10 Implementation Considerations
Lessons learned from complex, multi-stakeholder PPP procurements
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INTRODUCTION

Following the successful, recent close of a multi-procuring entity US$2.6 billion residual waste treatment PPP project in the United Kingdom, Carl Watson sets out a brief analysis of 10 key issues for public sector procuring entities to be aware of when implementing often complex, competitive dialogue-based PPP procurements.

Those 10 issues, in summary, are:

1. a joint approach to procurement;
2. need for clarity on project roles, priorities and the value of an experience project co-ordinator;
3. a central role of professional advisers as 'part of the team';
4. the role of clear communications and reporting;
5. internal meetings and dialogue with the private sector participants;
6. the role of a procuring entity's senior management;
7. development of project documentation and maintaining control over versions;
8. the approach to risk management;
9. the importance of working and co-ordinating with the central PPP agency and/or relevant sponsoring government department for the relevant procurement; and
10. building and maintenance of project momentum.

We look at each of the above in the following paper.

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1 Carl is a Hong Kong-based Registered Foreign Lawyer (England & Wales) in Pinsent Masons’ Projects and Construction Group. He has 10 years of experience in advising procuring entities (at both central and local government levels) and private sector participants in a range of PPP procurements across a range of sectors including: residual waste treatment; healthcare; secure accommodation; education; and transport.
1. Efficiency Savings via Effective Joint Procurement and Working

Genuine joint working

As the world continues to labour under the ongoing combined effects of the GFC, sovereign debt crisis and liquidity abyss together with the associated rule book ripping policies in cash-constrained economies to deliver scathing spending cuts, the drivers for savings and efficiencies when procuring infrastructure and/or services are as stark as ever. Effective joint working in the public sector manifested in the delivery of PPP procurement is one way to deliver both value and efficiency.

Certain PPP models provide for financial support from the relevant sponsoring central government department to the procuring entity of infrastructure asset(s) in the form of credits / revenue support grants (“RSG”). Where offered, it is common for the criteria governing the grant of such RSG support to expressly state the need for demonstrating a commitment to explore joint working as a factor in assessing an individual procuring entity’s application for the same.

Five reasons why co-operation between procuring entities is desirable are:

- the role of scale in a project which may be particularly relevant in attracting strong market interest – an important driver of value-for-money;
- the availability of suitable sites may not evenly distributed across the territories of all procuring entities, a site in an adjacent territory may be an optimal fit for the particular project being procured;
- transport links and logistics may dictate co-operation across procuring entity boundaries;
- failure by procuring entities to co-operate may hand a significant negotiating advantage to a supplier who has an ability to design a facility or asset to cater for more than one entity’s needs thus delivering enhanced efficiencies and savings; and
- economies of scale, which are another important driver of value-for-money.

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2 The UK’s Gershon Efficiency Review, in policy terms, is an example of this. It was a review by Sir Peter Gershon of efficiency in the UK public sector and was commissioned by then UK Prime Minister Tony Blair in 2004/05. The review was of all operations across the UK public sector with the output being recommendations regarding expenditure and efficiency. Following the review, all UK Government departments were required to agree reductions on long-term budget; and then develop a strategy to deliver challenging commitments without fundamentally and detrimentally affecting their existing obligations and service commitments to the public.

3 An example, is the UK Government’s Department for the Environment, Food and Rural Affairs (Defra) “Criteria for Securing Waste PFI Credits” guidance (2007, Defra) in relation to their ongoing residual waste / waste to energy PPP programme. The criteria states: ‘[procuring entities] are strongly encouraged to have explored [intra-public sector] the opportunities for joint working when considering a major procurement.’
Where RSG payments are available, it will be important for co-operating procuring entities to structure themselves in such a way that any outline business case (to the responsible central, sponsoring department or national finance department) is founded on a strong and well-planned partnering model. This inevitably will maximise the amount of RSG potentially available to the relevant procuring entity/ies.

Where a joint procurement is deemed appropriate or advantageous, the lead officers of the constituent procuring entities will often need to receive training by experienced professional advisers on the partnering models available and at any early stage in the pre-procurement phase expressly endorse any joint working approach (often utilising a ‘lead entity’ with joint working agreement (and inter-public sector entity sub-contract) model).

This early endorsement of any joint procurement and way of working is then clearly communicated to the relevant sponsoring central government department and provides them with the assurance they will need that the participating procuring entities are well-constituted and the procurement joined up.
2. The "Day Job Versus Project" Conflict

Existing roles

Inevitably, the public sector procuring entity officers charged with delivering a project and driving the procurement process will also retain significant commitments in their existing roles.

Whilst some key project officers may be seconded to the project on a full-time basis, even they are likely to have retained some management function in their legacy roles. Balancing all the officers’ functions with such a huge time commitment to the relevant project is not easy. However, with the co-operation and commitment of all officers concerned the procurement of the project (on time and budget) will receive the priority it requires.

Having clear project roles and requirements and clearly articulating the same to project team members from the outset will assist the process. However, there is no easy fix to resourcing constraints.

Project co-ordinator

A key appointment to ease the flow of any procurement is that of a dedicated project co-ordinator.

That individual will have been fully briefed (and, if possible, have prior experience) across all disciplines (i.e. technical, legal, financial and planning etc.). Further, where possible, that individual will have experience of governance and reporting requirements. These elements are often at the core of complex and/or multi-procuring entity procurements from the outset. Where the co-ordinator has such experience, this will result in officers, members and cabinet committees being well-informed to make decisions supporting the procurement at each of its regulatory milestones. This will safeguard against the risk of a lack of compliance in the administration of the procurement process (in relation to the underlying regulatory regime).

The project co-ordinator ensures that the various sub-group leads within the organisational structure of the project team regularly brief and involve him/her so that there is a methodology and structure to strategic decisions.
3. ADVISER TEAM INVOLVEMENT (CENTRAL NOT PERIPHERAL)

**Joined up team**

As legal advisers on large, multi-stakeholder, complex infrastructure procurements, we instinctively work closely with our professional colleagues from a range of disciplines. A seamless and joined up professional team is essential to a procurement’s success.

The importance of a truly joined up adviser team cannot be under-estimated.

In addition to legal advisers, the procuring entity’s financial advisers will have control over financial, funding and payment mechanism issues. The technical, design and planning advisers are responsible for the development of the procuring entity/ies’ technical requirements, output specification, testing and commissioning documentation and the technical aspects of site-related issues. To complete the adviser team are often (in complex and/or particularly high capex schemes) insurance advisers and they will develop the insurance schedule within the suite of contractual documents; deliver the compliant insurance package; and provide strategic insurance advice together with input on the insurance drafting in the main PPP contract (together with any indemnity cap input).

As the adviser team work closely in a collegiate fashion, the procuring entity benefits from a comprehensive procurement and the structured development of documents across all internal project disciplines. This joint working is also a real benefit during the development of the scoring/evaluation methodologies and then the evaluation of bids etc. through implementation of the same.

From our experience, major procurements (especially with a heavy technical emphasis) can be a very daunting process for our public sector clients. If on a project the procuring entity/ies can embrace the adviser team, they become integral to the procuring entity’s own project team. This materially benefits the procuring entity, aiding the ability of it to stick to often challenging procurement timetable. It also provides the vector for knowledge and skill set transfer into the public sector team whilst giving the advisers a deeper understanding of the pressures, drivers and culture within the public sector procuring team.
4. COMMUNICATIONS AND REPORTING

Internal Communications

The ability of the procuring entity to be effective when communicating messages both internally amongst itself and externally to Bidders is essential to a successful, timely procurement. Strong communication and clear channels for the same are essential to the delivery of complex procurements, especially given the huge demands imposed by complex competitive dialogue procurement processes. The onus on communications is heightened when dealing with a multi-procuring entity scheme.

Internally, the project co-ordinator needs to initiate lines of communication, for example a number of email loops to ensure that all project disciplines are kept abreast of project procurement developments, forthcoming milestones and resource peaks/troughs. The procuring entity should also consider a monthly e-update newsletter which can really assist in keeping all project stakeholders (i.e. in and outside of the project team) informed of project news, achievements and deadlines etc.

A well researched communications strategy will need to be developed which provides a comprehensive approach to informing all the main audiences regarding the key messages to put across; approved content that media organizations can use; and the resources to deliver the work.

The procuring entity should also develop a detailed communications plan. This needs to be fully resourced to ensure that the strategy can be delivered to keep all stakeholders informed with appropriate information on and at the right time. Additional communications staff may need to be recruited to plan and co-ordinate work in liaison with communications and marketing teams across all participating procuring entities (and public sector stakeholders).

The action plan will deliver a structured approach to communications for each key phase of the relevant project.

- **Phase 1: Bidding**: Mainly concerned with consultation, lobbying and media relations work.

- **Phase 2: Construction**: Equal split between PR and phasing in of marketing to increase usage/participation rates by end users once operational (for example, on a residual waste PPP scheme, communications with the public to promote recycling rates).

- **Phase 3: Operation**: Factory gate PR, plus marketing campaigns to encourage behaviour change.

It is also important for the project team to work closely with the procuring entity’s dedicated communications staff to ensure that messages to Bidders, the media and the public are fully controlled and approved. On a multi-procuring entity and/or complex or ‘controversial’ (for example, waste to
energy) scheme where there is a risk of conflict between political and commercial pressures, the "management of the message" has to be well-planned and understood by all stakeholders.

As legal advisers we would be consulted at all material milestones regarding press releases to ensure compliance with appropriate regulations. Specialists from Pinsent Masons (for example, planning and environmental lawyers) are experienced in providing input in the development of communications to the public and Bidders in relation to site selection and a range of other strategic issues.

External Communications

Externally, the communication with the Bidders must be consistent and transparent. Due to the nature of a competitive dialogue-based procurement it is essential for the procuring entity to follow clear lines of communication to avoid any risk of favouritism and collusion being alleged which would fundamentally impact the whole procurement process (for example, in Hong Kong, cognisance of the role of the Independent Commissioner Against Corruption (ICAC) is important).

From an early stage soft market testing of potential Bidders should be undertaken by the procuring entity (and often, additionally, by the sponsoring central government department in new PPP markets). The public sector must understand the importance of engaging with the technical/supplier industry if strong competitive interest in the relevant project is to be attained. For example, a well-attended Bidder Open Day can be promoted at an early stage in the procurement of a project with senior resource in attendance and a well-planned "Q&A" session facilitated. This can have real benefits in attaining interest and traction amongst interested investors and providers in a scheme.

The public sector must also understand that it is vital for all key audiences to be kept informed, involved and engaged as a project development. Any Communications Strategy (as introduced above) will emphasise the importance of providing appropriate communication channels so that all interested parties (including the public) have a chance to have their say. The communication plan will also provide a comprehensive timetable for communications and will benefit by looking to tailor communications to each audience (for example, members of the public, pressure groups/lobbyists, business community etc.).

Comprehensive public consultation should take place in a way that complies with any prescribed or mandated methodology across the procuring entity/ies’ geographic areas. Local residents and key stakeholders are to be encouraged to comment on any draft / for consultation versions of the regional development/project strategy documents / plans etc.

The consultation process can involve: information being made available at local municipal buildings and on municipal websites; the distribution of press releases and posters; and public involvement through questionnaires, focus groups, meetings, stakeholder and staff events and roadshows. A transparent mechanism to allow the comments received and feedback from the consultation to be considered in the
development of the final project development strategy will enhance public awareness and understanding of the drivers for change and/or development and contribute to buy in.

Once the procurement process has commenced, the Communications Strategy should outline further public engagement which will be conducted at key delivery milestones of the project to ensure that the benefits of the project are understood and participation/usage levels are increased to the required levels once operational.

In certain jurisdictions, formal planning permission consultation is separate to the consultation outlined in this section and will be undertaken in strict compliance with appropriate local, regional and/or national regulatory regime at all necessary times.

**Reporting**

On any complex procurement, and especially where a multi-procuring entity model is instituted to deliver the relevant PPP project (commonly using a ‘lead entity’ structure), there will need to be various reporting channels established as between the project team and the stakeholders and decision makers. Briefing at all levels will be through appropriate committees and groups.

Local council members and executive committees/cabinets of the procuring entity (or, where relevant, constituent procuring entities) will need to be briefed through the prescribed local/regional governance processes within such entity. Continued development of the project’s project management and governance arrangements to ensure that it is sufficiently robust to deliver a complex infrastructure project, will be key to timely delivery of the procurement.

A common feature of any procurement is the Executive Committee (“EC”) (or in a multi-procuring entity project, the Joint Executive Committee (“JEC”)) which acts as the ultimate decision-making committee for the procurement. The procuring entity/ies will need to carefully consider the composition and decision taking mechanics for the EC/JEC to follow to ensure compliance with the macro-PPP regulatory regime and also local requirements. Another consideration is whether to compartmentalise decisions into categories with separate mechanisms for more strategic and/or policy decisions; and decisions that affect financial parameters; bespoke technical outputs; and/or employee matters etc.

Each member of the EC/JEC will need to be empowered to have the delegated authority of their respective entity to make binding decisions in relation to the project. In the event that any member is unable to make a decision the matter is referred to their respective, relevant executive committee and a binding decision is made by that relevant group.

An EC/JEC meeting should be held at least every two months with the first meeting held at the inception of the procurement process. The initial meeting will agree and adopt the Terms of Reference for the EC/JEC.
It will be important for the EC/JEC to liaise and co-ordinate its approach with that of the relevant central PPP agency/ministry (see section 9, below).

A further detail for multi-entity/stakeholder PPP procurements, to support and enable the effective joint working arrangements between the same, is a Joint Working Agreement ("JWA"). This will be entered into between the entities/stakeholders. The JWA documents the detail of the joint working arrangements for the operational phase of the relevant project following financial close (for example, co-operation between staff, payment splits, performance monitoring, specific service delivery issues, etc.).
5. MEETINGS (BOTH INTERNAL AND DIALOGUE)

Internal processes and structure

As referred to earlier in this paper, a clearly defined and implemented project team structure is essential to timely and compliant procurement and project delivery. In many systems, the central government body responsible for the delivery of the PPP programme will have issued guidance to govern the internal arrangements for individual PPP procurements and the sign off of the relevant project documents therein.

A typical pyramidal structure for the organisation and reporting within a complex and/or multi-entity procurement is:

- Executive Committee / Joint Executive Committee (see section 4, above);
- Officer Project Board ("OPB");
- Project Team;
- Negotiating Team; and
- Sub-Group Teams.

In essence, the internal meetings process sees a Project Team operating under the direction of a Project Director (and day to day management of the Project Co-ordinator (see section 2 above)) and with Sub-Groups comprising representatives from each discipline (legal, planning, financial and technical (including communications)) and in the case of multi-procuring entity projects, from each entity. From the Project Team a selected negotiating group is drawn depending on the documentation under development at the relevant time. That Negotiating Team engages in dialogue with the participating bidders.

The sub-groups meet approximately every two weeks. In addition, the Chairs of the sub-groups meet every two weeks with the Project Director to form the OPB, ensuring progress against the key milestones in all subject areas. The Project Director reports every two weeks to the Project Executives on the EC/JEC, taking reports for decision or information/comment.

The Project Director is the main contact between the project and the central government sponsoring department and/or PPP agency.
**Dialogue**

Externally, dialogue with the private sector participants is conducted through a combination of set piece plenary sessions of all disciplines to focus on strategic issues and decisions affecting the procurement as a whole, with sub-group break-outs, conference calls and separate discipline meetings.

The nominated Negotiating Team attends such meetings following a briefing from the relevant Sub-Group. The Project Co-ordinator will also chair a weekly Project Team meeting (or at least conference call) during which dialogue is prepared for and internal adviser/client issues are discussed and decisions reached. That is the initial forum for feeding back the result of dialogue with the private sector participants.

Depending on the over-arching PPP guidance in the relevant jurisdiction, the procuring entity/ies, whilst prescribing certain minimum dialogue sessions, will need to be able to maintain a flexible approach to the actual scope and number of dialogue sessions with the bidding private sector participants throughout each stage of the procurement to ensure that individual disciplines (i.e. legal, technical, financial etc.) are progressed both jointly but also where required at different tracks within specific silos.

This means that multi-track delivery of a number of parallel actions is possible.
6. ROLE OF SENIOR MANAGERS

Confirmation of Commitment

The procuring entity (or each constituent authority if a multi-entity procurement) allocates a senior finance, legal and technical officer to the project. That manager will chair the relevant Sub-Group (see section 5, above).

As set out above, the EC/JEC will comprise Director level resource for the project in procurement and is chaired by the Project Owner (i.e. the relevant Group Director for the service line procuring the facility/asset/services (in a multi-entity procurement that will be from the lead entity).

The managers provide strategic input into the decision making process, confirm the commitment of the procuring entity/constituent entities to the procurement and provide focus to the wider Project Team. See also above in relation to competing commitments.

During a lengthy dialogue-based procurement process, a unified approach and attendance by the senior managers (particularly technical) ensures that the participating private sector bidders (and any central PPP agency assigned representative for the project) has confidence in the robustness of the Project Team and the commitment of the procuring entity/ies to its success.
7. DOCUMENT AND VERSION CONTROLS

Project management

Where the sponsoring central government department and/or PPP agency is mandated to approve departures from a standard form of PPP contract, it is crucial for the procuring entity/ies to liaise closely with such bodies to obtain the requisite approval of derogations at the relevant procurement milestones.

This liaison is best undertaken by the Project Director (on behalf of and with the approval of the EC/JEC).

As a result of the nature of complex, competitive dialogue procurements (i.e. those with development of documentation with multiple bidders prior to selection of a preferred bidder), it is important for legal advisers to work closely with the Project Team to keep a very close eye on document development and version control across all disciplines.

The legal project management skill sets brought to a project by Pinsent Masons will ensure a controlled and structured approach to document development. As the relevant PPP contract is followed by several accompanying Schedules and such documents will potentially be developed in silos with a number of participating bidders it is even more important to proactively control such documents as they develop.

Electronic documentation portals

There are many technology providers who offer e-tendering portal software to procuring entities (for example, see the portals utilised by the World Bank and ADB etc.) for the dissemination and submission of documents at each stage in the procurement (both internal and externally with and by participating bidders). This can be a real success and the technology providers will have a range of products capable of accommodating the individual procuring entity/ies needs ensuring that a bespoke e-solution is developed for the specific procurement.

Clarifications

In addition, during dialogue when formal clarifications are necessary a structured approach to clarifications asked by individual participating bidders must be adopted. Each discipline within the Sub-Groups can generate in some cases hundreds of clarification questions for bidders to answer (and from the bidders to the procuring entity/ies) with an audit trail of responses and then sub-clarifications.

Whilst administratively burdensome, this approach is the most effective for allowing a fully auditable, parallel approach to closure of outstanding issues across all disciplines and Sub-Groups to complement the dialogue meetings and conference calls.
8. Risk Management

Use of Risk Workshops

Operational and strategic risks should be identified and assessed for all risk factors of the project.

Risk workshops can be facilitated and carried out for each of the project Sub-Group work-streams together with for the project as a whole. An example would be to split such workshops into the following:

- Project Team;
- Technical/Specifications;
- Planning/Sites;
- Finance;
- Legal and Procurement;
- Communications and Marketing; and
- Risk and Insurance.

At each risk workshop:

- The approach and methodology for risk management adopted by the procuring entity/ies will be set out.
- Work-stream aims and objectives are discussed.
- Risks impacting on the achievement of each work-stream’s aims and objectives were systematically identified and analysed.
- Methods to control and mitigate the risks are determined.
- A risk register for each work-stream is then compiled.

A comprehensive risk register is developed that is proactively monitored, reviewed and updated by each project work-stream/Sub-Group.

Risk management, including identification of new risks and significant variances to existing risks, must be monitored by the Project Director, Project Team and the EC/JEC where it will be a rolling, standard item on each relevant meeting’s agenda.

Separately, contractual risks will be identified by Pinsent Masons and a legal risk matrix prepared and issued to the participating private sector bidders at the appropriate procurement stage. Such bidders will be required to bid back against that matrix and will be evaluated accordingly based on any deviations.
Part of the team

As explained above, the Project Team must work closely with any relevant sponsoring central government department and/or PPP agency representative to obtain a rolling approval for contractual derogations and deviations from approved project scope (and/or any standard form PPP contract and risk matrix) as developed during dialogue with the private sector participating bidders.

It is common in established PPP jurisdictions (especially on complex procurements) to assign a project transactor or representative to assist the procuring entity/ties to deliver the procurement in a manner that is compliant with the overarching PPP policy.

Even if a transactor is not physically assigned, ensuring communications with the relevant central PPP agency are proactively maintained is an important issue for the procuring entity/ies.

Practical best practice, for example, would be to include such representative on relevant strategic and progress-related communications; and ensuring that the input and advice of any such representative has been sought at all salient times during the procurement process.

The role of any such representative in delivery of the underlying project cannot be under-estimated. When it comes to the final approvals stage in the procurement, often a prerequisite to the closure of dialogue with participating bidders, ensuring the relationship between the Project Team (in particular the Project Director and Project Co-ordinator) with any such representative is positive, can result in the closing process being made much smoother.
10. "Once the ball is rolling" – The importance of Project momentum

Timetable is king

Competitive dialogue-based PPP procurements in technology-focussed sectors (such as residual waste treatment, waste water etc.) are inherently difficult to manage due to their complexity and scale. They take careful planning and structuring. Some considerations that procuring entities may seek to bear in mind, in the successful implementation of such procurements, include:

PPP programmes exist where there is a strong demand for the infrastructure that underlies the project in procurement. Accordingly, the delivery timetable is king.

Once the project ball starts to roll it is imperative for those driving the procurement to maintain that momentum.

Clearly, in any procurement, issues such as sites, planning and governance (especially on multi-procuring entity procurements) will crop up and can impede that momentum but there is always a fix to such issues. The blockage just needs to be isolated, understood and then resolved as soon as possible. If that means an escalation procedure is prudent, it should be considered early in the procurement process.

Keeping to timetable provides confidence: internally within the procuring entity/ies; and externally to participating private sector bidders who are potentially investing huge financial and time resource to the bidding process; and finally to material stakeholders such as the relevant sponsoring central government department and/or PPP agency, etc.
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