



## Economic and Social Council

Distr.: General  
16 March 2017

Original: English

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### Economic Commission for Europe

#### Committee on Innovation, Competitiveness and Public-Private Partnerships

##### Eleventh session

Geneva, 20-22 March 2017

Item of the provisional agenda

Item 5 (b)

#### **Revised Draft UNECE Standard for a Zero Tolerance Approach to Corruption in PPP Procurement**

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

This revised draft submitted to the Committee for information is based on an initial draft prepared by an international project team led by Mr. Marc Frilet and was revised to include comments made during the Public Review. The final draft is expected to be finalised in April 2017.

Once the Bureau approves the final draft, it will be submitted to the Working Party on Public-Private Partnerships for review and endorsement at its first session on 21-22 November 2017.

**Implementing the United Nations 2030 Agenda for Sustainable Development  
through effective “People-First Public-Private Partnerships”**

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**Terms**

AAAA	Addis Ababa Action Agenda
DB	Design and Build contract
DBO	Design Build and Operate contract
EPC	Engineering, Procure and Construct contract
OECD	Organisation for Economic Co-operation and Development
O&M	Operation and Maintenance
PFI	Privately Financed Infrastructure
PPP	Public Private Partnership
PfPPP	People First Public Private Partnership
SDG	Sustainable Development Goal
ToR	Terms of Reference
UNECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollars

## Introduction

The United Nations Sustainable Development Goals (SDGs) come with a huge price tag. Recent reports have estimated that global infrastructure will need USD 3.3 trillion of investment per year just to keep pace with projected growth.<sup>1</sup> This massive sum will need to be mobilized from many sources, including from the private sector. And governments scaling up investment and infrastructure development of this magnitude will need to make a strong commitment to transparency and integrity and in particular implement plans to fight corruption, in order to attract the requisite investment, efficiently and effectively partner with the private sector, and accelerate their initiatives to meet the UN SDGs.

While the potential of PPPs to fill the development gap is great, and the UN SDGs call on governments and officials to rise up to this challenge, corruption continues to pull governments down.

In 2015 alone, the Honduran Social Security Institute was accused along with a number of its top officials of awarding USD 200 million of contracts to phantom companies; Nigerian officials were accused of awarding phantom contracts for military supplies, including helicopters, fighter jets, bombs, and ammunition, that never arrived and caused estimated losses exceeding USD 2 billion; and senior Malaysian officials were accused of diverting upwards of USD 1 billion from a public fund intended to promote economic development and revitalize Kuala Lumpur.<sup>2</sup>

These are just some of the high-profile cases. In less sensational circumstances, and in countries around the world, there are compromised public processes, bribes being paid for basic public services, friends and relatives of officials being awarded contracts, and other abuses where public authority is leveraged for personal gain.

And the damage is not only monetary. Corruption slows the provision of public services, impairs economic growth and activity, and undermines the time, energy and resources applied by those attempting to provide actual good governance and public services.

Governments embracing the UN SDGs, however, in particular those seeking robust development programmes that include PPPs, should not measure corruption simply on the toll that it takes, or how it undermines their efforts; instead, governments should measure corruption by what they have to gain in successfully combating it and implementing a zero tolerance approach. How much could be saved? How many more people could be served? How would the world look with far less corruption?

### *The potential savings in fighting corruption*

#### **Saving Money**

The potential savings in fighting corruption in public procurement can be massive.

- The 2014 OECD Foreign Bribery Report estimates that bribery consumes 10.9 per cent of the total transaction value in public procurement globally.
- The World Bank estimates that about USD 1 trillion is paid each year in bribes around the world.<sup>3</sup>

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<sup>1</sup> McKinsey analysis; McKinsey Global Institute Analysis, 2016

<sup>2</sup> Foreign Policy, *The Worst Corruption Scandals of 2015*, Siobhan O'Grady, D

<sup>3</sup> World Bank Governance Brief Anti-Corruption. May 2016

While corruption is known to occur in virtually all sectors and involve both public and private actors, the potential savings in public construction projects alone (which is often a substantial part of PPPs) is also significant:

- Transparency International, in its Global Corruption Report 2005, estimated that corruption in construction could add as much as 50 per cent to a project's cost. It further estimated that 10 to 30 per cent of investment in a publicly funded construction project may be lost through mismanagement or corruption (COST 2011 Research).

*“We will work to strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions, of the corporate sector as well as of public administrations”.*

*Addis Ababa Action  
Agenda Declaration 2015*

The European Commission has stated that “annual losses in global construction through mismanagement, inefficiency and corruption could reach USD 2.5 trillion by 2020. And yet the savings are perhaps better measured not by the monetary savings, but by the increased impact that programmes and projects could have in a corrupt free environment.

### **Saving Lives**

The World Bank has stated that corruption disproportionately impacts the poor while undermining growth and prosperity by siphoning away resources from their intended purposes and exacerbating the long-term effects of those services not being delivered.<sup>4</sup> Corruption also erodes the social contract between state and citizens.

For example, in the healthcare sector, corruption can in very real terms harm people. Corruption diverts time, attention, and resources away from the care that is to be provided and the health of the population that are to be served. This means, among other impacts, increases in child mortality, decreases in the availability of critical medicines, and failures to prevent otherwise preventable illnesses.

### **People First PPPs**

Corruption is therefore of a particular concern for the UN SDGs and “People First PPPs” (PfPPP) because a core aim of PfPPP is to not just deliver value for money and have routine public services provided to the people, but for PPP projects and programmes to have the maximum positive transformational effect on the lives of those people<sup>5</sup>. This is especially critical for projects that aim to improve conditions in low and middle income countries and where budgetary and capacity constraints are most acute.

Consequently, there is an urgent need to build upon existing anti-corruption and anti-bribery resources and develop materials that a) are universal in nature, b) contain anti-corruption principles and recommendations specifically targeted toward PPPs, c) may be readily incorporated by countries and public authorities into their systems to combat corruption, and d) enhance a government's overall anti-corruption efforts. Doing so will offer all stakeholders of PPP projects a comprehensive and substantially increased level of protection against corruption and pave the way for pipelines of projects that bring real development to the users of these standards while saving money and saving lives.

<sup>4</sup> World Bank Group President Jim Yong Kim, Anti-Corruption Summit 2016, London, United Kingdom

<sup>5</sup> UNECE is currently preparing guidance materials and criteria for People First PPPs.

The purpose and implementation of this standard is also important because the UN recognizes that corruption has a unique potential to undermine the SDGs, and reference should be made in particular to:

- SDG 16 is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. SDG 16.5 and 16.7 further target a substantial reduction in corruption and bribery in all their forms, and development of effective, accountable and transparent institutions at all levels.
- SDG 17 calls for strengthening the means of implementation and revitalization of the global partnership for sustainable development. Its SDG 17.17 calls for encouraging and promoting effective public, public-private, and civil society partnerships, and building on the experience and resourcing strategies of partnerships.

The Addis Ababa Action Agenda (AAAA), a global framework for financing development post-2015, also calls on governments to combat corruption at all levels and in all its forms, and to implement effective, accountable and inclusive democratic institutions.<sup>6</sup>

### *Objectives and drafting considerations for the Standards*

#### 1. Objectives

The overall objectives of the Standard are the following:

- Provide a voluntary set of principles and conditions that government and public authorities could incorporate in their regulations or policies in undertaking PfPPP procurement in compliance with the SDGs.
- Assist law makers and public authorities to improve the opportunities to use PPPs in ways that mobilise their potential and reduce risk and complexity while improving the regulatory response to corruption in Peps.
- Inform and educate all parties, including civil society, on how PPPs may be entered and operated that are of high quality and not compromised by unethical behaviour and defects caused by the lack of integrity or corruption.

#### 2. Drafting considerations

To achieve the above-referenced objectives, this document has been based on:

- An identification by a multidisciplinary team of public and private PPP experts from various organisations and countries, of the 'high risk' areas within a PPP procurement process; and.
- An integrated drafting process aimed at producing a standard more or less of universal nature, drafted in plain language, and which is easy to understand, simple to apply, and requires little to no judgement in determining a means for effective implementation.

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<sup>6</sup> Addis Ababa Action Agenda, Financing for Development, Section II. B. 48; UN Sustainable Development Goals, Target 17.17

## Effective Implementation of the Standard

### *Presentation and Publication of the Standard*

- a. Governments seeking to implement this standard should adopt the standard and then adapt its recommendations through various actions that may include making them binding and subject to judicial review and criminal penalties in case of major infringement.
- b. Governments should make elements of the standard and its recommendations and actions publicly and freely available and accessible and put systems in place to keep them up to date.
- c. Governments should make all other authoritative information relating to a PPP procurement, notably legal rules and procurement procedures, easily accessible and free of charge to access this information.

### *Coordination with UNECE*

- d. Governments should consult with UNECE as needed on the implementation and compliance with the Standard.
- e. Governments should exchange with UNECE to resolve any issues of implementation and compliance with the Standard.
- f. Governments should utilize any accompanying UNECE materials, standards, guidance, and/or checklists for better implementation of the Standard.

### *Voluntary Certification of the Governmental Entity Responsible for Procurement of the PPP*

- g. Governments should work to bring their respective administrative and procuring entity(ies) into compliance with the standard and build the necessary institutions, procedures, and capacity to combat corruption.
- h. Governments should consider a voluntary review and consultation with UNECE to evaluate the entity(ies) responsible for Procurement of PPP compliance with the standard and progress toward the award of a UNECE certification of compliance.

### *Non-compliance with Transparency and Integrity Standard and Sanctions*

- i. Governments should investigate allegations of misconduct, conflict of interest, or other acts of corruption and utilize an independent authority having the power to take interim measures to safeguard the integrity of the procurement process.
- j. Governments should sanction any infringement with civil or criminal penalties as necessary and as determined by the jurisdiction.
- k. Governments should establish a transparent, independent, efficient and fair procedure of inquiry and enforcement.
- l. Governments should establish, publish, and maintain a debarment list within an independent authority and make the list judicially reviewable.

### *Misprocurement and Protests*

- m. Governments should implement an effective protest mechanism for bidders. A mechanism which, for example, can include a prohibition on the contracting authority signing the PPP contract for a specified period of time while the name of the preferred bidder and the basis for award is disclosed to all prospective bidders, and/or resolution of the protest has occurred.
- n. Governments should allow any bidder, or prospective bidder justifying an interest, who fails to be selected, to protest the award for misprocurement.
- o. Governments should allow protests to be reviewed by a Fairness Auditor and/or filed with an independent authority or a court having the power to make a full or interim decision to, among other things, suspend the awarding process upon proof of prima facie evidence that the protest has sufficient merit, cancel the procedure, and/or take other appropriate remedial action.
- p. In the event of a protest, governments should provide to the aggrieved bidder any special report certified by an Integrity Officer and any other transcript or procurement record generated by the public authority in accordance with the public disclosure rules. This is particularly important in scenarios where the procurement involved competitive dialogue or negotiation and/or there is a greater risk of improper communications.
- q. The Public Authority may proceed with the signature of the contract without prejudice of the right of any aggrieved bidder to initiate court proceeding for damages with a competent court.

### *Organization of the Standard*

**Part 1** discusses the three (3) stages of PPP procurement and highlights the potential for corruption in PPPs.

**Part 2** elaborates further the core areas where corruption in the procurement process may occur and sets out recommendations on implementing a zero tolerance to corruption approach in People First PPP procurement.

## **I. Corruption Risk in PPP Procurement**

### *Preliminary Observations and Public Contracts*

PPPs belong to the category of public contracts. As such, the core principles underlying the procurement of 'traditional' public contracts are also applicable to PPP contract procurement. This includes competitive bidding, transparency and non-discrimination throughout the tender. The UN Commission of International Trade Law (UNCITRAL) Model Law on Public Procurement provides that a well-designed procurement a) maximizes economy and efficiency, b) fosters and encourages participation in the process, c) promotes competition for the subject matter of the procurement, d) provides fair, equal, and equitable treatment of those involved, e) promotes integrity, fairness and confidence in the process by stakeholders, and (f) achieves transparency in the process.<sup>7</sup>

While of the same family, PPPs have certain distinguishing characteristics from 'traditional' public procurement contracts. One main distinction is that a PPP often

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<sup>7</sup> UNCITRAL Model Law on Public Procurement , January 2011, available here:  
<http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>



aggregates under one composite contract, the financing, design and construction (or rehabilitation) of public infrastructure, together with the delivery of part or all of the associated public services by the private partner. In addition, PPPs need to accommodate changing needs of the people they serve due to the longer period of the venture. This triggers a “partnership situation” where the public and private sector partners must truly work together over long periods of time and fine tune the services, economic conditions, and other contractual obligations and performance of the project. Parties must therefore build a fair and equitable approach to future contingencies and operational and maintenance issues that is uncommon, or at least of a much different magnitude, from other types of public contracts.

One of the procurement challenges of PPPs is to evaluate and plan for, well in advance the various issues and risks that will be encountered during the life of the contract. It is also difficult to choose a partner that is able to make long term commitments for financing, designing, building and operating infrastructure, under rigorous performance parameters and contractual clauses, capable of real partnership with the public sector, and who places the interest of the people first. This is arguably the most important distinguishing characteristic, that is, to find the right counterpart and bring public and private parties together in a lasting partnership that is not just a short term ‘deal’, but is grounded partnership law and traditional contract and procurement law.

The impact of this type of contracting on public procurement is manifold. For instance, one of the main selection criteria in traditional public procurement is the price to be paid upon acceptance of the work or upon completion of certain performance specifications. By contrast, in the majority of PPP cases, the price to be paid for the work or the infrastructure, while certainly important, is not the only selection criterion. Indeed, the price is commonly just one criteria among many others; criteria such as the optimum design commensurate with innovation, improvement, and adaptation of the service, the overall ability to limit maintenance costs, a robust asset replacement plan, a responsible and limited impact on the public budget, etc. In fact, this “basket” of performance criteria, along with appropriate weighting ratios, is the recommended procurement approach to selecting the private partner in PPPs.

Nevertheless, despite a range of differences, PPPs remain a public contract, arising from a public process, and aimed at fulfilling a public need. In this sense, a PPP will benefit from a well-designed procurement and a rigorous anti-corruption framework just as any traditional governmental contract would.

### *The Three stages of a PPP procurement*

PPP procurement operates much like traditional public procurement, either in concept or in fact, with the procurement process unfolding across three conceptual stages:

**Stage 1** is the public entity’s effort to identify its needs, examine its available resources versus those that it will need to obtain, then identify potential sources and solutions in the market, measure impacts and benefits, and risks of the PPP option, including identify budgetary capacity versus the potential liabilities of solutions due to the anticipated allocation of risks or rights of an approach, and finally set out the parameters of its proposed tender. A key goal of these Stage 1 activities is to ensure awareness by the public and private sectors of each other’s problems and preferences.

**Stage 2** is putting the contracting opportunity out to bid thus subjecting it to competition, and evaluating and awarding the contract. PPPs can be large projects with complex interconnected operational elements, and sometimes equally complicated financing, so the cost and time to generate a responsive bid and evaluate offers can be very high. As a result, PPP procurement is often broken into two steps, a qualifying step and then a bidding step.

The qualifying step is where qualified bidders are identified and the number of overall bidders invited to bid on the contract may be narrowed. The bidding step is then to have those pre-qualified bidders compete on the contracting opportunity and bid. In the end, the public entity, through an evaluation process, awards the contract to the bidder who it judges has proposed the best solution in terms of approach and cost, providing the services needed, and is capable of achieving the declared benefits for citizens' lives and sustainable development goals.

**Stage 3** is after a winning bidder has been identified, contract finalization occurs, and the contract starts beginning has been awarded. This is the long-term performance of the bidder parties under the contract. In infrastructure projects this is sometimes referred to as the operations and maintenance (O&M) phase. This is also when governments may review and identify variations in the expected and declared benefits of a project on citizens' lives and the identified sustainable development goals through an ex-post evaluation (and update any standardized tools, approaches, or risk allocation expectations used in the process.)

### *Risk across all three stages*

Corruption in PPP procurement is often seen as gaining an unfair advantage in the 'competition' or Stage 2 of the process, that is, influencing the competition such that one bidder wins or gains an unfair advantage amongst the pool of other potential bidders.

A holistic view of corruption in PPPs however needs to focus on all three of the PPP procurement Stages and their linkages. This is not only because corruption can occur at any stage of the process, but because corruption tends to go wherever the system is weakest or unregulated – that is, wherever it is easiest to get away with and in some cases where the least amount of scrutiny is being applied.

For example, empirical evidence shows that when extortion or bribes and other collusion with public officials occurs it is frequently at the outset of procurement, or, that one of the parties is underperforming, unfairly seeking adjustment to performance requirements, or distorting regulatory procedures, reporting, or invoices, years into a long-term contract<sup>8</sup>.

The fact that these examples demonstrate corrupt practices at the outset of a PPP and at the end during operations, might suggest that governments have a robust and well executed Stage 2, e.g. the tendering process.

Unfortunately, this less than absolute, many governments still lack basic institutional elements and good practices to conduct a robust tender, especially when the intensity and complexity of a PPP presents itself.

As a result, Government systems need improvement across all three stages. And in order to provide value for people through PPPs and follow the findings of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, governments (and their private partners) need to be thoughtful in the design and implementation of PPPs in order to prevent the pitfalls from the past and rise up to the ambitious goals of the UN SDGs.

### *Corruption potential*

Corruption in PPPs is not a certainty. Many PPP projects are undertaken and executed with integrity and transparency and result in very positive outcomes. In fact, in some ways PPPs can be better insulated from corruption than traditional public procurement contracts. Because PPPs often involve the creation or rehabilitation of large or signature pieces of

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<sup>8</sup> See, *Curbing Corruption in Public Procurement: A Practical Guide*, Transparency International, 24 July 2014

infrastructure, the project can receive a greater amount of attention and scrutiny than many routine or smaller public contracts. PPPs can also benefit from well-structured agreements that are negotiated at length and in detail, and have customized incentives to ensure a project is constructed to high standards and has long term durability; thus, reducing the risk of questionable contracts being awarded, contractors cutting corners, and bribery influencing the outcomes or performance.

Despite these potential upsides, PPPs can also be more at risk for corruption<sup>9</sup>, with some of the more prominent causes being:

- When the government lacks strong institutions –government structures, authority, and review and approval processes that are all clearly established and demarcated, and operate with integrity and transparency under robust yet efficient checks and balances on decision making.
- When a PPP concept is market tested and the public body goes out and interacts with the market and potential bidders to see what solutions are available - this interaction is often a necessary step in a PPP procurement, yet it also potentially opens opportunities for improper conversations or influence between the bidder and public officials, or simply for the private sector to steer the public party's 'needs'.
- When competitive dialogue and negotiation is used - which may be necessary to fine tune the public service, and if not well-organised with appropriate safeguards, it also provides opportunities for improper conversations or influence, behind the scenes arrangements, or schemes to gain an upper hand against competition.
- When projects are very large and/or technical in nature - certain sectors that compete on these types of public contracts are actually small communities, with a finite number of companies, employees, experts, and contractors working in that sector. The result being -- the risk of conflicts of interest are enhanced, especially when employees tend to move from public to private, and then private to public service.
- When projects involve significant amounts of money - the desire to win such opportunities can be intense, and the incentive to get access to the contract, even if for example it is simply helping a friend or family member gain a subcontracting opportunity on a lucrative project, can be great.
- When PPPs are long term - public contracting opportunities of significant length do not come around often, and as noted, certain sectors have a limited number of players who are able to provide such a service and for such a long term, so the need to gain an advantage over your competitors and/or win the contract can be acute.
- When governments are technically ill equipped – governments often have to retain sophisticated, front-end transactional, financial, technical, and/or legal consultants and experts to handle complex PPPs. These relationships, many of which the government relies upon heavily, present windows of opportunity to control the process or influence the outcomes of the procurement and consultants and experts, while necessary, need to be managed appropriately.

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<sup>9</sup> Most institutions, the UN, the World Bank Group, OECD recognize the corruption risks, and that it can come in different forms. from unfairly determining the winners, to awards favouring friends or relatives of government officials, to simply skewing how the institution or competition works. These large institutional players recognize that corruption is important and tackling them is critical to making their and governments' efforts effective and achieving sustainable change. (For example, the World Bank Group has debarred more than 370 companies, governmental organizations and individuals over the past 7 years.)

- When a project is ambitious but performance measurement is weak - governments can benefit from the outcome based approach of PPPs, yet, when there are no clear or applicable methodologies in the tender and/or contract to measure those outcomes and performance, such as reliable base year data, the project can be made to appear successful, but ultimately fail in its purpose.

## **II. Zero Tolerance Approaches to Anti-Corruption in PPP Procurement**

### **Stage 1**

**Stage 1** of a PPP procurement encompasses all the activities and period of time prior to a public entity putting a PPP contract out to bid. Anti-corruption measures implemented during this stage are often some of the most important because they establish many of the key elements of an anti-corruption environment and mentality that will span from project inception, to tender of the contract, and through the long term operational activities that will be carried out under a PPP contract. The following approaches are procurement related, institutional elements that promote the overall transparency and integrity of PPPs and the governmental systems within which they occur.

#### **A. Compliance with Laws and a Code of Ethics**

##### **Challenge**

*The challenge for governments in a PPP procurement is to promote predictability in an open and fair competitive process with public and private participants adhering to high ethical standards and clean conduct throughout the PPP process.*

##### **Recommendations**

1. Governments need to set boundaries, benchmarks and expectations for public and private sector participation in a PPP, and establish legal and ethical controls that build trust in, and between, the public and private participants and a framework that ultimately strengthens the underlying social compact between government and its citizens.
2. Governments should have anti-corruption laws, regulations and codes in place that either incorporate or are based upon international models and anti-corruption instruments.
3. Public and private sector participants to a PPP procurement process should endorse and/or commit to complying with all domestic and applicable international laws, regulations and codes relating to anti-Corruption.
4. The Tender documents shall refer to such applicable laws, regulations and codes and include an undertaking by the Public Authority and by the bidders to comply with them.
5. Governments should have and incorporate into their PPP activity a code of ethics setting up the standards of behaviour of public and private participants involved in the procurement process.
6. The Tender documents should incorporate and refer to the code of ethics.
7. The code of ethics should be formally endorsed by the public authority sponsoring the PPP, on behalf of itself and the various public entities involved in the process, and by bidders.
8. Violations of the law, regulations or codes relating to anti-corruption should be enforced and punishable or sanctionable, with such remedies as fines, civil or criminal penalties, and removal or disbarment of the offending person or entity.

9. Governments should have an independent anti-corruption entity providing oversight, guidance, administration and enforcement of anti-corruption systems.
10. Governments should require private sector companies bidding for PPPs to have their own published code of ethics and internal anticorruption procedures that can be independently audited.

## **B. Avoidance of Conflicts of Interest**

### **Challenge**

*In order to put “people first”, it is important for governments to ensure that their PPP projects are protected from those seeking to extract improper personal gain from the initiative. Conflicts of interest are one of the key indicators of just such an opportunity therefore governments are challenged to implement strong identification and remedial measures for conflicts of interest.*

### **Recommendations**

11. As part of their anti-corruption efforts and ethics system, Governments should avoid conflicts of interest in PPPs where the direct or indirect economic, financial or personal interests of a person or entity are incompatible with or perceived to compromise their impartiality, independence, or that arise from obligations occurring in their official public capacity and the PPP.

*Conflicts of interest are ‘red flags’ indicating the risk of corruption and a general threat to the integrity of the process. Because conflicts can be identified they are important tools to an anti-corruption system that attempts to uncover conduct that is often purposefully concealed or hidden.*

12. Governments should define corruption broadly and include conflicts of interest where bidders or their affiliates, contractors, or subcontractors receive or provide, or agree to receive or provide, a gift, gratuity, commission or consideration of any kind as an inducement for favour or disfavour in the PPP process.

13. Governments should be particularly aware of conflicts of interest that arise as the result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest.

14. Governments should take preventative steps or institute corrective measures even when there is merely an appearance of a conflict of interest.

15. Early identification, rapid disclosure, and appropriate mitigation are key to an effective system for handling conflicts of interest.

16. Governments are particularly at risk of conflicts of interest during exchanges with bidders and in a process of evaluating or optimizing the bids.

## **C. Disclosure of Information**

### **Challenge**

*Governments are challenged to provide access to the essential facts and information that public officials use to make decisions and undertake their official responsibilities.*

**Recommendations**

17. Public disclosure rules are essential to promoting transparency and integrity in the PPP process. Governments should institute robust disclosure practices at the outset of a PPP program or project and continue through general awareness and use of tools such as electronic disclosure, public information access systems and other disclosure practices.

*Imbalanced sharing of information can lead to opportunities for corruption. Because corruption is often concealed, stakeholder access to procurement information is critical to holding public and private sector participants accountable.*

18. Governments should create training and awareness programs that ensure the public disclosure requirements are met and utilized.

19. As an extension of any public disclosure rules, governments should establish an information disclosure framework for the PPP that spans the entirety of the project. The framework should offer, preferably by electronic means, unrestricted and full direct access

free of charge to relevant PPP documentation, abstracts, and key contract provisions and reports in a readily accessible format and updated on a regular basis. to the civil society of key project parameters updated on a regular basis.

20. While attention should be paid to robust disclosure requirements, PPPs often invite bidders to propose innovative solutions which can involve proprietary technology or trade secrets, therefore governments should put systems in place to protect these sensitive materials from unauthorized disclosure and use by public and private parties.

21. The framework should include other disclosure procedures, such as timing and violations of the framework through failure to disclose or other wrongful withholding of materials that were subject to disclosure.

22. The disclosure rules and framework should be well publicized and set out clearly for public and private participants and stakeholders to the PPP process.

**D. PPP Units, Committees and Boards**

**Challenge**

*Clear and transparent lines of reporting and responsibility for the contracting authority as well as the designation or existence of a high level coordinating and decision making body is a key factor for success.*

**Recommendations**

23. Governments should isolate the activities of preparation, evaluation, awarding and decision making in a PPP procurement and have each activity administered discretely by PPP Units, Committees and/or Boards that are independent from one another.

*Division of responsibilities and division of authority within a PPP procurement act as both i) a deterrent to corruption because no single actor can control the outcomes of the process and ii) an oversight function because the entities can monitor the activities of the others.*

24. Governments should establish PPP Units, Committees and Boards at appropriate levels in the governmental system such that there is a clear authority, competency, scope of

decision making and/or dispute resolution, and a clear approval path for projects to navigate.

25. Governments should publish and reference in the bidding documents the applicable PPP Units, Committees and Boards and their respective functions, responsibilities, roles, and decision making authority

## **E. Consultants and Experts**

### **Challenge**

*Because of the influence consultants and experts can exert on the decision-making processes of governments, including such basic decisions as whether to initiate a PPP, or on what grounds to award a PPP contract, governments are challenged to clearly specify and carefully control the basis for retention, input and deliverables of consultants and experts.*

### **Recommendations**

26. Governments should implement guidelines and open vetting of the necessity of and TOR for PPP consultants and experts.

27. Consultants and Experts should have a high level of integrity and competent to handle each stage of the project or tender for which they have been engaged, from evaluation of the needs of the public partner, up to final award of the PPP agreement(s) and oversight of the service provision.

28. Governments should give due consideration to the capacity of consultants and experts to work within a team of public officials and deal with the specific, yet diverse competencies needed within a PPP project or series of projects.

29. Consultants and experts should be independent and have no conflicts of interest with individuals, companies and institutions, financial or otherwise, having an interest in the Project.

30. Governments should use open, clear, and consistent invitations, TOR, and evaluation systems to retain consultants and experts.

31. Governments should consider use a value and/or quality based selection approach to evaluate consultants and experts and to balance the cost of their engagement with their available budget and the size, complexity, and cost of the project.

32. Governments should identify cost controls, including the ability to increase, decrease, or eliminate specified services, prior to the engagement of consultants and experts and incorporate them into their engagement contracts.

33. Governments should actively monitor consultant and expert performance and their maintenance of the conflict free advisory role.

## **F. Whistle-blowing**

### **Challenge**

*Governments are challenged to establish a framework for whistle-blowing that can act as a check and balance on improper conduct that is often difficult to track or identify and is purposely concealed from disclosure.*

**Recommendations**

34. A whistle-blower is any person from the public, and potentially the private sector, fairly witnessing a conflict of interest, corruptive manoeuvres or other fraudulent practices that is detrimental to public interest and deciding to report it in accordance with a, recommended, whistle-blowing framework.

35. Governments should establish whistle-blowing policies, rules and procedural frameworks that are easy to initiate by a whistle-blower, protect duly substantiated whistle-blowers, and enable and encourage proactive disclosure of conflicts, corruptive manoeuvres and other fraudulent practices.

36. Governments should incorporate whistle-blower rules and frameworks that verify the identity of the whistle-blower but provide confidentiality of the information involved and protect the identity of the whistle-blower from disclosure.

37. Governments should provide protection against personal and professional retaliation and against criminal and civil liability to a duly substantiated whistle-blower reporting in good faith.

38. Governments should not protect a whistle-blower when a disclosure does not meet the requirement of good faith, and in such case governments should be able to hold the whistle-blower liable to specified penalties.

**Stage 2**

**Stage 2** is the actual tender of the PPP opportunity and awarding the contract to the private partner by the public entity. Anti-corruption measures implemented during Stage 2 are focused on procurement procedure and carrying out the tender. They are designed to ensure a fair and transparent bidding process while promoting a competitive environment so the public entity receives the best offer from all participants. Stage 2 conceptually ends with award of the contract and when the project moves into the contract performance and operational stage. The following are key procedural elements that promote transparency and integrity in Stage 2 of a PPP procurement.

**G. Unsolicited Proposals****Challenge**

*Governments are challenged to bring innovative solutions to the task of providing public services, however they must do so in a cost-effective and responsible manner, therefore governments must be cautious when dealing with unsolicited proposals that may be intended to avoid the open and competitive tendering processes.*

**Recommendations**

39. Governments should be cautious with unsolicited PPP proposals, and if choosing to allow them, put in place stringent controls on their receipt, review and approval.

40. Unsolicited proposal may only be considered for PPP projects which are not part of PPP programs already published at national or local level and for projects which demonstrate unique innovative solutions that are fit for purpose to the government's needs and which could not

*Unsolicited proposals by their very nature circumvent the competitive process, and if not managed properly can divert public time, attention, and resources away from the strategic plans of the government and initiatives that could otherwise be undertaken in a competitive and open and transparent manner.*



be otherwise acquired by normal competitive means.

41. If other solutions exist, governments should organize a competitive procurement that is open to all potential bidders and invite competing proposals.

42. If the unsolicited PPP proposal contains elements of private finance, governments should evaluate whether the financial aspects can be put to open bidding and competition.

43. Governments should protect confidential or proprietary information within an unsolicited proposal, however all other information and data, including the existence of the unsolicited proposal, should be disclosed according to the government's public disclosure framework.

44. Governments should provide public notice, in an open and easily accessible location, that an unsolicited proposal has been received and is under review.

45. Governments should institute a multi-step review and approval process for unsolicited proposals that includes a second public notice being provided prior to award.

46. Governments should allow potentially responsive bidders and other interested stakeholders, upon a showing of substantiated grounds, the right to challenge an unsolicited proposal prior to award and the right to seek termination of unsolicited proposal contract after award.

## H. Tender Notices and Bidding Documents

### Challenge

*Procurement is most effective when there is competitive tension amongst the bidders. Governments are therefore challenged to ensure their PPP procurement process includes fair and transparent communications with all potential bidders such that it invites the greatest amount of participation and competition to PPP procurement.*

### Recommendations

47. Governments should apply the underlying requirements of transparency contained in the 2011 UNCITRAL's Model Law on public procurement implementing the UN Convention against Corruption.

*Tender and bidding documents that are vague, provide too little time to respond, have criteria that favour one bidder, are intentionally inconsistent, or not universally circulated, are all approaches that can be used to skew the competition in a PPP.*

48. Governments should design tender notices to seek responsive candidates and provide the highest possible degree of public information in proportion to the purpose, nature, subject and value of the PPP project.

49. Governments should use tender notices that are simple and accurate, contain all the main information relating to the tender, and allow any

responsive potential bidder to understand the functional specifications that are required by the project, as well as all pertinent information on the process, conditions and criteria for selection.

50. Governments should ensure that all candidates are able to have access at the same time, to the same information, and same documentation necessary for preparing responses and for participating in the tender procedure.

51. Governments should not include requirements of technical, professional or financial capabilities which are disproportionate or excessive in relation to the requirements and feasibility of a project, nor those that would favour any of the candidates.

52. Governments should provide within the tender notices and bidding documents for the disqualification of a bidder when a conflict of interest or other improper behaviour is identified.

53. Governments should indicate in tender notices and bidding documents that the bidders are to refrain from influencing the awarding process and avoid any direct or indirect contact with the contracting or administering authority and its agents unless such contact is expressly authorized and organized by the public authority.

## I. Pre-Qualification Process

### Challenge

*PPP Procurement is designed to attract bidders that on one hand are responsive, responsible and able to tender competitive offers, but on the other not be so burdensome as to negatively impact timeliness or cost effectiveness of the procurement. Governments are therefore challenged to create a fair and just pre-qualification process that permits qualified bidders to compete, yet assists in streamlining and expediting the administration of the procurement.*

### Recommendations

54. The purpose of prequalification is to advertise the project to the largest number of potential bidders, provide the information necessary to allow potential bidders to evaluate the reliability and quality of the preparation of the project, inform potential bidders of the criteria for prequalification and if interested, submit qualifying documentation with the objective of being pre-qualified.

*Prequalification can be a means of facilitating corruption because it can be used to exclude bidders who would otherwise be qualified.*

55. Governments should allow pre-qualification to be open and unlimited, however in some certain circumstances such as two-step procurements, competitive dialogues, and/or those projects with unique characteristics or involving functional specifications that are very complex or costly in nature, governments may limit the number of pre-qualified candidates, taking into account the cost of preparing and bidding, number of available providers in the market, and overall ability to maintain competition.

56. Governments should require bidders to maintain their prequalified status throughout the procurement process and may perform a timely post-qualification check of the successful bidder.

57. Governments should disqualify a bidder who has provided inaccurate or forged information related to the pre-qualification, and depending of the intent and nature the misleading information, be able to seek further penalties or sanctions, including after award annulling the contract.

58. The contracting authority should verify in a timely manner the accuracy of the relevant pre-qualification information provided by the winning bidder.

**J. Dialogue-based PPP Procurement****Challenge**

*Governments are challenged to maximize the opportunity that dialogue-based procurement provides, which is to assist governments to identify project specifications that are fit for purpose and achieve the objectives of the public entity, yet limit the window of opportunity for improper interactions or the provision of unfair competitive advantage to a bidder(s).*

**Recommendations**

59. Governments should use dialogue-based PPP procurement when the contracting authority, after having set up preliminary functional specifications and key performance parameters, is unable or does not have sufficient expertise to establish the design that meets the functional specifications and performance parameters over the lifetime of the project

*Dialogue based procurement that does not have strict controls in place allows for direct interaction and potential collusion or corruption between the public entity(ies) and the private bidders.*

60. Dialogue-based procurement may include two stage tendering including a first phase where the technical specifications and the characteristics of service meeting the functional requirements are discussed with preselected bidders and where only selected bidders having passed the technical evaluation are authorized to submit a financial bid. The successful bidder is the one having the best composite score aggregating the technical and financial evaluation.

61. Due to the elevated risks of corruption and potential abuse with open dialogue, Governments should tightly scope and control interactions between the contracting authority and one or more selected bidders, and focus the dialogue only on the technical (which may include certain financial requirements) of the PPP and where the public authority expects contribution from the bidders.

62. Governments should not permit dialogue to revisit functional specifications, performance parameters, or standards or norms which are clearly specified in the tender documents and/or are of the essence of the project as determined by the procuring authority.

63. Governments should put in place a tender evaluation committee that has the necessary capacity to evaluate technical proposals and make quick and fully documented decisions during any technical dialogue phase.

64. The contracting authority should ensure confidentiality of bidder information in any dialogue where intellectual property and know-how, including proprietary financial and contractual innovation is shared.

**K. Confidentiality and Maintenance of Information****Challenge**

*In a competitive PPP procurement environment, information is essential. Information that the public provides to the private sector that forms the basis of the PPP competition, and information the private sector may share with the public sector that forms the basis of their competitiveness. Governments are therefore challenged to hold public and private information confidential throughout the process because its disclosure could impact the objectives of the PPP and the competitiveness of the procurement, while unfairly affecting the decision making of the public authorities or willingness to participate of the participants.*

### Recommendations

65. Governments should protect and preserve the confidentiality, integrity and safe custody of information and documents that are shared during the bidding process.

*Leaking of bidder information is a common approach to providing a competitive advantage to a preferred bidder. This is particularly true in procurement involving dialogue where clarifications and modifications may be frequent and entities are forming their competitive solutions and value propositions in real time.*

66. Governments should establish and publish a clear chain of responsibility, with parameters and timing for retention and/or disclosure of information, in accordance with the public information disclosure framework.

67. Governments should maximize the use of electronic procurement and document management systems.

## L. Tender Evaluation Committee

### Challenge

*Governments are challenged to create a transparent system of review and evaluation of bidders and their bids that is uniform, based only on the merits of their proposal, and awards a contract to the entity that was judged to have submitted the best offer.*

### Recommendations

68. Governments should appoint members of the Tender Evaluation Committees after giving due consideration to the particulars of the project, the procurement method, the nature and timing of the evaluation, and the skills resources, and necessary capacity for the committee to carry out a fair, independent and professional evaluation.

69. Governments should bind each member and the Tender Evaluation Committee to a code of ethics and require that they have no conflicts of interest.

70. The Tender Evaluation Committee should memorialize in writing all deliberations and decisions.

71. The Tender Evaluation Committee should have a clear threshold for decision making (e.g. simple majority, highest score, etc.), and make all decisions based on objective criteria and only using information derived from the bidding materials and bidder responses provided during the course of the PPP procurement.

*Evaluation criteria can be tailored to favour one bidder, bias the decision making against a bidder, or simply cause a strong bid to be unresponsive. The criteria can also be over burdensome or unreasonable such that certain responsive bids are rejected.*

## M. Integrity and Fairness Mechanisms

### Challenge

*Governments are challenged to recognize that projects involving assets of particularly high value, complexity, or political sensitivity may require additional mechanisms for ensuring protection against corrupt practices.*

## Recommendations

### Integrity Officer

72. If a system for reviewing the integrity of a procurement does not exist, Governments should consider the use of Integrity Officers to ensure and review the integrity of a procurement.

73. Governments should appoint Integrity Officers to participate in and certify that the procurement proceedings comply with the applicable laws and regulations, tender documentation and procedures, and other requirements such as codes of ethics or information disclosure and confidentiality rules.

74. Integrity Officers should have proven professional capacity and skills and remain independent from all public and private parties involved in the PPP.

75. The Integrity Officer certificate should be a comprehensive report that comments on all pertinent activities and communications in light of the procedural requirements, and certifies compliance with the same (rather than for example stating an opinion).

*Probity and fairness inquiries provide a check and balance on procurement practices and authority that is largely consolidated in the public entity. They also act as a deterrent to corrupt behaviour because of the threat of an audit and exposure.*

76. Governments should make the integrity certificate and any associated reports or materials part of the documents reviewed by the body(ies) approving the choice of the successful PPP bidder and/or the body settling claims of misprocurement.

### Fairness Auditor

77. If a system or tribunal for handling claims of misprocurement does not exist, Governments may also appoint Fairness Auditors to audit the process, but unlike Integrity Officers, audit the substance of the proceedings, including deliberations of the evaluation committee and other sessions of the tendering entities, to ensure that a fair evaluation and neutral assessment was conducted.

78. Governments should ensure that Fairness Auditors have similar professional capacity, skills and independence as Integrity Officers.

79. Governments should allow the appointment of a Fairness Auditor at the request of any of the parties claiming misprocurement and/or as preliminary step to a claim of misprocurement.

80. The Fairness Auditor(s) is empowered to audit the full procurement process and should issue a report confirming compliance or non-compliance with applicable procurement procedures and rules and stating any reservations about the process identified in their audit.

81. Governments should make the Fairness Auditor report part of the documents reviewed by the body in charge of approving the choice of the successful bidder and/or the body settling claims of misprocurement.

82. Governments should require that the Integrity officers and Fairness auditors be different, independent individuals.

**Stage 3**

**Stage 3** is the contract performance period of the PPP procurement where the public entity is actively engaged in contract management and working with the private partner to undertake the PPP activity. Anti-corruption measures implemented during this Stage are focused on sound contract management practices and procedures and are designed to support full and compliant performance of the contractual obligations and realization of the project's full potential and value for money. The following are key elements that promote transparency and integrity in Stage 3 of a PPP procurement.

**N. Contract Management****Challenge**

*Governments are challenged to adapt to their new role as contract managers rather than contract implementers, and create contract management systems that will enable them to effectively oversee their private partners' activity, endure and adapt to the substantial length of many PPP projects, and track the range and complexity of performance and payment activities undertaken in PPPs.*

**Recommendations**

83. Governments should employ experienced technical and operational project managers who are knowledgeable in the applicable sector and project performance parameters and empowered to verify and interpret contract performance related issues.

84. Governments should establish multiple layers of review and approval, including non-consolidated approval authority and cross monitoring, for contract management activities such as payment of invoices, acceptance of materials and performance, and interpretation and modification of contractual obligations.

85. Governments should implement, preferably electronic, records management systems to provide comprehensive project tracking and record keeping, facilitate performance monitoring and management, retention of project documentation and materials, control billing and payment practices, and provide a transparent and traceable contract administrative record.

86. Governments should institute real time contract performance monitoring to manage the partner and project and identify necessary project modifications and/or performance adjustments.

87. Governments should institute real time accounting practices that respect and reconcile project expenditures with budgetary limitations and obligations, and allow officials to consider financial modifications and performance adjustments on an as needed basis.

88. Governments should authorize periodic self and external accounting and auditing functions, by officials or entities with clear oversight authority, that encourages, among other things, proactive review and reconciliation of contract documentation, performance compliance verification, and billing and payment practices.

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