

KINGDOM OF CAMBODIA

Public-Private Partnerships (PPP)

Procurement Manual



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Abbreviations

BLT	=	Build, lease and transfer
BOO	=	Build, own and operate
BOOT	=	Build, own operate and transfer
BOT	=	Build, Operate and Transfer
BTO	=	Build, transfer and operate
CDC	=	Council for the Development of Cambodia
CHM	=	Complaint Handling Mechanisms
CQS	=	Cost Quality Selection
EOI	=	Expression of Interest
FBC	=	Full Business Case
GCA	=	Government Contracting Agency, a Line Ministry
GCA Head	=	Minister of the Line Ministry
GGF	=	Good Governance Framework
GGP	=	Good Governance Plan
LoC	=	Laws on Concession
MEF	=	Ministry of Economy and Finance
OBC	=	Outline Business Case
PD	=	Project Director
PM	=	Project Manager
PPP	=	Public Private Partnerships
PEC	=	PPP Evaluation Committee
QCBS	=	Quality Cost Base Selection
RFP	=	Request for Proposal
RGC	=	Royal Government of Cambodia
RMU	=	Risk Management Unit
SOE	=	State-Owned Enterprises
SOP	=	Standard Operating Procedure
SPV	=	Special Purpose Vehicle
UNCITRAL	=	United Nations Commission on international Trade Law
VGF	=	Viability Gap Fund

SECTION 1: INTRODUCTION

1. Introduction

1.1 Guiding Principles

The Royal Government of Cambodia (RGC) is improving the delivery of infrastructure and public services through Public-Private Partnerships (PPP), identified, prepared, tendered and implemented in an efficient, fair and transparent manner, a process that will optimize value for money and overall life cycle costs. The objective is to provide additional infrastructure and related facilities to improve the well-being of all Cambodians.

PPP are distinguished from general public procurements in several respects, including:

- PPP transfer significant risks to the private sector to finance, design, build, operate and maintain the tendered infrastructure under a long-term contractual agreement. Typically, efficiency and motivation to recover costs and realize a profit enables the private sector party to best manage these risks based on long-term decision-making and market oriented commercial practices.
- The principles of economy, efficiency effectiveness, equity, value for money and life cycle costs are applicable to both PPP and general public procurements; however the emphasis is different between the two:
 - PPP are developed on the basis of output requirements rather than detailed design specifications for general public procurements. The private sector's management of risks to achieve the output requirements helps to ensure value for money and optimal life cycle costs.
 - General public procurements place greater emphasis on the lowest cost for the construction of a specified facility, with less emphasis on value for money and optimal life cycle costs.
- Government Contracting Agency or Agencies (GCA) authorized to carry out an approved PPP must ensure competition, transparency and fairness in the selection of the private sector party proposing to design, finance, construct, operate and maintain the infrastructure and related facilities under a long term, risk sharing contractual relationship;
 - **COMPETITION:** The principle objective of a fully-developed, well-functioning PPP system is to provide needed infrastructure facilities and related services at fair and reasonable tariffs to be paid by users. This objective can most effectively be achieved through free and open competition. The first step to maximize free and open competition is through widely-circulated public advertising which opens-up and instills greater confidence in the PPP procurement process, encourages more contractors to compete for government projects, and results in overall lower prices for the benefit of the public and all users.

- **TRANSPARENCY:** Transparency enables everybody affected by PPP projects to understand the Government objectives and the precise methods to be used to attain them. A transparent PPP process requires (a) the "rules of the game" to be made available to all participants and (b) the "game" to be followed in accordance with those rules.
- **FAIRNESS:** Capable, responsible contractors will compete for PPP projects only if they have confidence in the fairness and integrity of the overall process; i.e., all participants are treated fairly and consistently over time and as between each other.
- **ACCOUNTABILITY:** Public sector officials are held to a fiduciary duty or obligation to report, explain, or justify their action. All GCA officials are required to abide by good governance principles and to justify; e.g., the recommendation, through a PPP Selection Memorandum, to award the contract to the bidder offering the highest evaluated proposal.

1.2 PPP Procurement Manual Purposes

A key purpose of this PPP Procurement Manual is to clarify the implementing rules and regulations to support the provisions of Cambodia's Law on Concessions (LoC), as amended.

This PPP Procurement Manual is issued both to ensure assigned RGC officials, private sector participants and all stakeholders are aware of the Government's policies on PPP transactions and to provide step-by-step tendering procedures for those public sector officials authorized to perform their important PPP development function.

Currently, GCA are carrying out PPP in accordance with applicable laws and regulations; however, after considering the alternatives, the Government decided to adopt the enabling framework to promulgate this interim regulation to specific step-by-step PPP tendering procedures applicable to each approved PPP transaction.

1.3 PPP Procurement Manual Scope

- 1.3.1 The scope of this PPP Procurement Manual is the award of concessions to support the provisions of the LoC, as amended. The manual will clarify the implementing rules and regulations in the award of concessions defined under the LoC, which specifically excludes Economic Land concessions and similar types of concessions.
- 1.3.2 The scope of this PPP Procurement Manual pertains to the Four Phases of PPP Project Development shown in Figure 1.

Phase I: PPP Project Identification and Prioritization where prospective PPP projects are identified. Typically, prospective PPP Projects are those that have a "revenue stream." The income stream can be generated by a variety and combination of sources,

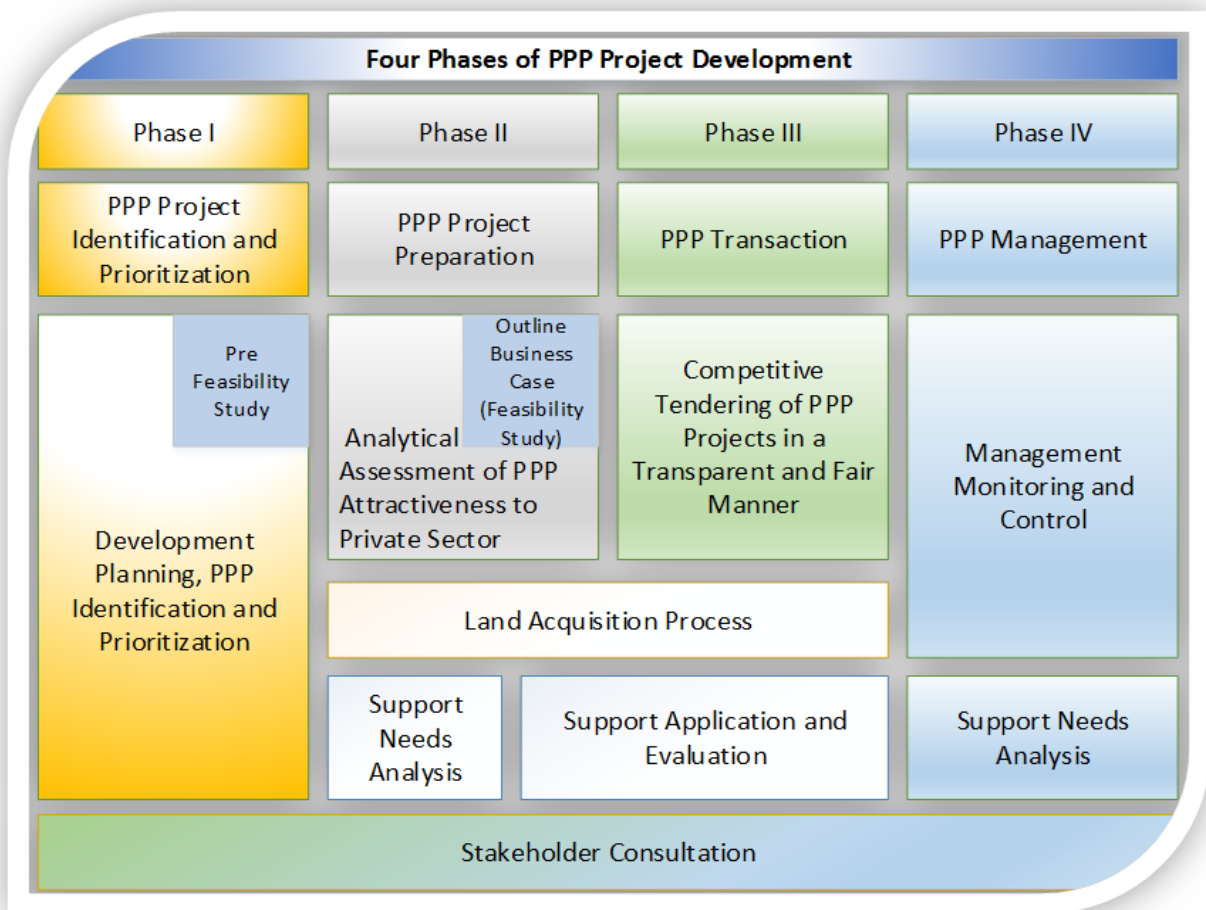
including fees, tolls, sub-concessions or other options, but must be reasonably assured for the term of the contractual agreement.

Phase II: PPP Project Preparation where market sounding activities are conducted to confirm the project attractiveness to the private sector and where a full Feasibility Study with an Outline Business Case (OBC), including the tender documents, are drafted to prepare the PPP project for tendering.

Phase III: PPP Project Transaction where the PPP project is tendered in accordance with the step-by-step procedures set forth in this PPP Procurement Manual following which a Concession Contract is signed.

Phase IV: PPP Project Management where the implementation of the Concession Contract is monitored and enforced by the responsible GCA officials.

Figure 1: Four Phases of PPP Project Development



- 1.3.4 Project Preparation and Transaction Advisory Services: In the event the Government requires specialized consulting services to assist in Project Preparation (Phase II) and/or to facilitate the transaction phase, Phase III, such actions are governed by the provisions of the May 2012 Procurement Manual, Volume I, Section 10.6, *et. al*, on the basis of Cost Quality Selection (CQS) or Quality Cost Base Selection (QCBS) or, as approved, a Single Source selection in “The Procurement of Consultancy Services.” Except for the recruitment of consulting services, the May 2012 Procurement Manual does not apply to the PPP procurement process.
- 1.3.5 Changes to the PPP Procurement Manual: This PPP Procurement Manual is intended to serve as an interim step while the PPP Policy and Strategy Paper is being considered, as well as amendments to the LoC. Changes are therefore expected to be incorporated into a final manual.

SECTION 2: GOVERNMENT’S PPP SOCIO-ECONOMIC POLICY

2. Government's PPP Socio-Economic Policy

DRAFTING NOTE 1: *The overarching cross-sectoral legal and regulatory framework, and the associated institutional arrangements, for PPP implementation are currently being developed. The need for PPP implementing rules and regulations (IRRs) was an outgrowth of the PPP Issues Workshop held in December 2014 wherein the merits of separate IRRs for Public Procurement and Public-Private Partnerships were discussed. During subsequent communications and a meeting held in March 2015 in Phnom Penh, the Government stated its plan to enact a "PPP Law" and adopt a regulation to provide a legal mandate MEF's "PPP Center." Subsequently, the Government decided to (a) consider amending the Concessions Law rather than drafting a separate PPP Law and (b) circulate a PPP Policy Paper, which included provisions for the organizational structure and staffing of the MEF PPP Center with capable, well-trained officials. Because of the sensitivities associated with these tasks, the Government is maintaining the drafts as confidential.*

Typically, the law development/legal reform sequencing of activities are:

- a. **FIRST:** *Government's adoption of an overarching PPP Socio-Economic Policy;*
- b. **SECOND:** *Enactment of an Amended Concessions Law;*
- c. **THIRD:** *Establishment of the institutional arrangements, including the PPP Center under a MEF Regulation; and,*
- d. **FOURTH:** *Adoption of implementing rules and regulations compliant with the Government's PPP Policy, the legal and regulatory framework, and the institutional arrangements.*

Awaiting the outcome of the Government's adoption of the PPP Policy and Strategy, the enactment of an amended Concession Law and an MEF Regulation to establish the PPP Center with a clear mandate, this PPP Procurement Manual will focus on:

- a. *Those activities occurring during the transaction phase that require the Government Contracting Agency (GCA) to disseminate a Feasibility Study, Outline Business Case and tender documents; all prepared in Phase II prior to the commencement of the transaction in Phase III, simultaneously to all shortlisted bidders;*
- b. *Those activities that require the GCA to, after the selection of the highest evaluated proposal and execution of an executed, contingent Concession Contract to seek approval of the Full Business Case prior to financial close; and*
- c. *Step-by-step PPP procurement procedures.*

This chapter of the PPP Procurement Manual will be drafted after review and discussions with MEF regarding the forthcoming PPP Policy and Strategy Paper, as well as the expected amendments to the to the LoC.

SECTION 3: THE GOVERNMENT’S GOOD GOVERNANCE, ANTICORRUPTION AND ACCOUNTABILITY POLICIES

3. Good Governance, Anticorruption and Accountability Policies

3.1 Good Governance and Accountability Policies

- 3.1.1 Cambodia has very clear and strict policies aimed at removing fraud and corruption from all public sector functions, including the PPP procurement process.
- 3.1.2 The RGC has made Good Governance, which includes fighting corruption, the core of its Rectangular Strategy. The Law on Anti-Corruption, No. NS/RKM/0410/004 was enacted on 19 April 2010, which also provides for the implementing regulations and an Anti-Corruption Commission to enforce the Law.
- 3.1.3 The Guiding Principles stated in Section 1 recognize the unique “partnership” nature of a PPP and the importance good governance, anticorruption and accountability have in facilitating and sustaining private sector participation, over the longer term Concession Contract, in the development of needed infrastructure.
- 3.1.4 Capable bidders (typically, a consortium comprised of a construction firm, an operator, a maintenance firm and, perhaps, an architectural or design firm) are more apt to enter into a partnership with the GCA if they have confidence in the fairness and integrity of the PPP process, founded on good governance, anticorruption and accountability. This is particularly true of foreign-dominated consortia that offer, and are best situated to bring, capital, innovative technology and private sector efficiency. Importantly, capable, reliable prospective foreign bidders are legally bound to adhere to their countries laws and regulations, including the Foreign Corrupt Practices Act enacted in the United States.
- 3.1.5 PPP transfer significant risks to the private sector to finance, design, build, operate and maintain the tendered infrastructure under a long-term contractual agreement, thus achieving value for money and optimal life cycle costs. Bidders are required to submit a financial proposal, which details the structuring of their equity, loans and other funds to adequately finance the infrastructure project through the Concession Agreement term.
- 3.1.6 Typically, bidders will propose loans as the largest component of the financing structure. Lenders, likewise, will evaluate the consortium’s loan application to ensure that, if approved, loan disbursements will be used for project-related expenses, absent illegal levies. Accordingly, good governance, anticorruption and accountability permeate the development and implementation of a successful PPP project.¹

¹ Provisions concerning Conflict of Interest, Complaint Handling Mechanisms and related topics (such as internal and external auditing) are to be included in Appendix IV, which is being redrafted and will be provided to MEF before the 26 January 2016 Workshop. When drafted, the provisions can be discussed and included in this Section 3.

3.2 Anticorruption Law

- 3.2.1 Cambodia's Law on Anticorruption No. NS/RKM/0410/004 was enacted on 19 April 2010, and consists of nine (9) Chapters and fifty-seven (57) Articles, and establishes an Anticorruption Commission to implement the Law.
- 3.2.2 The stated subject of the Anticorruption Law is to “promote effectiveness and good governance in leadership and state management as well as to maintain fairness and justice which is fundamental for social development and poverty reduction.”
- 3.2.3 The stated purpose of the Anticorruption Law is “to combat corruption through measures to educate, prevent, and implement to combat corruption offenses including public participation and international cooperation.”
- 3.2.4 The stated extent of the Anticorruption Law is to combat all forms, all natures and all levels of corrupt practices in the Kingdom of Cambodia that have occurred after the law was promulgated.
- 3.2.5 The Anticorruption Law applies to every person, whether engaged in PPP procurement or not, and carries severe penalties, both criminally and civilly, for violations of its provisions. A corruption offense refers to criminal offenses stated in Chapter 6 of the Anticorruption Law. A public official is defined as:
- (a) Any person holding a legislative, executive branch, or judicial office who is appointed by any legal letter whether permanent or temporary, whether paid or unpaid, regardless of his or her status or age.
 - (b) Any person holding a public office including public agency or public enterprise and any other public institutions as stated in the law of the Kingdom of Cambodia.
- 3.2.6 The Law will therefore apply to PPP procurements. Accordingly, any procurement official who receives, or learns of, a communication alleging that a person or persons attempted to commit or committed any act defined in the articles in the Law related to public procurement shall promptly report, in writing, the substance of the communication, and provide complete documentary evidence, to the Anticorruption Unit.
- 3.2.7 Provisions in the Law, most particularly Section 2, provide for the Anti-Corruption Commission for keeping confidential the identity of persons who report corruption and taking necessary measures to provide security to corruption whistleblowers.
- 3.2.8 In the investigative framework, Article 85 (the power of judicial police officer in real investigative offences) Article 91 (checking) Article 94 (subpoena in the case of exact investigation) and Article 114 (subpoena for preliminary investigation) of the code of criminal procedure, the chairperson of Anti-corruption Unit or assigned representative leads and coordinates the investigation up until the arrest of the suspect.

3.2.9 Everyone is subject to the Law, and PPP procurement officials shall be very familiar with its provisions and avoid even the appearance of a violation. Any procurement official who receives, or learns of, a communication alleging that a person or persons attempted to commit or committed any act defined in the articles related to public procurement shall:

- (a) Promptly report, in writing, the substance of the communication, and provide complete documentary evidence, to the Anticorruption Unit, at the address provided in Appendix I;
- (b) Maintain a copy of all of any and all information provided to the Anticorruption Unit;
- (c) Cooperate fully with the Anticorruption Unit.

3.2.10 Allegations of criminal corruption are distinct from the improprieties addressed in the Complaints Handling Mechanisms.

3.3 Governance and Cambodia's Good Governance Framework (GGF)

3.3.1 It is generally agreed that the term "Governance" includes four fundamental principles that are particularly important to further Cambodia's development objectives:

- Participation,
- Accountability,
- Predictability and
- Transparency.

3.3.2 Under **participation**, Cambodia's citizens can achieve greater self-determination as they are involved in the development process, help identify the need to acquire needed public goods and services; resulting in them having a strong, influential voice in the decisions of their government.

3.3.3 **Accountability** will help to ensure that policies adopted by the government are supported by its citizens and have the optimum chance to achieve their desired effect.

3.3.4 Developing appropriate legal and regulatory frameworks to facilitate and sustain economic growth, particularly in large value, long term PPP procurements will ensure **predictability**.

3.3.5 Publishing PPP procurement regulations and administrative rulings will assure the private sector that a contemplated transaction is permitted, and once entered in too; the transaction will be enforced on all parties by a free and independent judiciary. Accurate and timely information concerning Government's PPP procurement policies and the condition of the economy can be vital for private sector decision-making. **Transparency**, therefore, helps to ensure that information concerning government policies, rules, and decisions are available to the general public.

3.3.6 Cambodia's Good Governance Framework (GGF) is a subset of Governance. The process aims to supplement the traditional supply side interventions (such as

procurement, financial management) with demand side (such as role of civil society, complaints and grievance mechanisms) to enhance project transparency and accountability in the implementation of projects.

- 3.3.7 The GGF itself is essentially a matrix that summarizes the range of enhanced PPP procurement, financial management, public participation, transparency, third party verification and other measures that will be applied to projects to reduce and mitigate risks. The general GGF measures are derived from country and sectoral experience with corruption and other aspects of governance. In addition to providing a mechanism to assess the sum of actions being taken, the GGF provides a tool for strengthening supervision and evaluation by the Government of the key activities required to prevent corruption and misuse of project resources. This supervision and evaluation component also provides the Government with the opportunity to test the effectiveness of the GGF measures for eventual incorporation into strengthened country systems.
- 3.3.8 The GGF matrix is centered on eight categories, namely: (1) Procurement, including PPP; (2) Financial Management; (3) Disclosure; (4) Civil Society Role; (5) Complaints and Remedies; (6) Code of Ethical Conduct; (7) Sanctions; and (8) Project Specific Elements. The matrix also outlines salient risks that are common to most, if not all, GCA and to the project as a whole.
- 3.3.9 The same template based on the above eight categories has been adopted to prepare a similar ‘Good Governance Plan’ (GGP) for each GCA. This adds another layer of safeguards for ensuring open and clean management of all activities related to PPP Projects.
- 3.3.10 As successful achievement of good governance environment largely depends on project leaders, staff and all other external participants (contractors, suppliers, consultants etc.), the overall project GGF and the GCA GGPs have each been adopted and signed by their respective Project Director (PD) and senior management level officials in the concerned agencies. In projects where the Government has agreed on the use of the GGF, the project implementation team must comply with the requirements. It is essential that all actors involved in project implementation understand the behavior expected of them, agree voluntarily to follow the expected standards behavior and agree to fully cooperate with investigation in case of allegations of breach of conduct.

3.4 Accountability

Accountability is addressed in the Anticorruption Law and the Good Governance Framework, above, as well as the internal and external audit functions.

SECTION 4: PPP LEGAL FRAMEWORK

4. PPP Legal Framework

- 4.1 The legal framework governing PPP currently comprises the overarching, cross-sectoral Law on Concessions (LoC), which is in the process of being amended, and an implementing Sub-Decree, which has yet to be adopted, to provide additional guidance on the implementation of the law. As amended, the LoC will be the governing law for PPP, including provisions related to all four PPP phases. This PPP Manual will elaborate on the LoC's implementing rules and regulations for carrying out PPP activities, which may lead to the execution of a Concession Contract, and is expected to form an important part of the Sub-Decree.

The Law on Investment is peripherally related to the PPP Legal Framework in that it authorizes the Council for the Development of Cambodia (CDC) to issue a "final registration certificate" for a "Qualified Investment Project." Neither the Investment Law nor laws governing the extraction of minerals and resources regulate, or have jurisdiction over, the PPP process.

- 4.2. Enacted by the National Assembly in 2009, the LoC is intended to promote and facilitate the implementation of privately financed infrastructure and related services to help ensure the public interest and the fulfillment of the national economic and social objectives.

- 4.3 The transaction of a PPP must fall within the sectoral scope of the LoC, as follows:

- a. *power generation, power transmission and power distribution;*
- b. *transportation facilities systems, including, but not limited to roads, bridges, airports, ports, railways, channel.*
- c. *water supply and sanitation.*
- d. *telecommunication and information technology infrastructure.*
- e. *supra-structure related to tourism projects, but not limited to tourism resort museums;*
- f. *gas and oil related infrastructures including oil and gas pipelines;*
- g. *sewerage, drainage and dredging.*
- h. *waste management and treatment.*
- i. *hospitals and other infrastructure related to health, education and sport sectors.*
- j. *infrastructure related to special economic zones and social housing.*
- k. *irrigation and agricultural related infrastructure.*
- l. *other sectors for which a specific law allows for the granting of Concessions."*

- 4.4 The LoC provides that the manner in which the Government may transact, or work together with the private sector, and enter into concession contracts include the following modalities:

- a. *"Build, Operate and Transfer (BOT)*

- b. *Build, lease and transfer (BLT)*
- c. *Build, transfer and operate (BTO)*
- d. *Build, own and operate (BOO)*
- e. *Build, own operate and transfer (BOOT)*
- f. *Build, cooperate and transfer*
- g. *Expand, operate and transfer*
- h. *Modernize, operate and transfer*
- i. *Modernize, own and operate*
- j. *Lease and operate manage or management arrangements or any variant thereof or similar arrangement, including joint public-private implementation of Infrastructure Facilities.”*

- 4.5 Concessions are defined in the LoC as “any undertaking attributable to the state whereby an authorized GCA contracts with a private sector party the total or partial implementation of an Infrastructure Project for which that institution would normally be responsible and for which the third party assumes a major part of the construction and/or operating risks or receives a benefit by way of compensation from government revenue or from fees and charges collected from users or customers. Such acts of the state will henceforth be considered as “concessions” under this Law regardless of the legal name used for the act.”
- 4.6 The competitively selected bidder, whether a single entity or a consortium, is referred to in the LoC as the “Concessionaire,” and is defined as the private sector entity that carries out an Infrastructure Project under a Concession Contract entered into with the GCA.
- 4.7 The contractual arrangements entered into between the GCA and the private sector party are referred to as “Concession Contract,” and are defined as the mutually binding agreement between the GCA and the Concessionaire that sets forth the terms and conditions for the implementation of an Infrastructure Project.

SECTION 5: PPP INSTITUTIONAL FRAMEWORK

5. PPP Institutional Framework

This Section of the PPP Procurement Manual describes the institutions and their roles in carrying out PPP projects.

5.1 Government Contracting Agencies (GCA)

5.1.1 Authorized GCA are defined in LoC Article 4 as ministries, institutions, State-Owned Enterprises (SOE)², and local governments *“which have been delegated the required institution in accordance with the laws of Cambodia have the power to enter into Concession Contracts for Infrastructure Projects falling within their respective spheres of competence and have the power to enter into ancillary or related agreements, including for the purpose of facilitating any related financing.”*

5.1.2 LoC Article 11 provides that GCA are responsible for selecting the Concessionaire through “international or national bidding procedures, by negotiated procedure” (according to circumstances which are not defined, but should be addressed in the amended LoC); and that the selection of the Concessionaire shall be carried out in accordance with the procedures to be provided for in a forthcoming Sub-Decree (the Sub-Decree will be adopted to specify those government entities that have the authority to approve an infrastructure project as a concession project and which government authority has the authority to approve the Concession Contract). As stated above, the implementing Sub-Decree has yet to be adopted, but is expected to be promulgated with the amendment of the LoC, and this PPP Procurement Manual is anticipated to part of that Sub-Decree.

5.1.3 GCA are responsible for implementing all four phases of PPP project development. At the conclusion of Phase III, the GCA is the LoC-authorized public sector entity to enter into a contingent Concession Contract with the competitively-selected private sector bidder, the Concessionaire, typically a consortium of firms. The GCA submits the contingent Concession Contract and a Full Business Case, including a Selection Memorandum for review and approval. If approved, the Concession Contract becomes legally binding upon Financial Close.

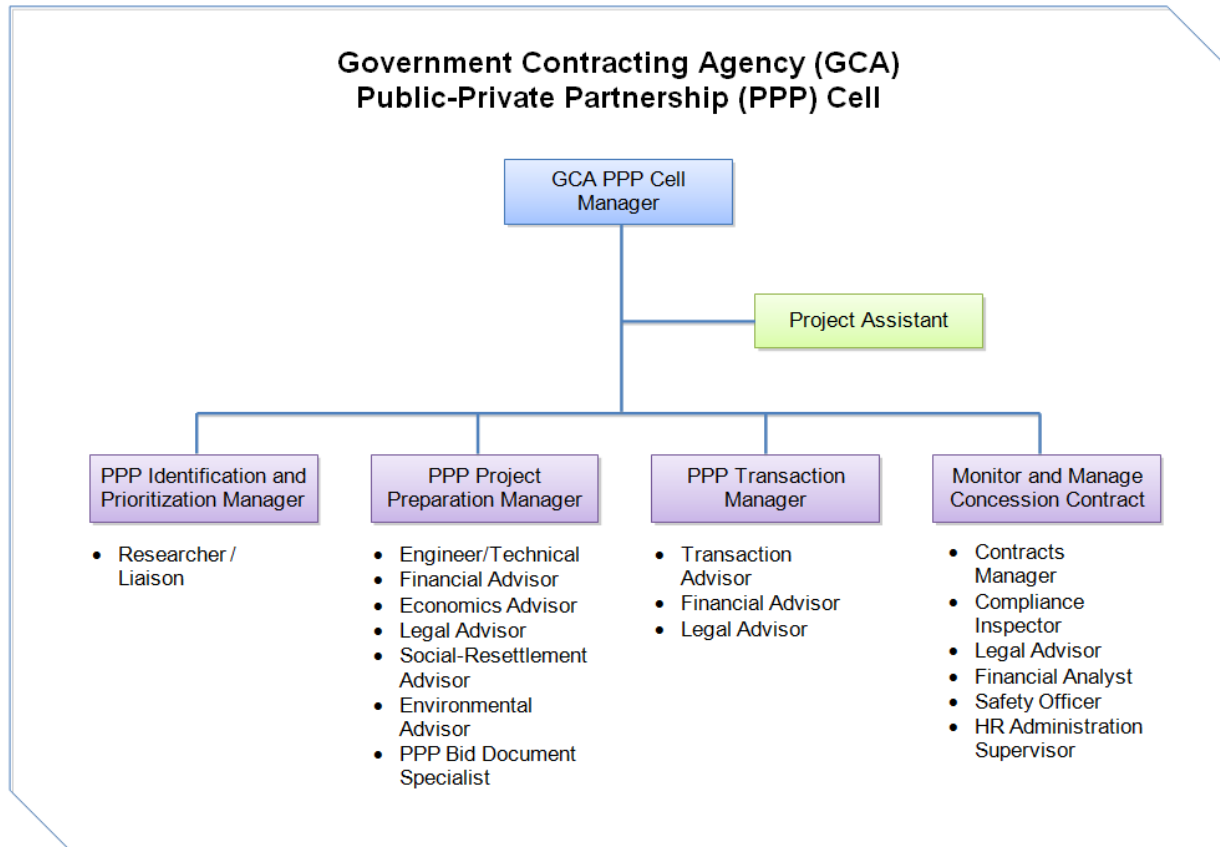
5.2 GCA PPP Cells

To capably carry out its significant responsibilities, including the long-term monitoring of the Concessionaire’s duties and responsibilities specified in the Concession Contract, the GCA is

² Although the LoC includes SOE as an authorized GCA to undertake infrastructure projects, based on international best practices, including potential conflicts of interest and lack of capacity, the RGC may wish to consider, in the drafting of an amended LoC and implementing Sub-Decree, to delete SOEs as an authorized institution. **SOE should be permitted to compete for the PPP as a member of a consortium. (To be discussed)**

responsible for developing a PPP Cell reporting, through the PPP Cell Manager, to the GCA Head. A typical organizational structure and staffing of a PPP Cell is shown in Figure 2.

Figure 2: GCA PPP Cell Organizational Structure and Staffing



GCA PPP Cells³ are responsible for managing all phases of PPP project development, in accordance with the PPP related procedures developed and disseminated by the MEF PPP Center (see section 5.3). The key objective of a PPP Cell is to stimulate and support the implementation of PPP projects in a stable manner that deliver better value-for-money, are fiscally affordable, and in a consistent manner that builds the PPP market and market confidence.

At each stage of PPP project development, the PPP Cell is responsible for preparing the documentation to be submitted by the GCA Head.

At the commencement of Phase III, the GCA Head, or his or her designee, issues a *Prakas* to form a PPP Evaluation Committee (PEC), more fully described in Section 5, below, to carry out,

³ LoC Article 4 provides that the GCA is responsible for the selection of the Concessionaire. To capably carry out the PPP project identification, prioritization and preparation work before the transaction phase leading to this selection, the GCA shall establish a GCA PPP Cell.

typically with the assistance of a panel of pre-qualified Transaction Advisors, the competitive PPP procurement process.

5.3 Ministry of Economy and Finance (MEF)

In accordance with the Law to Establish the Ministry of Economy and Finance (MEF) (Kram NS/RKT/0196/18) dated 24 January 1996 and the Sub Decree on The Organization and Functioning of the Ministry of Economy and Finance (04/ANK/BK) dated 20 January 2000, the Ministry of Economy and Finance has the responsibility and a mandate to manage and control activities of the ministries/institutions, provinces/municipalities and state-managed or publicly-owned autonomous institutions regarding procurement transactions, including the expenditure of public funds related thereto for the implementation of PPP.

MEF has the lead role in the implementation of the Law on Public Procurement. For PPP procurement, Article 3 of the Law on Public Procurement provides that MEF's role must be undertaken in accordance with the guidance of a "separate law," interpreted to be the LoC.

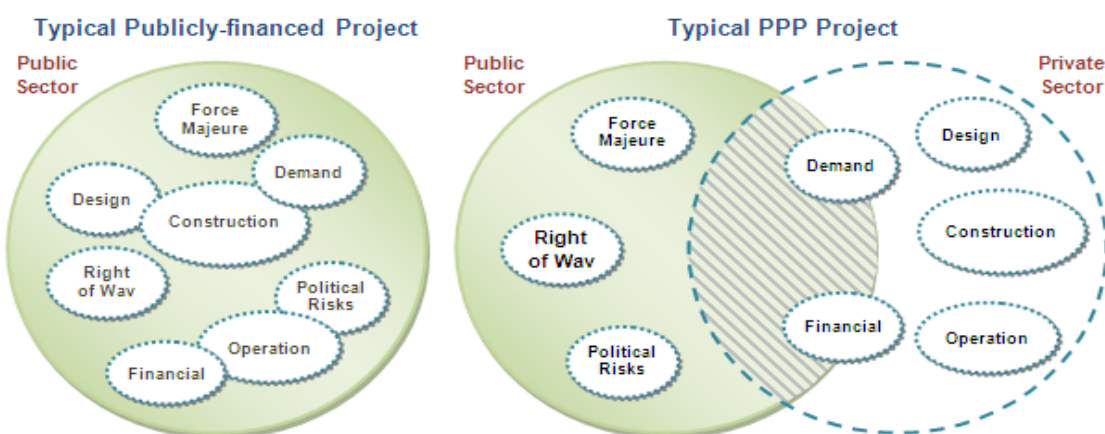
In addition to its routine public sector responsibilities, MEF is expected, under the forthcoming amended LoC and implementing sub-decree, to develop the following two new institutions to facilitate the development and transaction of PPP projects: MEF will closely monitor, and facilitate the GCA PPP Cell's development of all PPP documents; including analytical Pre-Feasibility Studies, an Outline Business Case, Transaction Documents, and a draft Concession Contract, to ensure uniform tendering to help foster and sustain an environment which encourages prospective, capable private sector entities to partner with the Government and provide needed infrastructure and related facilities.

- A. MEF PPP Center:** The key objective of a fully developed, well-functioning MEF PPP Center is to stimulate and support the implementation of PPP projects in a systemic, stable manner that deliver better value-for-money, are fiscally affordable, and in a consistent manner that builds the PPP market and market confidence. The MEF PPP Center is responsible for the coordination of the PPP program as a whole through; i.e., the development and dissemination of guidelines and documentation to assist the GCA PPP Cell to ensure appropriate analytical focus and consistency, with the aim of developing a viable pipeline of well-prepared PPP projects. The MEF PPP Center may also be assigned the role to recruit a panel of pre-qualified Transaction Advisors to assist the GCA organized Procurement Committee (PEC) with specialized technical assistance to carry out the competitive selection process. Subsequently, the PPP Cell may provide project management support to the GCA PPP Cell. The MEF PPP Center will closely monitor, and facilitate the GCA's development of all PPP Project Preparation Documents; including analytical Pre-Feasibility Studies, an Outline Business Case (OBC), Transaction Documents, Full Business Case (FBC) and a draft Contractual Agreement, to ensure uniform tendering to help foster and sustain an environment which encourages prospective, capable private sector entities to partner with the Government and provide needed infrastructure and related facilities.

- B. Risk Management Unit:** This to-be-formed institution within the MEF is responsible for assessing the effect of each PPP project on public debt and makes a determination of value for money for each project, as well as to advise the government on the policies for managing direct and contingent risks associated with PPPs assumed by the public sector, oversee risk management operations, and report on the overall guarantee position of the government.

Risk management is a particularly important analytical management task in preparing and implementing a PPP. The following graphically depicts the difference in risk allocation between a publicly-financed and a PPP, tasks that the RMU is responsible for analyzing and reporting.

Figure 3: Distribution of Risks in a Publicly-Financed Project vs. a PPP Project



Typically, the key tasks⁴ performed by an RMU include:

- Formulation of the socio-economic policy for managing contingent and direct PPP risks assumed by the government in the implementation of a PPP
- Appraise PPP project proposals to ensure the government only assumes those risks where the expected benefit of doing so is greater than the expected costs. Develop contracts and institutional measures such as fiscal intercept arrangements so RMU can recover costs of successful claims under the guarantee scheme from the responsible GCA through the annual budget allocation framework
- Develop and implement procedures for requesting, reviewing, approving, issuing, administering, paying out, accounting and reporting on guarantees, and prepare documented guidelines

⁴ Adapted from the May 2013 PPP Background Paper and anticipated to be incorporated into the Government PPP Policy and Strategy, expected to be adopted in the Fall 2015.

- Coordinate with Budget and Debt Management Functions within MEF and define a cap on the total value of the stock of actual and contingent liabilities that will be assumed by the government, and define valuation methodology
- Establish capital reserves, or standby credit facilities that are sufficient to meet the costs of guarantees if they are called
- Risk management oversight of Viability Gap Fund (VGF) and Payment Guarantee Facility, monitor direct fiscal obligations and guarantees at the portfolio level, and track the value of actual and contingent liabilities to ensure they remain below the capped level.
- Monitor, audit and report to MEF on the total stock of guarantees and associated contingent liabilities.

5.4 Council for the Development of Cambodia (CDC)

5.4.1 Articles 8, 9 and 10 of the LoC define the roles and responsibilities of CDC:

Article 8 provides that CDC is the one stop service entity for obtaining authorizations required to implement an Investment Project in accordance with the Law on Investment. CDC shall upon receipt of a request for a Qualified Investment Project to be implemented under a Concession Contract from a selected Concessionaire:

- a. Approve all investment incentives the Concessionaire is entitled to according to the Law on Investment of the Kingdom of Cambodia (impliedly, all such incentives must be included in the Bid Documents and draft Concession Contract disseminated by the GCA to shortlisted bidders);
- b. Specify all authorizations required to be obtained for the subject Concession Project, the competent institutions responsible for the issuance of the Authorizations; and
- c. Obtain in a timely manner all required authorizations as specified from the relevant institutions on behalf of the Concessionaire, provided that all required information and documents have been duly supplied.

Article 9 provides that CDC is the centralized service institution providing, on request, general information to potential investors regarding investment in “Concession Projects” in the Kingdom of Cambodia, including such information as mentioned in Article 8 (a) and (b) of this law. CDC shall likewise make available copies to all potential investors of any laws and regulations of general application to Concession Projects in the Kingdom of Cambodia.

Article 10 provides that CDC is responsible for; i.e.:

- a. Advising the RGC on Concession policy issues and making recommendations for improvement of laws and regulations applicable to Concession Projects (this provision may be changed in the amended LoC and be included as a joint responsibility with the MEF PPP Center);
 - b. Assisting other competent institutions in identifying and evaluating particular opportunities for privately financed Infrastructure Projects and in the promotion of viable projects to the investor community;
 - c. Developing, whether in the CDC or assessing externally, the necessary expertise to assist Contracting Institutions in preparing, tendering and monitoring complex Concession Projects, particularly for Project Preparation and Transaction Advisory services (*this responsibility may be changed in the amended LoC and be included as a responsibility of the MEF PPP Center*);
 - d. Proposing model selection procedures and model project documents in order to rationalize the financing, implementation and monitoring of Concession Projects (*this responsibility may be changed in the amended LoC and be included as a responsibility of the MEF PPP Center*);
 - e. Coordinating capacity building and training of officers and other civil servants involved in Concession Projects (*this responsibility may be changed in the amended LoC and be included as a responsibility of the MEF PPP Center*); and
 - f. Keeping a register of all Concession Contracts and Concession Projects for assessment and exchange of experience between Contracting Institutions/GCAs.
- 5.4.2 The amended LoC and implementing Sub-Decree are expected to clarify the PPP procurement roles and responsibilities, and flesh out the institutional arrangements; however, it is clear that CDC's responsibilities do not include the PPP procurement process. However, during the consultative process, CDC shall be consulted, as will other stakeholders.

SECTION 6: PPP APPROVAL REQUIREMENTS AND RESPONSIBILITIES

6. PPP Approval Requirements and Responsibilities

6.1 Introduction

The complex, large value nature of a typical longer-term, risk-sharing PPP infrastructure project necessitates the development and implementation of a *three-tiered* recommendation, review and approval process stated in this Section 6 of the PPP Procurement Manual.

The primary focus of this Manual is PPP procurement; however, before the competitive tendering process commences, the proposed project must first be identified, prioritized, appraised and properly packaged, tasks that are detailed in this Section 6, and approved.

6.2 Approval Requirements for Each PPP Phase

LoC Article 4 provides that the GCA is responsible for the selection of the Concessionaire. To capably carry out the PPP project identification, prioritization and preparation work before the transaction phase leading to this selection, the GCA shall establish a GCA PPP Cell, discussed above in Section 5.2.

The GCA PPP Cell shall make recommendations concerning Phase I Project Identification and Prioritization in the form of a Pre-Feasibility Study, Phase II Project Preparation as a Full Feasibility Study/Outline Business Case (OBC), Phase III Transaction in the form of a Full Business Case (FBC) and Phase IV PPP Monitoring and Evaluation of the Concessionaire's responsibilities under the long term Concession Contract. The GCA PPP Cell's recommendation for each of Phase shall include the following components:

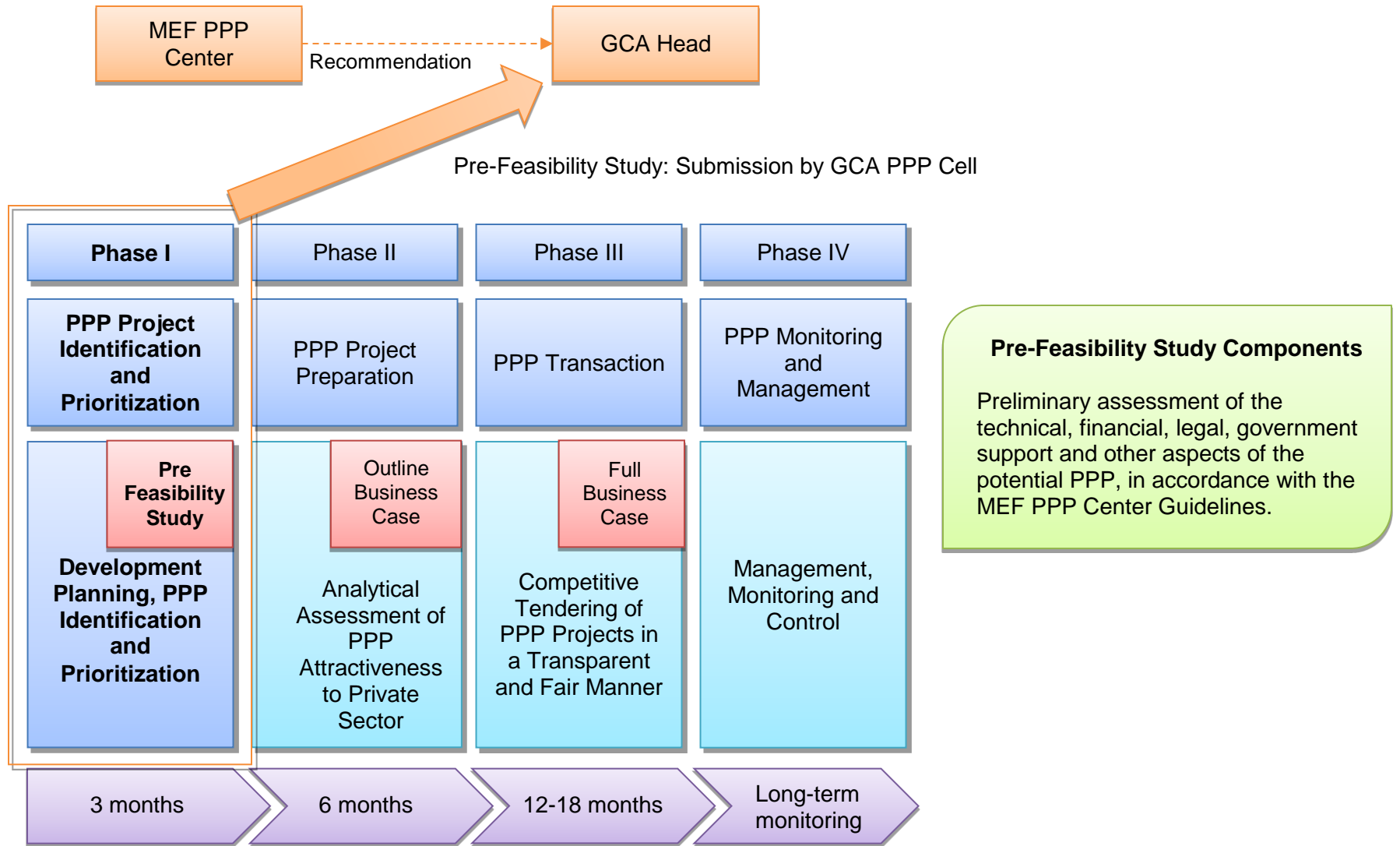
Phase I: Project Identification and Prioritization Approval Requirements:

The GCA PPP Cell shall submit to the GCA Head for review and approval, a **Pre-Feasibility Study**, compliant with MEF PPP Center Guidelines, before proceeding to Phase II Project Preparation. The Pre-Feasibility Study is a preliminary assessment of the technical, financial, legal, support requirements and other aspects of the proposed PPP to determine potential attractiveness to prospective private sector bidders.

The GCA Head's review and approval of the analytical work undertaken in Phase I is an important procedural step because of the considerable time and expense to properly prepare a PPP, requiring a team of public sector officials, oftentimes supported by technical, financial, legal and other outside experts, to work approximately six months to properly prepare the PPP for tendering, and costly, perhaps one-million US dollars or more. Clearly, if the potential project is not feasible or marginally so, the GCA Head may decide to not approve the submitted project and not incur the time and expense of developing a Full Feasibility Study and related documentation in Phase II.

Figure 4 on the following page shows the processing of the Outline Business Case.

Figure 4: GCA Approval of the Pre-Feasibility Study



Phase II Project Preparation Approval Requirements:

Provided the GCA Head approves the Pre-Feasibility Study, the GCA PPP Cell is then authorized to proceed to this Phase II Project Preparation. At the conclusion of the Project Preparation Phase II, the GCA PPP Cell shall have prepared an Outline Business Case (OBC), compliant with MEF PPP Center Guidelines, which includes the following components:

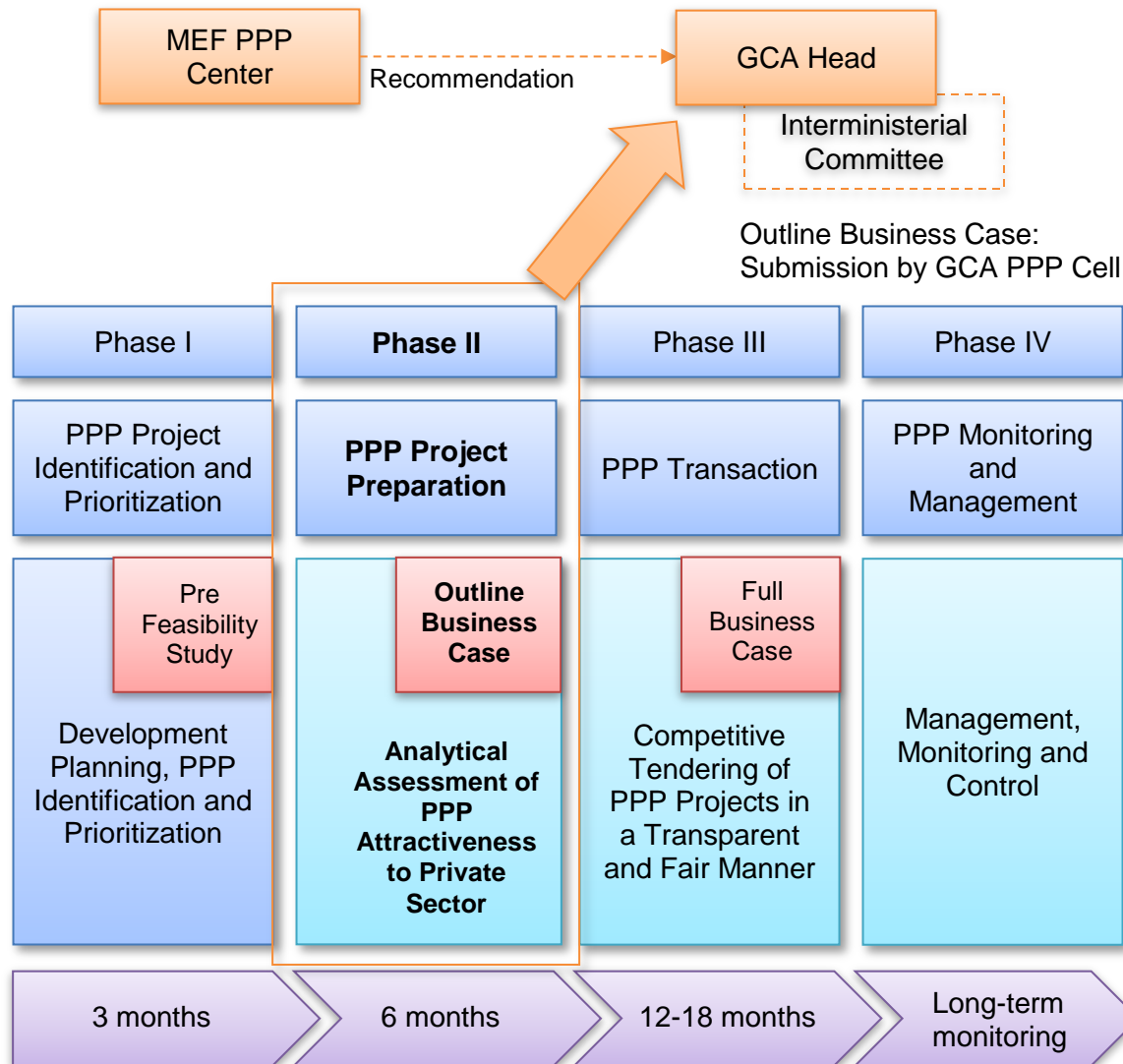
- **Full Feasibility Study** a thorough analysis of the technical output requirements, financial, legal, economic, implementation schedule, environmental impact, social resettlement, and other aspects of the proposed PPP project;
- **Tender Documents** including the following⁵
 - Draft advertisement “Invitation to Prequalify”
 - Prequalification Application, including shortlisting criteria
 - Request for Proposals (RFP), including the evaluation criteria and bidders’ required responses for technical and financial proposals
- **Draft Concession Contract** as a “Business Plan” between the public and private sector participants in the implementation of the PPP; i.e., the rights and responsibilities of the GCA and the selected bidder (typically, a consortium comprised of a construction firm, an operator, a maintenance firm and, perhaps, an architectural or design firm), specifically addressing the concession term and the conditions precedent to the effectiveness of the Concession Contract.
- **Market Sounding Results** detailing the GCA’s objective analysis of its assessment of potential interest by domestic and foreign bidders, typically conducted in a representative sample of countries outside Cambodia.
- **Indicative Government Support**, if any.

The GCA Head shall issue a *Prakas* to form an Interministerial PPP Approval Committee, chaired by the GCA Head, comprised of members from the MEF, the MEF PPP Center and other relevant ministries or bodies, to review and, if merited, approve the GCA PPP Cell’s OBC before it is authorized to proceed to Phase III Transaction.

International experience clearly shows that it is more efficient to include the tender documents, draft Concession Contract and Market Sounding Results in Phase II, rather than assign these tasks to the Transaction Advisory team in Phase III.

⁵ Pursuant to MEF comments, Document Preparation is being drafted for MEF review prior to the 26 January 2016 Workshop. A new section, entitled Document Preparation, will be included in the second draft.

Figure 5: GCA Approval of the Outline Business Case



Outline Business Case

- **Full Feasibility Study** a thorough analysis of the technical output requirements, financial, legal, economic, implementation schedule, environmental impact, social resettlement, and other aspects of the proposed PPP project;
- **Tender Documents** including the following
 - Draft advertisement “Invitation to Prequalify”
 - Prequalification Application, including shortlisting criteria
 - Request for Proposals (RFP), including the evaluation criteria and bidders’ required responses for technical and financial proposals
- **Draft Concession Contract** as a “Business Plan” between the public and private sector participants in the implementation of the PPP; i.e., the rights and responsibilities of the GCA and the selected bidder (typically, a consortium comprised of a construction firm, an operator, a maintenance firm and, perhaps, an architectural or design firm), specifically addressing the concession term and the conditions precedent to the effectiveness of the Concession Contract.
- **Market Sounding Results** detailing the GCA’s objective analysis of its assessment of potential interest by domestic and foreign bidders, typically conducted in a representative sample of countries outside Cambodia.
- **Indicative Government Support**, if any.

Phase III PPP Project Transaction Three-Tiered Approval Requirements:

Provided the GCA-organized Interministerial PPP Approval Committee approves the OBC, the GCA PPP Cell is then authorized to proceed to this Phase III PPP Project Transaction and can proceed with the step-by-step PPP Procurement Procedures described in Section 10.

At the conclusion of this Phase III, a three-tiered approval process is to be used to approve the contingent Concession Contract:

Tier One: The GCA PPP Cell shall, through an authorized Procurement Evaluation Committee (PEC) discussed in the following section, submit to GCA Head for review and approval a Full Business Case (FBC) compliant with MEF PPP Center Guidelines, to include the following components:

- **Selection Memorandum**, detailing; i.e., the prequalification results, shortlisting, Pre-Bid Meeting(s), any RFP amendments issued to shortlisted bidders, administrative processing of bidder proposals, technical and financial proposal evaluation, details of any bidder found to be non-responsive, ranking of bidders, clarification discussions, if any, held with the highest ranked bidder, any bid protest lodged and the results thereto, and the Selected Bidder;
- **Concession Contract** signed by the Selected Bidder, stating the conditions precedents such as GCA Head approval and CDC approval of incentives, if any and Financial Close;
- **Full Business Case** issued to shortlisted bidders;
- **Market Sounding** conducted during Phase II and an analysis of the variances actually experienced in the tendering of the PPP project; and
- **Indicative Government Support**, if any.

Tier Two: The GCA Head shall issue a *Prakas* to form an Interministerial PPP Approval Committee, chaired by the GCA Head, comprised of members from the MEF, the MEF PPP Center and other relevant ministries or bodies, to review and, if merited, approve the PEC recommendation.

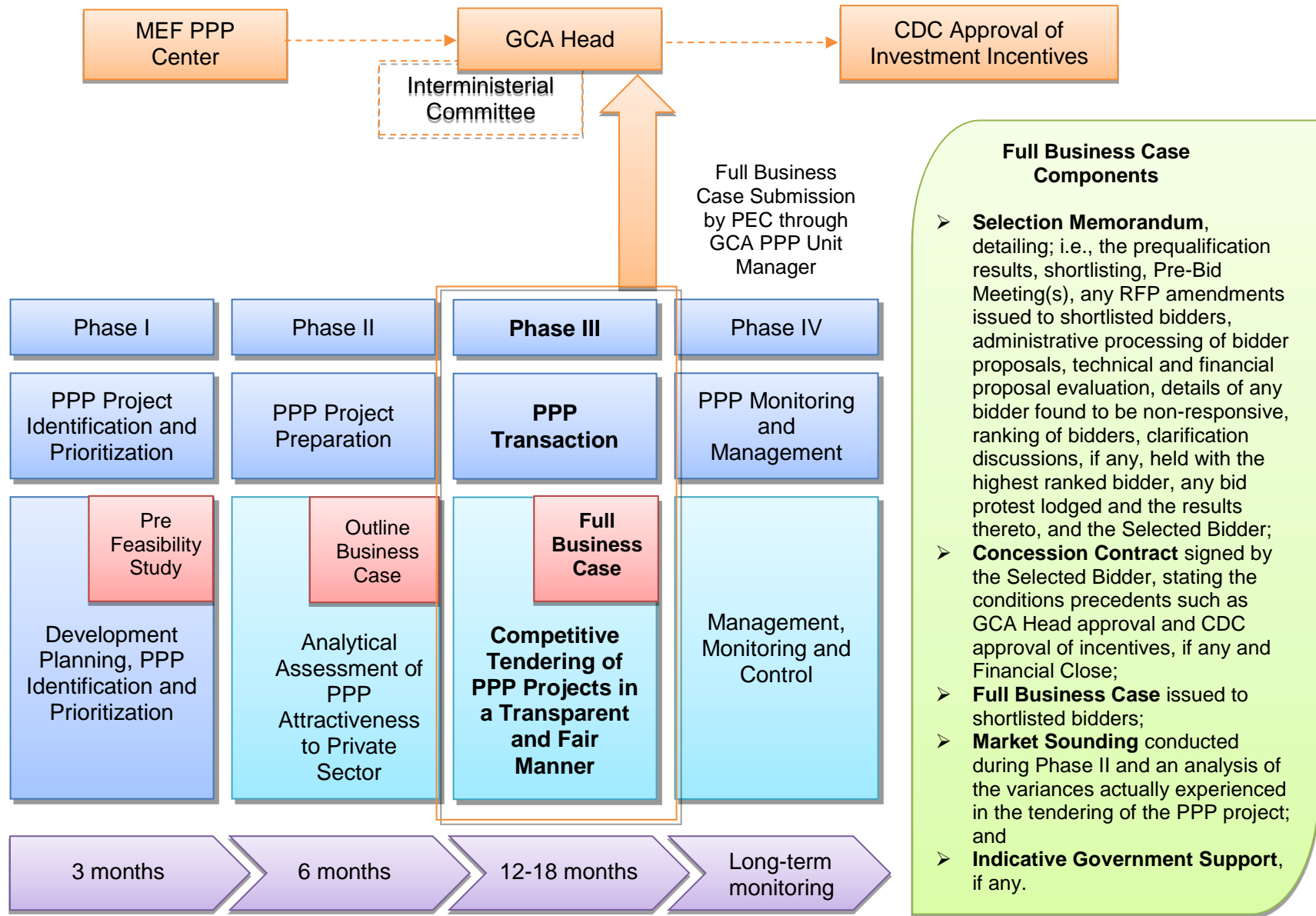
Tier Three: If approved by the GCA-organized Interministerial PPP Approval Committee, the GCA Head shall submit its approval recommendation to CDC to review and, if merited, approve any investment incentives included in the contingent Concession Contract. To carry out its responsibilities, it is recommended that CDC, likewise, form an interministerial committee, chaired by the CDC Head, comprised of members from the GCA, the MEF, the MEF PPP Center and other relevant ministries or bodies, to review and, if merited, provide final approval of the Concession Contract.

Phase IV PPP Implementation Approval Requirements:

Once approved by CDC, the GCA Head countersigns the contingent Concession Contract, which then becomes a binding legal document, subject only to financial close. Immediately after financial close, the GCA Head issues a Notice-to-Proceed to the Selected Bidder, now referred to as the Concessionaire, and the GCA PPP Cell commences its considerable responsibilities to monitor and enforce the Concessionaire’s responsibilities to finance, build, operate, and maintain the infrastructure to provide the public with the agreed upon service delivery and performance standards specified in the Concession Contract.

Figure 6 on the following page shows the three-tiered approval process in a graphic.

Figure 6: Approval of the Contingent Concession Agreement



6.3 Institutional Approval Responsibilities

6.3.1 GCA Approval Responsibilities: LoC Article 4 provides that the GCA is responsible for the selection of the Concessionaire. Accordingly, as detailed above, the GCA has approval authority over Phase I, Phase II and concurrent responsibilities with CDC in Phase III.

6.3.2 CDC Approval Responsibilities: LoC Article 8 (a) provides that CDC, among other responsibilities, is authorized to “*Approve all investment incentives the Concessionaire is entitled to according to the Law on Investment of the Kingdom of Cambodia.*” Accordingly, as detailed above, CDC has concurrent approval authority relative to the incentives or government support (financial or otherwise) provided in the Concession Contract.

6.4 PPP Transaction Responsibilities

6.4.1 This section defines the specific roles and responsibilities of the PPP Evaluation Committee (PEC) to competitively tendering the PPP opportunity through Project Transaction, prepare and submit a Full Business Case, including a contingent Concession Contract signed by the Selected Bidder.

6.4.2 Pursuant to its authority under LoC Article 4 and the delegation of authority in respect to PPP procurement decisions leading to a Selected Bidder, the GCA Head shall issue a *Prakas*, at the beginning of Phase III of the PPP project, to appoint a PEC comprised of GCA PPP Cell officials and a member of the MEF PPP Center, public sector professionals who are “knowledgeable” in PPP procurement procedures, the nature of the project being procured, contract law, technical aspects, financial aspects and other aspects of the PPP project. The schedule for competitive tendering of the PPP procurement shall allow sufficient time for completion of all steps in the procurement process, as provided below in Section 10.

6.4.3 Due to the, typically, high value of PPP projects authorized by the LoC and approved by the GCA Head in Phase I and Phase II, international best practices has shown that, to develop a stable cadre of capable, well-trained public sector officials to carry out Phase III Transaction tasks, the PEC members should be comprised of the following officials:

Project Director (PD): The PPP Cell Manager shall serve as the GCA official-PEC member responsible for oversight of the overall PPP transaction. After evaluation of proposals, Project Director has the authority, on behalf of the PEC, to submit a Full Business Case, including PPP Selection Memorandum, Full Business Case and a contingent Concession Contract signed by the Selected Bidder to the GCA Head for review and approval in accordance with the approval procedures set forth above in Section 6.2.

Project Manager (PM): The PPP Cell Concession Contract Manager shall serve as the GCA official-PEC member responsible for day-to-day management of the PPP transaction. The PD is the assigned public sector official responsible for the management of the Complaint Handling Mechanism (CHM)⁶, including initial responses to complaints related to bid protests, Concession Contract performance disputes, and complaints from any stakeholder. Appeals to the PM decisions are to be decided by the PD, and any further appeal shall be decided by the GCA Head or his or her designee.

MEF PPP Center Representative: This MEF member will be well trained in all Four Phases of PPP Project Development and knowledgeable of MEF PPP Guidelines, which will help to ensure quality and consistency throughout Phase III.

Technical Advisor: The PPP Cell Technical Advisor shall serve as the GCA official-PEC member responsible for all technical aspects of the PPP.

Legal Advisor: The PPP Cell Legal Advisor shall serve as the GCA official-PEC member responsible for analyzing, researching and documenting all legal aspects of the PPP.

Financial Analyst: The PPP Cell Financial Analyst shall serve as the GCA official-PEC member responsible for analyzing, researching and documenting all financial aspects of the PPP.

Safety Officer: The PPP Cell Safety Officer shall serve as the GCA official-PEC member responsible for all safety aspects of the PPP.

Project Assistant: The PPP Cell Project Assistant shall serve as the GCA official-PEC member responsible for all administrative aspects of the PEC.

6.4.4 If so provided in the founding *Prakas* issued by the GCA Head, additional PEC members may include other stakeholders, such as:

- Cambodian citizens residing in the community most affected by the infrastructure and related services to be developed through the PPP;
- Academia;
- Executives of domestic, private sector trade organizations who have no conflict of interest; and
- Any other stakeholder who may contribute to the successful transaction of the PPP.

6.4.5 The PD shall consult with the Head of the MEF PPP Center concerning the recruitment of a panel of pre-qualified Transaction Advisors to assist the PEC with specialized technical assistance to carry out the competitive selection process.

⁶ Currently in Appendix IV but being redrafted

SECTION 7: METHODS OF PPP PROCUREMENT

7. Methods of PPP Procurement

7.1 Introduction

LoC Article 11 provides that GCA “*shall select the Concessionaire through international or national bidding procedures, by negotiated procedure according to the circumstances.*”

International best practice supports the tendering PPP opportunities done competitively, fairly, and transparently, with full accountability. The GCA, supported by the MEF PPP Center, shall ensure that all PPP transactions are carried out in accordance with the Guiding Principles and the procedures set forth in this PPP Procurement Manual.

7.2 Government-Identified PPP Opportunities: International Bidding

Typically through routine development planning, a line ministry identifies a potential PPP opportunity and proceeds with the four PPP Phases as described in section 6.2. For these opportunities, the method of procurement is typically international competitive bidding.

7.3 Government-Identified PPP Opportunities: National Bidding

[The same procedures, above, apply to national competitive bidding. Discussions with MEF are necessary to complete this section because the consultant does not envision any national bidding because of the need for financing, technology and private sector initiative support international competitive bidding.]

7.3 Negotiated Unsolicited Proposals

7.3.1 Introduction

The above international and national bidding procedures apply to projects developed by the government. A second possible way to develop PPP projects is to allow private investors to approach the government with unsolicited proposals. Accepting unsolicited proposals allows the government to benefit from the knowledge and ideas of the private sector. However, it requires additional procedures and rules to strike the difficult balance between incentivizing the private sector to develop projects and ensuring sufficient transparency and competition to achieve value for money for the government. International approaches to unsolicited proposals for PPP projects are mixed.

Developing countries of Southeast Asia have found unsolicited proposals problematic in that, typically, politically-connected individuals and companies have been awarded Concession Contracts without competition. Some countries, such as Indonesia, only consider unsolicited proposals supported by a Full Feasibility Study prepared by the PPP proponent (a time consuming and expensive process that effectively precludes any unsolicited proposals from being considered).

Other countries, such as the United Kingdom, do not permit unsolicited projects. Others encourage unsolicited proposals — for example, the PPP law in the state of Virginia, USA is geared towards attracting unsolicited proposals, several of which have been innovative and valuable. The consultant recommends that a PPP framework should allow private firms to propose projects to government entities, and provide a framework for these proposals to be developed into PPP projects.

Governments often have limited experience in identifying and developing PPP, so private firms can be a good source of ideas for PPP. However, it is crucial that the processes and rules by which these unsolicited projects will be considered and adopted are clearly defined. These processes and rules should:

- Encourage private investors to develop proposals for PPP projects that address policy priorities in relevant sectors, but that require (at least) the development of a Pre-Feasibility Study to be submitted concurrent with the unsolicited proposal.
- Ensure projects based on unsolicited proposals are subject to competitive pressure.
- Ensure transparency in assessing projects and awarding contracts based on unsolicited proposals.

7.3.2 Proposed framework

The private sector, trade associations or any other stakeholders may identify a potential PPP and submit it as an Unsolicited Proposal for consideration by the applicable GCA, provided that:

- the interested party submits a Pre-Feasibility Study, in the same detail as would be required of the GCA PPP Cell, to support its proposal for a Government-Identified PPP Opportunities;
- the proposal does not require any RGC financial support.

Provided the GCA PPP Cell confirms the feasibility of the PPP opportunity submitted as an Unsolicited Proposal and recommends further processing, the GCA Head, with advice from the PPP Center, may decide to include in the bid documents either of the following:

- The bidder submitting the Unsolicited Proposal be awarded additional evaluation points, up to a maximum of ten; or
- The bidder submitting the Unsolicited Proposal be afforded the opportunity to match the highest evaluated bidders proposal; or

Alternatively, the GCA Head may decide, with advice from the PPP Center, to compensate the party for its intellectual property in preparing the Unsolicited Proposal.

This Section will be completed after discussions with MEF in January 2016.

SECTION 8: DOCUMENT PREPARATION

DRAFTING NOTE: Before the Section on Advertising Requirements, MEF commented that a new Section must be drafted/inserted to address the “preparation of pre-qualification and bid Documents. This is a very critical part of the procurement process. . . and that the provision and sample of model documents will need to be included also.”

The consultant agrees and is preparing this section for MEF review prior to the 26 January 2016 workshop. This section was not included in the Table of Contents circulated in July 2015 because, it was believed, this topic would be covered in a MEF PPP Center “Guideline.”

SECTION 9: PPP ADVERTISING REQUIREMENTS

9. PPP Advertising Requirements

9.1 Advertising and Recording

9.1.1 The Government recognizes that transparency in the PPP procurement process is essential to ensure that the correct procedures are being employed, to encourage firms in competing for contracts. There are currently two tools in use to help build transparency into the procurement process. The first being the advertising of PPP procurement opportunities and the second being the publication of evaluation results and contract awards. As the public IT infrastructure grows it is expected that various public information websites will also contribute towards increasing transparency in the procurement process.

9.2 Advertising of Opportunities

9.2.1 At the end of Phase I, the PPP opportunity shall be made publicly available through; e.g. a PPP Center website, international publications, trade magazines, embassies based in Phnom Penh, and should appear simultaneously in one English language and one Khmer language newspaper of national circulation within Cambodia.

9.2.2 At the end of Phase II and Market Sounding, the PPP opportunity shall be made publicly available through; e.g. a PPP Center website, international publications, trade magazines, embassies based in Phnom Penh, and should appear simultaneously in one English language and one Khmer language newspaper of national circulation within Cambodia.

9.2.3 After tender documents are finalized, the advertisement for an **Invitation to Prequalify** shall be made publicly available through; e.g. a PPP Center website, international publications, trade magazines, embassies based in Phnom Penh, and should appear simultaneously in one English language and one Khmer language newspaper of national circulation within Cambodia.

9.2.4 Once the shortlisting has been completed, a list of those bidders found qualified to compete shall be announced simultaneously in one English language and one Khmer language newspaper of national circulation within Cambodia.

9.2.5 Once the CDC has approved the Full Business Case, the highest evaluated bidder shall be announced simultaneously in one English language and one Khmer language newspaper of national circulation within Cambodia.

9.3 Recording Expressions of Interest

9.3.1 All expressions of interest received as a result of the advertised Invitation to Prequalify shall be recorded.

9.3.2 The Expressions of interest register will be maintained by the PEC.

9.4 Periodic Contract and Evaluation Summaries

9.4.1 To help deliver increased transparency the PEC is required to compile the following two reports: Summary of Evaluation and Contracts Register.

9.4.2 All Contracts are required to be advertised locally. Within 14 calendar days after the necessary approvals for the award of contracts have been received, the project shall post the Summary of Evaluation on the Project and/or the PPP Center website.

The summary of evaluation shall include bidders who submitted a proposal.

Note: this section will be completed after discussions with MEF in January 2016

SECTION 10: STEP-BY-STEP PPP PROCUREMENT PROCEDURES

10. Step-by-Step PPP Procurement Procedures

STEP 1: PEC Organizational Meeting

The PD organizes an initial PEC meeting to discuss and confirm organization and administrative matters relative to the PPP being tendered.

STEP 2: PEC Reviews the Bid Documents Approved

Immediately after completing the necessary organizational and administrative matters, the PEC shall review the preparation of PPP bid documents completed in the previous Phase II PPP Project Preparation, and approved as per Section 6.2. The review of the bid documents prepared during Phase II shall include⁷:

- (i) A draft advertisement, for inclusion on the PPP Center's website and publication in widely circulated newspapers, magazine or trade periodicals, inviting prospective bidders to compete for the project;
- (ii) Prequalification Application;
- (iii) Prequalification Evaluation Criteria for bidders to be included in the shortlist;
- (iv) Request for Proposal (RFP), including:
 - a. Instruction to Bidders;
 - b. Scope of the Project;
 - c. the scheduling of a site visit at a date and time convenient to the shortlisted bidders;
 - d. Provisions for RFP amendments;
 - e. Evaluation and Award criteria
 - f. Administrative matters, such as the language to be used in bidders' proposals; currency to be proposed; proposal validity period, whether or not alternative proposals may be submitted, the manner in which proposal are to be submitted to the address provided by the PEC, and the bidders signing of an offering letter;
 - g. Method on covering and labeling of proposals, deadline of proposal submission, the treatment of a late proposals, and prohibition to change or withdraw a proposal which has been submitted;
- (v) Outline Business Case, including a feasibility study and the results of the recently-completed Market Sounding, to be included in the RFP; and
- (vi) Draft Concession Contract to be included in the RFP, as the Government's proposed Business Plan to work with the competitively-selected private concessionaire.

⁷ [Remark MV: Consistency has to be checked with regard to the bid documents described in Section 6.2]

STEP 3: PEC Administers Draft Prequalification Questionnaires

The PEC shall use prequalification procedures to evaluate the capabilities of all prospective bidders when carrying out projects using competitive bidding, as follows:

A. Qualifications of Bidders: General

- (i) At any stage of the procurement proceedings, the PEC may make reasonable inquiries into the qualifications of any or all prospective bidders;
- (ii) In order to participate in procurement proceedings, all bidders must qualify by meeting such of the following criteria as the PEC considers appropriate in the particular PPP procurement proceedings:
 - (a) That they possess the necessary professional and technical qualifications; professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the project. This criteria includes, but is not limited to the bidder's (i) general experience in the sector; (ii) past performance on similar projects, including references from past clients for such projects; (iii) experience in similar geographical/topographical/climatic areas; (iv) capabilities with respect to personnel and equipment; and (v) financial capability to carry out the project;
 - (b) That they possess the requisite regulatory licenses, if any, in the field of its business;
 - (c) That they have the legal capacity to enter into a Concession Contract with the GCA Head;
 - (d) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
 - (e) That they provide audited financial statements for the past three years;
 - (f) That they have fulfilled their obligations to pay taxes to the State;
 - (g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of five (5) years preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

- B. Subject to the right of contractors to protect their intellectual property or trade secrets, the PEC may require bidders participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the bidders are qualified in accordance with the criteria referred to above.

- C. Any requirement established by the PEC shall be set forth in the prequalification documents and, subsequently in the bid documents or other documents for solicitation of proposals and shall apply equally to all bidders.
- D. The PEC shall evaluate the qualifications of bidders in accordance with the qualification criteria and procedures set forth in the prequalification documents.
- E. The PEC shall establish no criterion, requirement or procedure with respect to the qualifications of bidders that discriminates against or among bidders or against categories thereof on the basis of nationality, or that is not objectively justifiable, or that contravenes Cambodian law.
- F. Disqualification of bidders:
 - (i) The PEC shall disqualify a bidder if it finds at any time that the information the bidder submitted concerning its qualifications was false;
 - (ii) The PEC may disqualify a contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;
 - (iii) PEC may not disqualify a bidder on the ground that information submitted concerning the qualifications of the bidder was inaccurate or incomplete in a non-material respect. The contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the PEC.
- G. The prequalification document shall include, at a minimum the following information:
 - (i) Instructions for preparing and submitting prequalification applications;
 - (ii) A summary of the principal required terms and conditions of the contract to be entered into as a result of the PPP proceedings;
 - (iii) Any documentary evidence or other information that bidders are required to submit to demonstrate their qualifications;
 - (iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for bidders to prepare and submit their applications, taking into account the reasonable needs of the PEC; and
 - (v) Any other requirements that may be established by the PEC in conformity with Cambodian laws and regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.
- H. The PEC shall respond to any request by a bidder for clarification of the prequalification documents that is received by the PEC within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the PEC shall be given within a reasonable time so as to enable the bidder to make a timely submission of its

application to prequalify. The response to any request that might reasonably be expected to be of interest to other contractors shall, without identifying the source of the request, be communicated to all contractors to which the PEC provided the prequalification documents.

STEP 4: PEC to Announce the Availability of an Invitation to Prequalify

The process of prequalification is to ensure sufficient competition through prequalifying the most suitable bidders and, at the same time, to limit the number of bidders by rejecting those without the necessary technical and/or financial qualifications to successfully carry out the Project. Too many bids impose unnecessary costs on both the private sector because there will be many more failed bids than necessary, as well as on the public sector which has to evaluate the bids.

- A. To encourage prospective, capable bidders to compete for PPP projects, the PEC shall disseminate an "Invitation to Prequalify" notice through:
 - (i) [Drafting note: applicable once the site is operational] on the internet website of the MEF PPP Center, once one is formed;
 - (ii) Advertising in the print media [widely circulated Cambodian and English language newspapers;
 - (iii) Foreign embassies;
 - (iv) Trade publications and periodicals; and
 - (v) Cambodian Chambers of Commerce and related professional associations;
- B. The advertised Invitation to Prequalify shall contain, as a minimum, the name and address of the PEC conducting the public tender; a brief description on the work to be performed under a PPP arrangement, an estimate of the value of the project; requirements of prospective bidders to be shortlisted; and the venue, date, day, and time to submit prequalification applications.
- C. The PEC shall provide a set of prequalification documents to each firm that requests them and has registered in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents (good practice is not to charge for such documents, as they are typically available to be downloaded from the internet). The price that the PEC may charge for the prequalification documents shall reflect only the cost of printing them and providing them to prospective bidders.
- D. GCA shall afford a minimum period of sixty (60) days for prospective bidders to respond to the Invitation to Prequalify.
- E. Bidders are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the PEC decides, on grounds specified in applicable government regulations or according to other provisions of Cambodian law, to limit participation in PPP proceedings on the basis of nationality.

- F. PEC limitations regarding participation on the basis of nationality shall be include in the record of the PPP proceedings a statement of the grounds and circumstances on which it relied.
- G. The PEC, when first soliciting the participation of contractors in the PPP proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to this provision, it shall so declare to them.
- H. The PEC may, but is not required to, seek Expressions of Interests (EOI) from potentially interested bidders prior to advertising the Invitation to Prequalify.

STEP 5: PEC Conducts Prequalification Proceedings

- A. The PEC shall use prequalification proceedings to identify, prior to the submission of proposals or offers, contractors or consortia of contractors that are qualified. Bidders are allowed to form bidding consortia. The information required from these consortia is to demonstrate their qualifications as an integrated group. When considering the qualifications of a consortium, the contracting agency shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members fit together as a whole to meet the needs of the overall project.
 - (i) The PEC shall make a decision with respect to the qualifications of each bidder submitting an application to prequalify. In reaching that decision, the PEC shall apply only the criteria set forth in the prequalification document. The PEC shall evaluate the capability of prospective bidders to successfully carry out the project against a set of prequalification criteria, including but not limited to, an assessment of:
 - (a) The bidder's general experience in the sector.
 - (b) Experience past performance on similar projects, including references from past customers for such projects.
 - (c) Experience in similar geographical/topographical/climatic areas.
 - (d) Capabilities with respect to personnel and equipment.
 - (e) Financial capability to carry out the project (broad picture of equity, loans, etc.).
 - (ii) The PEC maintain a list of all bidders who responded to the Invitation to Prequalify and shall promptly notify each bidder submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all bidders that have been prequalified. Only bidders that have been prequalified are entitled to participate further in the PPP proceedings.

- (iii) The PEC shall, upon request, communicate to bidders that have not been prequalified the grounds therefore, but the PEC is not required to specify the evidence or give the reasons for its finding that those grounds were present. Disqualified prospective bidders may appeal to the head of the PEC the decision to disqualify the bidder's application for pre-qualification within 15 days from receipt of this decision. The PEC shall render a decision on the appeal within 30 days of its receipt of the appeal. [Optional language: "Disqualified prospective contractors may appeal the decision of the PEC to the [designate entity] which shall render a decision on the appeal within 30 days of its receipt of the appeal."]
 - (iv) After bid evaluation, the PEC may, when reasonable circumstances dictate, require a bidder that has been prequalified to certify that the bidder's prequalification data have not significantly changed since the bidder's original submission.
 - (v) When reasonable circumstances dictate, the PEC may require a bidder that has been prequalified and executed the aforesaid certification to demonstrate again its qualifications in accordance with the same criteria used to prequalify such bidder. The PEC shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so. The PEC shall promptly notify each bidder requested to demonstrate again its qualifications as to whether or not the bidder has done so to the satisfaction of the PEC.
- B. Subject to other provisions of law and any requirement of form specified by the PEC when first soliciting the participation of bidders in the PPP proceedings, documents, notifications, decisions and other communications to be submitted by the PEC or any other governmental authority to a contractor or by a bidder to the PEC shall be in a form that provides a record of the content of the communication.
- (i) Communications between bidders and the PEC referred to above must provide a record of the content of the communication provided. If an immediate record is not possible, immediately after an unrecorded communication, a confirmation of the communication must be given to the recipient of the communication in a form which provides a record of the confirmation.
 - (ii) The PEC shall not discriminate against or among bidders on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.
- C. The PEC shall maintain a record of the prequalification proceedings, including, at a minimum, the following information:
- (i) A brief description of the PPP project for which the PEC requested prequalification data;
 - (ii) The names and addresses of bidders that submitted prequalification data; and

- (iii) All other information relative to the qualifications, or lack thereof, of bidders.
- (iv) The PEC shall not be liable to bidders for damages owing solely to a failure to maintain a record of the prequalification proceedings.

The PEC shall complete its pre-qualification of prospective bidders within thirty (30) days of the closing date for pre-qualification.

STEP 6: PEC Prepares a Shortlist of Prequalified Bidders

- A. Short listing will result in a list of bidders that will be invited to submit proposals.
- B. The appropriate maximum number of bidders to be considered for inclusion in the shortlist depends on the nature of the project. If there are enough prequalification applicants, a short list of qualified bidders can be prepared. A prequalification exercise will produce a list of qualified candidates who pass the minimum standards. In some cases, officials will wish to invite all of these bidders to take part in the competition.
- C. Although the PEC ensured that the "Invitation to Prequalify" was widely disseminated to encourage all capable contractors to compete, in certain types of PPP projects the PEC may receive prequalification applications from a small number of contractors. In other cases with different types of PPP projects and different prevailing economic conditions, a PEC may receive prequalification applications from a large number of prospective bidders. If and when a PEC receives prequalification applications from a large number of qualified applicants, then the PEC shall prepare a shortlist of three (3) to five (5) of the most qualified bidders. The PEC's preparation of a shortlist is intended to (i) save marginally-qualified bidders the time and expense of preparing technical and financial bids and (ii) further encourage the most qualified bidders to marshal their resources to prepare fully responsive technical and financial bids.
- D. The PEC shall compile the shortlist by:
 - (i) first, removing from further consideration all bidders who failed the prequalification procedures;
 - (ii) second, if five or fewer bidders remain, include all qualified bidders on the shortlist;
 - (iii) or, if five or more bidders remain,
 - (iv) evaluate all remaining bidders based upon an equal weighing of the following factors:
 - (a) The bidder's general experience in the sector;
 - (b) Experience past performance on similar projects, including references from past clients for such projects;
 - (c) Experience in similar geographical/topographical/climatic areas;
 - (d) Capabilities with respect to personnel and equipment;
 - (e) Financial capability to carry out the project; and

- (v) rank each evaluated, qualified bidder in descending order of capability. The PEC shall prepare the shortlist based on the highest evaluated bidders.
- E. If the number of pre-qualified bidders is less than three (3), then a new invitation for tender is announced for additional participants. But if the number of all participants remains less than three after re-tendering, then the PEC, if authorized, continue with the tendering process.
- F. The PEC shall simultaneously issue a comprehensive bid document to those bidders included on the shortlist. Only prequalified, shortlisted bidders may compete further for the PPP project.
- G. The final shortlist is the one approved by the GCA Head.

STEP 7: PEC Disseminates the Bid Document to all Prequalified Bidders

- A. The PEC shall timely make available to all prequalified bidders a comprehensive bid document.
- B. The PEC shall maintain a list of each prequalified bidder, the date the bidder was informed of its inclusion in the shortlist, and the date (i) the bidder retrieves the bid document or (ii) the PEC couriered the bid document to the bidder.
- C. The bid document, among other objectives, establishes the rules of bidding and shall include, among others, the following:
 - (i) A covering letter from the GCA;
 - (ii) Instructions to bidders that include:
 - (a) A general description and objectives of the project; including a clear statement of the objectives, scope, and expected outputs, minimum design and output performance standards, population to be served and environmental standards;
 - (b) The bid submission procedures; including, among others the date, time and location of bid submission, bid security and bid validity period, and the permissible mode of bid transmission;
 - (c) The principles for setting and adjustment of tariffs, tolls, fees, charges, rentals and any other project charges;
 - (d) Any concession or grant; in the form of license, permit, agreement or otherwise to be provided the GCA;
 - (e) The requirements of concerned regulatory bodies, if any;
 - (f) The scope and extent of any support or enhancement measures that will be provided by the GCA, if any;
 - (g) The status of any land required to develop the Project; and
 - (h) A table that clearly indicates the risks that will be allocated among the Parties and, to the extent appropriate, allocated to users and the general public.

- (iii) The bid form which clearly specifies the information the PEC requires bidders to submit to be considered responsive;
 - (a) A copy of the Outline Business Case;
 - (b) A copy of a professionally prepared draft Concession Contract;
 - (c) Appendixes, including and relevant additional information that may facilitate the bidders' proposals to improve the quality of their bids; and
 - (d) Other documents the PEC may decide to include in the bid document.
- D. The PEC shall notify, in writing, all bidders of any amendments, clarification, correction or change to the bid document.
- E. The PEC shall afford all bidders an additional 30 days for preparation of bids if the PEC significantly amended, clarified, corrected or changed the bid document disseminated to bidders.
- F. The PEC may not require any bidder to submit a bid bond to establish the validity of a bid.
- G. The draft Concession Contract is a "Business Plan" to be discussed and agreed upon between two co-equal development "partners," the essence of a public-private partnership. The draft Concession Contract is to be disseminated simultaneously to all shortlisted bidders as an integral part of the Bid Document. The PEC shall ensure that the following provisions, as a minimum, are included in the draft Concession Contract:
 - (i) Scope of work to be carried out under the Project;
 - (ii) Tariff and the manner in which the tariff is to be adjusted;
 - (iii) Rights and obligations of the parties, including risk allocation;
 - (iv) Standard of service performance;
 - (v) Prohibition in transfer of Concession Contract or share inclusion in Business Entity as holder of Concession Contract before Infrastructure Provision is commercially operational;
 - (vi) Sanctions to be imposed when either party breaches its contractual obligations under the Concession Contract;
 - (vii) Termination of the Concession Contract, and the consequences thereof;
 - (viii) Provisions for the Business Entity to submit a financial report, for the report to be audited by an independent professional auditor chosen by the parties, and for an announcement of the audit results to be published in the national print media;
 - (ix) Mechanism for settlement of disputes; namely, consensus, mediation, and arbitration before either Party seeks recourse to the courts;
 - (x) Mechanism for monitoring and supervising the Business Entity's compliance with the Concession Contract;
 - (xi) The use and ownership of Project assets;
 - (xii) The manner in which the concessionaire will transfer the Project back to Government at the conclusion of the Project's term;

- (xiii) Force majeure;
 - (xiv) A representation and warranty of the Parties that the Concession Contract is legally binding the Parties in accordance with the prevailing laws and regulations;
 - (xv) The use of the Cambodian language, Khmer, in the Concession Contract. If the Concession Contract is prepared and executed in more than one language, the prevailing language must be Cambodian; and
 - (xvi) Cambodian law as the governing law.
- H. The Concession Contract shall clearly contain status of assets' ownership during the period of the agreement; and
- I. The GCA Head shall specify the criteria a concessionaire must follow to transfer shares and, provided further, that the proposed transfer shall not delay the commencement date of the Project.
- J. The bid document shall clearly indicate whether bidders are permitted to make adjustments to the project scope, and clearly indicate the events and/or contingencies for which cost adjustments, terms and conditions, or any other evaluation factors are permitted.
- K. Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the Project, and requirements concerning testing and test methods, packaging, marking or labeling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, bid documents or other documents for solicitation of bids.
- L. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.
- M. Unless otherwise provided in the bid document, PEC will allow bidders a period of one hundred eighty (180) days to prepare their bids. The 180-day period begins from the date of issuing the bid documents to the prequalified firms and concludes at 5pm Cambodian time on the 180th day or at 5pm on the next working day after the 180th day.
- N. The PEC shall not require any bidder to provide a performance guarantee.
- O. Bidders may be requested to extend the validity of their bid without modification to the bid. Bidders who do not wish to comply with this may have their bids returned.

- P. Each bidder is sole responsibility for carefully examining and fully acquainting itself with the requirements and terms and conditions of the bid documents and other documents that may be issued by the government or the PEC. The government and the PEC shall not assume any responsibility for any errors or misunderstandings on the part of the bidders arising out of any information (including the bid documents) supplied by the government or the PEC.
- Q. The final time, date, and place for delivery of bids shall be stated in the bid document. Although the bid document will be opened publicly at the stipulated time and place, because bids are subject to evaluation, neither the evaluation nor bid prices are not public and are not disclosed. Bidders may not modify, alter, or change their bids after the bids have been opened.

STEP 8: PEC Schedules a Pre-Bid Meeting for all Shortlisted Bidders

All communications from PEC to any or all bidders shall be effective with a return showing the bidders' receipt of the communication.

- A. The PEC shall schedule and hold a pre-bid conference not less than 14 days and not more than 45 days, after issuing the bid document to all shortlisted bidders.
- B. When a pre-bid meeting is to be held, the PEC will provide, either in the "Instructions to Bidders" or a separate facsimile or letter, to all prequalified bidders the precise date, time and location of the pre-bid conference. Any amendments to the timing and location of the pre-bid conference will be sent to each bidder via facsimile or letter in sufficient time for them to reconfirm their attendance.
- C. Bidders are encouraged, but are not required, to attend the Pre-Bid Meeting, and the PEC may not disqualify a bidder who does not attend.
- D. The PEC may not, during the pre-bid conference, modify in any material respect any provision or term of the bidding document unless such modification is made as a written amendment thereto prepared by the concerned PEC and disseminated to all bidders.
- E. During the Pre-Bid Meeting, the PEC shall explain to all participants:
- (i) method of tender;
 - (ii) method of submission of tender;
 - (iii) documents which shall be attached to bid documents;
 - (iv) agenda of opening of bid document;
 - (v) method of evaluation;
 - (vi) deficiencies that may cause the PEC to reject a bidder's proposal as non-responsive;
 - (vii) form of the Concession Contract; i.e., its terms are subject to negotiation; and

- (viii) provisions and procedures of evaluation in relation to price preference on the utilization of domestic products and services; and
- F. If necessary (and it usually is), the PEC may organize and conduct a site visit to which all bidders shall be invited to attend.
- G. Bidders may submit a written request to the PEC seeking clarification of any part of the bid document, or any other data or information relating to the bid. Bidders shall allow sufficient time for the PEC to consider and respond to such requests. The PEC shall send all responses, which shall be in writing, to each shortlisted bidder.
- H. The PEC shall send Minutes of Clarification of Pre-Bid Meeting each shortlisted bidder. The Minutes, signed by the PPP Evaluation Committee and at least one representative of the participants, shall be an inseparable part of the bid documents.
- I. In the event there are significant changes made to the scope of work or other material matters in the bid documents, the PEC shall disseminate to all shortlisted bidders an Addendum of the Bid Documents.
- J. For complex projects the PEC shall schedule and hold two conferences:
1. An initial conference to explain the bid document and especially the technicalities of the project, as well as emphasizing the critical elements of the:
 - a. Technical proposal wherein bidders either meet the requirements and pass, or do not meet the requirements and fail; and the
 - b. Financial proposal wherein key criteria include in order of importance price/tariff subsidy, capital cost and financing.
 2. A second conference is held to take into comments received and to provide to bidders the decision of the Government on these and any other issues arising. If the inputs from potential bidders are addressed fully, this will lead to potential negotiating points (both major and minor) being resolved, thereby eliminating or minimizing negotiation points.

STEP 9: PEC Bid Opening and Administrative Review

- A. The PEC will separately evaluate all Technical and Financial Proposals; therefore Bidders are required to submit their proposals in two separately sealed “envelopes” marked “TECHNICAL PROPOSAL” and “FINANCIAL PROPOSAL” respectively. Detailed procedures in the bid document explain how bidders are to submit the proposals, as well as other administrative requirements, including the number of copies required.
- B. When bids are received and the administrative process begins, the PEC can help to create and maintain an environment of transparency and fairness in the PPP process.

Fairness will help to foster confidence among prospective bidders, increase participation in the process, increase competition and, thus, achieving lower overall costs to the users of the PPP project. Professionally processing bids in accordance with the procedures specified in the bid document is therefore, an important step in the overall PPP process. To further develop an environment to encourage capable domestic and foreign investors to enter into the infrastructure arena and compete for PPP projects, it is very important therefore for the PEC to fairly and consistently treat all potential participants equally.

- C. Not only must this step in the process be carried out fairly, but, equally important, prospective investors must also perceive that GCA are, in fact, carrying out PPP tasks fairly and impartially. Accordingly, bids received by the PEC in response to the advertised PPP project must be processed, maintained and administratively handled in accordance with the bid document.
- D. The PEC shall receive and keep secure all bids submitted before the date and time specified in the bid document for bid closing. Any and all bids received by the PEC after the stipulated date and time for bid closing will be returned unopened. The PEC shall maintain, secure and unopened, all timely-submitted bids until the date and time announced for bid opening.

STEP 10: PEC to Fairly and Impartially Evaluate Proposals

- A. The PEC shall open bids at the time specified in the bid document or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the bid document.
- B. The PEC shall permit all bidders that have submitted bids, or their representatives, to be present at the bid opening. Because bids are subject to evaluation, however, only the opening is public. The PEC's evaluation and the bidders' financial proposals shall not be publicly disclosed.
- C. The PEC shall request at least two representatives of the bidders present to act as witnesses. If, at the outset of the bid opening proceedings, there are no witnesses from the bidders present, the PEC shall postpone bid opening until the expiration of the given time. After the lapse of given time, the PEC shall again request at least two representatives of the bidders present to act as witnesses. If there are still no witnesses from the bidders present, the PEC shall appoint, in writing, two witnesses from persons that are not part of the Procurement Evaluation Committee.
- D. The PEC shall examine the contents of each envelope marked TECHNICAL PROPOSAL.
- E. The PEC shall announce, to those persons present at the bid opening (and, on any request by a bidder who submitted a bid but is not present or represented at the bid

opening), the name and address of each bidder whose bid is opened, and whether or not a bid is complete and contains:

- (i) The offering letter, which states the validity period for the bid (but not the price),
 - (ii) The stipulation that no bid bond is required, and
 - (iii) The technical bid documents and other supporting documents required in the bid documents.
- F. PEC's announcement shall be recorded immediately in the record of the tendering proceedings, the Minutes of Tender Opening Meeting. The Minutes shall be signed by the PEC's Procurement Evaluation Committee members and the two witnesses appointed from the bidders present or other non-Procurement Evaluation Committee persons. The Minutes shall be distributed to each bidder. The public portion of the bid evaluation process is then closed.
- G. The PEC shall privately evaluate all bids in accordance with the evaluation criteria contained in the bid document.
- H. The PEC may, if required, engage outside specialists to assist in technical aspects of the evaluation process; however, the names, addresses and functions of the outside specialist shall be recorded in the PEC's bid evaluation report.
- I. The PEC's evaluation first focuses upon the responsibility of the bidders and the responsiveness of their bids:
- (i) The "responsibility" of the bidder is determined at the time of bidders are subject to prequalification procedures. Any prequalified bidder is, by definition, "responsible." If there has been a significant time lag between the time of prequalification and issuance of the bid document, bidders may be requested to submit any changes in the prequalification information at the same time as they submit bids. The bid of any bidder found not to be qualified will be rejected by the PEC.
 - (ii) A "responsive bid" is one that complies with all terms and conditions of the bid document without material modification. A material modification is one which affects the price, quality, scope, or completion date of the PPP requirement or which limits in any significant way the responsibilities, duties, or liabilities of the bidder or any rights of the PEC as any of the foregoing have been specified in the bid document.
- J. After the responsibility of the bidder and the responsiveness of the bid have been determined, bids are evaluated according to the bid evaluation criteria. The most effective procedure to evaluate bids is to develop a matrix or chart which shows the criteria to be considered with the weight to each criterion or group of criteria as specified in the bid document. Each bid is rated against each criterion, a numerical value is assigned, and the weighted ratings are totaled.

- K. Although the rating of bids against the criteria involves subjective judgments on the part of the rater, a degree of objectivity can be obtained by having the individual members of the selection panel independently rate the bids.
- L. Bid evaluation will then proceed using the technical aspects required in the bid document: All bids shall then be examined to ensure they fully address the required project objectives and performance requirements, including:
- (i) Basic design - this shall conform to the minimum design, technical, and environmental standards set out in the bid documents. The engineering surveys and plans shall be reasonable and the implementation schedule shall be achievable.
 - (ii) The proposed organizational arrangements for the project and its subsequent operations and maintenance shall be clear and unambiguous and ensure actual that performance will conform to the performance standards.
 - (iii) The plan and timeframe for the implementation of the project.
- M. Only those bids that are substantially responsive and have passed the technical examination with a specified minimum technical score will be subject to financial evaluation and comparison. The PEC shall use the following minimum criteria to evaluate financial proposals. The minimum requirements for financial evaluation and comparison are listed as follows:
- (i) The PEC shall evaluate and compare each bidder's financial proposal using the bid evaluation criteria specified in the bid document. The criteria for the evaluation of the financial proposal may typically be one or a combination of the below non-exhaustive list:
 - net present value or unit value of payments and subsidies requested from the GCA during the term of the Concession Contract;
 - level of the tariffs to be charged to users of the infrastructure or service; and
 - soundness of the proposed financing arrangements.
 - (ii) To be deemed responsive, a bidder's financial flows must be consistent with the minimum technical design and performance standards, plans, and specifications contained in the bid document.
 - (iii) The financing plan must be complete and account for all costs of construction of the project, its start-up and initial operations. Ambiguities or uncertainties in the financing plan are grounds for rejecting a bid. The bidder bears the burden of demonstrating to the PEC the reasonableness of the bidder's financing plan, including the availability of contingent financing arrangements, in the form of commitment letters, to cover possible cost overruns or delays.

- (iv) The PEC will evaluate each bidder's financial flows over the time period (or concession period) specified in the bid document. Any bidder's financial proposal that shows cash flows less than or greater than the period specified in the bid document may be deemed to be non-responsive.
 - (v) The PEC shall carefully examine each bidder's financial proposal to ensure that each bidder has adequately addressed or included provisions in its financial flow for:
 - (a) Staffing positions and related costs;
 - (b) Operating and maintenance costs;
 - (c) Adequate working capital (including among other things, accounts receivable, spare parts inventories, other inventories, accruals and prepayments);
 - (d) Replacement and renewal of equipment during the evaluation period licenses, permits, and payments with respect to technology licenses.
 - (e) Income taxes and other taxes;
 - (vi) The PEC shall carefully examine all bids to ensure that the demand projections and growth rates underlying the analysis are reasonable and broadly consistent with the demand projections included in the pre-feasibility study and/or bid document. If such projections are included in the bid document, the PEC shall include provisions in the Concession Contract for the bid document version to prevail over the pre-feasibility study version.
 - (vii) Tariff assumptions are to be consistent with those in the bid documents.
 - (viii) Any Government resources that are included as part of the financial proposal is to be properly and clearly indicated and costed in the analysis.
 - (ix) The implementation schedule of the project is consistent with the cash flows contained in the financial analysis.
 - (x) That all debt service, financing arrangements, interest and amortization of debt is properly indicated and accounted for in the financial analysis.
 - (xi) Any payments of revenue subsidies, public service obligation payments to be made by the Government, are to be clearly identified in the financial analysis.
- N. Clarification of Bids: A comparison of the ratings assigned by each member often brings to light ambiguities in the bid which shall be clarified by the bidder:
- (i) The PEC may ask bidders for clarifications of their bids in order to assist in the examination, evaluation and comparison of bids. No change in a matter of substance in the bid, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

- (ii) Notwithstanding subparagraph (a) of this paragraph, the PEC shall correct purely arithmetical errors that are discovered during the examination of bids. The PEC shall give prompt notice of any such correction to the bidder that submitted the bid.
 - (iii) When clarification of bids is required, the PEC shall maintain a written "Minutes of Clarification" report. Adequate notice shall be given to the bidder prior to conducting the meeting. The location and setting of the meeting shall be conducive to professionally discussing all issues leading to a resolution of the matter to be clarified.
- O. In certain cases, it may be necessary for the PEC to reject all proposals:
- (i) Subject to approval by the Head of the GCA, and if so specified in the bid documents or other documents for solicitation of bids, the PEC may reject all bids at any time prior to the acceptance of a bid. The PEC shall upon request communicate to any bidder that submitted a bid, the grounds for its rejection of all bids, but is not required to justify those grounds.
 - (ii) The PEC shall incur no liability, solely by virtue of its invoking this provision and rejecting all proposals submitted.
 - (iii) Notice of the rejection of all bids shall be given promptly to all bidders that submitted proposals.
- P. In certain cases, it may be necessary for the PEC to reject a responsive bid from a responsible bidder. Subject to approval by the Head of the GCA, the PEC shall reject a bid if the bidder that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the PEC or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the PEC in connection with the bid evaluation. Such rejection of the bid and the reasons therefore shall be recorded in the record of the PPP proceedings and promptly communicated to the bidder.

STEP 11: PEC Ranks all Responsive Bids

- A. The PEC shall prepare the Minutes of the Tender Results or a Selection Memorandum to document the ranking of all responsive bids. The Minutes shall be signed by the PEC PM and each of the Procurement Evaluation Committee members. The PEC shall maintain the Minutes as confidential and privileged information until the parties sign a binding Concession Contract.
- B. If the PEC determines that any bidder's bid is not responsive or that the bidder is not responsible (based upon information validly obtained after prequalification, and verified), the PEC shall delete the bidder's bid from further consideration and shall include within

the written record the reasons for determining the bidder non-responsive or not responsible.

- C. The Selection Memorandum shall detail:
- (i) the evaluation criteria as stated in the bid document;
 - (ii) list all of the bidders who submitted bids, and the tender price or corrected tender price submitted by each bidder;
 - (iii) a narrative of the bid evaluation process, including the method of assessment, formulas used and related analytical data;
 - (iv) date of the Minutes including number of bidders who passed and number of those who failed the technical evaluation; and
 - (v) ranking of bids according to the evaluation criteria.
- D. The PEC fairly and impartially ranks only those bids determined to be responsible and responsive. Bids shall not be rejected due to minor deviations which do not affect the price, quality, scope, or completion date of the PPP requirement or limits in any material way the responsibilities, duties, or liabilities of the bidder or any rights of the PEC;
- E. The PEC shall not accept nor rank a bid:
- (a) If the bidder that submitted the bid is not qualified;
 - (b) If the bidder that submitted the bid does not accept a correction of an arithmetical error made by the PEC; or
 - (c) If the bid is not responsive.
- F. No criterion shall be used that has not been set forth in the bid document.

STEP 12: PEC Recommends a Proposed Concessionaire

1. Based upon the evaluation, the PEC prepares the Minutes to recommend the proposed contractor as the one with the highest evaluated bid ascertained on the basis of criteria specified in the bid document.
 - (i) If there are three or more responsive bids, the PEC shall recommend a proposed contractor and two alternative contractors;
 - (ii) If there are only two responsive bids, the PEC shall recommend a proposed contractor and one alternative contractor;
 - (iii) If there is only one responsive bid, the PEC may either (a) declare the tender has failed and proceed to re-tender or, with pre-approval from the MEF PPP Center (b) declare the bidder as the Sole Bidder;
 - (iv) If there are no responsive bids, the PEC shall state in the Minutes that the tender has failed and proceed to re-tender (after, of course, correcting any problems that led to a tepid response).

2. Whether or not it successfully passed prequalification proceedings, the PEC may require the contractor submitting the bid to certify that its prequalification data have not significantly changed since the contractor's original submission. When reasonable circumstances require, the PEC may require a contractor that has been prequalified and executed the aforesaid certification to demonstrate again its qualifications in accordance with the same criteria used to prequalify such contractor. The criteria and procedures to be used for such further demonstration shall be the same as those used in the prequalification proceedings.
3. If the bidder submitting the successful bid is requested to demonstrate again its qualifications in accordance with this provision but fails to do so, the PEC shall reject that bid and shall select a successful bid from among the remaining bids, subject to the right of the PEC to reject all remaining tenders.
4. The PEC shall prepare and submit, through the PD, a report to the GCA Head to:
 - (i) Recommend the winner of the tender or
 - (ii) Request approval to negotiate with the Sole Bidder.
5. In the event the PEC recommends the highest evaluated bidder as the winner of the tender, the Committee shall prepare a report to the GCA Head to detail the following:
 - (i) a summary of the key provisions of the bid document and any addenda thereto, attaching a complete copy of the bid document;
 - (ii) Minutes of the Tender Opening Meeting;
 - (iii) Minutes of the Result of the Tender;
 - (iv) Summary of the tender process and the tender result;
 - (v) The proposal of the proposed tender winner candidate and the proposal submitted by the alternative candidate, both initialed by the Procurement Evaluation Committee and two bid representatives as witnesses;
 - (vi) If there are any delays in the recommendation of the tender winner, then PEC shall conduct confirmation to all tender participants to extend the offering letter. The winner candidate may resign from the tender without any sanctions.
6. In the event the PEC recommends Sole Bidder as the winner of the tender, the Committee shall prepare a report to the GCA Head to request approval to negotiate with the candidate Sole Bidder and to detail the following:
 - (i) Public bid documents, and addendum (if any);
 - (ii) Summary of the tender process and tender results;
 - (iii) The proposal of the proposed Sole Bidder initialed by the Procurement Evaluation Committee and the representative of the Sole Bidder;
 - (iv) If there are any delays in the report of negotiation with the Sole Bidder which causes its proposal validity to expire, then in that event the Procurement Evaluation

- Committee shall discuss and confirm with the Sole Bidder an agreement to extend the offering letter. The proposed Sole Bidder may, if it chooses, withdraw its bid without any sanctions;
- (v) In the event the GCA Head rejects the request to negotiate, then the procurement shall be re-tendered.
 - (vi) In the event the GCA Head approves the request to negotiate, then the PEC conducts negotiation with the Sole Bidder based on the public bid documents. PEC prepares Minutes on Result of the Negotiation;
 - (vii) PEC prepares and submits Minutes and other information to the GCA Head to propose the Sole Bidder as the winner of the tender;
 - (viii) The GCA Head shall stipulate the Sole Bidder as the winner of the tender.
7. In accordance with the Approval Requirements of Section 6.2, above, if approved, the GCA Head submits the Full Business Case to CDC for review and approval of the Investment Incentives.
8. Once approved, within two business days after receipt of the stipulation of the tender winner, the PEC shall notify all contractors of the bidder submitting the highest-ranked bid. The preferred bidder with the highest score is publicly announced and asked to follow the subsequent procedures for negotiation process.
9. In the event any of the bidders who were not selected as the tender winner objects to the announced winner, then, in that event:
- (i) The bidder shall be given an opportunity to file its objection in writing, at the latest on the appropriate time.
 - (ii) The bidder's objection shall be submitted to the GCA Head, accompanied with any evidence supporting the allegation of a deviation.
 - (iii) The bidder's objection may be submitted either by the bidder individually or jointly with the other bidders.
10. Issuance of Stipulation Letter of the Tender Winner.
- (i) The GCA Head issues a Stipulation on the successful bidder, provided that:
 - (a) There is no objection from any of the bidders; or
 - (b) Any objection which is received is found to be without merit or is received after the period of time for lodging a bid protest.
 - (ii) A bidder who is evaluated as highest ranked and is approved as the winner of a tender must accept such decision. If such bidder, for reasons acceptable to the GCA Head, withdraws its bid and resigns from the tender proceedings within its offering period then the bidder shall no longer be eligible to compete for the PPP procurement.

- (iii) If the highest ranked bidder, for reasons not acceptable to the GCA Head, withdraws its bid and resigns from the tender proceedings within its offering period then the bidder shall be sanctioned by being prohibited from competing for Cooperation Projects for a two year period of time.
 - (iv) If the highest ranked bidder is approved as the winner of a tender but resigns before executing a binding Concession Contract, then the second highest ranked bidder (if any) may be recommended for award of the contract provided that :
 - (a) The GCA Head approves the award to the second highest ranked bidder; and
 - (b) The second highest ranked bidder's proposal is still valid or has been extended by mutual agreement.
 - (v) If the second highest ranked bidder is approved as the winner of a tender but resigns before executing a binding Concession Contract with the GCA Head, then the third highest ranked bidder (if any) may be recommended for award of the contract provided that:
 - (a) The GCA Head approves the award to the third highest ranked bidder;
 - (b) The third highest ranked bidders proposal is still valid or has been extended by mutual agreement;
 - (c) If the second highest ranked bidder resigns, for reasons not acceptable to the GCA Head, and withdraws its bid it shall be sanctioned by being prohibited from competing for Cooperation Projects for a two year period of time.
 - (vi) If the third highest ranked bidder is approved as the winner of a tender but resigns, for reasons not acceptable to the GCA Head, before executing a binding Concession Contract with the GCA Head, and withdraws its bid, it shall be sanctioned by being prohibited from competing for Cooperation Projects for a two year period of time.
 - (vii) The PEC shall prepare and deliver to the successful bidder a Letter on Stipulation of the Winner within five working days after the announcement on the GCA Head's stipulation of the tender winner.
 - (viii) The PEC shall deliver one copy of the Letter on Stipulation of the Winner, without attaching any agreement or contract, to the GCA's internal audit unit.
11. Issuance of Stipulation Letter of the Sole Bidder.
- (i) The GCA Head issues a Letter on Stipulation of the Sole Bidder as the investor of the Cooperation Project, provided that:
 - (a) There is no objection from any of the bidders; or
 - (b) Any objection which is received is found to be without merit or is received after the period of time for lodging a bid protest.

- (ii) A Sole Bidder who is approved as the winner of a tender must accept such decision. If such bidder, for reasons acceptable to the GCA Head, withdraws its bid and resigns from the tender proceedings within its offering period then the bidder shall [sanctions to be discussed].
 - (iii) If the Sole Bidder, for reasons not acceptable to the GCA Head, withdraws its bid and resigns from the tender proceedings within its offering period then the bidder shall be sanctioned by being prohibited from competing for Cooperation Projects for a two year period of time.
 - (iv) If the highest ranked bidder is approved as the winner of a tender but resigns before executing a binding Concession Contract with the GCA Head, then the PEC shall retender the project.
 - (v) The PEC shall prepare and deliver to the Sole Bidder a Letter on Stipulation of the Sole Bidder within five working days after the announcement on the GCA Head's stipulation of the tender winner and CDC approval.
 - (vi) The PEC shall deliver one copy of the Letter on Stipulation of the Sole Bidder, without attaching any agreement or contract, to the GCA's internal audit unit.
12. As stipulated in the bid document, the PEC shall request the contractor whose bid has been accepted to sign a written contract conforming to the tender. Accordingly, the contractor is required to sign the contract within a reasonable period of time after the notice is dispatched by the PEC to the contractor.
13. All awards are subject to concurrence of the GCA Head and, according, the Concession Contract shall not enter into force before the approval is given as described in Section 6.2 and the GCA Head countersigns the contract.
14. The bid document shall specify the estimated period of time following dispatch of the notice of highest-ranking bidder, or Sole Bidder, that will be required to obtain the approval. Failure to obtain the approval within the time specified in the bid document shall not extend the period of effectiveness of bids specified in the bid document or the period of effectiveness of bid securities that may be required.
15. If the contractor whose bid has been accepted fails to sign a written contract or fails to provide any required security for the performance of the contract, the PEC shall recommend, from among the remaining bids that are in force, award to the next highest evaluated bidder, subject to the right of the PEC to reject all remaining bids.

STEP 13: Pre Bidding or Post Bidding Negotiations of Contracts

Typically, governments of developing countries do not specify the timing of negotiations on the concession contract. However, an important issue at both the Procurement and Negotiation stages is the optimal timing of contract negotiations. Such negotiations can take place pre- or post-bidding.

STEP 14: Executing the Concession Contract

After obtaining the approval requirements described in section 6.2, the GCA Head shall countersign the Concession Contract which becomes a binding legal document, subject only to Financial Close.

STEP 15: Financial Close

Typically, after a Concession Contract has been signed, both the Concessionaire and GCA will be required to fulfill specified conditions precedent before the PPP Project will commence. The following provides examples of negotiated conditions precedent, as well as an estimate of how long these tasks may require to complete. Below is a summary of the major steps in the process leading to financial close.

A. Formation of a Special Purpose Vehicle (SPV)

The Company Act of 2006 requires that foreign firms wanting to do business in Cambodia first register by submitting the following documents:

- a) A notarized copy or translation in the Cambodian language or English of the law or license under which the company was incorporated and established;
- b) A notarized Cambodian version of the memorandum and articles of the company;
- c) The complete address of the head office of the company;
- d) A list of the directors, managing agents, manager, secretary, etc. of the company along with their names, positions, contact details, and shareholdings, if any;
- e) The name and address of resident representative(s) of the company in Cambodia empowered to accept on its behalf time limits, notices, etc. issued to it; and
- f) The proposed location where business will be, or is being, conducted in Cambodia and the full address of the company's office.

One hundred (100) percent foreign ownership is allowed, including for PPP projects, in business areas not on the “negative list” while a fifty-one (51) percent limit is imposed on investment in the legal sector, management consulting, accounting, and engineering services.

- B. Business Permits
- C. Tax Registration
- D. Loan Application Approved and Disbursed to the Escrow Agent
- E. GCA Obtains Clear Title and Clears Land

F. PEC Appoints Independent Engineer (if desired)

STEP 16: PEC Issues a Notice-to-Proceed

After approval of the Concession Contract, fulfillment of all conditions precedent and financial close, the PEC shall thereafter issue to the Concessionaire a notice to proceed with the project.

SECTION 11: PPP PHASE IV: LONG TERM MANAGEMENT OF CONCESSIONAIRE’S CONTRACTUAL OBLIGATIONS

Drafting Note 3: MEF requested this section, but it is beyond the scope of the PPP Procurement Manual, the Consultant believes.

11. Long Term Management Of Concessionaire’s Contractual Obligations

11.1 Introduction

Successful GCA PPP Cells are those that have a stable cadre of capable, well-trained public sector officials to carry out each phase of PPP Project Development, including the significant responsibility (in Phase IV) to monitor and enforce the concessionaire’s responsibilities to finance, build, operate, and maintain the infrastructure to provide the public with the agreed upon service delivery and performance standards specified in the Concession Contract.

Internationally, contract management of the concessionaire’s responsibilities detailed in the Concession Contract is an important activity in PPP program/project administration. Successful PPP Cells are those with a management process in place from the outset – shortly after award, if not earlier -- to ensure the concessionaire’s timely completion and satisfactory operation of a project to agreed-upon delivery and performance standards.

The contract management process not only helps to fix responsibilities, but also allows timely response to any deviation in project implementation or operation from the provisions in the Concession Contract and thus helps to avoid disputes between the parties at later stages. The three key aspects of contract management are:

- Contract administration
- Service delivery management
- Relationship management

11.2 Contract Administration

Contract administration involves the establishment of administrative processes to ensure that all the procedures and documentation relating to the contract are effectively managed. The major activities in contract administration of a large-scale project include the responsibility to ensure the project is built, operated and maintained in accordance with the successful bidder’s technical proposal, which is typically incorporated by reference into the Concession Contract. Clear administrative procedures for these activities help to ensure that all parties to the Concession Contract clearly understand their individual responsibilities, and time and procedure of action.

11.3 Service Delivery Management to Specified Performance Standards

Service delivery management has two major elements: risk management and performance management. Risk management involves keeping the exposure of the project to potential risks at an acceptable level by taking appropriate action in time. Performance management is concerned mainly with ensuring the quantity and quality of service delivery in a timely and safe manner as specified in the Concession Contract, resource utilization, and future performance improvement to reflect technological and other new developments as appropriate.

11.4 Relationship Management

Relationship management between the private party and the PPP Cell over the long contract tenure of a PPP project is vital for its success. Building an effective relationship that is mutually beneficial does not imply that either party has to compromise its contractual rights and responsibilities.

The key factors to a successful relationship are mutual understanding, open communication and information sharing, and recognition of mutual objectives. Appropriate lines of communication at strategic, business and operational levels between the PPP Cell and the private party are necessary to build a successful relationship. The clear lines of communication at the appropriate levels help to reduce confusions and ensure a prompt resolution of issues that may arise.

Usually, a team comprising officials from the PPP Cell and other concerned departments of the government supported by a range of specialists and technical advisors with varying levels of involvement is required for contract management. The resource requirement of the team is affected by the overall size and complexity of the project and its implementation stage in the overall project cycle. In some cases, it may be possible for the contract management function to be carried out by a single individual. But for large projects it would normally require a team work. The contract management team, in effect, may evolve from the project team in the inception, feasibility and procurement phases, taking on different technical skills and experience as needed throughout the project cycle.

In addition to the PPP Cell's monitoring and management responsibilities, other governmental functions (for example, the MEF PPP Center) and the respective sector/industry regulator may also be involved in the concession management process. The main tasks in contract management include:

- Formalization of management responsibilities by the organization at different levels. A critical aspect is to identify and clarify the roles and responsibilities of key individuals involved in the concession management process. Ambiguity about the functions of important individuals in the concession management process could lead to unnecessary delays and disputes.
- Monitoring of project delivery (construction phase).
- Management of variations during project implementation (time schedule, change of design and specification, etc.) and operation.
- Monitoring of operational aspects and service outputs after project implementation.
- Maintaining the integrity of the concession involves establishing procedures to ensure that the agreement and related documentation are consistent, up-to-date and accessible to all the relevant parties. Concession Contract maintenance also involves taking action to allow all parties to develop a common view of contractual obligations.
- Fiscal obligations of the government, such as Viability Gap Funding, if any.

- Financial matters. Effective financial administration involves the development of systems and procedures to make and receive financial payments according to the provisions in the Concession Contract, and to keep records of such transactions.
- Redress of public grievances. Monitoring of action taken by the concessionaire for redress of complaints by affected persons.
- Compliance with reporting requirements by the concessionaire under contract.

The reporting requirements are specified in the Concession Contract. Usually, templates for the regular reports are also provided.

Separate monitoring frameworks may be developed for the construction and operational phases. A mechanism is also required to gather, collate and analyze the required information on a regular basis for these frameworks, and to feed that information to the relevant authorities according to their requirements.

The information requirements for different agencies are generally different. As such, the implementing agency, regulator and the government may require separate monitoring frameworks to serve their own specific needs. However, the monitoring frameworks for the implementing agency should be based primarily on the performance indicators mentioned in the Concession Contract and other administrative procedures related to PPPs as may be required.

11.5 Performance Disputes and an Independent Quality Assurance Inspector

The legal basis for the settlement of disputes is an important consideration in the implementation of PPP projects. Private parties (concessionaire, financiers and contractors) feel encouraged to participate in PPP projects when they have the confidence that the disputes between the PPP Cell and the concessionaire, or between the concessionaire and other parties (for example, the users or customers of the facility) can be resolved fairly and efficiently. Disputes may arise in all phases of a PPP project, namely, construction, operation, and final handover to the government.

The agreed methods of dispute resolution between the parties are detailed in the Concession Contract as allowed under the legal framework of dispute resolution in Cambodia.

The legal framework for dispute resolution may be included in a number of legal instruments and relevant rules and procedures. The legal framework may include (if applicable) the PPP Act, company law, tax law, competition law, consumer protection law, insolvency law, infrastructure sector laws, property law, foreign investment law, intellectual property law, environmental law, a Guidebook on Public-Private Partnership in public procurement law or rules, acquisition or appropriation law, and various other laws. The commonly used methods for dispute resolution include:

- Facilitated negotiation. A facilitator is appointed by the parties in the contract. The facilitator aids the parties in resolving any dispute through negotiation. He/She does not provide any opinion but assists the parties in analyzing the merits of their cases.
- Conciliation and mediation. A person or a panel appointed by the parties provides independent and impartial assistance to them in resolving a dispute. This process may end either in the settlement of the dispute agreed by the parties or it may end unsuccessfully.
- Non-binding expert appraisal. A neutral third party provides an appraisal on the merits of the cases of parties in dispute and also suggests an outcome for their consideration. The process is usually followed by negotiations between parties.
- Review of technical disputes by independent experts, typically an Independent Quality Assurance Engineer. This method is often used for the settlement of technical disputes between parties in contract. To review disagreements, the contesting parties refer such matters to an independent expert appointed by them. The decision of the independent expert may either be binding or non-binding, as agreed in the Concession Contract.
- Arbitration. In this process, the matter in dispute is referred to a board or tribunal of arbitrators appointed by the parties according to an agreed procedure set forth in the Concession Contract. Such arbitration is held in accordance with the rules and at a place as agreed in the Concession Contract. Any award made by the arbitral board or tribunal is binding on parties.
- Adjudication by Regulatory Authority. If a statutory Regulatory Authority exists with powers to adjudicate upon disputes between the contracting government agency and the concessionaire, matters of dispute may be referred to the Regulatory Authority. An appellate tribunal or a court of law as defined in the Concession Contract can consider an appeal against such adjudication.
- Legal proceedings. In accordance with the legal provisions, parties in dispute may go to the domestic judiciary for the settlement of their disputes.

It is important that the settlement mechanisms considered in the Concession Contract are in line with the international practices and requirements, particularly when large-scale investments from the foreign private sector are expected.

Generally, the Concession Contract specifies what methods of dispute resolution would be followed to settle any dispute arising between the parties and the rules and procedures to be followed for same. The United Nations Commission on international Trade Law (UNCITRAL) has prepared a Legislative Guide on Privately Financed Infrastructure Projects. The UNCITRAL Guide provides clauses related to dispute resolution that may be considered for inclusion in the Concession Contract.

PPP Cells have found it helpful to include provisions for the appointment and functioning of an Independent Quality Assurance Inspector or Engineer, which may be similar to the Concession Contract provisions in Appendix III. Basically, the Concessionaire is required, within sixty (60) Days from execution of the Concession Contract; retain a reputable and professional quality

assurance inspector (the "Quality Assurance Inspector"). The Concessionaire's appointment of the Quality Assurance Inspector is subject to the concurrence of the PPP Cell.

The function of the Quality Assurance Inspector shall include among other:

- i. review of the preliminary and detailed design and engineering;
- ii. periodic inspection of the Works and expediting thereof, as well as the final inspection of the Works preparatory to the issuance of the Certificate of Completion;
- iii. verification and checking of quality and quantity of Works accomplished by the contractor as against the approved drawings and architectural plans and specifications, and the Timetable;
- iv. make recommendations for corrective measures to be undertaken on defects of the Works;
- v. verification and recommendation for approval of statement of Works accomplished, and recommendations for the approval of the partial releases of the Performance Security pursuant to Section 5.05(c);
- vi. determination of the amount of Incremental and Consequential Costs to be borne by the relevant party hereto, in the appropriate cases specified herein; and
- vii. such other functions as may be stipulated in the relevant consultancy contract between the Quality Assurance Inspector and the Government.

In the discharge of its functions, the Quality Assurance Inspector shall, as an agent of the PPP Cell, at all times act fairly and impartially. The appointment of the Quality Assurance Inspector shall be evidenced by a consultancy contract containing terms and conditions mutually acceptable to the Quality Assurance Inspector and the PPP Cell. Upon the execution of the relevant consultancy contract, the same shall form part of this Agreement. The reasonable compensation of the Quality Assurance Inspector shall be borne solely by the Concessionaire.

Appendix I: Address of the Anticorruption Unit

Everyone is subject to the Law, and PPP officials shall be very familiar with its provisions and avoid even the appearance of a violation. Any procurement official who receives, or learns of, a communication alleging that a person or persons attempted to commit or committed any act defined in the articles related to public procurement shall promptly report, in writing, the substance of the communication, and provide complete documentary evidence, to the Anticorruption Unit, at the address below.

Appendix II: Integrity Declaration

To promote the practice of ethical standards and accountability, each member of the PPP Evaluation Committee (PEC) shall be required to sign a copy of the declaration shown below. This declaration will be attached to each evaluation report and signed by each member. In the event that it is found that a member has made a false declaration, he/she will be immediately and temporarily suspended from the project implementation team and the matter referred to the respective Head of the Ministry for appropriate actions.

**Appendix III: Recommended Concession Contract provisions for
an Independent Engineer**

Section XYZ: Supervision, Monitoring and Inspection of Construction.

- a. *The Government, through the GCA PPP Cell, shall monitor all of Concessionaires plans and programs for the development, construction and maintenance of the Project prior to the implementation of the same to ensure conformity with the Development Plan and accepted best engineering practices.*
- b. *Concessionaire shall, in writing, inform the GCA PPP Cell and the **Independent Quality Assurance Inspector** (as hereinafter defined) of any major inspections as set forth in the Timetable at least five (5) Days prior to the intended inspection date. Taking into consideration the Timetable, the GCA PPP Cell shall exert best efforts not to postpone said inspections. However, should the PPP Cell request a postponement, it shall inform Concessionaire thereof at least two (2) Days prior to the stated inspection date. Concessionaire and the PPP Cell Manager shall agree on the re-scheduled inspection date, which shall be held at the earliest time possible. The delay caused by such postponement shall result in an adjustment to the Timetable and shall not be construed as a breach by Concessionaire of any of its obligations in this Agreement.*
- c. *The PPP Cell's acceptance of the Works subject to inspection are limited to compliance with the approved drawings and architectural and engineering plans and specifications and the Construction Performance Standards, as certified by an "Independent Quality Assurance Inspector." For this purpose, the Concessionaire shall, within sixty (60) Days from execution date hereof, retain a reputable and professional quality assurance inspector (the "Quality Assurance Inspector"). The Concessionaire's appointment of the Quality Assurance Inspector is subject to the concurrence of the PPP Cell.*

The function of the Quality Assurance Inspector shall include among other:

- i. *review of the preliminary and detailed design and engineering;*
- ii. *periodic inspection of the Works and expediting thereof, as well as the final inspection of the Works preparatory to the issuance of the Certificate of Completion;*
- iii. *verification and checking of quality and quantity of Works accomplished by the contractor as against the approved drawings and architectural plans and specifications, and the Timetable;*
- iv. *make recommendations for corrective measures to be undertaken on defects of the Works;*
- v. *verification and recommendation for approval of statement of Works accomplished;*
- vi. *determination of the amount of Incremental and Consequential Costs to be borne by the relevant party hereto, in the appropriate cases specified herein; and*
- vii. *such other functions as may be stipulated in the relevant consultancy contract between the Quality Assurance Inspector and the Government.*

In the discharge of its functions, the Quality Assurance Inspector shall, as an agent of the PPP Cell, at all times act fairly and impartially. The appointment of the Quality Assurance Inspector shall be evidenced by a consultancy contract containing terms and conditions mutually acceptable to the Quality Assurance Inspector and the Government. Upon the execution of the relevant consultancy contract, the same shall form part of this Agreement. The reasonable compensation of the Quality Assurance Inspector shall be borne solely by the _____.

- d. If the Quality Assurance Inspector finds the Works subject of inspection to be acceptable, it shall certify such fact to the PPP Cell and Concessionaire. The PPP Cell shall issue a written certificate of approval and serve the same to Concessionaire within five (5) Days from receipt of the written report of the Quality Assurance Inspector. If the Quality Assurance Inspector finds the Works wholly or partly unacceptable, it shall likewise certify such fact to the PPP Cell and Concessionaire. The PPP Cell shall within the same period issue a written certificate of total or partial disapproval of the Works inspected, citing the findings of the Quality Assurance Inspector. Should Concessionaire not receive written acceptance, rejection, partial acceptance or partial rejection of the Works inspected within the period set forth, the PPP Cell shall be deemed to have accepted the Works subject of inspection and Concessionaire may proceed with further Works. All inspected Works which have been accepted or deemed accepted by the PPP Cell in accordance with the foregoing procedure shall be taken into account in the periodic partial releases of the Performance Security pursuant to Section _____.*
- e. If based on the findings of the Quality Assurance Inspector, the PPP Cell informs Concessionaire in writing of its rejection or partial rejection of the portion of the Works subject of the inspection within the period provided in Section _____, Concessionaire shall have the Works re-done to conform with the recommendations. The Concessionaire shall bear the cost to correct defects. Whereupon, the Works re-done shall again be subject to inspection by the Quality Assurance Inspector in accordance with the procedure in Section _____.*
- f. The acceptance of particular Works shall not absolve Concessionaire from its duties and obligations under this Agreement and, in particular, from complying with the Development Plan and the Construction Performance Standards.*
- g. Concessionaire shall maintain at the Site an efficient and capable organization with an adequate capacity and number of construction, operating and maintenance equipment and facilities to satisfactorily develop, construct, operate and maintain the Project in a safe, efficient, environmentally sound and professional manner.*

Appendix IV:

Provisions for Complaint Handling Mechanisms and Conflicts of Interest

**{This Appendix is being rewritten and will be provided to MEF before the
26 January 2016 Workshop}**