# The Public-Private Partnership Law Review

Second Edition

Editors
Bruno Werneck and Mário Saadi

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For further information please email
Nick.Barette@lbresearch.com

# Chapter 10

# IRELAND

*Mary Dunne and Fergal Ruane*[1]

## I OVERVIEW

PPPs are the most widely used model of project finance in Ireland. The Irish government set up the National Development Finance Agency (NDFA) in 2003 to procure PPP projects as well as other infrastructure projects with a capital value in excess of €30 million, having first carried out several pilot projects in the schools and roads sector and determined what model was most suitable for use in Ireland.

The NDFA procures PPP projects other than in the transport, local authority and water and waste water sectors. Road and light rail projects are procured by Transport Infrastructure Ireland (TII). TII is the result of a statutory merger in 2015 of the National Roads Authority (NRA) and the Railway Procurement Agency. Heavy rail projects are procured by Iarnród Éireann. Local authority projects are carried out directly by local authorities.

Project finance is also widely used in the energy sector, particularly on renewable energy projects such as wind farms. This is not the PPP model, but is a very typical structure where finance is secured by way of a power purchase agreement.

The most successful sectors in Ireland in terms of PPPs have been the roads and education sectors. There has been a rolling programme of motorway and school projects since the early 1990s.

## II THE YEAR IN REVIEW

Ireland went through a deep recession between 2008 and 2014 and saw the number of PPP transactions diminish very significantly during this period. Banks were not lending

1 Mary Dunne is a partner in Maples and Calder. Fergal Ruane is a senior associate in Maples and Calder.

and the Irish government cut back its capital spending as part of the austerity package agreed with the Imtenational Monetery Fund and European Central Bank. Indeed, as part of the government's deficit-reduction programme of 2009–2013, a number of PPPs were no longer affordable and were stopped, including:

*a* the National Concert Hall;
*b* the Government Office Decentralisation Programme;
*c* the Third-Level Institutions PPP programme;
*d* Dublin's large-scale mass-transport projects; and
*e* Thornton Hall prison.

However, Ireland has returned to growth and there has been an increase in the number of projects coming onto the market in the past 12-24 months as well as a corresponding increase in interest from international bidders.

Projects currently under procurement by the NDFA are as follows:

*a* Schools PPP Bundle 5 consisting of five new schools and an Institute of Further Education. The preferred bidder is Inspired Spaces and financial close is expected in Q2 2016.
*b* DIT Campus at Grangegorman, a third-level education facility. The preferred bidder is the Eriugena consortium. Financial close is expected in Q1 2016.
*c* The Primary Care Bundle PPP project consisting of 14 primary care centres. The preferred bidder is the Prime-Balfour Beatty consortium. Financial Close is expected in Q1 2016.
*d* The Courts Bundle PPP Project consisting of seven courthouses. The contract was awarded to the BAM PPP PGGM consortium in December 2015.
*e* The Charlemont Street Social Housing PPP also reached financial close in December 2015. Alcove Properties will develop up to 162 new apartments as part of the scheme.

***TII projects***

The N25 New Ross Bypass PPP Project was awarded to the BAM PGGM Iridium consortium and reached financial close on 26 January 2016 becoming the first Irish project to avail of the European Investment Bank's (EIB) project bond credit enhancement programme.

The Motorway Services Areas – Tranche 2 PPP project. Topaz Energy Group Limited was appointed as preferred Bidder in 2015. However, the procurement process has been challenged and is currently the subject of judicial review proceedings.

While the government has made various ambitious announcements about infrastructure spend and PPPs, in particular in the past 24 months, there will be a general election in Ireland in February 2016 and it is therefore difficult to say with any certainty what projects may and may not come to the market in 2016.

## III GENERAL FRAMEWORK

The NDFA developed the Template PPP Project Agreement in 2006 following extensive consultation with stakeholders in the private and public sectors. In addition, it published

a User Guide, which has a clause-by-clause commentary on the Template Project Agreement. These are available on the NDFA website at www.ndfa.ie/Publications/stdDocumentation.htm.

The Irish Template PPP Project Agreement is based largely on the UK PFI model adapted to suit the Irish landscape. In summary, the contracts tend to be 25-to-30-year design–build–finance–operate or design–build–finance–maintain contracts. In most cases, the authority retains ownership of the asset and grants the PPP company a licence to occupy and operate the land and asset for the term of the project. At the end of this period the licence terminates at the same time as the project agreement, and the asset remains in the ownership of the authority.

The operation aspect of most accommodation PPP contracts in Ireland tends to be confined to 'soft services' such as catering, cleaning and maintenance. This has avoided any real resistance from unions in Ireland as employment-protection issues have been minimised.

In contrast, full operation and maintenance of motorway PPP projects has been successfully included in the PPP contracts that have been entered into by the NRA (now TII).

The earlier motorway PPP projects in Ireland were done on the basis of a user-pays model, with or without subvention from the government. However, as the recent recession took hold, banks refused to finance on this basis and the motorway PPP projects were then executed on the basis of availability payments, in the same way as the financing of accommodation projects.

### i The authorities

The NDFA procures PPP projects in Ireland as well as other infrastructure projects with a capital value in excess of €30 million other than:

*a* the road and light rail sectors, which are procured by TII;
*b* the heavy rail sector which are procured by Iarnród Éireann;
*c* the local government sector which are procured by local authorities directly; and
*d* in the water and waste-water projects, which are procured by Irish Water.

While the NDFA advertises the PPP project, runs the procurement process and negotiates all project documentation, it does so on behalf of the public authority and it is the public authority that actually signs the contract. For example, in the case of a schools PPP project, the NDFA will run the entire procurement process and stay involved at contract management stage. However, the PPP Project Agreement will be signed by the Department of Education and Skills and the monthly unitary payments payable to PPP Co. will be made by the Department of Education and Skills.

The Central PPP Unit in the Department of Public Expenditure and Reform aims to facilitate PPPs by developing the policy framework for PPPs and issuing relevant guidance to departments and other authorities.

### ii General requirements for PPP contracts

To be classified as a PPP contract, a contract must be for a minimum of five years. However, there is no upper limit on the length of a contract. In practice the longest

contracts tend to be for 30 years and the term is dictated by the length of time needed to pay off the capital investment by the private sector and to allow the private parties to make a profit. EU law does not permit outsourcing of public contracts for longer than five years unless there are exceptional circumstances such as the need to pay off a capital investment. Therefore, much longer contracts for upwards of 90 years that can be found in East European countries, are not a feature of the Irish PPP market.

There are no statutory constraints on particular sectors preventing the use of PPPs. However, in practice, the operations side of accommodation projects is confined to 'soft services' such as cleaning and catering and there has been no attempt to outsource services in, for example, the health, education and prison sectors.

Before a procurement process for a proposed project can begin, a rigorous pre-procurement appraisal process must be followed, which is summarised below.

The sponsoring agency (usually the line ministry or the body that will be responsible for the day to day administration of the project), carries out a preliminary appraisal which includes an option appraisal, a cost benefit analysis and a preferred option.

Having completed the preliminary appraisal and received approval to undertake a detailed appraisal from the sanctioning authority, the sponsoring agency must seek the advice of the NDFA, which is the statutorily appointed financial adviser to the state for projects in excess of €30 million.

The sanctioning authority may be the line ministry or the government in the case of large projects (usually in excess of €100 million). It depends on the nature of the sponsoring agency and the size of the project.

The detailed appraisal will include a reasonable estimate of the overall budget required to procure the project. If the detailed appraisal results in the preferred option being a PPP, a PPP procurement assessment should be carried out. The NDFA provides financial, insurance and risk-analysis advice to state authorities to help them decide which is the most appropriate procurement mechanism.

The sanctioning authority will give its approval subject to a project budget. Once it receives this approval, the sponsoring agency either proceeds to procurement or hands the project to the NDFA for procurement on its behalf.

## IV BIDDING AND AWARD PROCEDURE

### i Expressions of interest

PPPs are public contracts and as such are awarded in line with EU public procurement law. Irish public procurement regulations closely mirror EU public procurement Directives at both the award and remedy stage and such regulations are rigorously applied and regularly challenged.

PPP contracts are almost always procured by way of a competitive dialogue or competitive negotiated procedure (see Section IV.iii, *infra*).

The initial expression of interest or pre-qualification stage follows the requirements of the EU Directives. Candidates are qualified on the basis of objective technical, legal

and financial criteria. In the case of the negotiated or competitive dialogue procedure, the authority qualifies at least three candidates, but as many as six may be qualified depending on the sector in which the PPP project is being awarded.

There is a natural reluctance to run up unnecessary bid costs for a larger number of candidates, which is set against the need to ensure a healthy level of competition in case one or more bidders fall out of the process.

The Irish government and the NDFA have for recent accommodation projects in the PPP Programme made provision, on an exceptional and non-statutory basis, for some reimbursement of bid costs for unsuccessful tenderers. The Invitation to Negotiate for each PPP project set outs the partial bid costs reimbursement that will apply for unsuccessful bidders.

### ii Requests for proposals and unsolicited proposals

Following the closure of the dialogue phase in the case of a competitive dialogue procedure or the end of clarification meetings in the case of a negotiated procedure, tenders are invited by the authority.

There are no formal procedures for submitting unsolicited bids in Ireland.

### iii Evaluation and grant

The two procedures used for the award of PPP contracts are the competitive dialogue and the competitive negotiated procedure.

*Competitive negotiated procedure*

The stages involved in a competitive negotiated procedure, following pre-qualification are:

*a* the authority issues an invitation to negotiate (together with detailed technical, legal and financial documents to be returned with the bid);

*b* the authority then provides a period of time to respond to any written questions and to hold clarification meetings with bidders;

*c* submission of bids;

*d* appointment of a preferred bidder on certain agreed terms; and

*e* the negotiation of project documents with the preferred bidder and the achievement of financial close.

A variation on this may be to have a 'best and final offer' stage between the submission of bids and the appointment of a preferred bidder.

*Competitive dialogue*

The competitive dialogue process is similar to the above. However, following pre-qualification, the authority enters into dialogue meetings with each candidate and refines the bid until a point when it is happy to close the dialogue and invite tenders. Following submission of tenders and appointment of a preferred bidder, no negotiation of documents is permissible and only clarification and fine-tuning of documents is allowed.

## V THE CONTRACT

### i Payment

A PPP contract for a typical accommodation project such as a school will involve a monthly unitary charge payment being made from the authority to the project company based on the whole-life costs of designing, constructing, operating, maintaining and financing the project plus an agreed profit for the project company.

The project company may suffer deductions from the monthly unitary charge for poor performance (performance deductions) or where a service is unavailable (availability deductions).

The early roads PPP projects were based on a user pays model but funders no longer fund on this basis given the uncertainty of traffic forecasts.

The Irish government does not give state guarantees for PPP projects.

### ii Distribution of risk

A typical risk allocation in a PPP project in Ireland is shown in the table.

| Risk | | | Private sector | Public sector | Shared |
|---|---|---|---|---|---|
| Site risk | Planning | Outline | | X | |
| | | Full | X | | |
| | Physical condition/contamination | | X | | |
| | Sufficiency of title | | | X | |
| | Access to site | | | | X |
| | Environmental risk | | X | | |
| | Archaeological risk | | | | X |
| Design and construction risk | | | X | | |
| Demand risk | | | | X | |
| Availability and performance risk | | | X | | |
| Change in law | Discriminatory change in law | | | X | |
| | General change in law involving capital expenditure during the service period | | | X | |
| | General change in the law other than that involving capital expenditure | | X | | |
| | Change in VAT | | | X | |
| Residual value | | | X | | |
| Maintenance risk | | | X | | |
| Insurance | General | | | | X |
| | Increase in premiums | | | | X |
| | Uninsurability | | | X | |
| Refinancing | | | | | X |

| Risk | | Private sector | Public sector | Shared |
|---|---|---|---|---|
| Compensation on termination | General | | | X |
| | For PPP company default | X | | |
| | For authority default and voluntary termination | | X | |
| | For force majeure, uninsurable risk or change in law | | | X |

### iii Adjustment and revision

PPP contracts have a change mechanism to allow the parties to agree variations throughout the life of the project and a mechanism for agreeing cost.

However, many changes are anticipated and dealt with in specific clauses of the contract and the risk arising from the change is allocated to one party or the other or the risk is shared.

For example, if a project is delayed or has to be altered as a result of an archaeological find, PPP Co. may have to pay for the first €100,000 of resultant costs but the public sector will be responsible for any costs after that.

Many contingencies are categorised as relief events (resulting in extra time being given to PPP Co.) or compensation events (resulting in monetary compensation and relief in terms of time being given to PPP Co.).

Contracts typically provide for three-to-five year benchmarking or market testing of certain services such as cleaning, catering and security and the costs in the financial model will be adjusted accordingly with an upwards or downwards adjustment to the unitary charge.

In summary, given that a typical PPP project has a minimum senior debt exposure of 80 per cent, that ownership of the asset remains with the state, that there are no state guarantees and that compensation on termination may leave the senior lenders exposed in certain circumstances, the senior lenders make sure that as many as possible potential changes are anticipated and the risk allocated and costed in advance.

### iv Ownership of underlying assets

In almost all cases of public infrastructure, the project company at no point owns the asset. It is usually granted a licence by the authority to occupy and operate the land and asset for the term of the project. At the end of this period the licence terminates at the same time as the project agreement, and the asset remains at all times in the ownership of the procuring public body.

### v Early termination

PPP Agreements may be terminated by the authority at any time for breach or convenience. The PPP Co. may terminate for breach. The Agreement may also be terminated for force majeure or uninsurability.

The compensation payable by the authority on termination of the PPP Agreement, for whatever reason, is a critical issue in the negotiation of any PPP Agreement. As the funders do not have security over the asset which remains in the ownership of the authority, the amount of compensation payable is critical to ensure that the debt is paid back.

## VI FINANCE

PPP projects in Ireland have typically been financed by senior debt provided by European project finance banks; junior or mezzanine debt – again provided mainly by the equity arm of the same project finance banks; and finally equity provided by the project sponsors. However, recent deals have shown new funders and funding structures, a few examples of which are below.

Senior debt tends to be about 80 per cent of the financing and the split between junior debt and equity varies considerably. During the 'boom' years there may have been 19 per cent junior debt and 1 per cent real equity, but since the recession, more real cash equity is required by the banks.

The early PPP projects in Ireland involved the bidding consortia bidding with their funders in place and the funding costed. The funding was then separated from the bids in later projects. The norm now is for the preferred bidder to run a funding competition in conjunction with the NDFA.

The most recent PPP roads project to reach financial close in January 2016 was the N25 New Ross Bypass awarded to BAM PPP PGGM Iridium consortium.

Funding for the €230 million project involved a combination of long-term debt in the form of bonds, and equity, with the senior debt supported by the EIB's project bond credit enhancement (PBCE) mechanism. The bonds, rated provisional Baa1 (stable) by Moody's Investor Service, and to be listed on the Frankfurt Stock Exchange, are pre-agreed to be sold to investors managed by Allianz Global Investors GmbH. Listing and a definitive rating will take place post financial close. ProjectCo will issue €146 million fixed-rate senior secured debt in the form of fully amortising bonds, purchased on a deferred basis, and the New Ross N25 road is the first project in Ireland to benefit from the EIB's PBCE initiative. BAM PPP PGGM Infrastructure Coöperatie UA and Iridium Concesiones de Infraestructuras SA are committing €17 million in equity to the project.

The recent Courts Bundle project awarded to the BAM consortium in December 2015 was funded by the Bank of Tokyo-Mitsubishi UFJ, Ltd (MUFG) including:

*a* MUFG providing the senior debt;

*b* MUFG arranging a private placement solution placed with Talanx Asset Management GmbH; and

*c* BAM PPP PGGM Cooperatie Infrastructure UA as equity investors.

## VII RECENT DECISIONS

### OCS One Complete Solution Limited v. The Dublin Airport Authority

The case of *OCS One Complete Solution Limited v. The Dublin Airport Authority*, High Court of Ireland (Barrett J) 30 May 2014 [2014] IEHC 306 and Supreme Court on 31 July 2014 [2014] IESC 51 involved an application to the Court to lift the automatic suspension applied to a procurement case when a judicial review is brought (procurement cases are taken by way of judicial review to the High Court in Ireland). The High Court rejected the use of the *American Cyanamid* test applied by UK courts in these cases. On

appeal, the Supreme Court ruled that the Irish Regulations do not give the courts any jurisdiction to hear an application to lift an automatic suspension before the judicial review is heard. This meant that once judicial review proceedings were brought in Ireland challenging a procurement process, the project could not continue until the judicial review had been heard. This would have led to significant delays in PPP projects

The Minister for Public Expenditure and Reform published legislation in May 2015 amending the Irish Remedies Regulations[2] in both the public and utilities sectors to give the High Court jurisdiction to make orders lifting the automatic suspension, at interim or interlocutory stage thereby making the decision of the Supreme Court in *OCS* in its interpretation of the Remedies Regulations largely redundant.

There are also a number of important ongoing legal cases concerning PPP projects.

**BAM PPP PGGM Infrastructure Cooperative UA v National Treasury Management Agency 2015 176 JR**

This ongoing case concerns the tendering process for a 25-year PPP contract to design, build, finance and maintain part of the new Dublin Institute of Technology campus at Grangegorman. BAM PPP PGGM Infrastructure Cooperative (BAM) initiated judicial review proceedings in March 2015 seeking the suspension of the award of the PPP for Grangegorman to a consortium called 'Eriugena' and an order setting aside the decision of the respondents to accept a late tender submitted by Eriugena. Upon the commencement of the judicial proceedings the award of the contract was automatically suspended. Following the introduction of, new retroactive regulations, the European Communities (Public Authorities' Contracts) (Review Procedures) (Amendment) Regulations 2015, the National Treasury Management Agency succeeded in lifting the automatic suspension and is now progressing towards financial close with the preferred tenderer. The date for the substantive case has not yet been set.

**Applegreen PLC & Anor v Transport Infrastructure Ireland 2015 483 JR**

Applegreen plc and Tedcastles Oil Products, which formed a consortium to bid for the design, build, operate and finance of motorway service stations on the Irish national road network, applied to the Court to quash a decision by Transport Infrastructure Ireland to appoint Topaz Energy Group Limited as the preferred tenderer.

2 European Communities (Award of Public Authorities' European Communities (Procedures) (Amendment) Regulations 2015 (SI No 192 of 2015) (Public Sector) and European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) (Amendment) Regulations 2015 (SI No 193 of 2015) (Utilities Sector).

## VIII OUTLOOK

While the PPP market in Ireland has been difficult for the past few years, owing to the recession, the economy has now returned to growth and a pipeline of new projects is beginning to emerge. International consortia have again returned to the market. In addition to the resurgence of the traditional roads and accommodation PPP projects, there has been a heightened interest in the potential delivery of social housing and nursing home facilities as part of PPP bundles to meet the growing national need for such infrastructure.

## Appendix 1

# ABOUT THE AUTHORS

**MARY DUNNE**
*Maples and Calder*
Mary Dunne is a partner in the Dublin office of Maples and Calder, and has specialised in public procurement law and infrastructure projects for over 20 years in both the public and private sectors. She acts as an expert to the OECD and World Bank on public procurement and PPPs and has advised many governments in that role, including most recently the governments of Ukraine, Jamaica, Morocco, Turkey and Montenegro.

**FERGAL RUANE**
*Maples and Calder*
Fergal Ruane is a senior associate in the Dublin office of Maples and Calder. He has spent over 15 years advising both private and public clients on public procurement, construction, infrastructure and commercial projects.

**MAPLES AND CALDER**
75 St. Stephen's Green
Dublin 2
Ireland
Tel: +353 1 6192000
Fax: +353 1 6192001
mary.dunne@maplesandcalder.com
fergal.ruane@maplesandcalder.com
www.maplesandcalder.com