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BOT Circular No 2 of 2016

From: Director, Procurement Policy Office

To : Heads of Public Bodies

Build Operate Transfer Projects Guidance Manual

Further to the Build Operate Transfer (BOT) Circular No. 1 of 2016 issued by this Office on 27 April 2016 and pursuant to section 5 (a) of the BOT Projects Act, please find attached a soft copy* of the BOT Projects Guidance Manual which, amongst others, provides for a detailed ten-step process to be followed for a BOT project.

**BOT Projects Unit
Procurement Policy Office
4 October 2016**

* Also available on the BOT Project Website: <http://bot.govmu.org>



Build Operate Transfer (BOT) Projects

Guidance Manual

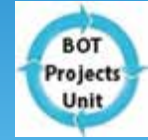
BOT Projects Unit
Procurement Policy Office
September 2016



Build Operate Transfer (BOT) Projects

Guidance Manual





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Preface

We are all aware that the procurement of public infrastructure works and services to meet the increasing demands of citizens and economic operators is constrained by Government's limited financial resources.

In the circumstance, for Government to match growing public expectations, and also catalyse the country's economic growth path, it has to structure alternative procurement methods by pairing with the private sector in financing and operating the delivery of public services which may, otherwise, have to wait indefinitely for public funding.

In this context, evolving types of public private partnership procurement methods, and in particular, Build Operate and Transfer (BOT) can boost the delivery of public services; provide investment opportunities to private sector, and concurrently promote economic growth and employment creation.

Within this perspective, the Concession Projects Act 1997, replaced by the Public Private Partnership Act in 2005, aimed at private sector participation in public sector projects. However, the perceived complex administrative process seems to have deterred the uptake.

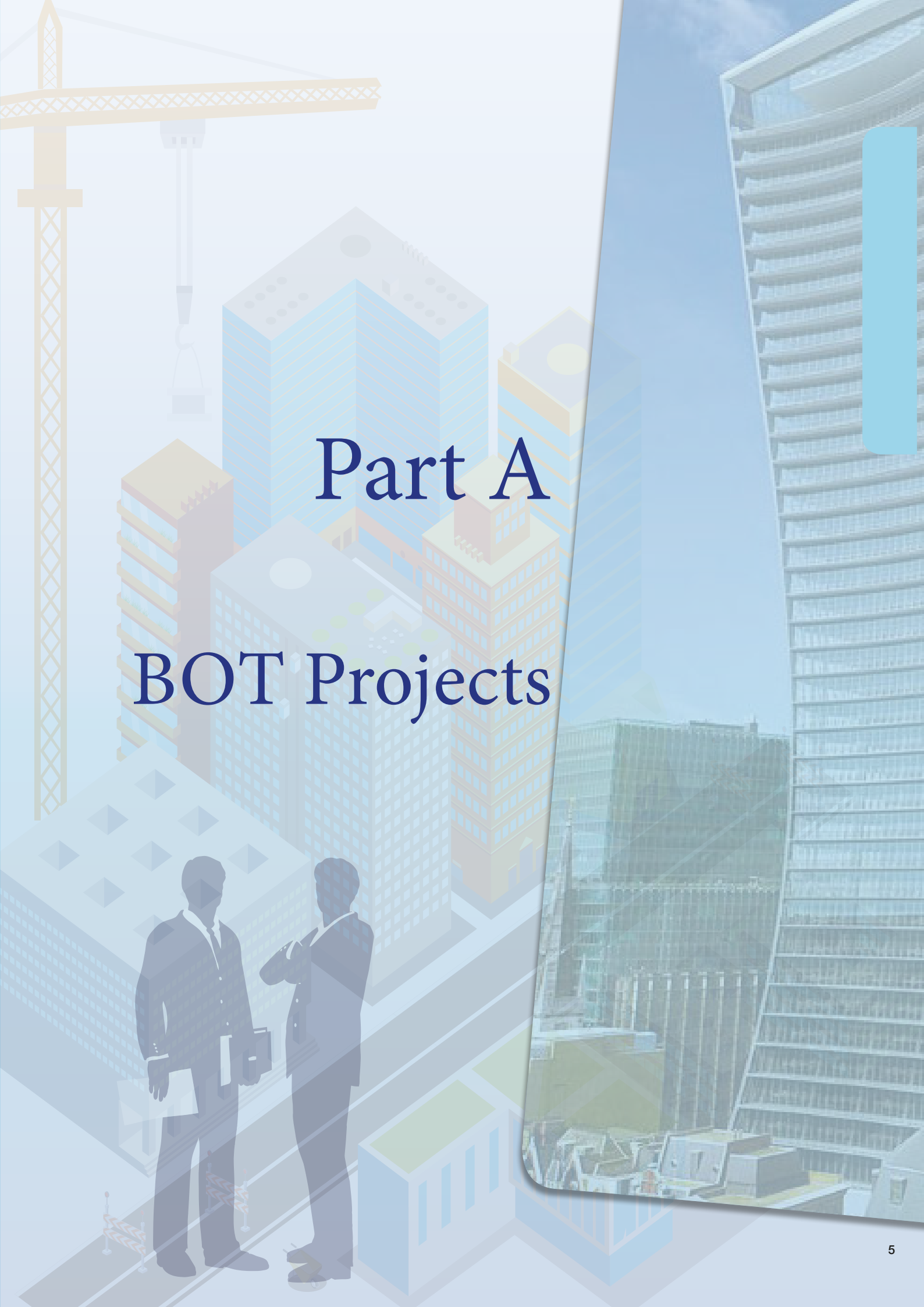
The BOT Projects Act, enacted on 5 April 2016, comes as the game changer to provide a simpler, transparent, and operationally more practical process to implement infrastructure projects with private sector participation.

This BOT Projects 10 Steps Guidance Manual is thus designed to assist all stakeholders in fostering an effective partnership with the private sector to build a still better Mauritius.

The Procurement Policy Office places on record the contribution of Mr. Deoprakash Khoodeeram, Ag Head BOT Projects Unit in preparing this edition of the BOT Projects Guidance Manual.

M. Dhoorundhur
Director
Procurement Policy Office





Part A

BOT Projects

SECTION 1 of this Manual defines a BOT project, compares it with a project implemented under traditional procurement method and describes the functions of the main players in the BOT projects preparation process.

Definition

What is a BOT project?

1.1 A BOT project is an arrangement whereby the private sector designs, builds, finances, operates and maintains a facility for a fixed tenure, at the end of which it is transferred to the government. BOT has a number of project variants.

1.2 The Build Operate Transfer (BOT) Projects Act 2016 provides the legal framework for the execution of projects under BOT agreements in Mauritius. It defines “BOT project” in its variants as “ a project based on the granting of rights, under a BOT agreement, to a private party, to build, set up, own, operate, rent, lease, finance, modernise, manage, maintain or develop, and to transfer the undertaking, in accordance with the BOT agreement; and includes any agreement which may provide for a project based on BOOT (Build, Own, Operate and Transfer), DBFOT (Design, Build, Finance, Operate and Transfer) or MOT (Modernise, Own/Operate and Transfer) models.” A copy of the BOT Act is at Annex 1

Traditional Procurement v/s Procurement under BOT

1.3 An important difference between methods of traditional procurement and a BOT arrangement is the major shift in the process and subject matter of procurement. The procurement processes in traditional procurement methods are fragmented, whereas procurement for a BOT project in its variants integrates financing, design, construction, operation, maintenance, transfer, and post transfer. It involves a number of participants with interdependent agreements with the private promoter/concessionaire, with all of them giving a whole life-cycle consideration in the development of the asset for early delivery of the services.

1.4 A second difference lies in the duration of the contract. The duration of a BOT contract agreement tends to be of a longer-term, generally ranging from 15 to 30 years. This allows for structuring of the BOT project to generate sufficient returns during operation to cover capital and recurrent cost with a reasonable profit after tax to the promoter for taking project risks from start to end. Thus the choice of the time period is to balance the future stream of revenue with the expected expenditure for the consumer/project sponsor (the contracting authority).

1.5 Another significant difference is in the crafting of the project specifications. The BOT promoter is required to deliver on output rather than on input specifications which is generally the case in traditional procurement. Consequently, the BOT promoter has to concentrate on:

- a) the delivery of performance standards of the services to be provided; and
- b) exploiting the output specifications that give the promoter the flexibility to bring innovative proposals, generate management efficiencies with low operating cost and accelerate project implementation.

1.6 **Table 1** gives a simple example of an output compared to input specifications for specified needs.

Table 1: Example of Input/ Output Specification to meet specified needs

Needs	Input Specifications	Output Specifications
Maintaining school playgrounds	Playing fields must be trimmed and cleaned thrice a week	Playing fields must be capable of providing playability during school hours
Maintaining drains, sewers and gutters	Drains, sewers and gutters must be cleaned at least once every day	All drains, sewers and gutters to be maintained free-flowing and free from odour at all times

BOT Institutional Framework

1.7 The BOT Projects Act specifies three players under the BOT projects institutional framework namely, the contracting authority, the BOT Projects Unit and the Central Procurement Board (CPB). The functions of each of these players are specified hereunder.

Who is a Contracting Authority?

1.8 A contracting authority refers to a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

What are the functions of a Contracting Authority?

1.9 A contracting authority is responsible, amongst others, to:

- a) identify whether its project is eligible for procurement under BOT arrangement;
- b) register the project with the BOT Projects Unit;
- c) appraise the project by carrying out its feasibility study;
- d) submit the feasibility report to the BOT Projects Unit for assessment;
- e) prepare the project bidding documents and submit to the CPB for approval prior to its issue;
- f) negotiate with the preferred BOT project promoter and report outcome to CPB;
- g) inform Cabinet of the draft BOT Agreement;
- h) sign the BOT Agreement on award;
- i) table at the earliest opportunity a copy of the BOT Agreement in the National Assembly; and
- j) monitor the BOT project implementation and deliverables.

How does the Contracting Authority execute its functions?

1.10 The Act requires the contracting authority to designate a suitable and qualified project officer capable to effectively manage a BOT project and to set up a project team. As such, the project officer and the project team have a pivotal role in triggering and managing the processes throughout the BOT project cycle.

What are the functions of the BOT Projects Unit?

1.11 The BOT Projects Unit is set up in the Procurement Policy Office (PPO) to assist contracting authorities. Its functions are to:

- a) formulate policies, including directives, procedures and guidelines on BOT projects;
- b) issue templates in relation to BOT projects;
- c) assess the project feasibility report submitted by a contracting authority and submit its comments and findings to the contracting authority, regarding, inter alia –
 - i. affordability;
 - ii. value for money; and
 - iii. sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- d) maintain a register of BOT projects; and
- e) conduct training programmes on BOT projects.

What are the functions of the Central Procurement Board in respect of BOT projects?

1.12 As per the BOT projects Act, the CPB is required amongst others to:

- a) examine and approve the request for proposal documentation for BOT project submitted to it prior to its public issue by the contracting authority;
- b) evaluate the BOT project bids in accordance with its own rules and procedures;
- c) make recommendations to the contracting authority for entering into negotiations with the preferred bidder;
- d) review outcome of negotiations, and
- e) recommend the contracting authority to enter into an agreement with a private party.

1.13 To ease contracting authorities track the decision points in the BOT procurement process, the next sections walk through the 10 steps BOT project procurement process flow chart.

Identification and Registration of BOT Projects

BOT Project Process
Flowchart



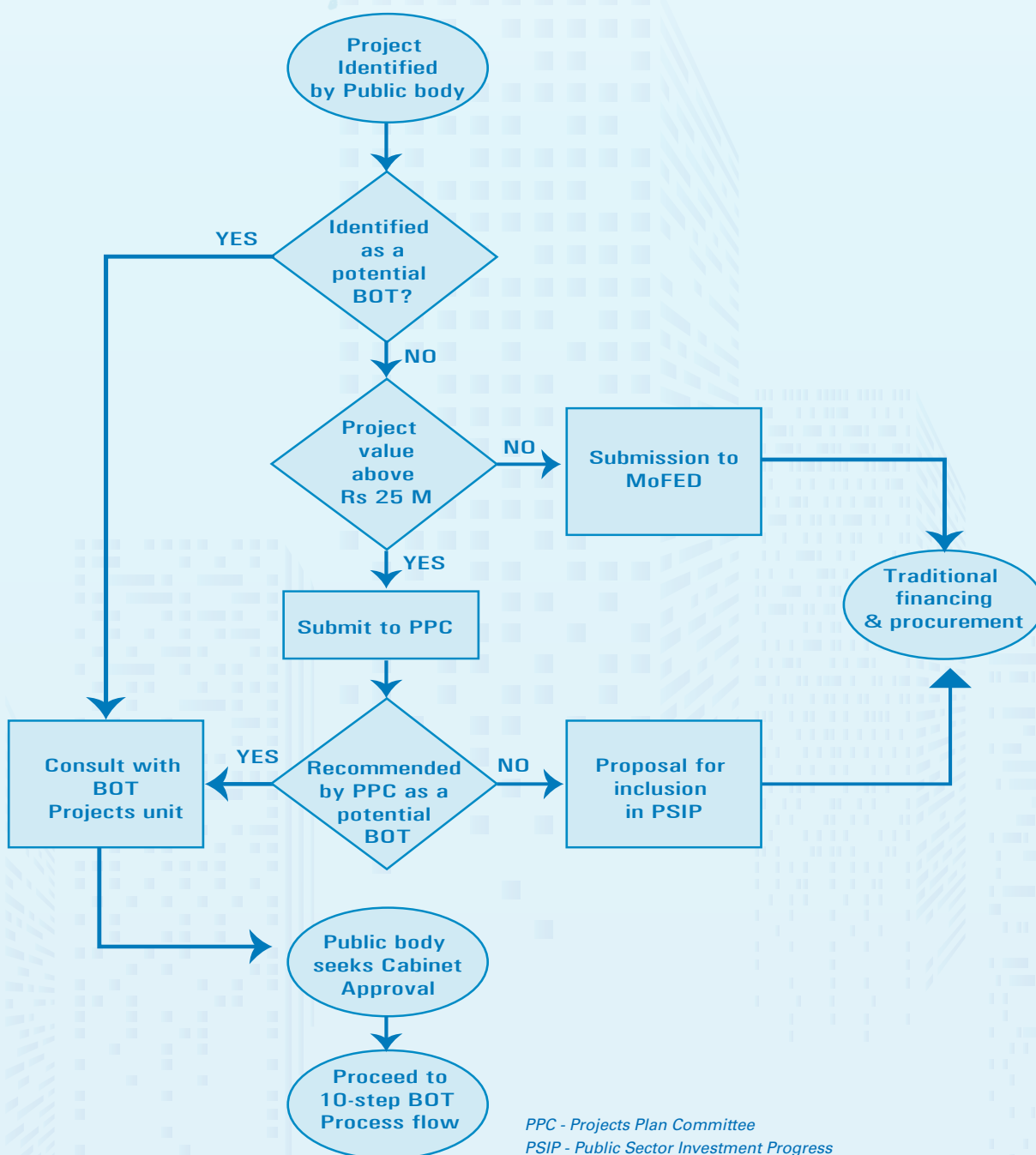
* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government

SECTION 2 of this Manual describes the first two steps in the BOT project process flow, which are identification of the BOT project by the contracting authority and its registration at the BOT Projects Unit.

Pre-BOT Process

2.1 A public sector project is usually identified by the relevant public body. The latter may at the outset decide to pursue the project along the BOT project process route if it considers that the project would require substantial private participation. After consultation with the BOT Projects Unit, the public body would be required to seek Cabinet approval before proceeding with the BOT process.

Figure 1: Pre-BOT Project Identification Process



2.2 If the BOT option is not considered during the initial stage, a public body would be required to either submit the project for consideration by the Ministry of Finance and Economic Development (MOFED) (if the project value is below Rs 25 M) or submit same to the Projects Plan Committee (PPC).

2.3 Projects received by the PPC would be evaluated for inclusion in the Public Sector Investment Program (PSIP). The latter may also alternatively, in consultation with the BOT Projects Unit recommend the project as a potential BOT. In such a case, the public body would be required to seek Cabinet approval before proceeding with the BOT process.

2.4 The pre-BOT project identification process is summarized in **Figure 1**.

Registration of BOT Project

2.5 Once a project obtains Cabinet approval to be pursued as a potential BOT project, the contracting authority will be required to submit same to the BOT Projects Unit for registration as per Section 5(d) of the Act.

2.6 The request for registration has to be accompanied by a project brief specifying the following:

- a) How the project proposes to achieve the strategic objectives of the contracting authority;
- b) The potential benefits and reasons for envisaging the BOT arrangement, which may include a combination on how:
 - (i) customer service delivery will be improved through the project;
 - (ii) the project will generate third party revenue;
 - (iii) private funds will be raised through the BOT project;
 - (iv) services will be expanded to a broader range of end users;
 - (v) the BOT arrangement will bring innovation and management efficiencies ;
 - (vi) risks responsibilities not effectively managed by the public sector will be transferred to the private sector;
 - (vii) the BOT arrangement has the potential to reduce the cost of delivering the service/ infrastructure under the project; and/or
 - (viii) the BOT arrangement will bring better operation and maintenance of assets.

2.7 The BOT Projects Unit will determine whether the project submitted to it can be conceived as a BOT project and on being satisfied, register it and provide a BOT Project Registration Number. All official documents pertaining to the project, for example, the Request for Proposal (RFP) or the BOT Agreement would thereafter bear that Registration Number. The Registration Number is to assure all stakeholders that the project has passed the first due diligence process.

BOT Project Process Flowchart



* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

SECTION 3 of this Manual details the third step in the BOT project process, namely the appointment of a Project Officer and the setting up of a Project Team by the Contracting Authority.

Management of BOT Projects

3.1 For the efficient management of a BOT Project process, section 7 (2) of the Act requires the contracting authority to designate a qualified Project Officer and set up a Project Team.

The Project Officer

3.2 A Project Officer designated by the contracting authority should be appropriately qualified and skilled to manage a BOT Project cycle from its inception to its expiration or termination.

3.3 The BOT Project Officer plays a leadership role to:

- a) Make a BOT project happen within defined time lines, with required resources, within budget and to the requisite performance standards;
- b) Constitute the effective project team;
- c) Secure the human resource and budget to manage the project;
- d) Manage the project from inception, through the feasibility study and the procurement phases, and at least during the first years of the delivery phase;
- e) Carry out the feasibility of the project and submit to the BOT Project Unit for approval and in case of complex project, arrange for a transaction advisor;
- f) Develop a Project Risk Management Scoring Matrix to track and manage the project risks as identified during the feasibility study phase;
- g) Keeping accurate records of all information pertaining to the project, including, minutes of meetings, decisions taken, correspondences and bid evaluations; and
- h) Manage change for results with structured communication with all project stakeholders, both internal (e.g. staff members, senior management and end-users within the contracting authority) and external (e.g. customers, labour unions, tax payers, general public and other government departments and potential project private promoters), by using the RACI model. {Responsible (R), Accountable (A), Consulted (C) and Informed (I)}

The Project Team

3.4 The contracting authority will require a multi skilled Project Team to support the Project Officer in managing the BOT project throughout its life cycle, as per the requirement of the BOT Projects Act (Section 7(2)). This team will be led by the Project Officer and comprise members as recommended by the Project Officer and approved by the contracting authority. Members could

be representatives of ministries and departments, including ad hoc ones with skills as required, who are able to provide both strategic and technical support to the Project Officer.

3.5 The responsibilities of the Project Team will, amongst others, be to:

- a) provide strategic direction and secure government and stakeholder commitment to deliver at each of the BOT project milestones;
- b) oversee project development budgets and expenditure;
- c) ensure that the progress of the project is effectively communicated to the project stakeholders;
- d) approve the deliverables of the transaction advisor; and
- e) review and endorse documentation related to the project.

3.6 A project secretariat has to be set up by the contracting authority to assist the Project Team in its administrative tasks.

Feasibility Report

BOT Project Process Flowchart



* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

SECTION 4 of this Manual describes the fourth step of the BOT project process, which is preparation of the feasibility report by the contracting authority and its assessment by the BOT Projects Unit.

Preparation of Feasibility Report & Assessment

4.1 After registration of a BOT Project with the BOT Projects Unit, and before embarking on the procurement process, a contracting authority is required to prepare or cause to be prepared a BOT feasibility study of the project, as per Section 8 of the BOT Projects Act.

4.2 The responsibility for carrying out the feasibility study rests with the project team including the project officer. For simple projects, the project team may carry out the feasibility study with its own skilled resources or seek additional external support where necessary. Otherwise, the project team may recruit a transaction advisory firm to conduct the feasibility study. The services of the transaction advisor may be retained further after the feasibility study, where deemed fit, to assist the contracting authority in the procurement phase of the project. Details on the recruitment and management of a Transaction Advisor are provided at **Annex 2**.

Content of Feasibility Report as required under the Act

4.3 Section 8 (1) of the BOT Projects Act specifies that the feasibility report shall:

- a) define the type, nature, scope and rationale for the BOT project;
- b) contain specific provisions on sector needs assessment, options analysis, value for money and affordability;
- c) specify the broad terms proposed for the BOT agreement, including the proposed sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- d) describe the legal and institutional framework for implementing the BOT project;
- e) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under such an agreement, and
- f) contain the observations, comments and recommendations of the contracting authority.

4.4 The above elements of the feasibility report are broadly elaborated in the following subsections.

I. Project Type, Nature, Scope and Rationale

4.5 The type, nature, scope and rationale for the project have to be broadly defined in the project brief that is submitted by the contracting authority to the BOT Projects Unit at time of project registration (refer to section 2.1). For compliance with section 8(1)(a) of the BOT Projects Act, the content of the project brief should be detailed in the feasibility study on the basis of additional information.

II. Sector Needs Assessment

4.6 In the Sector Needs Assessment Section, the Feasibility Report has to include the following:

- a) the contracting authority's vision and mission statements and its strategic objectives;
- b) description of the functions that the contracting authority performs in the public interest or on behalf of the public service, and
- c) Provide details on the following aspects of the BOT project:
 - (i) contribution of the project to the implementation of government and institutional policies;
 - (ii) capability of the contracting authority to provide the overall services ;
 - (iii) the size of the project, in terms of its anticipated budget or capital expenditure;
 - (iv) description of the potential cost savings for the contracting authority ;
 - (v) the potential for the private sector to provide the services;
 - (vi) expectations in relation to the performance level of the services, and
 - (vii) given the proposed duration of the project, whether the project will continue to address the broad needs of the contracting authority over the BOT project time frame.

III. Output Specifications

4.7 The next step, after the needs assessment is for the contracting authority to define the BOT project output specifications, that is, the services that the contracting authority requires over the BOT project period. The outputs should be specific, measurable, achievable, realistic and time-bounded for them to be adequately communicated to BOT project promoters. They should be defined in ways that allow their subsequent achievement to be evaluated. For example, if a public body procures a school on a BOT basis, it no longer simply procures an asset or school, but it procures on-going educational services facility from the private promoter for the duration of the BOT contract.

4.8 Describing objectives in terms of the outputs and deliverables that a BOT project requires, will incite private sector bidders to submit innovative proposals to meet the BOT project deliverables.

4.9 Contracting authorities should avoid gold plated output specifications that would defeat affordability criteria.

IV. Options analysis

4.10 The option analysis section of the Feasibility Report examines the feasibility of the different options to satisfy the identified need. The Report will have to appraise the BOT options' comparative strategic advantage and operational benefits, as required under section 8(1)(e) of the BOT Projects Act.

4.11 For guidance, the scope of the options analysis has to include the following:

- a) A list of all the options being considered as a proposed solution;
- b) Evaluation of each option to cover the following components:
 - (i) Brief description of the option, outlining its alignment to the institution's strategic plan, the service it needs to deliver, and the service level output specifications;
 - (ii) Preliminary analysis on its financial impacts;
 - (iii) How the option can be funded and its affordability;
 - (iv) Description of major risks under each option;
 - (v) Socio-economic aspects of each option;
 - (vi) Service delivery arrangements;
 - (vii) Transitional management issues, for example, on retention, redeployment and or redundancy of existing staff in the new working environment;
 - (viii) Comprehensive technical analysis and physical site conditions analysis, if required ;
 - (ix) Any major legal issues;
 - (x) Market capability to respond to the options, and
 - (xi) Qualitative benefits.
- c) Selection of the best option with adequate reasons for the preference.

V. Obligations and responsibilities of parties

4.12 Section 8(1)(c) of the BOT Projects Act requires the BOT feasibility report to contain the sharing of technical, operational, commercial and financial obligations and responsibilities among the parties. An optimal sharing of responsibilities between the private party and the contracting authority is aimed at ensuring the value for money and sustainability of a BOT project.

4.13 Transferring all responsibilities to the private party does not result in the highest value for money. For instance, if the private sector is required to take responsibility for activities on which it has no control, it would charge a higher premium to the contracting authority for the increased risks.

4.14 An appropriate approach in identifying and allocating risk/responsibilities is that they should be allocated to the party who is best able to take and manage a particular activity/risk. A party responsible for that risk/activity should receive the rewards or losses associated with changes related to that activity. Obviously, the allocation of responsibilities in a BOT project will vary with the nature and objectives of the project.

4.15 Some risk/responsibilities typically borne by the private sector are as follows:

- a) Construction risk of physical assets, including risks that the construction is not completed on time and within budget;
- b) Design risk of physical assets and work processes including risk of asset not being as per specifications;
- c) Asset quality risk relating to risk that the assets are not properly maintained over project cycle, and
- d) Performance risk for assets not operating adequately to deliver level of services as per agreed performance standards.

4.16 Some examples of responsibilities which may be shared between the private party and the contracting authority may relate to:

- a) Obtaining planning permission for the facilities to be developed;
- b) Ensuring that demand for the service matches the planned levels;
- c) Managing costs to meet general changes in legislation;
- d) Ensuring that the physical assets have a certain residual value at the end of the contract;
- e) Ensuring that optimal technology is used to deliver the required services, and
- f) option to share gains in application of new technology and cheaper refinancing during operation phase.

4.17 Some examples of responsibilities that the public sector may take include:


- a) Managing increase in costs due to inflation by indexing payments to the private party in accordance with an agreed price index, and
- b) Cost related to unforeseen policy change impacting directly on the BOT project operation cost.

VI. Legal and Institutional Framework

4.18 The Feasibility Report is required under section 8(1)(d) to illustrate the legal and institutional framework required to implement the BOT project.

4.19 The institutions/ parties which will be involved vary on the nature of each project. Their roles and responsibilities have to be elaborated in this section of the feasibility report. For instance, during implementation, the following parties would be individually and severally involved in a BOT project:

- a) *Lenders*: these may include a combination of private sector commercial lenders together with export credit agencies, bilateral and multilateral finance organisations;
- b) *Contracting authority*, as defined in the Act being “a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government”;

- 
- c) *Multilateral and bilateral agencies:*
 - (i) Multilateral agencies (MLAs) represent a grouping of nations, and are owned and funded by their members (for example, African Development Bank (AfDB), European Investment bank (EIB), International Finance Corporation (IFC), World Bank, and
 - (ii) Bilateral agencies (BLAs) also known as development finance institutions are funded by only one nation, for example, the Agence Francaise De Development They are generally mandated to provide support to specific developing countries, in the form of loan or equity investment;
 - d) *Project company:* the project company puts together a bid in an effort to be awarded the BOT project contract. Once selected, it may create a special purpose vehicle (SPV) which would enter into a contract with the contracting authority for the implementation of the BOT Project;
 - e) *Construction contractor:* The project company (SPV) will enter into a construction contract with the construction contractor in order to divest its obligation to design, build, test and commission the project and still be accountable under the BOT arrangement;
 - f) *Operator:* The operator will operate and maintain the project over the BOT contract period, often from completion of construction until the end of the concession period;
 - g) *Offtake purchaser:* An agreement may be made with a purchaser for the use of a project or the purchase of an output in order to assign market risk away from the project company, and
 - h) *Input supplier:* An input supplier provides an input necessary for operation of the project.

4.20 The various project participants have to work together to discharge their respective obligations and collectively ensure the success of the project.

VII. Value for Money analysis

Assessing Value for Money

4.21 Value for Money (VFM) in BOT projects is gained through the trading in of private sector efficiency, effectiveness, and economy along with a fair allocation of risks amongst parties in the project. The assessment of the potentials of the BOT project to secure VFM is a key element in informing Government on whether or not to proceed with a BOT procurement, and the most appropriate form of the BOT arrangement.

4.22 The final assessment of whether a BOT procurement represents improved VFM, can only be made at the conclusion of the competitive bidding process. The assessment of the potential for a BOT to deliver value for money has two parts:

- a) Identification of the factors that will determine whether a project delivers VFM, and
- b) An assessment of the potential of the private sector to deliver VFM with regard to those factors.

a) Factors that determine VFM

4.23 The factors that determine whether a project would deliver VFM will vary depending on project type, scope and sector. Some factors like economy, efficiency, effectiveness and ethics

(the 4Es) and the strategic objectives of Government will be common to all projects. Generally, a BOT arrangement can generate improved VFM through a number of ways including, inter alia:

- (i) **Reduced whole life cycle costs** - This can be achieved through the integration of infrastructure design, construction and operation; private sector bringing innovation in design through the avoidance of over-specification and improved maintenance scheduling;
- (ii) **Better allocation of risks** - Cost effective and fair allocation of risk amongst parties enables efficiency benefits to be generated throughout the term of the contract; sometimes, certain risks cannot be totally transferred to one party and have to be shared. (**Annex 3** provides more details on allocation of risks);
- (iii) **Faster project implementation** - The transfer of design and construction risks, together with the principle of no payment until the commencement of service delivery, provides significant incentives for the private sector to deliver infrastructure projects within shorter construction timeframes;
- (iv) **Improved quality of service** - This results from better integration of services with supporting assets, improved economies of scale, introduction of new technology, innovation in design, and the performance incentives and penalties included in a BOT contract, and
- (v) **Generation of additional revenue from project externalities** - more intensive exploitation of assets to generate additional revenues, for example from shared use of facilities or the sale of surplus assets.

b) Assessing VFM Potential

4.24 The potential of the private sector to deliver VFM through BOT arrangement may also be assessed from the experience of similar BOT projects that have been in operation for a number of years in other countries. Such experience may be accessed either through desk-based research or through consultations with private sector operators.

4.25 Precedent Review and Market Sounding are two widely used tools to identify potential sources of VFM and assess the likeliness of the private sector to deliver VFM.

Precedent Review

4.26 The areas to be investigated within the precedent review will vary from project to project. However, in general as referred earlier, experience in implementation of similar projects, both local and international should be investigated and the views of the private sector should be gathered in relation to the factors described at paragraph 4.23, and in particular in relation to:

- a) the scope of the project, including the balance between asset provision and service delivery;
- b) the potential for cost effective risk transfer, statutory process risk, demand risk and residual value risk;
- c) the scope for user charges, third party revenues and alternative asset uses that might reduce the cost of the project to contracting authority, and
- d) potential for VFM, drawn from the main sources of VFM that were identified at the end of the procurement of similar projects, and evidence that VFM was actually achieved in these areas during the construction and operation stages.

4.27 The review of precedent is useful in providing background information on the level of market interest, the capabilities of the private sector, the key risks associated with projects and the willingness of the private sector to accept those risks. The market sounding process can then focus on particular issues arising out of the precedent review, and issues that are specific to the infrastructure project.

4.28 Depending on the maturity of the market, the review of precedent could generate a wealth of information (including the results of previous market soundings) that proceeding further with a market sounding may not be necessary. However, there is always benefit to be gained from conducting even a limited market sounding exercise as a field reality test to investigate the particulars of the project under consideration in the current market condition.

Market Sounding

4.29 A BOT project can only be implemented where there are private promoters who are not only able to deliver the required service but also willing to accept sufficient risk transfer. Therefore, once the essential characteristics of the infrastructure project have been defined and an initial output specification produced, the nature and extent of market appetite in a BOT solution can be tested by means of a market sounding exercise.

4.30 The use of Project Prospectus disseminating the likely scope of the project, its service content, its anticipated key contractual terms and preliminary risk allocation attracts the potential private promoters to engage more effectively in the market sounding process. This engagement can be supplemented with a Project Questionnaire in order to provide a formal record of responses to key questions. To ensure the widest possible participation in the market sounding exercise, a Prior Information Notice can be released in the press and other information media inviting potential private sector suppliers to participate in the market sounding exercise.

VIII. Affordability analysis

4.31 Affordability analysis is a major component of the BOT feasibility report. Affordability relates to whether the cost of the project over the whole project life can be accommodated in the government's budget, given its existing commitments.

4.32 "Affordable", in relation to a BOT agreement, refers to the ability of the public body to meet any financial commitment incurred in relation to the BOT agreement from its existing or future budgetary funds. A particular BOT contract may not be affordable even though it brings VFM.

4.33 The first step for carrying out the affordability test would be based on a number of assumptions to estimate the BOT cost of the project by using the output specifications for the selected option. All direct and indirect costs as well as third party revenues should be included in the estimate. An example of items which may be included is provided in **Annex 4**.

4.34 The affordability test would require assessing the financial implication of the BOT project cost to the contracting authority. If affordability cannot be demonstrated, the project would either need to be shelved or the output specifications be modified in order to meet the affordability test.

IX. Legal Framework

4.35 As part of the BOT feasibility study, the legal implications of contracting with a private party over a period of time in a public sector project has to be assessed upfront less they might restrict delivery under the BOT asset life cycle. While complying with the law of contract, some 15 potential issues are herewith listed:

- a) Impact of any restrictions in the procurement legislation on the project;
- b) Any third-party rights to challenge the project;
- c) Legal basis for the contracting authority to enter into the BOT agreement;
- d) Corporate law to permit/restricting the setup of the project company ;
- e) Conditions related to obtaining of licences and permits;
- f) Legal systems related to movables or immovables as applied to the project;
- g) Legal provisions related to dispute resolution;
- h) Enabling law for collection of tariffs/tolls/charges, if applicable for the project;
- i) Legal restrictions with respect to applying penalties or sanctions and awarding bonuses;
- j) Legal provisions with respect to trusts and agency;
- k) Legal provisions related to bankruptcy and insolvency and step in rights;
- l) Legal constraints on currency convertibility;
- m) the international law provision on property rights;
- n) Legal provisions with respect to employment of staff by the project company, and
- o) Choice of law for the purpose of the project.

X. Recommendations of the Contracting Authority

4.36 Upon completion of the feasibility report by the Project Team, the contracting authority is required to submit the report to the BOT Projects Unit along with its recommendations.

4.37 The BOT Projects Unit will assess the report and submit its comments and findings to the contracting authority, as per section 8(2) of the BOT Projects Act.

BOT Project Process Flowchart



* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

SECTION 5 of this Manual describes the fifth step of the BOT project process which is the preparation of the RFP document by the contracting authority, vetting by the CPB and issue by the contracting authority. The components of the RFQ and the RFP are herein elaborated.

Preparing Request for Proposal for BOT Project

5.1 After receiving the comments and findings of the BOT Projects Unit on the proposed feasibility report, the contracting authority may start its procurement process. In accordance with subsection 9(1) of the BOT Projects Act, the contracting authority is required to prepare and submit the Request for Proposal (RFP) document to the CPB and obtain its written approval. The contracting authority may thereafter issue a public notice publicising the RFP.

5.2 The contracting authority has the possibility either to invite an RFP directly from the public or carry out an intermediate stage of Request for Qualification (RFQ) with a view to shortlisting qualified bidders. If the RFQ stage is omitted, the components as described in this guidance note for the RFQ may be included in the RFP documents.

5.3 The Project Team set up by the contracting authority has to prepare all the documents pertaining to the bidding process, including the RFQ and the RFP. If it does not have the necessary expertise to prepare the documents, it may recruit a transaction advisor to help in rolling out the process.

Request for Qualification (optional)

5.4 Where a contracting authority decides to carry out an RFQ exercise before the RFP, the contracting authority has to submit the RFQ documents to the CPB and obtain its written authorisation to conduct the pre-selection exercise as the CPB is responsible for end to end bidding process up to award, including clearing bid documents, evaluation of all the bids and making its recommendations. Public Invitation may be carried out by notices in local and foreign newspapers. The diplomatic missions accredited to the Government of Mauritius whose countries are potential sources for the subject matter of the procurement may also be informed of the notice of invitation.

5.5 The aim of the Request for Qualification (RFQ) is to constitute a list of interested bidders who have relevant experience and capacity to undertake the project. The RFQ may comprise the components listed in **Annex 5**.

5.6 The aim of the RFQ is to evaluate the interested bidders on the basis of commercial and technical criteria.

5.7 Some examples of the commercial evaluation criteria for the RFQ are given below:

- *Project management and BOT Understanding*: this includes skills on optimum risk allocation, BOT innovation, team integration and internal and external communications; and experience on management of multi-disciplinary team in development of BOT projects.
- *Capacity to invest equity*: this includes evaluation of access to equity, liquid assets of investors, credit capacity and financial commitments.

- *Infrastructure financing experience:* this includes accessing debt and equity or project finance structuring for similar or greater project size and complexity; experience of the proposed financial advisor in arranging debt or equity finance as part of a successful BOT, and financing strategies to demonstrate knowledge of financial markets and BOT financing techniques.
- *Bonding and insurance capacity:* The RFQ proponent has to submit an original confirmation letter from a surety of its ability to obtain bonding in respect of the Project. Similarly, there is also a need to submit an original confirmation letter from a recognized insurance company that the RFQ Proponent would be able to obtain appropriate insurance coverage.

5.8 The RFQ proponent must be requested to submit information regarding its past projects using a standard format. The format proposed in **Box I** may be used.

Box I Format for Information on Projects	
(a) General Details	<ul style="list-style-type: none"> • name of the project/facility (“Facility”); and • location of the Facility
(b) Facility Description:	<ul style="list-style-type: none"> • type, size, scope; and • and other special features such as environmentally sustainable and innovative
(c) Role with Respect to the Facility:	<p>Please detail the RFQ Proponent’s, Team Member’s or Core Organization’s role, as applicable (e.g. sponsor, borrower or advisor). For more than one role, please detail all roles and identify the primary role (if applicable) in bold font. If the RFQ Proponent, Team Member or Core Organization, as applicable acted as advisor, please identify the Firm/Person whom they advised.</p>
(d) Team member(s) or individuals involved and their roles	
(e) Financing Details:	<ul style="list-style-type: none"> • type of financing raised for the Facility, and • amount of financing raised for the Facility.
(f) Relevant Details	<ul style="list-style-type: none"> • date and structure of financial close
(g) Reference Contact:	<p>Please provide the following details for an independent reference contact available to verify the information provided:</p> <ul style="list-style-type: none"> • name of reference contact • company or agency • address • email address • telephone number; and • facsimile number

5.9 Some requirements under technical evaluation criteria for the RFQ are given below:

- a) Corporate knowledge, experience and capacity relevant to the project;
- b) Corporate design experience and engineering resources to carry out the design and construction of the Project;
- c) Construction experience to carry out the design and construction of the Project;
- d) Facility maintenance and asset management experience to operate the project, and
- e) Provision of suitably qualified and experienced personnel. The following information may be requested for each individual:
 - (i) Position
 - (ii) Name
 - (iii) Roles and responsibilities
 - (iv) Qualifications
 - (v) Years of experience
 - (vi) Relevant experience

5.10 The shortlist obtained after the RFQ exercise should be kept, if possible, to a minimum of three and a maximum of five bidders. Given the high cost of submitting proposals, this gives a higher chance of success to the shortlisted bidders.

5.11 The bidders may send their RFQ any time prior to the deadline. These RFQ's are opened by the CPB at the time, date and location which are set either in the RFQ or in an official bid bulletin for extending that date. The proposing entities should be invited to attend. The names and addresses of the RFQ proponents received should be announced and recorded. All bids received by the deadline should be opened. In essence, the CPB will adopt its own procedures for receiving, closing, opening and evaluation of bids received.

5.12 Each bid opened should be checked immediately against a checklist of compliance items, for instance, that all the required documents have been submitted. This checklist should be prepared before the opening by the contracting authority. Further compliance, such as, proper formats will be examined later on by the evaluation team. In case a bid is not compliant with the RFQ, it should be rejected. These procedures also apply for the Request for Proposal (RFP).

5.13 All correspondences between the CPB and the contracting authority should be carried out using its official letterhead or e-mail. A record of the exact timing of the incoming and outgoing correspondences has to be kept.

Preparation and Issue of the RFP Package

Introduction

5.14 Under this step the contracting authority prepares the RFP bidding documents, obtains clearance of CPB and where pre-qualification exercise is not appropriate (that is, RFQ), it issues the RFP under its official letterhead. The structure of the RFP is explained in detail in sections 5.21 to 5.39.

5.15 In fixing the closing date for the RFP, adequate period of time should be allowed to bidders for the preparation of their proposals as the bid preparation time depends on the size, nature and complexity of the project.

Pre-bid meeting

5.16 The contracting authority may fix a date for a pre bid meeting whereby the bidders may seek clarifications. This helps them to have a better understanding of the issues related to the project and submit a competitive proposal.

5.17 The meeting may be held between 21 and 45 days after the issuance of the RFP. During the meeting, the contracting authority provides the prospective bidders with specific information, clarifications on the bidding procedures, and gets their feedback. A site inspection may be organized if applicable to the project. The written record of the meeting has to be distributed to the participants preferably within a week of the meeting. If the contracting authority receives any question from a bidder after the meeting, it should communicate the response to all bidders.

Deadline for Queries from bidders

5.18 The contracting authority has to set a date limit for the receipt of queries from the bidders which is usually 14 days prior to bid submission closing date. In the light of the feedback, it may issue an addendum where necessary.

Submission date

5.19 The submission date may be extended by the contracting authority if the latter has valid reasons for doing so.

Cancellation of the bidding exercise

5.20 The contracting authority retains the right to cancel the whole bidding exercise at any time and issue a public cancellation notice with valid reasons for the cancellation, otherwise trust in the process may be undermined.

Structure of the RFP

Description of RFP

5.21 The RFP should provide guidelines and a format to facilitate the bidders in submitting their proposals. The advantage of having such a structure for all proposals is to ensure an objective analysis and marking of bids.

5.22 The various stages of the bidding process should be spelt out clearly so that bidders are not eliminated simply because of misunderstanding.

5.23 The RFP may be structured to include the following sections:

- A. Introduction
- B. Project Background
- C. Output Specification
- D. Project Milestones
- E. Instructions to Bidders
- F. Form of Contract
- G. Bid Forms
- H. Supplemental Information

A. Introduction

5.24 The introduction section should describe the intent of the contracting authority for this project. It includes:

- (i) A definition of terms that may not be common or defined elsewhere;
- (ii) Specific objectives of the project, and
- (iii) Any information of interest to the private sector or that might help attract the private sector to bid on the project.

B. Project Background

5.25 The RFP should provide in this section extensive information on the project, including information drawn from the feasibility study and classified under the following subheadings:

- (a) **Background:** describing briefly decision already taken on the project;
- (b) **Project Profile** to include the following:
 - (i) Description of the project site;
 - (ii) Explaining the BOT project phases regarding financing, design, build, modernize, manage, operate and transfer;
 - (iii) Reporting on existing facilities, supplies or resources;
 - (iv) Depicting the Project output, and
 - (v) Listing the Project end users or beneficiaries.
- (c) **Legal Framework:** Describe how the project may be related to the laws, regulations or policies in the Republic of Mauritius or abroad.
- (d) **Standards:** Specify the material and performance standards that have to be met by the private party indicating the related local and/or international standard specifications that have to be complied.
- (e) **Property Acquisition:** Any issues relating to the acquisition of property has to be explained, for instance, who would be responsible to acquire land not belonging to the State.

C. Output Specification

5.26 As described in sections 1.5 and 1.6, the RFP for BOT projects specify output specifications as compared to the defining of input specifications in traditional method of procurement.

5.27 The procedure for output specifications varies from project to project but the core principles which need to be followed are described below.

5.28 The output specifications must be specified in such a manner as to reflect the core objectives identified in the feasibility study that will also enable defining the performance specifications. An example for a contracting authority acquiring office accommodation is to specify the core objectives in terms of the number of staff to be housed, minimum space requirements, maintenance, cleanliness and security level for the services to be delivered.

5.29 Output specifications allow for private sector to innovate. Innovation by the private sector is encouraged where output specifications are set in accordance with the contracting authority's objective, without specifying how those objectives are to be met.

5.30 All performance and output constraints whether environmental, social or technical should be stated.

5.31 Two methods may be used in the Output specification section to address the affordability issue:

Method I: A fixed performance standard is set and the evaluation of proposals is based on price only.

Method II: The project budget is included as part of the output specification. This allows the bidders for reductions in project cost through acceptable deviations to the performance standards.

Method I has the advantage of market competitiveness ensuring maximum value for money.

Method II, on the other hand, informs the bidders about the budget so that they may compromise on the value for money. However, there may be difficulty in controlling and evaluating deviations to the performance standards.

5.32 The RFP explains on the methodology that will be used to monitor the performance of the private party. If the latter supplies a service below the minimum permitted level, it will be subject to a penalty.

D. Project Milestones

5.33 The major activities of the procurement process which are applicable to the bidders should be mentioned in this section and may include the following:

- Date of issuance and closing of the RFP
- Date, time and location of Pre-bid meeting
- Last date when written questions will be received
- Bid submission and bid opening date
- Date for announcement of award

E. Instructions to Bidders

5.34 This section of the RFP provides bidders with guidance on the preparation of their proposals.

The following sub-titles may be used.

- *Selected Pre-qualified bidders*: the names of the short-listed bidders who have been invited for the bidding exercise may be listed in this section.
- *Proposal Process*: a description of the process through which proposals will be received by the CPB.

- *Packaging of proposal and the number of copies:* description of the two-envelope system and the content of each envelope. What should be written on each envelope has to be mentioned: address, reference, or any other detail. The number of originals and copies to be sent by the bidders is specified herein.
- *Language of Proposal:* The language of the proposal, usually English, must be specified.
- *Criteria for rating of proposals:* The bidders must be informed of the methodology which will be used for evaluating and scoring of the proposals.
- *Conferences and site visits:* Details have to be given of the time, date, and location of the Pre-bid conference as well as the name and address of contact person to whom the bidders must register their intent to attend.
- *Supplemental Notices:* Process for any correspondence between the contracting authority and any of the pre-selected bidders concerning clarification should be sent to all the bidders. This is done officially by numbered bid bulletins.
- *Withdrawal/Modification of Proposals:* This section sets the rule for withdrawal or modification of proposals. Bidders are allowed to withdraw or modify their proposals in writing only before the closing date.
- *Qualifications to the tender:* Bidders often submit proposals which are different from what was requested in the RFP. These differences which are known as “qualifications to the tender” may be beneficial to the contracting authority. The bidders are hereby required to set aside a section to list all the qualifications to tender.
- *Withdrawal of a member:* If a member of the private party decides to withdraw from the project prior to the award or implementation of the contract, the offer of the private body may be cancelled. In that case, its security deposit is forfeited. If it is found that the other members may still continue with the project without the withdrawing member, the Contract may be awarded to the private party.
- *Validity period of proposal:* This section states the number of days the proposal must remain valid that vary from 60 to 90 days depending on the size and complexity of the project and the expected time for bid evaluation and award. The award of the Contract must be made within the period of validity/extended validity period.
- *Proposal Security/bid bond:* the bidder is required to submit together with its proposal, a security or bid bond. The amount and form of the security or bid bond has to be specified in the RFP. The proposal security or bid bond is forfeited if the bidder either withdraws his bid after the closing date for submission of bids or refuses to accept an award of contract.

F. Form of Contract

5.35 The bidders must understand what type of agreement they are expected to sign right before they make a proposal. That part of the RFP which specifies the important conditions of the Contract is known as the “Term Sheet”.

5.36 The Term Sheet includes the basic obligations of both parties. It also specifies the type of BOT Contract.

5.37 A bidder may accept all the conditions in the Term Sheet or it can propose changes. After the private party is selected, during negotiation, the clauses of the contract are then finalized.

G. Bid Forms

5.38 In order to maintain uniformity in the submission of all the bids, a bid form may be supplied to the bidders. A list of forms is given below. Some of these forms may not be applicable for some RFP while additional forms may be required for others depending on the nature of the contract.

- (i) Form of Tender
- (ii) Appendix to tender
- (iii) Qualification to Tender
- (iv) Form of Agreement
- (v) Performance Guarantee
- (vi) Surety Bond
- (vii) Guarantee for Advance Payment
- (viii) Targeted Procurement Data Sheets
- (ix) Joint Declaration (if applicable)
- (x) Checklist (envelope contents)

H. Supplemental Information

5.39 For certain projects there is the need to provide further information, such as, feasibility studies, design analyses, forecasts, drawings, maps, or other data as part of the RFP. These information may be included under this section.

Content of BOT Agreements

5.40 The BOT Projects Act (section 11(2)) states that “every agreement shall include provisions for –

- (a) the rights and obligations of the contracting authority and private party;
- (b) the period of execution of the project;
- (c) the relevant financial terms;
- (d) the conditions for the supply of services;
- (e) the management of performance of the private party;
- (f) the sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- (g) the termination of the agreement in case of breach of terms and conditions by either party, or otherwise;
- (h) the remedies in the event of default by either party, including lenders’ step-in-rights;
- (i) the return of the assets to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement, and
- (j) such other requirements as may be prescribed.”

5.41 The BOT Agreement usually starts with definitions of terms used in the contract. The following provides some guidelines on what further sections may be included in the BOT Agreement.

5.42 *Description*: insert a general description of the project.

5.43 *Term of project*: provide the commencement date and the expected duration of the contract. The commencement date of the service, if applicable, is also given.

5.44 *Role of the Implementing Department*: The roles of the implementing contracting authority should be well defined. It should not be involved in the implementation of the components for which the risks and responsibilities have been passed on to the private party. For instance, if the responsibilities and risks of design and construction have been given to the private body, the contracting authority should not be involved in supervision of works.

5.45 *Quality Assurance*: The contracting authority should have the right to audit the contractor's quality management system. It should be able to examine or inspect works or activities to verify the adequacy and accuracy of the documentation obtained.

5.46 *Acceptance and Service Commencement*: At certain points of the contract, the contractor should be under the obligation to demonstrate that the arrangements put in place will meet the output specifications in the contract. For instance, there may be a need for this before service commencement or when there are significant changes in the service.

5.47 *Design*: Since the contracting authority is the owner of the project, it has the right to receive copies of all designs, designs reports, drawings, maps and related design documents.

5.48 *Construction*: If the project includes construction, then the contract may have to specify the following:

- a) Adherence to national codes and construction standards;
- b) Adherence to specifications approved for the project;
- c) Provision of "as-built" drawings to the private body;
- d) Retention of all test results during and after construction, and
- e) Provisional and final acceptance certificate.

5.49 *Existing facilities*: In case the project concerns the improvement of an existing facility and/or its operation, the contract has to provide for an efficient and non-disruptive transfer of the facility to the private entity. The clause may include transfer plan for the facilities, operation of the facilities during preparation period, protection of government's interest in the facilities and taxes.

5.50 *Performance Bonds*: For construction project, the private body has to provide for a performance bond as a form of guarantee for completion. The private body and the financier may on their turn require a performance bond from the construction sub-contractor.

5.51 *Long-Stop Date*: In case there is a long delay in service commencement, the contracting authority may bring the contract to an end in order to take remedial action. A long-stop date has to be indicated in the contract. However, there may be an extension in the long-stop date if the cause of the delay is due to a compensation event, relief event or force majeure. These delays are further explained as follows:

- a) Compensation events are events which are at the contracting authority's risk and in respect of which the private body should be compensated. For instance, this may occur when there is breach from the part of third parties, like teachers for a school project. It may also occur due to changes in the legislation;

- b) A relief event occurs when a risk which is better managed by the private party materializes. The private party bears the financial risk in terms of higher costs or lower revenue. It is not worthwhile to terminate the contract since any other private party recruited thereafter will be faced with a similar situation, and
- c) Force Majeure is an event which occurs without the fault of any of the two parties.

5.52 *Information warranties:* The extent to which the information provided by the contracting authority has to be verified by the bidders has to be mentioned in this contract clause. Whoever bears the risk when the information provided is not exact, influences the bid prices of bidders as the changes in the information may have a direct impact on the cost of the project.

5.53 *Implementing Department Warranties:* This clause specifies that the contracting authority will warrant only those information which are relevant to the project.

5.54 *Latent Defects Risk:* The contract has to specify which party would bear latent defects risk in assets transferred by the contracting authority to the private body.

5.55 *Service Requirements and Availability:* The contract should specify the penalty to the private body if the service is unavailable at any point in time during the term of the contract.

5.56 *Maintenance:* The purpose of the RFP is for the contracting authority to procure output based on a certain performance level. The private body should plan on how to do the maintenance in order to keep the delivery standards. It has to take decisions on how and when to perform the replacement of the assets. The parties may establish a planned preventive maintenance programme so that they know when parts of the service are permitted to be unavailable without any payment deductions being made.

5.57 *Performance Monitoring:* Since the private party will be paid based on output performance, the contract has to specify the performance required, the means by which the contracting authority will be verifying the performance and the consequences if the private body does not meet the expected performance level.

5.58 *Consequences of Poor Performance:* The contract has to specify the approach which will be used by the contracting authority to penalize the private party if the latter does not meet the minimum performance. One approach is to specify performance points for each failure with the number of points varying according to the seriousness of the failure. When the aggregated number of points exceeds the threshold level, then the penalty in terms of reduced payments will apply.

5.59 *Price and Payment Mechanism:* This clause of the contract follows from the other sections on performance and allocation of risks. The payment mechanism depends on the type of projects but generally include the following:

- a) no payments should be made until the service is available;
- b) there should be a single unitary charge for the service;
- c) the single unitary charge should be paid only to the extent that the service is available, and
- d) if the private party provides substandard service, the payment mechanism will make deductions in proportion to the severity of the failure to keep to the required standard.

5.60 *Payments and Set-Off*: The contract should, in line with the section on “Price and Payment Mechanism” allow for the contracting authority to apply the penalty by reducing the payments to the private party. This should also apply for any other debts or liabilities owed to the contracting authority.

5.61 *Change in Service*: The contract should take into consideration the current as well as the future service requirements of the contracting authority. The contract should, however, allow for changes to the service which could not be anticipated or quantified at the time of signature of the contract. Similarly, changes in the service due to a change in the delivery method of the private party may be allowed after consultation and agreement of the contracting authority.

5.62 *Change in law*: The private body has to abide with all legislation. The price quoted should take into consideration the current legislation. It is natural for changes to occur in the legislation of a country. If the legislative changes relate directly to the project, then the risk has to be taken by the contracting authority. In case the changes relate to the general regulation, such as changes in tax, then the private party may be asked to bear the risk.

5.63 *Price Variations*: The contract will set the Unitary Charge for the whole of the contract term. However, it is in the interest of both parties to make provision for varying the Unitary Charge in certain specified circumstances. This enables the private party to charge less since there is the possibility of recouping the increases in costs due to unpredictable situations.

5.64 *Termination*: A contract may terminate naturally at its expiry date or as a result of early termination. In case of termination, the contract should specify what will happen to the assets and how much the private party will have to compensate, if applicable. Early termination may occur due to the following reasons:

- a) *Termination on Contracting Authority's Default*: The private party should be given the right to terminate the contract where the contracting authority acts in a way which renders their contractual relationship untenable or completely frustrates the private party to deliver the service. The level of compensation payable upon termination must be set out in the contract.
- b) *Termination on private party's Default*: The contract should specify the events of private party's default that may lead to termination. The amount of compensation payable on private party's default should be specified.
- c) *Termination on Force Majeure*: The force majeure events that can lead to the termination of the contract have to be defined in the contract. In case the force majeure occurs, the contracting authority should pay compensation to the private party reflecting the principle that the force majeure is neither party's fault and the financial consequences should be shared.
- d) *Termination on Corrupt Gifts and Fraud*: The contract must be terminated if it has been found that there have been corrupt acts or fraud involving members of the private party and the contracting authority.
- e) *Voluntary Termination by Contracting Authority*: In case the contracting authority is no longer able to continue the relationship for any reason, for instance, policy change, it may wish to keep the right to terminate the contract voluntarily, provided the private party is compensated in full.

5.65 *Indemnities, Guarantees and Contractual Claims:* The contracting authority has in many cases to enter into contract with a private body which is a special purpose vehicle (SPV) with no track record of service delivery. The contracting authority therefore requires comfort that the SPV and its sub-contractors will be able to meet their contractual obligations. With a BOT contract, where the private party is not paid until service is delivered, an extensive direct comfort is not necessary. However, the contracting authority may still request for a guarantee in order to ensure that continuity of service supply is maintained even if the private party is insolvent. The private party may also be required to indemnify the contracting authority against certain costs. The contracting authority may also seek a collateral warranty from sub-contractors so as to claim them directly under certain circumstances.

5.66 *Financiers' Security:* The private party may be asked to have a security package from the Senior Lenders in return of providing the necessary debt finance. The security may consist of an assignment of the private party's rights under the project documents, collateral warranties and performance bonds from the construction sub-contractor or guarantees from the shareholders of the private party.

5.67 *Damages Claims.* This clause establishes a limit to the ability of both the contracting authority and the private party to make claims against each other. The idea is to ensure that there is an incentive to perform. Any deduction should reflect the lost due to additional cost or decrease in revenue stream.

5.68 *Insurance.* The private party's insurance arrangements have to be specified here. Professional insurance advice must be sought to know what requirements should be imposed on the private party.

5.69 *Dispute Resolution.* A dispute resolution procedure must be specified in the Contract. The following three-stage process may be used:

- a) the public and private parties consult each other for a fixed time period in an attempt to come to a mutually satisfactory agreement;
- b) a third party expert may be appointed as specified in the contract to make recommendation, and
- c) if either party disagrees with the expert's recommendation, it may refer the matter to the court for a final and binding decision.

5.70 *Authority Step-in.* "Step-in" refers to the right for the Contracting Authority to take over some or all of the obligations of the private party for a period. This may arise if there is a risk to health, safety or the environment to discharge a statutory duty due to matters outside the scope of the work of the contractor or due to the private party being in breach of certain of its obligations under the contract.

5.71 *Project Supervisory Committee.* The contract should specify the membership of a Project Supervisory Committee with whom the selected private party can interact.

5.72 *Management of Special Project Company.* The contract should specify the management team for the private party as proposed in the technical proposal and finalized prior to preparation and signing of the agreement. The contract should stipulate the following:

1. President/Director
2. Senior management
3. Independent auditors (outside firm)
4. Management and operations plan

Any changes to the structure must be approved by the Contracting Authority.

5.73 *Financial Reports and Audits.* The financial year of the project company should be stated in this section as well as its obligation to submit quarterly and annual financial statements.

5.74 *Finance.* This section includes general statements regarding the plans for the financing to be arranged by the private party.

5.75 *Personnel.* The policies guiding the employment of current employees of the facility as well as the employment of people of the project company must be specified.

5.76 *Pre-conditions.* The Contract should list all the obligations which must be satisfied before the rights and obligations of the parties to the agreement become enforceable. This may include, for instance, acquisition of property, way-leave for the project, Government authorizations, proof of financing, registration of the consortium or joint venture, etc.

BOT Project Process Flowchart



* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

In this section of the Manual, steps six to ten of the BOT project process are explained. The steps involve evaluation of bids by the CPB, negotiation by the contracting authority, recommendation of award by the CPB, information memorandum to the Cabinet and tabling a copy of the agreement in the National Assembly.

Introduction

6.1 Since BOT projects are long-term undertakings, it is critical to carry out a proper evaluation of the proposals received. This section requests the use of a point-scoring approach.

The role of the Central Procurement Board (CPB)

6.2 Section 10(1)(b) of the Act states that the CPB will “evaluate bids in accordance with its rules and procedures.” The evaluation process needs to follow the criteria as specified in the bidding document.

Evaluation Team

6.3 An evaluation team with the necessary expertise has to be set up by the CPB. In case, a transaction advisor has been recruited for the project, a representative of the latter will be required to assist the evaluation team in the evaluation exercise.

Methodology for Evaluation

6.4 The project team must determine if selection of the bidder will be evaluated on technical considerations as well as financial consideration, or if final selection will be based on price considerations only. The evaluation should be carried out on the basis of allocation of marks. Some examples of possible weightings are:

- For a project where technical aspects are just as important as price, the split of technical/ financial procurement might be (50/50).
- For a project where technical aspects are not as important as price, the split of technical/ financial might be (30/70).
- For a project where price or contract value only is the determinant, the split of technical/ financial procurement might be (pass-fail/100).

Technical Proposal Evaluation

6.5 Whether evaluation is done on the basis of both Technical and Financial proposals or on the basis of Financial Proposals only, the technical proposal still needs to be evaluated using weighted points. For the pass/fail option a threshold, for instance of 70, must be assumed and once a bid passes the technical test, it is evaluated only on the basis of the financial bid.

6.6 If the evaluation procedure assigns weight to Technical as well as Financial proposals, then the points scored out of a possible 100 will, by proportion, determine the ultimate score of the Technical Proposal. For example, if the technical proposal has been assigned 40 points, and the financial proposal 60 points, then a score of 70 points for the technical will result in a weighted score of 28 points for the technical evaluation $[(70/100) \times 40 = 28 \text{ points}]$.

Financial Proposal Evaluation

6.7 The criteria used will vary from project to project and may include the following:

- a) Capital structure of the bidder;
- b) Sources of funds for project;
- c) Financial analysis for project;
- d) Integrity of capital investment plan;
- e) Credibility of revenues estimates;
- f) Residual value of facility, and
- g) Insurances offered.

Negotiation

6.8 Subsection 10(1)(c) of the Act stipulates that the CPB shall “make recommendations to the contracting authority for entering into negotiations with the preferred bidder”

6.9 The following steps may be followed by the contracting authority for carrying out the negotiation:

- a) *Preparing for the negotiation*
 - (i) The objectives of the negotiation should be outlined before embarking on the actual negotiation. This may include:
 - Clarification of terms and conditions in the contract, eliminating confusion or bridging gaps
 - Structuring an agreement which protects the interests of both the contracting authority and the private party;
 - (ii) A time frame and an agenda for the negotiation have to be prepared and agreed by parties;
 - (iii) A negotiation team with mixed skills needs to set up and a lead negotiator has to be assigned. In case a transaction advisor has been recruited for the project, he should form part of the team, and
 - (iv) A strategy needs to be formulated for the negotiation, which may include:
 - Anticipating the private party’s position on the items on the agenda
 - Preparing a detailed negotiation plan, including, in order of priority, alternatives solutions to the issues that would be discussed.

- b) *Invitation for negotiation*
 - (i) Invitation to the negotiation should be done in writing, specifying the date, time, venue and expected duration;
 - (ii) The agenda on the invitation should include all issues to be discussed to reach a package deal and the approach for the discussion, and
 - (iii) The bidder should be requested to submit the names and position of its authorized negotiating team.

- c) *Starting the negotiation meeting*
 - (i) After opening and welcoming remarks by the lead negotiator, each party would introduce the members of their team and their roles and responsibilities in relation to the project, and
 - (ii) The BOT project being a long term agreement, a start of a relationship between the parties is being established. Thus, a climate of trust and co-operation needs to be created.

- d) *During the meetings*
 - (i) At each meeting, the agenda should be re-set and agreed on the basis of the status of the negotiations;
 - (ii) A proper track record of time and date of all changes in the draft agreement(s) and other documents should be maintained;
 - (iii) Deal with easily resolved issues first to bring confidence in both parties, and
 - (iv) During the final bargaining, some compromises could be required in order to finally settle on the BOT agreement(s).

- e) *Way forward*
 - (i) A preliminary schedule for signing the BOT agreement has to be established

Award Process

6.10 After the evaluation and the negotiation has been completed, the CPB may “recommend the contracting authority to enter into an agreement with a private party” (section 10(1)(d) of the BOT Projects Act refers).

6.11 After obtaining the recommendation of the CPB, the contracting authority may enter into an agreement with the preferred private party after informing Cabinet, as per section 11(1) of the BOT Projects Act.

6.12 Once signed, and as soon as practicable, the BOT agreement has to be laid before the National Assembly by the contracting authority (BOT Projects Act, section 11(3)(c)).

Part B

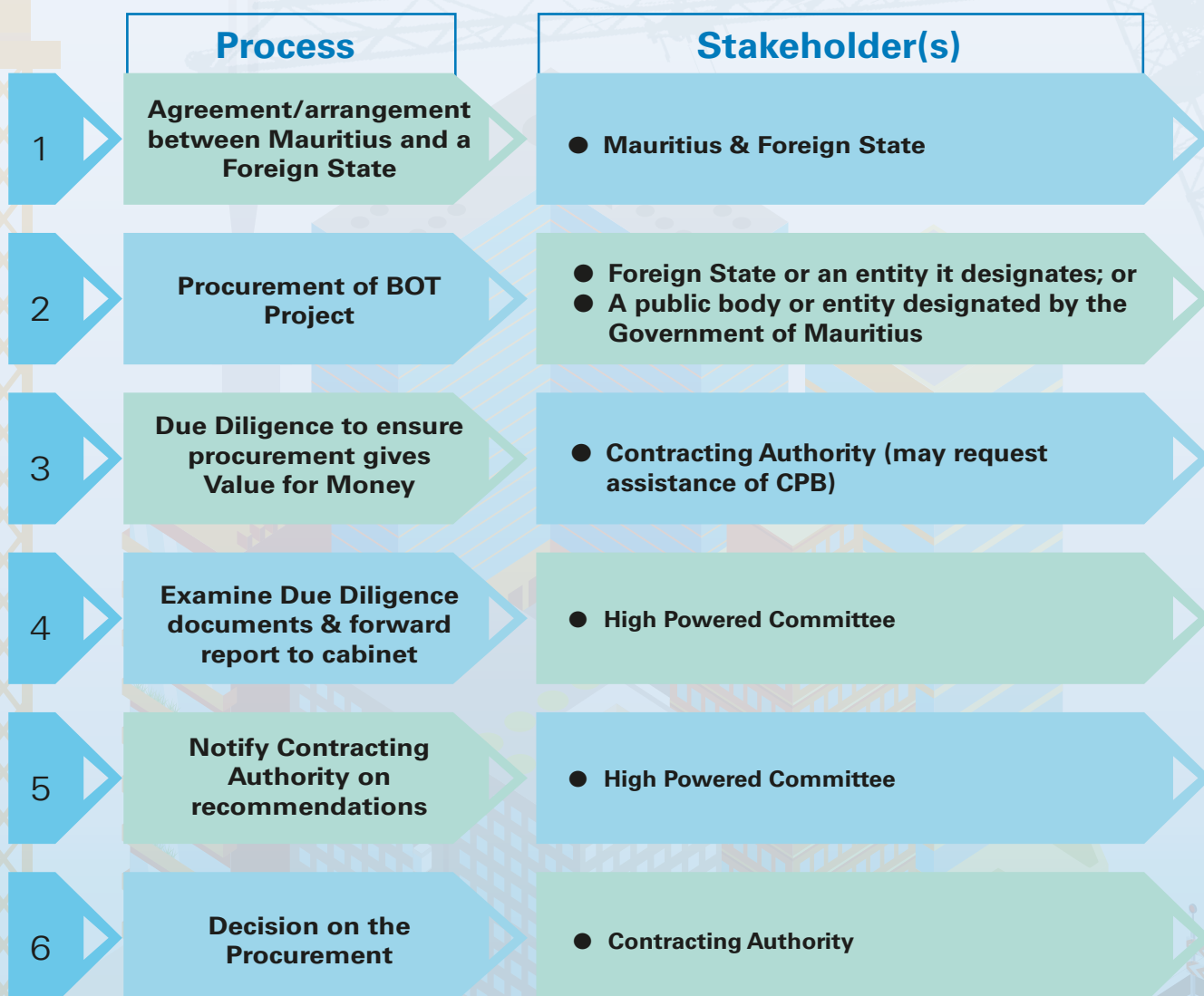
G to G Agreement



G to G Agreement

G to G Agreement Process for BOT Projects

Flowchart



* "Contracting authority" means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

SECTION 7 of this Manual describes the process to be followed for a BOT project for which there is a G to G agreement between Mauritius and a foreign State.

7.1 The rules for implementing BOT projects under the BOT Projects Act do not apply to a project for which there is an agreement or arrangement between Mauritius and a foreign State to benefit from the expertise and development experience of that foreign State in a particular field (refer to BOT Projects Act, Section 3(2)). Such arrangements are commonly known as the Government to Government (G to G) Agreement.

7.2 The BOT Projects Act states that Section 3 (1A) (a), (1B), and (1Ba) of the Public Procurement Act (PPA) shall apply for these projects, as follows:

- a) The procurement for the BOT project to be carried out by:
 - (i) the foreign State or by an entity which it designates, or
 - (ii) a public body or another entity as designated by the Government of Mauritius;
- b) The contracting authority will perform due diligence to ensure that the procurement at subsection (a) generates value for money. It may request assistance from the CPB to conduct the due diligence;
- c) The contracting authority is required to submit to a high-powered committee a report on the due diligence conducted at subsection (b);
- d) The high-powered committee referred to at subsection (c) will be chaired by the Secretary to Cabinet and Head of the Civil Service or his representative and comprise of other senior officials designated by the latter. The Committee may also co-opt appropriate public officer;
- e) The high-powered committee will examine the due diligence documents submitted by the contracting authority and forward a report on the procurement including its own recommendations to Cabinet, and
- f) After appraising Cabinet, the high-powered committee will notify the contracting authority of its recommendations for the latter to take a decision on the procurement.

7.3 The contracting authority is required to carry out the due diligence exercise stated at section 3(1B)(b)(i)(A) of the PPA to ensure that the G to G procurement of the BOT project entails value for money. The definition of VFM in relation to BOT projects is provided at section 4.19 of this Guidance Manual.

7.4 The process to be followed by the contracting authority to determine value for money may include the following:

- a) analysis of whether risks are optimally allocated between the Government and the private party. A detailed explanation of risks allocation is provided at **Annex 3**. The contracting authority needs to demonstrate that it is compliant with the four objectives of the risks transfer as stated at **Annex 3, Section 2**.
- b) determining whether the project is affordable on the basis of whole life cycle costs rather than on only the upfront costs. Section 4 (VIII) of this Manual provides details on how the affordability test may be carried out, and
- c) ensuring that there is sufficient incentives (including both rewards and deductions) in the contract(s) to ensure that assets and services are developed and delivered in a timely, economical, efficient, effective and ethical manner.

7.5 The contracting authority is also required to assess the capacity of the private party to generate the value for money in terms of experience in similar projects. In this respect, the private party may be requested to submit the relevant information using the format in **Box 1**.

The background features a stylized, isometric cityscape. On the left, a tall grey skyscraper with a grid of windows is partially visible. In the center, several colorful buildings in shades of blue, yellow, and green are stacked or layered. On the right, there are more buildings, some with construction cranes and barriers. At the bottom left, two silhouettes of people are shown: one standing and talking on a mobile phone, and another walking with a briefcase. The overall style is clean and modern, using flat colors and simple geometric shapes.

Annex 1

BOT Projects Act



THE BUILD OPERATE TRANSFER PROJECTS ACT 2016

ARRANGEMENT OF SECTIONS

Section

- 1. Short title**
- 2. Interpretation**
- 3. Non-application of enactment**
- 4. BOT Projects Unit**
- 5. Functions of BOT Projects Unit**
- 6. Staff of BOT Projects Unit**
- 7. Functions of contracting authority**
- 8. Feasibility report**
- 9. Request for proposal**
- 10. Functions of Central Procurement Board**
- 11. BOT agreement**
- 12. Regulations**

An Act

To provide for a legal framework for the execution of projects under Build Operate Transfer (BOT) agreements

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Build Operate Transfer Projects Act 2016.

2. Interpretation

In this Act –

“bid” means a proposal submitted in response to a request for proposal pursuant to section 10;

“bidder” means a participant in a request for proposal proceedings;

“BOT” means build, operate and transfer;

“BOT agreement” means an agreement, in relation to a BOT project, between a contracting authority and a private party;

“BOT project” –

- (a) means a project based on the granting of rights, under a BOT agreement, to a private party, to build, set up, own, operate, rent, lease, finance, modernise, manage, maintain or develop, and to transfer the undertaking, in accordance with the BOT agreement; and
- (b) includes any agreement which may provide for a project based on BOOT (Build, Own, Operate and Transfer), DBFOT (Design, Build, Finance, Operate and Transfer) or MOT (Modernise, Own/Operate and Transfer) models;

“BOT Projects Unit” means the unit referred to in section 4;

“Central Procurement Board” means the Central Procurement Board established under section 8 of the Public Procurement Act;

“contracting authority” means a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government;

“control”; in relation to “Government-controlled”; has the same meaning as in section 3(1D) of the Public Procurement Act;

“Director” means the Director referred to in section 4(1) of the Public Procurement Act;

“foreign State” has the same meaning as in section 3(1)(D) of the Public Procurement Act;

“Minister” means the Minister to whom responsibility for the subject of finance is assigned;

“own”; in relation to “Government-owned”; has the same meaning as in section 3(1D) of the Public Procurement Act;

“private party” means a corporate body established, incorporated or registered in Mauritius, or a consortium of corporate bodies;

“Procurement Policy Office” means the Procurement Policy Office referred to in section 4 of the Public Procurement Act;

“project period” means the initial period of a BOT agreement and any extension thereof.

3. Non-application of enactment

- (1) The Public-Private Partnership Act and the Public Procurement Act shall not, subject to subsection (2), apply to any BOT project under this Act.
- (2) Where there is an agreement or arrangement between Mauritius and a foreign State for a BOT project which allows Mauritius to benefit from the expertise and development experience of that foreign State in a particular field, section 3(1A)(a), (1B), and (1Ba) of the Public Procurement Act shall apply to that BOT project.

4. BOT Projects Unit

There shall be, within the Procurement Policy Office, a BOT Projects Unit which shall deal with BOT projects.

5. Functions of BOT Projects Unit

The BOT Projects Unit of the Procurement Policy Office shall –

- (a) formulate policies, including directives, procedures and guidelines on BOT projects;
- (b) issue templates in relation to BOT projects;
- (c) assess any feasibility report submitted by a contracting authority and submit its comments and findings to the contracting authority, regarding, inter alia –
 - (i) affordability;
 - (ii) value for money; and
 - (iii) sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
- (d) maintain a register of BOT projects; and
- (e) conduct training programmes on BOT Projects.

6. Staff of BOT Projects Unit

- (1) The Secretary to Cabinet and Head of the Civil Service may, on the recommendation of the Procurement Policy Office and subject to the Public Service Commission Regulations –
 - (a) designate such public officers as may be necessary to assist the BOT Projects Unit;
 - (b) enlist, on ad hoc basis and for such period as may be necessary, the services of suitable BOT experts to advise the Procurement Policy Office.
- (2) Any officer designated or expert enlisted under subsection (1) shall be under the administrative control of the Director.

7. Functions of contracting authority

- (1) Where a contracting authority identifies a BOT project, other than a BOT project referred to in section 3(2), that may be implemented under this Act, the contracting authority shall –
 - (a) appraise the BOT project and submit the report to the BOT Projects Unit for its assessment;
 - (b) prepare and submit to the Board a request for proposal documentation pursuant to section 10;
 - (c) develop and monitor the BOT project.
- (2) For the purpose of this Act, a contracting authority shall set up a project team and designate a suitable and qualified project officer who shall be capable to effectively manage a BOT project.

8. Feasibility report

- (1) A feasibility report submitted to the BOT Projects Unit under section 7(1)(a) shall –
 - (a) define the type, nature, scope and rationale for the BOT project;
 - (b) contain specific provisions on sector needs assessment, options analysis, value for money and affordability
 - (c) specify the broad terms proposed for the agreement, including the proposed sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
 - (d) describe the legal and institutional framework for implementing the BOT project;
 - (e) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under an agreement; and
 - (f) contain the observations, comments and recommendations of the contracting authority.

- (2) On receipt of a feasibility report, the BOT Projects Unit shall assess the report and submit its comments and findings to the contracting authority.

9. Request for proposal

- (1) On receipt of the comments and findings of the BOT Projects Unit under section 8(2), the contracting authority shall, subject to section 7(1)(b), prepare and submit a request for proposal to the Central Procurement Board for its approval in writing.
- (2) No contracting authority shall, unless approved by the Central Procurement Board, issue a notice of invitation or document pertaining to a request for proposal to any bidder.

10. Functions of Central Procurement Board

- (1) The Central Procurement Board shall, in respect of a BOT project, other than a BOT project referred to in section 3(2) –
 - (a) examine and approve the request for proposal documentation to be issued by the contracting authority;
 - (b) evaluate bids in accordance with its rules and procedures;
 - (c) make recommendations to the contracting authority for entering into negotiations with the preferred bidder; and
 - (d) recommend the contracting authority to enter into an agreement with a private party.
- (2) Where section 3(1)(b) and (1B) of the Public Procurement Act applies to a BOT project –
 - (a) “Ministry”, in section 3(1B)(b) of that Act, shall be deemed to refer to any of the entities described as a contracting authority;
 - (b) the high-powered committee shall forward its report to Cabinet, as specified in section 3(1B)(b)(ii)(A) of that Act, through the Prime Minister.

11. BOT agreement

- (1) Notwithstanding any other enactment but subject to this Act, a contracting authority may, after informing Cabinet through the Minister responsible for that contracting authority, enter into an agreement with a private party for the purpose of implementing a BOT project.
- (2) Every agreement shall include provisions for –
 - (a) the rights and obligations of the contracting authority and private party;
 - (b) the period of execution of the project;
 - (c) the relevant financial terms;

- (d) the conditions for the supply of services;
 - (e) the management of performance of the private party;
 - (f) the sharing of technical, operational, commercial and financial obligations and responsibilities among the parties;
 - (g) the termination of the agreement in case of breach of terms and conditions by either party, or otherwise;
 - (h) the remedies in the event of default by either party, including lenders' step-in-rights;
 - (i) the return of the assets to the contracting authority, at the termination or expiry of the agreement, in such manner as may be provided for in the agreement; and
 - (j) such other requirements as may be prescribed.
- (3) Every agreement shall –
- (a) be governed by, and construed in accordance with, the laws of Mauritius;
 - (b) provide for disputes between the private party and contracting authority to be resolved by amicable settlement, mediation or arbitration according to the rules specified in the agreement;
 - (c) as soon as practicable, be laid before the National Assembly by the contracting authority.
- (4) This section shall also apply to a BOT project referred to in section 3(2).

12. Regulations

- (1) The Minister may make such regulations as he thinks fit for purposes of this Act.
- (2) Any regulations made under subsection (1) may provide for the levying of fees and charges.




Annex 2

Hiring a Transaction Advisor

HIRING A TRANSACTION ADVISOR

1. As stated in section 7(2) of the BOT Projects Act and described in Section 3 of this Manual, a contracting authority is required to set up a project team which will be responsible for management of a BOT project. Although the project team is responsible for the management of the project, it may not itself have adequate relevant skills or resources to carry out all the tasks, including conducting the feasibility study and preparing the procurement documents. The project team may thus consider appointing a transaction advisor to carry out all such tasks under its close supervision.
2. A BOT transaction advisor is a single or team of experts, having skills and experience on financial, legal, technical and project management matters related to BOT projects. The BOT transaction advisor is usually recruited to conduct feasibility study for a project and upon approval of the study its services may be extended for assistance in the procurement phase of the project.
3. The Terms of Reference for a BOT transaction advisor may include the following components:
 - a) Undertake a comprehensive feasibility study for the Project as stated under Section 8 of the BOT Projects Act. The feasibility study has to be conducted in compliance with Section 4 of the BOT Guidance Manual;
 - b) If, on the basis of the feasibility study, a BOT solution is decided on, and subject to the approval of the contracting authority and the BOT Projects Unit, the transaction advisor may be required to provide the necessary technical, legal and financial advisory support for the procurement of a private partner. The procurement rules shall be as stated in the BOT Projects Act and detailed in the BOT Guidance Manual;
 - c) Prepare a complete set of procurement documents, complying with public sector procurement law, policies and guidelines, and in accordance with the format approved by the contracting authority. The documentation must be consistent with the results of the feasibility study and enable the contracting authority to obtain CPB's approval in terms of BOT Projects Act;
 - d) Conduct a market sounding exercise including road shows to ensure sufficient interest of high calibre private partners to bid for the Project. As part of this marketing exercise, the transaction advisor shall determine the presence, in Mauritius, of local counterparts that may have an interest in associating with any bidder for the project. This does not preclude the likelihood of a Mauritian firm being the main bidder;
 - e) Prepare an RFP document in accordance with best international practice and the BOT Guidance Manual, consistent with the results of the feasibility study;
 - f) Prepare a draft BOT agreement reflecting the risk profile as established in the Feasibility Study Report to be included as an attachment to the RFP and based on the BOT Guidance Manual. Close liaison with the contracting authority's management is required during drafting. The transaction advisor's team will have the necessary legal expertise to make legal recommendations on the best international practice of the drafting to be contained in this draft BOT agreement;
 - g) Provide all necessary administrative support to the contracting authority for the efficient and professional management of the bidding process. This includes the setting up and management of a data room, facilitating structured engagement between the

- contracting authority and bidders, helping the contracting authority to communicate effectively with bidders, and complying with any other requirements of the CPB in receiving bids;
- h) Develop a rigorous payment mechanism that captures the elements of risk transfer established in the feasibility study;
 - i) Set up a bid evaluation system and criteria, design a suitable bid process that will ensure comparable bids, devise effective systems for communicating with bidders and inspire market confidence. If appropriate, a system that allows for variant bids may be designed. The system must take into consideration the prevailing legal framework;
 - j) Compile all the documentation necessary for the contracting authority to obtain approval of the CPB as per provisions of BOT Projects Act to enable the procurement process to begin;
 - k) Designate a person from the transaction advisory team to act as member or advisor to the evaluation committee set up by the CPB to evaluate bids following guidance given in Section 6 of the BOT Guidance Manual;
 - l) Present the results of the bidding and evaluation of bids in a single value-for-money report (with relevant annexures) that demonstrates clearly how value for money will be achieved with the preferred bidder. The report must clearly indicate the preferred and second-ranked bidders and provide motivations;
 - m) Assist the contracting authority in final negotiations with the preferred bidder. This will involve preparing suitable negotiations teams, categorising issues appropriately, developing timelines for completion, and planning negotiation tactics and processes for reaching agreement. The transaction advisor must ensure that all agreements reached are incorporated into all the financial, commercial and legal documentation, and must assist with drafting the necessary and related correspondence. The transaction advisor must have the comprehensive legal and technical expertise to assist the contracting authority in negotiating the BOT agreement;
 - n) Draft a comprehensive BOT agreement management plan for the contracting authority;
 - o) Ensure that a comprehensive legal due diligence of the contracting authority has been completed. This will relate to legal compliance, competence and capacity to enter into the BOT agreement;
 - p) Help the contracting authority with all functions related to signing the final agreement;
 - q) Compile a comprehensive close-out report and case study. The close-out report will be a confidential document of the contracting authority, and will also be lodged with the BOT Projects Unit. The case study will become a public document, made available on various government websites; and
 - r) Provide the contracting authority all the necessary drafting, bidder communication and administrative support necessary for the entire procurement process to be conducted in accordance with law and policy, and to the highest standards of efficiency, quality and integrity.

- 
4. The transaction advisor has to be recruited on the basis of the provisions of the Public Procurement Act.
 5. The transaction advisor will have to report to the project team.
 6. The transaction advisor will be remunerated on the basis of deliverables which will be specified in its contract. It is recommended to include a success fee payable upon successful recruitment of the private party. The BOT agreement may be structured such that the payment of the success fee is effected by the private party upon signature of the agreement.

The background features a stylized, isometric illustration of a city. On the left, a tall yellow construction crane stands against a light blue sky. The city is composed of various buildings in shades of blue, grey, and yellow. In the foreground, there are construction barriers and a small yellow cart on a road. The overall scene is set against a light blue gradient background.

Annex 3

Allocation of Risks



ALLOCATION OF RISKS

1 Definition of Risk

A risk can be defined as any factor, event or influence that threatens the successful completion and operation of a project in terms of cost, time or quality.

2 Objectives of Risk Transfer

Within a BOT project, the primary objectives of transferring risks from a contracting authority to a private sector contractor are:

- a) to reduce the long-term cost of a project by allocating a risk to the party that is best able to manage it in the most cost effective way;
- b) to provide an incentive to the contractor to deliver a project on time, to the required standard and within budget;
- c) to improve the quality of customer service and increase revenue through a better management of risk, and
- d) to provide a more consistent and predictable profile of the contracting authority's expenditure on a project, by converting variable capital and operating costs into more consistent and predictable unitary payments.

3 Purpose of Risk Assessment

In a BOT project, the degree of risk transfer to the private sector will be determined by the nature of the project and will vary from project to project. The purpose of assessing risk within a BOT project is to:

- a) enable the selection of the most appropriate variant of BOT for a project;
- b) allow the development of contract documentation for a project;
- c) facilitate negotiation between the contracting authority and the short listed bidders (where the negotiated procedure is followed);
- d) facilitate the comparison of bids, and
- e) facilitate an assessment of value for money provided by the preferred tender when compared to traditional procurement.

4 Categories of Risk

The risks associated with infrastructure projects are commonly categorized under the following headings:

- a) *planning risk* – the risk that planning permission for the construction project may be refused, the risk that unacceptable conditions may be applied to any planning permission granted, and the risk that the planning process may take longer than anticipated and cost more than expected;

- b) *design risk* – the risk that the design solution adopted may not work satisfactorily and may fail to meet the requirements of the contracting authority, the risk that new technical standards may be introduced during the design phase, and the risk that the design process itself may take longer than anticipated and cost more than intended;
- c) *construction risk* – the risk that factors such as changes in labour and material costs, inadequate cost management, adverse site and weather conditions, and the failure of contractors to perform may lead to construction time and cost overruns;
- d) *operating risk* – the risk that factors such as high demand volumes, shortage of skilled labour, inadequate cost management, poor maintenance scheduling, late delivery of equipment, poor public relations and labour disputes may result in operating costs being more than intended and the required standards of performance and availability not being met;
- e) *demand risk* – the risk that usage of the service varies from the level forecast, and the risk that revenues generated from users (e.g. road tolls) are lower than expected;
- f) *financial risk* – the risk that factors such as fluctuations in exchange rates, variations in financial costs and changes in indexation assumptions may lead to operating or capital losses. A key element of financial risk is the residual value risk, which is the risk that the value of an asset (e.g. land and buildings) at the end of the contract term is different from that anticipated at the start of the contract term, and
- g) *legislative risk* – the risk that a regulatory or legislative change may be made that significantly affects the ability of the contractor to continue to meet its contractual obligations.

5 Steps in Risks Assessment

Through the process of risk assessment, the contracting authority is able to explore each of the above categories of risk in detail, identify and evaluate the most significant risks within each category, and allocate these risks between the contracting authority and the private sector contractor.

The steps in a preliminary risk assessment are:

Step	Step Description	Outcome
A. Preliminary Risk Identification	Identification of the principal risks associated with the design, construction and operation of an infrastructure project	Preliminary list of risks
B. Preliminary Risk Allocation	Formation of an initial view as to whether the contracting authority or the Contractor is likely to be better able to manage each risk. Risks are then either allocated to the contracting authority, the Contractor, or identified as risks to be shared.	Preliminary risk allocation
C. Qualitative Risk Assessment	Qualitative assessment of the potential significance or impact of each risk. The results of the qualitative assessment are combined with the list of risks and the risk allocation to provide a preliminary risk matrix for the project. A risk management plan is prepared for those risks that are to be retained by the contracting authority.	Risk management plan

A. Preliminary Risk Identification

The identification of risks may be undertaken by means of a brainstorming exercise in a workshop or series of workshops. The process of identifying the risks is:

- a) select the parties for the brainstorming session carefully and include those that are responsible for managing project risks;
- b) use a generic list of risks to structure the brainstorming session;
- c) focus on risks that are specific to the project;
- d) focus on the most significant risks;
- e) provide a clear and unambiguous description of each risk identified;
- f) check for missed risks and duplicated risks, and
- g) categorize risks.

B. Preliminary Risk Allocation

The guiding principle of risk allocation is that risk should be allocated to the party better able to manage it. In considering the most appropriate allocation of risk, the following issues should be taken into account:

- a) the capacity of the contracting authority to manage the risks and its ability to control them;
- b) the capacity of private sector contractors to manage the risks and their ability to control them, and
- c) the preferred allocation of risk, given any public interest issues.

The preliminary allocation of risk should reflect the specific characteristics of the project and the underlying strengths and weaknesses and capacities of each party. The degree of risk transfer to the private sector will vary on a project by project basis and may be informed by a precedent review and a market sounding exercise. The preliminary allocation of risk will influence the selection of the preferred form of BOT.

C. Qualitative Risk Assessment

Qualitative risk assessment enables the potential significance or impact of risks to be considered in two phases as follows:

- a) assessment of the potential impact of the risk – this is a subjective measure of how sensitive the project is to a particular risk, classified into high, medium and low impact, according to the extent to which the project is put at risk. The following table can be used as a guide:

Assessment of the Potential Impact of Risk

Scale of Impact	Description	Value (% of Baseline Project Cost)
High	Critical to continued service	> 50%
Medium	Serious impact	5% - 50%
Low	Small impact	< 5%

- b) assessment of the probability of occurrence – this is a subjective indication of how likely the risk is to occur, classified into high, medium and low probability. The following table can be used as a guide.

Assessment of the Probability of Occurrence

Probability	Description	Value (% of Project Cost)
High	Likely to occur	Probability > 10%
Medium	Occasionally occurs	Probability 1% - 10%
Low	Unlikely but possible	Probability < 1%

The probability of occurrence and estimation of each risk is then combined using the following matrix to provide a measure of significance of the risk.

Assessment of the Probability of Occurrence

		Probability		
		H	M	L
Impact	H	1	1	2
	M	1	2	3
	L	2	3	3

1= greatest significance/impact

3= least significance/impact

The numbers in the boxes show the level of priority that risks falling in that box have. The closer to the top left hand corner of the matrix that a risk is placed, the more significant the risk is likely to be, and the more important it is to focus on it. In this way, the qualitative assessment provides an indication of the most important risks which will be included in the risk management plan.

6 Risk Management Plan

A preliminary risk management plan should then be prepared for all the risks that are likely to be retained by the contracting authority. In preparing a risk management plan, greatest effort should be spent on planning and undertaking risk management activities for the most significant risks (as identified by the qualitative assessment) that are likely to arise first (e.g. planning risks). Risk management should be assessed in terms of their likely cost and effect (i.e. the extent to which probability and/or impact of a risk will be reduced). The cost of a risk should not exceed the probable cost of the risk occurring.

7 Risk Assessment and the Value for Money test

The primary purpose of undertaking the final risk assessment is to ensure that the bid selected provides the best value for money possible. This is achieved in two ways:

- a) by allocating risk to the party best able to manage it in the most cost-effective way; and
- b) by providing incentives for contractors to deliver infrastructure projects on time, to the required standard and within the budget.

The risk assessment undertaken at this stage should build on the risk assessment carried out at the Options analysis stage. In some circumstances the range and expected value of risk will have changed as a result of new information, and therefore, at the stage of conducting the value for money test, the contracting authority should consider:

- a) any additional risks that have become apparent;
- b) any risks that may no longer be appropriate, and
- c) any changes to the expected value resulting from greater uncertainty or the availability of accurate information.

Risk assessment is required during the procurement process to enable the following:

- a) contract terms and payment mechanism – the main way of allocating risk to a private sector contractor is through the contractual incentives and penalties incorporated within the payment mechanism. The design payment mechanism requires a detailed understanding of the types of risk involved in the construction and operation of an infrastructure project, and the value that the contracting authority attaches to such risk, and
- b) negotiation – if the negotiated procedure is used, then the risk assessment is required to establish the full cost (including risk) of items under negotiation, and to determine whether the cost of such items is minimized by transferring responsibility to the Contractor or retaining responsibility with the contracting authority.



Annex 4

Case study:
Examples of Cost and
Revenue for a Driver
Education and
Testing Centre

CASE STUDY: Examples of Cost and Revenue for a Driver Education and Testing Centre

Item	Breakdown
Cost	
Capital Cost	Land
	Buildings for education
	Furniture and Fittings for education
	Buildings for test
	Furniture and Fittings for test
	Vehicles
	Teaching and training equipment
	Workshop equipment
	Testing equipment
	Office equipment for education
	Library construction
	Driving simulators
	Driving range
	Design and Supervision cost
Operation and maintenance cost	Estimated as a percentage of capital cost + inflation over the concession period
Revenue	
License fees - First Timer	Theory for motor cars
	Theory for goods vehicles
	Theory for buses
	Theory for motor cycles
	Practice for motor cars
	Practice for goods vehicles
	Practice for buses
	Practice for motor cycles
Refresher fees	Theory for motor cars
	Theory for goods vehicles
	Theory for buses
	Theory for motor cycles
	Practice for motor cars
	Practice for goods vehicles
	Practice for buses
	Practice for motor cycles
Access to Testing Circuit: Other Users	Private motor cars
	Private goods vehicles
	Private buses
Test Fee	Private motor cycles
	Cars without package
	Cars with package
	Goods vehicle without package
	Goods vehicle with package
	Buses without package
	Buses with package
	Motor cycles without package
	Motor cycles with package
Other Revenue	Canteen rent
Project Cash Flow	Total revenue – Total cost over the concession period



Annex 5

Components of the Request for Qualification



COMPONENTS OF THE REQUEST FOR QUALIFICATION

Sub-title	Content
1. Overview	<ul style="list-style-type: none"> • Background to the Project • Scope of the Project • Access to the contracting authority's Business Directory (if any) • Information Package which will be issued to the retained bidders
2. Additional information sources	<ul style="list-style-type: none"> • Website and/or hard copy with contact persons
3. Overview of the selection process	<ul style="list-style-type: none"> • Selection process stages • The RFQ Stage • The RFP Stage • Presentations by RFQ or RFP proponents • Selection Process Anticipated Time-frame
4. Instructions to RFQ Proponents	<ul style="list-style-type: none"> • Contact Person • RFQ Response requirements (format, number of copies, mandatory requirements) • Submission location and submission time • Revisions to RFQ Responses Prior to the submission time
5. Evaluation process and criteria	<ul style="list-style-type: none"> • Overview of the Evaluation Process • Evaluation committee • Evaluation criteria and reference checks
6. Rules of procedure	<ul style="list-style-type: none"> • No unauthorized contact • Clarification of RFQ • Addenda • Cost of Preparing RFQ Response • Clarification of RFP Response • Notification of Success • Reservation of rights (e.g. modification of selection process or rejection of the RFQ exercise) • Limitation of damages caused to the interested party by submitting the RFQ • Confidentiality from the part of the contracting authority • Right to verify and conduct Background Investigations • Disqualification • Dispute Resolution • No representation or warranty from the part of the contracting authority of the RFQ • Removal/Replacement or Addition of Team Members or Core participants
7. Glossary of terms	
Schedules	<ul style="list-style-type: none"> • Commercial Evaluation criteria • Financial and Technical Evaluation criteria • Specimen Bonds • Insurance Requirements
Forms	<ul style="list-style-type: none"> • RFQ Response Declaration • Contact Details and RFQ Proponent Form • Relationship Disclosure Form • Letter of Availability

GLOSSARY OF TERMS

Affordability relates to whether the cost of the project over the whole project life can be accommodated in the government's budget, given its existing commitments.

Affordable in relation to a BOT agreement, refers to the ability of the public body to meet any financial commitment incurred in relation to the BOT agreement from its existing or future budgetary funds.

BOT refers to an arrangement whereby the private sector designs, builds, finances, operates and maintains a government facility for a fixed tenure, at the end of which it is transferred to the government.

Contracting Authority as defined in the BOT Projects Act refer to a Ministry, a Government department, a local authority, the Rodrigues Regional Assembly, a statutory body or any other Government-owned entity, or Government-controlled entity, designated by Government.

Due diligence refers to the care that should be taken before entering into an agreement or a transaction with another party. It is an investigation or audit of a potential investment. Due diligence serves to confirm all material facts in regards to a sale. It involves research and analysis of a company or organization done in preparation for a business transaction.

Output specification is a statement of the needs to be satisfied and defines the services and outputs required by the contracting authority. For example, if a public body procures a school on a BOT basis, it no longer simply procures an asset or school, but it is procuring on-going educational services from the private sector for the duration of the BOT contract.

Procurement is the act of acquiring, buying goods, services or works from an external source, often via a tendering or bid process.

Project Life Cycle represents the path a project takes from the beginning to its end. It is a series of activities which are necessary to fulfill project goals or objectives. A Project Life Cycle typically has the following four major phases: initiation, planning, implementation, and closure.

Project Officer refers to a dedicated person nominated by the contracting authority, who is capable and appropriately qualified to manage a BOT Project from its inception to its expiration or termination.

Project Team is the team that leads and monitors the project throughout the project life cycle. This team will be chaired by the project officer and its composition will comprise members as recommended by the project officer and approved by the contracting authority. Members would comprise of officials who can provide both strategic and technical support to the project officer.

Request for Proposal consists of the tender documents under the official letter of the implementing contracting authority.

Risk can be defined as any factor, event or influence that threatens the successful completion and operation of a project in terms of cost, time or quality.

Third-party revenue refers to money that a business earns indirectly through another source.

Traditional Procurement refers to procurement of goods, services and works as per the procedures stated in the Public Procurement Act 2006.

Value for Money in BOT projects is gained through the engagement of private sector efficiency, effectiveness, and economy and through the appropriate allocation of risks in the project.

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