreement.

6.11.1 Review and Approval of Construction Plans

Where it is felt necessary to deal with construction works and related matters in legislation, it is advisable to devise procedures that help to keep completion time and construction costs within estimates and lower the potential for disputes between the concessionaire and the public authorities involved.

For instance, where statutory provisions require that the contracting authority review and approve the construction project, the project agreement should establish a deadline for the review of the construction project and provide that the approval shall be deemed to be granted if no objections are made by the contracting authority within the relevant period. It may also be useful to set out in the project agreement the grounds on which the contracting authority may raise objections to or request modifications in the project, such as safety, defence, security, environmental concerns or non-conformity with the specifications.

6.11.2 Variation in the Project Terms

During the course of construction of an infrastructure facility, it is common for situations to arise that make it necessary or advisable to alter certain aspects of the construction. The contracting authority may therefore wish to retain the right to order changes in respect of such aspects as the scope of construction, the technical characteristics of equipment or materials to be incorporated in the work or the construction services required under the specifications. Given the complexity

of most infrastructure projects, it is not possible to exclude the need for variations in the construction specifications or other requirements of the project.

However, such variations often cause delay in the execution of the project or in the delivery of the public service; they may also render the performance under the project agreement more onerous for the concessionaire. Furthermore, the cost of implementing extensive variation orders may exceed the concessionaire's own financial means, thus requiring substantial additional funding that may not be obtainable at an acceptable cost.

It is therefore advisable for the contracting authority to consider measures to control the possible need for variations. The quality of the feasibility studies required by the contracting authority and of the specifications provided during the selection process play an important role in avoiding subsequent changes in the project. The project agreement should set forth the specific circumstances under which the contracting authority may order variations in respect of construction specifications and the compensation that may be due to the concessionaire, as appropriate, to cover the additional cost and delay entailed by implementing the variations.

The project agreement should also clarify the extent to which the concessionaire is obliged to implement those variations and whether the concessionaire may object to variations and, if so, on which grounds. According to the contractual practice of some legal systems, the concessionaire may be released of its obligations when the amount of additional costs entailed by the modification exceeds a set maximum limit.

Various contractual approaches for dealing with variations have been used in large construction contracts to deal with the extent of the contractor's obligation to implement changes and the required adjustments in the contract price or contract duration. Such solutions may also be used to deal with variations sought by the contracting authority under the project agreement. It should be noted, however, that in infrastructure concessions the project company's payment consists of user fees or prices for the output of the facility, rather than a global price for the construction work.

Thus, compensation methods used in connection with infrastructure concessions sometimes include a combination of various methods, ranging from lump-sum payments to tariff increases, or extensions of the concession period. For instance, there may be changes that result in an increase in the cost that the concessionaire may be able to absorb and finance itself and amortize by means of an adjustment in the tariff or payment mechanism, as appropriate. If the concessionaire cannot refinance or fund the changes itself, the parties may wish to consider lump-sum payments as an alternative to an expensive and complicated refinancing structure.

6.11.3 Monitoring Powers of the Contracting Authority

In some legal systems, public authorities purchasing construction works customarily retain the power to order the suspension or interruption of the works for reasons of public interest.

However, with a view to providing some reassurance to potential investors, it may be useful to limit the possibility of such interference and to provide that no such interruption should be of a duration or extent greater than is necessary, taking into consideration circumstances that gave rise to the requirement to suspend or interrupt the work. It may also be useful to agree on a maximum period of suspension and to provide for appropriate compensation to the concessionaire.

Furthermore, guarantees may be provided to ensure payment of compensation or to indemnify the concessionaire for loss resulting from suspension of the project. In cases where, facilities become public property once construction is finished, formal acceptance is typically given only after inspection of the completed facility and satisfactory conclusion of the necessary tests to ascertain that the facility is operational and meets the specifications and technical and safety requirements. Even where formal acceptance by the contracting authority is not required (for example, where the facility remains the property of the concessionaire), provisions concerning final inspection and approval of the construction work by the contracting authority are often required in order to ensure compliance with health, safety, building or labour regulations.

The project agreement should set out in detail the nature of the completion tests or the inspection of the completed facility; the timetable for the tests (for instance, it may be appropriate to undertake partial tests over a period, rather than a single test at the end); the consequences of failure to pass a test; and the responsibility for organizing the resources for the test and covering the corresponding costs.

In some countries, it has been found useful to authorize the facility to operate on a provisional basis, pending final approval by the contracting authority, and to provide an opportunity for the concessionaire to rectify defects that might be found at that juncture.

6.11.4 Guarantee Period

The construction contracts negotiated by the concessionaire will typically provide for a quality guarantee under which the contractors assume liability for defects in the works and for inaccuracies or insufficiencies in technical documents supplied with the works, except for reasonable exclusions (such as normal wear and tear or faulty maintenance or operation by the concessionaire). Additional liability may also derive from statutory provisions or general principles of law, such as a special extended liability period for structural defects in works, which is provided in some legal systems. The project agreement should provide that final approval or acceptance of the facility by the contracting authority will not release the construction contractors from any liability for defects in the works and for inaccuracies or insufficiencies in technical documents that may be provided under the construction contracts and the applicable law.

6.12 Duration of the Project Agreement

The laws of some countries contain provisions that limit the duration of infrastructure concessions to a certain number of years. Some laws establish a general limit for most

infrastructure projects and special limits for projects in particular infrastructure sectors. In some countries there are maximum duration periods only for certain infrastructure sectors.

The desirable duration of a project agreement may depend on a number of factors, such as the operational life of the facility; the period during which the service is likely to be required; the expected useful life of the assets associated with the project; how changeable the technology required for the project is; and the time needed for the concessionaire to repay its debts and amortize the initial investment.

The notion of economic "amortization", in this context, refers to the gradual charging of the investment made against project revenue on the assumption that the facility would have no residual value at the end of the project term. Given the difficulty of establishing a single statutory limit for the duration of infrastructure projects, it is advisable to provide the contracting authority with some flexibility to negotiate, in each case, a term that is appropriate to the project in question.

In some legal systems, this result is achieved by provisions that require that all concessions should be subject to a maximum duration period, without specifying any number of years. Sometimes the law only indicates which elements are to be taken into account for determining the duration of the concession, which may include the nature and amount of investment required to be made by the concessionaire and the normal amortization period for the particular facilities and installations concerned.

Some project- or sector-specific laws provide for a combined system requiring that the project agreement should provide for the expiry of the concession at the end of a certain period or once the debts of the concessionaire have been fully repaid and a certain revenue, production or usage level has been achieved, whichever is the earliest. However, where it is found necessary to adopt statutory limits, the maximum period should be sufficiently long to allow the concessionaire to repay its debts fully and to achieve a reasonable profit. Furthermore, it may be useful to authorize the contracting authority, in exceptional cases, to agree to longer concession periods, taking into account the amount of the investment and the required recovering period, and subject to special approval procedures.

7. CONCLUSIONS

It is important to remember that any P3 project involves the merging of two entirely different cultures. While the public side may understand the private partner's desire to ensure profitability, they have likely not *lived* in that environment. The same might sometimes be said for the private partner's understanding of the management of a public good.

For any public-private partnership to be successful over the long term, both sides must endeavour to understand the other side's cultural biases. They will probably also need to make changes to their internal culture.

For example, the public sector partner's management style will likely need to change from one of "hands-on" project management to that of what the UK government calls an "intelligent customer". It is most likely that the responsibility for the day-to-day operations has been transferred to the private sector, with functional details worked out earlier in the contracting stage. Overall, the main goal is that the agreed on service requirements are met. It should not matter so much to the contract manager *how* these are met, just that they are.

But that does not mean that the public partner will stop understanding the industry and the service being provided. Quite the contrary. To be an "intelligent" customer, management must keep current on any changes, including technical ones that might make for more efficient operations, because these changes may need to be managed.

Experience has shown that contract management is a distinct activity, with its own required skills and knowledge.

7.1 Contract management:

A good contract manager or management team is key to any successful P3 project.

A contract manager must be the single point of contact, ensuring not only that the obligations of the contract are met, but also that the agreed on risk allocation is maintained throughout the life of the agreement.

The manager and/or the management team will require skills ranging from contract management skills to interpersonal skills. While these skills can be maintained in-house or on-call, experience suggests that a strong, capable contract manager should be at the helm of any team and that this manager and staff be appointed at an early stage; in this way, they will be aware of how the contract was developed and the finer points of what was agreed to.

Training on contract management and partnerships will likely need to be offered to core project team staff. Perhaps some of this training can be offered in conjunction with the partner to save costs and start a solid working relationship.

"It is important to move quickly on education and training. Experience elsewhere has shown that the P3 process can be damaged if the requirements for action are ahead of the capacity of participants to deliver. This is not a 'go slow' recommendation; rather it demonstrates the critical nature of the education component in implementing P3s."

Building Partnerships: Report of the Task Force on Public-Private Partnerships, BC Gov't 1996,

No matter what the situation, the length of most P3 arrangements means that some staff will likely change. With continuity difficult to maintain, succession planning is important

Depending on the intricacies of the project, it may also be prudent to hire auditors occasionally to ensure the adequacy of the government's contract management and performance monitoring abilities and procedures.

7.2 Communication and reporting

Just as in earlier portions of the P3 process, solid and open communication is a key to success throughout the delivery stage of the project. It will foster a positive environment, help to eradicate hidden agendas and contribute to an environment where conflicts are resolved early on. This includes communication between the partners and communication with external users groups and taxpayers.

Of course, every P3 project will require regular reporting on the deliverables and other elements of the contract. Such reporting will likely be part of the deliverables and, in many cases, a prerequisite for some payments.

Whatever the formula, a reporting scheme should be developed and agreed -on at an early stage. It should be kept simple, with requirements to monitor only the essentials of the contract.

There will be costs associated with any monitoring activities, and such costs need to be undertaken by both sides. They can be expensive and, so, must be accounted for. One way to keep these costs in check is to have each side pay its own costs of monitoring. That way, each side monitors only what it truly needs to monitor.

As well, it is important to document all procedures and advice that might be useful to future staff on how the relationship between the partners can be strengthened.

Appendix one: Bibliography of Works Consulted

In the development of this document, several guides were consulted to see what common elements were shared when governments considered a P3 approach. As noted earlier and throughout this guide, several of these guides were used extensively. The following is a listing of both the resources consulted and those where portions were used with permission.

Where possible, web links are also provided and are correct as of May, 2001.

Strategic Public-Private Partnering - A Guide for Nova Scotia Municipalities - published under the auspices of the Canada/Nova Scotia COOPERATION Agreement, 1996.

Public Private Partnership - A Guide for Local Government - Ministry of Municipal Affairs, Government of British Columbia, May 1999.
(www.marh.gov.bc.ca/LGPOLICY/MAR/P3/)

P3 - Best Practices Guide - Advisory Committee on Public-Private Partnerships, Ministry of Employment and Investment, Government of British Columbia, Jan. 1998
(www.ei.gov.bc.ca/Publicinfo/publications/PublicPrivatePartnership/p3.htm)

Guide on the Establishment of Public Private Infrastructure Partnerships - Ontario Superbuild Corporation, Government of Ontario, Jan. 2001
(www.superbuild.gov.on.ca/english/Partnership_Guide.pdf)

Best Practices Review of Public-Private Partnerships - Crown Investments Corporation of Saskatchewan, with Deloitte Touche, October, 2000.

Public-private Partnerships (Guidelines and Protocols) - Province of New Brunswick
(www.gov.nb.ca/0158/reports/protocol/protocol.htm)

Winning in Global Infrastructure Markets Solutions Through Partnerships (Conference Report) Industry Canada, Feb. 1999
(<http://strategis.ic.gc.ca/SSG/sc01625e.html>)

Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/471 - United Nations Commission on International Trade Law (UNCITRAL) 33rd session, 12 June - 7 July 2000, New York
(www.uncitral.org/english/sessions/unc/unc-33/Index.htm)

A Step-by-Step Guide to the PFI Procurement Process - Treasury Task Force, Government of the UK (Revised November 1999)
(www.treasury-projects-taskforce.gov.uk/series_1/step/step0.htm)

The PFI Report (in association with HM Treasury Taskforce):
(<http://www.treasury-projects-taskforce.gov.uk>)

Small Communities Resource Guide: Public-Private Partnerships, US Environmental Protection Agency (www.epa.gov/region08/community_resources/muni/other/opublic.html)

Public-Private Partnerships for Environmental Facilities: A Self-Help Guide for Local Governments July 1991, EPA20M-2003 (available by calling (800) 490-9198)

Partnerships Victoria, Guidance Material (Exposure Drafts), March 27, 2001

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