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### **Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter III)**

#### **Note by the Secretariat**

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### III. Contract award

#### A. General remarks

1. The present chapter deals with methods and procedures recommended for use in the award of PPP contracts. In line with the advice of international organizations, such as UNIDO<sup>1</sup> and the World Bank,<sup>2</sup> the *Guide* expresses an obvious and strong preference for the use of competitive selection procedures, which are widely recognized as being best suited for promoting economy, efficiency and transparency, among other general principles that should guide PPP laws and regulations (see chapter I, para. ....). This is also consistent with article 9, paragraph 1, of the United Nations Convention against Corruption, which requires its States Parties to take the necessary steps “to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption.” The *Guide* recognizes, however, that under exceptional circumstances contracts may be awarded without competitive procedures in consideration of the specific aspects of the project but subject to the safeguards recommended herein (see paras. ....).

2. The selection procedures recommended in this chapter present some of the features of the request for proposals with dialogue (RFP with dialogue) under article 49 of the UNCITRAL Model Law on Public Procurement.<sup>3</sup> In addition to the request for proposals with dialogue, the UNCITRAL Model Law on Public Procurement provides for other procurement methods, such as two-stage tendering (art. 48) or competitive negotiations (art. 51), which may also be used for the award of PPP contracts, depending on the project characteristics and the assessment made by the contracting authority during the planning phase (see chapter II, “Project planning and preparation”, paras. ....). Where appropriate, this chapter refers the reader to those, as well as to various other provisions of the UNCITRAL Model Law on Public Procurement that usefully supplement the selection procedure described herein. When choosing the most appropriate selection methods and deciding on the structure and practical manner of conducting it, the contracting authority should also bear in mind the general principles of PPP laws and regulations (see chapter I, “General legal and institutional framework”, paras. ....) and the objectives that an adequate PPP contract award process should attain (see below, paras. ....).

#### 1. Selection procedures covered by the *Guide*

3. Through PPP projects a contracting authority is able to bundle together several activities that it would otherwise have procured separately (namely, design, construction, operation and maintenance but also financing and the general management of the whole life cycle of the infrastructure or service). The overall objective is to reallocate risks between the public and private sector in a manner that offers incentives to enhance the provision of public infrastructure or services. Nevertheless, even in those projects intended to be entirely funded by the private sector, and repaid through user fees and other charges, the Government remains ultimately accountable for the quality and cost of the infrastructure and services. Accordingly, except for some specific matters peculiar to PPPs and therefore not usually regulated in public procurement procedures, the main part of the selection of the private partner should be aligned or coexists with the relevant principles and best practices for public procurement.

4. This chapter deals primarily with selection procedures suitable for use in relation to infrastructure projects that involve an obligation, on the part of the selected

<sup>1</sup> *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, United Nations Industrial Development Organization, p. 91 seq. (UNIDO publication, Sales No. UNIDO.95.6.E)

<sup>2</sup> Public-Private Partnerships Reference Guide — Version 3, World Bank and its partners, p. 160 seq. (International Bank for Reconstruction and Development/The World Bank, 2017).

<sup>3</sup> UNCITRAL Model Law on Public Procurement (2011).

private partner, to undertake finance, design and physical construction, repair or expansion works in the infrastructure concerned with a view to subsequent private operation and provision of services to the public by the private partner. The award procedures discussed in this chapter may also serve for the award of PPPs contracts under which the facility would be subsequently operated and maintained by the private partner, but would be used by the contracting authority or other public body for its own needs or to house public services. This chapter does not deal specifically with other methods of selecting providers of public services through licensing or similar procedures, or of merely disposing of State property through capital increases or offerings of shares.

## **2. General objectives of selection procedures**

5. For the award of PPP contracts, the contracting authority may either apply methods and procedures already provided in the laws of the country or establish procedures specifically designed for that purpose. The law of the country may specify and regulate the most appropriate method for selecting the private partner for PPP in order to ensure transparency in the process. In all cases, it is important to ensure that such procedures are generally conducive to attaining the fundamental objectives of rules governing the award of public contracts. Those objectives are discussed briefly below.

### **(a) Economy and efficiency**

6. In connection with PPP projects, “economy” refers to the selection of a private partner that is capable of performing works and delivering services of the desired quality at the most advantageous price or that offers the best commercial proposal. Experience shows that one of the best ways to achieve economy is to promote competition among bidders. Competition provides them with incentives to offer their most advantageous terms and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so.

7. It should be noted, however, that competition does not necessarily require the participation of a large number of bidders in a given selection process. For large projects, in particular, there may be reasons for the contracting authority to wish to limit the number of bidders to a manageable number (see para. ...). Provided that appropriate procedures are in place, the contracting authority can take advantage of effective competition even where the competitive base is limited.

8. Economy can often be promoted through participation by foreign companies in selection proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the contracting authority and its country of technologies that are not available locally. Foreign participation in selection proceedings may be necessary where there exists no domestic expertise of the type required by the contracting authority. A country wishing to achieve the benefits of foreign participation should ensure that its relevant laws and procedures are conducive to such participation.

9. “Efficiency” refers to selection of a private partner within a reasonable amount of time, with minimal administrative burdens and at reasonable cost both to the contracting authority and to participating bidders. In addition to the losses that can accrue directly to the contracting authority from inefficient selection procedures (owing, for example, to delayed selection or high administrative costs), excessively costly and burdensome procedures can lead to increases in the overall project costs or even discourage competent companies from participating in the selection proceedings altogether, which would endanger the final objective that is to attract the best potential economic operators for the project.

### **(b) Promotion of the integrity of and confidence in the selection process**

10. Another important objective of rules governing the selection of the private partner is to promote the integrity of and confidence in the process. Thus, an adequate

selection system will usually contain provisions designed to ensure fair treatment of bidders, to reduce or discourage unintentional or intentional abuses of the selection process by persons administering it or by companies participating in it and to ensure that selection decisions are taken on a proper basis.

11. Promoting the integrity of the selection process will help to promote public confidence in the process and in the public sector in general. Bidders will often refrain from spending the time and sometimes substantial sums of money to participate in selection proceedings unless they are confident that they will be treated fairly and that their proposals or offers have a reasonable chance of being accepted. Those which do participate in selection proceedings in which they do not have that confidence would probably increase the project cost to cover the higher risks and costs of participation. Ensuring that selection proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable terms to the contracting authority.

12. To guard against corruption by government officials, including employees of the contracting authorities, the host country should have in place an effective system of sanctions. These could include sanctions of a criminal nature that would apply to unlawful acts of officials conducting the selection process and of participating bidders, such as debarment or suspension from the selection process. Conflicts of interest should also be avoided, for instance by requiring that officials of the contracting authority or each member of the evaluation commission or single evaluator fill a declaration of the absence of conflicts of interest at the beginning of the process. Officials, their spouses, relatives and associates shall be barred from owning a debt or equity interest in a company participating in a selection process or accepting to serve as a director or employee of such a company. Furthermore, in line with the provisions of the UNCITRAL Model Law on Public Procurement (art. 21), the law governing the selection proceedings should obligate the contracting authority to reject offers or proposals submitted by a party who gives or agrees to give, directly or indirectly, to any current or former officer or employee of the contracting authority or other public authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of or procedure followed by the contracting authority in connection with the selection proceedings. This obligation shall be applicable at any time in the selection proceeding and not limited to the tender period. These provisions may be supplemented by other measures, such as the requirement that all companies invited to participate in the selection process undertake neither to seek to influence unduly the decisions of the public officials involved in the selection process nor otherwise to distort the competition by means of collusive or other illicit practices (that is, the so-called "integrity agreement"). Also, in the procurement practices adopted by some countries, bidders are required to guarantee that no official of the procuring entity has been or shall be admitted by the bidder to any direct or indirect benefit arising from the contract or the award thereof. Breach of such a provision typically constitutes a breach of an essential term of the contract.

13. The confidence of investors may be further fostered by adequate provisions to protect the confidentiality of proprietary information submitted by them during the selection proceedings. This should include sufficient assurances that the contracting authority will treat applications to pre-qualify or for pre-selection, as well as proposals eventually received in such a manner as to avoid the disclosure of their contents to competing bidders or to any unauthorized person; that any discussions or negotiations will be confidential; and that trade or other information that bidders might include in their proposals will not be made known to their competitors.

#### **(c) Transparency of laws and procedures**

14. Transparency of laws and procedures, including judicial decisions and administrative rulings with precedent value, governing the selection of the private partner will help to achieve a number of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the

contracting authority and by bidders are fully disclosed, are not unduly complex and are presented in a systematic and understandable way. Transparent procedures are those which enable the bidders to ascertain what procedures have been followed by the contracting authority and the basis of decisions taken by it. The publication of upcoming opportunities by the public authority is another means to achieve transparency, as it helps potential bidders to know what is to be procured and how.

15. One of the most important ways to promote transparency and accountability is to include provisions requiring that the contracting authority maintain a record of the selection proceedings (see paras. ...). A record summarizing key information concerning those proceedings facilitates the exercise of the right of aggrieved bidders to seek review. That in turn will help to ensure that the rules governing the selection proceedings are, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the law will facilitate the work of public authorities exercising an audit or control function and promote the accountability of contracting authorities to the public-at-large as regards the award of infrastructure projects.

16. An important corollary of the objectives of economy, efficiency, integrity and transparency is the availability of administrative and judicial procedures for the review of decisions made by the authorities involved in the selection proceedings (see paras. ...).

### **3. Special features of selection procedures for PPPs**

17. Modern procurement systems provide public authorities with a broad range of procurement methods and greater freedom to choose the best procedure to meet their needs. The formal procedures and the objectivity and predictability that characterize the competitive selection procedures generally provide optimal conditions for competition, transparency and efficiency. Thus, the use of competitive selection procedures in PPPs has been recommended by UNIDO, which has formulated detailed practical guidance on how to structure those procedures.<sup>1</sup> The procurement policies of the World Bank also advocate the use of competitive selection procedures at national level, when such national legislation is correctly developed. A private partner selected pursuant to bidding procedures acceptable to the World Bank is generally free to adopt its own procedures for the award of contracts required to implement the project. However, where the private partner was not itself selected pursuant to those competitive procedures, the award of subcontracts has to be done pursuant to competitive procedures acceptable to the World Bank.<sup>2</sup>

18. It should be noted, however, that no international legislative model has thus far been specifically devised for competitive selection procedures in PPPs. Newly drafted domestic laws on competitive procedures for public procurement services may be suitable for PPPs or sometimes contain specific provisions applicable to PPPs. In view of the particular issues raised by PPPs, which are briefly discussed below, it is advisable for the Government to consider reviewing the suitability of existing procedures for the selection of the private partner in a PPP project.

#### **(a) Range of bidders to be invited**

19. The award of PPP projects typically involves complex, time-consuming and expensive proceedings, and the sheer scale of most infrastructure projects reduces the likelihood of obtaining proposals from a large number of suitably qualified bidders. In fact, competent bidders may be reluctant to participate in bid for high-value projects if the competitive field is too large and where they run the risk of having to compete with unrealistic proposals or proposals submitted by unqualified bidders. Open tendering without a pre-selection phase is therefore usually not advisable for the award of most PPP contracts, except perhaps for small-scale projects where the contracting authority may wish to seek proposals from all qualified bidders.

**(b) Definition of project requirements**

20. In traditional public procurement of construction works the procuring authority usually assumes the position of a *maître d'ouvrage* or employer, while the selected contractor carries out the function of the performer of the works. The procurement procedures emphasize the inputs to be provided by the contractor, that is, the contracting authority establishes clearly what is to be built, how and by what means. It is therefore common for invitations to tender for construction works to be accompanied by extensive and very detailed technical specifications of the type of works and services being procured. In those cases, the contracting authority will be responsible for ensuring that the specifications are adequate to the type of infrastructure to be built and that such infrastructure will be capable of being operated efficiently.

21. However, for many PPPS, the contracting authority may envisage a different allocation of responsibilities between the public and the private sector. In those cases, after having established a particular infrastructure need, the contracting authority may prefer to leave to the private sector the responsibility for proposing the best solution for meeting such a need, subject to certain requirements that may be established by the contracting authority (for example, regulatory performance or safety requirements, sufficient evidence that the technical solutions proposed have been previously tested and have met internationally acceptable safety and other standards). The selection procedure used by the contracting authority may thus give more emphasis to the output expected from the project (that is, the services or goods to be provided) than to technical details of the works to be performed or means to be used to provide those services (see paras. ...).

**(c) Evaluation criteria**

22. For projects to be financed, owned and operated by public authorities, goods, construction works or services are typically purchased with funds available under approved budgetary allocations. With the funding sources usually secured, the main objective of the procuring entity is to obtain the best value for the funds it spends. Therefore, in those types of procurement the decisive factor in establishing the winner among the responsive and technically acceptable proposals (that is, those which have passed the threshold with respect to quality and technical aspects) is often the global price offered for the construction works, which is calculated on the basis of the cost of the works and other costs incurred by the contractor, plus a certain margin of profit.

23. Many PPPs, in turn, are expected to be financially self-sustainable, with the development and operational costs being recovered from the project's own revenue, although some projects ("non-concession PPPs") may involve a specific payment by the contracting authority (see Introduction, para. ...). Therefore, a number of other factors linked with the capacity of the potential private partner to handle certain risks of the project that the public sector is not willing to assume (mainly — but not only — in connection with the technology or the specific sector), will need to be considered in addition to the construction and operation cost and the price to be paid by the users or the public authority. For instance, the contracting authority will need to consider carefully the financial and commercial feasibility of the project as presented by the bidders in the frame of the preliminary assessment undertaken by the public authority, the soundness of the financial arrangements proposed by the bidders and the reliability of the technical solutions used and their adaptability to the local context. Such interest exists even where no governmental guarantees or payments are involved, because unfinished projects or projects with large cost overruns or higher than expected maintenance costs often have a negative impact on the overall availability of needed services and on the public opinion in the host country. Also, the contracting authority will aim at formulating qualification and evaluation criteria that give adequate weight to the need to ensure the continuous provision of and, as appropriate, universal access to the public service concerned. Furthermore, given the usually long duration of PPP contracts, the contracting authority will need to satisfy itself as to the

soundness and acceptability of the arrangements proposed for the operational phase and will weigh carefully the service elements of the proposals (see para. ....).

**(d) Negotiations with bidders**

24. Laws and regulations governing tendering proceedings for the procurement of goods and services often prohibit negotiations between the contracting authority and the contractors concerning a proposal submitted by them. The rationale for such a strict prohibition, which is also contained in article 44 of the UNCITRAL Model Law on Public Procurement, is that negotiations might result in an “auction”, in which a proposal offered by one contractor is used to apply pressure on another contractor to offer a lower price or an otherwise more favourable proposal. As a result of that strict prohibition, contractors selected to provide goods or services pursuant to traditional procurement procedures are typically required to sign standard contract documents provided to them during the procurement proceedings.

25. The situation is different in the award of PPP contracts. The complexity and long duration of such projects makes it unlikely that the contracting authority would be in a position to determine in advance the technical and other requirements of the project without discussing the needs and the various available options to meet them with the qualified bidders. This is the reason why the *Guide* recommends the use of a selection process such as the request for proposals with dialogue set forth in article 49 of the UNCITRAL Model Law on Public Procurement, which provides a transparent structure for negotiations between the contracting authority and the bidders at a stage of the process that does not lead to changes to the basis on which the competition was carried out (see paras. ....; on the importance of proper project planning and preparation to clarify the scope for negotiations at the selection stage, see also chapter II).

**4. Preparations for the selection proceedings**

26. The award of PPP contracts is in most cases a complex exercise requiring careful planning and coordination among the offices involved. By ensuring that adequate administrative and personnel support is available to conduct the type of selection proceeding that it has chosen, the Government plays an essential role in promoting confidence in the selection process. Additionally, the involvement of a PPP unit or a PPP office at national or local level is widely seen as a good practice in order to streamline the preparation for the selection proceedings.

**(a) Early information on forthcoming PPP projects**

27. Countries that include PPP projects in their medium- and long-term infrastructure planning, as the *Guide* encourages them to do (see chapter II, “Project planning and preparation”, paras. ....), may wish to publish information regarding planned or possible future selection proceedings for PPP projects for the forthcoming months or years, as contemplated in article 6 of the UNCITRAL Model Law on Public Procurement. The purpose of this early notice is to enable more suppliers and contractors to learn about contract opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the contracting authority’s needs before any selection process is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the information and telecommunication sector) to allow the public sector to assess whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the project as planned by the public authority. Based on the data collected, the contracting authority may take a more informed decision as regards the most appropriate selection method to award the forthcoming contact. This advance notice should not be confused with a notice

seeking expressions of interest that is usually published in conjunction with request-for-proposals proceedings (see paras. ...) since publishing such expression of interest notice does not oblige the contracting authority to request proposals from all those that expressed interest.

**(b) Appointment of the award committee**

28. One important preparatory measure is the appointment of the committee that will be responsible for evaluating the proposals and making an award recommendation to the contracting authority. The appointment of qualified and impartial members to the selection committee is not only a requirement for an efficient evaluation of the proposals, but may further foster the confidence of bidders in the selection process.

29. Another important preparatory measure is the appointment of the independent advisers who will assist the contracting authority in the selection procedures. The contracting authority may need, at this early stage, to retain the services of independent experts or advisers to assist in establishing appropriate qualification and evaluation criteria, defining performance indicators (and, if necessary, project specifications) and preparing the documentation to be issued to bidders. Consultant services and advisers may also be retained to assist the contracting authority in the evaluation of proposals, drafting and negotiation of the project agreement. Consultants and advisers can be particularly helpful by bringing a broad range of technical expertise that may not always be available in the public administration of the contracting authority, such as technical or engineering advice (for example, on technical assessment of the project or installations and technical requirements of contract); environmental advice (for example, environmental assessment and operation requirements); or legal and financial advice (for example, on financial projections, review of financing sources, assessing the adequate ratio between debt and equity and drafting of contractual and financial information documents).

**(c) Feasibility and other studies**

30. As indicated earlier (see chapter II, “Project planning and preparation”, para. ...), one of the initial steps that should be taken by the Government in relation to a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility, and its social and environmental impact. The option to develop infrastructure as a PPP requires a positive conclusion on the feasibility and financial viability of the project under such PPP form to the exclusion of any other procurement method. In some countries, it has been found useful to provide for some public participation in the preliminary assessment of the project’s social and environmental impact and the various options available to minimize it.

31. Prior to starting the proceedings leading to the selection of a prospective private partner, it is advisable for the contracting authority to review and, in most cases, expand those initial studies. In some countries contracting authorities are advised to formulate model projects for reference purposes (typically including a combination of estimated capital investment, operation and maintenance costs) prior to inviting proposals from the private sector. The purpose of such model projects is to demonstrate the viability of the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public. They will also provide the contracting authority with a useful tool for comparison and evaluation of proposals. The confidence of bidders will be promoted by evidence that the technical, economic and financial assumptions of the project, as well as the proposed role of the private sector, have been carefully considered by the contracting authority.

#### **(d) Preparation of documentation**

32. Selection proceedings for the award of PPP contracts typically require the preparation of extensive documentation, including a project outline, pre-selection documents, the request for proposals, instructions for preparing proposals and a draft of the PPP contract. The quality and clarity of the documents issued by the contracting authority plays a significant role in ensuring an efficient and transparent selection procedure. Here too, the work of PPP units has been widely described as very positive in the process, by gathering the publication of clear and concise documents that are in line with the practice of the bidders.

33. Standard documentation prepared in sufficiently precise terms may be an important element to facilitate the negotiations between bidders and prospective lenders and investors. It may also be useful for ensuring consistency in the treatment of issues common to most projects in a given sector. However, in using standard contract terms it is advisable to bear in mind the possibility that a specific project may raise issues that had not been anticipated when the standard document was prepared or that the project may necessitate particular solutions that might be at variance with the standard terms. Careful consideration should be given to the need to achieve an appropriate balance between the level of uniformity desired for project agreements of a particular type and the flexibility that might be needed for finding project-specific solutions.

### **B. Pre-selection of bidders**

34. Given the technical nature of most PPP projects and the complexity of many of them, the contracting authority should seek proposals only from bidders who satisfy certain qualification criteria. In traditional government procurement, the pre-qualification proceedings may consist of the verification of certain formal requirements, such as adequate proof of technical capability or prior experience in the type of procurement, so that all bidders who meet the pre-qualification criteria are automatically admitted to the tendering phase. The pre-selection proceedings for complex procurement or PPP projects may, in turn, involve elements of comparison and selection. This may be the case, for example, where the contracting authority establishes a ranking of pre-selected bidders (see para. ...). In the case of smaller projects or less complex projects, however, the contracting authority may wish to stimulate greater competition among potential bidders and invite proposals from all those who meet the required qualifications, without ranking them. In order to avoid arbitrariness and possible improper handling of the selection process, it is advisable that the value threshold beyond which a pre-selection would be mandatory be set forth in the law or by regulations issued thereunder.

35. In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). For that purpose, those countries apply a quantitative rating system for technical, managerial financial, environmental, ethical and other compliance standards such as clean debarment record, anti-corruption status criteria, taking into account the nature of the project. Quantitative pre-selection criteria are found to be more easily applicable and transparent than qualitative criteria involving the use of merit points. However, in devising a quantitative rating system, it is important to avoid unnecessary limitation of the contracting authority's discretion in assessing the qualifications of bidders. The contracting authority may also need to take into account the fact that the procurement guidelines of some multilateral financial institutions may restrict the use of pre-selection proceedings for the purpose of limiting the number of bidders to a predetermined number. In any event, where such a rating system is to be used, that circumstance should be clearly stated in the pre-selection documents.

## **1. Invitation to the pre-selection proceedings**

36. In order to promote transparency and competition, it is advisable to advertise the invitation to the pre-selection proceedings in a manner that reaches an audience wide enough to provide an effective level of competition. The laws of many countries identify publications, usually the official gazette or other official publication, in which the invitation to the pre-selection proceedings is to be published. The electronic publication of the invitation through specially dedicated portals, including through the website of the PPP unit — if any — is also a widely used and effective means of circulating the invitation to the pre-qualification. With a view to fostering participation of foreign companies and maximizing competition, the contracting authority may wish to have the invitations to the pre-selection proceedings internationally, so as to be widely accessible to potentially interested international bidders. One possible medium is *Development Business*<sup>4</sup> of the United Nations.

37. Pre-selection documents should contain sufficient information for bidders to be able to ascertain whether the works and services entailed by the project are of a type that they can provide and, if so, how they can participate in the selection proceedings. The invitation to the pre-selection proceedings should, in addition to identifying the infrastructure to be built or renovated, contain information on other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tolls or whether public funds may be provided as direct payments, loans or guarantees) and, where already known, a summary of the main required terms of the project agreement to be entered into as a result of the selection proceedings (risk allocation).

## **2. Pre-selection criteria**

38. In addition, the invitation to the pre-selection proceedings should include general information similar to the information typically provided in pre-selection documents under general rules on public procurement.<sup>5</sup>

39. Generally, bidders should be required to demonstrate that they possess the professional, technical and environmental qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience necessary to carry out the project. Additional criteria that might be particularly relevant for PPPs may include the ability to manage the financial aspects of the project and previous experience in operating public infrastructure or in providing services under regulatory oversight (for example, quality indicators of their past performance, size and type of previous projects carried out by the bidders); the level of experience of the key personnel to be engaged in the project; sufficient organizational ability (including minimum levels of construction, operation and maintenance equipment); ability to sustain the financing requirements for the engineering, construction and operational phases of the project (demonstrated, for instance, by evidence of the bidders' ability to provide an adequate amount of equity to the project and sufficient evidence from reputable banks attesting the bidder's good financial standing). More recent developments have seen contracting authorities requesting that the bidders demonstrate that they meet recognized ethical standards (environmental certification, clean anti-corruption records, labor policy declarations). Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance, where appropriate. In addition, the bidders should be required to demonstrate that they meet such other qualification criteria as would typically apply under the general procurement laws of the country.<sup>6</sup>

<sup>4</sup> [www.devbusiness.com](http://www.devbusiness.com).

<sup>5</sup> See UNCITRAL Model Procurement Law, arts. 7, 8 and 10.

<sup>6</sup> For example, that they have legal capacity to enter into the PPP contract; that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they

40. One important aspect to be considered by the contracting authority relates to the relationship between the award of one particular project and the governmental policy pursued for the sector concerned (see “Introduction and background information on PPPs”, paras. ...). Where competition is sought, the Government may be interested in ensuring that the relevant market or sector is not dominated by one enterprise. To implement such a policy and to avoid market domination by bidders who may have already been awarded a PPP contract within a given sector of the economy, the contracting authority may wish to include in the pre-selection documents for new PPPs provisions that limit the participation of or prevent another award to such bidders. For purposes of transparency, it is desirable for the law to provide that, where the contracting authority reserves the right to reject a proposal on those or similar grounds, adequate notice of that circumstance must be included in the invitation to the pre-selection proceedings.

41. Qualification requirements should apply equally to all bidders. A contracting authority should not impose any criterion, requirement or procedure with respect to the qualifications of bidders that has not been set forth in the pre-selection documents. When considering the professional, technical and environmental qualifications of bidding consortia, the contracting authority should consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

### **3. Issues relating to the participation of bidding consortia**

42. Given the large scale of most infrastructure projects, the interested companies typically participate in the selection proceedings through consortia especially formed for that purpose. Therefore, information required from members of bidding consortia should relate to the consortium as a whole as well as to its individual participants. For facilitating the liaison with the contracting authority, it may be useful to require in the pre-selection documents that each consortium designate one of its members as a focal point for all communications with the contracting authority. It is generally advisable for the contracting authority to require that the members of bidding consortia submit a sworn statement undertaking that, if awarded the contract, they shall bind themselves jointly and severally for the obligations assumed in the name of the consortium under the PPP contract. Alternatively, the contracting authority may reserve itself the right to require at a later stage that the members of the selected consortium establish an independent legal entity to carry out the project (see also chapter IV, “PPP implementation: legal framework and PPP contract”, paras. ...).

43. It is also advisable for the contracting authority to review carefully the composition of consortia and their parent companies. It may happen that one company, directly or through subsidiary companies, joins more than one consortium to submit proposals for the same project. Such a situation should not be allowed, since it raises the risk of leakage of information or collusion between competing consortia, thus undermining the credibility of the selection proceedings. It is therefore advisable to provide in the invitation to the pre-selection proceedings that each of the members of a qualified consortium may participate, either directly or through subsidiary companies, in only one bid for the project. A violation of this rule should cause the disqualification of the consortium and of the individual member companies, save for exceptional situations in which participation in multiple consortia might be

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are not the subject of legal proceedings for any of the foregoing; that they have fulfilled their obligations to pay taxes and social security contributions in the State; that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a certain period of years preceding the commencement of the selection proceedings or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings (see UNCITRAL Model Law on Public Procurement, art. 9, para. 2).

authorized, for instance, because the project in question requires know-how or a proprietary method or technology that only one or a few companies possess.

#### **4. Pre-selection and domestic preferences**

44. The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. Such preferential or special treatment is sometimes provided as a material qualification requirement (for example, a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (for example, to appoint a local partner as a leader of the bidding consortium). The preferential treatment given to domestic operators, or even the outright exclusion of foreign entities, is also sometimes justified for strategic and sensitive sectors, such as national defence and security operations. The contracting authority should disclose any such limitation among eligibility criteria from the outset of the process, include them in the record of the selection proceedings and make the reasons available to any person upon request, in accordance with article 8 of the UNCITRAL Model Law on Public Procurement.

45. Domestic preferences may give rise to a variety of issues. Firstly, their use is not permitted under the guidelines of some international financial institutions and might be inconsistent with international obligations entered into by many States pursuant to agreements on international trade or regional economic integration or trade facilitation. Furthermore, from the perspective of the host country it is important to weigh the expected advantages against the disadvantage of depriving the contracting authority of the possibility of obtaining better options to meet the national infrastructure needs. It is also important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. This is the reason why many countries that wish to provide some incentive to national suppliers, while at the same time taking advantage of international competition, do not contemplate a blanket exclusion of foreign participation or restrictive qualification requirements. Domestic preferences may take the form of special evaluation criteria establishing margins of preference for national bidders or bidders who offer to procure supplies, services and products in the local market. The margin of preference technique, which is provided in article 11, paragraph 3, of the UNCITRAL Model Law on Public Procurement, is more transparent than subjective qualification or evaluation criteria. Furthermore, it allows the contracting authority to favour local bidders that are capable of approaching internationally competitive standards, and it does so without simply excluding foreign competition. Additionally, it has been witnessed that forced use of local content may lead to reduction of liability of the bidders regarding quality or even final output of the project. Where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

#### **5. Contribution towards costs of participation in the selection proceedings**

46. According to articles 38 and 49, paragraph 4, of the UNCITRAL Model Law on Public Procurement the price charged for the pre-selection documents should only reflect the cost of providing them to the bidders. In recognition of the high cost of the preliminary studies and preparatory work, including for the formulation of the request for proposals, standard contracts and other relevant bidding documents, in international practice it is not uncommon for a contracting authority to seek at least partial recovery of those costs through so-called “development fees” set above the mere cost of printing the bidding documents. A contracting authority should attempt to align the level of those fees with similar projects, bearing in mind market practices and expectations. Indeed, development fees should not be used as an additional tool to limit the number of bidders. Such a practice is both ineffective and adds to the already considerable cost of participation in the pre-qualification proceedings. The high costs of preparing proposals for infrastructure projects and the relatively high

risks that a selection procedure may not lead to a contract award may function as a deterrent for some companies to join in a consortium to submit a proposal, in particular when they are not familiar with the selection procedures applied in the host country.

47. Therefore, some countries authorize the contracting authority to consider arrangements for compensating pre-qualified bidders if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them after the pre-selection phase, when justified in a particular case by the complexity involved and the prospect of significantly improving the quality of the competition. When such contribution or compensation is envisaged, appropriate notice should be given to potential bidders at an early stage, preferably in the invitation to the pre-selection proceedings.

## **6. Pre-selection procedures**

48. The contracting authority should respond to any request by a bidding consortium for clarification of the pre-selection documents that is received by the contracting authority within a reasonable time prior to the deadline for the submission of applications so as to enable the bidders to make a timely submission of their application. The response to any request that might reasonably be expected to be of interest to other bidders should, without identifying the source of the request, be communicated to all bidders to which the contracting authority provided the pre-selection documents.

49. Upon completion of the pre-selection phase, the contracting authority usually draws up a short list of the pre-selected bidders that will subsequently be invited to submit proposals. One practical problem sometimes faced by contracting authorities concerns proposals for changes in the composition of bidding consortia during the selection proceedings. From the perspective of the contracting authority, it is generally advisable to exercise caution in respect of proposed substitutions of individual members of bidding consortia after the closing of the pre-selection phase. Changes in the composition of consortia may substantially alter the basis on which the pre-selected bidding consortia were short-listed by the contracting authority and may give rise to questions about the integrity of the selection proceedings. As a general rule, only pre-selected bidders should be allowed to participate in the selection phase, unless the contracting authority can satisfy itself that a new consortium member meets the pre-selection criteria to substantially the same extent as the exiting member of the consortium and the results of the pre-selection would remain the same should the new consortium member have participated originally in the consortium.

50. While the criteria used for pre-selecting bidders should not be weighted again at the evaluation phase, the contracting authority may wish to reserve itself the right to require, at any stage of the selection process, that the bidders again demonstrate their qualifications in accordance with the same criteria used to pre-select them.

## **C. Procedures for requesting proposals**

51. This section discusses the procedures for requesting proposals from the pre-selected bidders. As stated above, the procedures follow the main features of the request for proposals with dialogue provided in the UNCITRAL Model Law on Public Procurement, with some adaptations needed to fit the needs of contracting authorities.

### **1. Structure and phases of the procedure**

52. The choice of the procedure for requesting proposals will depend on the nature of the contract, on how precisely the contracting authority can determine the technical requirements and whether output results (or performance indicators) are used for selection of the private partner. If it is both feasible and desirable for the contracting authority to formulate performance indicators or project specifications to the

necessary degree of precision or finality, the selection process may be structured as a single-stage procedure. In that case, after having concluded the pre-selection of bidders, the contracting authority would proceed directly to issuing a final request for proposals (see paras. ...). The contract would be awarded to the bidder submitting the proposal that offers the best combined terms of (a) criteria other than price specified in the request for proposals and (b) price (see UNCITRAL Model Law on Public Procurement, art. ..., para. 10). Some flexibility may be added to the process (for instance where the contracting authority needs to consider and negotiate the financial aspects of proposals only after assessing their technical, quality and performance characteristics) by allowing a final round of consecutive negotiations with bidders submitting responsive proposals, in the order of their ranking (see UNCITRAL Model Law on Public Procurement, art. 50).

53. Single-stage bidding may be appropriate for relatively simple, small-scale projects where the contracting authority possesses sufficient technical knowledge and does not expect the private sector to come forward with alternative solutions, technology or know-how. In most PPP projects, however, it may not be feasible for the contracting authority to formulate its requirement in sufficiently detailed and precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. This may be the case, for instance, when the contracting authority has not determined the type of technical and material input that would be suitable for the project in question (for example, the type of construction material to be used in a bridge). The larger the project, and the greater its complexity, the less likely it is that single-stage selection procedures would be adequate or lead to a satisfactory result. In such cases, it might be considered undesirable, from the standpoint of obtaining the best value for money, for the contracting authority to proceed on the basis of specifications or indicators it has drawn up in the absence of discussions with bidders as to the exact capabilities and possible variations of what is being offered. This is why, in most cases, the contracting authority considers that interaction with suppliers or contractors is necessary (a) to refine its statement of needs and present them in a common description (two-stage tendering) or (b) to define its statement of needs and invite proposals to meet them (request for proposals with dialogue).

#### **(a) Two-stage procedure**

54. Where the selection procedure is divided into two stages,<sup>7</sup> the initial request for proposals typically calls upon the bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms. The invitation for bids would allow bidders to offer their own solutions for meeting the particular infrastructure need in accordance with defined standards of service. The proposals submitted at this stage would typically consist of solutions on the basis of a conceptual design or performance indicators without indication of financial elements, such as the expected price or level of remuneration. They shall not be considered as binding proposals and the contracting authority should not even solicit price commitment at this stage.<sup>8</sup>

55. To the extent the terms of the contractual arrangements are already known by the contracting authority, they should be included in the request for proposals, possibly in the form of a draft of the PPP contract. Knowledge of certain contractual terms, such as the risk allocation envisaged by the contracting authority, is important in order for the bidders to formulate their proposals and discuss the “bankability” of the project with potential lenders (see chapter II, “Project planning and preparation”, paras. ...). The initial response to those contractual terms, in particular the risk allocation envisaged by the contracting authority, may help the contracting authority reassess the feasibility of the project as originally conceived. However, it is important to distinguish between the procedure to request proposals and the negotiation of the

<sup>7</sup> Article 48 of the UNCITRAL Model Law on Public Procurement sets forth procedures for two-stage tendering.

<sup>8</sup> See *Guide to Enactment of the UNCITRAL Model Law on Procurement*, p. 188.

final contract, after the project has been awarded. The purpose of this initial stage is to enable the contracting authority to formulate its requirement subsequently in a manner that enables a final competition to be carried out on the basis of a single set of parameters. The invitation of initial proposals at this stage should not lead to a negotiation of the terms of the contract prior to its final award.

56. The contracting authority may then convene a meeting of bidders to clarify questions concerning the request for proposals and accompanying documentation. The contracting authority may, at the first stage, engage in discussions with any bidder concerning any aspect of its proposal. The contracting authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders or any other person not expressly authorized to obtain such information. Any discussions need to be confidential and one party to the discussions should not reveal to any other person any technical, financial or other information relating to the discussions without the consent of the other party.

57. Following those discussions, the contracting authority should review and, within the limits allowed by the law, revise the initial project specifications on their technical, quality or performance aspects. In formulating those revised specifications, the contracting authority should not modify the subject matter of the project, but could delete or modify any aspect of the technical, quality or performance characteristics of the project originally set forth in the request for proposals. The contracting authority could also at this stage delete or modify any criterion for examining or evaluating proposals initially provided and adding any new criterion, if necessary as a result of changes made in the technical, quality or performance characteristics of the project. Any such deletion, modification or addition should be communicated to bidders in the invitation to submit final proposals. Bidders not wishing to submit a final proposal should be allowed to withdraw from the selection proceedings without forfeiting any security that they may have been required to provide.

#### **(b) Request for proposals with dialogue**

58. Another procedure that the contracting authority may use to select the private partner for a PPP project is the request for proposals with dialogue.<sup>9</sup> This is a procedure designed for the procurement of relatively complex items and services. The typical use for this method is procurement aimed at seeking innovative solutions to technical issues such as saving energy, achieving sustainable procurement, or infrastructure needs. In such cases, there may be different technical solutions: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels).

59. Request for proposals with dialogue is procedurally similar to two-stage tendering, but with several distinguishing features. The method allows the technical, quality and performance characteristics and financial aspects of the contracting authority's needs to be discussed between the contracting authority and potential suppliers or contractors, again within the framework of a transparent and structured process. The process results in a request for a "best and final offer" (BAFO) to meet the contracting authority's needs, but there is no single, common set of technical specifications beyond stated minimum technical requirements. BAFOs can present a variety of technical solutions to those needs; in this sense, the suppliers and contractors are responsible for designing the technical solutions. The contracting authority examines those solutions to ascertain whether they meet its needs; evaluating them on a competitive but equal basis is a more complex procedure than in two-stage tendering.

60. In summary, the objective is to enable suppliers and contractors to understand, through the dialogue with the contracting authority, the needs of the contracting authority as outlined in its request for proposals. The dialogue, which may involve

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<sup>9</sup> See UNCITRAL Model Law on Public Procurement, article 49.

several stages, is an interaction between the contracting authority and the suppliers or contractors on both technical, quality and performance characteristics of their proposals and the financial aspects of their proposals. The dialogue may involve a discussion of the financial implications of particular technical solutions, including the price or price range. However, as in two-stage tendering, it is not intended to involve binding negotiations or bargaining from any party to the dialogue. Upon conclusion of the dialogue, the suppliers and contractors make BAFOs to meet the contracting authority's needs. BAFOs of different suppliers or contractors may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the contracting authority the opportunity to compare different technical solutions to meet its needs.

61. Methods based on this type of dialogue have proved to be beneficial to the contracting authority in the procurement of relatively complex items and services where the opportunity cost of not engaging in dialogue with suppliers or contractors is high, while the economic gains of engaging in the process are evident. In addition to the typical uses described above, they may be appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the contracting authority's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through dialogue. The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. The method has enabled the contracting authority in such situations to identify and obtain the best solution to its procurement needs.

62. The procedure itself involves two stages. At the first stage, the contracting authority issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers or contractors in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. By comparison with two-stage tendering, it is not intended that the procedure will involve the contracting authority in setting out a full technical description of the subject matter of the procurement.

63. The method requires the contracting authority to issue a statement of needs with minimum technical requirements, to understand technical solutions that are proposed and to evaluate them on a comparative basis, and so may require capacity in procurement officials that is not required in other procurement methods, particularly to avoid the method's use as an alternative to appropriate preparation for the procurement. A particular risk is that the responsibility of defining procurement needs may be shifted to suppliers and contractors or the market. Although the suppliers or contractors, not the contracting authority, make proposals to meet the contracting authority's needs, they should not take a lead in defining those needs.

## **2. Content of the request for proposals**

64. The contracting authority should invite the bidders to submit proposals with respect to the project specifications, performance indicators and contractual terms. The request for proposals should generally include all information necessary to provide a basis to enable the bidders to submit proposals that meet the needs of the contracting authority and that the contracting authority can compare in an objective and fair manner. The content and level of detail of the information provided to bidders at this stage will vary according to the type of PPP envisaged and the nature of the selection procedure used by the contracting authority. The information may be less detailed and would be typically less focused on technical aspects in cases where the contracting authority has used the procedure of request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement. However, where the contracting authority has instead used a two-stage procedure, the contracting authority would already have previously issued a less detailed initial solicitation for bids without price, and engaged in discussions with the bidders whose bids had not been rejected. Thus, at this stage, the contracting authority would have

prepared a more extensive set of terms and conditions, as provided in article 48, paragraphs 2 and 3, of the UNCITRAL Model Law on Public Procurement.<sup>10</sup>

**(a) General information to bidders**

65. General information to bidders should cover, as appropriate, those items which are ordinarily included in solicitation documents or requests for proposals for the procurement of goods, construction and services.<sup>11</sup> Particularly important is the disclosure of the criteria to be used by the contracting authority in determining the successful proposal and the relative weight or order of importance of such criteria (see paras. ....).

*(i) Information on feasibility studies*

66. It is advisable to include in the general information provided to bidders instructions for the preparation of feasibility studies they may be required to submit with their proposals. Such feasibility studies should not substitute for the “value for money”, financial risk and other feasibility and impact assessment studies that the contracting authority is required to conduct prior to obtaining approval for the project (see chapter II, “Project planning and preparation”, paras. ....). The bidders’ own feasibility study would typically cover, for instance, the following aspects:

(a) *Commercial viability.* In particular in projects financed on a non-recourse or limited recourse basis, it is essential to establish the need for the project outputs and to evaluate and project such needs over the proposed operational life of the project, including expected demand (for example, traffic forecasts for roads) and pricing (for example, tolls). In order to facilitate the contracting authority’s examination, bidders should also describe the scenarios used to justify the commercial viability of their proposal;

(b) *Engineering design and operational feasibility.* Bidders should demonstrate the suitability of the technology they propose, including equipment and processes, to national, local and environmental conditions, the likelihood of achieving the planned performance level and the adequacy of the construction methods and schedules. This study should also define the proposed organization, methods and procedures for operating and maintaining the completed facility, and provide information on the anticipated technology development;

(c) *Financial viability.* Bidders should indicate the proposed sources of financing for the construction and operation phases, including debt capital and equity investment. While the loan and other financing agreements in most cases are not executed until after the signing of the PPP contract, the bidders should be required to submit sufficient evidence of the lenders’ intention to provide the specified financing.

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<sup>10</sup> “2. The solicitation documents shall call upon suppliers or contractors to present, in the first stage of two-stage-tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or performance characteristics of the subject matter of the procurement, as well as to contractual terms and conditions of supply and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.”

“3. The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose initial tenders have not been rejected pursuant to provisions of this Law concerning any aspect of their initial tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.”

<sup>11</sup> For example, instructions for preparing and submitting proposals, including the manner, place and deadline for the submission of proposals and the period of time during which proposals shall be in effect and any requirements concerning tender securities; the means by which bidders may seek clarifications of the request for proposals, and a statement as to whether the contracting authority intends, at this stage, to convene a meeting of bidders; the place, date and time for the opening of proposals and the procedures to be followed for opening and examining proposals; the manner in which the proposals will be evaluated; the minimum requirements that proposals must meet in order to be considered responsive (see UNCITRAL Model Law on Public Procurement Law, art. 47, para. 2 and art. 49, para. 2).

In some countries, bidders are also required to indicate the expected financial internal rate of return in relation to the effective cost of capital corresponding to the financing arrangements proposed. Such information is intended to allow the contracting authority to consider the reasonableness and affordability of the proposed prices or fees to be charged by the private partner and the potential for subsequent increases therein;

(d) *Environmental impact.* This study should identify possible negative or adverse effects on the environment as a consequence of the project and indicate corrective measures that need to be taken to ensure compliance with the applicable environmental standards. Such a study should take into account, as appropriate, the relevant environmental standards of international financial institutions and of national, provincial and local authorities.

*(ii) Information on bid securities*

67. It is advisable for the request for proposals to indicate any requirements of the contracting authority with respect to the issuer and the nature, form, amount and other principal terms of any bid security that the bidders may be required to provide so as to cover those losses which may result from withdrawal of proposals or failure by the selected bidder to conclude a PPP contract. In order to ensure fair treatment of all bidders, requirements that refer directly or indirectly to the conduct by the bidder submitting the proposal should not relate to conduct other than withdrawal or modification of the proposal after the deadline for submission of proposals or before the deadline if so stipulated in the request for proposals; failure to achieve financial closing; failure to sign the PPP contract if required by the contracting authority to do so; and failure to provide required security for the fulfilment of the PPP contract after the proposal has been accepted or to comply with any other condition prior to signing the PPP contract specified in the request for proposals. Safeguards should be included to ensure that a bid security requirement is only imposed fairly and for the purpose intended.<sup>12</sup> The need for, and the terms of, a bid security should be considered in the light of the selection process chosen and, as required, adapted to its needs. For example, bid securities are not appropriate in request for proposals with dialogue, as the security would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue stage (to be contrasted with the best and final offer stage of the procedure).<sup>13</sup>

*(iii) Qualification of bidders*

68. In the rare cases in which no pre-selection of bidders was carried out prior to the issuance of the request for proposals or when the contracting authority has retained the right to require the bidders to demonstrate again their qualifications, the request for proposals should set out the information that needs to be provided by the bidders to substantiate their qualifications (see paras. ....).

**(b) Project specifications and performance indicators**

69. The type of PPP project, the ownership of the infrastructure and the envisaged allocation of risks and responsibilities between the public and the private sectors (see

<sup>12</sup> Article 17, paragraph 2 of the UNCITRAL Model Law on Public Procurement provides certain important safeguards, including, *inter alia*, the requirement that the contracting authority should make no claim to the amount of the tender security and should promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest: (a) the expiry of the tender security; (b) the entry into force of the project agreement and the provision of a security for the performance of the contract, if such a security is required by the request for proposals; (c) the termination of the selection process without the entry into force of a project agreement; or (d) the withdrawal of the proposal prior to the deadline for the submission of proposals, unless the request for proposals stipulates that no such withdrawal is permitted.

<sup>13</sup> Guide to enactment of the UNCITRAL Model Law on Public Procurement, p. 99, paragraph 5.

chapter II, “Project planning and preparations”, paras. ...) will determine whether the contracting authority has an interest in controlling the input and technical specifications of the works that the private partner will carry out, or whether it prefers to leave it for bidders to propose their own options for best meeting the needs of the contracting authority. This, in turn, will have a bearing on the contracting authority’s decision as to whether it will conduct a two-staged tendering with a view to arriving at a common set of terms, technical, quality or performance characteristics against which the bidders will be asked to submit final proposals, or whether it will leave the bidders greater freedom to develop their own solutions. Ideally, the contracting authority will have thoroughly considered these options during its preparations for bidding (see chapter II, “Project planning and preparations”, paras. ...), as they are essential for determining the appropriate balance between the input and output elements in the project description.

70. It is generally advisable for the contracting authority to bear in mind the long-term needs of the project and to formulate its specifications in a manner that allows it to obtain sufficient information to select the bidder that offers the highest quality of services under the best economic terms.

71. Thus, the contracting authority may find it useful to formulate the project specifications in a way that defines adequately the output and performance required without being overly prescriptive in how that is to be achieved. Project specifications and performance indicators typically cover items such as the following:

(a) *Description of project and expected output.* If the services require specific buildings, such as a transport terminal or an airport, the contracting authority may wish to provide no more than outline planning concepts for the division of the site into usage zones on an illustrative basis, instead of plans indicating the location and size of individual buildings, as would normally be the case in traditional procurement of construction services. However, where in the judgement of the contracting authority it is essential for the bidders to provide detailed technical specifications, the request for proposals should include, at least, the following information: description of the works and services to be performed, including technical specifications, plans, drawings and designs; time schedule for the execution of works and provision of services; and the technical requirements for the operation and maintenance of the facility;

(b) *Minimum applicable design and performance standards, including appropriate environmental standards.* Performance standards are typically formulated in terms of the desired quantity and quality of the outputs of the facility. Proposals that deviate from the relevant performance standards should be regarded as non-responsive;

(c) *Quality of services.* For projects involving the provision of public services, the performance indicators should include a description of the services to be provided and the relevant standards of quality to be used by the contracting authority in the evaluation of the proposals. Where appropriate, reference should be made to any general obligations of public service providers as regards expansion and continuity of the service so as to meet the demand of the community or territory served, ensuring non-discriminatory availability of services to the users and granting non-discriminatory access of other service providers to any public infrastructure network operated by the concessionaire, under the terms and conditions established in the PPP contract (see chapter IV, “PPP implementation: legal framework and PPP contract”, paras. ...).

72. Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the technical soundness of proposals, their operational feasibility and responsiveness to standards of quality and technical requirements, including the following information:

(a) Preliminary engineering design, including proposed schedule of works;

- (b) Project cost, including operating and maintenance cost requirements and proposed financing plan (for example, proposed equity contribution or debt);
- (c) The proposed organization, methods and procedures for the operation and maintenance of the project under bidding;
- (d) Description of quality of services.

73. Each of the above-mentioned performance indicators may require the submission of additional information by the bidders, according to the project being awarded. For the award of a PPP contract for distribution of electricity in a specific region, for example, indicators may include minimum technical standards such as: (a) specified voltage (and frequency) fluctuation at the consumer level; (b) duration of outages (expressed in hours per year); (c) frequency of outages (expressed in a number per year); (d) losses; (e) number of days to connect a new customer; and (f) commercial standards for customer relationship (for example, number of days to pay bills, to reconnect installations or to respond to customers' complaints).

**(c) Contractual terms**

74. Following from the "value-for-money" and other preliminary studies conducted at the stage of project planning and feasibility assessment (see chapter II, "Project planning and preparation", paras. ...), the contracting authority should be in a position to indicate in the bidding documents how it expects to allocate the project risks (see also chaps. II, "Project planning and preparation", and IV, "PPP implementation: legal framework and PPP contract"). This is important in order to set the terms of debate for dialogue and clarifications during the selection process (see paras. ...), but also to establish boundaries for fine-tuning of the contract, after selection of the private partner (see paras. ...). If risk allocation is left entirely open, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project.

75. Furthermore, the request of proposals should contain information on essential elements of the contractual arrangements envisaged by the contracting authority, including any clauses of the PPP contract that the contracting authority considers to be non-negotiable. Essential terms typically included in the request for proposals at this stage may include matters such as:

- (a) The duration of the contract or invitations to bidders to submit proposals for the duration of the contract;
- (b) Formulas and indices to be used in adjustments to prices;
- (c) Government support and investment incentives, if any;
- (d) Bonding requirements;
- (e) Requirements of regulatory agencies, if any;
- (f) Monetary rules and regulations governing foreign exchange remittances;
- (g) Revenue-sharing arrangements, if any;
- (h) Indication, as appropriate, of the categories of assets that the private partner would be required to transfer to the contracting authority or make available to a successor private partner at the end of the project period;
  - (i) Where a new private partner is being selected to operate an existing infrastructure, a description of the assets and property that will be made available to the private partner;
  - (j) The possible alternative, supplementary or ancillary revenue sources (for example, concessions for exploitation of existing infrastructure), if any, that may be offered to the successful bidder.

76. Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the financial and commercial elements of the

proposals and their responsiveness to the proposed contractual terms. The financial proposals should normally include the following information:

- (a) For projects in which the private partner's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility (concession-type PPP), the financial proposal should indicate the proposed price structure. For projects in which the private partner's income is expected to consist primarily of payments made by the contracting authority or another public authority to amortize the private partner's investment or by the addition of such payments from the public partner and the tolls, fees or charges paid by the customers or users, the financial proposal should indicate the proposed amortization payments and repayment period as well as the repartition foreseen between the public partner and the users contribution;
- (b) The present value of the proposed prices or direct payments based on the discounting rate and foreign exchange rate prescribed in the bidding documents;
- (c) If it is estimated that the project would require financial support by the Government, the level of such support, including, as appropriate, any subsidy or guarantee expected from the Government or the contracting authority;
- (d) The extent of risks assumed by the bidders during the construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees against those risks.

77. In order to limit and establish clearly the scope of the negotiations that will take place during the dialogue following the evaluation of proposals (see paras. ...), the final request for proposals should indicate which are the terms of the PPP contract that are deemed not negotiable.

78. It is useful for the contracting authority to require that the final proposals submitted by the bidders contain evidence showing the comfort of the bidder's main lenders with the proposed commercial terms and allocation of risks, as outlined in the request for proposals. Such a requirement might play a useful role in resisting pressures to reopen commercial terms at the stage of final negotiations. In some countries (see below paras. ...), bidders are required to initial and return to the contracting authority the draft PPP contract together with their final proposals as a confirmation of their acceptance of all terms in respect of which they did not propose specific amendments.

### **3. Clarifications and modifications**

79. The right of the contracting authority to modify the request for proposals is important in order to enable it to obtain what is required to meet its needs. It is therefore advisable to authorize the contracting authority, whether on its own initiative or as a result of a request for clarification by a bidder, to modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals. However, when amendments are made that would reasonably require bidders to spend additional time preparing their proposals, such additional time should be granted by extending the deadline for submission of proposals accordingly. Moreover, the contracting authority should avoid material changes to the selection process, in particular those likely to affect the pool of potential bidders, such as when the project characteristics have changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the contracting. Where such a material change is necessary, the contracting entity may have to cancel and re-start the selection process.<sup>14</sup>

80. Generally, clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated promptly by the contracting authority to all bidders to whom the contracting authority provided the request for proposals. If the contracting authority convenes a meeting of bidders, it should

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<sup>14</sup> Guide to enactment of the UNCITRAL Model Law on Public Procurement, p. 95, paragraph 4.

prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals and its responses to those requests and should send copies of the minutes to the bidders.

#### **4. Evaluation criteria**

81. As a general principle, it is important for the contracting authority to achieve an appropriate balance between evaluation criteria relating to the physical investment (for example, the construction works) and evaluation criteria relating to the operation and maintenance of the infrastructure and the quality of services to be provided by the private partner. Adequate emphasis should be given to the long-term needs of the contracting authority, in particular the need to ensure the continuous delivery of the service at the required level of quality and safety.

##### **(a) Evaluation of technical aspects of the proposals**

82. Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental and financial viability of the proposal vis-à-vis the specifications, indicators and requirements prescribed in the request for proposals. To the extent practicable, the technical criteria applied by the contracting authority should be objective and quantifiable, so as to enable proposals to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. Regulations governing the selection process might spell out how such factors are to be formulated and applied. Technical proposals for PPPs are usually evaluated in accordance with the following criteria:

(a) *Technical soundness.* Where the contracting authority has established minimum engineering design and performance specifications or standards, the basic design of the project should conform to those specifications or standards. Bidders should be required to demonstrate the soundness of the proposed construction methods and schedules;

(b) *Operational feasibility.* The proposed organization, methods and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards and should be shown to be workable;

(c) *Quality of services.* Evaluation criteria used by the contracting authority should include an analysis of the manner in which the bidders undertake to maintain and expand the service, including the guarantees offered for ensuring its continuity;

(d) *Environmental standards.* The proposed design and the technology of the project to be used should be in accordance with the environmental standards set forth in the request for proposals. Any negative or adverse effects on the environment as a consequence of the project as proposed by the bidders should be properly identified, including the corresponding corrective or mitigating measures;

(e) *Enhancements.* These may include other terms the author of the project may offer to make the proposals more attractive, such as revenue-sharing with the contracting authority, fewer governmental guarantees or reduction in the level of government support;

(f) *Potential for social and economic development.* Under this criterion, the contracting authority may take into account the potential for social and economic development offered by the bidders, including benefits to underprivileged groups of persons and businesses, domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills;

(g) *Qualification of bidders.* The contracting authority should have the right to re-confirm the qualification of bidders at the evaluation stage.

**(b) Evaluation of financial and commercial aspects of the proposals**

83. In addition to criteria for the technical evaluation of proposals, the contracting authority needs to define criteria for assessing and comparing the financial proposals. Criteria typically used for the evaluation and comparison of the financial and commercial proposals include, as appropriate, the following:

- (a) *The present value of the proposed tolls, fees, unit prices and other charges over the contract period.* For projects in which the private partner's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed tolls, fees, rentals and other charges over the contract period according to the prescribed minimum design and performance standards;
- (b) *The present value of the proposed direct payments by the contracting authority, if any.* For projects in which the private partner's income is expected to consist primarily of payments made by the contracting authority to amortize the private partner's investment, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications;
- (c) *The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs.* It is advisable for the contracting authority to include these items among the evaluation criteria so as to permit an assessment of the financial feasibility of the proposals;
- (d) *The extent of financial support, if any, expected from the Government.* Government support measures expected or required by the bidders should be included among the evaluation criteria as they may entail significant immediate or contingent financial liability for the Government (see chapter II, "Project planning and preparation", paras. 30–60);
- (e) *Soundness of the proposed financial arrangements.* The contracting authority should assess whether the proposed financing plan, including the proposed ratio between equity investment and debt, is adequate to meet the construction, operating and maintenance costs of the project;
- (f) *The extent of acceptance of the proposed contractual terms.* Proposals for changes or modifications in the contractual terms circulated with the request for proposals (such as in those dealing with risk allocation or compensation payments) may have substantial financial implications for the contracting authority and should be carefully examined.

84. A comparison of the proposed tolls, fees, unit prices or other charges is an important factor for ensuring objectiveness and transparency in the choice between equally responsive proposals. However, it is important for the contracting authority to consider carefully the relative weight of this criterion in the evaluation process. The notion of "price" usually does not have the same value for the award of PPP contracts as it has in the procurement of goods and services. Indeed, the remuneration of the private partner is often the combined result of charges paid by the users, ancillary revenue sources and direct subsidies or payments made by the public entity awarding the contract.

85. It flows from the above that, while the unit price for the expected output retains its role as an important element of comparison of proposals, it may not always be regarded as the most important factor. Of particular importance is the overall assessment of the financial feasibility of the proposals since it allows the contracting authority to consider the bidders' ability to carry out the project and the likelihood of subsequent increases in the proposed prices. This is important with a view to avoiding

project awards to bidders that offer attractive but unrealistically low prices in the expectation of being able to raise such prices once a contract is awarded.

86. It is important for the contracting authority to disclose the relative weight to be accorded to each evaluation criterion and the manner in which criteria are to be applied in the evaluation of proposals. Two possible approaches might be used to reach an appropriate balance between financial and technical aspects of the proposals. One possible approach is to consider as most advantageous the proposal that obtains the highest combined rating in respect of both price and non-price evaluation criteria. Alternatively, the price proposed for the output (for example, the water or electricity price, the level of tolls, the maintenance charges or rental fee payable by the contracting authority) might be the deciding factor in establishing the winning proposal among the responsive proposals.

## **5. Submission and opening of proposals**

87. Proposals should be required to be submitted in writing, signed and placed in sealed envelopes. Where the request for proposals accepts submissions by electronic means, it should require the bidders to submit their proposals in a manner that is capable of being displayed to the contracting authority and that offers reliable assurance as to the integrity of the information since the time when it was first generated in its final form.<sup>15</sup> A proposal received by the contracting authority after the deadline for the submission of proposals should not be opened and should be returned to the bidder that submitted it. For the purpose of ensuring transparency, national laws often prescribe formal procedures for the opening of proposals, usually at a time previously specified in the request for proposals, and require that the bidders that have submitted proposals, or their representatives, be permitted by the contracting authority to be present at the opening of the proposals or to receive confirmation that the proposal was opened guaranteeing integrity requirements. Such a requirement helps to minimize the risk that the proposals might be altered or otherwise tampered with and represents an important guarantee of the integrity of the proceedings.

88. In view of the complexity of PPP projects and the variety of evaluation criteria usually applied in the award of a project, it may be advisable for the contracting authority to apply a two-step evaluation process whereby non-financial criteria would be taken into consideration separately from, and perhaps before, financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria.

89. To that end, in some countries bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. The two-envelope system is sometimes used because it permits the contracting authority to evaluate the technical quality of proposals without being influenced by their financial components. However, the method has been criticized as being contrary to the objective of economy in the award of public contracts. In particular, there is said to be a danger that, by selecting proposals initially on the basis of technical merit alone and without reference to price, a contracting authority might be tempted to select, upon the opening of the first envelope, proposals offering technically superior works and to reject proposals offering less sophisticated solutions that nevertheless meet the contracting authority's needs at an overall lower cost.

90. As an alternative to the use of a two-envelope system, the contracting authorities may require both technical and financial proposals to be contained in one single proposal, but structure their evaluation in two stages. At an initial stage, the contracting authority typically establishes a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the criteria as set out in the request for proposals, and rates each technical proposal in accordance with such criteria and the relative weight and manner of application of

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<sup>15</sup> See UNCITRAL Model Law on Electronic Commerce, article 8, paragraph 1.

those criteria as set forth in the request for proposals. The contracting authority then compares the financial and commercial proposals that have attained a rating at or above the threshold. When the technical and financial proposals are to be evaluated consecutively, the contracting authority should initially ascertain whether the technical proposals are *prima facie* responsive to the request for proposals (that is, whether they cover all items required to be addressed in the technical proposals). Incomplete proposals, as well as proposals that deviate from the request for proposals, should be rejected at this stage. While the contracting authority may ask bidders for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making a non-responsive proposal responsive, should be sought, offered or permitted at this stage.

## **6. Dialogue with bidders**

91. Where the contracting authority has used a two-stage tendering procedure of the type set forth in article 48 of the UNCITRAL Model Law on Public Procurement, the contracting authority, upon receipt of the final proposals, would proceed to their evaluation and ranking with a view to finalizing the PPP contract (see below, paras. ....). Where, however, the contracting authority has used a request for proposals with dialogue of the type provided for in article 49 of the UNCITRAL Model Law on Public Procurement, it would, at this stage, engage in a dialogue with the responsive bidders. Article 49, paragraph 8, of the UNCITRAL Model Law on Public Procurement, sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the contracting authority should be involved to ensure consistent results.

92. The dialogue may involve several rounds or phases. At the end of each round or phase, the contracting authority may refine its needs and give the participating suppliers or contractors a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the contracting authority during dialogue. During the course of the dialogue, the contracting authority should not modify the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements established pursuant to article 49, paragraph 2 (f), of the UNCITRAL Model Law on Public Procurement, any element of the description of the PPP project or any term or condition of the PPP contract that is not subject to the dialogue as specified in the request for proposals. Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a supplier or contractor should be communicated at the same time and on an equal basis to all other participating suppliers or contractors, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions.

93. Following the dialogue, the contracting authority should request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request should be in writing and specify the manner, place and deadline for presenting best and final offers. One of the main distinct features of this procurement method is the absence of any complete single set of terms and conditions of the procurement beyond the minimum requirements against which final submissions are evaluated.

## **7. Final negotiations and contract award**

94. The award committee should rate the technical and financial elements of each proposal in accordance with the predisclosed rating systems for the technical evaluation criteria and specify in writing the reasons for its rating. In order to promote the transparency of the selection process and to avoid improper use of non-price evaluation criteria, a detailed justification may be particularly important where the awarding committee recommends selecting a proposal based on technical aspects rather than on the price. The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals.

**(a) Two-stage procedure**

95. Where the contracting authority has used a two-stage procedure of the type set forth in article 48 of the UNCITRAL Model Law on Public Procurement, the contracting authority would at this stage invite the best-rated bidder for final negotiation of certain elements of the PPP contract. If two or more proposals obtain the highest rating, or if there is only an insignificant difference in the rating of two or more proposals, the contracting authority should invite for negotiations all the bidders that have obtained essentially the same rating. The final negotiations should be limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected bidder's lenders. One particular problem faced by contracting authorities is the danger that the negotiations with the selected bidder might lead to pressures to amend, to the detriment of the Government or the consumers, the price or risk allocation originally contained in the proposal. Changes in essential elements of the proposal should not be permitted, as they may distort the assumptions on the basis of which the proposals were submitted and rated. Therefore, the negotiations at this stage may not concern those terms of the contract which were deemed not negotiable in the final request for proposals (see para. ....). The risk of reopening commercial terms at this late stage could be further minimized by insisting that the selected bidder's lenders indicate their comfort with the risk allocation embodied in their bid at a stage where there is competition among bidders (see para. ....). The contracting authority's financial advisers might contribute to this process by advising whether bidders' proposals are realistic and what levels of financial commitment are appropriate at each stage. The process of reaching financial close can itself be quite lengthy.

96. The contracting authority should inform the remaining responsive bidders that they may be considered for negotiation if the negotiations with the bidder with better ratings do not result in a PPP contract. If it becomes apparent to the contracting authority that the negotiations with the invited bidder will not result in a PPP contract, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the next bidder on the basis of its ranking until it arrives at a PPP contract or rejects all remaining proposals. To avoid the possibility of abuse and unnecessary delay, the contracting authority should not reopen negotiations with any bidder with whom they have already been terminated.

**(b) Request for proposals with dialogue**

97. As a general rule, no negotiations with bidders would take place where the contracting authority has used a request for proposals with dialogue of the type provided for in article 49 of the UNCITRAL Model Law on Public Procurement. Indeed article 49, paragraph 12, of the UNCITRAL Model Law on Public Procurement expressly provides that "no negotiations shall take place between the contracting authority and suppliers or contractors with respect to their best and final offers." The rationale for this strict prohibition is that the dialogue phase would have already afforded ample opportunity for the bidders to offer improvements on all aspects of their proposals. The "best-and-final-offer" stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by bidders so as to restrict an undesirable situation in which the contracting authority uses the offer made by one bidder to pressure another, in particular as regards the price offered. Otherwise, in anticipation of such pressure, bidders may be led to raise the prices offered, and there is a risk to the integrity of the process.<sup>16</sup>

**D. Contract award without competitive procedures**

98. The *Guide* strongly recommends the use of competitive, structured procedures for the award of PPP contracts, as such procedures are widely recognized as being best suited for promoting the objectives of economy and efficiency ("value for

<sup>16</sup> *Guide* to enactment of the UNCITRAL Model Law on Public Procurement, p. 209, paragraph 27.

money”), integrity and transparency (see chapter I, “General legal and institutional framework”, paras. ...; see also above, paras. ...). At the same time, the contract award procedures recommended by the *Guide* avoid the rigidity that characterize some open procedures (such as traditional tendering for goods and services) and afford the contracting authority ample flexibility for choosing the operator who best suits its need, in terms of professional qualifications, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal.

99. Direct negotiations do not ensure the level of transparency and objectivity that can be achieved by more structured competitive procedures. Moreover, in some countries there might be concerns that the higher level of discretion in those negotiations might carry with it a higher risk of abusive or corrupt practices. In view of the above, the *Guide* strongly recommends that the law should prescribe the use of competitive selection procedures as a rule for the award of PPP contracts and to reserve direct negotiations (i.e. without prior recourse to competitive selection procedures of the type described herein) to exceptional and objectively justifiable situations, and subject to procedures to ensure transparency and fairness in the conduct of the selection process.

## **1. Authorizing circumstances**

100. For purposes of transparency as well as for ensuring discipline in the award of PPP contracts, the law should identify the exceptional circumstances under which the contracting authority may be authorized to select the private partner without using competitive selection procedures. They may include, for example, the following:

- (a) When there is an urgent need for ensuring immediate provision of the service and engaging in a competitive selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part. Such an exceptional authorization may be needed, for instance, in cases of interruption in the provision of a given service or where an incumbent private partner fails to provide the service at acceptable standards or if the PPP contract is rescinded by the contracting authority, when engaging in a competitive selection procedure would be impractical in view of the urgent need to ensure the continuity of the service;
- (b) In the case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;
- (c) Reasons of national defence or security;
- (d) Cases where there is only one source capable of providing the required service (for example, because it can be provided only by the use of patented technology or unique know-how) including certain cases of unsolicited proposals (see paras. ...);
- (e) When an invitation to the pre-selection proceedings or a request for proposals has been issued, but no applications or proposals were submitted or all proposals were rejected and, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award. However, in order to reduce the risk of abuse in changing the selection method, the contracting authority should only be authorized to award a PPP contract without using competitive selection procedures when such a possibility was expressly provided for in the original request for proposals.

## **2. Measures to enhance transparency in the award of contracts without competitive procedures**

101. Procedures to be followed in procurement through negotiation outside structured competitive procedures are typically characterized by a higher degree of flexibility than the procedures applied to other methods of procurement. Few rules and procedures are established to govern the process by which the parties negotiate

and conclude their contract. In some countries, procurement laws allow contracting authorities virtually unrestricted freedom to conduct negotiations as they see fit. The laws of other countries establish a procedural framework for negotiation designed to maintain fairness and objectivity and to bolster competition by encouraging participation of bidders. Provisions on procedures for selection through negotiation address a variety of issues discussed below, in particular, requirements for approval of the contracting authority's decision to select the private partner through negotiation, selection of negotiating partners, criteria for comparison and evaluation of offers, and recording of the selection proceedings.

**(a) Approval**

102. A threshold requirement found in many countries is that a contracting authority must obtain the approval of a higher authority prior to engaging in selection through negotiations outside structured competitive procedures. Such provisions generally require the application for approval to be in writing and to set forth the grounds necessitating the use of negotiation. Approval requirements are intended, in particular, to ensure that the contract award without competitive procedures is used only in appropriate circumstances.

**(b) Selection of negotiating partners**

103. In order to make the award proceedings as competitive as possible, it is advisable to require the contracting authority to engage in negotiations with as many companies judged susceptible of meeting the need as circumstances permit. Beyond such a general provision, there is no specific provision in the laws of some countries on the minimum number of contractors or suppliers with whom the contracting authority is to negotiate. The laws of some other countries, however, require the contracting authority, where practicable, to negotiate with, or to solicit proposals from, a minimum number of bidders (three being as well a common number). The contracting authority is permitted to negotiate with a smaller number in certain circumstances, in particular, when fewer than the minimum number of potential bidders were available.

104. For the purpose of enhancing transparency, it is also advisable to require a notice of the negotiation proceedings to be given to bidders in a specified manner. For example, the contracting authority may be required to publish the notice in a particular publication normally used for that purpose. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of bidders than might otherwise be the case, thereby promoting competition. Given the magnitude of most infrastructure projects, the notice should normally contain certain minimum information (a description of the project, for example, or qualification requirements) and should be issued in sufficient time to allow bidders to prepare offers. Generally the formal eligibility requirements applicable to bidders in competitive selection proceedings should also apply in negotiation proceedings.

105. In some countries, notice requirements are waived when the contracting authority resorts to negotiation following unsuccessful bidding proceedings (see para. ... (e)), if all qualified bidders are permitted to participate in the negotiations or if no bids at all were received. Under the Model Law on Public Procurement, the public notice can be waived only in case of urgency, emergency or risk of disclosure of classified information.

**(c) Criteria for comparison and evaluation of offers**

106. Another useful measure to enhance the transparency and effectiveness of negotiations outside structured competitive procedures consists of establishing general criteria that proposals are requested to meet (for example, general performance objectives or output specifications), as well as criteria for evaluating offers made during the negotiations and for selecting the winning private partner (for example, the technical merit of an offer, prices, operating and maintenance costs and

the profitability and development potential of the PPP contract). Where more than one proposal is received, some elements of competition may be usefully introduced in the negotiations. The contracting authority should identify the proposals that appear to meet those criteria and engage in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the contracting authority. The price of each proposal could enter into those discussions. When the proposals have been finalized, it may be advisable for the contracting authority to seek a best and final offer on the basis of the clarified proposals. It is recommendable that bidders should include with their final offer evidence that the risk allocation that the offer embodies would be acceptable to their proposed lenders. From the best and final offers received, the preferred bidder can then be chosen. The project would then be awarded to the party offering the “most economical” or “most advantageous” proposal in accordance with the criteria for selecting the winning private partner set forth in the invitation to negotiate.

#### **(d) Notice of contract award**

107. The contracting authority should be required to establish a record of the selection proceedings (see paras. ...) and should publish a notice of the contract award, which, except in cases involving national defence or national security interests, should disclose, in particular, the specific circumstances and reasons for the award of the contract without a proper competitive procedure (see para. ...). In many countries, it has become a well-established practice to publish the full PPP contract in the interest of promoting transparency and accountability.

### **E. Unsolicited proposals**

108. PPP projects sometimes result from proposals submitted directly by the private sector. These proposals are usually referred to as “unsolicited proposals”, since they do not relate to a project for which the public sector has initiated a contract award process. Unsolicited proposals may result from the identification by the private sector of an infrastructure need that may be met by a PPP. They may also involve innovative proposals for infrastructure management and offer the potential for transfer of new technology to the host country. However, they may give rise to various concerns of transparency, accountability and value for money. Countries that nevertheless wish to allow the consideration of unsolicited proposals should carefully ponder those concerns and devise appropriate safeguards.

#### **1. Policy considerations**

109. One possible reason sometimes cited for allowing the consideration of unsolicited proposals is to provide an incentive for the private sector to submit proposals involving the use of new concepts or technologies to meet the contracting authority’s needs. By the very nature of competitive selection procedures, no bidder has an assurance of being awarded the project, unless it wins the competition. The cost of formulating proposals for large infrastructure projects may be a deterrent for companies concerned about their ability to match proposals submitted by competing bidders. In contrast, the private sector may see an incentive for the submission of unsolicited proposals in rules that allow a contracting authority to negotiate such proposals directly with their authors. The contracting authority, too, may have an interest in the possibility of engaging in direct negotiations in order to stimulate the private sector to formulate innovative proposals for infrastructure development.

110. At the same time, however, the award of projects pursuant to unsolicited proposals and without competition from other bidders may expose the Government to serious criticism. Best practices of good governance require public authorities to anticipate their infrastructure needs and systematically plan for meeting them. They should build the capability to conceive and plan their own projects, rather than relying on the private sector to initiate them (see Chapter II, “Project planning and preparation”, paras. ...). In addition, prospective lenders, including multilateral and

bilateral financial institutions, may have difficulty in lending or providing guarantees for projects that have not been the subject of competitive selection proceedings. They may fear the possibility of challenge and cancellation by future Governments (for example, because the project award may be deemed subsequently to have been the result of favouritism or because the procedure did not provide objective parameters for comparing prices, technical elements and the overall effectiveness of the project) or legal or political challenge by other interested parties, such as customers dissatisfied with increased prices or competing companies alleging unjust exclusion from a competitive selection procedure.

111. These are a few reasons why countries have preferred not to regulate unsolicited proposals or to expressly prohibit them. Countries that nevertheless wish to permit the consideration of unsolicited proposals should consider the need for, and the desirability of, devising special procedures for evaluating and handling unsolicited proposals so as to avoid their use to circumvent public investment management mechanisms. For that purpose, it may be useful to analyse two situations most commonly mentioned in connection with unsolicited proposals, namely, unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs and unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority.

**(a) Unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs**

112. Generally, for projects that require the use of some kind of industrial process or method, the contracting authority would have an interest in stimulating the submission of proposals incorporating the most advanced processes, designs, methodologies or engineering concepts with demonstrated ability to enhance the project's outputs (by significantly reducing construction costs, for example, accelerating project execution, improving safety, enhancing project performance, extending economic life, reducing costs of facility maintenance and operations or reducing negative environmental impact or disruptions during either the construction or the operational phase of the project).

113. The contracting authority's legitimate interests might also be achieved through appropriately modified competitive selection procedures instead of a special set of rules for handling unsolicited proposals. For instance, if the contracting authority is using selection procedures that emphasize the expected output of the project, without being prescriptive about the manner in which that output is to be achieved (see paras. ...), the bidders would have sufficient flexibility to offer their own proprietary processes or methods. In such a situation, the fact that each of the bidders has its own proprietary processes or methods would not pose an obstacle to competition, provided that all the proposed methods are technically capable of generating the output expected by the contracting authority.

114. Adding the necessary flexibility to the competitive selection procedures may in these cases be a more satisfactory solution than devising special non-competitive procedures for dealing with proposals claiming to involve new concepts or technologies. With the possible exception of proprietary concepts or technologies whose uniqueness may be ascertained on the basis of the existing intellectual property rights, a contracting authority may face considerable difficulties in defining what constitutes a new concept or technology. Such a determination may require the services of costly independent experts, possibly from outside the host country, to avoid allegations of bias. A determination that a project involves a novel concept or technology might also be met by claims from other interested companies also claiming to have appropriate new technologies.

115. However, a somewhat different situation may arise if the uniqueness of the proposal or its innovative aspects are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, either worldwide or

regionally. The existence of intellectual property rights in relation to a method or technology may indeed reduce or eliminate the scope for meaningful competition. This is why the procurement laws of most countries authorize procuring entities to engage in single-source procurement if the goods, construction or services are available only from a particular supplier or contractor or if the particular supplier or contractor has exclusive rights over the goods, construction or services and no reasonable alternative or substitute exists (see the UNCITRAL Model Law on Public Procurement, art. 30, para. 5).

116. In such a case, it would be appropriate to authorize the contracting authority to negotiate the execution of the project directly with the proponent of the unsolicited proposal. The difficulty, of course, would be how to establish, with the necessary degree of objectivity and transparency, that there exists no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. For that purpose, it is advisable for the contracting authority to establish procedures for obtaining elements of comparison for the unsolicited proposal. In this situation, the use of provisions set for in the request for proposals with dialogue under the UNCITRAL Model Law on Public Procurement is in line with the need to ensure a fair and objective treatment of the unsolicited proposals.

**(b) Unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority**

117. The merit of unsolicited proposals of this type consists of the identification of a potential for infrastructure development that has not been considered by the authorities of the host country. However, in and of itself this circumstance should not normally provide sufficient justification for a directly negotiated project award in which the contracting authority has no objective assurance that it has obtained the most advantageous solution for meeting its needs. An unsolicited proposal, however well justified, should not substitute for the Government's own assessment of its infrastructure needs and the planning and assessment measures required by law (see chapter II, "Project planning and preparation", paras. ....).

**2. Procedures for handling unsolicited proposals**

118. In the light of the above considerations, it is advisable for the contracting authority to establish transparent procedures for determining whether an unsolicited proposal meets the required conditions and whether it is in the contracting authority's interest to pursue it.

**(a) Restrictions to the receivability of unsolicited proposals**

119. In the interest of ensuring proper accountability for public expenditures, some domestic laws provide that no unsolicited proposal may be considered if the execution of the project would require significant financial commitments from the contracting authority or other public authority such as guarantees, subsidies or equity participation. The reason for such a limitation is that the procedures for handling unsolicited proposals are typically less elaborate than ordinary selection procedures and may not ensure the same level of transparency and competition that would otherwise be achieved. However, there may be reasons for allowing some flexibility in the application of this condition. In some countries, the presence of government support other than direct government guarantees, subsidy or equity participation (for example, the sale or lease of public property to authors of project proposals) does not necessarily disqualify a proposal from being treated and accepted as an unsolicited proposal.

120. Another condition for consideration of an unsolicited proposal is that it should relate to a project for which no selection procedures have been initiated or announced by the contracting authority. The rationale for handling an unsolicited proposal without using a competitive selection procedure is to provide an incentive for the private sector to identify new or unanticipated infrastructure needs or to formulate

innovative proposals for meeting those needs. This justification may no longer be valid if the project has already been identified by the authorities of the host country and the private sector is merely proposing a technical solution different from the one envisaged by the contracting authority. In such a case, the contracting authority could still take advantage of innovative solutions by applying a selection procedure involving dialogue with bidders (see paras. ...). However, it would not be consistent with the principle of fairness in the award of public contracts to entertain unsolicited proposals outside selection proceedings already started or announced.

**(b) Procedures for determining the admissibility of unsolicited proposals**

121. A company or group of companies that approaches the Government with a suggestion for private infrastructure development should be requested to submit an initial proposal containing sufficient information to allow the contracting authority to make a *prima facie* assessment of whether the conditions for handling unsolicited proposals are met, in particular whether the proposed project is in the public interest. The initial proposal should include, for instance, the following information: a statement of the author's previous project experience and financial standing; a description of the project (type of project, location, regional impact, proposed investment, operational costs, financial assessment and resources needed from the Government or third parties); details about the site (ownership and whether land or other property will have to be expropriated); and a description of the service and the works.

122. Following a preliminary examination, the contracting authority should inform the company, within a reasonably short period, whether or not there is a potential public interest in the project. If the contracting authority reacts positively to the project, the company should be invited to submit a formal proposal, which, in addition to the items covered in the initial proposal, should contain a technical and economic feasibility study (including characteristics, costs and benefits) and an environmental impact study. Furthermore, the author of the proposal should be required to submit satisfactory information regarding the concept or technology contemplated in the proposal. The information disclosed should be in sufficient detail to allow the contracting authority to evaluate the concept or technology properly and to determine whether it meets the required conditions and is likely to be successfully implemented on the scale of the proposed project. The company submitting the unsolicited proposal should retain title to all documents submitted throughout the procedure and those documents should be returned to it in the event the proposal is rejected.

123. Once all the required information is provided by the author of the proposal, the contracting authority should decide, within a reasonably short period, whether it intends to pursue the project and, if so, what procedure will be used. Choice of the appropriate procedure should be made on the basis of the contracting authority's preliminary determination as to whether or not the implementation of the project would be possible without the use of a process, design, methodology or engineering concept for which the proposing company or its partners possess exclusive rights.

**(c) Procedures for handling unsolicited proposals that do not involve proprietary concepts or technology**

124. If the contracting authority, upon examination of an unsolicited proposal, decides that there is public interest in pursuing the project, but the implementation of the project is possible without the use of a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, the contracting authority should be required to award the project by using the procedures that would normally be required for the award of PPP contracts, such as, for instance, the competitive selection procedures described in this *Guide* (see paras. ...). However, the selection procedures may include certain special features so as to provide an incentive to the submission of unsolicited proposals. These incentives may consist of the following measures:

(a) The contracting authority could undertake not to initiate selection proceedings regarding a project in respect of which an unsolicited proposal was received without inviting the company that submitted the original proposal;

(b) The original bidder might be given some form of premium for submitting the proposal. In some countries that use a merit-point system for the evaluation of financial and technical proposals the premium takes the form of a margin of preference over the final rating (that is, a certain percentage over and above the final combined rating obtained by that company in respect of both financial and non-financial evaluation criteria). One possible difficulty of such a system is the risk of setting the margin of preference so high as to discourage competing meritorious bids, thus resulting in the receipt of a project of lesser value in exchange for the preference given to the innovative bidder. A preferable alternative form of incentive may be the reimbursement, in whole or in part, of the costs incurred by the original author in the preparation of the unsolicited proposal. For purposes of transparency, any such incentive should be announced in the request for proposals.

125. Notwithstanding the incentives that may be provided, the author of the unsolicited proposal should be required to meet the same qualification criteria as would be required of the bidders participating in a competitive selection proceedings (see paras. ....).

**(d) Procedures for handling unsolicited proposals involving proprietary concepts or technology**

126. If it appears that the innovative aspects of the proposal are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the author or its partners possess exclusive rights, either worldwide or regionally, it may be useful for the contracting authority to confirm that preliminary assessment by applying a procedure for obtaining elements of comparison for the unsolicited proposal. One such procedure may consist of the publication of a description of the essential output elements of the proposal (for example, the capacity of the infrastructure facility, quality of the product or the service or price per unit) with an invitation to other interested parties to submit alternative or comparable proposals within a certain period. Such a description should not include input elements of the unsolicited proposal (the design of the facility, for example, or the technology and equipment to be used), in order to avoid disclosing to potential competitors proprietary information of the person who had submitted the unsolicited proposal. The period for submitting proposals should be commensurate with the complexity of the project and should afford the prospective competitors sufficient time to formulate their proposals. This may be a crucial factor for obtaining alternative proposals, for example, if the bidders would have to carry out detailed subsurface geological investigations that might have been carried out over many months by the original bidder, who would want the geological findings to remain secret.

127. The invitation for comparative or competitive proposals should be published with a minimum frequency (for example, once every week for three weeks) in at least one publication of general circulation. It should indicate the time and place where bidding documents may be obtained and should specify the time during which proposals may be received. It is important for the contracting authority to protect the intellectual property rights of the original author and to ensure the confidentiality of proprietary information received with the unsolicited proposal. Any such information should not form part of the bidding documents. Both the original bidder and any other company that wishes to submit an alternative proposal should be required to submit a bid security (see para. ....). Two possible avenues may then be pursued, according to the reactions received to the invitation:

(a) If no alternative proposals are received, the contracting authority may reasonably conclude that there is no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. This finding of the

contracting authority should be appropriately recorded and the contracting authority could be authorized to engage in direct negotiations with the original proponent. It may be advisable to require that the decision of the contracting authority be reviewed and approved by the same authority whose approval would normally be required in order for the contracting authority to select a private partner through direct negotiation (see para. ...). Some countries whose laws mandate the use of competitive procedures have used these procedures in order to establish the necessary transparency required to avoid future challenges to the award of a PPP contract following an unsolicited proposal. In those countries and according the Model Law, the mere publication of an invitation to bid would permit an award to the bidder who originally submitted the unsolicited proposal, even if its bid were the only one received. This is so because compliance with competitive procedures typically requires that the possibility of competition should have been present and not necessarily that competition actually occurred. Publicity creates such a possibility and adds a desirable degree of transparency;

(b) If alternative proposals are submitted, the contracting authority should invite all the bidders to negotiations with a view to identifying the most advantageous proposal for carrying out the project (see paras. ...). In the event that the contracting authority receives a sufficiently large number of alternative proposals, which appear *prima facie* to meet its infrastructure needs, there may be scope for engaging in full-fledged competitive selection procedures (see paras. ...), subject to any incentives that may be given to the author of the original proposal (see para. ...).

128. The contracting authority should be required to establish a record of the selection proceedings (paras. ...) and to publish a notice of the award of the project (see para. ...).

## **F. Confidentiality**

129. In order to prevent abuse of the selection procedures and to promote confidence in the process, it is important that confidentiality be observed by all parties, especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that bidders might include in their proposals and that they would not wish to be made known to their competitors. Confidentiality should be kept regardless of the selection method used by the contracting authority.

## **G. Notice of project award**

130. PPP contracts frequently include provisions that are of direct interest for parties other than the contracting authority and the private partner and who might have a legitimate interest in being informed about certain essential elements of the project. This is the case in particular for projects involving the provision of a service directly to the general public. For purposes of transparency, it may be advisable to establish procedures for publicizing those terms of the PPP contract which may be of public interest. Such a requirement should apply regardless of the method used by the contracting authority to select the private partner (for example, whether through competitive selection procedures, direct negotiations or as a result of an unsolicited proposal). One possible procedure may be to require the contracting authority to publish a notice of the award of the project, indicating the essential elements of the proposed agreements, such as: (a) the name of the private partner; (b) a description of the works and services to be performed by the private partner; (c) the duration of the contract; (d) the price structure; (e) a summary of the essential rights and obligations of the private partner and the guarantees to be provided by it; (f) a summary of the monitoring rights of the contracting authority and remedies for breach of the PPP contract; (g) a summary of the essential obligations of the Government, including any payment, subsidy or compensation offered by it; and (h) any other essential term of the PPP contract, as provided in the request for proposals.

## H. Record of selection and award proceedings

131. In order to ensure transparency and accountability and to facilitate the exercise of the right of aggrieved bidders to seek review of decisions made by the contracting authority, the contracting authority should be required to keep an appropriate record of key information pertaining to the selection proceedings.

132. The record to be kept by the contracting authority should contain, as appropriate, such general information concerning the selection proceedings as is usually required to be recorded for public procurement (such as the information listed in art. 25 of the UNCITRAL Model Law on Public Procurement), as well as information of particular relevance for PPPs. Such information may include the following:

- (a) A description of the project for which the contracting authority requested proposals;
- (b) The names and addresses of the companies participating in bidding consortia and the name and address of the members of the bidders with whom the PPP contract has been entered into; and a description of the publicity requirements, including copies of the publicity used or of the invitations sent;
- (c) If changes to the composition of the pre-selected bidders are subsequently permitted, a statement of the reasons for authorizing such changes and a finding as to the qualifications of any substitute or additional consortia concerned;
- (d) Information relative to the qualifications, or lack thereof, of bidders and a summary of the evaluation and comparison of proposals, including the application of any margin of preference;
- (e) A summary of the conclusions of the preliminary feasibility studies commissioned by the contracting authority and a summary of the conclusions of the feasibility studies submitted by the qualified bidders;
- (f) A summary of any requests for clarification of the pre-selection documents or the request for proposals, the responses thereto, as well as a summary of any modification of those documents;
- (g) A summary of the principal terms of the proposals and of the PPP contract;
- (h) If the contracting authority has found most advantageous a proposal other than the proposal offering the lowest unit price for the expected output, a justification of the reasons for that finding by the awarding committee;
- (i) If all proposals were rejected, a statement to that effect and the grounds for rejection;
- (j) If the negotiations with the consortium that submitted the most advantageous proposal and any subsequent negotiations with remaining responsive consortia did not result in a PPP contract, a statement to that effect and of the grounds therefor.

133. For contract awards without competitive procedures (see para. ...), it may be useful to include in the record of those proceedings, in addition to requirements referred to in paragraph 121 that may be applicable, the following additional information:

- (a) A statement of the grounds and circumstances on which the contracting authority relied to justify the direct negotiation;
- (b) The type of publicity used or the name and address of the company or companies directly invited to the negotiations;
- (c) The name and address of the company or companies that requested to participate and those which were excluded from participating, if any, and the grounds for their exclusion;

(d) If the negotiations did not result in a PPP contract, a statement to that effect and of the grounds therefor;

(e) The justification given for the selection of the final private partner.

134. For selection proceedings engaged in as a result of unsolicited proposals (see paras. ...), it may be useful to include in the record of those proceedings, in addition to requirements referred to in paragraph ..., that may be applicable, the following additional information:

(a) The name and address of the company or companies submitting the unsolicited proposal and a brief description of it;

(b) A certification by the contracting authority that the unsolicited proposal was found to be of public interest and to involve new concepts or technologies, as appropriate;

(c) The type of publicity used or the name and address of the company or companies directly invited to the negotiations;

(d) The name and address of the company or companies that requested to participate and those which were excluded from participating, if any, and the grounds for their exclusion;

(e) If the negotiations did not result in a PPP contract, a statement to that effect and of the grounds therefor;

(f) The justification given for the selection of the final private partner.

135. It is advisable for the rules on record requirements to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as the general desirability, from the standpoint of the accountability of contracting authorities, of broad disclosure; the need to provide bidders with information necessary to enable them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking review; and the need to protect the bidders' confidential trade information. In view of these considerations, it may be advisable to provide two levels of disclosure, as envisaged in article 25 of the UNCITRAL Model Law on Public Procurement. The information to be provided to any member of the general public may be limited to basic information geared to the accountability of the contracting authority to the general public. However, it is advisable to provide for the disclosure for the benefit of bidders of more detailed information concerning the conduct of the selection, since that information is necessary to enable the bidders to monitor their relative performance in the selection proceedings and to monitor the conduct of the contracting authority in implementing the requirements of the applicable laws and regulations.

136. Moreover, appropriate measures should be taken to avoid the disclosure of confidential trade information of suppliers and contractors. This is true in particular with respect to what is disclosed concerning the evaluation and comparison of proposals, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of bidders. As a general rule, the contracting authority should not disclose more detailed information relating to the examination, evaluation and comparison of proposals and proposal prices, except when ordered to do so by a competent court.

137. Provisions on limited disclosure of information relating to the selection process would not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the host country.

## I. Review procedures

138. The existence of fair and efficient review procedures is one of the basic requirements for attracting serious and competent bidders and for reducing the cost and the length of award proceedings. An important safeguard of proper adherence to the rules governing the selection procedure is that bidders have the right to seek review of actions by the contracting authority in violation of those rules or of the rights of bidders. Various remedies and procedures are available in different legal systems and systems of administration, which are closely linked to the question of review of governmental actions. Whatever the exact form of review procedures, it is important to ensure that an adequate opportunity and effective procedures for review are provided. It is particularly useful to establish a workable “pre-contract” recourse system (that is, procedures for reviewing the contracting authority’s acts as early in the selection proceedings as feasible). Such a system increases the possibility of taking corrective actions by the contracting authority before loss is caused and helps to reduce cases where monetary compensation is the only option left to redress the consequences of an improper action by the contracting authority. Elements for the establishment of an adequate review system are contained in chapter VIII of the UNCITRAL Model Law on Public Procurement.

139. Article 9 of the United Nations Convention against Corruption requires (among other things) procurement systems to address “[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established ... are not followed.” Consistent with that mandate, Chapter VIII of the UNCITRAL Model Law on Public Procurement offers a number of review provisions, which enacting States are encouraged to incorporate into their procurement laws to the extent that their legal system so permits. They include the possibility of an optional request to the procuring entity to reconsider a decision taken in the procurement process, giving the aggrieved supplier or contractor in such case the possibility to apply either to the procuring entity, to an independent body or to the court. However, the Model Law acknowledges that the sequence of application to review bodies will very much depend on legal traditions of enacting States. Given the requirements in the Convention against Corruption, States must have both a review and an appeal mechanism, but the Model Law is flexible so that enacting States can implement its provisions in accordance with their legal traditions. Under the Model Law, any decision or action by the procuring entity allegedly not in compliance with the provisions of the procurement law may be challenged by suppliers or contractors that claim to have suffered or claim that they may suffer loss or injury because of such alleged non-compliance. This broad challenge mechanism comes with various mechanisms to ensure the efficacy of the procedure, and to appropriately balance the need to preserve the rights of suppliers and contractors and the integrity of the procurement process on the one hand and, on the other, the need to limit disruption of the procurement process. Thus, article 65 of the Model Law provides for a general prohibition against taking any step to bring the procurement contract into force while a challenge remains pending, except where urgent public interest considerations call for lifting that prohibition. The Model Law also offers provisions for suspension of procurement proceedings, as well as supporting measures to encourage early and timely resolution of issues and disputes that enable challenges to be addressed before stages of the procurement proceedings would need to be undone.

### III. Contract award

#### **Model provision 8. General rules**

The contract authority shall select the private partner in accordance with model provisions 9–22 and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive public procurement procedures equivalent to those set forth in the UNCITRAL Model Law on Public Procurement*].<sup>17</sup>

#### **1. Pre-selection of bidders**

##### **Model provision 9. Purpose and procedure of pre-selection**

1. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged project.
2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].
3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],<sup>18</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:
  - (a) A description of the infrastructure facility;
  - (b) An indication of other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the private partner);

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<sup>17</sup> The reader's attention is drawn to the relationship between the procedures for the selection of the private partner and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of PPP projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the request for proposals, two-stage tendering, competitive negotiations and single-source procurement methods under the UNCITRAL Model Law on Public Procurement, which was adopted by UNCITRAL at its forty-fourth session, held in Vienna from 27 June to 8 July 2011. The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators in developing special rules for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and challenge procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein.

<sup>18</sup> A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 18, paragraph 3, of the Model Procurement Law.

(c) Where already known, a summary of the main required terms of the PPP contract to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*]<sup>19</sup>, the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with model provision 10;

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 11;

(c) Whether the contracting authority intends to request only a limited number<sup>20</sup> of pre-selected bidders that best meet the pre-selection criteria specified in the pre-selection documents to submit proposals upon completion of the pre-selection proceedings in accordance with model provision 12, paragraph 2; if so, the maximum number of pre-selected bidders from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing the maximum number, the contracting authority shall bear in mind the need to ensure effective competition;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*the enacting State*] in accordance with model provision ...

5. For matters not provided for in this model provision, the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification or pre-selection of suppliers and contractors*]<sup>21</sup>.

#### **Model provision 10. Pre-selection criteria**

Interested bidders must meet such of the following criteria as the contracting authority considers appropriate<sup>22</sup> and relevant for the particular contract:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) That they have sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) That they meet ethical and other standards applicable in [*this State*]

(d) That they have the legal capacity to enter into the PPP contract;

(e) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;

(f) That they have fulfilled their obligations to pay taxes and social security contributions in [*this State*];

<sup>19</sup> A list of elements typically contained in pre-qualification documents can be found in article 18, paragraph 5, of the Model Procurement Law.

<sup>20</sup> In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four).

(g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years [*the enacting State specifies the period of time*] preceding the commencement of the contract award proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

#### **Model provision 11. Participation of consortia**

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with model provision 10 shall relate to the consortium as a whole as well as to its individual participants.
2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*]] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium<sup>23</sup> at the same time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.
3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

#### **Model provision 12. Decision on pre-selection**

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria, requirements and procedures that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 13–22.
2. Notwithstanding paragraph 1, where the contracting authority has indicated through an appropriate statement in the pre-selection documents that it reserved the right to request proposals only from a limited number of bidders that best meet the pre-selection criteria, the contracting authority shall rate the bidders on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings up to the maximum number specified in the pre-selection documents but at least three, if possible. In drawing up the list, the contracting authority shall apply only criteria and the manner of rating that are set forth in the pre-selection documents.

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<sup>21</sup> Procedural steps on pre-qualification and pre-selection proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 18 and 49(3) of the Model Procurement Law

<sup>22</sup> The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Guide* (see chapter III, "Contract award, paras. ....). The *Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they must be announced at the outset of the selection proceedings (i.e. in the invitation to the pre-selection proceedings).

<sup>23</sup> The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

## 2. Procedures for requesting proposals

### **Model provision 13. Choice of selection procedure**

1. A contracting authority may select the private partner for a PPP project by means of two-stage request for proposals in accordance with *[the enacting state indicates the provisions of its laws that provide for a procurement method equivalent to the two-stage tendering provided for in article 48 of the UNCITRAL Model Law on Public Procurement]* where the contracting authority assesses that discussions with bidders are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under *[the enacting state indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement]*, and in order to allow the contracting authority to obtain the most satisfactory solution to its procurement needs.
2. A contracting authority may select the private partner for a PPP project by means of a request for proposals with dialogue in accordance with *[the enacting state indicates the provisions of its laws that provide for a procurement method equivalent to the request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement]* where it is not feasible for the contracting authority to formulate a detailed description of the subject matter of the procurement in accordance with *[the enacting state indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement]*, and the contracting authority assesses that dialogue with bidders is needed to obtain the most satisfactory solution to its procurement needs.

### **Model provision 14. Content of the request for proposals**

1. The contracting authority shall provide a set of the request for proposals and related documents to each bidder invited to submit proposals that pays the price, if any, charged for those documents.
2. In addition to any other information required by *[the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals]*,<sup>24</sup> the request for proposals shall include the following information:
  - (a) General information as may be required by the bidders in order to prepare and submit their proposals;
  - (b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;
  - (c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;
  - (d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion or the descending order of importance of all evaluation criteria; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

### **Model provision 15. Bid securities**

1. When the contracting authority requires bidders to provide a bid security, the request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.
2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:<sup>25</sup>
  - (a) If so stipulated in the request for proposals, withdrawal or modification of a proposal or a best and final offer before or after the stipulated deadline;

- (b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 22, paragraph 1;
- (c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 18, subparagraph (e);
- (d) Failure to sign the PPP contract, if required by the contracting authority to do so, after the proposal has been accepted;
- (e) Failure to provide required security for the fulfilment of the concession contract after the proposal or offer has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

#### **Model provision 16. Clarifications and modifications**

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 14. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

#### **Model provision 17. Two-stage request for proposals**

- (a) Prior to issuing the request for proposals in accordance with [model provision 14] the contracting authority issues an initial request for proposals calling upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;
- (b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been rejected as non-responsive or for other grounds specified in law.<sup>26</sup> Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;<sup>27</sup>
- (c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

<sup>24</sup> A list of elements typically contained in a request for proposals can be found in articles 47 and 49 of the Model Procurement Law.

<sup>25</sup> General provisions on bid securities can be found in article 17 of the UNCITRAL Model Law on Public Procurement.

<sup>26</sup> E.g. corruption, collusion, conflict of interest.

<sup>27</sup> General provisions on clarification of request for proposals and the conduct of meetings with bidders be found in article 15 of the UNCITRAL Model Law on Public Procurement.

- (d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provision 14.

### **Model provision 18. Request for proposals with dialogue**

Where a request for proposals with dialogue is used in accordance with [model provision 13(2)]:

- (a) The contracting authority shall invite each bidder that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The contracting authority shall ensure that the number of bidders invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition;
- (b) The dialogue shall be conducted by the same representatives of the contracting authority on a concurrent basis;
- (c) During the course of the dialogue, the contracting authority shall not modify the subject matter of the project, any qualification or evaluation criterion, any minimum requirements, any element of the description of the project or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals;
- (d) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a bidder shall be communicated at the same time and on an equal basis to all other participating bidders, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of [*the enacting state indicates the provisions of its laws equivalent to article 24 of the UNCITRAL Model Procurement Law*];
- (e) Following the dialogue, the contracting authority shall request all bidders remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

### **Model provision 19. Evaluation criteria**

1. The criteria for the evaluation and comparison of the technical elements of the proposals shall include at least the following:
  - (a) Technical soundness;
  - (b) Compliance with environmental standards;
  - (c) Operational feasibility;
  - (d) Quality of services and measures to ensure their continuity.
2. The criteria for the evaluation and comparison of the financial and commercial elements of the proposals shall include, as appropriate:
  - (a) The present value of the proposed tolls, unit prices and other charges over the contract period;
  - (b) The present value of the proposed direct payments by the contracting authority, if any;
  - (c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
  - (d) The extent of financial support, if any, expected from a public authority of [*the enacting State*];
  - (e) The soundness of the proposed financial arrangements;

- (f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;
- (g) The social and economic development potential offered by the proposals.

**Model provision 20. Comparison and evaluation of proposals or offers**

1. The contracting authority shall compare and evaluate each proposal or offer in accordance with the evaluation criteria, the relative weight accorded to each such criterion or the descending order of importance of evaluation criteria and the evaluation process set forth in the request for proposals.
2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals or offers that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

**Model provision 21. Further demonstration of fulfilment of qualification criteria**

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.<sup>28</sup>

**Model provision 22. Contract award**

1. Where a two-stage procedure is used in accordance with model provision 13(1):
  - (a) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the PPP contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals;
  - (b) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer;
  - (c) If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals;
  - (d) The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.
2. Where a request for proposals with dialogue is used in accordance with model provision 13(2):
  - (a) No negotiations shall take place between the contracting authority and bidders with respect to their best and final offers.
  - (b) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

<sup>28</sup> See UNCITRAL Model Law on Public Procurement, article 9(8).

### 3. Direct negotiation of PPP contracts with one or more bidder s

#### Model provision 23. Circumstances authorizing direct negotiation

Subject to approval by [the enacting State indicates the relevant authority],<sup>29</sup> the contracting authority is authorized to negotiate a PPP contract without using the procedure set forth in model provisions 9 to 22 in the following cases:

- (a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 9 to 22 would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;
- (b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [the enacting State specifies a monetary ceiling]] [set forth in [the enacting State indicates the provisions of its laws that specify the monetary threshold below which a project may be awarded through direct negotiations]],<sup>30</sup>
- (c) Where the use of the procedures set forth in model provisions 9–22 is not appropriate for the protection of essential security interests of the State;
- (d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
- (e) In other cases where the [the enacting State indicates the relevant authority] authorizes such an exception for compelling reasons of public interest.<sup>31</sup>

#### Model provision 24. Procedures for negotiation of a PPP contract

Where a PPP contract is negotiated without using the procedures set forth in model provisions 9–22 the contracting authority shall:

- (a) Cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices]<sup>32</sup>;

<sup>29</sup> The rationale for subjecting the direct negotiation of a PPP contract to the approval of a higher authority is to ensure that the contracting authority makes use of this exception only in the appropriate circumstances. The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

<sup>30</sup> As an alternative to the exclusion provided for in subparagraphs (b) and (c), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by allowing direct solicitation in the procedures described in model provisions 9 to 22, as envisaged in article 35(2) of the UNCITRAL Model Law on Public Procurement.

<sup>31</sup> Enacting States that deem it desirable to authorize the use of direct negotiation procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the selection procedures envisaged in model provisions 9–22 may prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of direct negotiation procedures that may be provided for under specific legislation.

<sup>32</sup> See UNCITRAL Model Law on Public Procurement, article 7.

- (b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;
- (c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

#### **4. Unsolicited proposals<sup>33</sup>**

##### **Model provision 25. Admissibility of unsolicited proposals**

As an exception to model provisions 9 to 22, the contracting authority<sup>34</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 26 to 28, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced

##### **Model provision 26. Procedures for determining the admissibility of unsolicited proposals**

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall inform the proponent as soon as practicable whether or not the project is considered to be potentially in the public interest.<sup>35</sup>
2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications<sup>36</sup> and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.
3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

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<sup>33</sup> Enacting States wishing to enhance transparency in the use of direct negotiation procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 23 and 24. An indication of possible qualification criteria is contained in model provision 10.

<sup>34</sup> The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the institutional and administrative arrangements of the enacting State, a body separate from the contracting authority may have the responsibility for handling unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 17 and the references cited therein).

<sup>35</sup> The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

<sup>36</sup> The enacting State may wish to provide in regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 10.

**Model provision 27. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive**

1. Except in the circumstances set forth in model provision 23, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 9 to 22 if the contracting authority considers that:
  - (a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and
  - (b) The proposed concept or technology is not truly unique or new.
2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

**Model provision 28. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights**

1. If the contracting authority determines that the conditions of model provision 27, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 9 to 22. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4 of this model provision.
2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].
3. If no proposals in response to an invitation issued pursuant to paragraph 2 of this model provision are received within [a reasonable period] [*the amount of time specified in paragraph 2 above*], the contracting authority may engage in negotiations with the original proponent.
4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 19. In the event that the contracting authority receives a sufficiently large number of proposals, which appear *prima facie* to meet its needs, the contracting authority shall request the submission of proposals pursuant to model provisions 9 to 22, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 27, paragraph 2.

**5. Miscellaneous provisions**

**Model provision 29. Confidentiality**

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to model provisions 17, 18, 21, paragraphs 1, 23, 24 or 28, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party

**Model provision 30. Notice of contract award**

The contracting authority shall cause a notice of the contract award to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*<sup>37</sup>]. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract.

**Model provision 31. Record of selection and award proceedings**

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*]<sup>38</sup>.

**Model provision 32. Review procedures**

A bidder that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the contracting authority with law may challenge the decision or action concerned in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].

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<sup>37</sup> See UNCITRAL Model Law on Public Procurement, article 23.

<sup>38</sup> The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, is set out in article 25 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.