The Commercial Law Development Program
Presents
Public-Private Partnership Webinar Series

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Public-Private Partnerships Contract Management

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Setting Performance Standards

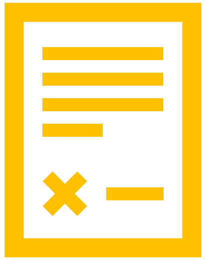
- Outcome-based performance specifications:
  - What a facility is intended to achieve rather than prescribing methods and materials for achieving facility goals.
  - The purpose of using outcome-based performance specifications is to make service delivery more efficient by allowing the concessionaire flexibility to decide how best to achieve the intended results.
  - Should be well defined, measurable, and enforceable.

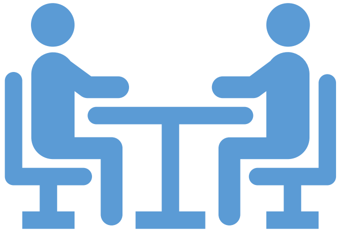
Managing the P3 Contract

- Monitoring Technical and Financial Performance: can include self-reporting procedures, independent audits, regular meetings and reports, and the use of intelligent systems that automate data collection and reporting processes.
- Assessing Payments and Penalties for Performance: payment reductions or retentions and non-compliance or default points.
  - Once non-compliance or default points reach a specified level, they can result in increased oversight, work by the owner at the contractor's expense, suspension of work, or termination of the contract.

Managing the P3 Contract

- Resolving Disputes: P3 contracts typically specify dispute resolution processes to reduce the risk of legal conflict over technical issues or differences in contract interpretation.
  - Alternative dispute resolution processes may include mediation and third-party arbitration following a period of time allowed for both parties to make good faith efforts to resolve the dispute themselves.





Managing the P3 Contract

- Managing Handback: P3 contracts generally specify the required condition of the facility at the end of the contract term. To manage the financial risks associated with handback, some P3 agreements require the concessionaire to establish a handback reserve account that begins to accrue toward the end of an agreement and may be used for unplanned repairs required prior to or shortly after handback of a facility to the public owner.

Effective Contract Governance

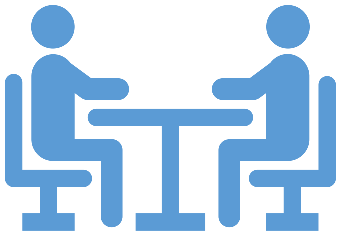
- Public agencies can promote effective contract governance by facilitating knowledge sharing between the procurement team and the contract management team.
  - Some public agencies have found that the best way for the contract management team to understand and manage contract provisions is for team members to have played a role in the development and negotiation of the contract.

Effective Contract Governance

- Sufficient resources, whether internal or external, are necessary to properly monitor and enforce contract requirements and ensure the public agency continues to meet its contractual obligations
  - Agencies with no previous P3 contract management experience tend to rely heavily on advisors to help develop systems and processes that support effective contract management.

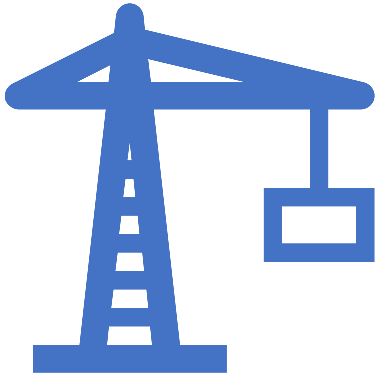
Effective Contract Governance

- Public agencies can also improve the sustainability of effective contract governance practices by ensuring that decisions and processes are documented, and that succession planning takes place.
- Mechanisms such as regularly scheduled face-to-face meetings can facilitate the development of an effective relationship between the government and the concessionaire. To maintain this relationship, enforcement mechanisms should be used consistently and proportionally.



Performance Risks

- Design and construction (impact through operation and maintenance phases)
- Long-terms risks:
  - Operation
  - Financial
  - Demand
  - Political



Just because risks are addressed in the contract structure, It does not mean they go away.

Influence the Outcome

- Early stages of project development offer the greatest ability to influence outcome.
- Start with defining the need of the project and identifying strategy for delivery.
- Confirmed in the justification of the project through value for money analysis based on performance requirements.
- Once the terms are defined and procurement begins, there is less flexibility in influencing the outcome.
- Upon award of contract, performance requirements are set and would be difficult to change without consequences.

Defining the goals and objectives at the inception of a project is critical to success.

Key Contract Terms

- Financial compensation: availability/penalties, ROI, revenue sharing, innovation (cost savings, efficiencies, improved performance)
- Equity guarantees, lenders' obligations, step-in rights
- Noncompliance and remedies, dispute resolution
- Defaults, early termination, compensation
- Hand-back requirement, monitoring, reporting, and audit rights.
- Output/outcome specifications: service level, asset condition, etc.
- Concession based through user fees (revenue risk)
- Term

Primary Goals

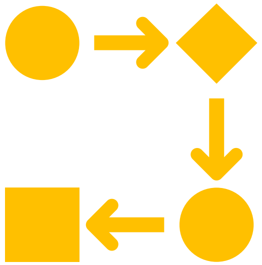
- Establishing processes/protocols in accordance with agreement
- Implementing the appropriate level of performance monitoring that confirms value of project activities and aligns with agreement requirements
- Ensuring terms and conditions of the agreement are met by the agency and the developers
- Identifying best practices/lessons learned to be utilized by the department in administering the implementation phase
- Documenting and implementing phase-specific activities, oversight, and contract administration

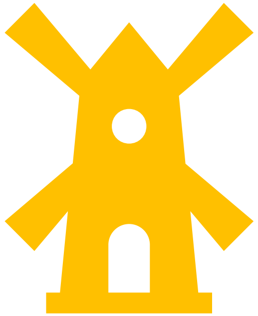
Roles and Responsibilities

Source	Responsibility
Concessionaire	▪ Develop management plans and procedures ▪ Collect Monitoring data ▪ Develop status reports ▪ Self-report violations
Public Agency	▪ Set performance standards ▪ Review plans, procedures and status reports ▪ Perform audits and inspections ▪ Assess penalties and awards
Third Party	▪ Perform independent audits and inspections ▪ Data collection ▪ Resolve disputes
Shared	▪ Daily communication and problem solving ▪ Conduct regular face-to-face meetings ▪ Complete annual performance reviews

Managing Performance

- Clear understanding of performance measures
- Process for monitoring performance
- Assessing payments and penalties for performance
- Designing and managing dispute resolution processes
- Managing handback of the facility





Implementation Plan

- Finalize contract documents (forms, procedures, lessons learned)
- Keeping checklist of milestones, roles, and responsibilities
- Internal control procedures and reporting
- Kick off meeting and training

Key Monitoring Activities

- Auditing and financial reviews
- Physical inspection
- Spot check and testing
- KPI measurements and updates
- Records of noncompliance and remedies

Project Handback

- The handback process begins at the beginning!

- Handback requirements and processes need to be codified in the PPP contract to ensure that all parties involved know what is essential for a success project.

Project Handback

- Aligned goals between all sides for the end of the contract term

- 'Sinking funds' level requirements for replacement of equipment to make sure that the facility is in a state of good repair at handback. These funds are the money the private sector must save in dedicated accounts for dedicated reasons.

- Detail the rights of the owner (public sector) for inspection of all facility systems before handback and legally requirement for remedy of any outstanding deficiencies.

- Transfer of all remaining warrantees to the owner

Project Handback

Make sure the partnership ends well and the partners will work together again!

Front-end Constraints on PPP Success

Front-end issues that may impact the execution and success of PPPs:

- Lack of planning and coordination among ALL stakeholders (public/end users, public sector champions, engineering and construction consultants, financiers, operations experts)
- A poorly defined project need and/or addressable market (end users)
- Undue political influence that disregards the technical merit (or lack thereof) of the project
- Weak and/or unsupportive regulatory environment(s)

Front-end Constraints on PPP Success

Front-end issues that may impact the execution and success of PPPs:

- Imbalance within the project financing and risk allocation structure(s)
- Insufficient end-user buy-in
- Reliance on insufficient data that does not support the project as contemplated (adds to the risks of unknowns)
- Lack of government experience with PPPs and complex capital transactions
- Consistent overestimation of project revenues and perceived benefits to the end-user

Post-loan Constraints on PPP Success

Post-loan execution issues that may impact the success of PPPs:

- Project demand does not materialize: projected traffic and/or user demand falls short of projections and lender financial cases
- Revenue: shortfalls and slow growth
- Availability of funding and capital commitments as planned from PPP partners does not materialize (access to, cost of, and limits on capital)
- Operations and maintenance costs are considerably higher than anticipated

Post-loan Constraints on PPP Success

Post-loan execution issues that may impact the success of PPPs:

- Shared risks and project unknowns were not appropriately sized into the financing
- Construction: prolonged delays, environmental hazards, cost overruns, and unforeseen conditions
- Technology: unproven tolling and enforcement technologies may impact collection rates

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