PPP Projects in the Health Sector of Nigeria:
Key Development & Financing Considerations

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Introduction

The Nigerian health sector is battling with poor infrastructure, poor equipment, poor funding and low staff capacity. For 2020, the Federal Government allocated just 4.14% (N427.3 billion) of the budget to healthcare, despite being a signatory to the Abuja Declaration since 2001, where countries pledged to allocate at least 15% of their annual budget to improve the health sector.

Currently, the regulatory mechanisms for health service delivery, quality assurance management and distribution of commodities such as drugs, vaccines, and equipment are largely ineffective. Services in public and private sectors frequently all below acceptable standards. In some cases, the lack of effective regulation is resulting in people receiving (and paying for) treatment of little or no therapeutic value; even worse, some are exposed to dangerous products and practices, and are thereby suffering harm.

Health care delivery in the public sector is currently highly bureaucratized, undermining effective delivery of services, professional ethos, job performance, and morale.

In the private sector, the cost of care is unaffordable to a large percentage of the people, and very high for those who could even afford such services. As a result, the populace is unsatisfied with services provided in both public and private facilities.

The introduction of PPP into Nigerian healthcare was made possible through the National Policy on Public-Private Partnership for Health adopted by the Federal Government in 2005. The policy was introduced as a reform to address the deplorable national health profile as evidenced by poor infant and maternal mortality rates, and low life expectancy.

A "public private partnership" is a collaborative relationship between the public and private sectors aimed at harnessing (and optimizing the use of all available resources, knowledge, and facilities required to promote efficient, effective, affordable, accessible, equitable and sustainable health care for all people in Nigeria.

Public Private Partnership (PPP) Model in Healthcare

PPPs are defined as a broader partnership between private contractors and government, in which the common characteristics are that the public sector contracts (usually on a long-term basis) with the private sector for the provision of a public service.

Historically, governments have engaged the private sector to deliver services through healthcare PPPs to achieve one or more of six functions:

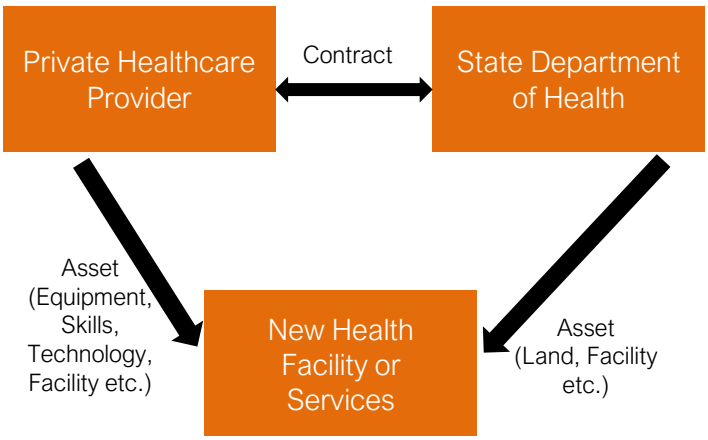
- Finance – financing or co–financing of the project
- Design – design of the project, including design of the infrastructure and care delivery model
- Build – construction or renovation of facilities included in the project
- Maintain – maintenance of hard infrastructure (facilities as well as equipment as applicable)
- Operate – supply of applicable equipment, IT and management/delivery of nonclinical services
- Deliver – delivery and management of specified clinical and clinical support services.

The majority of facility–based PPPs bundle these functions into three models:

- **Infrastructure–based model** – to build or refurbish public healthcare infrastructure
- **Discrete Clinical Services model** – to add or expand service delivery capacity
- **Integrated PPP model** – to provide a comprehensive package of infrastructure and service delivery.

Health systems will need to become more integrated, addressing care needs across the continuum, while utilizing technology to enhance delivery.

PPP models are adapting to these changes. Where early PPPs focused on building and replacing critically-needed hospital infrastructure, integrated PPPs were the next evolution, adding clinical service delivery and private sector management practices to improve the quality of care delivered, as well as access to specialty care.



Generic Healthcare PPP Model

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Drivers of Health Sector PPP

Healthcare has been largely overshadowed in the PPP market by super projects in energy, telecommunications, and transportation. While estimated at only about 10% of all PPPs, healthcare projects require a special understanding of the delicate balance of the needs in social infrastructure.

For example, in other types of PPP projects, the physical infrastructure is the desired end product and any provisioning to maintain and run it is secondary. Health systems are different. For health systems, a hospital is a small part of what keeps people healthy; the desired end result for government is better health for a population. Increasingly, PPPs in health are built on common drivers, but with a new-found urgency in today's economic and social environment:

Investment Need: A shift from assets to efficient operations.
Governments are spending increasing portions of their budgets on health. Spurred by ageing, chronic disease and technology, as well as the growing expectations of the population, health spending is growing much faster than inflation. While credit has tightened, interest rates have remained low, providing finance for well structured and executed projects. In general, the financial situation will be a positive influence (for PPPs).

Budget Constraints:
Exacerbated by the global pandemic and recession and financial crisis, governments face frighteningly gaping deficits, making private investment and expertise even more vital to address their health system needs.

Better Procurement: Shifting government's role from provider to regulator
Following two decades of refining PPPs in infrastructure, a number of private organisations have honed their abilities to work with governments on PPPs, and vice versa. PPPs in infrastructure are long-term contracts, usually 20 years or more, giving governments real-world experience in making long-term commitments to private sector arrangements. It also allows the role of government to evolve from provider of services to commissioner and regulator of services.

Access to Skills and Knowledge: Health PPPs require more than dealmakers
As PPPs move beyond infrastructure, the vision moves beyond the deal. This requires a broader team of experts in clinical, legal, technology, process engineering and strategy. "Public sectors can make significant savings by working with expert service providers. Most importantly, public and private partners must determine how the PPP team works together to improve care for patients. Today, healthcare knowledge is shared through broad networks of information technology. Old health systems are siloed and inefficient.

Service Capacity: Some territories still need new beds, but many need other types of social infrastructure.
A funding mechanism that focuses solely on hospitals leads to perverse incentives to overuse hospital care and weaken preventive efforts. The health needs of the world are changing, and so is the definition of infrastructure. For some nations, there is still a crucial need for beds.

According to a report by WHO in 2020, Nigeria boasts of 0.9 hospital beds per 1,000 people less than the global average of 2.3 while its Intensive Care Unit, ICU, beds for emergencies is estimated at 0.07 per 100,000 people.

Key Evaluation Process

This is largely driven by the concept of “value for money,” which takes into account “whole life cost optimisation.” In the long run, the private sector alternative provides better value for money compared with the public sector, as it takes into consideration capital costs as well as maintenance costs.

The enhancement of partnerships between the public and private sectors is one of the elements that needs to be addressed in ensuring sustainable economic growth. There are five key principles:

Drawing on Past Experience
Privatisation has served to define the relationship between the public and private sectors, where it has created thousands of employment opportunities and generated multiplier effects to spur

the overall economy. Nonetheless, it is still viewed with suspicion and skepticism. The government needs to identify the reasons for these shortcomings and address the key deficiencies in these programmes.

Becoming a better partner

The lessons learnt need to be applied for the government to become a better partner, so as to secure better public services and value for money for the taxpayer. This can be achieved by the government taking a more long-term view as shareholder, by growing the value of the businesses and drawing on practices in the private sector and in other countries.

Safeguarding public interest

The success of PPPs lies in whether the added value generated benefits users of public services, and the wider community. The government must protect public interest by enforcing a structured tender process to assess the benefits of the private sector's proposed services vis-à-vis the total costs to be borne; delivering better value for money and better management of capital spent; putting effective regulation in place to ensure all public services are accountable to customers and communities that rely on them; and maintaining continuous government involvement in those elements of PPP where a strong public interest remains.

Recognising the contribution of staff

As dedicated and committed staffs are central to the long-term success of partnerships, it is vital that their contribution is recognised and entitlements protected.

Developing innovative partnerships

PPPs are about changing the way in which the government does business and interacts with the private sector, to introduce the private sectors' expansive skills, experience and finance into the wide range of public sector activities for new and innovative solutions.

Other generic process may include:

- Scope of service provider selection through:
  - Competitive bidding
  - Competitive negotiation
- Risk and revenue sharing
  - Market risk arising from insufficient demand
  - Implementation risk: delay in project completion, environmental damage
  - Finance risk
  - Maintenance risk
- Enabling environment
  - Leadership from both partners
  - Healthy competition to achieve the desired result
  - Trust-based contracts
  - Achievement of performance indicators
  - Periodic review of the progress
- Economic cooperation and integration.
- Cost-effectiveness specially to marginalized people.
- Delivery and management of specified clinical and clinical support services.
- Target achievement with limited investments
- Strong partnership with diverse and dynamic human resource within the team

Risk Analysis

One of the key parameters for evaluating PPP programs is the degree of risk transfer they achieve through the contractual structure. The basis of the risk transfer is that the risk is borne by the party that is best able to manage the risk. Following are some of the key risks involved in any PPP arrangement.

- Design risks
- Construction and development risks
- Performance risks
- Operating cost risks
- Variability of revenue risks
- Termination risks
- Technology and Obsolescence risks
- Residual risks

As the blueprint for the PPP is developed, it is essential that both the public sector and private participants discuss the following risks and develop a detailed list of all specific items under the above heads. A clear picture of the above risks will serve as a vital input for the evaluation framework used for evaluating the PPP model.

The financial risks related to Healthcare PPP could be encountered in the construction stage and the operating stage. They are discussed below:

Construction Stage Financial Risks

- Availability of finance. This represents the risk of financing (especially third party financing, that is, debt arrangements) not being available at commercial close or before construction starts, or only being available on prohibitive conditions. This risk relates to an essential obligation of a PPP and should generally be assumed by the private partner. However, the government has to proactively mitigate the risk by proper preparation and appraisal, and potentially (in some projects in EMDE countries) share the risk by putting in place public institutional finance.

- Financial costs/interest rates. This is another essential private risk in PPPs, with the exception of the interest base rate risk between bid submission and financial close, which is taken back or shared by the authority in a number of countries.

- Refinancing. Some jurisdictions include the obligation for the private partner to share any refinancing gains with government. In some specific projects, governments also share the downside refinancing risk.

- Forex risk. In the context of hard currency cross-border financing this is a major issue.

Operation Stage Financial Risks

- Revenue risk in user-pays. This refers to the risk of the revenue flows not being correctly assessed. The main or most likely reason is volume risk, that is, the potential impact of demand or usage not being at the anticipated level. This risk is at the heart of user-pays structures and should generally be borne by the private party. However, to share this risk and/or limit it to some extent may provide Value for Money (by providing a guarantee for minimum traffic or minimum revenue), especially when the likelihood of the risk occurring is very significant. This danger should be assessed during appraisal and even tested with the market, including stress tests and break even analysis.

- Revenue risk – inflation and indexation. Any contract must provide clear rules as to how payments will be indexed to reflect any rise in cost-inflation. Generally, the risk of cost inflation not being compensated for by revisions to pricing should be assumed by the private partner. However, specific issues may arise in the context of user-pays PPPs where the authority reserves for itself the ability to settle the tariff level during the course of the contract. In this case, when the tariff is not approved at the level anticipated by the private partner, specific measures to neutralize the impact on the private partner should be a part of the contract.

- Revenue risk availability and quality. Revenue risk linked to availability and quality issues — when the performance requirements and performance target levels are not met — must be the responsibility of the private partner. Failure to meet these requirements may affect the revenue directly (abatement of payments) or indirectly (imposition of penalties or liquidated damages (LDs)). This risk is borne by the private partner as it is the essence of the PPP objectives. Sometimes the risk is referred to as performance risk.

- Other revenue risk events. Other risks related to revenue may arise on some projects or in some countries. Sub-categories (not present in every project) are:
  - credit risk or counterparty risk
  - third party and ancillary revenues
  - Foreign exchange risk (forex) for cross-border investors. However, it should be noted that risk with respect to cross-border loans in hard currency.
  - fraud/non-payment by users.

Bankability

The primary consideration of any lender to a PPP project is a simple one – to ensure it will be repaid what is has lent together with an appropriate level of interest. With an healthcare project, as with most PPP projects, a lender's main objectives will therefore include protecting the revenue stream (for example, by ensuring deduction risk is clear and properly assessed), creating an adequate security package (for example, by ensuring there is a realizable recourse to sponsors, setting appropriate caps on liability for sponsor recourse, parent company guarantees, on-demand construction bonds if required and/or performance bonds and the like) and pricing finance commensurate with its ultimate view of the risks involved.

Clearly, the cost/revenue analysis is of key importance. Also, as mentioned briefly above in relation to termination, in certain downside scenarios like force majeure termination or certain default termination, lenders will want to know they still have a reasonable prospect of return through recourse to certain levels to the public sector, to sponsors or to additional security providers. A structure that adequately satisfies the risks of a project is therefore fundamental to the "bankability" of the project.

Case Studies

The $1 billion new Royal Children's Hospital (RCH) Project by Partnerships Victoria in Australia.

The new $1billion RCH Project is the largest hospital redevelopment to be undertaken by the State. The Project involves the construction of a new facility adjacent to the north-western boundary of the existing site, with retention of the existing Research Precinct Building and Front Entry Building.

The outcomes of the Project will have a major impact on the quality of tertiary health services to be delivered to children in both metropolitan Melbourne and rural / regional Victoria, reaching to Tasmania and South Australia.

The current RCH buildings were designed when most hospital care was provided at the bedside and parents could only visit during designated visiting hours. Although the RCH continues to deliver high quality tertiary health services, its buildings have become unsuitable for the complex high technology multidisciplinary care now provided for children. The facilities do not support families in the manner expected of a world-class children's facility and have failed to keep pace with the rapid expansion of sameday and ambulatory care services.

The site to be used for the Project (including the retained buildings) will be less than the existing site area of 4.1ha. The State has put in place legislation that requires the final size of the new hospital site to be less than that currently occupied by the existing site – resulting in an increase in parkland after construction activities are completed.

The State undertook a detailed assessment of the PPP delivery model and three alternative models to deliver the Project. These models are described briefly below:

- **Fixed Price**: the State engages a design team to develop the design documentation then engages a builder to deliver the works at the fixed price tendered.
- **Managing Contractor**: the State engages a private sector contractor to manage some or all aspects of the design, documentation and build phases of a project on behalf of the State for an agreed lump sum.
- **Alliancing**: the State shares risks with a private sector builder in a relationship culture which encourages a "no blame" approach for issues and instead seeks to foster a "solutions" based culture.
- **PPP**: the State engages a private sector consortium to design and build the project, finance it and assume responsibility for facilities maintenance and asset replacement over a defined period (typically around 25 - 30 years).

After a detailed assessment, the PPP structure was selected as the preferred procurement method for the Project.

Parties to the PPP

RCH: The RCH is a body corporate established under the Health Services Act 1988 (Vic). The RCH is not a party to the Project Agreement, but has formally been nominated by the State as the organisation that will deliver the hospital services and functions.

The State: The State is the contracting entity for the Project and is a signatory to the Project Agreement and other ancillary documents involving the State. The Minister for Health is the person empowered to execute these contracts on behalf of the State.

CHP: CHP is the entity that has contracted to deliver the Project. CHP is the counterparty to Project Agreement and is the main contracting entity with the State. CHP in turn has entered into a range of contractual relationship with its consortium partners to deliver elements of the Project. Notwithstanding this, CHP will be the organisation ultimately responsible for the delivery of the Project and will, amongst other things, provide strong "hands on" management over the duration of the Project.

Equity Provider: Babcock & Brown International Pty Ltd will underwrite the equity requirement for CHP.

Financiers: CHP has arranged for the involvement of a number of financiers to raise funds to pay for the construction of the hospital and other associated costs. A majority of the funding for the Project will be raised from the issue of bonds into the capital market. Proceeds raised will be placed in a deposit account managed by CHP until required.

Builder: CHP has engaged Bovis Lend Lease Pty Ltd to design, construct and commission the new facility, and to demolish and remediate that part of the existing site that will be repatriated with Royal Park.

Facility Management Subcontractor: Spotless P&F Pty Ltd is an experienced service company. CHP has engaged Spotless to provide a range of facility management related services over the operating phase of the Project.

Project's Commercial Elements

The provision and operation of the agreed commercial opportunities (as defined in the Project Agreement) comprising 353 hospital beds, a food court, retail precinct, 90 room hotel, gymnasium, office accommodation and consulting suites, childcare facility (in addition to the RCH childcare facility) and approved vending machines

Key Principles

Two key principles underlying Healthcare PPP arrangements are:

- **the allocation of risk to the most appropriate** party (being the party most able to manage those risks, be that the public or the private sector participant);
- **payment when and only for services delivered; and**
- **ensuring value for money** (in terms of both the overall cost to government and the level and quality of services delivered) is achieved through the structure and contractual suite of documents entered into.

Typically, healthcare-based PPP projects involve the design, construction, operation and financing for a hospital (or Healthcare Diagnostics) or other healthcare facilities and/or the refurbishment and upgrade of existing facilities. The operation of the facilities will usually involve both "soft" facilities management services such as healthcare information systems, cleaning, catering or estate management services as well has "hard" facilities management services such as building maintenance services. Core Healthcare services such as the provision of doctors and nurses are usually retained by government but in theory there is no reason why such core healthcare services could not be provided under a PPP arrangement

Most helathcare PPP projects have common features which include in particular the following:

- clear and unambiguous **long term contractual performance standards agreed at financial close** of the relevant project;
- clear output based services specification document there should always be a degree of flexibility built into the output specification by way of a formal change mechanism to recognise that changes in circumstances beyond the contemplation of the parties at financial close may occur given the long term arrangements being put in place;
- costs calculated on a whole life basis (which means taking into account the private sector's expectations at financial close of the relationship between the design and build of the relevant healthcare facilities, their long term operation and any improvements over the contract term);
- an ability for both the public and the private sector participants increase monitoring and to remove service providers or other sub-contractors for persistent nonperformance as an alternative to termination of the PPP project in its entirety;.
- processes and arrangements for regular dialogue and partnership working between the contracting parties; and
- arrangements for harnessing the benefits, economies or other improvements to the services offered by new technology or innovation during the contract term – this is especially relevant in healthcare projects which often provide great emphasis on services involving information and communications technology (ICT), the hardware and software that provides networked computing to the hospitals and their paitents

Risk Analysis

PPP projects ordinarily involve limited recourse by project lenders to the private sector sponsor(s). Tight construction timetables, service provision requirements and termination arrangements also put at risk sponsors investment and reputation. As a result, project lenders in particular but also project sponsors will always carry out an exhaustive analysis of the inherent project fundamentals, including the overall robustness of revenue streams and key project risks.

Some of these project risks are detailed below, many of which will applicable to many accommodation based PPP projects and some of which are more particular to healthcare projects

Construction risks

- **Land (Ground) conditions** – a risk common to all accommodation-based projects. Unforeseen ground conditions such as fossils, remains, munitions, contamination or other environmental factors can have a serious impact on the timing and cost of a project. In some jurisdictions, it is more common to have government bodies accepting responsibility for non foreseeable ground conditions resulting in construction delay, but this is not always the case. Where the public sector passes ground risks to the private sector, it will be necessary to ensure the risk is fully passed down to the construction contractor.

- **Completion requirements** – any completed healthcare facility (including connection of relevant utilities and ICT) most come into operation by passing all relevant tests imposed by government and associated relevant authorities. It is a crucial stage for any project as capital spend is at a high point, there will have been no return on capital to date and the project will be entering into a phase of transition between a contractor who has completed a facility, with the possibility of liquidated damages requirements being imposed if problems arise, and an operator taking on an as yet unproven facility who will have the prospect of deductions being imposed for unavailability or poor performance which may be caused (in whole or part) by problems with a relevant facility.

  There are numerous ways in which this key moment of interface can be appropriately managed, including ensuring:

  a) that there are clear and unambiguous commissioning and completion tests in place under the contract arrangements;
  b) where relevant, there are clear provisions relating to the appointment of an independent tester;
  c) any **construction contractor** remains responsible during an initial period of operations whilst a facility is proven and that there are appropriate "snagging" rectification arrangements and defects liability; and
  d) tri-partite arrangements are put in place between the PPP contractor, the construction contractor and the service provider (often in the form of an interface or cooperation agreement) clearly allocating the part to be played by each party in relation to commissioning and completion and providing mechanisms for dealing with claims between each party and dispute resolution.

- **Planning and third-party consents** – the risks associated with planning and other third-party consents or approvals required for any hospital project are often passed by government to the private sector.

  Where possible, it is recommended that planning risk is alleviated by obtaining at least some form of outline consent at an early stage and to the extent possible, detailed planning consents.

  Where this is not possible, on occasion contractual mechanisms can be built in to either move commencement/completion dates or provide an appropriate exit if planning proves impossible. Whilst planning and consent risk is mostly mitigated by pass through to subcontractors, it is in any event imperative that the risk is managed through clear processes to ensure all relevant third parties are aware and informed of the development and its requirements at all relevant stages.

Change in law

- Healthcare PPP companies are required to comply with law and governments usually require a contractual obligation in concession agreements requiring their private sector counterparty to comply with law in the relevant jurisdiction. It is now widely accepted as market practice that the public sector will remain responsible for compensation associated with discriminatory and specific changes in law.
- General changes in law during the construction and operation phases however usually remain a risk that needs to be specifically addressed. Sometimes, this can be alleviated by capping or sharing arrangements agreed with public sector bodies.

Demand risk

- Unlike many other sectors, demand risk in Healthcare PPPs is **not usually a key risk that needs to be addressed by the private sector as it is usually (but not necessarily always) a risk retained by government or municipality**. This is especially the case for Healthcare PPP projects, where governments have usually stressed the importance of helath authorities being assured in respect of the long term projections for hospitals required (although obviously recognizing that the number of patients at hospital demographics will inevitably differ somewhat from year to year). It is generally considered that patient demand is a risk that best sits with the public sector and accordingly demand risk is not ordinarily an issue in the healthcare sector.

Public sector step-in

- Healthcare is a core service for any government and accordingly public sector bodies will usually seek to retain security related approval rights for private sector personnel and rights to step-in where it considers its core healthcare responsibilities may be jeopardised or for emergency reasons.

- It is important that the arrangements put in place clearly describe the way in which this can be done, the requirements of the private sector in such circumstances and the compensation/payment the private sector will require under various circumstances.

Damage

- In Nigeria vandalism remains one of the primary problems that the private sector will need to address. Where appropriate, arrangements should be put in place addressing responsibility for vandalism, prevention techniques and capping arrangements. PPP contracts will also contain indemnity provisions relating to claims made against the public sector body (for which it requires private sector indemnification), and damage caused (whether by patients, community or otherwise).

Abandoments and late delivery

- Because of the critical importance of healthcare to governments, and the desire to minimise disruption on doctors and staff involved in healthcare provision, decanting arrangements are of paramount concern in PPP projects. An healthcare project will often involve either the refurbishment and/or demolishment of an existing facility and the construction of a new hospital facility or facilities. In such circumstances, the project will need to address, for example, how healthcare provision can continue during new works phases how and when transfer to new facilities can take place minimization of impact on in-patients and out-patients requirements if relevant phasing of works. Hospital projects will also usually obtain quite stringent requirements with respect to delivery timetables and consequences of late delivery.

- Whilst in-built incentives to deliver on time are common to most PPP projects, hospital projects will often contain more stringent than usual requirements with respect to delivery of facilities. It would not be unusual to see reasonably tight longstop arrangements with respect to construction and other arrangements for delay including provision of temporary clinical requirements.

Termination risks

- Because of the significant investments made in PPP projects and the associated reputations of the relevant parties, termination regimes remain one of the key points of negotiation and risks associated with PPP arrangements. There are also different perspectives and views that need to be considered and respected – the public sector body wants to know that ultimately, it has the right to remove and cease a project where, for example, a project is significantly overdue in terms of completion, or where service provision is at such a poor level over an extended period that it has no other choice but to remove a contractor.

- Sponsors of a project will have committed significant levels of equity and accordingly will want to see a return on their investment. Similarly, lenders will have significant exposure risks in terms of their investment if a project fails on a default basis

- Compensation on termination differs according to the basis for termination (fault, no-fault and voluntary termination) and there are reasonably settled positions accepted in the market now for compensation arrangements under all the different termination scenarios.

Bankability

The primary consideration of any lender to a PPP project is a simple one – to ensure it will be repaid what is has lent together with an appropriate level of interest. With an Healthcare based project, as with most PPP projects, a lender's main objectives will therefore include protecting the revenue stream (for example, by ensuring deduction risk is clear and properly assessed), creating an adequate security package (for example, by ensuring there is a realizable recourse to sponsors, setting appropriate caps on liability for sponsor recourse, parent company guarantees, on-demand construction bonds if required and/or performance bonds and the like) and pricing finance commensurate with its ultimate view of the risks involved.

Clearly, the cost/revenue analysis is of key importance. Also, as mentioned briefly above in relation to termination, in certain downside scenarios like force majeure termination or certain default termination, lenders will want to know they still have a reasonable prospect of return through recourse to certain levels to the public sector, to sponsors or to additional security providers. A structure that adequately satisfies the risks of a project is therefore fundamental to the **"bankability"** of the project.

Typical Concession Terms in Hospital PPPs

Set out below are some typical issues for a PPP project which involves an upgrade or construction and operation of a hospital facility. How these issues are addressed in practice will be deal-specific.

Typical Issues

Topic	Comment
Appointment of a PPP contractor	▪ Provisions will be required to describe in outline a private sector participant's basic rights and obligations, also defining the geographical scope of the concession of the hospital. Hospital based PPP that involves hospital development is required to pass a level of demand and/or usage risk, the PPP contractor may wish to be protected from the public sector developing a competing arrangement. A public sector body may decline to agree not to promote competing arrangements, but economic protection from the consequences of doing so could be provided.
Duration of agreement	▪ Healthcare PPP arrangements usually have a 30 - 45 year service period. The term will usually run from financial close, so a delay to the completion of a relevant facility may result in a shortening of the service term.
General functions of concession holder	▪ The standards to which all works and services must be performed (typically to comply with all laws and with good industry practice) will be set out in a detailed output based specification document. ▪ The performance regime will usually be directly linked to the specification document through a payment mechanism that will provide for deductions for unavailability.

Typical Issues

Topic	Comment
Planning and other Consents	▪ As part of the general duty of the PPP contractor to comply with applicable law, there will often be specific obligations about the licences and other regulatory approvals which the concession holder must obtain. Environmental and domestic regulatory aspects will also be addressed. ▪ Sometimes the relevant public sector body (or a separate authority) may also agree to provide an element of cooperation to assist the PPP contractor's licensing applications to other authorities.
General functions of a public sector body	▪ This will describe the main tasks and duties of the public sector (whether State or Federal Government), which are often project specific and can be few or can be detailed. Appropriate land rights and access must be specified. ▪ If relevant, the basis on which any enabling works will have to be carried out, such as the demolition of existing healthcare structures to clear space for facilities, would be set out. As with connecting infrastructure, a key point is the extent of the public sector body's liability if there should be delay or defects in these enabling works. ▪ It may deal with the provision of power, water and other utilities, to the extent these are not to be procured by a PPP contractor itself. ▪ There may be service level agreements to be entered with the relevant public sector body or other authorities which continue to provide certain services. Non-performance of these services may give some relief (from breach/default responsibility and possibly compensation) to a PPP contractor. ▪ There are likely to be regulatory rules required by the public sector body itself which need analysis and contractual implementation. ▪ To facilitate viability for investors, the conditions on which licences can be revoked/ renewed and the overall exercise of hospital functions should be clear and objective. ▪ If the public sector body is to provide any financial support to a PPP contractor, the scope of support should be clearly described and the requirements which must be achieved in order for payment to be made should be specified
Emergency powers and other authorities	▪ The project agreement may provide for the public sector's intervention powers where academic services are jeopardised and in: • emergencies • disaster control • fire fighting • emergency communications • national security etc. ▪ The private sector consortia will need to be aware of and understand the risks associated with such interventions and the project agreement should contain additional protections for a PPP contractor and lenders where such interventions occur
Transfer of assets, personnel etc	▪ There may need to be provisions providing for the transfer to a PPP contractor the existing facilities at hospital or other facilities, such as any existing physical assets, rights of workers and possibly also certain liabilities. Usage, condition and liability issues often need to be negotiated, agreed and appropriately documented. ▪ In healthcare PPP projects where existing employed personnel are transferred to a PPP contractor, provisions need to be addressed dealing with the transfer process and risk allocation.
Site and project disclaimer	▪ To give effect to the transfer of design and construction risk to the PPP contractor, normally the public sector body will disclaim all responsibility for site conditions, requiring a PPP contractor to rely on its own surveys and judgement of known and unknown ground conditions. This may not always offer value for money, however, and sometimes risk can be transferred back to a public sector body where unforeseen site risks materialise.
Technical requirements of a public sector body for the relevant facility	▪ Provisions will need to address functional and other technical specifications of the hospital for design, construction and operation. ▪ To maximise innovation and risk transfer, these requirements should be primarily expressed as outputs (describing the functional result to be achieved), but in practice an element of input based requirements (describing the method by which the result will be achieved) is common. ▪ There should also be set out the PPP contractor's solution to meeting those requirements.
Design and construction procedure	For an Healthcare PPP project, we would typically expect to see set out: ▪ the timetable for completing design and construction of the works needed to develop the healthcare facilities ▪ the process for design approval ▪ the process for changes to the initial design ▪ the access and inspection powers of the public sector body to monitor proper construction ▪ any intervention powers (if any) of the public sector body if there is a breach and ▪ the sanctions which may be imposed for default.

Typical Issues

Topic	Comment
Completion tests and commissioning	Provisions will be required to describe, among other things: ▪ the objective tests which establish whether the works have been completed to contractual standards ▪ equipment commissioning tests, to ensure the overall facilities are operationally integrated and functioning to specification
Performance requirements	▪ This will specify (with detail typically set out in schedules) the operational standards and other requirements, including arrangements for heavy and routine maintenance (including when and how such maintenance is to be carried out and impact on academic services). ▪ The project agreement will often include a system of performance measurement to assess achievement of the functional operational requirements of the facility. ▪ Deductions to the unitary payment are ordinarily based on performance and availability criteria in healthcare PPP projects.
Concession fee	▪ A monthly unitary payment is usually established under a PPP contract. ▪ If there is to be a guaranteed minimum fee (which is not normally the case on healthcare PPP projects as it is against the principle of payment for service provision only), consideration should be given as to whether there are any circumstances where the guaranteed fee should not be payable as a result of external factors.
Controls on changes	▪ A public sector body may seek powers to approve changes in: • the organisations used by a PPP contractor to perform its obligations; or • the terms of those contractual arrangements. ▪ It may also wish to approve certain changes in the shareholders of the PPP contractor. This may be: • to ensure key organisations such as operators have adequate financial incentive to make the project a success, or • to prevent unsuitable organisations, such as someone considered undesirable for national policy reasons, from becoming interested in the school. ▪ The relevant public sector body may also wish to control changes in the debt financing arrangements, for example: • to cap its exposure on termination payments, or • to participate in refinancing gains (often on a 50/50 basis).
External events	▪ The project agreement will need to provide for the effects of various categories of events which are outside the control of the PPP contractor and/or the relevant public sector body. ▪ These circumstances may range from natural events of force majeure, such as earthquakes beyond the design tolerance of the facilities, or cover human factors, such as: • acts of war or terrorism, • widespread industrial action, or • breaches resulting in delay or loss. ▪ The effects of such events may be: • to protect the PPP contractor from the imposition of sanctions (such as termination) for what would otherwise be a breach of contract, • to grant extensions of time, or • in some circumstances, to entitle the PPP contractor to a specified amount of compensation.
Indemnities	This will set out: ▪ the circumstances in which the PPP contractor must indemnify the relevant public sector body (such as liability to third parties for property damage or personal injury) ▪ vandalism risk (which in some jurisdictions is of genuine concern in healthcare projects) ▪ any circumstances in which the public sector should indemnify a PPP contractor and ▪ caps on liability (if relevant).
Insurance	▪ The public sector body will specify the scope of insurance cover which it requires a PPP contractor to maintain. ▪ The implications of uninsurability (and its link to termination) and substantial premia increases should be addressed.
Change of law	▪ While in many jurisdictions the PPP contractor must bear any change in general taxation, the agreement would also usually allocate responsibility for the risk of this or other changes in law, especially discriminatory laws. There are often market accepted positions now in relation to changes in law with respect to healthcare based PPP projects. ▪ Changes in law need to be addressed in healthcare projects because, in particular, given the size of new facilities being built, there is always a genuine risk of changes in law necessitating significant capital expenditure in addition to any operational expenditure increases.

Topic	Comment
Sanctions of the relevant public sector	▪ The public sector may wish to retain specific powers to impose sanctions, short of termination, for breach by a PPP contractor. ▪ These may take the form of: • liquidated damages for delay (where it makes economic sense (value for money) to impose such payment obligations) • the imposition of additional monitoring • the reservation of the right to correct a breach itself at the cost of a PPP contractor or • other intervention powers. ▪ As an alternative to termination, a public sector body may wish to have the power to force the removal of non performing subcontractors.
Termination for PPP contractor default	▪ This will set out the events which entitle the public sector body to terminate the concession for breach by the PPP contractor. ▪ To be viable, the defaults should be serious, and, in general, a reasonable cure opportunity should be given before termination rights can be exercised. ▪ Typically there will be a right to terminate if the completion tests have not been successfully completed by a specified "longstop" date (as extended by extension events). ▪ Other termination events might include: • insolvency • serious unremedied breach • unauthorised change in control • fraud or corruption etc. ▪ On many healthcare projects, public sector bodies in markets in the UK have also sought termination rights for persistent breaches and for material breach. Given the level of investment made in PPP projects, the private sector consortia need to carefully assess termination default events. ▪ There will often be a termination right linked to long term poor performance – it is vital for the private sector that this is appropriately calibrated in terms of the levels that might trigger such a right for a relevant public sector body, as both sponsors and lenders are likely to want to have an ability to take proactive steps to address such poor performance long before a public sector body has any right to terminate a project for poor performance. ▪ An important consideration in establishing the default and termination regime is that of overall bankability. The regime must be acceptable to prospective lenders of the private sector participants.
Termination for default by the public sector body	▪ There will be a limited number of circumstances (which are often limited to fundamental matters) which entitle a PPP contractor to terminate for breach by the public sector body, such as failure to make payment after a specified time.
Termination for force majeure	▪ If external events cause a prolonged (usually at least six months) inability to operate the facilities (or carry out the works) either party may have a right to terminate for this force majeure.
Voluntary termination	▪ The public sector body may with to reserve the right to terminate the concession prematurely if, for example, it is in the national interest to do so.
Termination compensation	▪ A PPP contract will need to set out in detail the formulae for compensation payable in the different causes of termination. Whilst there are now generally accepted positions with respect to compensation on termination for different scenarios, arrangements differ from jurisdiction to jurisdiction and this part of a project still represents one of the key bankability requirements
Other termination consequences	▪ Assuming a PPP type build-operate-transfer structure is adopted, this would provide for hand-over of the facilities and other assets and rights (either to the public sector body itself or to an incoming concessionaire), and deal with outstanding liabilities and personnel issues. ▪ To support hand-over, there may be arrangements for a series of inspections in the years leading up to expiry, to identify refurbishment/reinstatement works and provide for their funding.

Financial Consideration

Government Funding

The Government may choose to fund some or all of the capital investment in a project and look to the private sector to bring in expertise and efficiency. This is generally the case in a so-called Design-Build-Operate project where the operator is paid a lump sum for completed stages of construction and will then receive an operating fee to cover operation and maintenance of the project. Another example would be where the Government chooses to source out the civil works for the project through traditional procurement and then brings in a private operator to operate and maintain the facilities or provide the service.

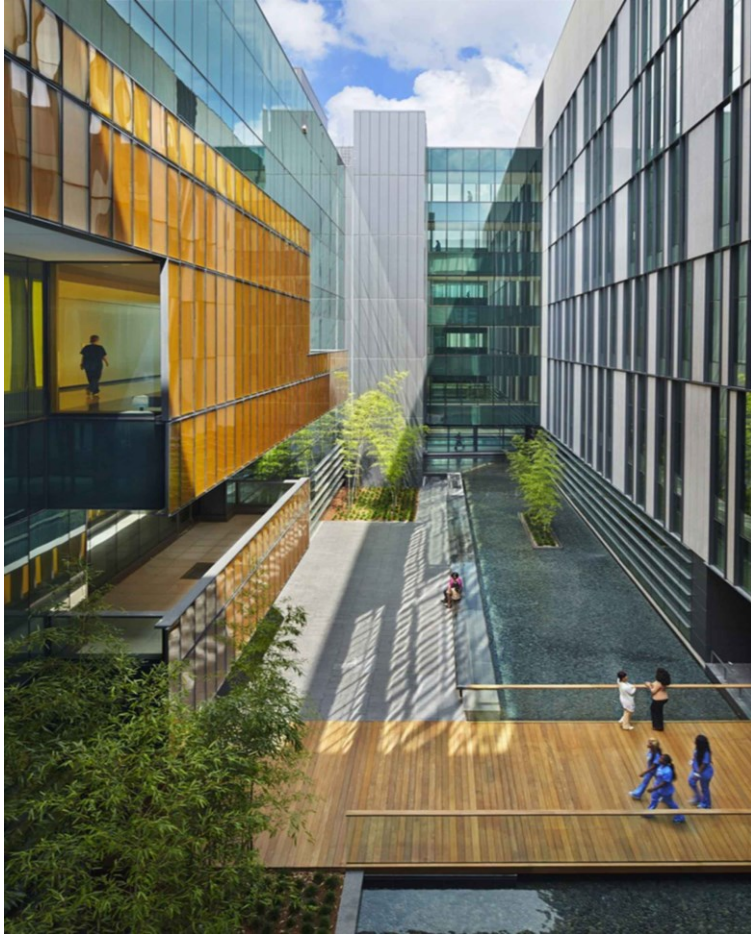
Corporate or On-Balance Sheet Finance

The private operator may accept to finance some of the capital investment for the project and decide to fund the project through corporate financing – which would involve getting finance for the project based on the balance sheet of the private operator rather than the project itself. This is typically the mechanism used in lower value projects where the cost of the financing is not significant enough to warrant a project financing mechanism or where the operator is so large that it chooses to fund the project from its own balance sheet.

The benefit of corporate finance is that the cost of funding will be the cost of funding of the private operator itself and so it is typically lower than the cost of funding of project finance. It is also less complicated than project finance. However, there is an opportunity cost attached to corporate financing because the company will only be able to raise a limited level of finance against its equity (debt to equity ratio) and the more it invests in one project the less it will be available to fund or invest in other projects.

Project Finance

One of the most common - and often most efficient - financing arrangements for PPP projects is “project financing”, also known as “limited recourse” or “non-recourse” financing. Project financing normally takes the form of limited recourse lending to a specially created project vehicle (special purpose vehicle or “SPV”) which has the right to carry out the construction and operation of the project. It is typically used in a new build or extensive refurbishment situation and so the SPV has no existing business. The SPV will be dependent on revenue streams from the contractual arrangements and/or from tariffs from end users which will only commence once construction has been completed and the project is in operation. It is therefore a risky enterprise and before they agree to provide financing to the project the lenders will want to carry out an extensive due diligence on the potential viability of the project and a detailed review of whether the project risk allocation protects the project company sufficiently. This is known commonly as verifying the project’s “bankability”



Conclusion

Healthcare is a constantly changing environment—from shifting demographics, to rapidly evolving therapeutics, treatments and technologies, to emerging diseases, conditions and service demands amid increasingly mobile populations.

PPP design is evolving to address these changing needs. By leveraging private sector expertise, financing, capacity, systems and management discipline, public health systems have been able to take advantage of new technologies and clinical support practices for their populations.

Pursuit of PPPs has also allowed governments to gain experience in transitioning from delivering care, to overseeing it via policy, regulation and performance management—critical experience that over time will allow governments to expand services far beyond traditional public capacity, and manage care across the spectrum of public, private and informally-delivered services.

Care should also be taken to ensure that decision making around PPP strategy is transparent and inclusive.

Clearly defined and measurable output-based performance standards will need to be defined that specify the end goal that the government wants to achieve through the PPP—rather than specific definitions of how PPP services will be delivered.

This will give the private partner flexibility to incorporate new ways of achieving the desired patient and financial outcomes as conditions evolve.

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