

Best Practices on Contract Design in PPPs: Checklist

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Best Practices on Contract Design: CHECKLIST

The following checklist takes stock of a number of issues that should be addressed in assessing the contract design of Public-Private Partnerships for infrastructure projects, with particular emphasis to Governance issues. Its structure and content are based on the accompanying best practices on contract design in order to minimize the likelihood of poor performance of a PPP, but the order is slightly modified to focus them on governance issues. Questions in **bold** are particularly important for the Governance of PPPs, and should therefore have higher weight in the evaluation.

I. TRANSPARENCY	Yes/No	Comments
1. Are the final contract and all other documents publicly disclosed in a proactive way?		
2. If part of the contractual documentation is not disclosed, did it pass a tight test that evaluates that it is truly ‘commercially sensitive’ information, or that there is a public interest in keeping it confidential, against the presumption that they are not?		
3. Are output specifications, performance targets, and payment mechanism (including deductions or fines for low performance) put in the public domain?		
4. Does the contract require to proactively disclose measurements contractor performance along the development of the project, and payment changes connected to the measured performance?		
5. Does the contract require to proactively disclose motivation and cost assessment of any change in output or in other terms of the contract before approval?		
6. Does the contract require to proactively disclose methodology and results of all benchmarking and market testing exercises the contract requires?		
7. Is the above information disclosed in an electronic form in the main page of the project?		
8. Is the above information disclosed within a pre-determined and short time from its emergence?		
9. Are the disclosure requirements compulsory?		
10. Does the contract itself specify such disclosure rules?		
II. RISK ALLOCATION	Yes/No	Comments
11. Have the main risks of the project been identified?		
12. Does the contract transfer risks to the private-sector party that it can control?		
13. Does the public-sector party bear risks that the private-sector cannot control?		
14. Are the risks properly allocated in order to give appropriate incentives to the private-sector party?		
III. PAYMENT MECHANISM	Yes/No	Comments
15. Are the required service standards based on output specifications?		
16. Are all these service standards easily monitorable and verifiable?		

17. If not, are other objective measures of performance specified?		
18. Are customer satisfaction surveys used to monitor performance of the private-sector party?		
19. If yes, are customer satisfaction surveys carried out by an independent third party?		
20. Does the contract exhibit a consistent link between output specifications, risk allocation and incentives, and the payment mechanism?		
21. Is the payment mechanism consistent with the allocation of risks between the public and private parties, and hence with the incentives given to the private-sector party?		
22. Is the payment due to the private-sector party conditional on service provision?		
23. Does the contract specify a service commencement day after which the first payment is made?		
24. Does the public-sector party impose sufficient contractual protections from delays in service commencement, like robust deductions and liquidated damages?		
25. If the payment mechanism is based on user charges, does the tariff level ensure the bankability of the project?		
26. Does the level of tariff discourage demand, particularly if there is an alternative free-available service?		
27. Are there provisions to combine user charges with any form of subvention from the public-sector party?		
28. Do these subventions depend on the private-sector performance, like subventions based on the number of users?		
29. Is the private-sector party allowed to collect secondary revenues, like advertisement, food services, etc.?		
30. If the revenues collected by the private-sector party turn out to be higher than expected, are there mechanisms to limit the private sector profits, like sharing surplus revenues?		
31. If the payment mechanism is based on usage, is the definition of service usage measurable and observable, like traffic volumes?		
32. Is the usage payment capped for high levels of usage?		
33. Does the payment mechanism include bonuses or deductions according to availability of the service and/or performance targets?		

34. Do deductions vary according to the severity of the availability/performance failure?		
35. Does the contract include clear rectification periods providing the private-sector party with clear deadlines within which to rectify the failures to avoid additional and increasing deductions?		
36. Do deduction payments use a ratchet mechanism where deductions increase with the duration and frequency of the failure?		
IV. PRICE VARIATIONS	Yes/No	Comments
37. Does the contract include provisions allowing tariffs or usage payments to vary according to the evolution of costs that are independent of contractor's performance?		
38. Does the contract include indexation clauses?		
39. Does the contract specify the price index to be applied?		
40. Does indexation apply to the proportion of tariffs or usage payments that matches the proportion of the private-sector party variable costs in total costs?		
41. Does the contract specify the frequency of tariffs or usage payments indexation?		
42. Does the contract require and detail market testing or benchmarking procedures?		
43. Is the market competitive enough to apply market testing procedures?		
44. Does the contract specify the frequency of the market testing or benchmarking procedures?		
V. FLEXIBILITY AND RENEGOTIATION	Yes/No	Comments
45. Are all anticipated (foreseen) changes in service provision pre-specified in the contract, so they can be part of the initial bid?		
46. Does the contract include provisions allowing the public-sector party to require other likely small changes that cannot be pre-specified exactly and therefore cannot be priced at the competitive tendering stage?		
47. If yes, does the contract pre-specify exactly how compensation to the private-sector party for the extra costs arising from these required small changes should be calculated?		
48. In particular, is any cost reimbursement compensation backed by benchmarking or market testing procedures before changes are approved and implemented?		

49. Is there a third party (e.g. panel of experts) involved in approving the cost reimbursement before changes are implemented?		
50. For completely unanticipated large change needs, does the contract precisely specify a transparent change protocol through which proposed changes are requested, assessed, approved, and implemented?		
51. Are independent third parties involved in such a change protocol and in particular at the approval stage?		
52. Does the change protocol require and detail benchmarking or market testing procedures before these larger unanticipated changes are approved and implemented?		
53. Does the contract specify a freeze period at the beginning of the contract life within which no change can be requested by any party?		
54. Is this freeze period proportional to the construction phase period of the project?		
55. Is this freeze period longer for contract changes required by the private-sector party than for those required by the public-sector party?		
56. Does the contract specify fees to accompany the private-sector demand for contract changes to be withheld by the public-sector party if the change requested is rejected?		
VI. CONTRACT DURATION	Yes/No	Comments
57. Does the contract specify its duration?		
58. Do the contract length and the payment profile ensure the bankability of the project?		
59. Does contract duration encourage non-contractible investments?		
60. Does contract duration include review periods (recurrent possibilities to stop or renew the contract to the incumbent contractor) to be used as an in-kind reward for the private-sector party's good performance?		
61. Are contract renewals contractually conditioned on reaching pre-specified target levels of performance?		
62. Does contract duration allow the private-sector party to exploit economies of scale?		
63. If the project involves the provision of soft and hard services by the private-sector party, do these services have different contract duration (shorter the former, much longer the latter)?		

VII. OTHER CONTRACTUAL ISSUES	Yes/No	Comments
64. Does the contract include a dispute resolution mechanism?		
65. If yes, does the procedure involve different stages for resolving disputes?		
66. Does the dispute resolution mechanism envisage appointing of PPP experts or arbiter among distinguished professionals?		
67. Are there strict deadlines specified for the PPP experts/arbiter to make decisions and reach resolution?		
68. Are the decisions made by experts/arbiter enforceable?		
69. Does the contract include provisions allowing the public-sector party to step-in?		
70. Does the contract specify the circumstances under which the public-sector party is entitled to step-in?		
71. Does the contract specify who should bear the costs arising from the public sector's step-in actions?		
72. Does the contract include provisions allowing the lenders of the project to step-in?		
73. Does the contract specify the circumstances under which the lenders are entitled to step-in?		
74. Does the contract include early termination clauses?		
75. Does the contract specify the circumstances under which the private-sector party has the right to terminate the contract before the contract expires because of a public-sector party default?		
76. Does the contract specify the circumstances under which the public-sector party has the right to terminate the contract before the contract expires because of a private-sector party default?		
77. Does the contract specify the circumstances under which the public-sector party has the right to voluntarily terminate the contract?		
78. Does the contract specify the compensation payable to the private-sector party in the above cases?		
79. Does the contract include provisions for early contract termination because of force majeure events?		
80. Does the contract specify these force majeure events?		
81. Does the contract consider corrupt gifts and fraud as causes for early contract termination?		

VIII. SUBCONTRACTING	Yes/No	Comments
82. Does the contract impose any restriction on subcontractors in order to avoid conflicts of interest?		
83. Does the contract entitle the public-sector party to approve the replacement of subcontractors?		
84. Does the contract impose liquidated damages on non-performing subcontractors?		
85. Does the contract specify that the employment of subcontractors will terminate whenever the contractual relationship between the public and private parties terminate?		