Contractual Framework for the Standard Form Public Private Partnership (PPP) Project Agreement

Overview and Background
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## Glossary

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<th>Term</th>
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<tr>
<td>Abatement</td>
<td>A reduction in the Unitary Charge for performance below the standard required by the Project Agreement.</td>
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<tr>
<td>Base Case Financial Model</td>
<td>The financial model agreed (and finalised at Financial Close) for the purpose of, amongst other things, calculating the Unitary Charge.</td>
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<tr>
<td>Business Case</td>
<td>A management tool that supports decision-making for an investment. A robust Business Case can provide an explicit and systematic basis for decision-making, transparency and accountability, assurance that the proposed Investment optimises Value for Money, and a plan for realising the expected benefits, and for managing costs and risks.</td>
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<tr>
<td>Cabinet Office Circular (19) 6</td>
<td>Cabinet Office circulars complement the Cabinet Manual and CabGuide, providing detailed guidance on central government processes. Cabinet Office Circular CO (19) 6 sets out Cabinet’s expectations regarding investment management and asset performance in the state services, including expectations relating to consideration and implementation of PPP procurement.</td>
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<tr>
<td>Commission</td>
<td>The New Zealand Infrastructure Commission, Te Waihanga</td>
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<tr>
<td>Consortium</td>
<td>A group of private sector parties who work together to bid and, if successful, deliver the Project. The bundled services included in the scope of the Project will require Consortium members with specialisation in design, construction, asset management, Facilities Management, operational expertise (if applicable), and debt and equity financing.</td>
</tr>
<tr>
<td>Contract Period</td>
<td>The period from Financial Close to the expiry of the Project Agreement.</td>
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<tr>
<td>Contractor</td>
<td>The entity (a Special Purpose Vehicle - typically a limited liability company, or limited partnership) with which the Procuring Entity contracts (through the Project Agreement) for the delivery of the Project.</td>
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<tr>
<td>Contractual Close</td>
<td>The date at which the finalised Project Agreement is signed by authorised representative(s) of the Procuring Entity and Contractor.</td>
</tr>
<tr>
<td>Conventional Procurement Methods</td>
<td>Those procurement methods usually adopted by the Procuring Entity for major infrastructure projects. These procurement methods (such as design and construct contracts) are typified by greater Input Specifications and prescriptive requirements than outcomes focused contracts. In the context of setting the PSC, conventional procurement refers to the most likely, efficient and effective procurement method that would otherwise be used to procure the asset and services if the Project were not procured as a PPP.</td>
</tr>
<tr>
<td>DBFM</td>
<td>A form of PPP procurement that bundles the Design, Build, Finance and Facilities Management components of the Project (including associated risks) for delivery by the Contractor. Responsibility for provision of Operational Services (and risk) is retained by the Procuring Entity.</td>
</tr>
<tr>
<td>DBFMO</td>
<td>A form of PPP procurement that bundles the Design, Build, Finance, Facilities Management and Operational Services components of the Project (including associated risks) for delivery by the Contractor.</td>
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<tr>
<td>Facilities Management</td>
<td>Management of the Project facilities for the duration of the Operating Period.</td>
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<td>Financial Close</td>
<td>The time at which financing obligations (in particular, the final setting of interest rates, the Base Case Financial Model and Unitary Charge, and the process by which equity contributions will be made to the SPV) are set and agreed between the Procuring Entity and the Contractor, in accordance with the Financial Close Adjustment Protocol.</td>
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<tr>
<td>Financial Close Adjustment Protocol</td>
<td>The protocol to be followed at Financial Close to address a number of financing obligations and closing mechanics. Although the Financial Close Adjustment Protocol is implemented following contractual close, it must be agreed before the contract is signed.</td>
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### Glossary continued

<table>
<thead>
<tr>
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<tr>
<td><strong>Government Procurement Rules (the Rules)</strong></td>
<td>Standards of good practice for government procurement as published by the Ministry of Business, Innovation and Employment, many of which are mandatory. These include a requirement that agencies considering the procurement of infrastructure with a total cost of ownership over $50 million must consult with the Commission and follow relevant Commission guidance. (Rule 64). The Rules apply to all contract types, including PPPs (Rule 10). <a href="https://www.procurement.govt.nz/procurement/principles-and-rules/government-procurement-rules/">https://www.procurement.govt.nz/procurement/principles-and-rules/government-procurement-rules/</a></td>
</tr>
<tr>
<td><strong>Infrastructure</strong></td>
<td>Fixed, long-lived structures that facilitate economic performance and wellbeing. Infrastructure includes buildings and physical networks (principally: transport, water and energy), social assets such as hospitals and digital infrastructure such as mobile and broadband infrastructure.</td>
</tr>
<tr>
<td><strong>Input Specification</strong></td>
<td>A level of prescription or direction from the Procuring Entity as to how the asset ought to be designed or function, which may restrict the scope for innovation by RFP respondents and potentially result in greater risk being retained by the Procuring Entity.</td>
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<tr>
<td><strong>Investment</strong></td>
<td>The commitment of capital or balance sheet resources to the delivery of government services via projects, programmes or portfolios.</td>
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<td><strong>Lifecycle Costs</strong></td>
<td>The cost of replacing or refurbishing asset components during the Contract Period.</td>
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<td><strong>Operating Period</strong></td>
<td>The period from Service Commencement to the expiry of the Project Agreement.</td>
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<td><strong>Operational Services</strong></td>
<td>The front line public services delivered using the asset during the Operating Period (which can be contrasted with asset management or facilities maintenance services which keep the asset in the condition necessary to enable the Operational Services to be delivered).</td>
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<tr>
<td><strong>Payment Mechanism</strong></td>
<td>The methodology for applying the Performance Regime to calculate the Unitary Payment for a period (and set out in a schedule to the Project Agreement). The Payment Mechanism and Performance Regime work together to determine the Unitary Payment for a period and therefore incentivise performance of the Contractor’s obligations under the Project Agreement and delivery of the Project outcomes.</td>
</tr>
<tr>
<td><strong>Performance Regime</strong></td>
<td>The performance standards expected of the Contractor, including key performance indicators, and Abatements to the Unitary Charge for performance below the standard required by the Project Agreement (and set out in a schedule to the Project Agreement). The Payment Mechanism and Performance Regime work together to determine the Unitary Payment for a period and therefore incentivise performance of the Contractor’s obligations under the Project Agreement and delivery of the Project outcomes.</td>
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<tr>
<td><strong>Preferred Bidder</strong></td>
<td>The respondent whose Proposal best met the requirements of the Project and has been selected to negotiate and execute the Project Agreement with the Procuring Entity.</td>
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<tr>
<td><strong>Procuring Entity</strong></td>
<td>A public sector entity responsible for the procurement of a major infrastructure Project; specifically, those staff involved in the development and internal approval of the Project Business Case and procurement process. The Procuring Entity may refer to multiple entities if the delivery of the Project is a joint mandate or partnership.</td>
</tr>
<tr>
<td><strong>Project (the)</strong></td>
<td>The combination of assets and services required to be delivered by the Contractor.</td>
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<tr>
<td><strong>Project Agreement</strong></td>
<td>The contract between the Procuring Entity and the Contractor which sets out each party’s rights and obligations in relation to delivery of the Project.</td>
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<td><strong>Proposal</strong></td>
<td>A Consortium’s submission in response to the RFP.</td>
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<td><strong>Public Private Partnership (PPP)</strong></td>
<td>In the New Zealand context, a PPP is a long term contract for the delivery of a service, where provision of the service requires the construction of a new asset, or enhancement of an existing asset, that is financed from external sources on a non-recourse basis, and full legal ownership of the asset is retained by the Crown.</td>
</tr>
<tr>
<td><strong>Request for Proposals (RFP)</strong></td>
<td>The stage of the procurement process in which the short listed respondents develop Proposals (in response to the Request for Proposals document) for delivering the Project outcomes required by the Procuring Entity, through an interactive tender process. The Procuring Entity then evaluates the Proposals with the objective of selecting one respondent as the Preferred Bidder.</td>
</tr>
<tr>
<td><strong>Risk Allocation</strong></td>
<td>Risks are allocated (through the Project Agreement) to the party that is best able to manage and mitigate those risks, in order to drive delivery of the required service outcomes and Value for Money. All Project risks are identified early in the procurement process, and the cost of those risk to the Procuring Entity determined. Risks will only be allocated to the Contractor where they can manage those risks more effectively or efficiently than the Procuring Entity, and therefore provide a Value for Money solution.</td>
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<tr>
<td><strong>Service Commencement</strong></td>
<td>See the Standard Form PPP Project Agreement. Service Commencement is the date from which the asset is available for use and Unitary Payments to the Contractor begin.</td>
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<tr>
<td><strong>Special Purpose Vehicle (SPV)</strong></td>
<td>The legal entity established for the sole purpose of entering into the Project Agreement with the Procuring Entity and sub-contracting with Consortium members. The SPV will generally be a limited liability company or limited partnership.</td>
</tr>
<tr>
<td><strong>Standard Form PPP Project Agreement</strong></td>
<td>The model contract for PPP Projects which forms the basis for PPP Projects in New Zealand. It contains the core commercial principles and structure of the New Zealand PPP model. The base agreement, schedules, and contractual framework are available on the Treasury website.</td>
</tr>
<tr>
<td><strong>Third Party Finance</strong></td>
<td>Equity and debt finance for the construction of the Project provided by third party investors and lenders. The use of Third Party Finance within the PPP structure place significant third party capital at risk for non-delivery or non-performance of the Project. Together with the Performance Regime and Payment Mechanism, the application of Third Party Finance incentivises delivery of the required service outcomes.</td>
</tr>
<tr>
<td><strong>Unitary Charge</strong></td>
<td>Means the fee payable by the Procuring Entity during the Operating Period of a PPP.</td>
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<td><strong>Unitary Payment</strong></td>
<td>The periodic (generally quarterly) amount that is payable to the Contractor, as calculated in accordance with the Payment Mechanism.</td>
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<td><strong>Value for Money</strong></td>
<td>Value for Money is achieved where PPP procurement delivers better outcomes from a Project than Conventional Procurement Methods for the same, or lower, net present cost.</td>
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1: About this guidance

1.1 The Infrastructure Commission

The New Zealand Infrastructure Commission, Te Waihanga, was established on 25 September 2019. The Commission will help improve how New Zealand coordinates and plans its infrastructure, makes the most of the infrastructure it already has, and ensures that investment in infrastructure delivers what New Zealand needs.

One of the Commission’s core functions is to support agencies and local authorities to procure and deliver major infrastructure projects; supplementing rather than replacing existing capability.

Another key function is to prepare research and best practice guidance on major infrastructure procurement and delivery, to provide guidance on specific issues, beyond the more general procurement guidance already available from other agencies.

As part of this function, the Commission is responsible for maintaining and developing the New Zealand Public Private Partnership (PPP) model. This function was previously undertaken by the former PPP Unit in the New Zealand Treasury (the Treasury). As part of this role, the Commission is responsible for:

- developing PPP policy and processes
- assisting agencies with PPP procurement
- maintaining the Standard Form PPP Project Agreement
- engaging with potential private sector participants, and
- monitoring the implementation of PPP projects.

1.2 Purpose

The purpose of this guidance paper is to provide an overview of the contractual framework of the Commission’s Standard Form Public Private Partnership (PPP) Project Agreement (version published April 2020).

The Guidance covers the following topics:

- Section 2: Contractual Framework, which provides an overview of the contractual framework, including the precedence of documents, the structure of the Base Agreement, Schedules and Operative Documents, and Post Financial Close considerations
- Section 3: Contract Background and Acknowledgements
- Appendix: Structure of Base Agreement and Schedules.

The Guidance forms part of a suite of guidance documents issued by the New Zealand Infrastructure Commission relevant to the planning and delivery of major infrastructure projects in New Zealand, including of PPPs. It should be read in conjunction with other Commission guidance and requirements of the Treasury’s Investment Management and Asset Performance team (IMAP). The Guidance assumes that the Commission’s Standard Form PPP Project Agreement will form the basis of the contract to be signed with the Preferred Bidder. The Commission is planning further updates to its suite of PPP guidance.

1.3 The New Zealand PPP model

In the New Zealand context, a PPP is a long term contract for the delivery of a service, where provision of the service requires the construction of a new asset, or enhancement of an existing asset, that is financed from external sources on a non-recourse basis, and full legal ownership of the asset is retained by the Crown.

PPP procurement has been implemented in New Zealand for the primary purpose of improving the focus on, and delivery of, required service outcomes from major infrastructure assets by:

- integrating asset and service design
- incentivising whole of life design and asset management
- allocating risks to the parties who are best able to manage them, and
- only paying for services that meet pre-agreed performance standards.

Whole of life services are purchased under a single long-term contract with payments to the contractor based on
availability and performance of the asset. The combination of assets and services required to be delivered by the private sector are referred to in this document as the ‘Project’.

The PPP model seeks to improve outcomes by capturing best practice and innovation. Lessons learnt from PPP projects can be implemented across a broader portfolio of public assets to significantly leverage the benefits of single PPP transactions. The competitive procurement process, focus on outcomes, appropriate risk allocation and performance based Payment Mechanisms that put third party capital at risk optimise the incentives and flexibility for private sector participants to deliver innovative and effective solutions.

PPP procurement is only used where it offers value for money over the life of the project, relative to conventional procurement methods. This means achieving better outcomes from a project than if it were procured using conventional methods, for the same, or lower, net present cost.

1.4 Government Procurement Rules

Public sector staff responsible for procurement are required to comply with the Government Procurement Rules (the Rules) and the overarching principles that apply to all government procurement and provide the foundation of good practice for procurement planning, approaching and engaging the supplier market. These include being fair to all suppliers and getting the best deal for everyone.

Anyone can use the Rules to help drive good procurement practice. If a procurement is worth more than $100,000 (or $9 million for new construction works) they are mandatory for:

• Government departments
• New Zealand Police
• the New Zealand Defence Force, and
• most Crown entities.

All other government agencies are encouraged to follow the Rules.

The Chief Executive of the Ministry of Business Innovation and Employment (MBIE) is the Procurement Functional Leader, responsible for driving procurement performance across the State Services by helping government agencies to deliver better public value, and MBIE’s New Zealand Government Procurement team supports the Chief Executive in that role.

Under the Rules, following the Commission’s guidance is mandatory for infrastructure projects with a total cost of ownership of more than $50 million delivered by government departments as well as the Police and Defence Force and most Crown entities.

In addition to the Rules, Cabinet Office Circular (19) 6 requires agencies to evaluate all procurement options, including innovative and non-traditional approaches to procurement and alternative financing arrangements, such as PPP1.

Cabinet Office Circular (19) 6 notes that current government policy precludes initiating the use of new Public Private Partnerships (PPPs) in the education, health and corrections sectors.

Under Cabinet Office Circular (19) 6, agencies also must consult early with the Commission, and follow any relevant guidance published by the Commission, if they are considering any significant innovative and non-traditional approaches to infrastructure procurement, alternative financing arrangements, or PPPs.

1.5 Questions and further information

General enquiries about the information contained in this guidance can be sent to info@infracom.govt.nz.

Other guidance documents and useful information can be found at www.infracom.govt.nz.

1.6 Definitions

Capitalised terms in this guidance, unless otherwise defined, have the meaning given to those terms in the Standard Form PPP Project Agreement. Many of the terms in the glossary have separate definitions in the Standard Form PPP Project Agreement.

2: Contractual Framework

2.1 Overview

A typical contractual framework for a PPP transaction is represented in Figure 1. PPP transactions, by their nature, involve complex contractual documentation. The relationships between the various stakeholders (the Procuring Entity, the Contractor, the sub-contractors, the debt financiers and equity financiers, amongst others) need to be clear and to cover a wide variety of contingencies. The main reasons PPP transactions tend to require more documentation than many other forms of procurement are:

- the long-term nature of the relationship (e.g., a 25-year operating term)
- the use of a SPV as the Contractor, with the attended passing down of all operating requirements to design and construction/facility management sub-contractors
- the costs to all parties of early termination mean that a clear delineation of risk is required, and
- limited recourse debt providers, who will be involved from the outset, have stringent credit criteria for PPP transactions and the debt financiers’ ‘bankability’ requirements need to be addressed.

Figure 1: Typical PPP Contract Framework
2.1.1 Core Documents

The Standard Form PPP Project Agreement comprises the following documentation:

- the Base Agreement. The Base Agreement covers general terms and issues of risk allocation. It covers matters such as Project objectives, commencement and duration of the Project, the contractual requirements for Works Completion/Service Commencement, general terms relating to service quality, warranties, indemnities, step in rights, insurance requirements and termination events.
- the Schedules. The Schedules include both near-generic and Project-specific elements of the Project. As noted in more detail below, the likelihood is that the schedules for each different Project will vary considerably more than the Base Agreements for those Projects.
- the Operative Documents. The Operative Documents are the technical documents setting out the detailed requirements for the Works Provisioning and Operational Services phases of the Project. These documents will be wholly Project-specific (although they may of course be based on precedents used for other projects within the relevant sector). It is important to note that Operative Documents can bind the Contractor to perform its obligations in a certain way, but will not bind the Crown unless it specifically agrees otherwise.

The Project Agreement was drafted on the following assumptions:

- the private sector partner contracting with the Procuring Entity is a special purpose company, with only relatively mechanical amendments required to accommodate a special purpose limited partnership, (the SPV) with sub-contractors providing the actual performance on its behalf
- the Project is financed on a third party funded project finance basis by use of limited recourse debt
- the Project is “greenfields” – all assets by which the service is to be provided (the Facilities) will be developed or supplied by the Contractor, and
- the Project does not involve the transfer of personnel from the employment of the Procuring Entity to the Contractor, and is not primarily for the provision of information and communications technology

The Project Agreement was developed for a Facilities Management based Project, and changes will be required where the Standard Form PPP Project Agreement is to be used for a full operating Project. Specific legislation relating to a particular Project may also need to be incorporated into the Project Agreement in certain circumstances.

2.1.2 Direct Deeds

In addition to the Project Agreement, the Procuring Entity will typically be party to:

- at least three ‘Direct Deeds’ (one with the construction sub-contractor, one with the Facilities Management sub-contractor and one with the representative of the Senior Lenders). In the absence of Direct Deeds, there would be no contractual relationship between the Procuring Entity and the financiers or sub-contractors. In general terms the Direct Deed with the Major Sub-Contractors is designed to protect the Procuring Entity by prohibiting the relevant sub-contractor from terminating its contract with the Contractor without first providing the Procuring Entity with the opportunity to remedy any default or otherwise take action to ensure that the sub-contract can continue, and
- a deed of appointment with the Independent Reviewer and the Contractor, and potentially other project parties. This deed establishes a joint appointment of an independent engineer to (in particular) monitor the construction phase of the Project and to provide certifications relating to Works Completion.

The form of the Direct Deeds and the Independent Reviewer’s Deed of Appointment are scheduled to the Project Agreement. Model forms of the Financier Direct Deed and the Major Sub-contractors’ Direct Deeds are available. A model form of the Independent Reviewer’s Deed of Appointment will be produced at a future stage – however transaction precedents are available for this document.

2.1.3 Ancillary Documents

Ancillary Documents, as defined in the Project Agreement are the agreements to which the Contractor is a party for the performance of its obligations under the Project Agreement, but to which the Procuring Entity is not a party (such as the
Construction sub-contract and the Facility Management sub-contract, but excluding the Financing Agreements).

The typical PPP structure is that the Contractor will sub-contract substantially all of its performance obligations to the entities that will actually deliver the required services. The nature of the Contractor as a SPV means it will not have the resources to perform services in its own right, and will have a governance, contract management and administrative role (although whether the Project SPV provides these services directly or has them provided by associated parties under an asset/investment management arrangement depends on the nature of the Project, its parties and the sub-contracting structure).

The key sub-contracts will typically be:

- the design and construction sub-contract, under which the Contractor engages a construction company to design and construct the Facilities, and
- the Facilities Management sub-contract, under which the Contractor engages a facilities management company to maintain the Facilities.

The apportionment of risk between the Major Sub-contractors will be addressed in an interface agreement or similar document (this should not alter the Contractor’s risk). This agreement sets out, in particular, the allocation of risk in relation to defects in the Facilities and their impact on the facilities manager’s ability to duly perform its role.

The Project Agreement is conditional upon the Contractor delivering to the Procuring Entity certified copies of all Initial Ancillary Documents. The Contractor must deliver to the Procuring Entity copies of any Ancillary Documents entered into, varied or terminated within five Business Days of its execution, variation or termination. The Contractor’s failure to comply with its obligations under and in respect of an Ancillary Document may, if serious enough, constitute grounds for the Procuring Entity to terminate the Project Agreement.

As noted the Procuring Entity is not party to the Ancillary Documents; however, these will be reviewed on behalf of the Procuring Entity as part of the due diligence carried out prior to finalising the Project Agreement for a particular project. The Procuring Entity’s focus will typically be on ensuring that the subcontracts adequately pass risk from the Contractor to the relevant sub-contractors (as the Contractor will have limited ability, as a SPV, to actually manage these risks itself, and on ensuring that the termination provisions are consistent with the requirements of the Project Agreement and the Direct Deeds with the relevant sub-contractors. Any termination payment provisions under the Ancillary Documents must also be carefully reviewed as they will have an impact on the Procuring Entity’s liability in certain termination scenarios.

### 2.1.4 Parent Company Guarantees

It is a mandatory requirement of the Project Agreement that the Ultimate Parent Companies of the Major Sub-Contractors provide a guarantee in respect of those companies’ obligations. These guarantees are primarily for the benefit of the Contractor and the senior lenders, although the Procuring Entity can have direct recourse to them in limited circumstances set out in the Project Agreement. It is important that guarantees are provided by Ultimate Parent Companies and any request to derogate from this position should be rejected.

### 2.1.5 Financing Documents and Equity Documents

The financing documents are entered into between the Contractor and the senior lender or its agent – there may also be other parties involved depending on the level of financial support provided by other consortia parties (eg, performance bonds or guarantees) and the overall Consortium structure. The documents will typically include a loan facility agreement and various security documents (likely to include general security agreements and mortgages where applicable).

The Procuring Entity is not party to the Financing Documents, but will review them as part of the due diligence process. Third party debt funding is fundamental to the economics of each project and it is important that the Procuring Entity understands the default and covenant packages under the Financing Documents. The Financing Documents also form the basis for calculating an important component of the Procuring Entity’s liability on termination of the Project Agreement. For this reason in particular, the Project Agreement contains detailed restrictions on the Contractor’s ability to amend or replace the Financing Documents without the Procuring Entity’s consent.

The equity documents may include various subordinated debt or equity subscription arrangements, depending on the structure adopted. These will also need to be reviewed by the Procuring Entity. The Procuring Entity’s main concern with these documents is to ensure that they provide certainty of funding and are consistent with the lock-in arrangements in the Project Agreement.
2.1.6 Shareholder Agreements

In addition to the documents described above, there are likely to be shareholder agreements setting out the rights and obligations of the shareholders of the Contractor (typically establishing a governance framework, addressing the procedure for resolving disputes and regulating the parties’ abilities (or requirements) to transfer their interests in the Project from time to time). Depending on the structure adopted these may be separate from the equity documents set out above.

2.2 Precedence of Documents

Where there is an ambiguity, inconsistency or conflict of obligations between the documents which comprise the Project Agreement, the following order of precedence is to apply:

- the Base Agreement
- the Schedules (other than Schedule 11 (Works Requirements) and Schedule 12 (Service Requirements))
- Schedule 12 (Service Requirements)
- Schedule 11 (Works Requirements), and
- the Operative Documents.

Where there is an ambiguity, inconsistency or conflict of obligations between the Project Agreement and any of the other Project Documents to which the Procuring Entity is a party, the following order of precedence is to apply:

- the Financier Direct Deed
- the Project Agreement, and
- the remaining Project Documents to which the Procuring Entity is a party.

This structure has been designed to reflect the following:

- the Base Agreement itself covers areas of risk allocation and accordingly it prevails over the more technical documentation included in the Schedules. This is intended to ensure that the Schedules do not inadvertently upset the agreed risk allocation
- at a general level the Service Requirements are more important to the Procuring Entity than the Works Requirements (eg, the Procuring Entity is focussed on the purchase of a service, rather than a facility) – it is appropriate that if there is any ambiguity between these two areas of the Schedules, the focus should be on the Service Requirements and these should prevail, and
- the Operative Documents are input-focussed technical documents, and it is important that the specific nature of these documents is subordinate to the more outcome/output focussed nature of the Project Agreement and the Schedules.

2.3 Structure of Base Agreement, Schedules and Operative Documents

The Base Agreement has been designed to be of general application. The Commission does not expect that significant change will be required to the Base Agreement to tailor it for specific projects, although inevitably there will be changes to reflect different asset classes, where the Base Agreement is adopted for use in specific sectors. Most project-specific issues will be addressed in the Schedules and the Operative Documents. However, Procuring Entities need to be aware that some changes to the Base Agreement may be required (by way of example only) to address:

- the legislation governing the sector in which a project is to be carried out
- the provision of full services (for example, a custodial prison project) rather than the provision of serviced accommodation
- elements such as multiple sites or multiple commencement dates
- any interface with existing assets, and/or
- the inclusion of any ICT-related elements.
Set out in the table in the Appendix is an overview of the structure of the Schedules, including commentary on what is covered by each schedule, whether they are generic or project specific, and whether model precedents or examples only are available.

2.4 Post Financial Close

Following Financial Close, the Project and its management will typically transition (fully or partially) into a different team within the Procuring Entity. This section sets out some commentary on matters to be considered by the Procuring Entity following Financial Close. This is not intended to be a guide to contract management, which is addressed separately, but as a brief description of areas of focus once the contract has been signed.

2.4.1 Design and Construction Phase

The focus during the design and construction phase will be:

• reviewing and commenting on design documentation submitted by the Contractor
• addressing any Resource Management Act issues that are required to be addressed after Financial Close (such as submission of an Outline Plan of Works)
• monitoring performance of the Contractor against its construction programme, including meetings of the Project Governance Group or similar
• reviewing and commenting on operating phase Operative Documents scheduled to be submitted and finalised during the design and construction phase
• liaison with the Independent Reviewer and planning the final testing phase prior to the Contractor achieving Works Completion
• establishing the structure for payment of the Design and Construction Payment/Rental Prepayment on Service Commencement, and
• preparing for and implementing the commissioning matters (if any) to be addressed by the Procuring Entity between Works Completion and the Service Commencement Date.

2.4.2 Design and Construction Phase

Following successful achievement of Service Commencement, the focus of the Project will of course change, from delivery of a correctly constructed facility to delivery of the contracted services. The key matters to consider will be as follows:

• the operating interface between Retained Service Operator personnel and the Contractor
• ongoing project governance via the Governance and Service Management schedule
• monitoring service levels and addressing any performance failures
• establishing an efficient structure for receiving and reviewing performance reports and making the associated payments of the Unitary Payment
• ‘reactive’ management (such as following a natural disaster or other force majeure event)
• addressing any change requests and refinancing requests within the required time periods, and
• monitoring and acting on any serious issues leading to Contractor Default and possible termination.
3: Contract Background and Acknowledgements

3.1 Contract Background

The PPP Project Agreement is generic and has been developed for the design, build, finance and maintenance of social accommodation-based infrastructure. It should be specifically noted that, without amendment, the PPP Project Agreement will not meet all of the requirements of a PPP with a significant operational component, or of a user-pays infrastructure PPP contract. However, the PPP Project Agreement does provide the underlying commercial principles that New Zealand PPP projects should adhere to, and we estimate that over 80% of the PPP Project Agreement remains unchanged for operational-focused and user-pays infrastructure PPP contracts.

The PPP Project Agreement is a set of ‘model terms’. It does not deal with matters that are specific to individual projects or sectors. Most project specific matters will be dealt with in the schedules to the Project Agreement. The schedules included in the PPP Project Agreement provide a framework for the inclusion of project specific material. Where the schedules are generic and applicable to PPP procurement generally, a template has been provided. Where a schedule is highly project-specific, examples are available through the Commission.

Each clause has been developed on the basis of its international validity and its relevance to the New Zealand market. The principles and concepts contained within the PPP Project Agreement have been tested on several New Zealand PPP projects and this version is the culmination of extensive discussions with Crown agencies and private sector participants and advisors. We have also had the benefit of drawing from the extensive PPP knowledge and experience in foreign jurisdictions. Many parts of the PPP Project Agreement draw on existing market practice and precedent from international PPP contracts, primarily in Australia and the United Kingdom.

However, the PPP Project Agreement is unique to the New Zealand market – it is built on our overarching objectives of achieving Value for Money, optimal risk transfer and standardisation.

The Standard Form PPP Project Agreement has been prepared on the basis of the following key assumptions:

- the private party contracting with the public sector is a special purpose company (with only relatively mechanical amendments required to accommodate a special purpose limited partnership) with sub-contractors providing services on its behalf;
- the project is financed by third party provided project finance;
- the project is ‘greenfields’ – all assets will be developed by the Special Purpose Vehicle, and
- the project does not involve the transfer of personnel from the public sector to the private party.

3.2 Contract Versions

Version One of the PPP Project Agreement was released for market feedback in October 2010. Following detailed review of market submissions received, Version Two of the PPP Project Agreement was released in April 2011.

The successful signing of contracts in relation to the two pathfinder projects in New Zealand (the Ministry of Education’s ‘Hobsonville Schools PPP’ and the Department of Corrections’ ‘Auckland South Corrections Facility PPP’) resulted in a full review of the Standard Form PPP Project Agreement to reflect valuable lessons learned and thoroughly tested contractual positions. Version Three (the current version) of the Standard Form PPP Project Agreement built on the negotiated positions reached in these transactions and establishes a credible and market-tested precedent for future PPP projects.

3.3 Review of the New Zealand PPP Model

At the time of writing, the Commission is in the final phases of a review of the New Zealand PPP Model. The review is an opportunity to reflect on lessons learned from the eight PPP projects that have reached Financial Close since Version One of the Standard Form PPP Project Agreement was released in 2010.

Following the conclusion of the review, the Commission expects that there will be revisions to the Standard Form PPP Project Agreement. The Commission will publish any revised Standard Form PPP Project Agreement on its website and will also invite comment of the revised version.
3.4 Acknowledgements

The Commission wishes to thank the following agencies and acknowledge its use of the following documents in developing these model terms:

- Australian Partnerships Victoria - Partnerships Victoria in Schools Project Agreement;
- Australian Partnerships Victoria - Biosciences Research Centre Project Agreement;
- United Kingdom Ministry of Defence - PFI Project Agreement (August 2006);
- United Kingdom Partnerships for Schools BSF PFI Project Agreement (December 2007);
- United Kingdom Ministry of Justice - draft Runwell Project Agreement (25 February 2010);
- United Kingdom National Health Services Project Agreement (version 3); and
- United Kingdom HM Treasury - Standardisation of PFI Contracts (version 4 and subsequent supplements).

The Commission also wishes to acknowledge that information contained in the Australian Partnerships Victoria Agreements is reproduced with the permission of the State of Victoria and that copyright in those Agreements belongs to the State of Victoria.

The Commission also wishes to acknowledge the role of the Department of Corrections and the Ministry of Education in the development of these model terms through the pathfinder PPP projects.

The Commission also wishes to acknowledge law firms Bell Gully (NZ), Corrs Chambers Westgarth (Australia) and Allen & Overy (UK) who, working together, independently reviewed Version Two of the PPP Project Agreement and Bell Gully who reviewed the 2013 version.

The Commission also wishes to acknowledge the work of the New Zealand Treasury’s former PPP Team who led the development of the New Zealand Standard Form PPP Agreement.
## Appendix: Structure of Base Agreement and Schedules

This explanatory note sets out the status of the schedules to the Standard Form PPP Project Agreement as at April 2020.

Where the status is 'Available', a copy of the model schedule is available [here](#).

Where the status is ‘Examples only’, a model schedule or document does not currently exist, typically due to its project-specific nature. Redacted examples of the schedule or document are available from the Commission.

<table>
<thead>
<tr>
<th>SCHEDULE</th>
<th>MATTERS COVERED</th>
<th>STATUS</th>
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</table>
| Schedule 1 (Conditions Precedent)           | Lists the Conditions Precedent to the agreement becoming effective that must be satisfied between the date of signing the Project Agreement and the date of Financial Close (for example, providing a director’s certificate, legal opinions, provision of Ancillary and Financing Agreements, etc).  
This Schedule is already populated with the generic Conditions Precedent expected to be required on many or all Projects. Conditions Precedent that are particular to a specific Project will need to be added as needed, with the most likely additional conditions relating to tax rulings, Overseas Investment Act approvals and specific consenting requirements. | Available                   |
| Schedule 2 (Contractor Warranted Data)      | Sets out basic information relating to the Contractor and certain related parties, eg, registered name, registered office, contact details, directors, shareholders and shareholdings.  
This schedule is generic and provided in template form.                                                                                                                                   | Available (template form)   |
| Schedule 3 (Project and Ancillary Documents)| This schedule lists the Project and Ancillary Documents, and sets out the form of certain of the Project Documents (Direct Deeds, Independent Reviewer’s Agreement, Facility Lease and Third Party Interface Protocols).  
This schedule itself is generic and provided in template form. The attachments (excluding the Independent Reviewer’s Agreement, of which examples only are available) are intended to be of general application.  
This schedule includes a number of attachments:  
- Annexure 1 – Financier Direct Deed – Available  
- Annexure 2 – Major Sub-contractor’s Direct Deed – Available  
- Annexure 3 – Independent Reviewer’s Agreement – Examples only  
- Annexure 4 – Facility Lease – Available  
- Annexure 5 – Third Party Interface Protocols – Available | Available (template form)   |
| Schedule 4 (Financing)                      | This schedule sets out the form of Financial Close Adjustment Protocols and the Swap Pricing Protocol, and lists the Senior and Subordinated Financing Agreements.  
This schedule itself is generic and provided in template form. The attachments (excluding the Financial Close Adjustment Protocol, of which examples only are available) are intended to be of general application.  
This schedule includes a number of attachments:  
- Annexure 1 – Financial Close Adjustment Protocol – Examples only  
- Annexure 2 – Swap Pricing Protocol – Available  
- Annexure 3 – Form of Quarterly Finance Summary - Available | Available (template form)   |
| Schedule 5 (Property)                       | This schedule sets out the property description, and associated access and ancillary arrangements, in respect of the Project. This schedule will need to be developed on a project specific basis depending on the specific land elements of the Project. A summary and transaction precedents are available.  
This schedule includes a number of attachments:  
- Annexure 1 – Property Description – Available  
- Annexure 2 – Access Arrangements – Available  
- Annexure 3 – Ancillary Arrangements – Available  
- Annexure 4 – Summary document included | Examples only. Summary document included |
### Schedule 6 (Resource Management Act requirements)

This schedule allocates responsibility for compliance with designation conditions between the Contractor and the Procuring Entity.

This schedule will need to be developed on a project specific basis depending on the specific designation(s) relating to the Project – and may not be necessary in projects with a very simple designation. A summary and transaction precedents are available.

Examples only. Summary document included.

### Schedule 7 (Governance and Service Management)

Part 1 of this schedule sets out the formal structure under which the parties will interact during the Works Provisioning and Operational Services phases of the Project (ie, the composition and functions of the Project Governance Group and Relationship Management Group).

Part 2 of this schedule establishes the functions of the Procuring Entity’s Representative and the Contractor’s Representative for the Project.

This schedule is largely generic and can be used as drafted, but specific agencies may wish to establish different arrangements to meet their own internal organisational requirements.

Available

### Schedule 8 (Review Procedures)

This schedule applies whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with the Review Procedures. The schedule contains the process for submittal by the Contractor, the response from the Procuring Entity and the grounds upon which the Procuring Entity may comment. It also sets out the effect of review and comments by the Procuring Entity and the responsibility for document management.

The procedures are largely generic, but development will be required to link this to the Reviewable Documents for any particular project.

Available

### Schedule 9 (Operative Documents)

This schedule sets out the Operative Documents that will be required for the Project, and the timing of their delivery.

This schedule will need to be developed on a project specific basis, although a template and transaction precedents are available.

Available (template form only – also see examples)

### Schedule 10 (Completion Requirements)

This schedule will need to be developed on a project specific basis depending on the technical requirements of the Project. A summary and redacted transaction precedents are available.

Examples only

### Schedule 11 (Works Requirements)

This schedule sets out the Works Requirements specific to the Facility to be built for the Project.

This schedule will need to be developed on a project specific basis, although transaction precedents are available.

Examples only

### Schedule 12 (Service Requirements)

This schedule sets out the Service Requirements specific to the Facility to be built for the Project.

This schedule will need to be developed on a project specific basis, although transaction precedents are available.

Examples only

### Schedule 13 (Performance regime)

This schedule will need to be developed on a project specific basis depending on the nature of the Facility to be provided. A summary and redacted transaction precedents are available. This schedule will need to be closely linked to Schedule 14 and will establish the framework for deductions and/or charges.

Examples only. Summary document included.

### Schedule 14 (Payment Mechanism)

This schedule establishes the payment and deduction regime. Is intended to be algebraic/formuialic, with the substantive detail of the performance requirements set out in Schedule 13. This schedule details calculation of the periodic Unitary Payment and contains specific provisions addressing indexation, insurance payment, lifecycle elements, and the Effective Base Rate structure.

This schedule is likely to require a degree of development on a project specific basis but (aside from project-specific elements) is complete.

Available
<table>
<thead>
<tr>
<th>SCHEDULE</th>
<th>MATTERS COVERED</th>
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<tbody>
<tr>
<td>Schedule 15 (Insurance)</td>
<td>This schedule sets out the requirements for insurances to be held by the Contractor. This schedule is provided in template form only and will need to be developed on a project specific basis (based on both the template and available transaction precedents).</td>
<td>Available (template form only – also see examples)</td>
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<tr>
<td>Schedule 16 (Change notice)</td>
<td>This schedule contains the template form of Change Notice to be utilised by a party requesting a change. This schedule is intended to be of general application.</td>
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<tr>
<td>Schedule 17 (Change Compensation Principles)</td>
<td>This schedule sets out the principles governing how changes are to be priced, funded and paid when a Change Notice has been issued. It also includes provisions relating to the Procuring Entity’s ability to require a Significant Material Change to be tendered. This schedule is intended to be of general application.</td>
<td>Available</td>
</tr>
<tr>
<td>Schedule 18 (Calculation of Compensation on Termination)</td>
<td>This schedule sets out the principles governing the calculation of compensation on termination in each of the circumstances for which the Project Agreement can be terminated (Crown convenience, Contractor default, Uninsurable Risk/ Uninsurability). This schedule is intended to be of general application.</td>
<td>Available</td>
</tr>
<tr>
<td>Schedule 19 (Disengagement)</td>
<td>This schedule sets out the requirements for disengagement at the expiry or earlier termination of the Project Agreement. This schedule is intended to be of general application but will need to be developed on a project-specific basis to establish the relevant disengagement/ hand-back requirements.</td>
<td>Available</td>
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</tbody>
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