



Economic and Social Council

Distr.: General
12 September 2017

Original: English

Economic Commission for Europe

Committee on Innovation, Competitiveness and Public-Private Partnerships

Working Party on Public-Private Partnerships

First session

Geneva, 21-22 November 2017

Item 5 of the provisional agenda

**Review of the PPP work since the eighth
and final session of the Team of Specialists on PPPs
on 20-21 October 2016**

UNECE Standard on a Zero Tolerance Approach to Corruption in PPP Procurement

Implementing the United Nations Agenda for Sustainable Development through effective 'People-First Public Private Partnerships'

Note by the Secretariat

Background

The following document was prepared by a UNECE Project Team led by Marc Frilet (France).

The present document has been finalised by the Project Team following a public consultation as envisaged by the Open and Transparent Standard Development Process and has been endorsed by the Bureau of the Team of Specialists on Public-Private Partnerships with a recommendation to the Working Party to endorse it.

Contents

	<i>Page</i>
I. Introduction	3
A. The potential savings in fighting corruption	3
B. Objectives and drafting considerations for the Standards	5
II. Corruption Risk in PPP Procurement	6
III. Zero Tolerance Approaches to Anti-Corruption in PPP Procurement.....	10
A. Compliance with Laws and a Code of Ethics.....	10
B. Avoidance of Conflicts of Interest	10
C. Disclosure of Information	11
D. PPP Units, Committees, Boards, and Oversight Authorities.....	12
E. Consultants and Experts	13
F. Whistle-blowing	13
IV. Tender specific Approaches	14
A. Unsolicited Proposals.....	14
B. Tender Notices and Bidding Documents.....	15
C. Pre-Qualification Process.....	16
D. Dialogue-based PPP Procurement.....	17
E. Confidentiality and Maintenance of Information	18
F. Tender Evaluation Committee.....	18
G. Integrity and Fairness Mechanisms	19

I. Introduction

1. 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.¹ 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 SDGs.
2. While the potential of public private partnerships (PPPs) to fill the development gap is great, and the SDGs call on governments and officials to rise up to this challenge, corruption continues to pull governments down.
3. In developed and developing 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.
4. And the damage is not only monetary. Corruption slows the provision of public services, impairs economic activity and growth², and undermines the time, energy and resources applied by those attempting to provide actual good governance and public services.
5. 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?

A. The potential savings in fighting corruption

Saving Money

“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.

6. The potential savings in fighting corruption in public procurement can be massive.
 - (a) The 2014 Organisation for Economic Co-operation and Development (OECD) Foreign Bribery Report estimates that bribery consumes 10.9 per cent of the total transaction value in public procurement globally.
 - (b) The World Bank estimates that about USD 1 trillion is paid each year in bribes around the world.³

¹ McKinsey analysis; McKinsey Global Institute Analysis, 2016

² IMF and World Bank studies

³ World Bank Governance Brief Anti-Corruption. May 2016

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

- Transparency International 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 corruption⁴

8. The Construction Sector Transparency Initiative states that “by 2030, unless measures are introduced that effectively improve this situation, close to \$6 trillion could be lost annually through corruption, mismanagement and inefficiency”.⁵ And yet the importance of taking steps toward anti-corruption are perhaps better measured not by the monetary savings, but by the increased impact that programmes and projects could have in a corruption free environment.

Saving Lives

9. 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.⁶

10. 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.

11. Corruption is therefore a threat to not only the finances of a government but to the services and benefit that a public project intends to deliver to its people.

Putting People First

12. UNECE is developing a clear differentiation for initiatives undertaken through PPP, calling on governments to put ‘people first’ in their PPP programmes and projects ‘People-First PPP’ in that programmes and projects:

- (a) Increase access to essential services and lessen social inequality and injustice;
- (b) Enhance resilience and deliver more care with the environment;
- (c) Improve economic effectiveness;
- (d) Promote replicability and the development of further projects
- (e) Fully involve all stakeholders.

13. These “People First PPPs” (PfPPPs) would deliver not only core public services in a more efficient manner, but would bring a more positive transformational effect to the lives of the people they serve. PfPPPs, and indeed the SDGs themselves, therefore require

⁴https://www.transparency.org/whatwedo/publication/global_corruption_report_2005_corruption_in_construction_and_post_conflict

⁵ <https://www.weforum.org/agenda/2016/02/why-is-the-construction-industry-so-corrupt-and-what-can-we-do-about-it>, OECD Web Forum, Petter Matthews, Executive Director, CoST International Secretariat

⁶ World Bank Group President Jim Yong Kim, Anti-Corruption Summit 2016, London, United Kingdom

governments to combat corruption in very real terms if they want to unlock the potential efficiency and improved public service delivery that PPPs offer. This is especially critical for programmes and projects that aim to improve conditions in low and middle income countries and where budgetary and capacity constraints are most acute.

14. The UN recognizes that corruption has a unique potential to undermine the SDGs and consequently is working 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 governments into their systems to combat corruption, and d) enhance a government's overall anti-corruption efforts.

15. Doing so will offer all stakeholders of PPP projects a comprehensive and substantially increased level of protection against corruption, unlock the potential for pipelines of projects in countries, and put people first while saving money and lives.

16. The purpose and implementation of this United Nations Economic Commission for Europe (UNECE) Standard on a Zero Tolerance Approach to Corruption in PPP Procurement ("Standard") is furthermore to help build the strong, corruption free institutions called for by the SDGs:

(a) 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.

(b) 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.

17. The Addis Ababa Action Agenda, 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.⁷

B. Objectives and drafting considerations for the Standards

1. Objectives

18. The overall objectives of the Standard are the following:

(a) Provide a voluntary set of principles and conditions that governments could incorporate in their regulations or policies in undertaking PfPPP procurement in compliance with the SDGs.

(b) Assist governments desiring to improve the implementation of PPPs in ways that mobilise their potential and reduce risk and complexity while improving the regulatory response to corruption in PPPs.

(c) 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.

⁷ Addis Ababa Action Agenda, Financing for Development, Section II. B. 48; UN Sustainable Development Goals, Target 17.17

2. Drafting considerations

19. To achieve the above-referenced objectives, this document has been based on:
 - (a) 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; and.
 - (b) An integrated drafting process aimed at producing a standard of universal nature, which is drafted in plain language, easy to understand, simple to apply, and requires little to no judgement in determining a means for effective implementation.

3. Effective Implementation of the Standard

20. Governments seeking to implement this Standard should adopt the Standard and, to the extent consistent domestic mechanisms do not already exist, incorporate its recommendations into their legal and administrative systems. This may include making these recommendations binding and subject to judicial or administrative review and imposing penalties in the case of infringement.
21. To assist with the implementation of this Standard, UNECE intends to supplement this standard with an implementation tool to assist governments with effective implementation. UNECE may also issue additional materials and related guidance, recommendations and standards to further expand upon the content contained herein. Governments are therefore encouraged to consult and exchange with UNECE as they work to implement and comply with the standard.

II. Corruption Risk in PPP Procurement

Preliminary Observations and Public Contracts

22. PPPs are 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, and a need for transparency and non-discrimination throughout the tender. The United Nations 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.⁸

23. While still a procurement, PPPs have certain distinguishing characteristics from ‘traditional’ public procurement contracts. One main distinction is that a PPP often 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. PPPs trigger a “partnership situation” where the public and private sector partners must truly work together over extended periods of time and fine tune the services, economic

⁸ 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>

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.

24. 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 i) make long term commitments for financing, designing, building and operating infrastructure, ii) comply with rigorous performance parameters and contractual clauses, iii) demonstrate the ability to create a real partnership with the public sector, and iv) strike a fair balance between its own interests and the interest of the people. This is arguably the most important distinguishing characteristic of a PPP procurement, 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 an agreement that exhibits aspects of both partnerships and traditional public procurement contracts.

25. The impact of this type of contracting on public procurement is manifold. For instance, a criterion 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 just one of many criteria; criteria such as the optimum design commensurate with innovation, improvement, and adaptation of the service that is to be delivered, the overall ability to limit maintenance costs, the existence of a robust asset replacement plan, a demonstrated responsible and limited impact on the public budget, etc. In fact, this type of transparent, objective, performance criteria, along with appropriate weighting ratios, is the recommended approach to selecting a private partner in a PPP procurement, rather than the traditional lowest responsible bid approach used in many traditional procurements

26. PPPs therefore present a unique set of challenges for governments, yet despite their differences, they remain a public contract, arising from a public process, and aimed at fulfilling a public need on the best terms of tender. In this sense, a PPP will benefit from a well-designed procurement and a rigorous anti-corruption framework just as any traditional procurement contract would.

The Three stages of a PPP procurement

27. PPP procurement operates much like traditional public procurement in that it unfolds across three conceptual stages:

Stage 1 is the public entity’s effort to identify what public problem is to be resolved; determine what it needs to do address that problem and obtain in relation thereto, including an examination of its available resources versus those that it will need to procure; evaluate and forecast potential financial and physical options for the project; identify potential sources and solutions in the market; measure impacts, benefits, and risks of the PPP option; identify budgetary capacity versus the potential liabilities of solutions in light of the anticipated allocation of risks and rights of a project approach; and finally set out the parameters of its proposed tender. Key goals of these Stage 1 activities is to select a project wisely and 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.⁹ The qualifying step is where qualified bidders are identified and shortlisted to enter the next bidding step. The shortlisted bidders then compete on the contracting opportunity and bid. In the end, the public entity, through an evaluation process, awards the contract to the bidder who has proposed the best solution in terms of approach, cost, and services that are needed, and can achieve the declared benefits for citizens and the SDGs.

Stage 3 is after a winning bidder has been identified, contract finalization occurs, the contract is awarded, and the long-term performance under the contract commences. This Stage 3 is sometimes referred to as the design, construction, and operations and maintenance phase and includes such key activities as contract administration, performance reporting and monitoring, change and dispute resolution, and ongoing relationship management. This is also when governments may review and identify variations in the expected and declared benefits of a project on citizens and the identified SDGs through an ex-post evaluation (and update any standardized tools, approaches, or risk allocation expectations used in the process.)

Risk across all three stages

28. Corruption in PPP procurement is often seen as gaining an unfair advantage in the ‘competition’ (Stage 2 of the process), that is, influencing the competition such that one bidder wins or gains an unfair advantage amongst competing bidders.

29. While this certainly occurs, a holistic view of corruption in PPP procurement however needs to focus on all three of the 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 weak or unregulated – that is, wherever it is the easy to get away with, and in some cases where insufficient attention or scrutiny is being applied.

30. For example, corruption can just as easily occur through extortion, bribes and other collusion with public officials to ‘win’ contracts at the outset of procurement, as it can in the long-term performance of the contract where a private partner seeks to renegotiate the contract or adjust performance requirements, distort regulatory procedures and reporting, or inflate invoices long after the contract is underway¹⁰.

31. While risk occurs across all three stages, many governments still lack basic institutional elements, experience, and good practices in conducting a robust tender, especially when the intensity and complexity of a PPP presents itself. These results in a high risk of corruption during the procurement, often times an ineffective tender, and increases the likelihood of long term project failure.

32. Government systems therefore need improvement across all three stages, but Stage 2 remains critical to successful PPP initiatives. And in order to provide value for people through PPPs as called for by the UN SDGs, 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 PPP procurement in order to prevent the pitfalls from the past and rise up to the ambitions of the UN SDGs.

¹⁰ See, *Curbing Corruption in Public Procurement: A Practical Guide*, Transparency International, 24 July 2014

Corruption potential in PPP procurement

33. 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 well-formed PPPs undergo an intense review process and receive a significant amount of attention and scrutiny before they are put out to tender and/or awarded -- more 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 risk allocation and incentives to ensure a project is, for example, constructed to high standards and has long term durability. This level of scrutiny, while highlighting the great number of risk areas, can also reduce the risk of corruption in certain respects, such as the award of unnecessary or inflated sub-contracts, contractors cutting corners, and/or bribery influencing the outcomes and performance requirements.

34. Despite these potential upsides, PPPs can also be more at risk for corruption¹¹, with some of the more prominent risk scenarios arising when:

- (a) A government lacks strong and independent institutions and fail to properly oversee the PPP initiative;
- (b) A PPP concept is market tested and during the tender process the public entity interacts with, and in particular allows itself to be improperly influenced by, the market or potential bidders;
- (c) A competitive dialogue or negotiated agreement during tender is poorly organized, there are significant opportunities for improper conversations or arrangements;
- (d) Governments do not take appropriate steps to prevent conflicts of interest in very technical or complex projects or those involving niche markets, and especially where employees tend to move between a limited number of public and private players within the sector;
- (e) PPP projects involve significant amounts of money or public contracts that do not arise very often, and the desire to win, or use all means necessary to win the tender, is intense;
- (f) A government is technically ill equipped for the PPP tender, and while necessary to employ sophisticated, front-end transactional, financial, technical, or legal experts to assist, allows those advisors to control the process or influence the outcomes;
- (g) Project preparation and the pre-tender design of performance measurement is weak, such as the failure to generate of reliable base year data, such that actual outcomes and performance can be made to appear successful, yet the project ultimately fails in its purpose;
- (h) A government lacks sector expertise and fails to guard against the inclusion of unnecessary commercial aspects, inflated pricing, and/or hidden profit mechanisms;

¹¹ 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.)

- (i) A government lacks an open and a transparent project formation process such that certain bidders are permitted, inadvertently or purposefully, to gain competitive advantages within the tender.

III. Zero Tolerance Approaches to Anti-Corruption in PPP Procurement

A. Compliance with Laws and a Code of Ethics

Challenge

35. 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

- (i) 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.
- (ii) Governments should have in place PPP and anti-corruption laws, regulations and codes, including a code of ethics, that either incorporate or are based upon international models and anti-corruption instruments.
- (iii) Senior officials and all public and private sector participants to a PPP procurement process should endorse and/or commit to comply with all domestic and applicable international laws, regulations and codes relating to anti-Corruption, including a code of ethics that sets up the standards of behaviour for public and private participants involved in the procurement process.,
- (iv) The Tender documents shall refer to such applicable laws, regulations and codes and require a written commitment by the public authority and by the bidders to comply with them.
- (v) Violations of the law, regulations or codes relating to anti-corruption should be enforced and contain provisions for punishment or sanctions for violations, including such remedies as fines, civil or criminal penalties, and removal or disbarment of the offending person or entity.
- (vi) Governments should have an independent anti-corruption entity providing oversight, guidance, administration and enforcement of anti-corruption systems.
- (vii) 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 and are maintained throughout the life of the contract.

B. Avoidance of Conflicts of Interest

Challenge

36. 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

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.

- (i) 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.
- (ii) Governments should define corruption broadly.
- (iii) 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.
- (iv) Governments should take preventative steps or institute corrective measures even when there is merely an appearance of a conflict of interest.
- (v) Early identification, rapid disclosure, and appropriate mitigation are key to an effective system for handling conflicts of interest.
- (vi) 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

37. 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

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.

- (i) Public disclosure is 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 laws, regulations, and systems and other project specific disclosure practices.
- (ii) Governments should create training and awareness programs that ensure the public disclosure requirements are met and utilized.

- (iii) 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 and provides, preferably by electronic internet based means, unrestricted, uniform and full direct access free of charge to relevant PPP documentation, feasibility studies, project abstracts and reports, proposed contract provisions in a readily accessible format, and that is updated on a regular basis.
- (iv) While attention should be paid to robust disclosure rules and framework, 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.
- (v) The rules and framework should include procedures that, for example, address timing and specify how to handle violations of the framework through failure to disclose or other wrongful withholding of materials that were subject to disclosure
- (vi) The disclosure rules and framework should be well publicized and set out clearly for public and private participants and stakeholders the motivations and justification for PPP delivery and the PPP process that will be followed.
- (vii) The disclosure rules and framework should account for the fact many PPP projects are complex and the bidding process can be much longer than traditional procurement, therefore, project information and requirements should be announced to the public as early as possible in the tender process to ensure a robust competition.
- (viii) The disclosure rules and framework should survive tender and award and require regular disclosure of project progress and any changes in the core conditions of the project (such that they should be subjected to a new fair competition).

D. PPP Units, Committees, Boards, and Oversight Authorities

Challenge

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

Recommendations

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.

- (i) Governments should isolate certain preparation, evaluation, awarding and decision making activities, including auditing functions, in a PPP procurement and have select activities administered discretely by entities such as PPP Units, Committees Boards, and Oversight Authorities that are independent from one another, provide an oversight and/or independent approval function, and are designed to provide checks and balances on the PPP decision making and process.
- (ii) Governments should establish PPP Units, Committees, Boards, and Oversight Authorities 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.
- (iii) Governments should publish and reference in the bidding documents the applicable PPP Units, Committees, Boards, and Oversight Authorities that will be implicated in the PPP and outline their respective functions, roles and responsibilities, and decision making authority with regards to the PPP.

E. Consultants and Experts

Challenge

39. 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 employing consultants and experts and the scope of their expected deliverables.

Recommendations

- (i) Governments should implement guidelines that control when, if, and under what terms and conditions consultants and experts may be employed for a PPP project, including the use of open, clear, and consistent invitations, terms of reference, and evaluation systems to retain such consultants and experts
- (ii) Consultants and Experts should have a high level of integrity, independence, and be 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 contract award and oversight of service delivery.
- (iii) Governments should employ consultants and experts who are independent, unbiased, have no conflicts of interest, and have the capacity to work within a team of public officials and deal with the specific, yet diverse competencies needed within a PPP.
- (iv) 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, including the implementation of cost controls with the ability to increase, decrease or eliminate specified services they perform.
- (v) Governments should examine the past performance of consultants and experts and consider any positive or negative outcomes, including consultant and project performance during project implementation, operations and maintenance periods.

F. Whistle-blowing

Challenge

40. 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

- (i) 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.
- (ii) 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.
- (iii) 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.
- (iv) 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.
- (v) 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.

IV. Tender specific Approaches

A. Unsolicited Proposals

Challenge

41. 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

Unsolicited proposals by their very nature do not originate from the public planning process. If not managed properly, they can divert public time, attention, and resources away from the government's strategic plans and priority projects that could have otherwise been undertaken.

- (i) 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.
- (ii) Governments should plan their infrastructure needs and services and give priority to publicly originated and procured projects. Unsolicited proposals should be considered as an exception and only when technical or financial capacity is needed and/or innovation in the delivery of public services is desired.
- (iii) The majority of unsolicited proposals can be competitively procured in whole or in part, Governments should therefore strive to organize a competitive procurement that is open to all potential bidders, invites competing proposals, and in particular provides sufficient time for other potential bidders to develop their proposal.

- (iv) In the exceptional circumstance that an unsolicited proposal is not able to attract market interest and competition and is directly negotiated with the proponent, governments should implement rigorous negotiation procedures that include a value for money determination, a project that meets or exceeds public benchmarks, and costs that are market rate and within prudent fiscal constraints. Governments should also consider whether competition can be brought into individual components of the project, such as construction or financing.
- (v) Respect for proprietary information and intellectual property encourages private entities to submit innovative unsolicited proposals, however, governments should not allow unsolicited proposal proponents to claim confidentiality on the basis of proprietary information or intellectual property without sufficient evidence to support such assertion.
- (vi) Governments should implement a high degree of disclosure in order to prevent actual or perceived corruption. Disclosure should include all relevant project information and data, including the existence of the unsolicited proposal.
- (vii) Governments should provide public notice, in an open and easily accessible location, that an unsolicited proposal has been received and is under review.
- (viii) Governments should align PPP and unsolicited proposal policies and processes in order to increase stakeholder support, enhance market interest, and ensure consistency in public decision-making. This should include a multi-step review and approval process at key moments of the unsolicited proposal process.

B. Tender Notices and Bidding Documents

Challenge

42. 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 an appropriate amount of participation and competition to the PPP procurement.

Recommendations

Tender and bidding documents that are vague, provided 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.

- (i) 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.
- (ii) During the preparatory stage, Governments should use informational sessions and other pre-bid announcements to provide potential bidders with general information on the bidding opportunity.
- (iii) Governments should design tender notices and bidding documents 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.
- (iv) Governments should use tender notices and bidding documents 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.

- (v) Governments should ensure that all candidates are able to have access at the same time to the same information and documentation necessary for preparing responses and to participate in the tender procedure.
- (vi) 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 criteria that are designed to favour any of the candidates.
- (vii) 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.
- (viii) Governments should prohibit bidders from influencing the awarding process and instruct them in notice and bidding documents to avoid any direct or indirect contact with the tendering and/or contracting authority and its agents unless such contact is expressively authorized and controlled.

C. Pre-Qualification Process

Challenge

43. PPP Procurement is designed to attract bidders that are responsive, responsible and able to tender competitive offers, yet 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

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

- (i) 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, identify the criteria for prequalification and if interested, allow potential bidders to submit qualifying documentation with the objective of being pre-qualified prior to bidding.
- (ii) Governments should allow pre-qualification to be open and unlimited, however in some 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 need to maintain competition.
- (iii) 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.

- (iv) 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.
- (v) Governments should verify in a timely manner the accuracy of the relevant pre-qualification information provided by the winning bidder.

D. Dialogue-based PPP Procurement

Challenge

44. 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

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.

- (i) Governments should use dialogue-based PPP procurement when, after having set up preliminary functional specifications and key performance parameters, the government is unable to establish or unify from a number of possible solutions, the technical solution it desires to compete.
- (ii) Dialogue-based procurement may be conducted in two stages, with the government first discussing with prequalified bidders the technical specifications, functional requirements, and characteristics of the service needed, and then the prequalified 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.
- (iii) Due to the elevated risks of corruption and potential abuse with open dialogue, Governments should tightly scope and control interactions between the government 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 government expects contribution from the bidders.
- (iv) 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.
- (v) Governments should establish a tender evaluation committee that has the necessary capacity to evaluate technical proposals and make quick, fully documented decisions during any technical dialogue phase.
- (vi) Governments should ensure confidentiality of bidder information in any dialogue where intellectual property and know-how, including proprietary financial and contractual innovation is shared.

E. Confidentiality and Maintenance of Information

Challenge

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

Recommendations

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.

- (i) Governments should protect and preserve the confidentiality, integrity and safe custody of information and documents that are shared during the bidding process.
- (ii) 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.
- (iii) Governments should maximize the use of electronic procurement and document management systems.

F. Tender Evaluation Committee

Challenge

46. 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

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.

- (i) 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.
- (ii) Governments should bind each member and the Tender Evaluation Committee to a code of ethics and require that they have no conflicts of interest.

- (iii) The Tender Evaluation Committee should memorialize in writing all deliberations and decisions.
- (iv) 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.

G. Integrity and Fairness Mechanisms

Challenge

47. 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

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.

- (i) If a government does not have a system, tribunal or authority that reviews and/or audits the integrity or fairness of procurement, Governments should consider the use of integrity and fairness audits, including dedicated Integrity and/or Fairness Officers, to ensure and review the integrity and fairness of procurement.
- (ii) Integrity audits should 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.
- (iii) Fairness audits should 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.
- (iv) Integrity and fairness audits should be conducted by individuals with proven professional capacity and skills and individuals and entities who remain independent from all parties involved in the PPP.
- (v) Integrity audits should certify, rather than stating an opinion, and provide a comprehensive report to the body(ies) approving the selection of the successful PPP bidder that comments on all pertinent activities and communications in light of the procedural requirements.
- (vi) Fairness audits should 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.

- (vii) Governments should make the Fairness Auditor report part of the documents reviewed by the body in charge of approving the selection of the successful bidder and/or the body settling claims of misprocurement.
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