

**The Canadian Council for
Public-Private Partnerships**



**Le Conseil Canadien des
Sociétés Publiques-Privées**

Responsible PPP Procurement for British Columbia

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The Canadian Council for Public-Private Partnerships
Tel: (416) 861-0500 E-mail: partners@pppcouncil.ca
Website: www.pppcouncil.ca

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1. Introduction

Infrastructure projects being undertaken through public-private partnerships are increasingly common in Europe, Asia and Australia. The U.K. has a successful record of delivering public infrastructure projects using public-private partnerships for 15 years, Australia for over eight and more recently, Asia. In the U.K. alone more than 620 Private Finance Initiatives (PFI) contracts with a value of Euros 60 billion have been signed and over 450 projects are operational. As a model of procurement, governments are becoming more comfortable with the approach. As favourable results are demonstrated, their support for the model is reinforced.

The increased use of public-private partnerships internationally means more competition for Canadian sponsor governments to attract both domestic and international businesses to participate in the Canadian market, which is relatively new.

British Columbia has emerged as a leader in the development of public-private partnerships in Canada. As of March 2005, four projects have reached financial close and many others are underway. The speed with which the government was able to move has been facilitated by the existence of Partnerships BC, an agency of the Province, with a mandate of bringing together ministries, agencies and the private sector to develop projects through public-private partnerships.

A robust competitive market is essential to achieve success with public-private partnerships in B.C. Ensuring a highly efficient and effective competitive procurement process will attract lenders, investors and contractors and will help strengthen the B.C. market. Procurement processes must be sensitive to many conditions including the timing of the project's placement into the market, meeting consistency with international standards of competition, and demonstrating the commitment and support of the sponsor government.

Public-private partnership procurements can be judged to be successful when a competitive environment is maintained throughout the procurement process. This results from the participation of a number of respected bidders, with the objective of winning the contract with a bid that achieves value for money. As global opportunities increase, bidders with defined resources and capital available are becoming increasingly discriminating in determining which projects they will participate in. Sponsor governments must be sensitive to the yardsticks by which projects are measured. Therefore, feedback from the market is essential to ensure that projects meet standards met elsewhere and to ensure the continued participation of the market.

Having worked through the full stages of four procurements in B.C., and midway through others, it was considered timely to gain feedback from the market and where necessary, to make refinements in future procurements.

Working with The Canadian Council for Public-Private Partnerships (the Council), the BC Chapter of the Council in co-operation with Partnerships BC, undertook an organized outreach to the market to obtain feedback. Meetings were held both in Vancouver and Toronto and more than 25 organisations participated. These included bidders, lenders and advisors from the private sector and public sector project sponsors. PricewaterhouseCoopers LLP Vancouver (PwC) assisted in the task of establishing and facilitating meetings and reporting findings.

Recommendations emerging from the meetings and captured in this report are those of the market participants. Although there were variations in detailed views on a number of matters arising in the meetings, there was consistency in the overall observations and objectives of the market participants. For further detail on the methodology, the participants in this process, and in the development of this document, please refer to Appendix A.

The primary goals of the market articulated in this report are: to reduce time taken during the procurement process; to reduce procurement costs for both the public and private sectors; to achieve optimal risk transfer in projects; and, to drive consistency in standardizing procurement documents.

By achieving these goals, B.C. will be in a better position to compete in the public- private partnership market and to, therefore, increase opportunities for the private sector engagement in the market.

The issues and recommendations outlined in the foregoing were raised quite a few months prior to the final report being published. The report outlines the priority issues raised by workshop participants and provide a general overview of the current status of how these issues are being addressed. Many improvements continue to be made through an iterative process. The public and private sector partners continue to work together to address each issue and recommendation highlighted by workshop participants.

2. Strengthening the Public-Private Partnership Market

Throughout the workshop process, a number of priority issues were raised by participants. The priority issues were those that would be most likely to have the greatest immediate impact on strengthening the market in B.C. These issues are highlighted in the table below and have been separated into categories for further discussion in the following sections.

Priority Issue	Desired Outcome
Public-Private Partnership Environment	
1. Public Awareness	Participants felt it was important to raise public awareness and understanding of public-private partnerships and benefits to build greater acceptance of this procurement model amongst the broader public.
Market Potential and Project Identification	
2. Project Flow	Participants recommended improved communication on upcoming projects would help build a strong market and allow bidders to more effectively plan and allocate required resources.
3. Project Structure, Size and Scope – The Right Project	Participants recommended that public sector sponsors have a dialogue with the market early in the process to ensure project feasibility, finance-ability and sufficient market interest.
Procurement Process	
4. The Optimum Process	Participants agreed that the market should also be involved early to help design an efficient process and that key decision-makers should be at the table throughout a procurement process to ensure timely decisions are made.
5. Cost and Duration	Participants stressed the importance of reducing cost and duration of the procurement process to ensure manageability for both public and private sectors.
6. Consistency	To reduce process costs and duration, participants recommended ensuring consistency in the B.C. procurement process by standardizing: <ul style="list-style-type: none"> • Process • Risk allocation • Procurement documents
7. Risk Allocation	Participants recommended early analysis of risk allocation to achieve the right balance of risks.
8. Canadian Approach	Participants recommended ensuring a robust made-in-Canada partnership model to reflect the realities of the market.

2.1 Public-Private Partnership Environment

Public Awareness

While the public has indicated strong support for the private sector's involvement in infrastructure (EnviroNics Research Group, 2004), public-private partnerships are not well understood. As a result, it is difficult to counter commentary by 'critics' of the partnership procurement method in an accessible, easily understandable fashion.

Workshop participants recommended that both the public and private sectors raise public awareness and support for public-private partnerships by:

- Communicating the infrastructure challenges facing B.C. and Canada
- Communicating the successes and benefits of partnership projects in B.C. and partnerships generally by:
 - Highlighting the commitment to fair and transparent procurement process including the release of Fairness Reports, Value for Money Reports and making Project Agreements publicly available
 - Providing factual information on projects
 - Citing examples from B.C. and Canada
- Building awareness and support for projects by actively engaging the local community.

In B.C., the recommendations are being addressed on an ongoing basis through strategic communications and stakeholder relations. A focus on the benefits of individual projects is the strategic direction in which these recommendations have been addressed.

2.2 Market Potential and Project Identification

Project Flow

The discussion related to project flow involved two issues. The first issue is the desire of the private participants to see the government commit to putting projects to market over the longer term. While the market in B.C. and Canada is still developing, providing the certainty that a stream of projects will be forthcoming will continue to be a challenge. It can be partly addressed, however, by the market getting some sense of the government's intent to continue to use public-private partnership when the need to develop infrastructure arises and when it is seen to provide the best solution.

The second issue is the need for improved communication with the market on upcoming projects. This issue is largely a matter of giving bidders early information on project timing so that they have a better ability to allocate resources and prioritize other commitments. For the sponsor's own purposes, the early interface with the bidder community would highlight any conflicts with other projects being put to the market in other jurisdictions that might have an impact on the level of competition or simply the need to review the timing of the various stages of their own procurement.

To keep the lines of communication open between the government and the market on both of these issues, it is recommended that semi annual meetings be established between the public and private sectors to discuss project flow from all perspectives, allowing sufficient time for both sectors to compile the necessary resources to manage the process and for the public sector to be sensitized to competing projects in other jurisdictions which may compromise their own procurement.

Project Structure, Size and Scope – The Right Project

Participants also recommended that public sector sponsors have a strong dialogue with the market early in the process to ensure project feasibility, “finance-ability” and sufficient market interest. In other words, to ensure the Province pursues the most appropriate type of projects.

The overarching goal is to pursue projects with acceptable scope and size and feasibility as a public-private partnership while delivering value for money. By developing the right business terms and risk allocation, and by ensuring project feasibility, timing and staging of the procurement process, the Province will be in a better position to reach that goal and to pursue the right projects.

It is recommended that projects undergo an appropriate screening process before they reach the market and that the business plan be sufficiently developed so that key business terms and risk allocation are understood.

2.3 Procurement Process

The Optimum Process

Once the right project is selected participants also recommended involving the market early to help facilitate the design of the most efficient process for a given project to ensure the lowest bid and transaction costs possible. This would enable the Province to structure processes to better reflect project size and scope, to reduce complexity for smaller projects, and to achieve efficiencies in all projects. In addition, to ensure both a real partnership approach to the procurement process, and to facilitate timely decisions and an efficient procurement process, participants agreed that all key decision-makers need to be at the table when engaging the market.

Private sector participants felt that there were a number of examples - Expressions of Interest (EOI), Request for Qualifications (RFQ) or Request for Proposals (RFP) - in which the formal procurement process - commenced prior to having detailed transaction objectives, structure and timetable. This often leads to changes in the process, and therefore, making it more expensive for bidders and sponsors.

A specific example was cited in which the RFP was initially issued in draft form to invite comments from proponents. The principle behind this was supported, however participants felt that the length of time before the RFP was finalized led to considerable uncertainty.

Extended procurement timetables were consistently viewed as a major contributor to increased costs. Many comments therefore focused on bringing greater certainty to the procurement process and timetable. These included:

- Discussing the schedule in advance and revising as necessary
- Performing extensive “what if” analysis on the schedule
- Requiring business advisors and legal counsel to take on some schedule risk to encourage timely delivery
- Ensuring adequate resources are available to meet schedules.

It was agreed that these recommendations would be addressed.

Cost and Duration

Reducing the costs and duration of procurement processes were identified as being the most important issues to be addressed in future procurements. Participants suggested this would facilitate efficiencies and streamline the process for both the public and private sectors.

Participants recommended reducing the number of steps in the procurement process. For example, the RFQ phase was seen as often more complex and lengthy than its purpose required. Other recommendations included ensuring a good match between requirements and project characteristics and the provision of more comprehensive information on transactions to facilitate more appropriate team formation. A concern cited was the often extended timeframes between submission of the RFQ and commencement of the RFP, making planning a difficult challenge for the private sector.

There was a general concern about the level of binding commitments, and in particular, financing commitment, at the submission stage. Participants recommended that a consistent approach to, and definition of, bid commitment is developed in consultation with the private sector, subject to some variation depending on the requirements of different transactions.

There was a lack of consensus amongst workshop participants in respect to the use of Best and Final Offer (BAFO) processes. Opinions varied on whether or not BAFO is a useful means for the public and private sector to refine the commercial and technical proposal before incurring the full costs of a binding and committed financed bid.

A related issue is the use of letters of credit or security deposits to support proponent participation and commitment. Again there was a lack of consensus in how to approach this issue. An issue for consideration is the relative importance of maintaining competitive pressure following the announcement of preferred proponent compared to the high costs this can involve. It is recognized that a relatively high security deposit can drive earlier involvement of financiers in the transaction, but at increasing costs to bidders.

It is recommended that further work needs to be done on these issues in consultation with the private sector before any decision is made regarding the future use of BAFO and/ or security deposits and the conditions under which they are used.

Both the private and public sector agree that there is a need to better understand the actual costs being incurred by bidders and sponsors to participate in procurements. Specific issues noted were the considerable level of detail required from proponents to support their bids. It was suggested that the focus could be more on meeting performance specifications than providing detailed engineering drawings beyond those needed to establish a firm price. Participants recommended that a workshop be held with bidders and the public sector sponsors to review the relative technical requirements, performance specifications and the costs of allocating resources and complying with procurement requirements.

The results of this workshop could be used to review procurement requirements to identify scope for cost reductions and to assist in a review of the need for and extent of honoraria or stipends. The cost of maintaining competition up to the final stage of the procurement process could be recognized and a consideration for break fees (if the public sector sponsor were to cancel the process) could be addressed.

To address the concerns that have already been raised, procurement in B.C. is being developed with greater standardization of procurement documentation and with the establishment of realistic procurement schedules for projects. The Council is prepared to support this standardization effort by facilitating further private sector consultation in the form of further detailed workshops and responses to issue papers.

Consistency

Market participants identified consistency as being one of the most important issues to address in procurement processes. Recommendations were made to increase the level of standardization in processes, in risk allocation, and in procurement documents. It was, however, recognized that individual projects possessed unique commercial features that could only be addressed by individualized treatment.

A number of challenges to establishing consistency were identified, including:

- Many of the early transactions were initiated prior to the existence of a provincial body to procure public-private partnerships
- Project sponsors within the public sector often have strong policies or preferences on key risk issues
- PBC has different roles, sometimes as procurement manager, other times as an advisor, and, thereby, limiting the degree to which PBC can drive consistency
- External business advisors and legal counsel have differing views on the approach, and, thereby, influence the approach taken on each project
- Private sector bidders often have differing views on the appropriate model.

Notwithstanding these challenges, participants agreed that consistency and standardization are critical success factors in moving the B.C. market forward and that the Province should play a central role in achieving them.

Participants recommended that Partnerships BC take a lead in establishing these standard models, with input from both public sector ministries and private sector proponents. For this to be truly effective participants identified the following issues:

- The starting point could be a review of previous transactions to determine process or policy opportunities that could achieve consistency

- The Council could assist by establishing private sector working groups on specific standardization issues to support Partnerships BC's development of policy
- Ensuring the use of these standardized models, once they are established
- External business and legal advisors could be brought together to understand why they are making different recommendations and to ensure buy in to standardized models
- The Council and Partnerships BC could initiate an outreach program to try to achieve acceptance of these standardized models elsewhere in Canada.

Role of PBC

The existence of PBC was recognized as putting B.C. at a distinct advantage relative to other provinces in as much as there was a centralized agency with a very clear roll to facilitate public-private partnerships. It was recommended that the existing mandate could be strengthened to give Partnerships BC greater authority to achieve the consistencies required as the public-private partnership market matures in B.C.

Public Sector Comparator ("PSC")

Participants suggested that the Province take a consistent approach to developing, managing and maintaining the PSC and, in turn, make that approach available to the market. It was strongly recommended that the PSC be continually updated to accurately reflect current market conditions.

Peer Reviews

Concerns were raised by some workshop participants about the potential of peer reviews to add value to a project. There was concern that competing professional advice may lead to delays in project timelines. However, there was recognition that a well-defined peer review provides a useful tool to support decision makers as well as to validate particular aspects of a public-private partnership or process.

Accordingly, it was concluded that clear definitions of the purpose, content and timing of peer reviews are required. Peer reviews are not meant to provide differing views from different advisors. Rather, they are intended to provide an objective, third-party perspective, and ideally, validation of an aspect of a project. Consequently, decision-makers are provided with the information, corroboration, and support for making informed and meaningful decisions.

Fairness Commissioners

All participants applauded the use of Fairness Commissioners to facilitate open and transparent procurement processes. However, a view was expressed by many participants that standard measurements for determining fairness of the transaction are required. These standards could better encourage innovation and

reduce barriers to the resolution of issues which are considered routine in public-private partnership delivery.

There were three major comments in this respect:

- Market participants expressed frustration about the application of conflict of interest rules, which sometimes appear to be inconsistently applied and which can also appear to be excessively restrictive in a relatively small marketplace.
- Concern was expressed that the distinction between procurement using "conventional tenders" versus "public-private partnership proposals" was not fully understood by all parties. This can place excessive emphasis on lowest cost rather than the public-private partnership focus on greatest value for money.
- A related comment from many participants was that the communication channels between the public sector sponsor and the private sector proponents are often excessively rigid and formalized and that more open communication is an important feature of effective public-private partnership procurement. This again differs from conventional delivery practices.

It is recommended that a workshop be convened to explore the differences between public-private partnership procurement and conventional procurement. The workshop could help to establish guidelines on how public-private partnership procurement can be structured to meet the policy and legislative requirements of the public sector.

Risk Allocation

Participants recommended early, rigorous and realistic analysis of risk allocation by the public sector sponsors to achieve efficiencies in project procurement. Participants encouraged the public sector sponsors to clearly define risks and select appropriate risks to transfer to the private sector. These are risks the private sector can price, mitigate and/or insure. Participants recommended that the procurement process strive to resolve issues early in the process so that bidders would be discouraged from deferring contentious issues until the late stages of negotiations.

These recommendations are being addressed by:

- Developing a risk register early in the process;
- Conducting market sounding with respect to reasonable risk transfer;
- Developing risk allocation guidelines;
- Issuing draft RFP and agreements to the market for early comment;
- Ensuring risks are finance-able and insurable; and,
- Risk allocation is being tracked across projects to assess consistency.

The development of a position paper(s) on key risk allocation issues to facilitate a dialogue with the broader public-private partnership market is underway. More

detail on this and other position papers can be found in the recommendations section of this report.

Canadian Approach

Participants recognized that the maturity, size, predictability and risk allocation methodology of the Canadian market differs significantly from the U.K. and other markets. Therefore, customizing the procurement model for B.C. and Canada is an important objective. Measures are underway to take the best of different markets and to develop a “made-in-Canada” approach to partnerships, while utilizing applicable best practices from other jurisdictions.

Participants felt that addressing the issues outlined in the previous sections would have the most significant material impact on strengthening the procurement process and the public-private partnership market in B.C.

3. Technical and Policy Recommendations

The purpose of this section is to identify and make recommendations on a range of specific technical and policy issues raised by workshop participants. Recommendations for continuing to improve the public-private partnership procurement process in B.C. included the development of position papers and policy papers on a wide range of these technical and policy issues. They are listed below, reflecting the priorities agreed to by workshop participants.

Position Papers

Working groups of Partnerships BC and the Council will prioritize the preparation of draft position papers for Partnerships BC approval on the following:

- Force majeure – insurable and uninsurable events, relief events and delay events
- Change in law
- Compensation on termination
- Long-stop dates

Position papers on the following will be developed as a secondary priority:

- Intellectual property
- Collateral agreements
- Direct lenders agreements
- Confidentiality
- Refinancing gains
- First Nations

Policy Papers

Working groups of Partnerships BC and the Council will prioritize the preparation of draft policy papers for Partnerships BC approval on the following:

- Streamlining qualification stage through centralized financial statement submissions
- Role of security deposit
- Honorarium/partial compensation

Policy papers on the following will be developed as a secondary priority:

- Role of fairness commissioners
- Role of PSC
- Conflict of interest
- Communications
- Evaluation criteria and disclosure to bidders

4. Conclusion

Participants recognized there has been significant progress towards establishing a strong public-private partnership market and a commitment to project flow in B.C. that is providing good opportunities to deliver critical infrastructure and services.

It was acknowledged that as the public-private partnership market in B.C. is in its early stages of development, some growing pains can and should be expected. As the Province moves further into developing public-private partnerships, adhering to standardized processes and procurement documentation will help achieve a more cohesive policy and practice environment for both the public and private sector.

Both the public and private sectors are committed to working together to address the issues raised in this report. As these issues are dealt with in a collaborative fashion, it will assist in achieving a strong and robust competitive market environment in which to pursue public-private partnerships.

The best practices and consistencies developed throughout this process will be equally relevant to other jurisdictions in Canada pursuing procurement through this approach.

Appendix A - Methodology

This report was undertaken by a Review Team comprised of two members of the Board of Directors for the Council (Brian Bentz, AMEC; Nicholas Hann, Macquarie NA), the Executive Director of the Council (Jane Peatch), and two representatives of PBC (Suromitra Sanatani; Grant Main). Pricewaterhouse Coopers (PwC) – (represented by Mark Hodgson) was retained to coordinate meetings and to document comments.

Initial Workshop Sessions

Five different workshop sessions were organized and facilitated. Participants were provided with a list of topics and questions to consider in advance of the session. The agenda for each session consisted of issue discussion, theme sorting of the issues and discussion of alternative approaches that people have seen or would suggest to rectify or address the identified issues.

Each workshop was attended by one of three distinct groups of public-private partnership practitioners: bidders, lenders and investors; advisors; and public sector sponsors, i.e. government Ministries. This organization of the meetings ensured a fairly consistent perspective for the discussion in each workshop. As well, each workshop was attended by representatives from PBC. The tone and approach to the sessions was to be as open and forthcoming as possible to achieve full disclosure of issues.

The outcomes of the sessions were captured on the basis that comments would not be attributed to any particular organization or individual. Thirty nine distinct issues were identified by the participants. These issues were categorized by the various phases of a public-private partnership project. These phases included:

- The foundation and overarching environment for partnerships in B.C.
- Pre-procurement, establishing the business case and project scope
- Procurement and bringing the opportunity to market
- Governance of public-private partnerships in B.C.

Most of the issues that were raised were attributed to the procurement process itself. The majority of the participants were bidders, lenders and investors. The second largest group was advisors, and the final group was the public sector sponsors.

Participants for all five workshop sessions are listed below:

- Russell Anthony, Vancouver Convention Centre
- Duncan Ball, Macquarie North America, Ltd.
- Brian Bentz, AMEC Inc.
- Frank Blasetti, BC Ministry of Transportation
- Dave Bustos, Scotia Capital Inc.

- John Casola, PricewaterhouseCoopers Corporate Finance Inc., Toronto
- John Collings, Collings Johnston Inc.
- Nick Crisp, BC Ministry of Energy & Mines
- Garry Dawson, BC Ministry of Transportation
- Ken Dobell, Office of the Premier of BC
- Paul Dunstan, ABN AMRO N.V., Canada Branch
- Robert Ennis, Aecon Group Inc.
- Peter Ferris, Office of the Comptroller General, BC Ministry of Finance
- Byran Gibson, McCarthy Tétrault LLP
- Don Goedbloed, Stuart Olson Construction
- Nick Hann, Macquarie North America, Ltd. Vancouver
- Mark Hodgson, PricewaterhouseCoopers Corporate Finance Inc., Vancouver
- Gerald Hoff, Serco North America
- Cliff Inskip, CIBC World Markets, Toronto
- Helmut Johannsen, Fasken Martineau DuMoulin LLP
- Karim Kassam, EPCOR Water Services Inc.
- Scott Lyons, Ledcor Industries
- John McArthur, Bilfinger Berger BOT Inc.
- Duncan McCallum, RBC Capital Markets
- Ian Macintosh, Blake Cassels & Graydon LLP
- Mike Marasco, Partnerships BC
- Frank Margitan, Peter Kiewit Sons Co.
- Peter Milburn, BC Ministry of Transportation
- Jim Mitchell, PCL Constructors Canada Inc.
- Stefan Parche, Aecon Group Inc.
- Catherine Peacock, Ernst & Young Corporate Finance Inc.
- Jane Peatch, The Canadian Council for Public-Private Partnerships
- Ashley Richardson, Serco North America
- Suromitra Sanatani, Partnerships BC
- Andrew Shaw, KPMG LLP
- Steve Skelton, Bilfinger Berger BOT Inc.
- Patrick Smyth, BC Ministry of Energy & Mines
- Peter Sorensen, PRP International Inc.
- Chris Sullivan, BC Ministry of Health Services
- Esther Tse, SNC-Lavalin

Final Workshop Session

A sixth and final meeting was organized and facilitated to review the issues captured from the initial workshops and identify solutions that could be satisfactory to both bid participants and procurement agencies.

A select group of representatives from each of the previous five meetings was invited to attend. Unfortunately none of the invited public sponsors were able to attend. The agenda for this session consisted of identifying and confirming the priority issues, discussing solutions and making recommendations.

Participants in the final workshop were asked to each identify their top three issues from the list of issues produced during the initial workshop sessions that they felt would provide the greatest return on investment to the public-private partnership market over a 12 month horizon.