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## **Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects**

### **Note by the Secretariat**

#### **Addendum: Consolidated final draft of model legislative provisions**

1. The annex to this note contains the full text of the model legislative provisions on privately financed infrastructure projects, as they were approved by the Working Group on Privately Financed Infrastructure Projects at its fifth session (Vienna, 9-13 September 2002).
2. As noted in document A/CN.9/521, paragraphs 19-21, there are essentially three options available to the Commission as regards the relationship between the draft model provisions and the legislative recommendations contained in the Legislative Guide. The first option might be to retain both the legislative recommendations and the model provisions, upon their adoption, as two parallel texts. The second option might be to replace the legislative recommendations in their entirety with the model legislative provisions. The third option might be to replace only those legislative recommendations in respect of which the Commission adopted model legislative provisions. A concordance table presenting the legislative recommendations and the corresponding model legislative provisions is contained in document A/CN.9/522/Add.2.
3. In order to further assist the Commission's consideration of the matter, the annex to this note sets out the text of those legislative recommendations in respect of which no model legislative provision has been prepared, which are followed by the full text of the model legislative provisions. The legislative recommendations have been renumbered, so as to keep their sequence. The foreword reflects the assumption that at least some of the legislative recommendations will be retained with the model legislative provisions.
4. If the Commission decides to proceed in this manner, the first publication of the model legislative provisions, pending their incorporation in a future



consolidated edition of the UNCITRAL Legislative Guide, will contain a footnote with a statement along the following lines:

*“The model legislative provisions (hereinafter referred to as “model provisions”) were adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 2003 as an addition to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (hereinafter referred to as “the Legislative Guide”), which was adopted in 2000. The model provisions reflect, in legislative language, the principles set forth in the legislative recommendations originally contained in the legislative guide, which are superseded, except for those in respect of which no model provisions have been formulated. While most model provisions relate to specific legislative recommendations, they do not cover the entire range of issues dealt with in the legislative recommendations. In particular, no specific model provisions have been formulated on administrative or institutional matters, such as those dealt with in legislative recommendations 1 and 5-13. The consolidated text of the remaining legislative recommendations and the model provisions replaces the entirety of the legislative recommendations set out in pages xi to xxv of the UNCITRAL Legislative Guide on privately financed Infrastructure Projects.”*

5. The text in the annex contains cross-references underneath the headings of the draft model provisions, and occasionally in their text, to the corresponding legislative recommendations. If the Commission decides that the model provisions, upon adoption, should replace in whole or in part the legislative recommendations, those cross-references would be removed from the final text.
6. Internal cross-references between the draft model provisions have been kept italicized and in square brackets, pending a decision by the Commission as to whether or not the draft model provisions should become a model law. If the form of a model law were chosen, the cross-references would be to “articles” rather than “model provisions”.

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## Foreword

*The following pages contain a set of general recommended legislative principles entitled “legislative recommendations” and model legislative provisions (hereinafter referred to as “model provisions”) on privately financed infrastructure projects. The legislative recommendations and the model provisions are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. They are followed by notes that offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area. The user is advised to read the legislative recommendations and the model provisions together with the notes which provide background information to enhance the understanding of the legislative recommendations and model provisions.*

*The legislative recommendations and the model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.*

*The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability.*

*It should be noted that the legislative recommendations and the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the Legislative Guide. Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law, and environmental protection and consumer protection laws.*

## **Part One**

### **Legislative recommendations**

#### **I. General legislative and institutional framework**

**Constitutional, legislative and institutional framework (see chap. I, “General legislative and institutional framework”, paras. 2-14)**

Recommendation 1. *The constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness, and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated.*

**Scope of authority to award concessions (see chap. I, “General legislative and institutional framework”, paras. 15-22)**

Recommendation 2. *The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects.*

Recommendation 3. *Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems.*

Recommendation 4. *The law should identify the sectors or types of infrastructure in respect of which concessions may be granted.*

Recommendation 5. *The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.*

**Administrative coordination (see chap. I, “General legislative and institutional framework”, paras. 23-29)**

Recommendation 6. *Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.*

**Authority to regulate infrastructure services (see chap. I, “General legislative and institutional framework”, paras. 30-53)**

Recommendation 7. *The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services.*

Recommendation 8. *Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers.*

Recommendation 9. *The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means.*

Recommendation 10. *The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based.*

Recommendation 11. *Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.*

## **II. Project risks and government support**

**Project risks and risk allocation (see chap. II, “Project risks and government support”, paras. 8-29)**

Recommendation 12. *No unnecessary statutory or regulatory limitations should be placed upon the contracting authority’s ability to agree on an allocation of risks that is suited to the needs of the project.*

**Government support (see chap. II, “Project risks and government support”, paras. 30-60)**

Recommendation 13. *The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.*

## Part Two

# Draft model legislative provisions on privately financed infrastructure projects

## I. General provisions

### Model provision 1. Preamble

[see recommendation 1 and chap. I, paras. 2-14]

WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

WHEREAS the [Government] [Parliament] of ... considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

[Other objectives that the enacting State might wish to state;].

Be it therefore enacted as follows:

### Model provision 2. Definitions

[see introduction, paras. 9-20]

For the purposes of this law:

(a) “*Infrastructure facility*” means physical facilities and systems that directly or indirectly provide services to the general public;

(b) “*Infrastructure project*” means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) “*Contracting authority*” means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project [under the provisions of this law];<sup>1</sup>

(d) “*Concessionaire*” means the person that carries out an infrastructure project under a concession contract entered into with a contracting authority;

(e) “*Concession contract*” means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

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<sup>1</sup> It should be noted that the authority referred to in this definition relates only to the power to enter into concession contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as “regulatory agency” in subparagraph (h), may have the responsibility for issuing rules and regulations governing the provision of the relevant service.



(f) “*Bidder*” and “*bidders*” mean persons, including groups thereof, that participate in selection proceedings concerning an infrastructure project;<sup>2</sup>

(g) “*Unsolicited proposal*” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) “*Regulatory agency*” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

### **Model provision 3. Authority to enter into concession contracts**

[see recommendation 2 and chap. I, paras. 15-18]

The following public authorities have the power to enter into concession contracts<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authorities or a combination thereof*].<sup>5</sup>

<sup>2</sup> The term “bidder” or “bidders” encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority’s request for proposals.

<sup>3</sup> The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, “General legislative and institutional framework”, paras. 30-53).

<sup>4</sup> It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, “General legislative and institutional framework”, paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to clearly identify which entities have the power to provide such support and what kind of support may be provided (see chap. II, “Project risks and government support”).

<sup>5</sup> Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the States [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

**Model provision 4. Eligible infrastructure sectors**

[see recommendation 4 and chap. I, paras. 19-22]

Concession contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].<sup>6</sup>

## II. Selection of the concessionaire

**Model provision 5. Rules governing the selection proceedings**

[see recommendation 14 and chap. III, paras. 1-33]

The selection of the concessionaire shall be conducted in accordance with [*model provisions 6-27*] 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 procedures for the award of government contracts*].<sup>7</sup>

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<sup>6</sup> It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>7</sup> The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire 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 privately financed infrastructure 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 principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (hereinafter referred to as the "Model Procurement Law"). 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 to develop special rules suited 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, bid security and review 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.

## 1. Pre-selection of bidders

### Model provision 6. Purpose and procedure of pre-selection

[see chap. III, paras. 34-50]

1. The contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure 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>8</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility to be built or renovated;

(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, 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 concessionaire);

(c) Where already known, a summary of the main required terms of the concession 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>9</sup> the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with [*model provision 7*];

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in [*model provision 8*];

<sup>8</sup> A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

<sup>9</sup> A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

(c) Whether the contracting authority intends to request only a limited number<sup>10</sup> of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with [*model provision 9, para. 2*], and, if applicable, the manner in which this selection will be carried out;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [this State] in accordance with [*model provision 30*].

5. For matters not provided 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 of suppliers and contractors*].<sup>11</sup>

#### **Model provision 7. Pre-selection criteria**

[*see recommendation 15 and chap. III, paras. 34-40, 43 and 44*]

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria<sup>12</sup> that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

#### **Model provision 8. Participation of consortia**

[*see recommendation 16 and chap. III, paras. 41 and 42*]

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The

<sup>10</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). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", paras. 48 and 49). See also footnote 14.

<sup>11</sup> Procedural steps on pre-qualification 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 7 of the Model Procurement Law, paragraphs 2-7.

<sup>12</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 Legislative Guide (see chap. III, "Selection of the concessionaire", paras. 43 and 44). The Legislative 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 should be announced in advance, preferably in the invitation to the pre-selection proceedings.

information required from members of bidding consortia to demonstrate their qualifications in accordance with [*model provision 7*] 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>13</sup> 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 individual capabilities 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 9. Decision on pre-selection**

[*see recommendations 17 (for para. 2) and chap. III, paras. 47-50*]

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 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 10-17*].

2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number<sup>14</sup> of bidders that best meet the pre-selection criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria 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. In drawing up the list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

<sup>13</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.

<sup>14</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). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", para. 48). It should be noted that the rating system is used solely for the purpose of the pre-selection of bidders. The ratings of the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on an equal standing.

## 2. Procedure for requesting proposals

### **Model provision 10. Single-stage and two-stage procedures for requesting proposals**

[see recommendations 18 (for para. 1) and 19 (for paras. 2 and 3) and chap. III, paras. 51-58]

1. The contracting authority shall provide a set of the request for proposals and related documents issued in accordance with [model provision 11] to each pre-selected bidder that pays the price, if any, charged for those documents.

2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when the contracting authority does not deem it to be feasible to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

3. Where a two-stage procedure is used, the following provisions apply:

(a) The initial request for proposals shall call 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;<sup>15</sup>

(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The contracting authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the contracting authority;

(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

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<sup>15</sup> In many cases, in particular for new types of project, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession contract, in particular the way in which the project risks should be allocated between the parties under the concession contract. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, 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 (see chap. III, "Selection of the concessionaire", paras. 67-70; see further chap. II, "Project risks and government support", paras. 8-29).

to [model provision 26] 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;

(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 provisions 11-17].

#### **Model provision 11. Content of the request for proposals**

[see recommendation 20 and chap. III, paras. 59-70]

To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals],<sup>16</sup> the request for proposals shall include at least the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;<sup>17</sup>

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;<sup>18</sup>

(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; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

#### **Model provision 12. Bid securities**

[see chap. III, para. 62]

1. 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>19</sup>

(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to [model provision 17, para. 1];

<sup>16</sup> A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

<sup>17</sup> A list of elements that should be provided can be found in chapter III, "Selection of the concessionaire", paragraphs 61 and 62, of the Legislative Guide.

<sup>18</sup> See chapter III, "Selection of the concessionaire", paragraphs 64-66.

<sup>19</sup> General provisions on bid securities can be found in article 32 of the Model Procurement Law.

(c) Failure to formulate a best and final offer within the time limit prescribed by the contracting authority pursuant to [*model provision 17, para. 2*];

(d) Failure to sign the concession 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 has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

**Model provision 13. Clarifications and modifications**

[*see recommendation 21 and chap. III, paras. 71 and 72*]

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 11*]. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to [*model provision 26*] 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 14. Evaluation criteria**

[*see recommendations 22 (for para. 1) and 23 (for para. 2) and chap. III, paras. 73-77*]

1. The criteria for the evaluation and comparison of the technical proposals<sup>20</sup> 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 proposals<sup>21</sup> shall include, as appropriate:

- (a) The present value of the proposed tolls, unit prices and other charges over the concession 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 [*this State*];
- (e) Soundness of the proposed financial arrangements;

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<sup>20</sup> See chapter III, "Selection of the concessionaire", paragraph 74.

<sup>21</sup> See chapter III, "Selection of the concessionaire", paragraphs 75-77.



- (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 15. Comparison and evaluation of proposals**

*[see recommendation 24 and chap. III, paras. 78-82]*

1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion 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 that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.<sup>22</sup>

**Model provision 16. Further demonstration of fulfilment of qualification criteria**

*[see recommendation 25 and chap. III, paras. 78-82]*

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>23</sup>

**Model provision 17. Final negotiations**

*[see recommendations 26 (for para. 1) and 27 (for para. 2) and chap. III, paras. 83 and 84]*

1. The contracting authority shall rank all responsive proposals and invite for final negotiation of the concession 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.
2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the bidder

<sup>22</sup> This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, "Selection of the concessionaire", paragraphs 79-82, of the Legislative Guide, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the Legislative Guide are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the 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. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process.

<sup>23</sup> Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

fails to formulate an offer acceptable to the contracting authority within the prescribed time limit, the contracting authority shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

### **3. Negotiation of concession contracts without competitive procedures**

#### **Model provision 18. Circumstances authorizing award without competitive procedures**

*[see recommendation 28 and chap. III, para. 89]*

Subject to approval by ... *[the enacting State indicates the relevant authority]*,<sup>24</sup> the contracting authority is authorized to negotiate a concession contract without using the procedure set forth in *[model provisions 6-17]*, 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 6-17]* 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 privately financed infrastructure project may be awarded without competitive procedures]*;<sup>25</sup>

(c) Where the project involves national defence or national security;

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<sup>24</sup> The rationale for subjecting the award of the concession contract without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, "Selection of the concessionaire", paras. 85-96). 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>25</sup> As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

(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 cases of unsolicited proposals falling under [*model provision 23*];

(f) 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 failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgement of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award within a required time frame;<sup>26</sup>

(g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.<sup>27</sup>

#### **Model provision 19. Procedures for negotiation of a concession contract**

[*see recommendation 29 and chap. III, para. 90*]

Where a concession contract is negotiated without using the procedures set forth in [*model provisions 6-17*] the contracting authority shall:<sup>28</sup>

(a) Except for concession contracts negotiated pursuant to [*model provision 18, subpara. (c)*], 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*];

(b) Engage in negotiations with as many persons as the contracting authority judges capable<sup>29</sup> of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

<sup>26</sup> The enacting State may wish to require that the contracting authority include in the record to be kept pursuant to [*model provision 26*] a summary of the results of the negotiations and indicate the extent to which those results differed from the project specifications and contractual terms of the original request for proposals, and that it state the reasons therefore.

<sup>27</sup> Enacting States that deem it desirable to authorize the use of negotiated 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 competitive selection procedures may in turn 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 negotiated procedures that may be provided under specific legislation.

<sup>28</sup> A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, "Selection of the concessionaire", paragraphs 90-96, of the Legislative Guide.

<sup>29</sup> Enacting States wishing to enhance transparency in the use of negotiated procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to [*model provisions 18 and 19*]. An indication of possible qualification criteria is contained in [*model provision 7*].

#### 4. Unsolicited proposals<sup>30</sup>

##### **Model provision 20. Admissibility of unsolicited proposals**

[see recommendation 30 and chap. III, paras. 97-109]

As an exception to [model provisions 6-17], the contracting authority<sup>31</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in [model provisions 21-23], provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

##### **Model provision 21. Procedures for determining the admissibility of unsolicited proposals**

[see recommendations 31 (for paras. 1 and 2) and 32 (for para. 3) and chap. III, paras. 110-112]

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest.<sup>32</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>33</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.

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<sup>30</sup> The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, "Selection of the concessionaire", paragraphs 98-100, of the Legislative Guide. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 21-23.

<sup>31</sup> The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining 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 24 and the references cited therein).

<sup>32</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 infrastructure 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>33</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 7].

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.

**Model provision 22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights**

*[see recommendation 33 and chap. III, paras. 113 and 114]*

1. Except in the circumstances set forth in *[model provision 18]*, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with *[model provisions 6-17]* 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 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights**

*[see recommendations 34 (for paras. 1 and 2) and 35 (for paras. 3 and 4) and chap. III, paras. 115-117]*

1. If the contracting authority determines that the conditions of *[model provision 22, para. 1 (a) and (b)]* are not met, it shall not be required to carry out a selection procedure pursuant to *[model provisions 6-17]*. 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 2-4.<sup>34</sup>

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]*.

<sup>34</sup> The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, *mutatis mutandis*, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law.

3. If no proposals in response to an invitation issued pursuant to paragraph 2 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 infrastructure needs, the contracting authority shall request the submission of proposals pursuant to [*model provisions 10-17*], subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with [*model provision 22, para. 2*].

## 5. Miscellaneous provisions

### **Model provision 24. Confidentiality of negotiations**

[*see recommendation 36 and chap. III, para. 118*]

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to [*model provisions 10, para. 3, 17, 18, 19 or 23, paras. 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, apart from its agents, subcontractors, lenders, advisers or consultants, any technical, price or other information that it has received in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

### **Model provision 25. Notice of contract award**

[*see recommendation 37 and chap. III, para. 119*]

Except for concession contracts awarded pursuant to [*model provision 18, subpara. (c)*], 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*]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession contract.

### **Model provision 26. Record of selection and award proceedings**

[*see recommendation 38 and chap. III, paras. 120-126*]

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>35</sup>

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<sup>35</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, are discussed in chapter III, "Selection of the concessionaire", paragraphs 120-126,

**Model provision 27. Review procedures**

[see recommendation 39 and chap. III, paras. 127-131]

A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].<sup>36</sup>

**III. Construction and operation of infrastructure****Model provision 28. Contents of the concession contract**

[see recommendation 40 and chap. IV, paras. 1-11]

The concession contract shall provide for such matters as the parties deem appropriate, such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire [*see chap. IV, para. 1*];

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract [*see recommendation 5*];

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with [*model provision 30*] [*see recommendations 42 and 43 and model provision 30*];

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with [*model provisions 31-33*] [*see recommendations 44 and 45 and model provisions 31-33*];

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority [*see recommendations 46 and 48*];

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of the Legislative Guide. The content of such a record for the various types of project award is further set out in article 11 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.

<sup>36</sup> Elements for the establishment of an adequate review system are discussed in chapter III, "Selection of the concessionaire", paragraphs 127-131, of the Legislative Guide. They are also contained in chapter VI of the Model Procurement Law. If the laws of the enacting State do not provide such an adequate review system, the enacting State should consider adopting legislation to that effect.

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility [*see recommendation 52*];

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users [*see recommendation 53 and model provision 38*];

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements [*see recommendations 52 and 54, subpara. (b)*];

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations [*see recommendation 54, subpara. (a)*];

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled [*see chap. IV, paras. 73-76*];

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons [*see recommendation 56*];

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project [*see recommendation 58, subparas. (a) and (b)*];

(n) Remedies available in the event of default of either party [*see recommendation 58, subpara. (e)*];

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control [*see recommendation 58, subpara. (d)*];

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination [*see recommendation 61*];

(q) The manner for calculating compensation pursuant to [*model provision 47*] [*see recommendation 67*];

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire [*see recommendation 69 and model provision 49*].



**Model provision 29. Governing law**

[see recommendation 41 and chap. IV, paras. 5-8]

The concession contract is governed by the law of this State unless otherwise provided in the concession contract.<sup>37</sup>

**Model provision 30. Organization of the concessionaire**

[see recommendations 42 and 43 and chap. IV, paras. 12-18]

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*this State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws and significant changes therein shall be set forth in the concession contract.

**Model provision 31. Ownership of assets<sup>38</sup>**

[see recommendation 44 and chap. IV, paras. 20-26]

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

<sup>37</sup> Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the Legislative Guide (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also Legislative Guide, chap. VII, “Other relevant areas of law”, paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the execution of an infrastructure project (see generally Legislative Guide, chap. VII, “Other relevant areas of law”, sect. B).

<sup>38</sup> Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see “Introduction and background information on privately financed infrastructure projects”, paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 20-26). Irrespective of the host country’s general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire’s ability to create security interests in project assets for the purpose of raising financing for the project (*ibid.*, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

**Model provision 32. Acquisition of rights related to the project site**

[see recommendation 45 and chap. IV, paras. 27-29]

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the execution of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*].

**Model provision 33. Easements<sup>39</sup>**

[see recommendation 45 and chap. IV, para. 30]

The concessionaire shall [have] [be granted] the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

**Model provision 34. Financial arrangements**

[see recommendations 46 and 47 and chap. IV, paras. 33-51]

The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides. The concession contract shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].<sup>40</sup>

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<sup>39</sup> The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 30-32). The alternative wording offered within the first set of square brackets in the model provision is intended to reflect those options.

<sup>40</sup> Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, “Project risks and government support”, paras. 30-60). The cost at which public services are provided is typically an element of

**Model provision 35. Security interests**

[see recommendation 49 and chap. IV, paras. 52-61]

1. Subject to any restriction that may be contained in the concession contract,<sup>41</sup> the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*this State*].

**Model provision 36. Assignment of the concession contract**

[see recommendation 50 and chap. IV, paras. 62 and 63]

Except as otherwise provided in [*model provision 35*], the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

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the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of "reasonableness", "fairness" or "equity" (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 36-46).

<sup>41</sup> These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

**Model provision 37. Transfer of controlling interest<sup>42</sup> in the concessionaire**

[see recommendation 51 and chap. IV, paras. 64-68]

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

**Model provision 38. Operation of infrastructure**

[see recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2)]

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

- (a) The modification of the service so as to meet the demand for the service;
- (b) The continuity of the service;
- (c) The provision of the service under essentially the same conditions for all users;

(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

**Model provision 39. Compensation for specific changes in legislation**

[see recommendation 58, subpara. (c) and chap. IV, paras. 122-125]

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

**Model provision 40. Revision of the concession contract**

[see recommendation 58, subpara. (c) and chap. IV, paras. 126-130]

1. Without prejudice to [model provision 39], the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost

<sup>42</sup> The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

- (a) Changes in economic or financial conditions; or
- (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

- (a) Occur after the conclusion of the contract;
- (b) Are beyond the control of the concessionaire; and
- (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.

**Model provision 41. Takeover of an infrastructure project by the contracting authority**

*[see recommendation 59 and chap. IV, paras. 143-146]*

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

**Model provision 42. Substitution of the concessionaire**

*[see recommendation 60 and chap. IV, paras. 147-150]*

The contracting authority may agree with the entities extending financing for an infrastructure project on the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.<sup>43</sup>

<sup>43</sup> The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

## **IV. Duration, extension and termination of the concession contract**

### **1. Duration and extension of the concession contract**

#### **Model provision 43. Duration and extension of the concession contract**

*[see recommendation 62 and chap. V, paras. 2-8]*

1. The term of the concession contract, as stipulated in accordance with *[model provision 28, subpara. (p)]* shall not be extended except as a result of the following circumstances:

(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control;

(b) Project suspension brought about by acts of the contracting authority or other public authorities; or

(c) *[Other circumstances, as specified by the enacting State.]*<sup>44</sup>

2. The term of the concession contract may further be extended to allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs during the original term.

### **2. Termination of the concession contract**

#### **Model provision 44. Termination of the concession contract by the contracting authority**

*[see recommendation 63 and chap. V, paras. 14-27]*

The contracting authority may terminate the concession contract:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For *[compelling]*<sup>45</sup> reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

(c) *[Other circumstances that the enacting State might wish to add in the law.]*

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<sup>44</sup> The enacting State may wish to consider the possibility of authorizing a consensual extension of the concession contract pursuant to its terms, for compelling reasons of public interest.

<sup>45</sup> [Possible situations of a compelling reason of public interest are discussed in chapter V, "Duration, extension and termination of the project agreement", paragraph 27, of the Legislative Guide.]

**Model provision 45. Termination of the concession contract by the concessionaire**  
[see recommendation 64 and chap. V, paras. 28-33]

The concessionaire may not terminate the concession contract except under the following circumstances:

- (a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;
- (b) If the conditions for a revision of the concession contract under [*model provision 40, para. 1*] are met, but the parties have failed to agree on a revision of the concession contract; or
- (c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, such as those referred to in [*model provision 28, subparas. (h) and (i)*], and the parties have failed to agree on a revision of the concession contract.

**Model provision 46. Termination of the concession contract by either party**  
[see recommendation 65 and chap. V, paras. 34 and 35]

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

### 3. Arrangements upon expiry or termination of the concession contract

**Model provision 47. Financial arrangements upon expiry or termination of the concession contract**

[see recommendation 67 and chap. V, paras. 43-49]

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

**Model provision 48. Wind-up and transfer measures**

[see recommendation 66 and chap. V, paras. 37-42 (for lit. a) and recommendation 68 and chap. V, paras. 50-62 (for lit. b-d)]

The concession contract shall set forth, as appropriate, the rights and obligations of the parties with respect to:

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority, where appropriate;
- (b) The transfer of technology required for the operation of the facility;

(c) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(d) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

## V. Settlement of disputes

### **Model provision 49. Disputes between the contracting authority and the concessionaire**

*[see recommendation 69 and chap. VI, paras. 3-41]*

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.<sup>46</sup>

### **Model provision 50. Disputes involving customers or users of the infrastructure facility**

*[see recommendation 71 and chap. VI, paras. 43-45]*

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

### **Model provision 51. Other disputes**

*[see recommendation 70 and chap. VI, para. 42]*

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

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<sup>46</sup> The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.