

2010

**Ministry of Economic Affairs,
Royal Government of Bhutan**

**FRAMEWORK FOR
PRIVATE PARTICIPATION
IN INFRASTRUCTURE**

Table of Contents

1. Introduction.....	2
2. Title.....	2
3. Objectives	2
4. Scope	2
5. Project Solicitation Process.....	3
5.1 Project Initiation	3
5.2 Investment Model and Period	4
5.3 Project Ownership	4
5.4 Project Definition and Preparatory Studies	5
5.5 Pre-Qualification	5
5.6 Project Allotment Process.....	5
6. Environmental Requirements.....	8
6.1 Adherence to Legislation	8
6.2 Environment Management Plan	8
7. Project Investment Issues.....	8
7.1 Lock-in Period.....	8
7.2 Foreign Direct Investment	8
7.3 Repatriation.....	8
7.4 Expatriate employment and work permits	8
8. Approval	9
8.1 Approval Committee	9
8.2 Evaluation Committee	9
9. Incentives and Exemptions	9
10. Provision of land	10
11. Exceptions	10
12. Effective Date	10
13. General Provision.....	10
14. References	11

1. Introduction

The Economic Development Policy (EDP) identifies numerous opportunity areas such as IT, education, SEZs, industrial estates etc. The purpose of this framework is to come out with a mechanism on how developers could be invited to bid for the construction and operations of such infrastructure. Since land is a very scarce commodity in a small and mountainous kingdom like Bhutan, it is important for the RGoB to be judicious in the allocation of this valuable resource. This framework does not apply to the use of private land for which normal business application procedures will apply.

The EDP further reinforces the policy commitment under 7.1.11 that states “The Royal Government shall develop an appropriate policy framework to allow public private partnership in infrastructure projects. The framework shall provide adequate security for private sector investment and at the same time ensure that adequate checks and balances are maintained through transparency, competition and regulation. The PPP may be BOOT, BOLT, BOT or any other relevant method”.

Based on the foregoing, the Royal Government hereby issues the Framework for Private Participation in Infrastructure (PPI). This framework shall be rescinded as and when legislation/policy is developed and adopted by the Royal Government.

2. Title

The framework shall be called the “Interim Framework for Private Participation in Infrastructure, 2010”.

3. Objectives

The objectives of this framework are to:

- Ensure transparency in the invitation, selection and award of projects to interested developers
- Establish uniform procedures across the sectors
- Ensure fair and equal access in the award of projects and concessions to interested developers
- Facilitate and promote private participation, both national and foreign

4. Scope

Projects under this framework shall include both the planned projects earmarked for implementation under PPP model as well as suitable proposals initiated by the RGoB. This framework shall apply for inviting developers, both domestic as well as foreign, inter alia, in the following sectors or areas:

- a) Airports
- b) Multi-dwelling residential buildings
- c) Non-residential buildings
- d) Highways
- e) Bridges, Elevated Highways, and Tunnels
- f) Outdoor sport and recreation facilities such as golf courses and botanical gardens
- g) Other specialized facilities such as:
 - o Industrial Estates
 - o IT Parks
 - o Industrial Parks
 - o SEZs
 - o AEZs
 - o Economic Cities
 - o Knowledge Cities
 - o Sports Cities
 - o Health/Wellness Centres
 - o Dry Ports
 - o Land Reclamation
 - o Other similar facilities

Concerned agencies shall be responsible for coming out with rules and regulations covering their respective sectors.

5. Project Solicitation Process

5.1 Project Initiation

The sector or agency herein referred to as “concerned agency” shall initiate and coordinate implementation of project that has been already identified as well as those proposed by private developers for implementation in partnership with the RGoB or solely by the private developer. Identified projects shall mean those where the RGoB has issued directives to pursue project implementation through PPP model. Proposals from both national and foreign developers shall be examined for consideration under this framework. The concerned agency may appoint a Project Manager for the particular project to proactively pursue project execution. The Project Manager shall be the nodal officer for the project until the signing of the contract agreement for the project and take over of the management responsibility by the legal entity established for the purpose.

5.2 Investment Model and Period

- 5.2.1 The RGoB shall identify PPI projects that would be developed under a concession model. The project shall be allotted to a Developer for a concession period excluding the construction period. Based on the performance of the incumbent operator and on terms and conditions to be agreed upon, the period can be extended. The initial lease period shall be determined by the concerned agency/sector and approved by the government. The concerned agency may take into consideration good practices in other parts of the world to determine both initial lease period as well as any extension thereto.
- 5.2.2 Project Developer shall register with the Registrar of Companies (RoC) as a separate company as per the Companies Act of the Kingdom of Bhutan. The company shall be a Special Purpose Vehicle (SPV) dedicated for a specific project in Bhutan. The SPV shall be required to obtain licenses from the Ministry of Economic Affairs for construction and operation of the Project.
- 5.2.3 The RGoB or one of its appointed agencies shall carry out mandatory inspection of the project during the concession period to ensure that the project assets are maintained to the required standards. If such inspections find that the life of the project is being undermined by inadequate maintenance, the RGoB shall seek remedial measures from the Project Company.
- 5.2.4 The return conditions applicable at the end of the concession period shall be specified in the concession agreement.

5.3 Project Ownership

Public Ownership

- 5.3.1 The RGoB shall directly award projects for development as 100% Royal Government undertaking to an RGoB agency.

Public-Private Partnership

- 5.3.2 The RGoB may develop projects through Public-Private Partnership. For this, the RGoB shall allocate projects directly to Royal Government undertaking. The private partner shall be selected through the transparent selection process outlined in 5.5 and 5.6 below.
- 5.3.3 In the event the RGoB undertaking is a corporate body incorporated as per the Companies Act of the Kingdom of Bhutan, it may follow its own procurement procedures so long as the procedures are transparent and fair. In lieu of Section 8, the company shall seek approvals from a committee as per their procurement rules.
- 5.3.4 The RGoB may opt to have a share in Projects developed by private investors.

Strategic Partnership

- 5.3.5 Subject to special approval by the Royal Government of Bhutan, an investor can be selected without bidding as a strategic partner having maximum shareholding of twenty six percent (26%).

100% Private ownership

- 5.3.6 Projects to be developed with 100% private ownership shall follow the processes as identified in 5.5 and 5.6 below.

5.4 Project Definition and Preparatory Studies

- 5.4.1 All project definition and preparatory studies up to at least the Pre-feasibility level for the projects shall be carried out by the concerned RGoB agency promoting the Project.
- 5.4.2 The pre-feasibility reports will identify basic parameters of the projects like location, size of land, availability of electricity, water, access road, distance from the nearest airport, purpose of the Project, geological conditions, preliminary costs and socioeconomic as well as environmental benefits. Pre-feasibility studies will be carried out in accordance with internationally accepted practices. The bidder will have the right, at its own cost, to examine, evaluate and to carry out additional studies to make its own assessment about the pre-feasibility and viability of the project, as part of its due diligence process.

5.5 Pre-Qualification

- 5.5.1 Notices inviting Bids for pre-qualification to develop the projects shall be widely advertised.
- 5.5.2 For each identified site, as notified by the RGoB from time to time, there shall be a pre-qualification of the bidders based on their past experience, and financial and technical capacity. The applicants qualifying in the pre-qualification stage will be eligible for participating in the Bid solicitation phase. Each attribute set for pre-qualification will be evaluated. Guidelines for evaluation, and the passing scores on attributes required for pre-qualification, shall be specified at the time of inviting Bids for pre qualification.
- 5.5.3 Request for Bid (RfB) will be made available to the pre-qualified bidders along with Pre-feasibility reports.

5.6 Project Allotment Process

- 5.6.1 Quality and cost based selection (QCBS) system shall be adopted as it uses a competitive process among short-listed firms that takes into account the quality of the proposal and the cost of the services in the selection of the successful firm. The relative weight to be given to the quality and cost shall be determined for each case depending on the nature of the project.

The concerned agency shall adopt the following procedures in soliciting, receiving, evaluation, seeking approval, negotiations and award of contract:

- Preparation of the TOR and criteria for evaluation;
- advertising for expression of interest (EOI);
- preparation of the short list of developers;
- preparation and issuance of the Request for Proposal (RFP) which shall include: the Letter of Invitation (LOI); Instructions; the TOR and the terms and conditions including concessions; receipt of proposals/criteria to be used for evaluation;
- evaluation of proposals: consideration of quality;
- opening of technical and financial proposals;
- evaluation of proposals;
- final evaluation of quality and cost;
- seek approval of the Approval Committee;
- negotiations and
- award of the contract to the selected firm.

5.6.2 In the evaluation of proposals, clear and quantifiable criteria shall be specified wherever feasible. The proposals shall be evaluated based on uniform criteria stipulated in the EOI and RFP. The final selection of the developer shall be based on the highest or lowest bid as specified in the bid documents. The criteria may be based on, inter alia, the following:

- Generation of employment for Bhutanese
- Revenue contribution
- Least cost delivery of services
- Timeframe for completion of construction
- Foreign exchange earnings
- Development priority and impacts
- Environment and waste management as may be relevant
- Range of services
- Land lease period, etc

5.6.3 If there are two or more identical Bids which emerge as the best Bids for the project, allotment will be made on the basis of the higher score obtained in valuation of the pre qualification among the identical bidders.

5.6.4 Following the completion of due process of soliciting proposals, if only one proposal is received, the sponsoring agency shall present to the Approval Committee a summary of selection process followed and seek the directives of the Approval Committee on the course of action. The Approval Committee may decide or seek Government directives to either proceed with evaluation and negotiations with the investors or direct for re-invitation of bids.

- 5.6.5 The selected Developer shall reimburse to the RGoB the expenditure incurred on investigations and infrastructure work for the project at the time of signing the Project Development Agreement (PDA). This amount will be specified in the Request for Bid (RfB) document for the Project.
- 5.6.6 The PDA shall constitute the commitments and obligations of the parties and will provide a timeline for the selected Developer to prepare a Detailed Project Report (DPR). The DPR will consist of the techno-economic feasibility studies undertaken by the selected bidder. If the submission of the DPR is delayed, an extension of a maximum of six months may be granted by the RGoB, provided that it is satisfied that the cause for delay is reasonable. The Developer must make the request for such an extension to the RGoB three months prior to the DPR submission deadline. Should the Developer submit a DPR which is not approved by the RGoB, the Developer will be given six months to review their DPR and re-submit it.
- 5.6.7 However, if the DPR for the proposed project has already been prepared by the RGoB, the project shall be awarded on the basis of the DPR and the provisions of 5.6.6 shall not apply.
- 5.6.8 The quality of DPR, Construction and Operation & Maintenance shall be conforming to International Standards and Specifications, and shall be enforced by the RGoB.
- 5.6.9 The Developer will be permitted to withdraw from the project, if the RGoB is satisfied that the Developer has sufficient grounds to establish that the project is not techno-economically feasible. The RGoB shall not be held liable for any expenditure the selected bidder may have incurred.
- 5.6.10 After the DPR is approved by the RGoB, the selected Developer shall sign a Concession Agreement (CA) with the RGoB. The CA shall be the key legal instrument granting the concession to the Developer, specifying the rights and obligations of the parties. The CA shall also include time schedules for getting necessary legal/administrative/technical approvals, financial closure, construction, commissioning, operation, maintenance and transfer of the project.
- The Developer may be allowed an extension should there be any delay in obtaining any of the approvals/licenses mentioned in the CA. This extension will be granted by the RGoB, provided the Developer shows sufficient grounds for such an extension. The terms and penalties associated with such extensions shall be stipulated in the CA. If the Developer is unable to show sufficient grounds for an extension, the project will revert to the RGoB, and the allotment shall be treated as automatically cancelled. In such a case, the Developer shall not be compensated for any expenses they may have incurred including any up-front payment made as may be specified in the RFP.

6. Environmental Requirements

6.1 Adherence to Legislation

- 6.1.1 The Project developer shall ensure that the Project is developed in line with the environmental legislations of the Kingdom of Bhutan.
- 6.1.2 Initial pre-feasibility study for environmental aspects shall be carried out by the concerned RGoB agencies. The developer shall be required to carry out comprehensive EIA as per the environmental legislations of the Kingdom of Bhutan.

6.2 Environment Management Plan

- 6.2.1 The Project Developer shall make suitable provisions for mitigation of adverse impacts as per approved EIA Report. The implementation of Environment Management Plan (EMP) and other risk management measures shall be the responsibility of the Project Developer at all stages of the project.

7. Project Investment Issues

7.1 Lock-in Period

- 7.1.1 The “Developer” identified as the "Principal Developer" in the application for pre-qualification, having a lead role and possessing sufficient financial strength, is required to hold 100 % of his equity invested in the SPV during the “lock-in period” which will be from the signing of Project Development Agreement till the end of the fifth year of commercial operation.

7.2 Foreign Direct Investment

- 7.2.1 PPI Projects shall be developed through domestic and foreign investments. FDI shall be based on the prevailing Foreign Direct Investment Policy and Foreign Direct Investment Rules and Regulations. Other terms as specified in the concession agreement shall also apply.

7.3 Repatriation

- 7.3.1 Repatriation of capital and Remittance of dividends shall be governed by the Income Tax Act of the Kingdom of Bhutan, the Foreign Exchange Regulations of Bhutan, the Foreign Direct Investment Policy, and Foreign Direct Investment Rules and Regulations.

7.4 Expatriate employment and work permits

- 7.4.1 Foreign companies will be allowed to bring in expatriate personnel in areas where there are shortages of Bhutanese with requisite skills and in accordance with prevailing laws of the Kingdom of Bhutan.

8. Approval

8.1 Approval Committee

An Approval Committee shall be established at the National level comprising of the following members:

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|---------------------------------|------------------|
| • Secretary, Concerned Ministry | Chair |
| • Secretary, MoF | Vice -chair |
| • Secretary, GNHC | Member |
| • Secretary, MoEA | Member |
| • Secretary, NLC | Member |
| • Secretary, MoWHS | Member |
| • Concerned Head of Dept | Member Secretary |

The Committee shall deliberate and grant “in principle” approval for all projects to be undertaken. The mandate of the Committee shall be clearly specified by the Royal Government.

8.2 Evaluation Committee

An Evaluation Committee shall be constituted comprising the following members:

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|---|------------------|
| • Head of the concerned Department | Chair |
| • Head, Public Procurement Policy Division, MoF | Member |
| • Senior Attorney, OAG | Member |
| • Head, PMCD, GNHC | Member |
| • Senior Officer of DPA/DBA/DRC | Member |
| • Representative of MoEA | Member |
| • Concerned Division/Unit Head | Member Secretary |

The Evaluation Committee shall evaluate the proposals and submit recommendations to the Approval Committee for approval and/or for further negotiations. Detailed TOR of the Committee shall be developed and adopted. In order to get the best participation of potential developers, the concerned agency shall organize road shows and promotional activities in the target markets.

9. Incentives and Exemptions

Incentives and exemptions shall be as per the provisions of the EDP. The concerned agency shall obtain approval of the RGoB on any additional incentive and exemption that may be sought by the developer.

10.Provision of land

The concerned agency shall be responsible for the identification of the land. However, the agency shall seek the approval of the RGoB on the size, location, and lease period of the land.

The RGoB shall provide the land required for the infrastructure to the developer on:

Long term lease or
as equity of the RGoB.

The terms for lease or equity shall be determined by the concerned agency in keeping with the Land Act and international best practices.

11. Exceptions

The RGoB may accept proposals that are unique, innovative, ecologically sound, socially responsible, and that further boost and support the development philosophy of the Royal Government. Such proposals will not be required to go through a bidding process. The concerned RGoB agency shall evaluate the proposals including any negotiations that may be necessary with the proponents. The proposals shall then be forwarded for further evaluation by the Evaluation Committee and then submitted to the Royal Government for approval.

12.Effective Date

This framework shall be effective on the date of notification upon approval of the Royal Government.

13.General Provision

The mechanisms and provisions provided in the Procurement Manual, 2009 may be adopted in so far as these serve the purpose in ensuring transparent, efficient and fair selection of developers. Private participation in infrastructure is one form of procurement of services of private developer for a specific project and therefore similar to contract or consultancy service except for the scale, duration and broader impacts. Project specific requirements may be addressed during negotiations wherever necessary.

Any unsolicited proposal, with the exception as in section 11, shall not be treated as a formal bid and any agency/company showing interest shall have to apply as and when RfPs are announced. All unsolicited proposals submitted shall be at the risk and cost of the party submitting such proposals and the RGoB shall not be held liable whatsoever including any disclosure of information related to the project proposal.

14. References

1. State Authorities (Public Private Partnership) Act, 2002, Ireland
2. PPP in Ireland accessed from: <http://www.ppp.gov.ie/about-the-central-unit/about-the-central-unit>
3. PPP in India: GoI: Guidelines for Formulation, Appraisal and approval of PPP Projects
4. Formulation, Appraisal and Approval of PPP Projects in India
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7. PPPs in Infrastructure – South Korea (Presentation Paper)
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9. PPP Manual, South Africa
10. Public-Private Partnership, Models and Trends in European Union
11. Procurement Manual 2009, Royal Government of Bhutan
12. Sustainable Hydropower Policy, June 2008

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