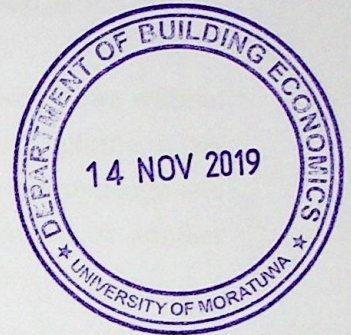


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**REGULATING PUBLIC PRIVATE PARTNERSHIP IN
SRI LANKA: THE PUBLIC SECTOR PERSPECTIVE**

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**Dissertation submitted in partial fulfillment of the requirements of
for the degree of Master of Science in Construction Law and Dispute
Resolution**

Department of Building Economics

**University of Moratuwa
Sri Lanka**

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ABSTRACT

Regulating Public Private Partnership in Sri Lanka: The Public Sector Perspective

Governments around the world have sought to involve the private sector in the delivery of public services that have customarily been within the public authorities' domain through Privatization and Public Private Partnership is an innovative approach to procurement, where the intersection of the public and private sector forces to provide a public service or facility. According to the recent years' budget speeches, it was revealed that there is a vast trend in Public Private Partnerships in future Sri Lanka. Lack of well-established legal and regulatory framework has been identified as one of key challenges among implementing Public Private Partnerships. Thus, this study attempts to identify how existing PPP procurement law should be reformed to meet challenges in procuring Public Private Partnership.

Widely used national and international model laws, guidelines, constitution, government circulars, published reports and case laws were used to collect secondary data while case studies has been adopted to collect primary data. Desk review method has been used to analysis secondary data and primary data were analysed through content analysis and cross case analysis methods.

This study identified that based on international model laws and guides, various countries around the world, have been enacted special Public Private Partnership law or guidelines to regulate it in their countries. In Sri Lanka, there is no specific act dealt with Public Private Partnership procurement and Part II Guideline and subsequently issued supplements to it, form Public Private Partnership procurement law in Sri Lanka. Research results revealed that short term and long terms reforms are required for existing Public Private Partnership procurement law to meet future challenges in procuring. Finally, as a guide a framework for reforming existing Sri Lankan Public Private Partnership procurement law was developed.

Key words: Economic Development, Public Private Partnership, Tradition Public Procurement

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ABBREVIATIONS

ADB	- Asian Development Bank
BII	- Bureau of Infrastructure Investment
BOI	- Broad of Investment
BOO	- Build, Own and Operate
BOOT	- Build, Own, Operate and Transfer
BOT	- Build, Operate and Transfer
CANC	- Cabinet Appointed Negotiation Committee
CBSL	- Central Bank of Sri Lanka
CE	- Chief Engineer
DGM	- Deputy General Manager
DL	- Director Legal
DPD	- Deputy Project Director
EBRD	- European Bank for Reconstruction and Development
EOI	- Expression of Interest
GDP	- Gross Domestic Product
LO	- Legal Officer
LTA	- Lead Transaction Advisor
MOF	- Ministry of Finance
NC	- Negotiation Committee
OECD	- Organization for Economic Co-operation and Development
PC	- Project Committee
PD	- Project Director
PFI	- Private Financial Initiatives
PFIP	- Privately Financed Infrastructure Project
RFP	- Request for Proposal
PPP	- Public Private Partnership
PS	- Procurement Specialist
SPV	- Special Purpose Vehicle
TPP	- Traditional Public Procurement

UNCITRAL	- United Nation Commission on International Trade Law
UNIDO	- United Nations Industrial Development Organization
USAID	- United States Agency for International Development
VFM	- Value for Money
WB	- World Bank

1. INTRODUCTION

1.1 Background

The progress of any country depends on the way of building association for a collective development of overall economy, among numerous clusters (Liu & Wilkinson, 2014). Investment in infrastructure is a key to economic development, poverty reduction, enrichment of life and, access to healthcare and education, and aids in accomplishing numerous of the dreams of a strong economy (Weisheng, Liu, Hongdi & Zhongbing, 2013; World Bank [WB], 2016a). Tang, Shen and Cheng (2010) viewed that infrastructure development has been a most important element in any country that could lead the country's socio-economic standard to a higher level. Generally, all developing countries have been limited in the area of infrastructure development because of they are trying to uphold other core functions such as agriculture, industries and service (Roehrich, Lewis & George, 2014).

The potential of any authorities to acquire capital effectively and efficiently for their cultural, financial and changing purposes is essential and central to their success and development (Loosemore & Cheung, 2015). Thus, different governments around the world have sought private segment participation to deliver public services that were normally delivered by public authorities (Teliford, 2009). Yescombe (2007) stressed that privatisation is one of the most commonly adopted procurement method by several countries to involve private sector into economic development. Osei-Kyei and Chan (2015) viewed privatization means the elimination of government involvement and the expansion of the private sector's role in meeting people's needs and, in essence, the permanent shift from public property ownership to the private sector. Recently, Public Private Partnerships (PPPs) becomes popular to most of the developing counties as a substitute to Traditional Public Procurement (TPP) and privatisation (International Monetary Fund, 2006).

PPPs is an inventive approach used by the public sector to contract with the private sector, bringing their resources and their capacity to deliver projects in a timely and budgetary manner, while the public sector maintains the responsibility for delivering

such services to the government in a manner that benefits the public and leads to economic prosperity and quality of life. Governments embrace PPPs to meet future development challenges, such as alleviating public financial constraints, raising public service standards, stepping up innovation and optimizing risk transfer (Chan, Lam, Chan, Cheung & Ke, 2009; Grimsey & Lewis, 2007).

In a country's viewpoint, infrastructure can be bi-categorical; namely social and economic (Schwartz, Corbacho & Funke, 2008). Ng and Loosemore (2006) stressed that the rate of infrastructure development is proportionately affected to the rate economic development of the country. Thus, any government has to allocate considerable portion for infrastructure development and most of the government cannot bear entire expenditures for infrastructure development alone (Carbonara et al., 2014). As the result of that, there is a trend in government to share responsibilities in delivering basic social services, including infrastructure, with private segment (Ball, 2011). In a nutshell, PPPs have developed as a best investment tool for both categories of social and economic infrastructure development.

Grimsey & Lewis (2007) stressed that even in the 19th century; PPPs were used as a toll for the financing of infrastructure projects. Further, they expressed that the Suez Canal; one of the best-known water project, was managed by the private sector until it was nationalised in 1950s. Additionally he cited that in the 1960s, Spain has launched its system of motorways, funded through the private sector due to the inadequacy of national finances to meet the country's infrastructure needs at the time. PPPs have emerged as a popular funding instrument late 1980s and early 1990s in the world (WB, 2016a). Since then, PPPs have turned out to be a phenomenon that spreads the globe and is of considerable interest (Fourie & Burger, 2000). On the other hand, why are PPPs so interested now? Ultimately, PPPs, on the other hand, completely escape the often negative effect of either private ownership or privatization. For both public and private companies, this is a win - win scenario.

United State Agency for International Development (USAID, 2016) viewed that Sri Lanka has not a lengthy history of implementing PPPs in their development of infrastructure like other counties. Nevertheless, between 1990 and 2014, Sri Lanka has entered into 73 PPP initiatives with a complete funding of over \$6 billion. In its Annual Report for 2015, the Central Bank of Sri Lanka (CBSL) had emphasised to

fill the funding gap, inspire the private sector to invest in infrastructure growth and other related projects, often aimed at short- to medium-term development of pharmaceutical areas, airports and Megapolis.

Further, a concessional agreement was signed in August 1999 by the Sri Lankan Ports Authority with South Asian Gateway Terminals (Private) Limited. to construct, manage and operate a container terminal in the Port of Colombo under Build, Operate and Transfer (BOT) contract. Furthermore, on 23rd February 2016, the Sri Lankan Government and the Asian Development Bank have signed a transactional consultancy agreement to design, build, operate, maintain and transfer certain port facilities at the Colombo Port East Container Terminal through a PPP (Finance Commission of Sri Lanka, 2017). CBSL Annual Report (2015) viewed that as announced in Budget 2016, in its development strategy, the government decided to use PPPs, especially in the areas of urban development, expressways, power generation, etc. Moreover, the Ministry of Megapolis and Western Region Development has a robust infrastructure project pipeline (Ministry of Megapolis and Western Region Development, 2016) with 21 project value equivalent to Rs. 12,067 Mn. and expected to execute through PPPs. Thus, it clearly demonstrated that there is a vast trend in PPPs in future Sri Lanka.

In developing countries, a variety of PPP programs, were either held up or terminated owing to certain reasons and this inspired previous authors to conduct studies on PPP implementation burdens (Chan et al., 2009; Ismail & Haris, 2014). Thus, various scholars, PPP experts, and researchers have identified key challenges in implementing PPPs in economic, legal and regulatory, political, environmental, social and technological aspects. According to studies of Ismail & Haris (2014), Li, Akintoye, Edwards & Hardcastle (2005) and Mahalingam (2010), inadequate legal and regulatory framework has been identified as a one of top five (05) key challenges in implementing PPPs.

1.2 Problem Statement

WB (2014) considered that all laws and regulations governing whether and how to enforce PPPs must form part of the legal and regulatory framework for PPPs. At the United Nations Commission on International Trade Law (UNCITRAL) Colloquium on PPPs held in Vienna in May 2013, concerns about lack of legal certainty and regulatory stability were highlighted for PPP transactions (UNCITRAL, 2013b). Some governments carry out PPPs without having an overall PPP policy, leading to undefined goals and problems with the projects (Simmons & Simmons Limited Liability Partnership, 2017; WB, 2014). Presently, various international organizations have published a series of non-uniform legislative guidelines to standardize PPPs (UNCITRAL, 2013a). Some countries adopt special PPP legislation as a strong legal framework and good government policies attracting the private sector to support the development of infrastructure (WB, 2014). 40% of Asia and the Pacific countries have already enacted PPP Laws, while 31% have PPP guidelines and 10% have concession laws to govern PPPs (Economic and Social Commission for Asia and Pacific, 2017).

Currently, even though legislative guide, manuals and model laws on PPPs have been published at the international level, Sri Lanka has only a guideline, which is called Procurement Guideline – Part II for Private Sector Financed Project (USAID, 2016). Perera (2016) pointed out that weak regulatory framework includes government of key challenge in implementing PPP in Sri Lanka. Although, weak legal and regulatory framework has been identified as one of key challenge in implementing PPPs, none of studies were conducted to evaluate the existing the PPP procurement law available in Sri Lanka. Thus, This work aims at filling the gap in knowledge by describing the problems as; “how to reform existing PPP procurement law to meet future challenges in procuring PPPs in Sri Lanka?”.

1.3 Aim

The aim of this research is to investigate necessity of reformation of existing PPP procurement law to meet future challenges in procuring PPPs in Sri Lanka.

1.4 Objectives

Following the afore mentioned aim, the objectives were identified as to;

1. Critically review challenges and issues faced due to lack of proper legal framework in PPP procurement
2. Critically review model laws and regulatory frameworks available for procurement of PPPs in international context
3. Analyse the gaps in guiding PPP procurement in Sri Lankan context
4. Develop a framework to reform existing PPP procurement law to successfully procure PPPs in future Sri Lanka

1.5 Methodology

Following methodologies were followed to accomplish the above aim and objectives.

1.5.1 Literature review

A comprehensive literature review was carried out to identify the significance of PPPs for economic development and critically review, challenges and issues faced due to lack of proper legal framework in PPP procurement, by referring books, journals, conference papers, model laws, acts and conventions.

1.5.2 Data collection

Secondary data

In order to accomplish the second objective of this research work, secondary data was gathered by referring international and national legislative frameworks.

Primary data

As primary data collection tool; the semi structured interviews were adopted to identify background information of the selected case studies, investigate gaps, and recommendation to close the gaps in the existing legal framework for procurement of PPPs in Sri Lanka.

1.5.3 Data analysis

After acquiring information through interviews and reviewing secondary sources, content analysis and cross case analysis were carried out to data reduction and concept identification and were presented in tabulation format. Based on findings finally, a framework was developed for reformation of existing PPP procurement law.

1.6 Scope and Limitation

Mainly, this study focused only procurement stage of PPP project life cycle while, the cases for primary data collection were selected only from PPP project adjoining with construction in public sector perspective due to prevent any complications that may arise, when evaluating construction related PPPs and other PPPs simultaneously. The case study sample was limited to three PPP projects and public sector organisations and secondary data were gathered by only referring four international legislative framework due to the size and time constraints of this analysis.

1.7 Structure of the Study

The dissertation comprises with five chapters including the introduction chapter.

Chapter one - Introduction

Chapter one includes the study context, research problem, aim, objectives, a brief overview of the study's research methodology, range and limitation, and structure.

Chapter two - Literature synthesis

Chapter two addresses the theoretical status and research problems through systematic analysis and synthesis of literature to clarify and evaluate the research question's significance.

Chapter three - Research methodology

Chapter three sets out the work outlined to achieve this research's aim and objectives. Secondly, it explains the methods used for this study to collect data and analyse data.

Chapter four – Research findings and data analysis

The results obtained after the review of secondary sources and semi-structured interviews are discussed in accordance with the research methodology and the analysed results.

Chapter five – Conclusions and recommendations

Chapter five provides a summary of the findings and conclusions. Second, it explains the research's practical implications. Third, it addresses opportunities within this area of study for further research.

2. LITERATURE SYNTHESIS

2.1 Introduction

Chapter one gave a brief introduction to the study. Nevertheless, this chapter aims at synthesizing the current level of research area awareness and defining the research problem.

First, in the interpretation of PPP, the concept of PPP is expressed (Section 2.2). Second, deferent PPP models, necessity of PPP are explored while discussing PPP life cycle section 2.3, 2.4, and 2.5 subsequently. Third, contribution of PPPs to economic development is critically reviewed in comprehensive manner (Section 2.6). Then, issues and challenges in implementation of PPPs and, legal and regulatory framework for PPPs are subsequently explored in section 2.7 and 2.8.

Finally, the review of the literature ends with the approach to the research problem, “how to reform PPP procurement law to successfully procure PPPs in Sri Lanka?”.

2.2 PPP Concept

Traditionally, social scientists have treated government as a separate entity from civil society. Hence, the public-private dichotomy, and the state governs civil society; the state does not enter into governance systems with it (Weber, 1946). Weber (1946) famously defined the state as a compulsory political association performing continuously as an organisation consisting of administrative staff. Such staff effectively upholds claims to the monopoly of the legitimate practice of physical force in the implementation of its command. Similarly, the American democratic theorist Robert Dahl conceived of a clear separation between public and private. Dahl (1976) defined government in terms of its exclusive regulation of the legitimate use of force in enforcing its laws within a given territorial region. Governments allocate resources by command, as through acts of legislatures, courts and bureaucracies, while markets allocate resources through the uncoordinated decisions of individuals, as reflected in the price systems (Ball, 2011). Moreover, he stressed that markets reflect a private ordering of goods,

services and wealth, in contrast to a hierarchical public one. That complements public hierarchies and private markets: governance through PPPs. Thus, it is useful to discuss PPP definitions and analysis of PPP key features and those are discussed in sub-section 2.2.1 and 2.2.2.

2.2.1 'PPP' in definition

PPP is an innovative procurement style, where with the collaboration of public and private sector, a public service or facility to deliver users (Carbonara et al., 2014; Ke et al., 2010). According to the view of Roumboutsos and Anagnostopoulos (2008), in this arrangement, both the public and private sectors generally subsidize the project's expertise and capital and share the risks involved. Sciulli (2008) reported PPP as a term that is relatively new and evolving. However, PPPs have existed in countries within Europe and the United States of America (Li et al., 2005), Western and Central Africa (Fall, Marin, Locussol, & Verspyck, 2009; Li et al., 2005), and Asian countries (Li et al., 2005) for many decades. Given the varying social, financial and political environment linked to globalization and economic constraints, PPPs in various countries around the world are becoming inevitable and indeed desirable. (Grimsey & Lewis, 2000).

The PPP model has been dissected and debated from distinctive angles by using numerous scholars. Accordingly, this concept has been used or planned to use globally by number of developing and developed in the ways that they see it advantageous (Ball, 2011; Fall et al., 2009; Li et al., 2005; Mouraviev & Kakabadse, 2012; Nisar, 2007). As such PPP is a broader concept, which has been defined by agencies like Asian Development Bank (ADB, 2008), Canadian Council for Public Private Partnerships (2011), United Nations Development Program (2016), European Commission (2003), and WB (2014). The word "Public Private Partnership" has no universally accepted meaning as it is not a "one size fits all" kind of an approach (Carbonara et al., 2014; Weihe, 2005). A partnership has been described as a relationship between two (02) people or two (02) organizations, according to the Oxford Advanced Learner's Dictionary (Hornby, Cowie & Lewis, 2015). Similarly, Partnership is described in the Chambers 21st Century dictionary as associations in which two (02) or more individuals or groups act as partners or corporations or other

undertakings owned or operated jointly by two (02) or more individuals, etc. (Chambers & Chambers, 2011). Therefore, from the above definitions, it could be deduced that two (02) or more parties are involved in a partnership and that in this specific concept; a relationship is established between the public and private sectors. ADB (2008) noted that the phrase ' PPP ' identifies a range of possible partnerships between public and private entities with respect to infrastructure and other resources, while WB (2012) defines a relationship is being established between the public and private sectors for the provision of a public asset or service in which the private party assumes a major responsibility for risk and management. In addition, the concept of PPP can differ slightly from one jurisdiction to another, depending on which part of the agreement focuses on the value.

Although the concept of PPP does not have a uniform definition, most definitions include four (04) coherent features. Firstly, all definitions imply a voluntary or agreed association between at least one government and one non- government performer. Second, the relationship should be a formalized long-term commitment to collaborate in which the efforts of the partners complement each other in a way which allows them to achieve their goals within the given PPP more efficiently than on their own. Thirdly, PPPs ' key feature is that partners are responsible for sharing resources, expenses and incentives. Fourth, the purpose of most PPPs is to provide some form of public service or asset. Although, the diverse working definitions adopted by PPP scholars to influence by their varied perspectives, based on common features of their definitions, PPP can be defined as an arrangement or arrangement existing in the public and private sectors together to make over a public project or render an infrastructure service, and this will entail the sharing of risks, rewards, resources and responsibilities for actions and outcomes on a long-term basis.

2.2.2 Principles of PPP arrangements

Affordability, Value for Money (VFM) and risk transfer are three (03) benchmarks in determining the PPP viability (Morallos & Amekudzi, 2008; Weisheng et al., 2013). Firstly, Weisheng et al. (2013) viewed that affordability of PPP is where it can handle the spending and other distribution within the limits of the budget.

Secondly, Morillos and Amekudzi (2008) defined VFM as the best composition of life cycle cost and quality or fitness for purpose of the good or service to come across the user's necessity. A PPP is brought excessive VFM compare to expenses made by the government where they provide a service in-house or where contracts out a service to a private company (Chang, 2013). The better risk allocation and burden-sharing are frequent argument in favour of PPPs (Chang, 2013; Grimsey & Lewis, 2000; Smith, Merna & Jobling, 2014). Morillos and Amekudzi (2008) pointed out that PPPs may optimise risk allocation by transferring the risks to the party who is able to succeed them. European Commission (2004) highlighted four (04) objectives for risk transfer in PPPs, which include reduction of long-term project costs; timely delivery, acceptable standard and allocation of projects; improvement of service quality; and ensuring a reliable spending profile.

2.3 PPP Models

Even though there are various types of PPPs categorised based in their coherent features, with a robust upsurge recently on the contractual type, PPPs can be categorises into concession model and the Private Finance Initiative (PFI) (Bovaird, 2004; Kakabadse et al., 2007; Sadran, 2004; Sedjari, 2004). Concessions are kind of contractual arrangements which private segment operates the facility for a certain period of time and investment are recovered from user fee (Abednego & Ogunlana, 2006; Kakabadse et al., 2007). Additionally, Kakabadse et al. (2007) stressed that PFI schemes are funded privately for public facilities and public works, but are paid for by a public authority in general and not by individual users. However, many scholars emphasised that the various types of PPPs are emerged across a wide range of different market segments to deliver the service to public which was normally executed by the government organisation. Therefore, sub-section 2.3.1 and 2.3.2 separately discuss those two models in detail.

2.3.1 Concession model

Abednego and Ogunlana (2006) stated that concession type PPPs has a long history and most PPPs are in form of concessions. Form of contractual arrangements by which the government provides a facility to the private sector, which then maintains

the facility for a certain period of time, or a private party uses private financing structures and renovates a public asset as concessions (Weisheng et al., 2013; Sadran, 2004). Sedjari (2004) viewed that private investors in concessionaires form a new venture company called ' Special Purpose Vehicle ' (SPV) responsible for funding, constructing, extending and improving public sector services. The private segment usually gets a long-term loan from business banks, and the private division benefits directly from the users of the facilities for the length of the concession (Tang et al., 2010). Following the evolution of PPP, different spectrum of PPP models has been widely implemented including Build Operate Transfer (BOT), Design Build Finance Operate, Build Own Operate Transfer (BOOT), Operate and Maintain, Build Lease and Transfer and several other similar concession acronyms (Abednego & Ogunlana, 2006).

2.3.2 PFI model

In contrast to the concession model, financing arrangements are organised differently in PFI model (Tang et al., 2010). Commercial contracts for public facilities and public works have different highlights in PFI projects, but they are paid in all a public authority, not by individual customers (Sadran, 2004). Additionally, Weisheng et al. (2013) pointed out that in PFI, a private company is not an SPV, but a direct service provider.

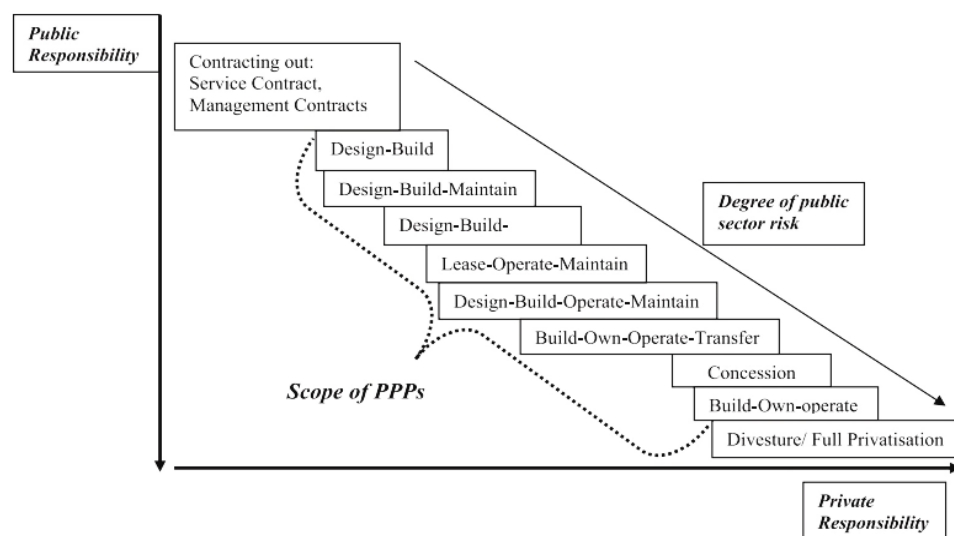


Figure 2.1: Variants of PPP

Source: Canadian Council for Public Private Partnership (2011)

Figure 2.1 shows variants of PPP based on the risk-bearing between the public and private sector. It highlights that public sector bear high portion of risk in service contracts and management contracts, while in BOO and BOOT contracts, the private segment bears more portion of risk than state sector.

2.4 Why PPP

At present day, the economic development challenges became too difficult and interdependent while managing resources to address them are too scarce, for any sole organisation alone (WB, 2012; Weisheng et al., 2013). Further, they proved that these problems are often attributed to rapid population growing, coupled with low economic development, contracting public sector expenditure, rising unemployment and impoverishment, which have widened the gap between delivering of social services and infrastructure as required. Liu and Wilkinson (2014) pointed out that owing to these challenges various governments thought advantageously and innovatively to underpin the infrastructure networks and enhance service distribution to their people. In this respect, the concept of PPPs receives serious consideration.

In today's world PPP becomes strategical methodology adopted by various the government to harvest the benefits of involvement of the private segment in the infrastructure growth along with addressing responsibilities towards the public (Teliford, 2009). As results, countries having a heavy debt burden riding on their shoulders, embraced and adopted PPP as commonly used tool to address the infrastructure investment gap (International Monetary Fund, 2006). According to the literature, PPPs have established the ability to harness additional financial resources, reduced whole life costs, better risk allocation, innovative technology, faster implementation, enhanced public management, functioning efficiencies inherent to the private sector, and perceived as vehicles for maximising value for money.

2.5 PPP Life Cycle

Project Management Institute (2013) defines project life cycle as an arrangement of successive stages through which a task is created from its start to its conclusion. The life cycle of PPP has been shown as composite sequential stages from inception to

closure (Chan et al. 2005). In PPP guidelines published by multilateral development banks and other states divided PPP project life cycle in various stages while European Investment Bank (2012) promotes four phases by highlighting stages and co-activities in each phases as given in Figure 2.2. To encourage the accomplishment of the developing PPP foundation advancement, analysts and professionals should keep on watching PPP life cycle, recognize potential issues, and give arrangements.

Phases	Stages	Steps
1. Project Identification	1.1 Project selection and definition	<ul style="list-style-type: none"> . Identification . Output specifications
	1.2 Assessment of the PPP option	<ul style="list-style-type: none"> . Affordability . Risk allocation . Eurostat treatment . Bankability . Value for money
2. Detailed Preparation	2.1 Getting organised	<ul style="list-style-type: none"> . Project team . Advisory team . Plan and timetable
	2.2 Before launching the tender	<ul style="list-style-type: none"> . Further studies . Detailed PPP design . Procurement method . Bid evaluation criteria . Draft PPP contract
3. Procurement	3.1 Bidding process	<ul style="list-style-type: none"> . Notice and prequalification . Invitation to tender . Interaction with bidders . Contract award
	3.2 PPP contract and financial close	<ul style="list-style-type: none"> . Final PPP contract . Financing agreements . Financial close
4. Project Implementation	4.1 Contract management	<ul style="list-style-type: none"> . Management responsibilities . Monitoring service outputs . Changes to the PPP contract . Dispute resolution . PPP contract termination
	4.2 Ex post evaluation	<ul style="list-style-type: none"> . Institutional framework . Analytical framework

Figure 2.2: PPP Life Cycle

Source: European Investment Bank (2012)

2.6 PPP for Economic Development

Economic development is a complex subject with commitments drawn from various fundamental lines of thinking (Shaffer, Deller & Marcouiller, 2006). Leigh and Blakely (2013) viewed that, it tends to be viewed as an arrangement of financial

improvement thoughts including those of sustainability, way of life, productivity, equity and wealth creation.

Infrastructure investment is vital to economic growth, poverty reduction, quality of life and access to health care and education, and helps to achieve many of the goals of a strong economy (Ball, 2011). In a country's viewpoint, infrastructure can be bi-categorical; namely social and economic (Schwartz et al., 2008). Further, they explained that economic infrastructures are generally those where the income is gathered directly from the end-user, for example toll roads, railways etc. On the other hand, social infrastructures are commonly upheld by a customary charge paid by the legislature, for example schools, hospitals and so forth. In addition, Grimsey and Lewis (2000) pointed out that infrastructure development bring change in society, transfer the natural structure, set novel structure by replacing the old structure and eventually establishes the new modern facilities. Hence, for any region's overall growth with an effective service delivery mechanism infrastructure plays a vital role.

According to Airoidi et al., (2013) Global demand for infrastructure has surpassed historic levels, leaving a staggering annual funding gap of between \$1 trillion and \$1.5 trillion from 2013 to 2030. Most of regimes have emphasised that, investment for infrastructure development is decidedly needed and most of the governments cannot sustain all expenditures for infrastructure development alone (Ball, 2011; Tang et al., 2010). Thus, most governments worldwide embrace PPPs as a one of the key tool to narrow infrastructure investment gap to underpin and reinforce for a sustainable economic development (Ke et al., 2010; Liu, Wang & Wilkinson, 2016). It is also noted that most developed countries and developing countries are moving increased reliance on PPPs to build infrastructure in an effort to overcome the general constraints of the public sector in terms of either a shortage of public funds, a lack of capacity, resources or specialized expertise to build, manage and operate infrastructure assets in public sector (Carbonara et al., 2014).

2.6.1 Contribution of PPPs in global economic development context

In the nineteenth century, PPPs were used as concessions to finance infrastructure projects (Grimsey & Lewis, 2007). Further they mentioned that until Suez Canal

was nationalized in the 1950s, it owned by the private sector and in the 1960s Spain embarked on its motorway plan, which was funded by the private sector due to the inadequacy of the domestic budget to meet the country's transport needs at the time. Lancaster Turnpike, the first long-distance stone and gravel road in the United States of America, constructed between 1792 and 1795 by the Philadelphia and Lancaster Turnpike Company; the Erie Canal, opened in 1823; and the Transcontinental Railroad; completed in 1869, there are some worldwide PPP memories. (Fourie & Burger, 2000; Tang et al., 2010). Accordingly, it is obvious that various countries in worldwide had ample experiences in the adoption of PPP approach to bridge infrastructure investment gap.

Over the recent 25 years, commitments for investment totalled 1,5 trillion dollars in more than 5,000 foundation extends in 121 countries with low and middle incomes (WB, 2016b). Figure 2.3 shows global investment in PPP project from 1991 to 2015 and investment as a percentage of Gross Domestic Product (GDP). There were two (02) significant expansion periods and one contraction period during that period. During that period, there were two (02) notable periods of expansion and one (01) contraction period. There was strong growth leading up to the Asian financial crisis of 1997 as the role of the private sector in financing and delivering infrastructure services grew steadily from 16 projects totalling \$7 billion in 1991 to 230 projects totalling \$91 billion in 1997. In many developing countries, this period of lively activity reflected a healthy global economy and structural reforms (WB, 2016b).

The trend of PPP investments in infrastructure as a share of GDP went from 0.1% in 1991 to 1.1% in 1997 throughout the 1990s. Nevertheless, Figure 2.3 shows a steady decline over the next seven (07) years in the post-crisis era (from 1.1% to 0.2%), representing a drop in investment at a faster rate than GDP.

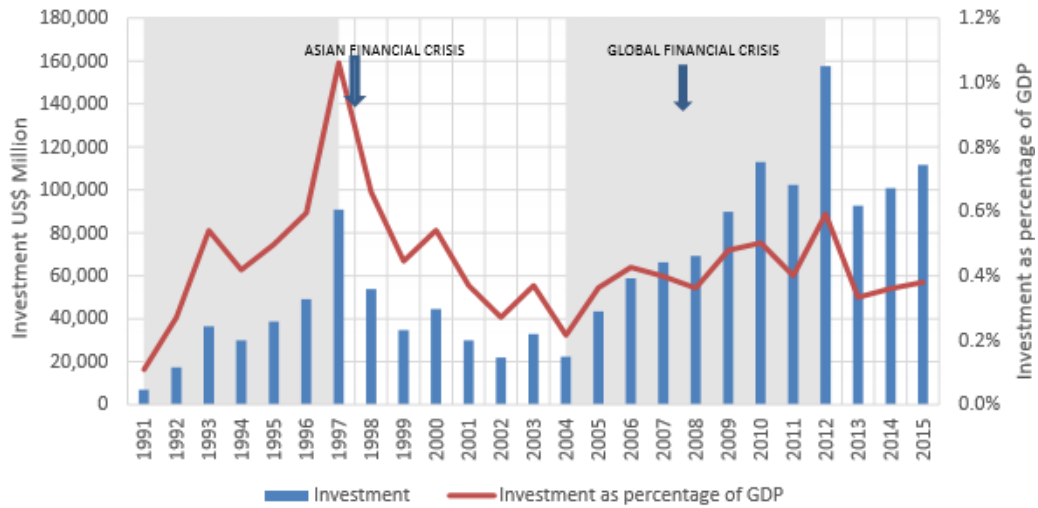


Figure 2.3: Global Investment in PPP Project from 1991 to 2015

Source: WB (2016b)

As indicated by WB (2016b), regardless a rush of auxiliary changes, great development arrangements, and a worldwide economy that grabbed steam in the mid-2000s brought about a subsequent development stage that saw a seven-crease increment in absolute responsibilities. To be sure, this eight-year development from 2005 to 2012 finished in record speculation of \$158 billion. Nonetheless, a huge decay happened in 2013, when absolute ventures diminished from \$158 billion of every 2012 to \$93 billion out of 2013. Further, Figure 2.3 illustrates, although total global investment in PPPs had a second increase in absolute terms (2005-2012) with investment rates far higher than the previous growth segment, infrastructure investment remained relatively small as a percentage of GDP, between 0.2% and 0.6%, and did not exceed the previous record of 1.1% in 1997.

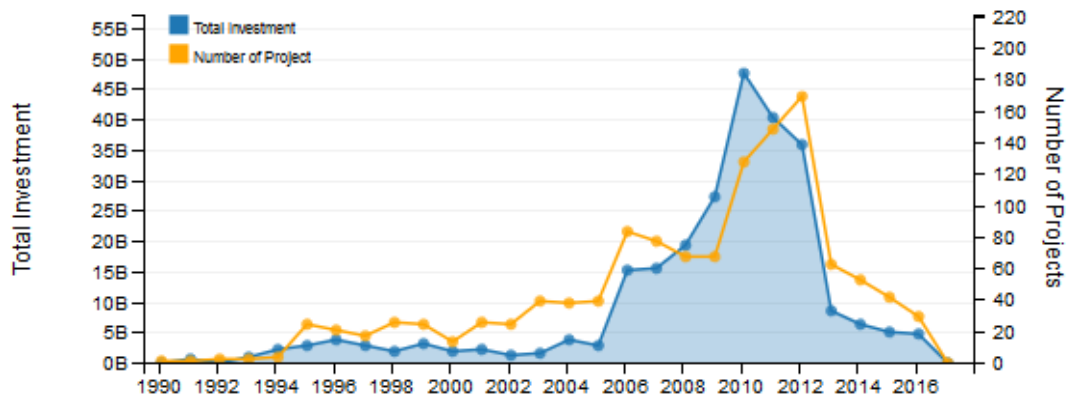


Figure 2.4: Total PPP Investment (\$ billion) and Number of Executed PPP Project in South Asian Region

Source: WB (2017b)

Considering the South Asian region from 1990 to 2016, Figure 2.4 illustrates total PPP investment and number of executed PPP project. According to that total PPP investment is gradually increased up to 2006 and reflected investment falling in next three (03) years. Whereas, number of PPP projects during that era are not declined. Second growth phase was started in 2009 and ended in 2012. A significant decline occurred in 2012 in total PPP investments and from 2010 number of executed PPP projects are decreased gradually. Further, Figure 2.4 demonstrated that South Asian region exceedingly used PPP as investment tool during the period of 2006-2013.

Figure 2.5 demonstrates investment (\$ billion) in PPP projects by sector in South Asian region from 1990 to 2016. According to that, there is a trend in infrastructure related PPP investments in electricity, road and information communication and technology sectors. During last 27 years, South Asian region countries invested in airports, ports and railways sectors in PPP basis respectively for ten (10), 51 and nine (09) projects.

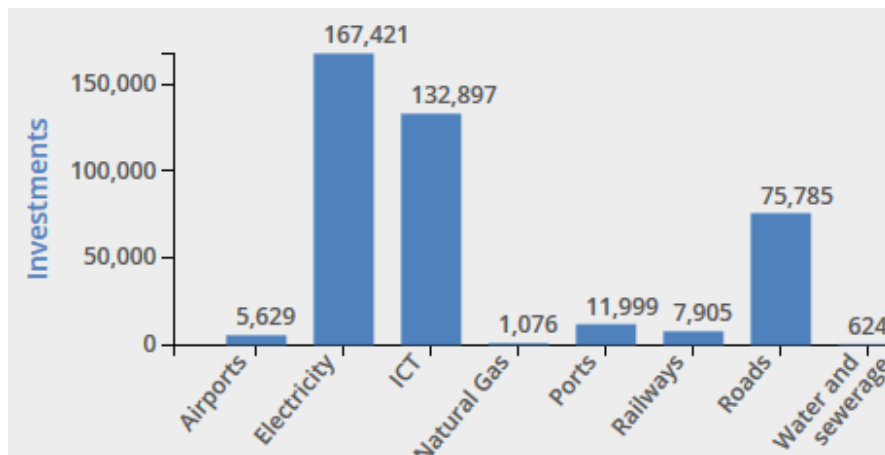


Figure 2.5: Investment (\$ billion) in PPP Projects by Sector in South Asian Region

Source: WB (2017a)

In view of worldwide involvement with PPPs, most nations around the globe have shown the capacity of the government to convey the advantages of the commitment of the private element to foundation advancement just as satisfying open commitments and furthermore practicing command over key public assets. In global context, many regimes around the world, specially in South Asian region embrace PPPs as a one of the significant tool to bridge infrastructure investment gap to

reinforce for a sustainable economic growth. According to literature, it was revealed that global infrastructure investments in PPPs as a percent of GDP between 0.2% and 0.6% during previous decade. South Asian region remarkably has used PPP as investment tool during the period of 2006-2013. PPPs have been used highly as an investment tool in electricity, road and information communication and technology sectors in South Asian countries. Thus, PPP is not an innovative concept to world and it was decidedly practiced during last few decades to meet development issues and challenges in various countries.

2.6.2 Sri Lankan context

In Sri Lanka, the traditional procurement methods have been commonly used for infrastructure development and funds are sourced from loans or grants (Broad of Investment, 2009 cited Perera, 2016). Sri Lanka's PPP history is not long and has been discussed in the country since 1990s (Finance Commission of Sri Lanka, 2017). Contradictorily, United State Agency for International Development (USAID, 2016) viewed that Sri Lanka has a significant history of introducing PPPs in its infrastructure development. Sri Lanka entered 73 PPP projects with a total investment of over \$6 billion between 1990 and 2014. USAID (2016), however, stressed that these projects were restricted to three (03) sectors, namely electricity, telecommunications and ports.

Figure 2.6 demonstrates investment (\$ billion) in PPP projects by sector in Sri Lanka from 1990 to 2014.

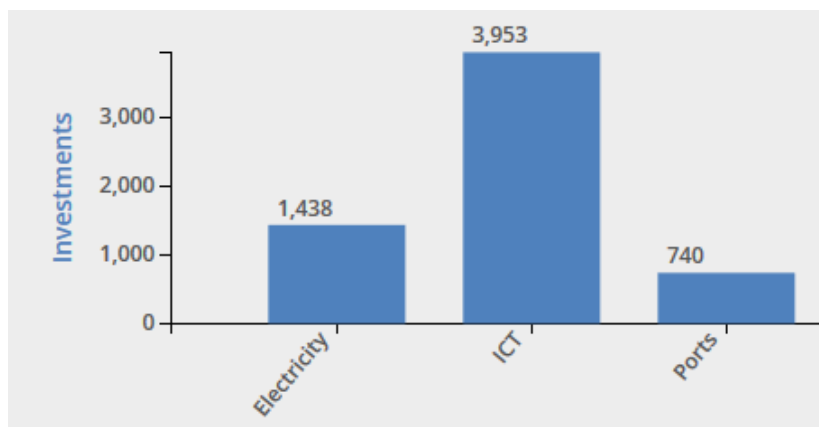


Figure 2.6: Investment (\$ billion) in PPP Projects by Sector in Sri Lanka
 Source: WB (2017a)

As stated in USAID (2016), PPP in Sri Lanka is limited to infrastructure investments in few sectors. Yet, during last 25 years, Sri Lanka has been engaged in electricity, ports and information communication and technology sectors in PPP basis respectively for 64, 2 and 7 projects (WB, 2017b). A contract was signed in August 1999 by the Sri Lankan Ports Authority with South Asia Gateway Terminals (Private) Limited to construct, manage and operate a container terminal under BOT in the Port of Colombo. This project's total investment amounted to nearly \$200 million and this BOT deal has a 30-year term (Finance Commission of Sri Lanka, 2017). It also reported that in 2016, the Government of Sri Lanka and ADB has signed a Transaction Advisory Services Agreement to design, construct, operate, maintain and move certain port facilities through a PPP at the East Container Terminal in Colombo Port. Broad of Investment (2009 cited Perera, 2016) stated on Sri Lanka having PPP experience in diesel power plant at Sapugaskand, combined cycle power plant at Kalenitissa, diesel power plant at Matara and barge mounted power plant at Colombo Fort.

Table 2.1: Government Investment in Infrastructure

Year	Economic		Social		Total	
	Rs. bn	% of GDP	Rs. bn	% of GDP	Rs. bn	% of GDP
2010	280.8	5.0	56.2	1.0	337.0	6.0
2011	312.2	4.8	63.0	1.0	375.2	5.8
2012	343.8	3.9	71.2	0.8	415.0	4.8
2013	369.4	3.9	77.6	0.8	447.0	4.7
2014	330.1	3.2	112.3	1.1	442.5	4.3
2015	429.0	3.8	124.4	1.1	553.4	4.9
2016	424.0	3.6	117.3	1.0	541.3	4.6
2017	474.1	3.5	135.4	1.0	609.5	4.5
2018	437.9	3.3	133.2	1.0	571.1	4.3

Source: CBSL Annual Report, 2018

Table 2.1 shows government investment in infrastructure from 2010 to 2016. According to that the government of Sri Lanka has invested 6% of GDP in total, in

the year 2010, 5% of GDP was allocated for economic infrastructure development and the rest (1% of GDP) for social infrastructure development. Accordingly, though the percentage of GDP to infrastructure development has been decreased from 6% to 4.3%, when reaching to 2018, invested amount for infrastructure has been increased up to 2017 and there is a slight decrease in 2018.

Central Bank Annual Report (CBSL Annual Report, 2018) stated that Public investment in the GDP ratio rose from 4.3% in 2014 to 4.9% in 2015, primarily in the areas of roads and bridges, highways, water, irrigation, health, education, growth of local and rural infrastructure. Further, it emphasised that, the development of the repetitive consumption and the deficit in the administration income restricting the asset envelope for the open speculation and in order to fill this investment gap the private sector is encouraged to invest in infrastructure development activities and other related projects through PPPs programs primarily aimed at short- to medium-term creation of pharmaceutical areas, airports and Megapolis etc.

According to the CBSL Annual Report (2015), as announced in Budget 2016, the government has decided to use PPPs in its development strategy, especially in urban development, expressways, power generation, etc. The Ministry of Megapolis and Western Region Development has a robust infrastructure project pipeline as shown in Table 2.2 and will be implemented as PPPs (Ministry of Megapolis and Western Region Development, 2016).

Table 2.2: Ministry of Megapolis and Western Region Development Project the Pipeline

Project	Cost LKR (Mn.)
Transport	
Railway Electrification, Modernization & Expansion	18,000
Colombo Rapid Transit System (RTS)	435,000
Construction of New Expressway	800,000
Bonded Highway for Logistics Corridor	150,000
Development of Multimodal Transport Hubs and Centers	32,000
Energy	
Sapugaskanda Oil Refinery Expansion & Modernization	282,000
600 MW Natural Gas Combined Cycle Power Plant, Kerawalatpitya	64,000

Water	
Variety of water projects, including treatment, reservoirs and supply	410,000
Solid Waste and Wastewater	
Solid Waste Management – Colombo and Suburban Area	30,000
Wastewater Collection, Treatment & Disposal <u>Negombo Township</u>	16,500
Wastewater Collection, Treatment & Disposal <u>Kelaniya-Peliyagoda</u>	13,000
Wastewater Collection, Treatment & Disposal <u>Sri Jayawardenapura Kotte</u>	40,000
Wastewater Collection, Treatment & Disposal <u>JaEla/Ekala& Ratmalana</u>	15,000
Ports and Airports	
Extension/Expansion Breakwater & Development of West Container Terminal 2	113,000
North Port Development Project	324,000
Establishment of Cargo Village	1,000,000
Industrial, IT & Incubator Parks	
Industrial Township Development – <u>Meerigama</u>	36,000
Industrial Township Development – <u>Horana</u>	45,000
<u>Malabe Science City</u>	44,000
Tourism and Spiritual Developments	
Tourism Development & Expansion – <u>Negombo Township</u>	35,000
Relocation of Government Offices	
Relocation of Government Offices from CBD to Government Park in Colombo	8,000,000

Source: Ministry of Megapolis and Western Region Development (2016)

However, PPPs in Sri Lanka were not lasted in many decades as most of the countries around the world. Sri Lankan PPP history was started since 1990s and only limited to electricity, telecommunications and ports sectors. Yet, therefore, PPP is not an innovative concept to Sri Lanka even though it is rooted little later. Literature revealed that Ministry of Megapolis and Western Region Development has a robust infrastructure project pipeline, which will be implemented in PPP procurement mode. Thus, it is clear that there a vast trend in PPPs in future Sri Lanka. Indeed, Sri Lankan government as other regimes around the world should embrace PPPs as a one of the significant tool to address development issues and challenges to underpin and reinforce for an economic growth.

2.7 Issues and Challenges in PPP

In world today, the drive for social-economic development has gained a wide spread consideration over the recent years in the entire world (European Commission, 2003; Leigh & Blakely, 2013). In order to achieve this form of growth, there has been establishment of development organisational structures based on partnerships such as PPPs (Liu et al., 2016). PPP allows governments that are already struggling for capital with the current economic climate to use alternative sources of funding from the private sector while at the same time obtaining the expertise and management advantages that the private sector can offer. (Weisheng et al., 2013). Nevertheless, in developing countries, a variety of PPP programs are either suspended or terminated, which has led previous researchers to conduct studies on barriers to the implementation of PPPs (Chan et al., 2009; Ismail & Haris, 2014). Various scholars, PPP experts, and researchers in worldwide developed and developing countries have identified key challenges in implementing PPPs in economic, legal and regulatory, political, environmental, social and technological aspects. Table 2.3 shows identified key issues and challenges in PPP implementation.

Table 2.3: Key Issues and Challenges in PPP Implementation

Category	Sources	Barriers identified
Social	Chan et al. (2009)	Popular distrust of the advisors/consultants at the expense of the consumer
	Kosovo Ministry of Economy and Finance (2012)	PPP may lead to higher user charges
		PPP do not achieve absolute risk transfer
	European Commission (2003)	Lack of understanding of PPPs
	Zhang (2005)	Public opposition
	Grimsey and Lewis (2000)	
	Corbett and Smith (2006)	Lack of flexibility
	Li et al. (2005)	
Grimsey and Lewis (2000)		

Legal & Regulatory	European Commission (2003)	Absence/ inadequate coverage of PPP legal regime/ institutional framework
	Li et al. (2005)	
	Mahalingam (2010)	
	Ismail and Haris (2014)	
	Zhang (2005)	
Economical	United Nations Economic and Social Commission for Asia and the Pacific (2013)	Lack of public sector project development funds
		Difficulties in obtaining long-term finance
		Lack of public sector project
	Chan et al. (2009)	Bidding for PPP projects is expensive
	Zhang (2005)	Difficulties in seeking financial partners
	Grimsey & Lewis (2000)	
Technological	Chan et al. (2009)	Lack of suitable skills and experience
		Lengthy bidding and negotiation process
	European Commission (2003)	PPP process not clearly defined
		Absence of model concession agreements
Political	European Commission (2003)	Lack of awareness/ poor understanding about PPPs by politicians/ decision makers
		Lack of coordination between central and local governments

According to studies of Ismail and Haris (2014), Li et al. (2005) and Mahalingam (2010), inadequate legal and regulatory framework has been identified as a one of top five (05) key challenges in implementing PPPs. Studies, however, showed insufficient coverage of the PPP legal regime, unsound regulatory frameworks and lack of policy enforcement, lack of institutional capacity and PPP strategies, lack of PPP conflicts which concern legal institutions as legal constraints for proper implementation of PPPs in most developing economies, among others (Ismail & Haris, 2014; Li et al., 2005). Kwofie, Afram, Botchway, Kumaraswamy and Rouboutsos (2016) indicated that some developing-country governments with less mature economies carry out PPPs even in the absence of overall PPP policies, leading to inappropriately set goals and objectives that ultimately create greater potential for project implementation issues.

PPP is significant to developing countries like Sri Lanka, though there are challenges to adapt PPP policy in Sri Lanka (Appuhami, Perera & Perera, 2011). They further, highlighted that lack of state credibility: political backing for successful PPP, unsound legal and regulatory framework: includes government institution and government law, regulations, policies and guidelines, focused on macro-economic objectives: budget deficit and the high level of public debt but not concerned about the micro-economic objectives such as “VFM”, political uncertainty, underdeveloped capital market and deficiency of social support as some such challenges.

Therefore, various studies done in worldwide have identified key challenges in implementing PPPs. In particular, lack of well-established legal and regulatory framework has been identified as a key challenge in implementing PPPs and researchers viewed that it has given to rise number of disputes, which are inevitable in PPPs. According to studies of Appuhami et al., (2011), unsound legal and regulatory framework has been identified as a key challenge in implementing PPPs in Sri Lanka.

2.8 Legal and Regulatory Frame Work for PPPs

PPPs involve complex process management on a number of fronts requiring a programmatic approach to start PPPs as a recurring option for suitable projects (WB, 2014). ADB (2008); Canadian Council for Public Private Partnerships (2011); WB (2014) viewed that as in any programmatic action, or any procedure or approach that has a long-term aim, a framework as an essential requirement. Further, Canadian Council for Public Private Partnerships (2011) explains many countries with an effective programmatic PPP approach have a strong PPP system incorporated into this program.

WB (2014) highlighted a regime’s PPP framework is changing over time, often in response to specific challenges facing the PPP programme. PPP framework overview is shown in Figure 2.7 and it illustrates the possible components of a ‘comprehensive’ PPP framework into component.

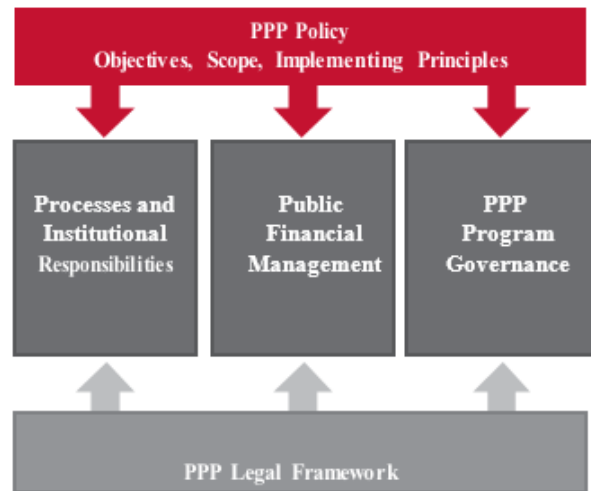


Figure 2.7: PPP Framework Overview

Source: World Bank (2014)

The legal framework explores the legal guidelines and regulations underpinning the PPP system that require authorities to enter into PPPs and set guidelines and parameters for the implementation of PPPs. The steps by which PPP tasks are defined, developed, assessed, introduced and managed; and processes and organizational obligations underlie the functions of distinctive organizations in that system. The strategy to public financial management examines how PPPs track, display and design fiscal responsibility to ensure that PPPs have VFM barriers that put undue burdens on and cope with future generations. Broader governance arrangements underline that various institutions such as auditing bodies, legislatures and the public are involved in the PPP process and hold those responsible for implementing PPPs accountable for their decisions and actions (WB, 2014).

WB (2014) viewed that the Legal and regulatory structure for PPPs to include all laws and regulations that govern whether, and how PPPs can be enforced. Governments need to change the current legal and regulatory framework to ensure that PPP contracts can be concluded and the relevant legal rights and procedures clarified, while private investors review the legal and regulatory framework to ensure viable PPP contracts (WB, 2012). Simmons and Simmons Limited Liability Partnership (2017) declared that the lack of a suitable legislative framework for PPPs hinders efficient and effective PPPs by referring to existing practice and performance.

There is no hesitation, therefore, that it would be a key tool for developing countries to have a common legislative framework for PPPs, but also for developed countries, which still need to build or upgrade their aging infrastructure, as inadequate legal and regulatory framework discourages the use of PPPs.

2.9 Summary

This chapter has mainly discussed on PPP concept, various PPP models, why PPP emerged, contribution of PPP to economic development, issues and challenges in PPP and finally legal and regulatory frame work for PPP.

PPP is a long-term contract for a public asset or benefit between a private entity and a government agency in which the private party bears significant responsibility for risk and management. PPP has been identified as a one of the significant tools to bridge infrastructure investment gap to reinforce for a sustainable economic growth. Although, origin of Sri Lankan PPPs was not lasted in many decades as most of the countries around the world, there a vast trend in PPPs in future Sri Lanka. In particular, absent of well-established legal and regulatory framework has been identified as a key challenge in implementing PPPs and it has given rise to an increasing number of disputes in PPPs.

The research methodology for this analysis is discussed in the next section.

3. RESEARCH METHODOLOGY

3.1 Introduction

A methodological foundation of consciousness is a key to the effective conduct of a study. This chapter is mainly designed to address the overall methodological process work implemented in this study.

The chapter begins by discussing the philosophical position of this study on the nature of reality and the relationship between the researcher and the investigated. Then, this section highlights the nature, determinations and characteristics of each method of inquiry and clarifies the researcher's logic behind selecting a qualitative approach in section 3.2.2. The chapter moves in section 3.2.3 on to the in-depth explanation of data collection and data analysis methods that this study employs. The chapter proceeds to the discussion of factors that ensure the research's validity (section 3.3). The final section 3.4 summarizes the author's research positions for establishing a comprehensive methodological structure for this review.

3.2 Research Design

The Oxford Advanced Learner's Dictionary connotes the term 'Research' as "*The systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions* (Hornby, Cowie & Lewis, 2015)". Fellows and Liu (2015) viewed that methodology of research deviates from the fundamentals and procedures of logical thinking processes applied to scientific research. Kagioglou *et al.* (2000) exhibits the research methodology as a hierarchical model where the research techniques are under the research approaches and the research approaches are under research philosophy as shown in Figure 3.1.

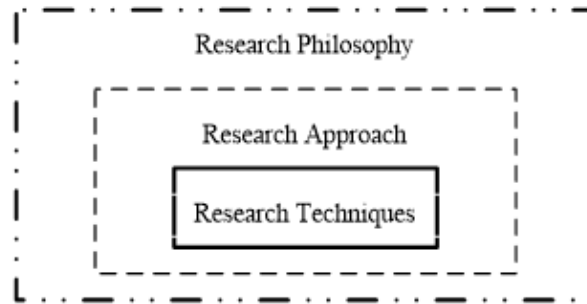


Figure 3.1: The “Nested” Research Model

Source: (Kagioglou *et al.*, 2000)

Collins (2010) viewed that the research philosophy is primarily concerned on the assumptions made by a researcher. Further, he stressed that methods of research involve coordinating research activities and incorporating data collection in ways that are most likely to achieve the study objectives. Analysis methods include data collection as well as data analysis that are part of the inner circle of nested research methodology (Saunders *et al.*, 2009). Hereinafter, sub-section 3.2.1, 3.2.2 and 3.2.3 explores these three layers in Figure 3.1 in detail.

3.2.1 Research philosophy

Creswell (2007) declared that research philosophy applies to knowledge creation and design, while Collins (2010) remarked that the selection of the research methodology used also prescribes the conclusions that the researcher sees the world at large. Easterby-Smith *et al.* (2002) emphasised the relevance of philosophy of research for three (03) purposes: firstly, explaining the research design is essential to the researcher; secondly, it is possible for the researcher to understand which designs are work; and finally, it enables researchers to identify and shape research designs that extend beyond their previous experience.

Considering the intent of the research and the scope of this report, it is clear that this study requires careful consideration at international and national level of the current legal structure for PPPs. Therefore, this issue allows the researcher to conclude that within the observed people is the reality that the research aim seeks. ' Interpretivism ' is one of the philosophies arguing that the truth of the people is subjective and inner

(Easterby-Smith *et al.*, 2002). In this work, therefore, the philosophy of interpretivism research has been adapted.

3.2.2 Research approach

A suitable research method had to be chosen after identifying the research philosophy to deal with the research issue. Easterby-Smith *et al.* (2002) stated that upon identifying the research philosophy, an appropriate research method had to be chosen to solve the research problem.

Research methods are primarily categorized as quantitative and qualitative in two (02) groups (Walliman, 2005). Fellows and Lui (2015) viewed that in general, the quantitative approach will be identified with positivism and try to gather real information. Further, they stated that this explores the relationships between documents and how they are historically compatible with hypotheses and results of any research conducted. Wigren (2007) viewed that qualitative research depends on the interpretation of words being clearly described, developing concepts and variables, and drawing up interrelationships. The aim of this research is to investigate on the adequacy of legal frame work to procure PPPs successfully in Sri Lanka. Accordingly, the question of study could be established as; “how to reform the present PPP procurement law to procure PPPs successfully in Sri Lanka?”. This research is an exploration of the subject without prior formulations and is concerned with gaining knowledge and gathering information on the legal requirements for successive PPPs in an international context in order to assess the national context. Further, it proposed reforms and develop a legal and regulation framework to assist PPPs enabling contribution to Sri Lankan economy development. Thus, qualitative research approach was selected.

Among the research approaches used in the qualitative research that considers context as an essential part of the phenomenon, the methods such as case study research, ethnography and action research are more applicable (Gummesson, 2000). Patton and Appelbaum (2003) stated that for studies with dominant qualitative data, case studies are more suitable. Yin (2014) proposed that a case study approach to science that has research concerns such as "why" and "why" styles. Further, he noted that an empirical case study exploring a contemporary phenomenon in a real-life

context where the distinctions between phenomenon and context are not clear and where different sources of proof are used. This indicates that the case study research method can be very useful if very little is known about a unique phenomenon. Due to the lack of research conducted in connection with the regal and regulatory framework of PPPs, the knowledge of the research area was very little in this research. By considering above reasons, case study research style was selected for this research.

3.2.3 The Research methodological frame work

Figure 3.2 presents the overall methodological framework work adopted in this study.

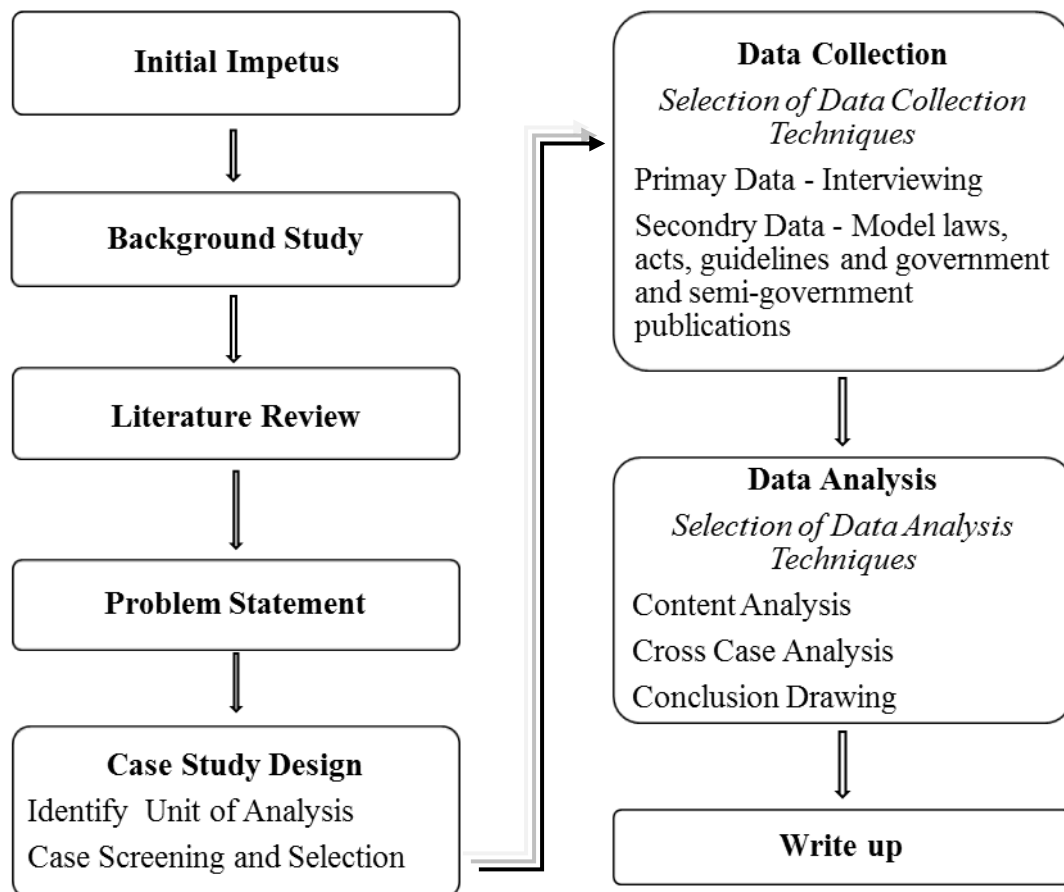


Figure 3.2- Methodological Frame Work of the Research

3.2.3.1 Initial impetus

When the author began to read journals and texts about "PPP's" as an interesting subject as practicing as a Quantity Surveyor, the initial impetus to undertake this

study was created. While reading, researcher was curious to explore the adequacy of legal and regulatory framework to implement PPPs successfully in Sri Lanka; because the existing literature revealed that none of studies was carried on said area. Thus, the researcher anticipated filling this research gap in the second-year dissertation in partial fulfilment of Master on Construction Law and Dispute Resolution.

3.2.3.2 Background study

While the initial impetus continues, the author performed a background analysis on a wider point of view to familiarize himself with the subject of the legal and regulatory system to enforce PPPs referring to books, journal articles, conference papers, guidelines, acts and model laws. Initial study showed that PPPs have been used in numerous countries as a one of the key tools to narrow infrastructure investment gap to underpin and reinforce for a sustainable economic development, and several governments have adopted PPPs without a general policy of PPPs, leading to unclear targets. The focus gave on legal and regulatory framework requirement to implement PPPs those were very limited in literature. Thus, a literature synthesis was undertaken to determine in depth research issues relevant to the requirements of the legal system for PPPs.

3.2.3.3 Literature synthesis

A comprehensive review of the literature was then carried out to discuss the concept of PPP, PPP models, significance of PPP, and contribution of PPP to economic development, challenges in PPP, legal and regulatory framework for PPP and role of regulatory bodies. Further, it has contributed to the recognition of the gaps in this area and the realization of the importance of the research problem. This was done through mainly by referring books, journal articles, conference papers, guidelines, acts and model laws. The yield on this synthesis of literature was used to create the environment for the research issue and discuss this study's first objective.

3.2.3.4 Research problem statement

Following the results of the synthesis of literature, the research question was more extensively established as “how to reform existing PPP procurement law to procure PPPs successfully in Sri Lanka?”.

3.2.3.5 Case study design

Feagin *et al.* (1991 cited in Tellis, 1997) viewed that if a holistic, in-depth investigation is required, case study as an ideal methodology. According to Yin (2014), the author aims to generalize a specific set of results to a wider concept of methodological generalization. Further, he noted that, when designing a case study, the generalizability of the sample can be improved, and special attention should therefore be paid to case study design. The case study development process, outlined first, involves specifying the research system, determining the number of cases and criteria for selection.

Identification of unit of analysis

Identifying ' unit of analysis ' or ' case ' is of primary importance to any research design and is related to the way of research problem; while Miles, Huberman and Saldana (2014) pointed out that the study unit shall define the study's ' base ' or ' heart ' with its boundaries. Aim of this study is the investigation on the adequacy of legal and regulatory framework to implement PPPs successfully in Sri Lanka. Therefore, in this research, the unit of analysis or the case was PPP project.

Defining number of cases

After defining the case management unit, it is important to define the number of cases. Yin (2014) considered that the number of cases in a case study may vary from one (1) to eight (8) depending on the nature of the research, while Perry (1998) stated that it is best to use only one (1) or two (2) and a maximum of four (4) cases where the area of study in qualitative research is too wide. Therefore, there is no straightforward guidance regarding the number of cases to be included. In this case study, the author decided to limit the number of cases examined to three (3) due to the time constraints associated with the analysis.

Criteria for selection of cases

Yin (2014) emphasized that the selection criteria are questions of preference and decision, clarity, access and subjectivity for research purposes. The cases in this study were only selected from PPP project adjoining with construction due to prevent the complications that may arise when evaluating PPPs related to construction and other PPPs simultaneously.

3.2.3.6 Data collection techniques

Patton and Appelbaum (2003) emphasised that an overly complex theory may result from the extensive use of empirical evidence. Therefore, there is definitely a need for discipline and focus in data collection and the sources used for data collection are also important. In general, there are two (2) major sources of data collection; primary and secondary information (Collins, 2010; Saunders et al., 2009).

Secondary data

The secondary data are those already obtained by someone else and passed through the statistical process (Walliman, 2011). Fellows and Liu (2015) declared that the understanding of the quality of the information and conclusions made is a major aspect of the use of secondary data. In addition, they considered that this is achieved by analysing the quality of the evidence contained in the arguments, and the legitimacy of the controversies themselves and the credibility and qualifications of the author or presenter. Saunders et al. (2009) found out that secondary information may be either released or unpublished. Further, he stated that typically published data are available in various government and non-governmental organizations publications; scientific and scientific journals; books, magazines and newspapers; reports and publications of different bodies of business and industry, banks and stock exchanges; reports of academic scholars, universities and economists.

To achieve the second and third objectives of this research work, secondary data were gathered by referring international and national legislative frameworks such as the UNCITRAL Model Law on PFIPs, UNIDO's Guidelines for Infrastructure Development through BOT, OECD Basic Elements of Law on Concession

Agreements, European Bank for Reconstruction and Development (EBRD's) Core Principles on Modern Concession Law and the European Commission's Directives on the Award of Concessions, national Procurement Guideline – Part II for Private Sector Financed Projects (1998), government circulars, constitution, supplements to procurement guidelines, and other published reports.

Primary data

The primary data are those obtained for the first time and are therefore novel in character (Walliman, 2011). Collins (2010) remarked that it is time consuming and not always possible to obtain primary data. Six (06) sources of data collection under case study methods have been demonstrated by Yin (2014), namely: reports, archival records, interviews, direct observation, participant observation and physical objects. Interviews were selected as the most accessible and reasonable data collection tool among these techniques when considering circumstances and the nature of the research in order to address third and fourth objective of this study.

Walliman (2011) distinguishes between three (06) interview types, namely; Structured Interviews, Semi-Structured Interviews and Unstructured Interviews. In structured interviews a single set of pre-determined questions is used and unstructured interviews are informal discussions where the interviewer has no fixed question schedule, but is directed by a topic (Saunders et al., 2009). Further he stated that the middle ground between aforementioned methods can be known as ' Semi-Structured Interviews '.

Noor (2008) expressed the view that semi-structured rather than formal interviews provide enough flexibility to approach different respondents differently, while still covering the same data collection areas. Sekaran (2003) stated that, when interviews are conducted semi-structured, it allows the necessary questions to be adapted, clarifies doubts and confirms that the answer is properly understood by repeating and rephrasing the questions. He further emphasised that if the interviews are conducted face-to-face, the researcher can pick up the respondent's nonverbal clues. Therefore, the interviews were carried out face-to-face in semi structured manner from key participant for PPP projects.

Interview guidelines

Guidelines for the interview are designed to capture research data and based on the literature review, the interview questions were developed. The first section identified background information of the selected PPP projects. Afterwards, loopholes of existing legislative framework was investigated under headings of general, solicitation planning, solicitation and award in second, third and fourth sections respectively. Finally, reforms to overcome the legal and regulatory resistances to procure successful PPPs were overlooked.

Interview Process

The interviews are carried out with three (3) main PPP project team members, such as; project directors, procurement specialists, legal experts, engineers, architects and quantity surveyors. It allows for continuity of each case within a sample of the interviewee. In addition, this sample was represented technical experts, procurement experts and legal experts and hence, maintained the balance.

Nine (9) interviews were conducted in total and each was usually 45 minutes to one (1) hour in length. A brief theoretical explanation on the results of literature was given during interviews in order to obtain the best experiential knowledge from the interviewees.

During the interview, note taking and tape recording (with the interviewee's permission) were performed to maintain data collection accuracy. Eventually, transcripts for interviews are developed to create meaningful adaptation of information for interviews. However, to maintain confidentiality, in this report or any other document related to this study, the actual names of the projects and the interviewees have been revealed.

3.2.3.7 Data analysis techniques

Qualitative data analysis comprised of three (3) foremost stages such as data reduction, data displaying and conclusion drawings as illustrated in Figure 3.3.

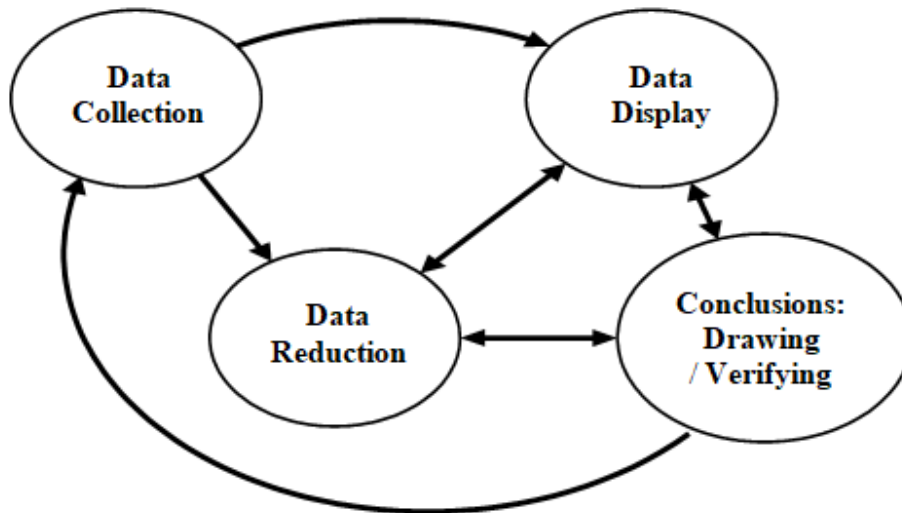


Figure 3.3: Components of Data Analysis: Interactive Model

Source: Miles, Huberman and Saldana (2014)

Miles, Huberman and Saldana (2014) stressed that as a technique of collecting, organizing, liberalizing, abstracting and converting knowledge that exists in written field notes or transcriptions and providing data, information reduction is an integration of expertise that makes it possible to draw conclusions. Additionally, they stated that conclusion drawings are the interpretations of scholar, which was drawn purport from displayed data.

Data reduction

Content analysis is a method of aggregating data, involving the codification of qualitative information into predefined categories to trends in data delivery and reporting, and is used to assess the existence of certain words or concepts in text or collection of texts (Guthrie, Petty, Yongvanich, Ricceri: 2004). Perry (1998) stressed that cross-case analysis as a system for recognizing interrelationships and disparities between individual cases and drawing conclusions afterwards. Further, he stated that desk review method has been adopted by my researchers to analysis the secondary data findings from primary and secondary sources. Accordingly, after gaining information through interviews, data reduction and concept identification were accomplished through content analysis and cross case analysis while the secondary data was analysed using desk review method.

Data display

Qualitative data display formats fall into two (2) major families: matrices with defined rows and columns and networks with a series of linked ' nodes ' (Miles, Huberman & Saldana, 2014). This research was considered to be a data display tool for networks over matrices.

Conclusion drawing and verification

Final step of data analysis is conclusion drawing and verification. Miles, Huberman and Saldana (2014) viewed that conclusion drawings are used for interpretation and drawing meaning from the displayed data. Thus, when summarising the key findings in relation to the research question and implications from this study, conclusions were drawn on both theory and practice. Further, new research directions, which emerge from this research was highlighted in the conclusions.

3.2.3.8 Write up

The research process finished with the professional writing up of the paper. From time to time, this has gradually developed. Chapter 02 included the descriptive writing and the theoretical writing was performed in Chapter 04, while the final chapter summarizes the results as conclusions and suggestions according to the objectives.

3.3 Research Validity

Validity and reliability are two (2) considerations that should concern every qualitative researcher when planning a report, evaluating findings and assessing the study's performance (Golafshani, 2003). To assess the performance of any qualitative research, four (4) tests are broadly used: building validity, internal validity, external validity and reliability. Accuracy, authenticity, confirmability and accuracy of data are the criteria proposed for these tests (Yin, 2014). The tests can be summarised as below.

- **Construct validity:** constituting correct operational measures for the concepts being studied.
- **Internal validity:** establishing a causal cognation, whereby certain conditions are shown to lead to other condition, as differentiated from supposititious relationships.
- **External validity:** instituting the domain to which a study's findings can be generalised.
- **Reliability:** demonstrating that the operations of a study can be recurred, with the same results.

Hence, the measures, which had been taken to ensure the validity of this case study research underneath each of aforesaid levels, had been identified as per Table 3.2.

Table 3.1: Measures taken to ensure the Validity of the Research

Test	Measures taken in this research
Construct Validity	<p>Triangulation: Interviewing three people on the unit of analysis, integrating different kinds of literature, integrating two data analysis techniques: content analysis and cross case analysis</p> <p>Conducting semi structured and face-to-face interviews: Adapting the questions necessary, clarify mistrusts, picking up the nonverbal cues from the respondent for greater understanding</p> <p>Selecting interviewees: Selecting the project team members (individuals) who has regular interactions</p>
Internal Validity	<p>Developing research problem and process model: developed the research questions and process model progressively in a logical manner</p> <p>Logical analytical process: linking data progressively within literature review, process of pattern matching under cross case analysis</p>

External Validity	<p>Multiple source of secondary data: Selecting four international legislative guides</p> <p>Multiple case studies: Selecting three cases to investigate the research problem</p> <p>Logical case selection: Adapting logical criteria for selecting cases</p>
Reliability	<p>Transparent interview process: Tape-recording or note-taking during interview and developing interview transcripts to ensure accurate data capture. Maintain confidentiality.</p> <p>Consistence interview guidelines: Interviewing all interviewees based on the same defined interview guidelines</p> <p>Consistent interviewee sample: Interviewing technical expert, procurement expert and legal expert from each PPP project.</p>

With regard to consistency, the obviously established research methodology with a logical sequence of steps offered accountability for the entire study.

3.4 Summary

The methodological methodology used in this research study has been discussed and explained in this section. Research development starts with the ' nested method ' definition and is accompanied through the research process. The research procedure was once explained through initial impetus, background study, literature review, problem statement, case study design, data collection techniques, data analysis techniques and comparison study. Four (4) international legislative frameworks were be selected as sources of secondary data collection and semi-structured interviews were picked out as primary source of data collection under case study research methodology, while content analysis and cross case analysis were used to draw conclusions. Finally, the steps taken to enhance the quality and reliability of the research study are discussed. The next section outlines the research findings of this study.

4. RESEARCH FINDINGS AND ANALYSIS

4.1 Introduction

While the research method adopted for this dissertation was based on Chapter 03, the aim of this chapter is to explain in detail the results of the empirical study. The study recognized what was stressed in literature to fulfil the research goals, and these were widely discussed through the collection of primary and secondary data.

Investigation of existing international and national legal and regulatory frame works for PPPs was carried out as secondary data collection by doing in depth studies on constitutions, model laws, acts, guidelines and government publications. Meanwhile, primary data was collected by conducting case studies in order to ascertain the gaps in existing PPP legal and regulatory framework. Once the within case analysis concluded to each case study, a cross case analysis based discussion was done in order to ascertain the similarities and differences across the cases. Finally, findings of both primary and secondary data were analysed in order to develop a legal and regulation framework to assist procurement of PPPs in future Sri Lanka.

4.2 Findings from Secondary Data

To accomplish the second objective of this research, in depth study, was conducted to investigate the existing legal and regulatory frame work for PPPs by referring widely used international PPP model laws, PPP acts and PPP guidelines in various countries for international context, and national constitution, national publications and procurement guidelines for local context and was comprehensively described herein after under section 4.2.1 and 4.2.2.

4.2.1 Globally available legal frame works for PPPs

There are currently a number of non-uniform legislative guidelines prepared by various international organizations to standardize PPPs at international level (UNCITRAL, 2013a). WB (2014) highlighted that due to the rapid growth of PPPs worldwide, the need for a specific set of rules for direct PPP transactions has been growing. There are currently published legislative guide, manuals and model laws on

PPPs at the international level such as UNCITRAL Privately Financed Infrastructure Projects (PFIPs) Instruments, United Nations Industrial Development Organisation's (UNIDO's) Guidelines for Infrastructure Development through BOT 1996, Organisation for Economic Co-operation and Development (OECD) Basic Elements of Law on Concession Agreement - 2000, and European Bank for Reconstruction and Development's (EBRD's) Core Principles on Modern Concession Law 2006 and European Commission's Directives on the Award of Concessions (ADB, 2016; Simmons & Simmons Limited Liability Partnership, 2017; UNCITRAL, 2013b), which are scrutinised hereinafter.

4.2.1.1 UNCITRAL Privately Financed Infrastructure Projects Instruments

These instruments comprise of the UNCITRAL Legislative Guide on PFIPs in 2000 and Model Legislative provisions on PFIPs in 2003. These instruments contain both legislative recommendations and model provisions on PFIPs. The legislative recommendations and the model provisions contained therein are intended to support and direct the law-making bodies of member nations in the implementation of a typical PPP framework in their respective countries (Son, 2012). The Model Provisions translate the guidance provided as recommendations in the Legislative Guide into legislative language as 51 provisions, while the Legislative Guide contains 71 recommended legislative principles that aim to assist in the creation of a legislative framework.

Simmons and Simmons Limited Liability Partnership (2011) considered that UNCITRAL instruments' provisions focus only on physical infrastructure projects and exclude all other projects that may involve natural resource extraction and development. However, it highlighted that the UNCITRAL instruments were produced more than a decade ago, when PPPs did not really grow significantly. In the report on Legal Analysis on Public-Private Partnerships regarding Model PPP Rule by Son (2012), he categorically criticised declaring that, even though UNCITRAL Guide and Model provisions provide information for drafting national PPP laws, rather than contracts, they do not constitute a model law.

There is no doubt that UNCITRAL Guide and Model provisions can at best serve as a useful basis for assessing the readiness of the political, economic, legal and regulatory system of a government to support PPPs, although both of them are neither a model law nor are they intended to be.

4.2.1.2 UNIDO's Guidelines for Infrastructure Development through BOT

UNIDO issued a guideline for infrastructure development through BOT Projects in 1996. In order to undertake a BOT project, the guidelines provide a basic orientation. It considers both financial and legal issues as well as the vital practical information on the outline that a good BOT project should take while carrying out BOT projects. This guideline comprises chapters on introduction to the BOT concept, phases of a BOT project, economic framework for BOT schemes, the government's role in providing for successful BOT projects, transfer of technology and capability building through BOT projects, procurement issues and selection of sponsors, financial and economic appraisal of BOT projects, risk identification and management, financial structuring of BOT projects; the contract package; the project agreement, the construction agreement; operation and maintenance contracts, transfer of ownership and factors that determine success.

Some of the features in the guidelines of UNIDO, however, are very close to what can be provided in TPP (Son, 2012). However, he argued that the distinction between TPP and PPPs is not clear under the UNIDO Guideline and that it is necessary to identify the characteristics of PPPs distinct from those of TPP.

4.2.1.3 OECD BASIC Elements of Law on Concession Agreements

OECD published the set of Basic Elements for Concession Agreements for corporate law and foreign direct investment legislation, which is a result of a joint project between the Istanbul Stock Exchange, the OECD and a group of experts. In order to facilitate PFIPs, this report created twelve (12) key provisions to supplement existing concession laws. Son (2012) conjectured UNCITRAL PFIP instruments as focused solely on infrastructure projects, OECD elements focus not only on infrastructure projects, but also on natural resource projects.

4.2.1.4 EBRD's Core Principles on Modern Concession Law

A collection of ' Core Principles ' has been published by the EBRD with the main objective of defining and supporting full concession and PPP fundamentals. Promoting equity, predictability, sustainability and resilience and protecting both private investors and the public sector from unethical behaviour and violence are among the key goals of this report. Simmons and Simmons Limited Liability Partnership (2011) stated that all but one (01) of the ten (10) Core Principles specifically focus to one (01) or more of the recommendations in the UNCITRAL Guide as a source. Son (2012) viewed that these principles are based on international standards and best practices and therefore, can aid in assessing a country's model concession law and in identifying the requirement for reform.

There is no doubt, according to the literature, that there are substantial numbers of UN texts and reports, multilateral organizations, and even multilateral development banks on PPPs. Concerns have been raised, however, that various international bodies are developing multiple PPP methods, processes and procedures with the aim of governing PPP transactions. It was also discovered that public performance can only be increased in PPP transactions if there are standard legal and operational procedures with some degree of flexibility to meet each project's specific needs. Internationally published legislative guides, manuals and model laws on PPPs have been declared that a framework should be formed to ensure the project's accountability, fairness and long-term sustainability and model law should specify the law that are empowered to grant concessionaries, types and categories of infrastructure which suite for PPPs, administrative and coordinating entities.

4.2.1.5 PPP law

The essence of the legal framework for PPPs is solely based on the country's existing legal system (UNCITRAL, 2014b; WB, 2014). WB (2014) and United Nations Economic Commission for Europe (2008) stated that there are two (02) main forms of international legal systems: common law and civil law. In addition, they claimed that government operations are rigidly prescribed in administrative law in civil law systems, while common law systems are usually far less prescriptive with numerous contract law clauses. In common law countries. PPPs are considered as variety of

government procurement for which no special arrangement is not needed; in others preliminary civil law countries specific PPP legislation may be necessary to provide PPP contract structure (ADB, 2016; Simmons and Simmons Limited Liability Partnership, 2017; WB, 2014). UNCITRAL (2014b) and ADB (2016) viewed that PPP laws may include procurement law, public law on financial management, business laws and regulatory frameworks, environmental laws and regulations, land acquisition laws and regulations, tax rules and employment laws.

Usually, a well-designed PPP law sets out standards that can be followed by more specific guidance to prevent rigidity and allow the PPP system to evolve over time. (WB, 2014). Further, it stated that some countries enact special PPP laws, while ADB (2016) declared that a particular PPP law is not a necessary requisition for PPP development. Table 4.1 provides examples of the PPP laws and regulations in different countries.

Table 4.1: PPP Laws and Regulations in Various Countries

Jurisdiction	PPP-Specific Laws and Regulations
Brazil	<p>Law 8987 (1995) is the Federal Concessions Law</p> <p>It defines concession types, sets out criteria for selecting bidders during tender, the required content of concession contracts, rights and responsibilities of the contracting government agency, the concessionaire and users, the tariff policy, and the acceptable reasons for step in and contract termination.</p> <p>Law 11079 (2004) is the Federal PPP Law</p> <p>It defines PPPs in the Brazilian context, establishes the scope of the PPP program, defines the contents of PPP contracts, sets rules for providing guarantees, setting up the Special Purpose Vehicle, tendering the project, and defines the rights and responsibilities of the contracting authority</p>
Chile	<p>Law 20410 (2010) - Concessions Law</p> <p>It updated the previous legal instrument for concessions - Decree 900 (1996) - which had modified the original legal instrument for PPPs in Chile. The law sets out the institutional framework for PPPs, tender rules, concessionaire's rights and obligations, inspection and oversight requirements, and procedures for resolving conflicts.</p>

Malaysia	PPP Guideline in 2009 It clarifies the types of project suitable for the PPP approach, procedures to follow when making proposals, qualifying criteria for bidders, operating models, payment mechanisms, and process flow for project approvals.
Philippines	BOT Law (Republic Act 7718, 1994) The law establishes rules concerning the bidding process, financing, government support, and regulatory authorities. Executive Order No. 8 (President of the Philippines, 2010) under President Aquino III modifies the BOT law, reorganizing the BOT Office of the National Economic Development Authority into a PPP Center, and outlining its duties and responsibilities
South Africa	The Public Finance Management Act (No. 1, 1999) This is the enabling legislation for PPPs. In accordance with this Act, the National Treasury issued Treasury Regulation 16 (2004) to the Act, PPP which establishes rules for the nation's PPP program.
Tanzania	PPP Act No. 13 2010 It sets out the responsibilities of the private and public sectors, the functions and powers of the PPP Unit, and the approval process for PPPs.
Thailand	PPP Act in 2013 It aims to streamline the project approval process, introducing clear systematic guidelines for the implementation of PPP projects.

Source: (Economic and Social Commission for Asia and Pacific, 2017; WB, 2014)

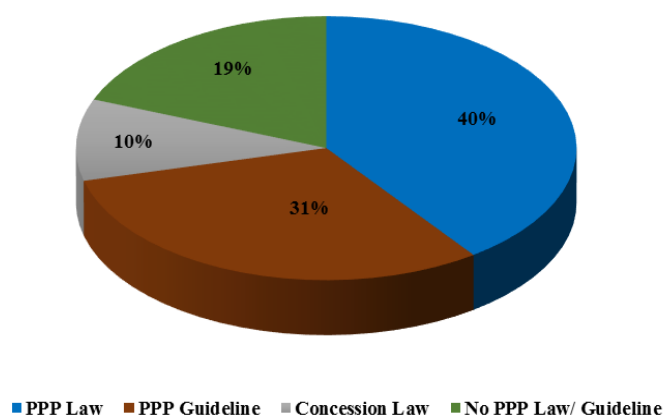


Figure 4.1: PPP Framework in Asia and the Pacific Countries

Source: (Economic and Social Commission for Asia and Pacific, 2017)

Figure 4.1 illustrates PPP framework in Asia and the Pacific countries. According to figure 4.1, 40% of Asia and the Pacific countries, have already enacted PPP Laws, while 31% have PPP guidelines and 10% have concession laws to govern PPPs.

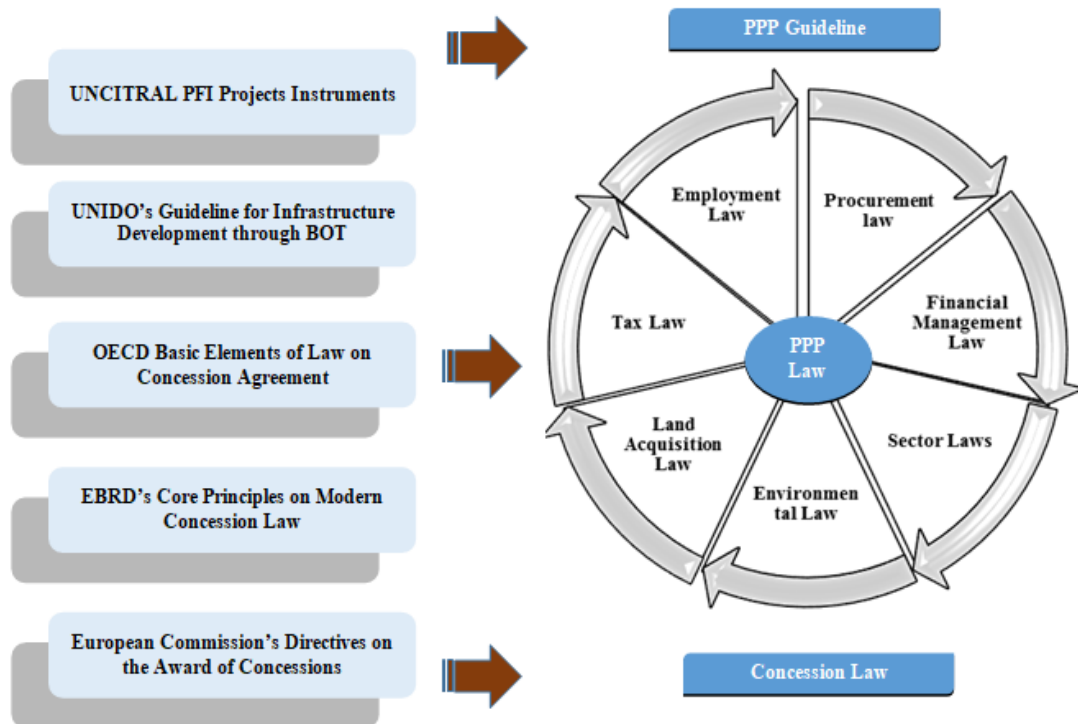


Figure 4.2: Development of PPP Legislative Framework

Since, there is no uncertainty that in attracting the private sector to contribute to infrastructure development, it is very important to have a strong legal structure and good governance policies. To clearly identify all stakeholders' roles and responsibilities, an enabling legislative structure is vital. Thus, various countries have been enacted especial PPP law or concession laws or PPP guidelines based on international legislative guides, manuals and model laws on PPPs as shown in Figure 4.2 since many governments around the world embrace PPPs as a one of the major tool to narrow infrastructure investment gap to underpin and reinforce for a sustainable economic development. In Asia and the Pacific countries, only 10% have neither PPP laws nor guidelines while other countries have at least one legislative basis to govern PPPs.

4.2.2 Legal frame work for PPPs of Sri Lankan

Public Property Act (1992) specified that government officials should ensure the use of public resources in a way that protects the public's interest. The Supreme Court ruled in the case of *Premchandra v Jayawickreme [1994]* that: there is no absolute or unfettered authority in public law; discretion is granted to trusted public officials to be used for the public good, and the purpose of exercising that discretion is to be assessed in relation to the purposes for which they were so named.

Accordingly, as public is a party to the PPP, the state becomes the trustee for the use of natural and national resources to the benefit of the public and all public bodies are required to perform honestly, transparently and impartially when delivering PPPs. Therefore, as prescribed in international model law and guidelines in section 4.2.1, proper legislative frame work is immensely needed to Sri Lanka in delivering PPPs in the manner; honestly, transparently and fairly.

4.2.2.1 PPP Procurement Law

WB (2003) stressed that the basic contract law does not have specific provisions directly related to TPP or PPP and that there is no specific act dealing with procurement in Sri Lanka, but other bodies of the procurement law are: Unfair Contract Terms Act, Selling of Goods Ordinance, Employment, Taxes, Customs, Insurance, Banking, Export & Import and Foreign Exchange Regulation. Further, it proclaimed that there is no special provision with regard to award of contracts in the Constitution of Sri Lanka. Ministry of Finance and Planning (1992) viewed that under the power vested by Article 43 (1) of the Constitution, the President assigned the subject of the "Government Financial Regulations, Interpretation and Amendments" to the Minister of Finance. Further, Ministry of Finance and Planning (1992) stated that originally published in 1966, the financial regulations were revised in 1992 and Chapter XIII set out the rules for the procurement of works, goods and services to be followed. Ministry of Finance and Planning (1998) viewed that in order to acquire economically the most beneficial and qualitatively the best services for the nation, Guidelines on Government Tender Procedure have been issued in two parts: Part I – Procurement financed by Public Fund including Donor Funds; and Part II – Private Sector Financed Projects (Part II Guideline). Later, Part I

was replaced by Government Procurement Procedure for Goods and Works (2006) and Part II is still applicable (National Procurement Agency, 2006).

Ministry of Finance and Planning Sri Lanka (1998) stated that Part II Guideline is applicable for the projects financed by the private sector on BOOT, BOO, BOT and other variants would be built, owned and operated by the investor transferred or leased to the public sector after a concession period. USAID (2016) declared that various line ministries and contracting authorities in Sri Lanka presently use certain aspects of the Part II Guidelines for PPP projects, including the Ministry of Megapolis and Western Regions, the Ceylon Electricity Board, and the Ministry of Finance, though the guidelines are not followed rigorously.

In *Smithkline Beecham Biological S. A. and Another v State Pharmaceutical Corporation [1997]* case, Honorable Justice of the Supreme Court, Dr Amerasinghe, when providing judgment on a case relating to procurement “*In my view law includes regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities*”. There is no uncertainty that in absence of specific provision in the basic contract law or specific act to deal with procurement, procurement guidelines crates law for procurement activities. Accordingly, Part II Guidelines makes the PPP law in Sri Lanka.

4.2.2.2 PPP Procurement Process

Part II Guideline discloses the procedure of processing proposal, issuing RFP, proposal evaluation, negotiation, contract award and signing implementation agreement. Reference 225 of the Part II Guideline sets out this guideline for infrastructure projects that are not identified to be funded under the Consolidated Fund and discusses proposals that are both requested and unsolicited. A solicited proposal is when the client requests for a proposal through issuing a RFP for shortlisted bidders through an EOI. A solicited proposal provides a description of what is expected from the Client. Figure 4.3 shows the main steps involved in the process of calling solicited proposals as laid down in Part II Guideline.

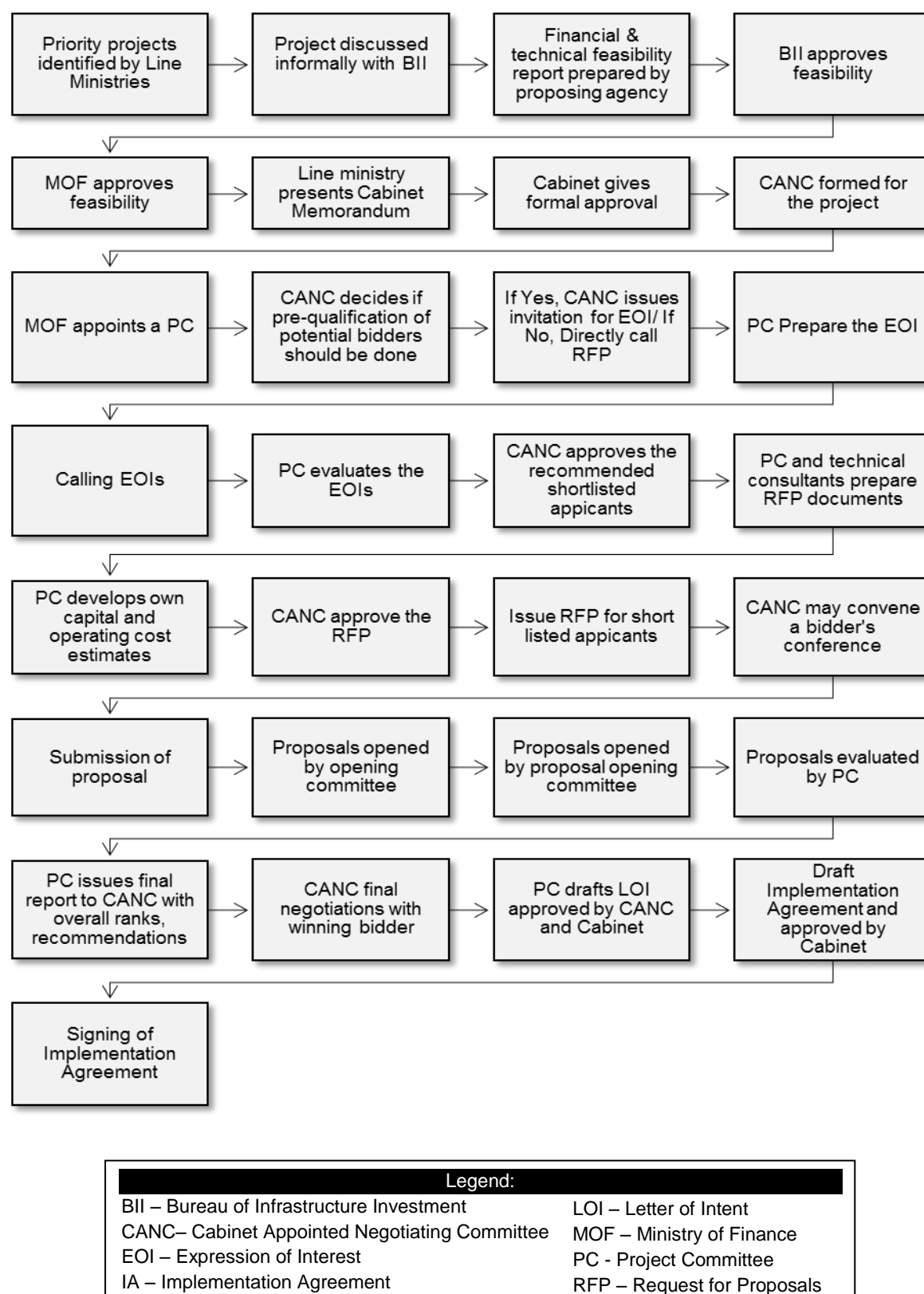


Figure 4.3: Flow Chart of Processing Solicited PPP proposals as per Part II Guidelines

Source: (Ministry of Finance and Planning, 1998)

As shown on Figure 4.3, Bureau of Infrastructure Investment (BII), Ministry of Finance (MOF), Cabinet Appointed Negotiation Committee (CANC), Project Committee (PC), Negotiating Committee (NC), Attorney-General's Department and Central Environmental Authority become the regulatory and institutional bodies which are involving PPP process. Moreover, Table 4.2 clarifies the functions of each entity in implementing PPPs as stipulated in Part II Guideline.

Table 4.2: Functions of Regulating Authorities in Developing and Implementing PPPs in Sir Lanka

Regulating Authority	Function
1. Line Ministries	<ul style="list-style-type: none"> ▪ Identified priority projects ▪ Answers queries raised on RFP ▪ Draft Letter of Intent ▪ Negotiation of content of implementation agreement
2. Bureau of Infrastructure Investment	<ul style="list-style-type: none"> ▪ Promoting, facilitating and coordinating projects ▪ Project feasibility approval ▪ Negotiation of content of implementation agreement
3. Ministry of Finance	<ul style="list-style-type: none"> ▪ Project feasibility approval ▪ Appointment of PC
4. Cabinet Appointed Negotiation Committee	<ul style="list-style-type: none"> ▪ Deciding necessity of pre-qualification process ▪ Approving short list firm ▪ Final negotiation with selected bidder ▪ Make recommendation implementation agreement to grant approval from cabinet
5. Project Committee	<ul style="list-style-type: none"> ▪ Evaluation of pre-qualification ▪ Preparation of Request for Proposal (RFP) Document ▪ Answers queries raised on RFP ▪ Proposal evaluation ▪ Draft Letter of Intent
6. Attorney General's Department	<ul style="list-style-type: none"> ▪ Granting approval for drafted Letter of Intent ▪ Approve implementation agreement

Source: (Ministry of Finance and Planning, 1998)

PPP knowledge Lab (2017) stated that in the early 1990s, Sri Lanka has formed the Infrastructure Development Secretariat and the Private Sector Infrastructure Development Corporation and in the mid-1990s the Sector Infrastructure Development Corporation was absorbed by the Board of Investment (BOI) and renamed BII with additional powers. Besides, USAID (2016) viewed that various PPP related institutions such as BII, CANC, PC and NC, were formed within the

1998 PPP Guidelines Part II, though many of these bureaus have become inactive, with the exception of the offices and departments. Therefore, it is obvious that though Part II Guideline creates an institutional frame work to implement PPPs, certain key institutions are not functioning now and practical application of this guideline is debatable. Further, it demonstrates that our existing PPP procurement law is defective.

Reference 237 (a) of Part II Guideline stated *“Line ministries, agencies and BOI/BII receiving unsolicited proposals should have them processed according to the procedures applicable to solicited proposals”*. Furthermore, reference 237(b) said guidelines suggested that a decision should not be made solely on the basis of unsolicited offers without inviting proposals through public advertisement. Pursuant to the provisions of the said Part II Guideline, solely unsolicited proposals were not entertained. Whereas, Ministry of Finance (2011) declared that in Supplement 23 to Government Tender Procedure Part II Reference: 237, it is allowed to deal with unsolicited offers without going through the normal procurement procedure subject to recommendations of Standing Cabinet Appointed Review Committee with assistant of supporting committee. Later, Ministry of Finance (2016) proclaimed that in Supplement 30 to Government Tender Procedure Part II Reference: 237 superseding the said Supplement 23, under the "Swiss Challenge" procurement process involving the government agency, unsolicited proposals should be dealt by publishing an RFP and inviting counter-proposals on development projects or services from interested parties.

The Swiss challenge is a process for public procurement where a public authority that has provided an unsolicited project proposal publishes bid information and encourages third parties to match or exceed the offer. In this process, the original bidder shall submit a proposal including feasibility study, basic contractual terms and conditions, pre-qualification requirements, financing plan, implementation plan, cost incurred in developing the proposal (with evidence). Afterwards, counter proposals are invited and original bidder is requested to submit a second improved version to match with counter proposal. If original bidder is succeeded, his proposal is accepted unless, counter proposal is embraced subjected to compensate the development cost of original proposal. The procedure of Swiss challenge approach as stipulated in Supplement 30 to Part II Guideline, is shown in Figure 4.3.

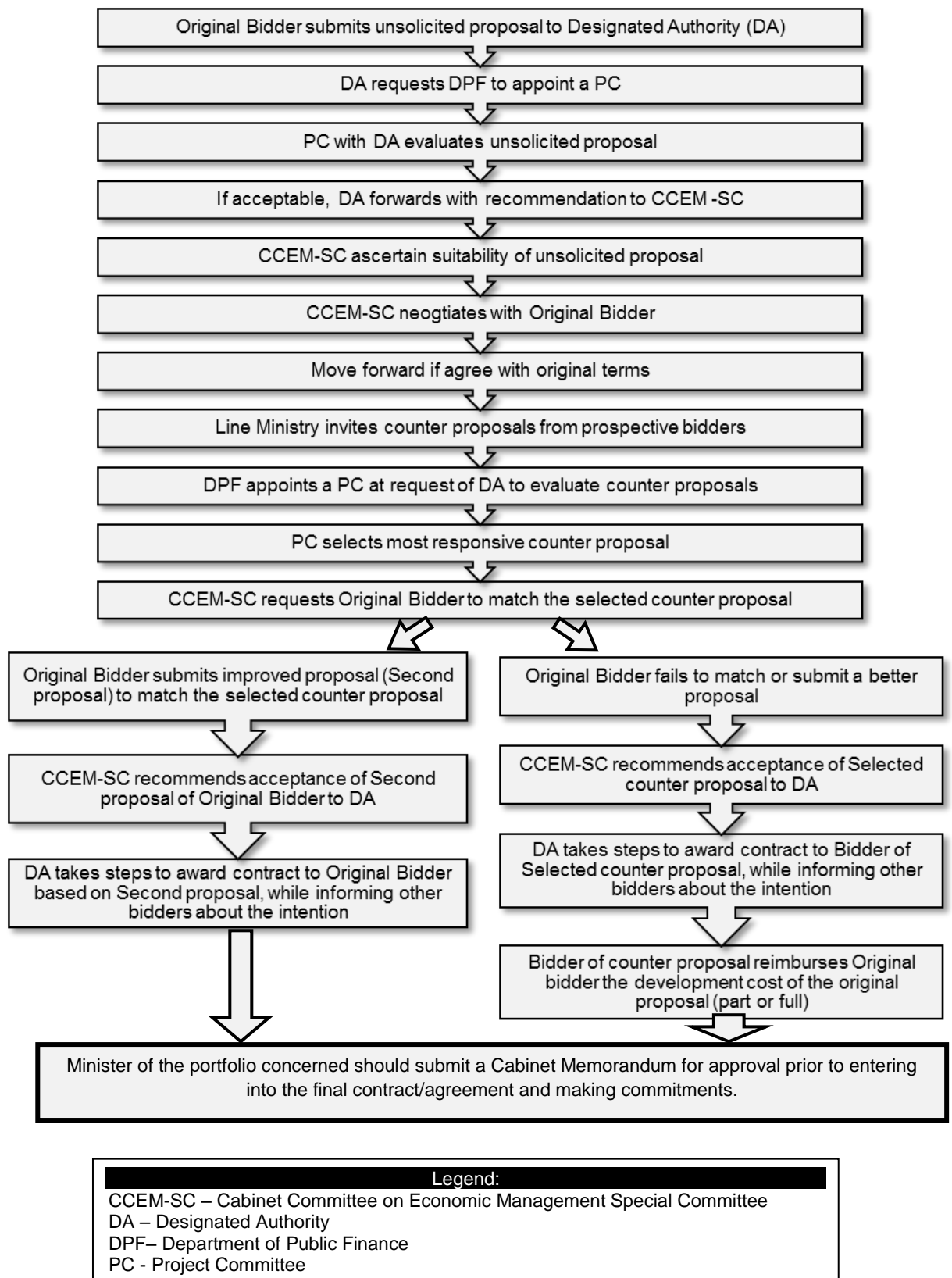


Figure 4.4: Flow Chart of Processing Unsolicited PPP Proposals as per Supplement 30

Source: (Ministry of Finance, 2016)

Even though unsolicited proposals are entertained by the said Supplement 23 published in 2011, with the announcement of Supplement 30 in 2016, it was declared that unsolicited proposal can entertained only through Swiss Challenge procurement method. According current PPP law, PPPs can be launched through only solicitation and Swiss Challenge method.

Following a cabinet decision, the National Agency for PPP unit has being constituted under the MOF in 2017 May to improve the organizational, political and legal structure for PPP projects (Ministry of Finance, 2017b). Further, it declared that new PPP unit comprises of 16 executive experts in banking, investment, economics, financial management, legal and risk management. Whereas, scope and objectives of implementing national PPP unit was not yet clearly disclosed and incorporated by issuing Supplement to Part II Guideline. Therefore, it is debatable of function and role of national PPP unit in PPP practice.

The National Procurement Commission was created pursuant to Section 156(b) of the Constitution with the adoption of the 19th amendment to the Constitution. Accordingly, National Procurement Commission empowers the functions to formulate fair, equitable, transparent, competitive and cost effective procedure and guideline for public procurement. Consequently, the powers vested with MOF for procurement actions were transferred to the National Procurement Commission. The National Procurement Commission has the power to formulate procurement guidelines for the procurement of goods and services, functions, consulting services and information systems, as stipulated in section 156(c) of the Constitution. Whereas, it does not say, who has the authority of the PPP procurement. Therefore, currently it is debatable the authority of formulation of PPP procurement whether it is belongs to MOF or National Procurement Commission.

In a nutshell, Figure 4.5 illustrates the aforesaid development of national PPP legislative framework for procurement.

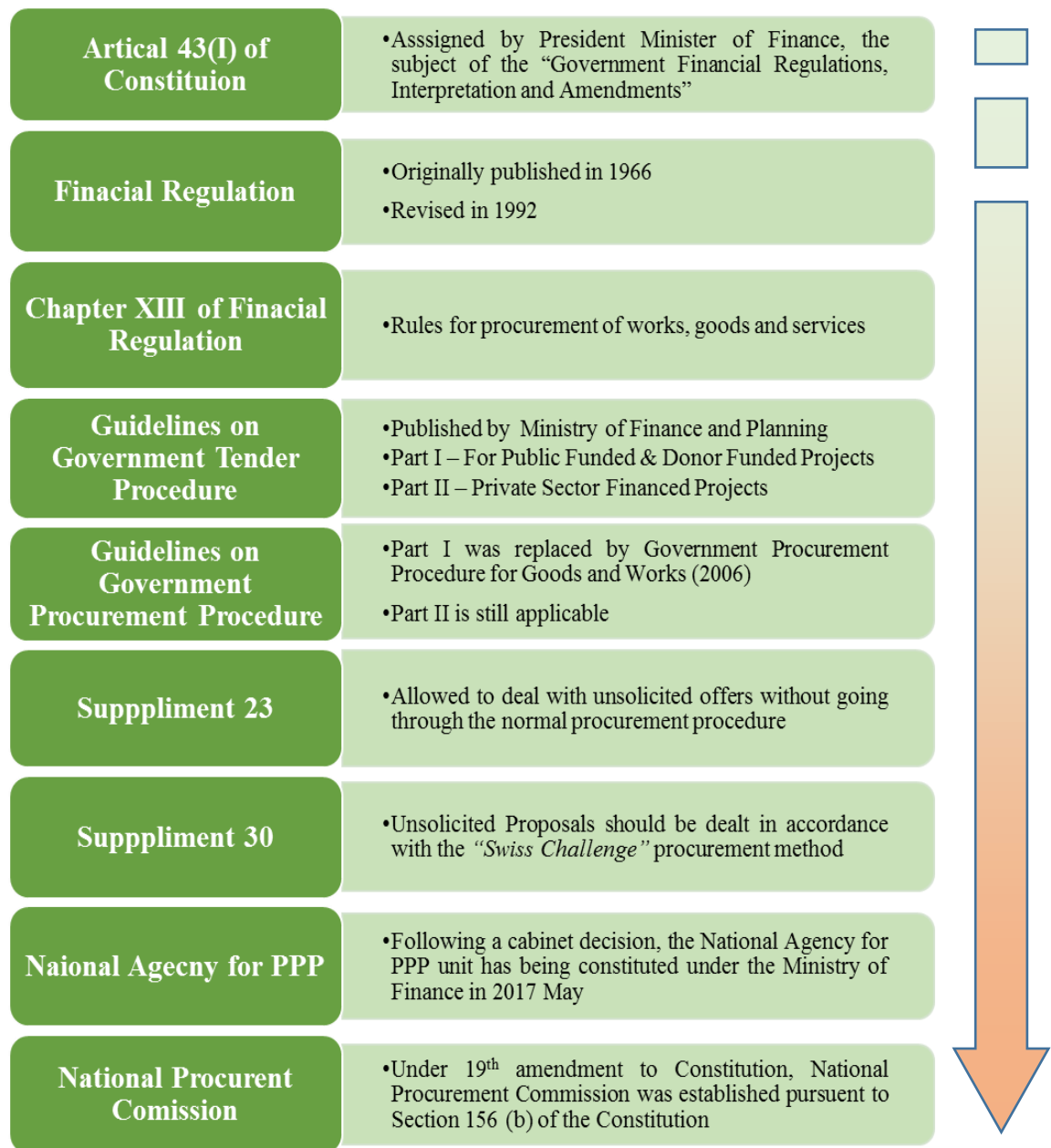


Figure 4.5: Development of National PPP Legislative Framework for Procurement

Source: (Ministry of Finance and Planning, 1998; Ministry of Finance and Planning, 1998; Ministry of Finance, 2011; Ministry of Finance, 2016; National Procurement Agency, 2006)

4.3 Finings from Case Studies

The unit of analysis of this study was PPP practicing organisation and this empirical study focused on three (03) such organisations. Identification of, the gaps in existing PPP legal and regulatory framework and suggestions for legal reformation were conducted through interviewing three members (03) from each organisation, as given in Table 4.3.

Table 4.3: Information of Interviewees

Organisation	Designation of the Interviewee
Case A	Project Director (PD) Deputy Project Director (DPD) Legal Officer (LO)
Case B	Lead Transaction Adviser (LTA) Director Legal (DL) Procurement Specialist (PS)
Case C	Deputy General Manager (Engineering Service) (DGM) Chief Engineer (CE) Senior Quantity Surveyor (SQS)

All the interviews were transcribed (refer Appendix A for an example) and content analysis was done. Case introduction and within – case analysis, of the each three cases were presented in section 4.3.1, 4.3.2 and 4.3.3.

4.3.1 Case A

4.3.1.1 Case introduction

One of project implementation and monitoring unit established under the government ministry which highly practices PPP in Sri Lanka was taken as Case A as stated above. The Project Director, the Deputy Project Director and the Legal Officer were interviewed based on the interview guideline (Appendix B).

Project Director (PD) said *“Our ministry's primary objective is to bring systematic changes and mechanisms of growth In Sri Lanka's urban community, ensuring that urban residents become part of the country's socio-economic development while maintaining a high standard of living quality”*. Further, the interviewees stressed that separate independent project implementation and monitoring units have been established with the approval of cabinet ministers to implement, monitor and administrate the various large and medium scale development projects. Deputy Project Director (DPD) viewed *“Technical, economical and legal experts are working in our unit and most of officers have experience in working government sector development projects”*. Legal Officer (LO) stated that retired government officers gave their service as consultants and foreign consultancy service has been

obtained when absence of local expertise in certain mega development projects. As per their view, certain PPP mega development projects has been already implemented by their project implementation and monitoring units and most of them are in feasibility and procurement stages.

4.3.1.2 Solicitation Planning

PPP Guidelines

PD viewed that even though, Part II guidelines is used as guideline for PPP procurement, it does not define the term; PPP. Further, PD stressed that due to absence of such definition, various government organisations are practicing certain projects as PPPs, but really they are not PPPs. As a solution, PD suggested that it is required to overlook how other countries are practicing PPPs, how their acts and guidelines define PPPs. DPD stated *“There is no guideline for specifically PPP in Sri Lanka and Part II guideline is for concessionary types privately finance projects”*. The same argument was forwarded by the LO and emphasised that however, Part II guideline had to be sued in PPP procurement. Accordingly, it is apparent that there is no specifically stated guideline for PPPs and Part II guideline has been adopted by different government ministries and departments for implementation of PPPs. Further, it was demonstrated that there is no proper definition for PPP in our legislative frame work and it leads to certain malpractices in PPPs.

Identification of national prioritised PPP

As per the opinion of the PD, *“There should be a special expert committee to identification of national prioritised projects which are launched through TPP and PPP and said nation expert committee should consist of professionals representing technical, financial and legal segments”*. DPD and LO accepted the same view but, they suggested that national PPP unit can identify the said priority list of projects and said PPP unit consists of various experts with technical, legal, financial and economic background. All of interviewees are in same view that there should be a national committee to identity and prioritise the projects which are suite to launch through TPP or PPP.

Risk allocation

All of interviewees viewed that up to date there is no any guidance for sensible risk allocation for PPP projects in Sri Lanka. Additionally, interviewees stated that risk components are allocated to the most competent person who can bear. DPD stated that a standard form of contract should be developed in near future to suit for various PPP models to provide a guidance on sensible risk allocation and it will provide smooth platform to all clients, consultants and investors to implement future PPPs successfully. LO said that at the initial stage of the procurement, proper risk assessment should be conducted to identification and allocation of risk components to appropriate parties and it will evade occurrence of future conflicts in PPP contract and lead to successful execution of the PPPs.

Bidding process

DPD viewed *“I believed that there should be a mixture of unsolicited and solicited mechanism in PPP bidding process to craft the merits of the both and competitive method gives least cost option but no guarantee on actually we are getting best product to incurred value while in unsolicited model, proponent will come with best product to match with the Employer’s requirement since price become a critical factor of wining the bid”*. Additionally, DPD pointed out when prioritising PPP mega developments by national PPP unit, they should compare merits and demerits of the said projects separately when they are procured under unsolicited and solicited basis and accordingly, PPP unit should suggest best mechanism to procure PPPs. PD stated that Sri Lanka as well as other countries had bad experiences with unsolicited proposals as actual product expected by the public is not received and it becomes a mechanism to easily enter less qualified parties and to highly affect political influences. Further, PD expressed that we have used unsolicited method for PPP procurement and from 2015 onwards government banded unsolicited method by introducing Swiss Challenge Approach whereas, with the approval of the Cabinet Ministers currently unsolicited proposals are entertained in special circumstances. As per the opinion of the LO, *“We have to follow transparent, fair and accountable procedure for PPPs as we are using public properties. Therefore, competitive bidding is essential for PPP also”*. Even though, DPD overlooks the merits of both

methods, others highly emphasised that PPPs followed a competitive process to selection of most competent partner and criticised the unsolicited mechanism.

Committees

DPD viewed *“Even though, Part II Guideline discusses Project Committee and Cabinet Appointed Negotiation Committee to execute procurement activities of PPP, it is quite doubtful whether appointed members of the said committees are competent enough”*. Whereas, PD stated that very less PPP expert are in Sri Lanka and if such committees felt that they are not competent enough, anytime they can call for external expert views. As per the opinion of the LO, *“According to the nature of the PPP, suitable qualified members should be appointed and it is not only a job of expert in a particular one area. It should joint work of technical, financial, legal and other experts”*. Accordingly, it is demonstrated that the competency level of the committee members are quite questionable since they are not fully trained for PPP procurement and provisions has been incorporated to Part II Guideline to call external experts if it is required.

Accordingly, key findings of solicitation planning in Case A are summarised in Figure 4.6.

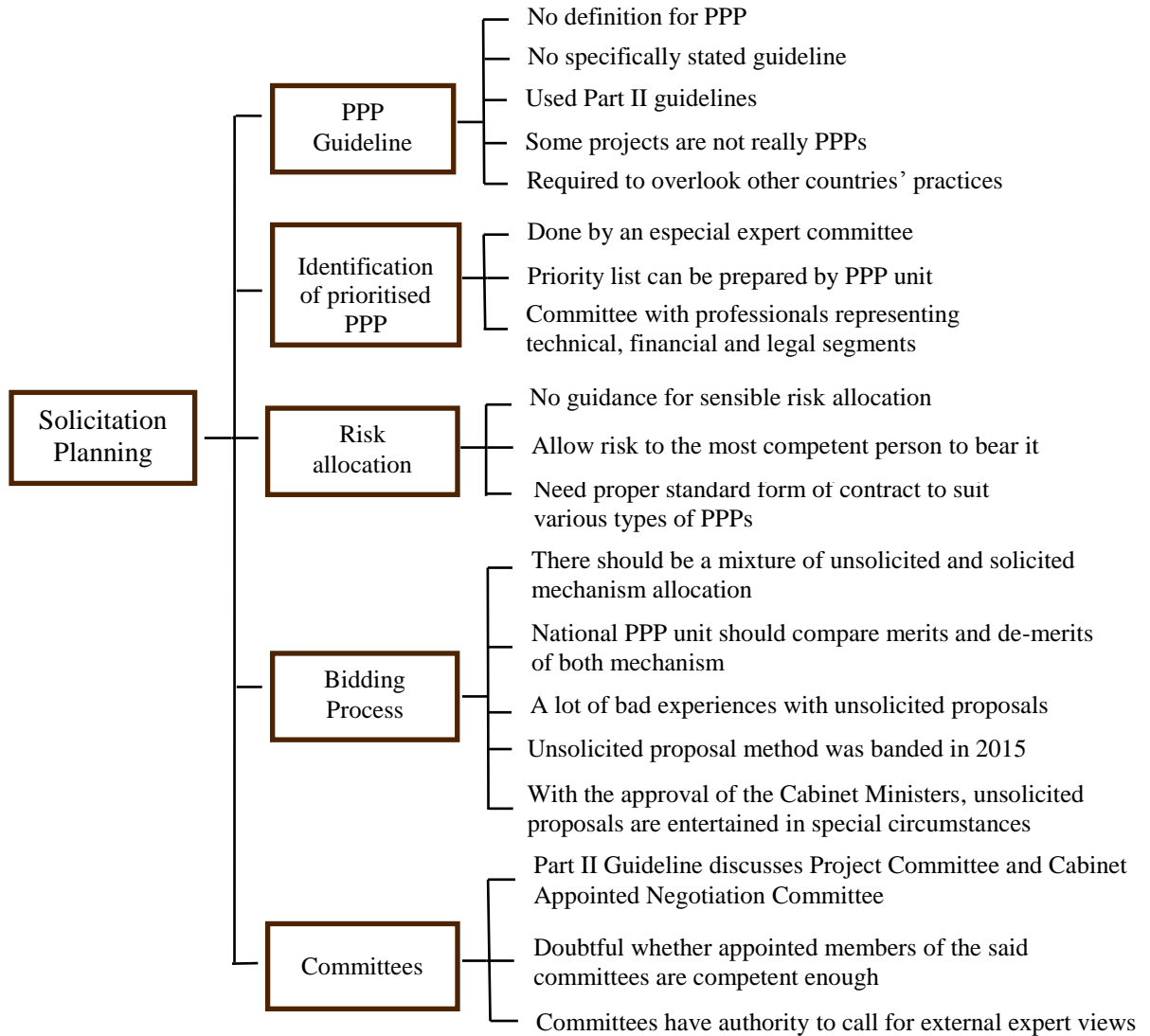


Figure 4.6: Findings of Solicitation Planning in Case A

4.3.1.2 Solicitation and Award

Negotiation

DPD explained “After the assessment of PPP proposals, but before the successful proponent is chosen, it may be appropriate to compromise on issues identified as having the potential to improve performance and returns and reduce uncertainties”.

Further, DPD stated that such negotiation terms should clearly discuss in RFP document and at the time of proposal evaluation, parties can only negotiate the terms which are clearly mention as negotiable terms in RFP document. PD viewed that negotiations may be for reduction of cost, identification of fresh alternatives and confirmation on terms of the implementation agreement. Additionally, PD stated that

proper negotiation process needed to adopt in PPP procurement are not clearly discussed in Part II guideline and due to that different parties are used to follow ad-hoc methods for such negotiation. Furthermore, PD expressed that a proper negotiation process, guidance for negotiable instruments and authorised party for such negotiation should be discussed in PPP guideline. LO argued *"Negotiations are done quite often in PPP and this activity is totally contrary to the values of fairness and openness, but it is important to work out the best value for the money of the company, to find the best alternative and to avoid ambiguities in the PPP agreement."* Besides, LO viewed that negotiation should be executed by a separate independent negotiation committee not with PC or CANC. Furthermore, he emphasised *"Parties must sign a Memorandum of Understanding to incorporate negotiations into the original offer at the conclusion of the negotiations or a fresh proposal to implement such negotiations should be made by the respective proponent"*. Their views expressed that although having negotiation for PPPs is healthy to improve outcome and returns and current Guideline does not discuss the negotiation process and its authority and it leads to implementation of ad-hoc and mal practices for PPP negotiation.

Appellate Process

PD stated that according to current legal framework, applicant has no chance to challenge or appeal on unfair term, unfair criteria, and unrealistic risk in bidding documents or RFP document during tendering period and proponent can embrace only he agree with the terms and conditions. Besides, PD emphasised that for the proper execution of procurement of PPP, there be an independent body to appeal against such deficiencies to get relief for the proponent. Further, PD viewed that whereas, if the proponent felt that decision of the PC and CANC to award the PPP contract is unfair, they can appeal for Procurement Appeal Board. Whereas, DPD and LO argued that Procurement Appeal Board is only applicable for TPP. Besides, LO said *" Each and every proponents have a right to know who is the winner and reasons for unsuccessful accordance to Right to Information Act and therefore, Employer should issue Intention to award letter first and wait for any appeals or challenges to CANC decision before awarding the contract"*. Accordingly, interviewees highlighted that the PPP guideline does not disclose on procurement

appellate process even though guidelines for TPP discusses Procurement Appeal Board.

Contract agreement

PD said “*We have no standard form to draft implementation agreement for PPP projects and most of the cases with involvement of the legal and technical experts in particular departments, they prepared bespoke agreement*”. Furthermore, PD argued that as different procurement entities prepare their own documents, it may create many ambiguities, discrepancies and conflicts among parties and finally leads to disputes. Same argument was forwarded by the DPD and additionally, he suggested that as soon as possible country need a proper guidance on preparation of implementation agreement. As per the view of the LO, “*If particular agreement is prepared beyond the standard form, definitely government department or institute should obtain the concurrence from Attorney Generals’ Department*”. Besides, DPD argued that even though we referred Implementation Agreement to Attorney Generals’ Department, they have the capacity to judge only legal compliances of the agreement and it is not sufficient for such mega development programme. Further, DPD argued that once implementation agreement is prepared it should be reviewed through an expert panel representing legal, technical and financial experts. As per their views, it was understandable that generally bespoke agreements are prepared for PPPs due to absence of a proper standard form and it leads to rising disputes at the implementation stage. Further, it was noted that review such agreements through only Attorney Generals’ Department is not sufficient and proper in depth review is required in technical and financial aspects.

Accordingly, key findings of solicitation and award in Case A are summarised in Figure 4.7

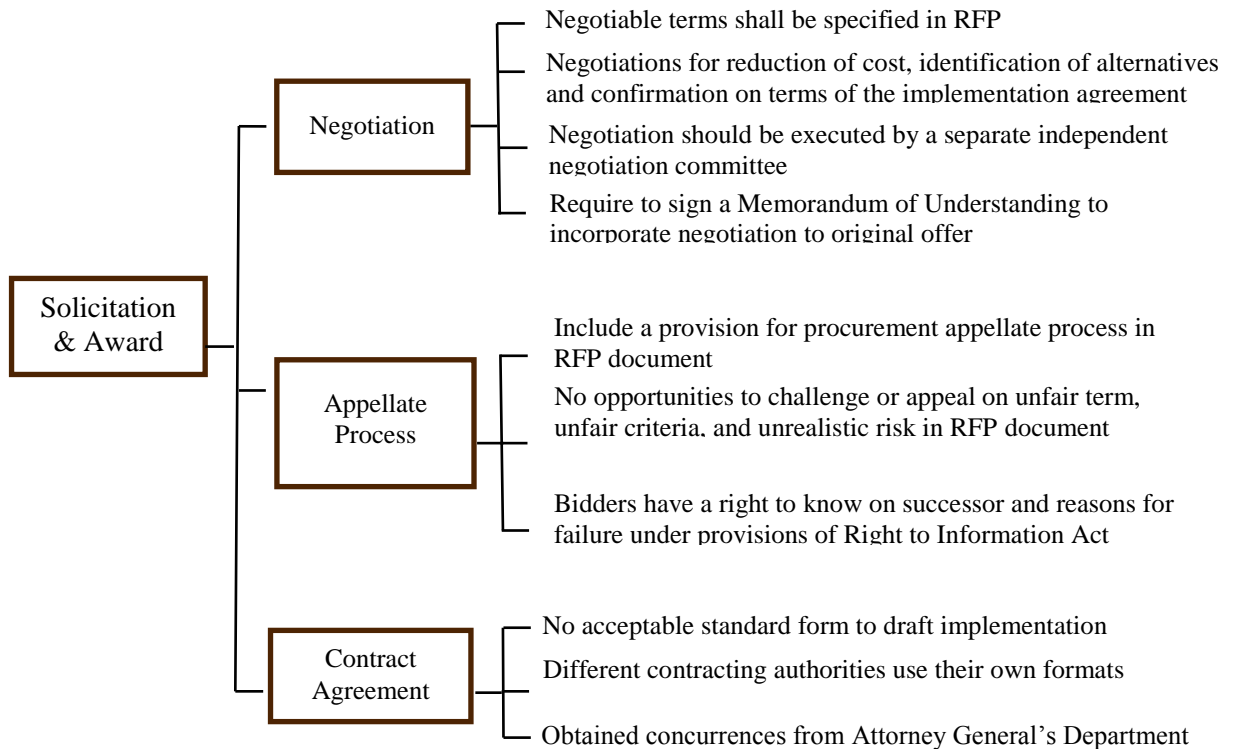


Figure 4.7: Findings of Solicitation and Award in Case A

4.3.1.3 Proposed Reforms

LO stated “*PPPs are complicated long term transactions that are affected by numerous areas of law and therefore, the legal framework should be satisfactorily attractive for investors to bid for PPPs*”. PD highlighted that most jurisdictions have public procurement laws that set out the rules and procedures to be followed and since in PPP, private party is willing to deliver a service which normally provided by the public sector, application of public procurement law is contradictory and special law should be catered to it. DPD reiterated that our country still relies on Part II Guideline for PPP procurement, even though it is not specifically focused for PPPs and not updated from 1998 when other procurement guidelines have been amended to meet current challenges and issues. Accordingly, all interviewees accepted that our existing legal and regulatory framework for PPP is inadequate and short and long term reforms are immensely needed to announce to prevailing system.

As short term reforms to existing legislative framework, PD stated that the amendments are required to the existing Part II Guideline, incorporating proper definition for PPPs, assigning the powers of the inactive organisations prescribed in Part II Guideline to vigorous proficient institutes, empowering the national PPP unit

as a separate body which can facilitate PPPs and making mandatory requirement that the all PPPs should undergo through national PPP unit although they comes from different procurement entities. Further, PD suggested that new guideline should be development to supersede the Part II Guideline incorporating changes of introducing national PPP unit, national procurement commission and their obligations, proper PPP definition, application and limitation of various PPP modes, requirement of pre-qualification, debriefing, procurement dispute resolution system and possibility of accepting unsolicited proposals as a long term reforms to PPP legislative framework. Additionally, PD highlighted that new guideline should discuss content of an EOI and RFP documents, guidance for risk allocation, technical and financial review process of proposals.

As the short term improvements to PPP current legislative framework, DPD viewed that, a national level independent expert committee representing members from technical, financial and legal professional bodies, should be established to identify the national prioritised projects which should be befitted to be launched through PPPs since various government departments implement PPPs without proper understanding. According to the opinion of DPD, the National PPP unit should draft a guidance which should be valid until new PPP guideline is published, for sensible risk allocation, preparation of implementation agreement, pre-qualification and RFP document to enhance current PPP practice and to prevent ad-hoc practice. Moreover, as long-term reforms DPD stated that a new guideline should be develop to address the issues of the existing guideline, incorporating modern practices and international best practices of PPPs. Additionally PDP stated that in line with PPP procurement guideline, a manual should be develop to describe the method of execution of the prescribes activities like two separate procurement guideline and manual has been developed for TPP. As long term reforms, further DPD suggested that since there is a trend for future PPPs, other PPP laws such as public financial management law, administrative law, environmental law, law and regulation for land acquisition, tax rules and employment law should be amended to attract private proponent for PPPs and provide single window fast tract approval process for project proposals, designs, granting concessions and investor's payment recoveries. DPD stressed that *"Notwithstanding proper PPP procurement law is enacted, if other PPP laws are*

rigid and not promote PPPs, private proponents are not fascinated and finally, objective: best value for the client's money cannot be achieved”.

As per the view of LO for short term reforms, government of Sri Lanka needs to take immediate actions to active the non-functioning organisations prescribed in Part II Guideline or grant such authority to active institutions and make mandatory requirement to follow said Part II guideline for PPP procurement until a new guideline is implemented. Besides LO stated that a group of experts should trained through international PPP practitioners for PPP procurement, implementation, and administration and engage them for various committees in PPP procurement stage. Moreover, LO stated that since Right to Information Act has been enacted, debriefing procedure should be introduced to all PPP projects. LO expressed that government long term action plan contains publishing a new guideline specifically for PPPs to strengthen the existing legal framework for PPPs with incorporating national and international level experts suggestions and international PPP best practices. Further, LO viewed that said new guideline includes application and limit PPPs, institutional frame, public financial management rules, fast tract approval process and procurement dispute resolution process for PPPs. Besides, LO declared that in future national PPP policy should be develop in Sri Lanka to provide clear understanding on potential benefits of PPPs, support competitive and effective delivery of services, encourage the private sector investors for PPPs, make flexibility to response PPP project specific requirements and market conditions.

According views of interviewees, there should be short term and longer improvements to the existing PPP legislative frame work to encourage the private sector investors and enhance the PPP procurement practice. Finally, it was emphasised that without a sound and detailed PPP procurement legislative initiative, the client's objective: best value for the client's money cannot be achieved.

Accordingly, key findings of proposed reforms in Case A are summarised in Figure 4.8.

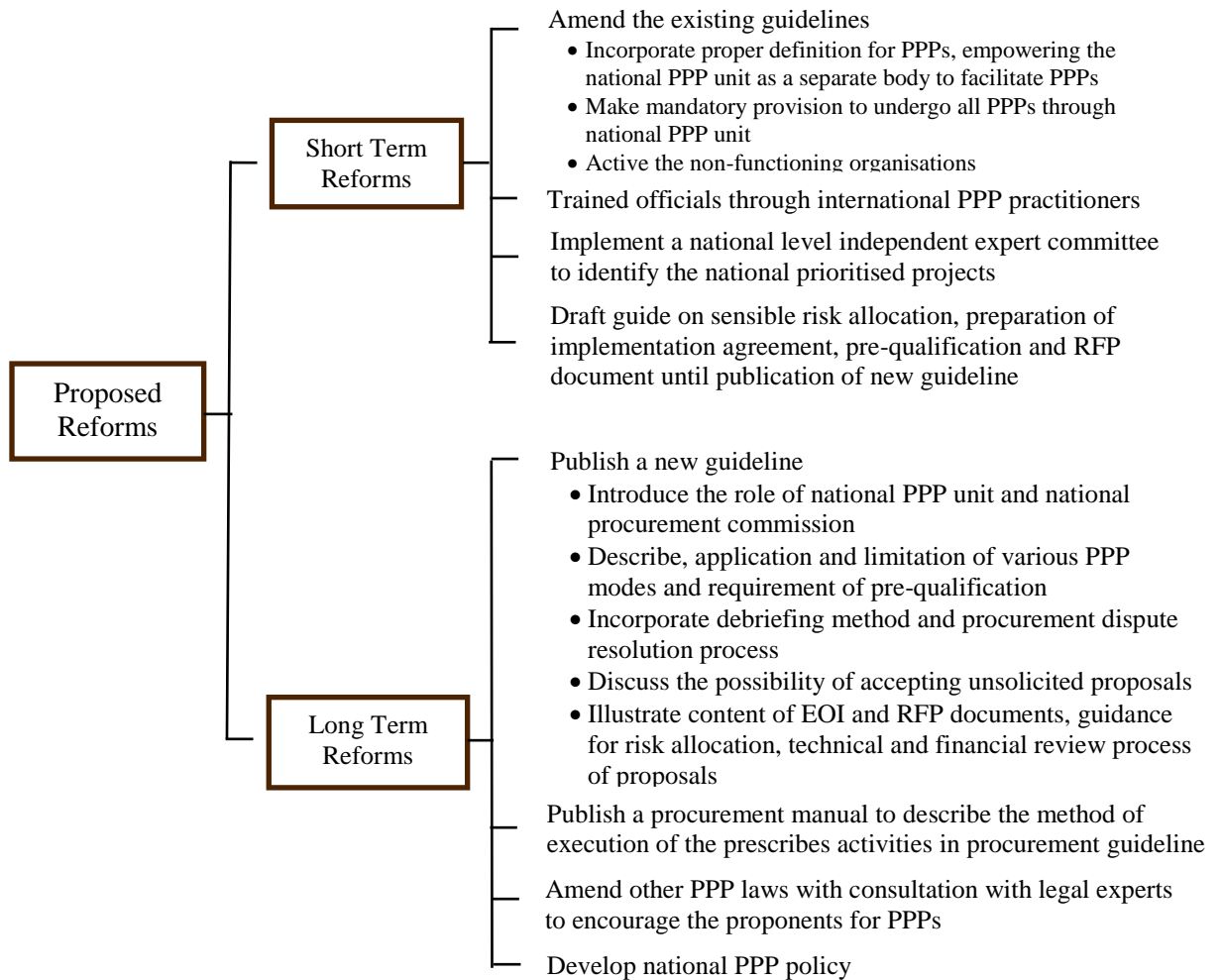


Figure 4.8: Findings of Proposed Reforms in Case A

4.3.2 Case B

4.3.2.1 Case introduction

A national agency established under government ministry to enhance PPP practice in Sri Lanka was selected as Case B as stated above. The Lead Transaction Adviser, the Director Legal and the Procurement Specialist were interviewed based on interview guideline (Appendix B).

Lead Transaction Adviser (LTA) stated *“Following a cabinet decision, our unit has been formed in mid-2017 to fulfil national economic objectives of securing investments with private sector engagement and providing investment inflow for sustainable economy”*. Director Legal (DL) said *“Primary role of our division is to provide oversight in execution, transparency, good governance, formulation of policies and recommendations to the Cabinet Committee on Economic*

Management". Besides, DL highlighted that they are equipped with expert permeant professionals and individual consultants representing various segment such as banking, finance, law and construction. Further, interviewees emphasised that currently they are involving certain mega PPP development projects with various government ministries and departments.

4.3.2.1 Solicitation planning

PPP Guidelines

Procurement Specialist (PS) stated that only Part II guideline published on 1998 can be used for PPPs even though it was not clearly specified for PPPs. Further, PS emphasised that although, Part I guideline issued for TPP has been superseded by Government Procurement Guideline 2006 (Goods and Works), Part II guideline remains as effective yet and drafted guideline for PPPs in 2007 was not published. Similarly, PS said that various circular has been issued by MOF such as Supplement 23 and Supplement 30 to amend the existing guideline. DL viewed "*There is no clear legal definition so far for the concept of PPP and specified guideline and due that various government department used ad-hoc pattern to implement PPPs*". Furthermore, DL stressed that said ad-hoc pattern may confuse and discourage the private investors attract for new developments. Same argument was brought by the LTA and emphasised that Part II Guideline applicable not only Infrastructure Development Projects on BOOT, BOT and BOO not exactly PPP even though state sector department are used. Accordingly, there may be different arguments on use of Part II Guideline for PPPs since said guideline specifically does not stated whether it can be used for PPPs.

Identification of national prioritised PPP

LTA stressed that entertaining each project through PPP, is not heathy to a particular country and there should be a balance of implementation of project through TPP and PPP. Similarly, PS highlighted that project should be executed through PPP only if it is possible to craft merits of PPPs. All of interviewees accepted that there should be a national level committee to identification of priority projects. DL stated that our legal system should be reformed to grant approval from PPP unit as national prioritised

project before implementing any project through PPP and it provides a barricade to execute the PPPs as their wishes by various government institutes according to ad-hoc system. Further, LTA expressed that master procurement plan for PPPs should be developed by PPP unit for entire country and various government department should bring forward their proposals to PPP unit to include such projects to master national PPP procurement plan and such master plan should be forwarded to cabinet of ministers for their review and approval through ministry of finance. Besides, LTA categorically criticised the current system and stated that today PPPs are practicing in Sri Lanka without a master national plan as the wishes of various government institutes. Bring an adverse argument, PS viewed that national prioritisation of projects should be executed through a separate independent body or committee and such committee is responsible for preparation of master procurement plan for mega developments. Even though, all of them viewed that there should be a national committee to identify the prioritised projects, there are different arguments on existence. Moreover, interviewees highlighted that significance of national master PPP procurement plan to the country.

Risk allocation

As per the view of Procurement Specialist, *“Most of the cases, the Employer tries to transfer more portion of the risk to private party in PPPs but actually I believed that the risk of PPPs should be delegated to the group that is best able to manage it”*. LTA stated that risk allocation is typically based on the principle of generating the most efficient allocation of risk, the project's lowest costs, and the highest value for money. Additionally LTA viewed that no standard guide for such risk allocation and it leads to additional cost and conflict between parties. DL said that while a PPP delivery model allows transition to the private party of certain venture risks, the public agency still maintains certain risks. In addition, DL emphasized that additional guidance principles are also needed, including consideration of which party has the greatest opportunities to pursue preventive risk management and mitigate the financial consequences of a risk. Interviewees brought an argument on risks in PPPs should be assigned to the best party who is able to manage them and highlighted that necessity of a standard guide for such risk allocation for PPPs.

Bidding process

LTA stated that in many of the world's most controversial private infrastructure projects initiated as unsolicited proposals but practice and some governments' experiences with unsolicited proposals are unfavourable and caused to public corruptions. Similarly, DL said that lead to public corruption was the main reason to barricade for unsolicited proposal by certain countries. Further, LTA viewed that it is quite questionable whether unsolicited proposal is a transparent, fair and accountable procedure. Besides, LTA highlighted that competition by itself does not guarantee greater public welfare but under normal conditions a competitive procedure probably drives down the tariff demanded by the private partner as long as it attracts more than one bidder. PS viewed *“Even though the commonly in unsolicited proposals, developer's profit margin has been increased, government can reduce time and cost incurred for tendering process and as price no a critical factor in unsolicited proposals, proponent will come with best technology and best mechanism”*. Further PS suggested that Swiss challenge approach can be adopted for unsolicited proposals to dropdown the unnecessary increment of proponent's profit margin. Besides, PS suggested that procurement law should describe situations where unsolicited proposals can be entertained, as unsolicited proposals cannot be dropped out focusing only its demerits. All of interviewees viewed that the contracting authority shall participate in pre-selection proceedings in order to identify proponents who are sufficiently qualified to carry out a PPP. Furthermore, PS said that there may be exceptional circumstances where pre-qualification process is not practicable and such circumstances should describe in procurement guidelines.

There is a discussion on merits and demerits of the unsolicited proposals among the interviewees and it focused on introducing a Swiss challenge to crafts merits of the unsolicited proposals and balance of both solicited and un-solicited method for PPP procurement.

Committees

Both LTA and PS viewed that Procurement guideline should describe composition of the proposal, evaluation committees and procurement committees. Besides, PS expressed his dissatisfaction on the current appointing method of committees, and

competency level of committee members. Further, PS emphasised, *“PPP unit are authorised to provide necessary advice to PPP procuring entities and well expertise professionals representing various sectors, are staffed in our unit. Hence, we can provide guidance to the committees as required”*. Additionally, PS suggested that PPP procurement guideline should have a mandate provision to undergo a review process of draft EOIs, RFPs and all evaluations through national PPP unit since committee members have less or no experience on PPPs. Forwarding similar argument, DL indicated, *“Since budget speeches of last few years proclaimed PPP option to as a tool to address the infrastructure investment gap, there a trend of PPPs in Sri Lanka near future and thus, certain professionals representing technical, legal, financial, etc. should be trained for future PPPs and trained professionals should assigned to technical and procurement committees”*.

Accordingly, key findings of solicitation planning in Case B are summarised in Figure 4.9.

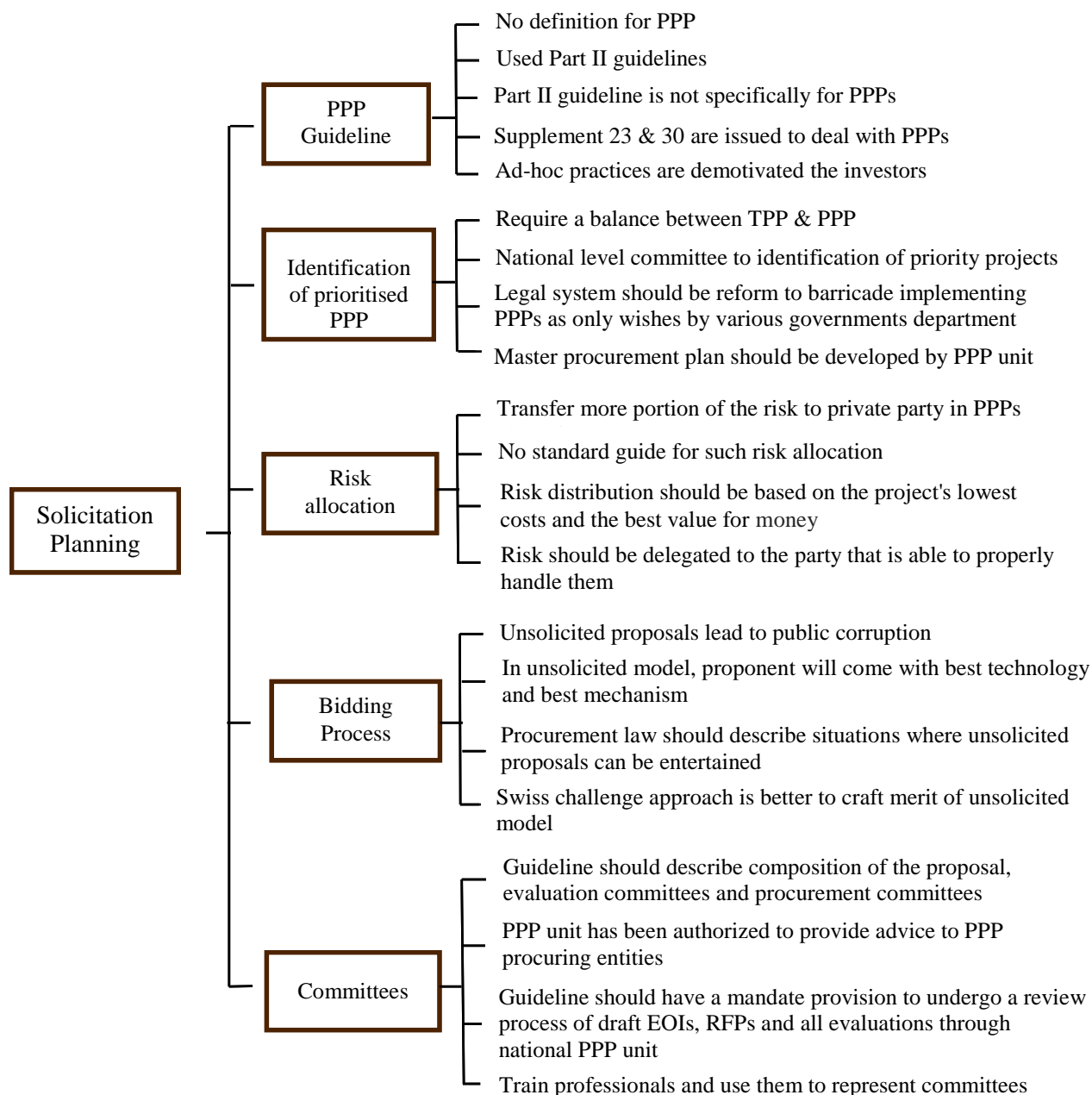


Figure 4.9: Findings of Solicitation Planning in Case B

4.3.2.2 Solicitation and award

Negotiation

LTA stated that negotiable and non-negotiable terms should be clearly mentioned in RFP document and parties are bound to negotiate only such terms. Moreover, LTA viewed that negotiations often focus on risk allocation issues in project implementation agreement and the willingness of parties to seek compromise through a sharing of risks and rewards. While forwarded the same argument, DL

stressed that at the negotiation stage, the host government and the private proponent have a mutual understanding, on who is duly authorised to represent the host government in order to avoid misdirected negotiations. Both of them clearly stated that it should be prohibited such negotiation by different parties to prevent misconduct and corruptive practice. PS emphasised that even though, TPP laws and regulations also prohibit negotiations between the procuring entity and the tenderer concerning a bid or proposal submitted by them, due to the complexity and long duration of PPP projects, parties require to negotiate the terms of a draft project agreement, and drop down the bid price to a reasonable value. Besides, PS said that according to the Part II Guideline, CANC has full authority to negotiate the private proponent and thus definitely negotiation expert should represent the CANC.

Experts stressed that duly authorised officers only should engage such negotiation to prevent misconduct and corruptive practice and such negotiation should be limited to the negotiable terms prescribed in RFP document.

Appellate Process

According to PS, the existence of reasonable and well-organized one of the basic prerequisites for attracting serious and competent bidders for PPPs is the review procedures, and Part II does not discuss such appeal process and is one of the key issues in that guideline. Additionally, PS viewed that in TPP, any failure can referred to such procurement dispute to National Procurement Appeal Board and such facilitation was given under National Procurement Guideline 2006 for Goods and Works. DL stated *"In certain legal systems, administrative and judicial review are offered in order to resolve disputes in the procurement of PPPs"*. Further, DL stressed that in Sri Lanka, such administrative review process does not exist for PPPs and whereas, any failure can go to courts to claim losses due to breach of duty imposed on contracting organisation under common law of the country. Lead transaction advisor said that any proponent made a complain on breach of duty imposed on a procurement entity, National PPP unit has a right to call explanations from government entities. However, both DL and Lead Transaction Advisor stated that each bidders have a right to know on successor and reasons for failure under provision of Right to Information Act even though Part II Guideline is silent on procurement apples.

According to the views of interviewees, the existing legal system has no provision to resolve procurement dispute through administrative process for PPPs even such provision includes for TPP and highlighted the requirement of such administrative procurement dispute resolution process for PPPs.

Contract agreement

All of interviewees viewed that there is no acceptable standard form to prepare implementation agreement for PPPs and bespoke agreements prepared by legal divisions are used as implementation agreement. Additionally, PS argued that as different contracting authorities use their own formats and it was reported that due to absence of such standard PPP model agreement, many ambiguities and conflicts have been arisen among parties and finally leads to disputes. DL viewed that a standard model implementation agreement is highly essential to Sri Lanka since a few mega developments are implemented through PPPs. Both DL and Lead Transaction Advisor suggested that requirement of a national level expert committee to draft model implementation agreement and called the need for comments and views from PPP practicing entities, external practitioners and international experts.

As per the views of interviewees, absence of standard form to draft contract agreement becomes a key issue to PPPs and drafting model implementation agreement for PPP is highly essential with the help of the professional experts.

Accordingly, key findings of solicitation and award of Case B are summarised in Figure 4.10.

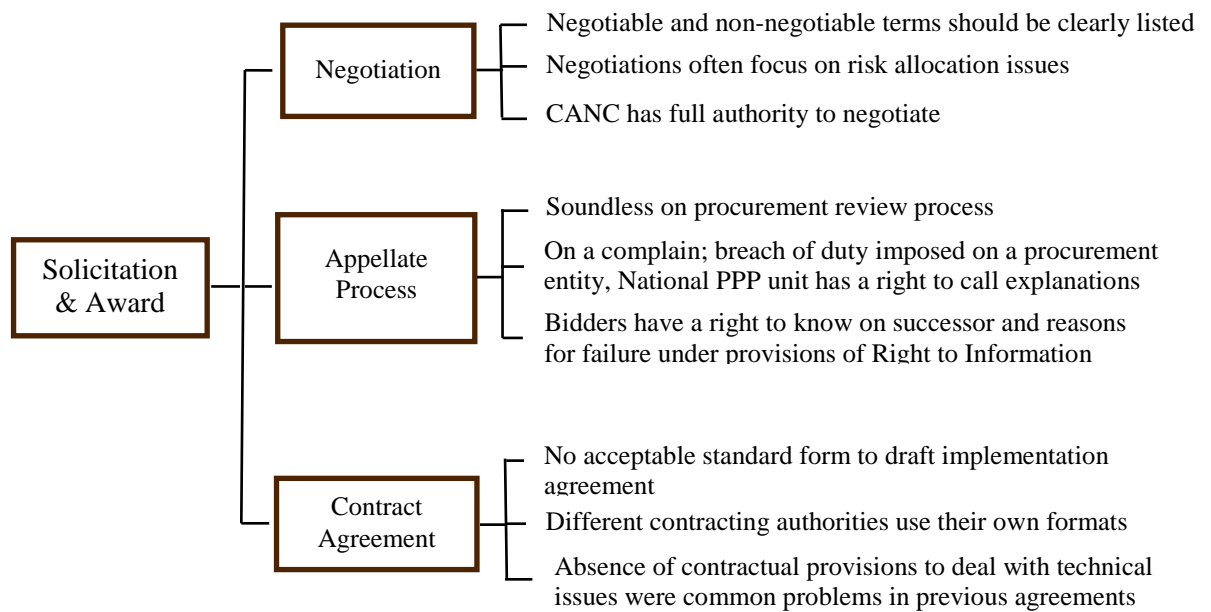


Figure 4.10: Findings of Solicitation and Award in Case B

4.3.2.3 Proposed Reforms

LTA viewed "PPPs should be given the most comprehensive legal framework capable of ensuring transparency, accountability and accuracy in the procurement process, and our existing system is too far away for such a framework". Others brought same argument and additionally, DL highlighted that a key challenge is lack of clarity and a robust legal framework in coping with PPPs in Sri Lanka, and in order to accept PPPs, the government must introduce a proper legal reform to various branches of law. All interviewees argued that certain reforms should be incorporated to existing PPP legal framework to strengthen the quality of PPP procurement.

LTA highlighted that there are several arguments on application of Part II guideline for PPP procurement and however, it is used by various state sector organisations in different levels. Further, LTA argued that master PPP procurement plan should be needed to a country which PPPs are emerged and whereas currently, such master PPP procurement plan is not with us and today various government department practicing PPPs according to their internal procurement plan. Additionally, LTA emphasised that such master PPP procurement planned should be prepared for all PPP practicing state sector organisation with collaboration with a national PPP unit and a national PPP unit should publish such master plan and authority of

amendments and modifications of the master plan go to national PPP unit. LTA viewed that said suggestions can be recommended as short term reforms to existing PPP legislative framework and supplement should issue to Part II guideline to incorporate national PPP unit and its scope and functions. LTA viewed that as a long term reforms, national PPP procurement guideline should be published describing the institutional framework, composition of various committees, guidance for preparation of EOIs and RFP documents, risk assessment and preparation of implementation agreement. Moreover, the LTA stressed *“There are various arguments on suitability of unsolicited proposal for PPPs and definition for PPP and actually they should be forwarded to wide discussion among experts”*. Further, LTA suggested that new guideline should empower the national PPP unit to PPP procurement feasibilities, advice and review and authorise the said unit to maintain a pool of technical, procurement, financial, legal, and economical external expert. Such expertise should employ for PPP procurement documentation, risk assessment, resolution of PPP procurement dispute, advice to state organisation and drafting implementation agreement.

As short term reforms to existing legislative framework, DL stated incorporating proper definition for PPPs, empower the national unit of PPP to advice and review the PPP procurement actions of government entities, assign the negotiation power of PPP to a specific committee consisted of well trained for PPP negotiation and having negotiation skills rather than negating by various entities for different PPPs. Further, DL proposed that until new guideline is published, a model form of implementation agreement and guide to risk assessment of PPP should be published by national agency for PPP and issue a supplement to Part II Guideline stating to adhere to said model forms and guides. DL stated *“It will be significant to put in place a clear and consistent policy on the PPP procurement and the policy framework will help to improve and align understanding of PPPs within Government together with establishing a PPP policy, a review of the current legal framework needs to be undertaken to align policy and the regulatory framework”*. Develop such kind of PPP policy, draft a new PPP guideline to replace the existing Part II Guideline establishment of permanent national committee to priorities the development projects in Sri Lanka and finally enactment of a PPP act to properly structure and manage PPPs and it includes definitions, institutional framework, government financial

support to PPPs, procedure of solicitation and source selection, adoptability of unsolicited proposal, and contract administration practice, are proposed by DL as long term reforms required to our existing legal framework.

PS emphasised that certain amendments to existing guideline should be made as short term reforms. Such amendments are definition for application of said guideline for PPP projects, assignment of powers vested with BII to national agency for PPP, draft content of procurement documents and model implementation agreement. Further PS viewed that a national PPP policy should be established to a better understanding both state and private sector organisations and to encourage private sector investors to PPPs. New PPP guideline should drafted with aid of international PPP expert after broad study of the loop holes of the existing guideline and it should discuss the key aspects role of private and public sector partners, various model of PPPs and their application and limits, composition of the various committees, PPP source section methods. National PPP unit should be authorised as PPP procurement advising and review unit and based on final review comments of the national PPP unit, other committees appointed according to the new guideline should proceed the work. Set of new documents for PPP procurement should be published by national PPP unit and make mandatory requirement that follow said standard documents by government sector organisation for PPP procurement. The said new standard document should include risk assessment methodology, feasibility studies of PPPs, preparation of pre-qualification documents and RFP document, conditions of contract and sample agreement. As per the view of Procurement Specialist, implement national PPP policy, publishing of new guideline and set of standard documents are long term reforms to existing legislative frame work. Additionally, PS viewed *“We have to take advice and guidance from international PPP practitioners and researchers and proper study on the issues of legislative framework of other PPP practicing countries”*.

All interviewees suggested various short term and long term reforms to our existing PPP legislative frame work for popper delivery future PPPs. Accordingly, key findings of proposed reforms of Case B are summarised in Figure 4.11.

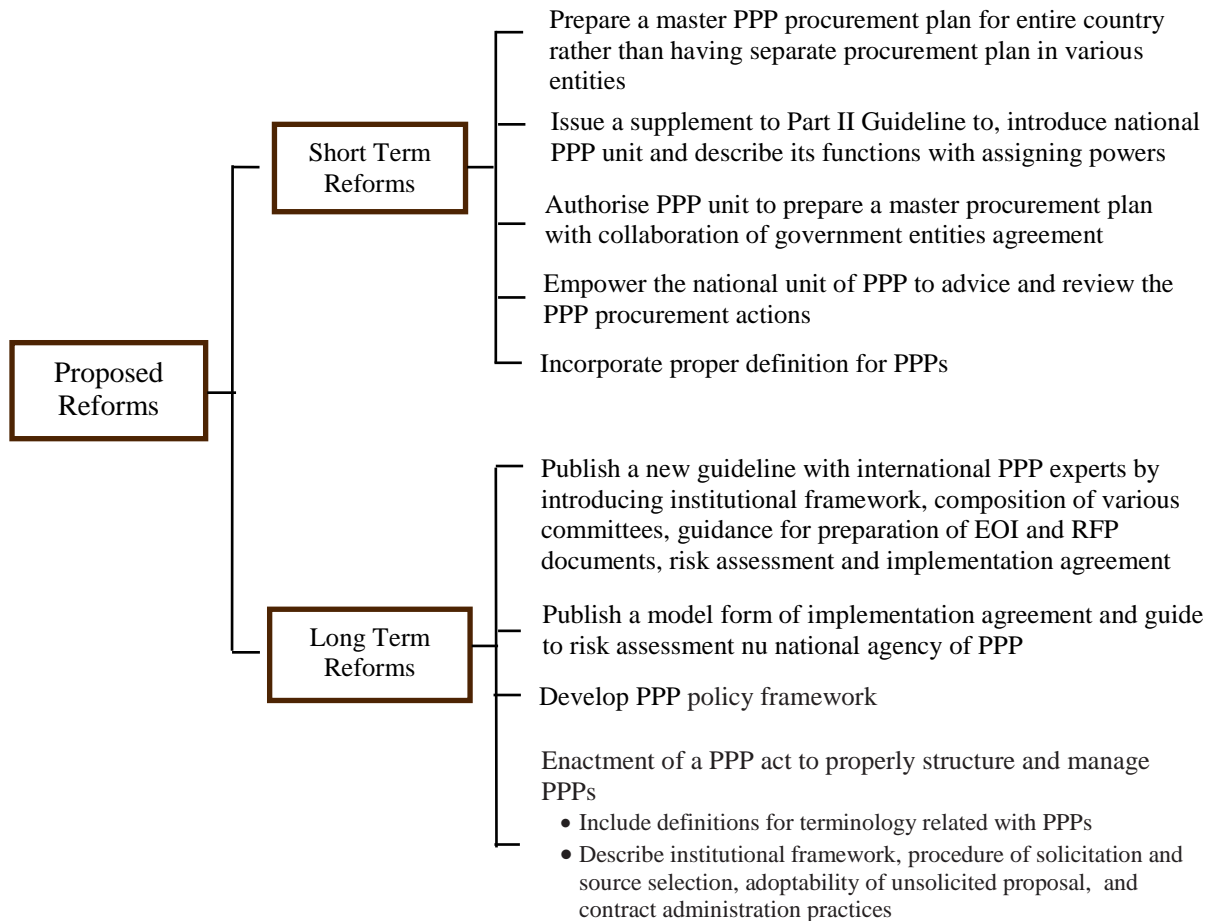


Figure 4.11: Findings of Proposed Reforms in Case B

4.3.3 Case C

4.3.3.1 Case introduction

A national department established under an act passed by parliament, was selected as Case C as stated above. The Deputy General Manager, the Chief Engineer and the Senior Quantity Surveyor were interviewed based on interview guideline (Appendix B).

Deputy General Manager (DGM) said “*The prime objectives of our department are directly engage in construction of individual houses and apartments, formulate scheme to establish housing development projects, re-development of slum and sanity areas and promote activities related with housing development*”. The interviewees explained that they have plenty of experience in different forms of PPPs especially in housing and mixed developments and besides, Senior Quantity Surveyor (SQS) said

that our exposure to PPPs belongs feasibility, procurement and execution stages. Similarly, Chief Engineer (CE) stated that once PPPs is implemented, separate project monitoring unit undertake the responsibility of supervision and administration of PPP.

4.3.3.1 Solicitation planning

PPP Guidelines

As per the view of DGM, *“PPP is a broad term for the associations moulded between the private segment and public institute in order to deliver services which normally delivered by public body and according to my knowledge the term “PPP” is not defined anywhere in our guidelines”*. Both DGM and CE stressed that Part II guideline can be accommodated for procurement of PPPs. Incompatible to their argument, SQS emphasised that certain authorised institutions listed in Part II guideline, have become inactive and specially coordinating body: BII was not functioning now and if such main authorised institutions are not active, it is questionable how such guideline can stand for procurement of PPPs. Additionally, he stated that without specific guideline and clear cut definition for PPP, it is difficult to prevent the use of ad-hoc pattern for PPP procurement. The experts’ arguments revealed that absence of a definition for PPP and currently inactive organisations prescribed in Part II Guideline has been caused to use to ad-hoc practices by various government institution.

Identification of national prioritised PPP

As per the advice of DGM, *“Identification of national prioritized projects are extremely essential not only for PPPs but also for other projects and such prioritization should be done by an external independent committee representing Institute of Engineers Sri Lanka, Institute of Quantity Surveyors Sri Lanka, Institute of Architects Sri Lanka, Institute of Accountants Sri Lanka, Sri Lanka Bar Association and etc”*. Furthermore, DGM viewed *“I believed that execution of the said prioritization through national PPP unit is not healthy option as certain responsibilities have been assigned within a limited time frame and they may be buyers when achieving assigned targets on time”*. Both CE and SQS forwarded a

similar argument that identification of projects needed to procure through PPPs, are highly essential to be executed by an expert body yet they did not declared whether it should be done through a national PPP unit or any other independent committee. Even though there are different views on existence of national expert committee, the interviewees stressed that such committee is highly essential to the country to identify the prioritised project.

Risk allocation

DGM stated that it is significant effective risk management approaches for the public and private sectors for PPPs in order to minimise the occurrence of dispute during the execution stage. Further, DGM viewed that a proper guideline should be issued by National Procurement Commission on risk assessment in PPPs to produce a most reasonable risk allocation and unique PPP practice. CE viewed that proper risk assessment should be conducted before implementation of the PPPs and identified individual risks should be allocated to the parties who are properly able to manage that risk. While forwarding similar argument by the SQS, he highlighted that improper risk allocation may cause to project failures and proper guidance should be given through PPP unit once PPP proposal is forwarded for its approval and review. All of them viewed that identification of risk and proper allocation of them is crucial in PPPs and lack of such guide is one major loop hole in the existing PPP legislative framework.

Bidding process

As per the advice of DGM, *“I think that it is not essential to follow competitive process to select suitable proponent for PPPs since permitting unsolicited proposals should encourage the private sector to generate most advantageous concept for project development that might have not been surveyed by the government”*. Similarly, CE argued that it is required to entertain even unsolicited proposal by the government, when there may be projects which investor are not attracted, yet highly essential to fulfil public needs. Further, CE stated that by using unsolicited method, a government can save money owing to by-pass the tender process. Both DGM and CE emphasised that PPPs should emerge from unsolicited and solicited mechanism since government has to craft the returns of the both. SQS said that since 2015,

government barricaded the space given to entertain unsolicited proposal by Part II Guideline as most of projects emerged through unsolicited basis in Sri Lanka have been failed during the last few years. Further, SQS viewed that unsolicited proposals lead to increment of public sector corruptions and one way to reduce public sector corruption and opportunistic behaviour by private proponents of projects is to forbid all unsolicited proposals.

Additionally, DGM emphasised that in the majority of PPPs, the financial capacity and prior experience of implementing similar nature projects are the most important requirements, therefore pre-qualification process is highly essential for PPPs. Similar CE and SQS said that pre-qualification process help to short list the interested parties and reduce to participation of less qualified parties to proposal submission.

Committees

As per the view of DGM, *“Although, most of the members of technical committees and procurement committees are thoroughly familiar about TPP, they are not well conversant with PPP, guidelines and practice and therefore, they used to follow TPP process to implement PPPs”*. SQS brought the same argument and suggested that PPP process including procurement activities, should be monitored and reviewed by national procurement unit. Moreover, DGM stressed that at least group of professionals should be needed to train on PPP process. CE pointed out that composition of various committees should be clearly described on PPP guideline and there should be a provision to obtain the service of expert professionals if such committee needed.

Accordingly, key findings of solicitation planning in Case C are summarised in Figure 4.12.

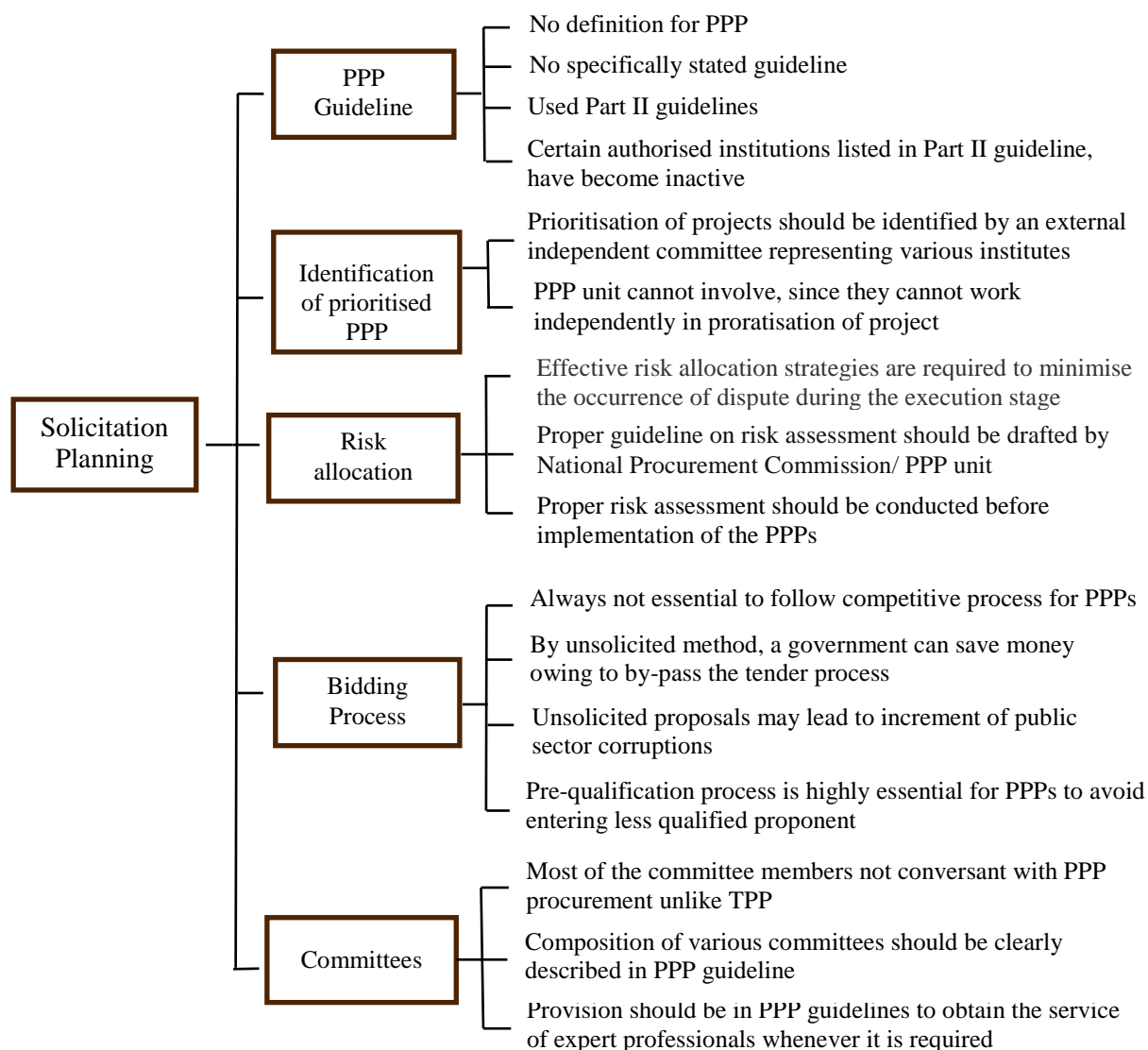


Figure 4.12: Findings of Solicitation Planning in Case C

4.3.3.2 Solicitation and award

Negotiation

CE stated that PPP negotiations are generally focused on price and risk allocation and that the procurement entity should rank all responsive proposals on the basis of the evaluation criteria set out in the RFP and invite the best-rated proponent to negotiate certain elements listed in the RFP as negotiable tools. Similar argument was brought by the SQS and stressed that negotiations between the contracting authority and private party should be confidential and all member should give a declaration confirming that negotiated technical, price or other commercial

information are not revealed to any other party. As per the view of DGM, *“In structuring, negotiating and implementing PPPs, the host government negotiators should recognize and seek ways to accommodate the fundamental interests of the private proponents, in a manner not inconsistent with the government’s interests”*. Accordingly, negotiation is possible in PPPs to craft best outcome from PPPs and their views denoted that RFP document should disclose negotiable terms clearly.

Appellate Process

DGM stated *“Even though Part II guideline is soundless on procurement review process, generally in RFP documents, we include provision for procurement appellate process, since it is effective and efficient resolution of procurement dispute through administrative procure such as procurement appellate board rather than moving for judicially review process”*. Moreover, DGM viewed that authoritative procedure may encourage economy and effectiveness, since as a rule, specifically preceding the granting of the undertaking, the contracting authority might be very ready to address procedural mistakes, of which it might even not have known and the key issue raised concerning legal audit is tedious and the impact of a judgment that abrogates a granted agreement which works have just been started. Both CE and SQS pointed that no opportunities to challenge or appeal on unfair term, unfair criteria, and unrealistic risk in RFP document during tendering process and highly emphasised the existence of such administrative review process to resolve PPP procurement dispute. CE emphasised *“It may also be useful to provide for the first instance review by higher government administrative bodies and, lastly, by the court system, since most domestic procurement schemes adopted for PPPs and such an administrative body should be a separate independent body and not a PPP practicing or facilitating institution”*. Therefore, it is obvious that even though such procurement appellate process is discussed for TPP in Procurement Guideline for Goods and Works (2006), Part II Guideline does not disclose such procedure and procurement dispute can be resolved only through litigation process.

Contract agreement

All of interviewees viewed that there is no acceptable standard form to draft implementation agreement for PPPs and bespoke agreements which were used to

previous projects with necessary amendments and improvements, are used as implementation agreement for PPPs. Further, interviewees stated that before implementing project agreement, generally it is reviewed by the legal department and obtained concurrences from Attorney General's Department. SQS highly emphasised that the previous PPPs agreements were prepared and reviewed by legal division and at the implementation stage of the PPPs, both contracting organisation private entities had to suffer certain issues since absence of contractual provisions to deal with technical issues and some of them were resolve by signing amendment to implementation agreement and others leads to disputes. Further, SQS stressed that a standard form is highly essential to the country since Sri Lanka is willing to implement new PPPs near future and National PPP unit can start preparation of draft version of PPP model agreement with aids of World Bank. Similarly, DGM stated that a national level committee should be appointed with legal and technical experts including PPP practitioners to draft model implementation agreement and it can be reviewed through international PPP expert committee.

Accordingly, key findings of solicitation and award of Case C are summarised in Figure 4.13.

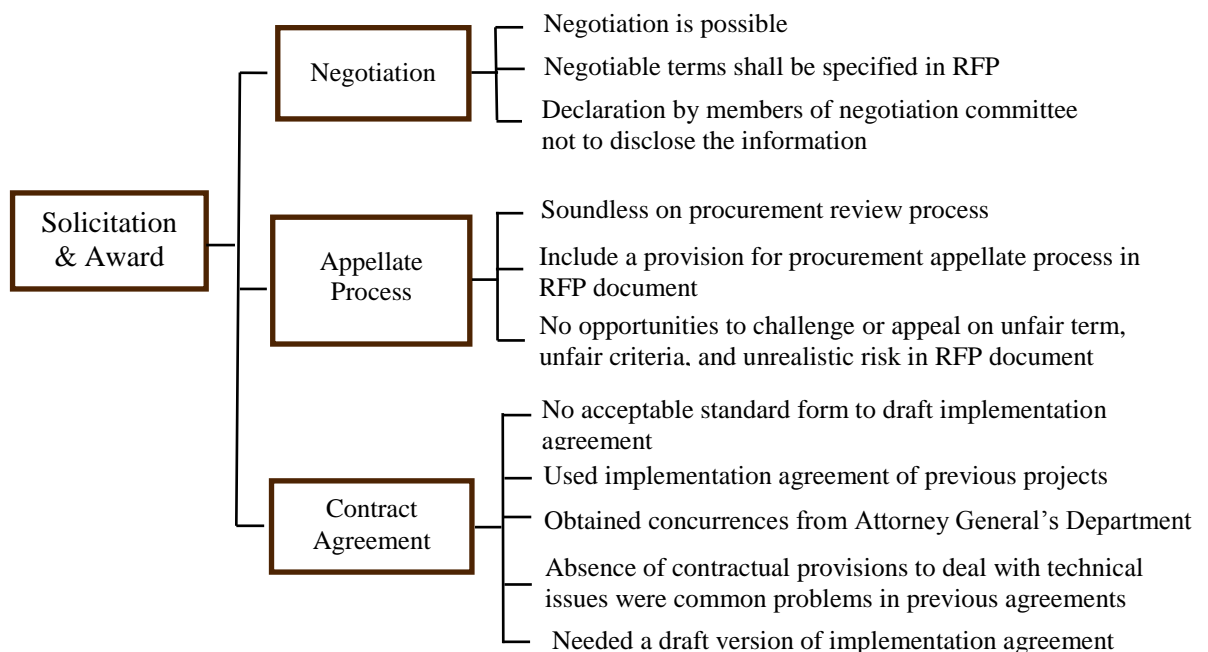


Figure 4.13: Findings of Solicitation and Award in Case C

4.3.3.3 Proposed reforms

As per the view of DGM, *“Today, there is a worldwide revolution in the delivery of infrastructure through PPPs and thus a country's legal framework for embarking PPPs is crucial”*. In addition, DGM stressed that a high degree of legal certainty and regulatory stability, which is very important in building an enabling environment for PPPs to thrive, is very important for Sri Lanka. SQS expressed that last year budget speech highly discussed on adopting PPPs to economic development to prevent the government financial constraints and to face new challenges in PPPs, it is required to strengthen the existing legal framework. Same argument was forwarded by CE and additionally, he stated that proper legal review should be conducted incorporating Attorney General's Department and private sector legal experts before moving for large scale PPPs. Accordingly, all interviewees accepted that certain reforms are essential to strengthen the existing legal framework to meeting future challenges in PPPs.

DGM stressed *“Until proper guideline is set out, we have to use existing Part II Guideline for PPP procurement and as short term reforms to our PPP legal framework, shortfalls in the said guideline can be rectified”*. Therefore, power vested with inactive organisations such as BII and NC should be empowered to capable entities and proper definition for PPP, its application, limits and various mode of PPP should be introduced. Besides, DGM emphasised that the need for a separate, autonomous and strong central PPP unit within the administration of the host country with overall responsibility for policy-making and practical guidance for public and private sector organizations and the need to link the recently established national PPP agency to Part II Guideline. Moreover, DGM viewed that various government department currently follow only certain aspect pf Part II Guideline, therefore as a long term reforms proper PPP procurement guideline and manual to describe respectively what to do and how to do in PPP procurement, are essential with proper studying of international model laws, guidelines, manuals, researches and laws of other PPP practicing countries. The said guideline and manual should describe that clear definition for PPP, models of PPP, their application and limits, possibility of entertaining unsolicited proposals, requirement of pre-qualification process, PPP tendering process, debriefing system, review of procurement dispute

and award of PPP contracts. Additionally DGM stated that national agency of PPP should undertake the responsibility of training the selected professional for PPP procurement and registering the pool of experts in the field of legal, technical, economic and financial to provide the external expert services if the contracting organisations are required.

As per the view of CE, the new PPP legislation should provide guidelines on the correct allocation of risks, the choice of tendering approaches, the drafting of procurement documents and a space for contracting authorities to negotiate the terms of the PPP contract in a reasonable manner, while the legislative structure is silent for those. Further he emphasised that last few years budget speech highlighted the implementing PPPs for several sectors and certain projects already procured and therefore as short form reforms to the existing legal framework, model PPP contract, guideline for sensible risk allocation and drafting procuring documents should be drafted to make good to use the said document among PPP contracting institutes and departments. To strengthen the PPP legislative framework, PPP act should be passed and it should discuss PPP process and institutional framework, special reforms to other exiting laws for PPPs. As a long term strategy to support and promote PPPs, new act should recognised centralised PPP unit and it should be authorised to promote, advice and review PPPs and prepare relevant guidelines, manual and model forms. Further CE viewed that said PPP unit should coordinate all PPPs in national level and to coordinate and support for PPPs in ministry and department level, few PPP nodes should be developed within the specific line ministries.

As short-term reforms to existing legislative framework SQS viewed that a national level independent expert committee, should be established to identify the national prioritised project which are needed to launch as PPP and highlighted that need of incorporating proper definition for PPPs, empower the national unit of PPP to advice and review the PPP procurement actions of government entities, assign the negotiation power of PPP to a specific committee. Further, CE stressed that the standardized contracts make the PPP process much more effective and transparent without unnecessary administrative or legal restrictions should not be placed on the ability of the contracting authority to agree on a risk allocation appropriate to the project's needs in order to use the PPP concept effectively. Therefore, the legislative

framework should support to proper risk assessment and effectively draft PPP contract and this purpose model PPP contract and risk assessment guide should published to use contracting authorities with the aid of the national and international experts as long term reform. Additionally, he highlighted that new PPP guideline should be developed discussing the key aspect of PPP implementation models, private and public sector role, PPP procurement process, project operation.

Accordingly, key findings of proposed reforms of Case C are summarised in Figure 4.14.

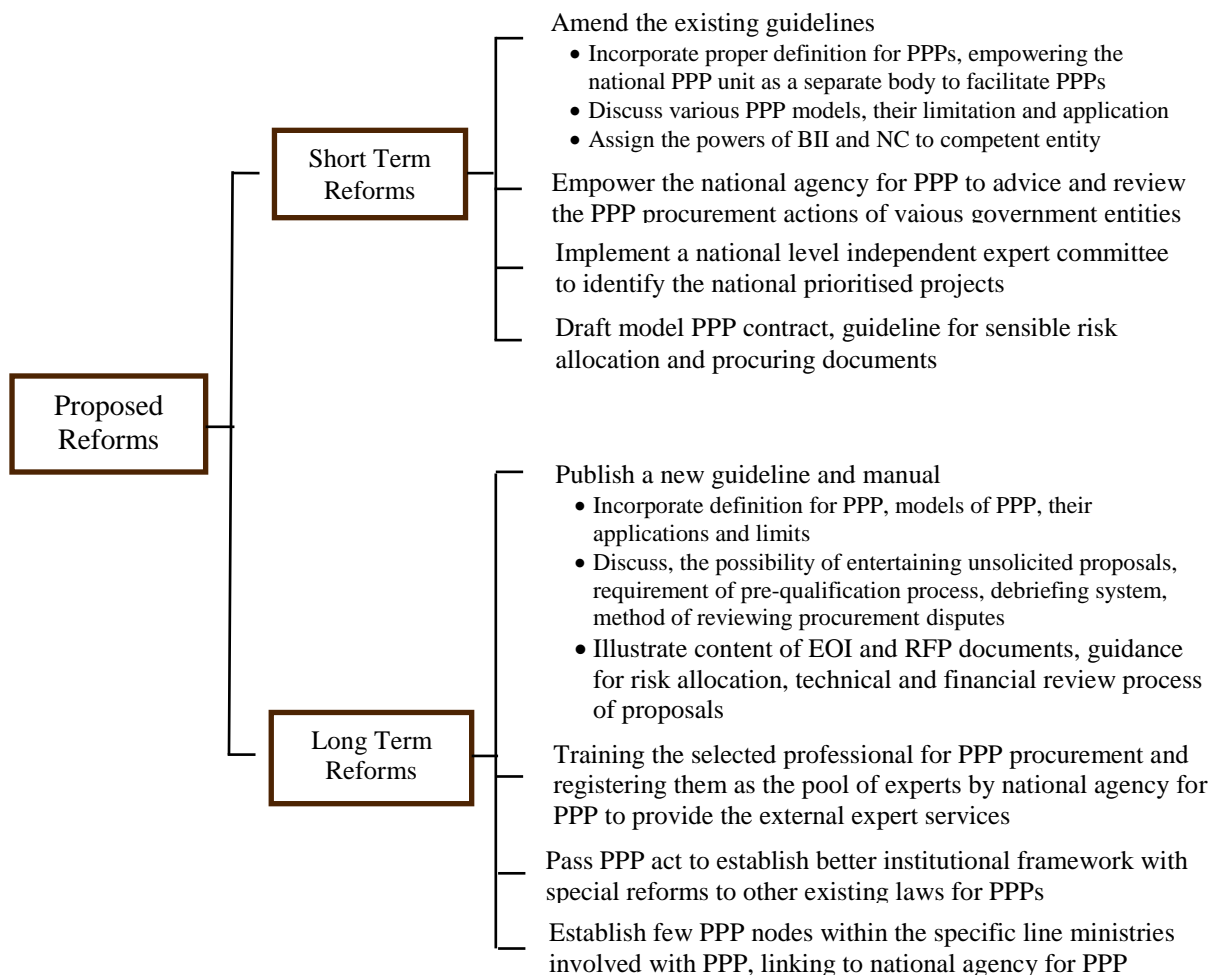


Figure 4.14: Findings of Proposed Reforms in Case C

4.4 Cross Case Analysis

The cross case analysis is based on the PPP procurement in order to identify the deficiencies in PPP procurement process, current practices and proposed reforms. In-depth exploration of all three (03) cases and summarised content analysis in Figures 4.6 - 4.14, existing deficiencies in PPP legal framework, current practices and proposed reforms are illustrated in Table 4.4 under nine (09) broad headings: PPP guidelines, national prioritised PPPs, risk allocation, bidding process, committees, negotiation, appellate process and contract agreement.

Table 4.4: Deficiencies, Current Practices and Proposed Reforms

No.	Deficiencies	Current Practice	Proposed Reforms/ Suggestions
<i>PPP Guideline</i>			
01	No specific guideline for PPP in Sri Lanka	<ul style="list-style-type: none"> • Procuring Entities use ad-hoc methods • Used Part II Guideline 	<ul style="list-style-type: none"> • Draft a new guideline for PPP procurement
02	No proper definition for PPP	<ul style="list-style-type: none"> • Some projects named as PPPs though they were not really PPPs 	<ul style="list-style-type: none"> • Define “PPP” in procurement guideline • Overlook on practices of other countries • See definition given in other countries’ acts and guidelines
03	Non-functioning of regulatory bodies	<ul style="list-style-type: none"> • Procuring Entities use ad-hoc practices 	<ul style="list-style-type: none"> • Activate non-functioning institutes • Delegate power vested with BII to national agency of PPP
<i>National prioritised PPP</i>			
04	No existing procedure to identify the national prioritized PPP	<ul style="list-style-type: none"> • Various procuring entities procure their PPP separately • No assessment of national prioritized projects 	<ul style="list-style-type: none"> • Assess through separate independent expert team representing technical, financial and legal professionals • Assess through an expert committee representing members from professional institutes • Assess through National Agency of PPP • Preparation of master procurement plan for PPP by through National Agency of PPP with collaboration of other government departments

<i>Risk Allocation</i>			
05	Absence of risk assessment guideline for PPP	<ul style="list-style-type: none"> • Proper risk assessment is not conducted before implementing PPP • Risks are allocated unreasonable, unrealistic manner 	<ul style="list-style-type: none"> • Draft a risk assessment guideline by National Procurement Commission • Draft a risk assessment guideline by National Agency for PPP • Make a dequate provision to PPP procurement Guideline on risk assessment
<i>Bidding process</i>			
06	Unsolicited proposal leads to corruptive practice	<ul style="list-style-type: none"> • Both unsolicited and solicited methods are practiced • Used for less competitive projects or where price is not most critical 	<ul style="list-style-type: none"> • Limit use of unsolicited proposal for PPPs • Procurement Guideline should describe the circumstances where unsolicited proposal can be entrained • Practice Swiss Challenge approach
07	No any guidance for pre-qualification of proponent	<ul style="list-style-type: none"> • Procuring Entities use a d-hoc methods 	<ul style="list-style-type: none"> • Procurement Guideline should describe where pre-qualification process should undergo • Pre-qualification process should describe in PPP Procurement Guideline • Draft pre-qualification document should be published by National Agency for PPP
<i>Committees</i>			
08.	Procurement and technical committee members are not conversant PPP, practice and procurement	<ul style="list-style-type: none"> • Procuring Entities use a d-hoc methods • Obtained the service of National Agency for PPP 	<ul style="list-style-type: none"> • Conduct workshops and seminars on PPP practice and procurement by National Agency for PPP • Train group of professional with international exposure • Called experts views if such committees are not competent • Maintain pool of expert by national agency for PPP • Undergo draft documents and proposal evaluation through National Agency for PPP
<i>Negotiation</i>			
09.	No-guidance to specify the negotiable and non-negotiable terms	<ul style="list-style-type: none"> • Procuring Entities use a d-hoc methods • Obtained the service of National Agency for PPP 	<ul style="list-style-type: none"> • Describe in RFP document on negotiable and non-negotiable terms • National Agency for PPP should publish a draft RFP

□

10.	No authorised party to negotiate terms	<ul style="list-style-type: none"> • Procure entity negotiate terms • Negotiation were done by a separately appointed committee • Negotiation were done by a procurement committee • Negotiation were done by jointly procurement committee and procuring entity 	<ul style="list-style-type: none"> • Give full authority to National Agency for PPP • Appoint separate independent impartial negotiation committee
<i>Appellate Process</i>			
11.	Not existence of procurement appellate process for PPP	<ul style="list-style-type: none"> • Specify the procurement appellate process in RFP • No procurement appellate are entertained • Judicial appellate process is only existing 	<ul style="list-style-type: none"> • Procurement Guideline specify the Procurement appellate process for PPP • Give authority to National Agency for PPP to entertain the complaints of bidders at tender stage
<i>Contract agreement</i>			
12.	Absence of standard form to draft implementation agreement	<ul style="list-style-type: none"> • Attorneys draft implementation agreement • Hire contract specialist to draft • Use agreement of previous PPPs with necessary amendments and improvements • Get consent from Attorney General's Department for draft agreement 	<ul style="list-style-type: none"> • Publish a standard form of contract by National Agency for PPP • When deviating implementation agreement from standard form, obtain the concurrence from Attorney General's Department • Review bespoke agreement by legal and technical expert committee

According to the views of interviewees, there are short and long term reforms to rectify the identified deficiencies in current legal and regulatory framework in PPP procurement and further they are summarised in Table 4.5 and 4.6 respectively,

based on the summarised proposed reforms by all interviewees in case A, B and C which are given in Figure 4.8, 4.11 and 4.14.

Table 4.5: Short Term Reforms

No.	Short Term Reforms
01	Amendments to the existing Part II Guideline <ul style="list-style-type: none"> • Incorporating proper definition for PPPs • Assigning the powers of the inactive organisations • Empowering the national PPP unit to facilitate PPPs • Making mandatory to undergo national PPP unit when implementation
02	Establishment of national project prioritization committee
03	Preparation of master procurement plan through national PPP unit
04	Conduct workshops and seminars on PPP practice
05	Train group of professional with international exposure
06	Draft guidelines until new PPP guideline published <ul style="list-style-type: none"> • Pre-qualification • RFP document • Risk assessment • Implementation agreement

Table 4.6: Long Term Reforms

No.	Long Term Reforms
01	Publish a new PPP Guideline <ul style="list-style-type: none"> • Define role of National procurement committee and national agency for PPP • Incorporating proper PPP definition • Describe application and limitation of various PPP modes • Requirement of pre-qualification • Describe debriefing and standstill period • Detail procurement dispute resolution system • Describe possibility of accepting unsolicited proposals • Describe the content of EOI and RFP documents • Guidance for risk assessment • Detail proposal evaluation process • Negotiation process and authority • Describe international best practices of PPP
02	Publish a PPP procurement manual to use along with guidelines
03	Make amendments PPP related other laws
04	Establish national PPP policy
05	Preparation of standard documents <ul style="list-style-type: none"> • Pre-qualification and RFP document • Risk assessment • Implementation agreement
06	Obtain advise from international PPP experts
07	Establishment of PPP nodes

Accordingly, based on the summaries of cross case analysis given in Table 4.4, 4.5 and 4.6, a framework to assist procurement of PPP was developed and illustrated in Figure 4.15. It describes a framework to reform existing PPP procurement law in general and for procurement stages: solicitation planning, solicitation and award. Further, framework explains methodology which should be adopted to, mitigate the deficiencies and reform the existing PPP law in short term and long term.

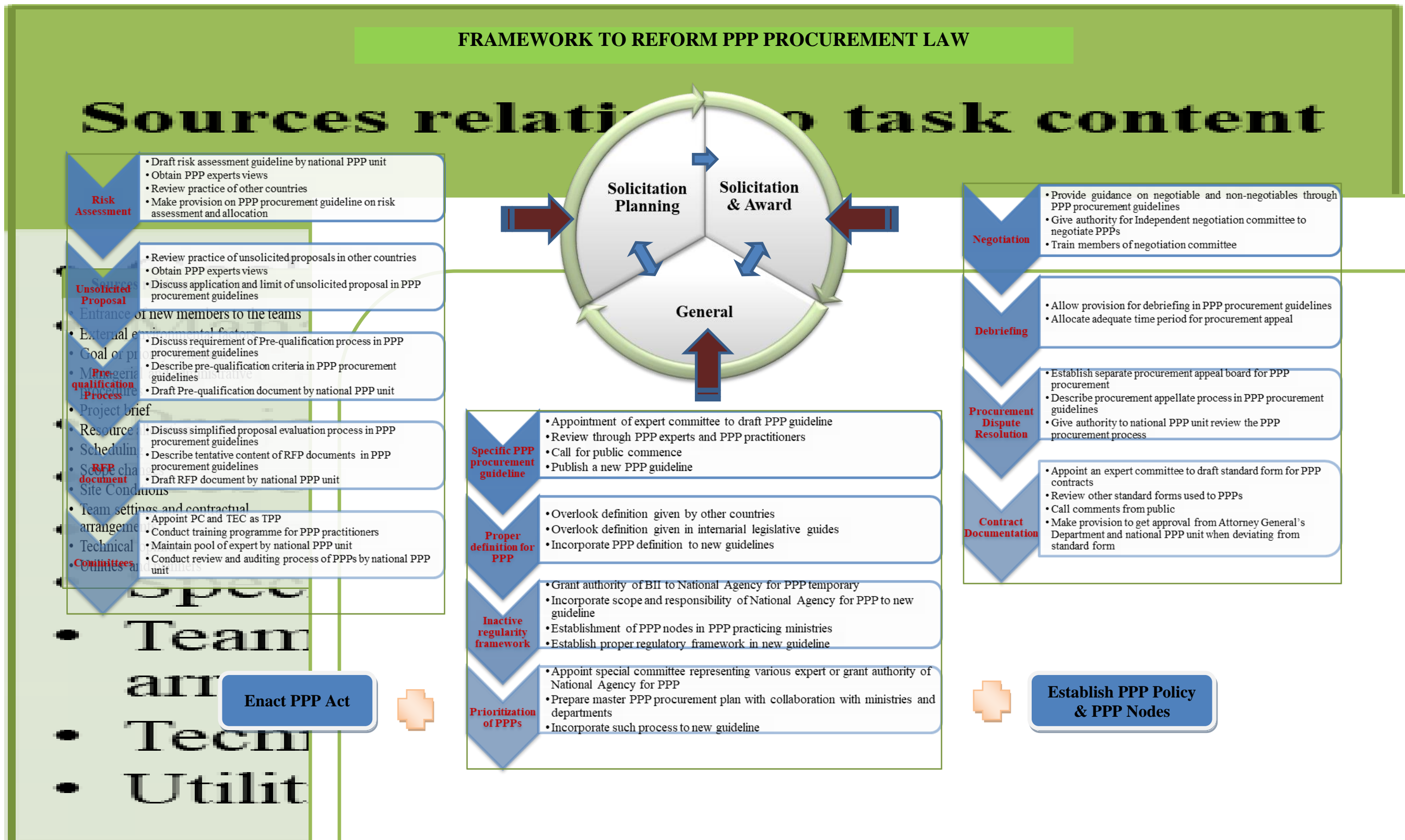


Figure 4.15: Fram

4.5 Summary

In summary, in-depth analysis of primary and secondary data, it was concluded that there are currently a series of non-uniform legislative guidelines on PPPs and, based on international model laws, different countries around the world have adopted special PPP laws or PPP guidelines to regulate PPPs in their countries. Even though, in Sri Lanka there was no specific act dealt with PPP procurement, various procuring entities used Part II Guideline and subsequently issued supplements as PPP procurement law. Further, it was revealed that our existing legal and regulatory framework for PPP procurement is defective and short and long term reforms are required to rectify the deficiencies of existing PPP procurement law to meet future challenges.

5.0 CONCLUSION AND RECOMMENDATION

5.1 Introduction

The previous section examined the primary and secondary data results and addressed them. This chapter focuses on conclusions and recommendations from the previous chapter's analysis and discussion.

Next, findings are provided on the overall problem of study. Subsequently, a framework was developed based on the empirical studies to assist in the procurement of PPPs, and the findings were summarized to get a better understanding. Recommendations are subsequently presented under the subdivisions: Implication to Theory and Implication to Building Industry. Finally, the new directions of research that emerge from this study are being developed.

5.2 Conclusions

Prime aim of this study is to investigate necessity of reformation of existing PPP procurement law to meet future challenges in procuring PPPs in Sri Lanka. Literature synthesis concluded that worldwide, PPP has been identified as one of the significant tools to bridge infrastructure investment gap to underpin and reinforce for an economic development, and there a vast trend for PPPs in future Sri Lanka to narrow the investment gap and in particular and absent of well-established legal and regulatory framework has been identified as a key challenge in implementing PPPs.

After acquiring information through interviews and secondary sources, content analysis and cross-case analysis were carried out data reduction and concept identification. Accordingly, it is explicit that currently, there are series of non-uniform legislative guides such as UNCITRAL Legislative Guide, UNIDO's Guidelines for Infrastructure Development, OECD Basic Elements of Law on Concession Agreement, EBRD's Core Principles on Modern Concession Law and European Commission's Directives on the Award of Concessions, made by distinct international organisations to guide on best practice of PPPs. Based on international model laws and guides, various countries around the world, have been enacted special PPP law or PPP guidelines to regulate PPPs in their countries. In Sri Lanka,

there is no specific act dealt with PPP procurement. Therefore, Part II Guideline and subsequently issued supplements (23 and 30) to it, form PPP procurement law in Sri Lanka and other bodies of the law such as Unfair Contract Terms Act, Sale of Goods Ordinance, Labour, Taxes, Customs, Insurance, Banking, Export & Import and Foreign Exchange Control law, support for PPP procurement. Accordingly, current PPP legislative framework in Sri Lanka, PPPs can be launched through only solicitation and Swiss Challenge method. Whereas, various PPP related institutions such as BII, CANC, PC and NC, were formed as prescribed in the Part II Guidelines, which have become inactive now. Following a cabinet decision, the national PPP unit has being constituted under the MOF in 2017 and afterwards, with the 19th amendment to Constitution, National Procurement Commission was established. Whereas, certain ambiguities and grey areas have been created in PPP procurement law, since scope and responsibility of national PPP unit is not clear and Section 156 (b) of the Constitution is silent on PPP procurement. Finally, after extensive investigation of secondary sources, it was revealed that the existing legal and regulatory framework for PPP procurement is defective and caused to create lot of ambiguities. Further, it was denoted the extensive requirement of certain legal reforms to existing PPP procurement Law for better implementation of PPPs to contribute economic development properly.

Case study findings indicated that current existing legal and regulatory framework for PPP procurement is defective. Therefore, short and long term reforms are highly essential to underpin and reinforce the existing legal framework to meet future challenges. In-depth empirical studies revealed major twelve (12) deficiencies in the existing PPP procurement law. Inactive regulatory framework, absence of, separately specified procurement guideline, specific definition for PPP, guidelines for risk assessment, RFP document drafting and contract agreement, are among them. Besides, due to such deficiencies, various state sector entities adopted different mal-practices and ad-hoc system to PPP procurement and it has been discouraged the PPP proponent and investors. Further, findings highlighted that amendments to the existing Part II Guideline, establishment of national project prioritisation committee, preparation of master procurement plan, conducting workshops and seminars on PPP practice, train group of professional with international exposure and draft guidelines for risk assessment, contract agreement and RFP documentation as short term

reforms while emphasising publishing a new PPP Guideline and manual, reforming PPP related other laws, establishing national PPP policy, preparation of standard documents, obtaining advise from international PPP experts and establishment of PPP nodes as long term reforms.

Accordingly, as shown in Figure 4.15, developed framework can be adopted to reform existing PPP procurement law since it has been addressed the identified deficiencies, short term and long term reforms. Further, it provides guidelines to reforms PPP procurement law in general and stage wise: solicitation planning, solicitation and award.

5.3 Recommendations

This research focused on regulating PPP for economic development and mainly investigated procurement stage. Following the research findings can be suggested as implications for the construction industry and theory.

5.3.1 Implications to theory

This study identified that PPP is not an innovative concept to the world and it was decidedly practiced during last few decades to answer the development issues and challenges in numerous countries. Lack of sufficient regulatory and legal structure for PPP becomes a key challenge implementation of PPPs successfully in various countries. According to the countries' legal system, it is required to enact specially PPP law or regulation or guidelines and amendments to other PPP related laws to successfully implement PPPs. Many non-uniform legislative guidelines are provided by various international organizations to standardise PPPs and PPP practicing countries can use said legislative guides to draft their own PPP laws.

Sri Lankan government embraced PPPs as one of the significant tool to address development issues and challenges to underpin and reinforce for an economic growth. There is no specific PPP act in Sri Lanka and Part II guideline and subsequently issued supplements only creates PPP law in Sri Lanka. Therefore, this research unearthed a framework as given in Figure 4.15 and it can be used to implement PPP procurement law for Sri Lanka.

5.3.2 Implications to industry

The research findings revealed that our existing PPP procurement law is defective and it is debatable the authority of formulation of PPP procurement whether it is belongs to MOF or National Procurement Commission since scope and responsibility of National Agency for PPP, are not well defined and section 156 (b) of the Constitution is silent on PPP procurement. Due to that various line ministries and contracting authorities in Sri Lanka presently use only certain aspects of the Part II Guidelines. It was recognized that short term and long term actions are required to implement for reformation of PPP procurement law since there will be a vast trend on PPP in future Sri Lanka.

As described in table 4.4, this research identified twelve major deficiencies in PPP procurement law in Sri Lanka and further in Table 4.5 and 4.6 illustrated short term and long term reforms respectively. As a solution to the identified aforesaid deficiencies, suggested framework shown in Figure 4.15 can be used to implement short term and long term reforms to smooth practice of PPPs in future.

5.4 Limitations of the Research

This study was limited only investigation of legislative framework of PPP in procurement stage in public sector perspective. As illustrated and clarified in Chapter 3, the study's generalizability is limited to the sample population of the case study and cannot be extended to a larger population or universe. The cases for primary data collection were selected only from PPP project adjoining with construction and secondary data was gathered by only referring four widely used international legislative guides. It is also important to note the issues relating to project accessibility have also limited the research's generalisability.

5.5 Further Research

It seemed fitting, after performing this research that further work should concentrate on the following areas.

1) A study on same unit of analysis in different contexts

It is obvious that the results of this study can be modified in different contexts, especially in other industries that are practiced by PPPs.

2) Same study on different unit of analysis

The unit of analysis in this study was PPP practicing organization. Same study can be repeated with different unit of analysis such as PPP projects and PPP practicing industries.

3) Same study for referring other secondary sources

This study was limited to four widely used international legislative guides. Same study can be carried out by referring other countries PPP laws which has similar legal system to Sri Lanka.

4) Same study for other stages of PPPs

This study was limited to procurement stage. Therefore, similar nature investigation can be executed for inception, detailed preparation and implementation stages of PPPs.

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APPENDIX A:

INTERVIEW GUIDELINES

Interview Structure

The information from this interview will only be used in fulfilling requirements of the dissertation for the award of Master of Science degree in Construction Law and Dispute Resolution. The interview is structured in following four main sections.

1. Identify the background information
2. Explore adequacy of existing legal and regulatory framework to procure PPP
3. Identify the gaps in legal and regulatory framework for PPP procurement
4. Propose reforms and recommendations in order to close the gaps of legal and regulatory framework

The interviews will be conducted with three (3) key participants of the PPP project team such as; project directors, procurement specialists, legal experts, engineers, architects and quantity surveyors. During interviews, a brief theoretical explanation about literature findings will be given in order to get the optimum experiential knowledge from the interviewees.

Note taking and tape recording (with permission of the interviewee) will be doing while interviewing to collect data accurately. However, to maintain confidentiality, the actual names of the projects and the interviewees will be not revealed in this report or any other document relating to this study. The selected persons will be interviewed based on the following guidelines.

Name of the organization:

Name of the Interviewee:

Designation:

Date of interview:

Venue:

Duration:

BACKGROUND INFORMATION OF THE INTERVIEWEE

1. Can you give a brief introduction to your organisation/ unit?
2. Can you explain briefly about your role in your organisation/ unit?

SOLICITATION PLANNING

3. What is the existing legal and regulatory framework in Sri Lanka to govern PPP procurement?
4. Is the term PPP defined in our legal and regulatory framework? If yes, how is it define? If no, do you think that such definition is required?
5. Who has the authority to identify national prioritised project which are needed to be procured under PPPs? Do you feel that such prioritization as required?
6. How is the sensible risk allocation made to PPPs? Is there any guidance given in the legal and regulatory framework? If no, do you think that such guideline is required?
7. Is it essential to follow competitive process to select suitable proponent for PPPs always? If yes/ no can you brief your justification?
8. Do you think that pre-qualification is necessary for PPPs? Why?
9. How do you prepare pre-qualification/ bidding document for PPPs?

-
10. Do you satisfied with the involvement of members of Project Committee and Cabinet Appointed Negotiation Committee to PPP procurement? Are they competent enough? Brief you answer.

SOLICITATION & AWARD

11. Do you thick that negotiation is required for PPP procurement? How do we conduct negotiation process? Who has the authority to negotiate such terms?
12. Can unsuccessful applicant appeal in PPP procurement? What is the process? If such process is not followed, do you feel that appellate process is required for resolution of PPP procurement dispute?
13. How do you prepare contract agreement? Is there any guideline/ standard form? If no, do think that such guideline/ standard form is needed?

PRPOSED REFORMS

14. Do you think that existing legal and regulatory framework for procurement of PPPs is adequate? Can you brief your argument?
15. If you are thinking that there are gaps in existing system, what are the short term and long terms reforms, which you are suggesting to incorporate to existing legal and regulatory framework?

APPENDIX B:**EXAMPLE OF AN INTERVIEW TRANSCRIPT**

Name of the organization: Organization A (actual name is not disclosed to maintain confidentiality)

Name of the Interviewee: Mr. A1 (actual name is not disclosed to maintain confidentiality)

Designation: Project Director

Date of interview: 06th of November 2018

Venue: Head office of organization A (actual venue is not disclosed to maintain confidentiality)

Duration: 45 minutes

BACKGROUND INFORMATION OF THE INTERVIEWEE

1. Can you give a brief introduction to your organisation/ unit?

The prime objective of our ministry is to bring systematic changes and development processes into the urban community in Sri Lanka which will ensure that the inhabitants of urban areas become a part of socio-economic development of the country while maintaining high levels in quality of life. Separate independent project implementation and monitoring units has been established with the approval of cabinet ministers to implement, monitor and administrate the various large and medium scale development projects.

2. Can you explain briefly about your role in your organisation/ unit?

I am working as a Project Director of one of project implementation and monitoring unit. We have to undertake 12 projects and some of them have already been started. I am monitoring the project planning, procurement and implementation work, which are directly under three DGM. Also I chair the Project Procurement Committee and representing member of procurement

and technical evaluation committees of other units. Further I have to participate ministry progress review meetings and Cabinet Committee on Economic Management.

SOLICITATION PLANNING

3. What is the existing legal and regulatory framework in Sri Lanka to govern PPP procurement?

There is no guideline for specifically PPP in Sri Lanka and Part II guideline is for concessionary type privately finance projects. However, we have to use said guideline for PPP procurement and most of the state sector organization used said Part II guideline for PPP procurement.

4. Is the term PPP defined in our legal and regulatory framework? If yes, how is it define? If no, do you think that such definition is required?

Even though, Part II guidelines is used as guideline for PPP procurement, it does not define the term; PPP. Due to absence of such definition, various government organisations are practicing certain projects as PPPs, but really they are not PPPs. Proper definition for PPP is essential. As a solution, he suggested that we have to overlook how other countries are practicing PPPs, how their acts and guidelines define PPPs.

5. Who has the authority to identify national prioritised project which are needed to be procured under PPPs? Do you feel that such prioritization as required?

There should be a special expert committee to identification of national prioritised projects which are launched through TPP and PPP and said nation expert committee should consist of professionals representing technical, financial and legal segments. Currently such committee is not exiting and various government entities procure PPPs and other development project without proper evaluation of their priorities.

6. How is the sensible risk allocation made to PPPs? Is there any guidance given in the legal and regulatory framework? If no, do you think that such guideline is required?

Most of the cases, the Employer tries to transfer more portion of the risk to private party in PPPs but actually I believed that even in PPPs risks should be allocated to the party who is the best able to manage them. Up to date there is no any guidance for sensible risk allocation for PPP projects in Sri Lanka and a proper guideline should be issued by National PPP unit on risk assessment to produce a most reasonable risk allocation and unique PPP practice.

7. Is it essential to follow competitive process to select suitable proponent for PPPs always? If yes/ no can you brief your justification?

Sri Lanka as well as other countries had bad experiences with unsolicited proposals as actual product expected by the public is not received and it becomes a mechanism to easily enter less qualified parties and to highly affect political influences. We have used unsolicited method for PPP procurement and from 2015 onwards government banded unsolicited method by introducing Swiss Challenge Approach whereas, with the approval of the Cabinet Ministers currently unsolicited proposals are entertained in special circumstances. Therefore, we have to follow transparent, fair and accountable procedure for PPPs as we are using public properties. Therefore, competitive bidding is essential for PPP also.

8. Do you think that pre-qualification is necessary for PPPs? Why?

In PPPs, the financial capacity and prior experience of implementing similar nature projects are the most important requirements and therefore pre-qualification process is highly essential for PPPs. Further, Pre-qualification process help to short list the interested parties and reduce to participation of less qualified parties to proposal submission.

9. How do you prepare pre-qualification/ bidding document for PPPs?

There is no standard procedure and various institutes prepare those documents based on their experienced or they hired competent consultant.

10. Do you satisfied with the involvement of members of Project Committee and Cabinet Appointed Negotiation Committee to PPP procurement? Are they competent enough? Brief you answer.

Even though, Part II Guideline discusses Project Committee and Cabinet Appointed Negotiation Committee to execute procurement activities of PPP, it is quite doubtful whether appointed members of the said committees are competent enough. There are very few PPP expert are in Sri Lanka and if such committees felt that they are not competent enough, anytime they can call for external expert views.

SOLICITATION & AWARD

11. Do you think that negotiation is required for PPP procurement? How do we conduct negotiation process? Who has the authority to negotiate such terms?

Negotiations may be for reduction of cost, identification of fresh alternatives and confirmation on terms of the implementation agreement. Proper negotiation process needed to adopt in PPP procurement are not clearly discussed in Part II guideline and due to that different parties are used to follow ad-hoc methods for such negotiation. A proper negotiation process, guidance for negotiable instruments and authorized party for such negotiation should be discussed in PPP guideline.

12. Can unsuccessful applicant appeal in PPP procurement? What is the process? If such process is not followed, do you feel that appellate process is required for resolution of PPP procurement dispute?

According to current legal framework, applicant has no chance to challenge or appeal on unfair term, unfair criteria, and unrealistic risk in bidding documents or RFP document during tendering period and proponent can embrace only he agree with the terms and conditions. For the proper execution of procurement of PPP, there be an independent body to appeal

against such deficiencies to get relief for the proponent. If the proponent felt that decision of the PC and CANC to award the PPP contract is unfair, they can appeal for Procurement Appeal Board.

13. How do you prepare contract agreement? Is there any guideline/ standard form? If no, do think that such guideline/ standard form is needed?

We have no standard form to draft implementation agreement for PPP projects and most of the cases with involvement of the legal and technical experts in particular departments, they prepared bespoke agreement. As different procurement entities prepare their own documents, it may create many ambiguities, discrepancies and conflicts among parties and finally leads to disputes. In my view, national PPP unit make an attempt to draft model implementation agreement and issued to all PPP practicing institutes and it should be a user friendly document to adjust the terms to cater various the requirement of the PPP.

PROPOSED REFORMS

14. Do you think that existing legal and regulatory framework for procurement of PPPs is adequate? Can you brief your argument?

PPPs are complicated long term transactions that are affected by numerous areas of law and therefore, the legal framework should be satisfactorily attractive for investors to bid for PPPs. Most jurisdictions have public procurement laws that set out the rules and procedures to be followed and since in PPP, private party is willing to deliver a service which normally provided by the public sector, application of public procurement law is contradictory and special law should be catered to it. In my view, our existing legal and regulatory framework for PPP is inadequate and short and long term reforms are immensely needed to announce to prevailing system.

15. If you are thinking that there are gaps in existing system, what are the short term and long terms reforms, which you are suggesting to incorporate to existing legal and regulatory framework?

As short term reforms to existing legislative framework, I proposed the amendments are required to the existing Part II Guideline, incorporating proper definition for PPPs, assigning the powers of the inactive organizations prescribed in Part II Guideline to vigorous proficient institutes, empowering the national PPP unit as a separate body which can facilitate PPPs and making mandatory requirement that the all PPPs should undergo through national PPP unit although they comes from different procurement entities. Further, I suggested that new guideline should be development to supersede the Part II Guideline incorporating changes of introducing national PPP unit, national procurement commission and their obligations, proper PPP definition, application and limitation of various PPP modes, requirement of pre-qualification, debriefing, procurement dispute resolution system and possibility of accepting unsolicited proposals as a long term reforms to PPP legislative framework. Besides, I suggest that new guideline should discuss content of an EOI and RFP documents, guidance for risk allocation, technical and financial review process of proposals.