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Chapter 4. Tendering procedures and requirements

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1. Introduction

Tendering requirements. The Model Law sets out a clear legal framework for the procurement of PPP projects, based on tender structures and stages which will be familiar to readers experienced in procuring major projects. It allows for one- and two-stage tenders, preselection of bidders, competitive dialogue and direct negotiation. Open, public tendering is the general principle and should be applied in most cases, as the Model Law indicates (Chapter IV (introductory text) and Article 15.1). Direct negotiation with one bidder and closed tenders can take place in certain limited, closely defined circumstances. Tenders can use electronic trading systems where available (many countries, including members of the European Union, now make them compulsory). Host countries should think carefully about any specific conditions that they wish to apply to each option and reflect in subordinate legislation.

The widely accepted rationale for insisting on open, competitive tendering is that it promotes transparency, fairness, integrity and efficiency – and therefore optimal results and best value for money/people. (This is in keeping with the introductory words to Chapter IV, which explicitly requires PPP procurement to comply with the fundamental principles of open access, equal treatment, fairness, transparency and free competition. It specifically includes “value for people and the planet”, which means compliance with the SDGs). Public tendering gives all potentially interested (and plausible) bidders an opportunity to participate if they wish. This helps to generate a thriving market for PPPs. It also leads to more competitive pricing and strengthens the bargaining position of the contracting authority. Depending on the tender structure adopted, it can leave relatively little or even no scope for negotiation with bidders. The whole process is transparent to all participants, which minimises any room for abuse or corruption.

The broad bid evaluation criteria typically involved (for example, “the most economically advantageous offer”) mean that bidders are pressured to enhance the appeal of all aspects of their bids, while allowing the authority to select a winner that genuinely offers the most appealing proposal considered in the round. Studies also show that projects which have been competitively tendered are less at risk of being subsequently renegotiated or cancelled than ones that have not. The timescales involved may be longer, but the feasibility analyses, due diligence and thorough project definition tend to lead to more robust long-term solutions.

Scope of supporting documents. The supporting documents can develop all aspects of the PPP

procurement procedures in as much detail as the host country considers appropriate. This chapter outlines how the supporting documents might be approached in this context and the grounds they might need to cover. It highlights a number of ways that the SDGs and SDG Guiding Principles can be factored into them. Where the PPP law is integrated with a country’s existing procurement regime, under its general procurement legislation, other laws or regulations may already set out these details, making further elaboration unnecessary. Where it disapplies that regime, however, and defines a self-standing procurement system for PPPs, as the Model Law does, it may be necessary to provide for them extensively in subordinate legislation and guidelines. Care should be taken to ensure that important areas of detail do not “fall through the gaps”, with parties assuming that well-defined details in the procurement laws apply, when in fact they do not.

2. Strategy and structure: initial decisions

The contracting authority should reflect carefully about the most appropriate procurement strategy to select the private partner, to obtain the best value for money/people, and make an early decision about the route it plans to follow. The tender documents which follow will differ, depending on which process is chosen. Practical questions include:

- Which of the available structures can and should be used?
- Which structure will best give effect to the SDGs and SDG Guiding Principles?
- The timing and duration of each stage?
- Suitable bidder profile (experience and capabilities)?
- Prequalification and evaluation criteria?
- Anticipated interaction/dialogue with bidders?

A two-stage open tender is arguably the norm for PPP projects, at least in emerging markets. A pass/fail prequalification mechanism allows the contracting authority to preselect only those bidders which meet the preselection criteria. The applicants first submit their qualifications. The contracting authority shortlists those that meet the criteria set out in the request for qualifications and then invites them (either all or a limited number) to prepare and submit their proposals.

The timing and duration of each stage of the tender process will need precise definition. Obviously, larger and more complex projects will call for longer periods

of time to prepare both tender documents and bids. If a competitive dialogue is used, sufficient time will be needed to make possible the extensive discussions and iterations with bidders that are typically required to make the process effective. In that case, fewer bidders will be allowed to participate, so the process remains manageable. The contracting authority should maintain and update a **project schedule** as it defines the various stages, bearing in mind that this will eventually be released to bidders with the tender documents. At this stage, however, it will also be useful to the contracting authority as a management tool, to control and allocate resources and plan ahead.

Tender committee and advisers

The Model Law requires (Article 18) the contracting authority to form a tender committee. This is to give it its formal title, but, at least in the case of smaller projects, it may simply be described as a tender assessment or evaluation team. Its principal functions remain much the same, however. Some degree of formal recognition also helps to underscore its importance, impartiality and integrity. Its purpose is to help ensure the efficient and transparent application of the tender process in accordance with its stated requirements and to advise on or make certain key decisions during that process. The regulations should provide in some detail for its structure, composition and functioning, although with a degree of flexibility about all these matters, to allow the most suitable mechanism to be devised for each project.

One important conceptual question the host government will need to address as the regulations are prepared is the extent to which the tender committee should be independent of the contracting authority. On the one hand, the contracting authority must (in the normal course) take full “ownership” of the PPP project it is awarding, for which it has ultimate responsibility, and therefore stand behind the key decisions made in the process. On the other, an element of independence helps safeguard the transparency and integrity of the system and bidders’ trust in it. The need for independent expertise can be allowed to vary in accordance with the evaluation criteria being applied to a project and the scope this gives to subjective judgements. Most countries prefer to provide for at least an element of independence.

The professional skills represented by the members of the tender committee should include expertise in the relevant technical, legal and financial areas, at a level appropriate to the task of reviewing and evaluating the bids concerned. An understanding of the SDGs and SDG Guiding Principles should also be a requirement. Different government authorities or regulators may

need to be represented, depending on the nature of the project. Expertise in public procurement will be important. Professional advisers can be brought in if necessary from the contracting authority’s team, to reinforce the capabilities of the committee.

The contracting authority may have already hired professional advisers in connection with the preparation of the PPP project. These may include financial/commercial, legal and accounting advisers and technical consultants. The need for them will depend on the nature and scope of the project as well as the experience and capabilities of the internal project team. If they have not already been hired, the need for them (in whole or part) is likely to be reinforced at this stage of the process (that is, the tendering stage). The contracting authority may face additional challenges as it finalises the terms of the project and interfaces with private-sector bidders. The advisory team may have to assist with a range of important tasks, such as confirming the feasibility and risk analysis, preparing the tender documents and PPP contract, supporting the tender committee, conducting market assessments, managing tender activities (for instance, data room, pre-bid conference, site visits), responding to questions and comments, negotiating and amending the tender documents, and producing the final award.

The contracting authority and its advisers should then start to implement a **stakeholder consultation plan**. Adequate stakeholder consultation is one of the main requirements of the SDG Guiding Principles. The supporting documents can create a helpful framework for it. It should extend to all stakeholders identified during the project preparation phase. They may include other relevant authorities with powers over aspects of the project, other political bodies, perhaps a regulator, potential private-sector participants (sponsors/contractors/lenders), relevant property owners and community stakeholders, and, of course, the general public. Good communication is widely regarded as vital to a project’s success these days. The Model Law highlights it. The SDG Guiding Principles require it. Projects can be killed off by public or political opposition. It is a matter of elementary fairness and transparency that the views of those who stand to be affected by the project should be consulted and taken properly into account.

Therefore, the ways that the contracting authority interfaces with each stakeholder group and processes the feedback received need thought and planning. A community advisory group, for example, comprising members of the population segments most directly affected by the project, may be appropriate, especially from the perspective of the SDG Guiding Principles. Taking appropriate account of feedback will play

a vital part in defining sustainable features of the project.

The tender committee and the advisers should then complete any **final preparatory reviews** – and any steps that must be taken – before the project can be formally tendered. The implementing regulations can set out a checklist for them, although the list will always vary with the nature of the project and the contents of the feasibility study. A comprehensive, project-specific **action plan** should be drawn up each time. Examples might include:

- Specify any legislative or regulatory changes necessary to implement the project
- Identify land, buildings and property interests that need to be acquired or provided for
- Confirm the formal identity of the public entity/entities that will sign the PPP agreement
- Plan any staffing and labour-related provisions and changes to be made (for example, numbers, duties and liabilities)
- Determine the exact legal ownership of the assets which the project will comprise
- Ensure that the SDGs and the SDG Guiding Principles have been given due consideration and factored into the process

A “greenfield” project is likely to call for fewer and simpler steps under this heading than a “brownfield” one, where the private partner is to take over existing public assets, operations and staff.

3. Preparing the tender documents

Great care always needs to be taken in drawing up the tender documents. Rushing them out to tenderers in the hope of getting quick results will be counter-productive if they contain errors and omissions or lack sufficient clarity. They need to be fully consistent with the detail of the project as defined, prepared and formally approved. This includes its risk allocation and evaluation criteria. The supporting documents should therefore provide for their thorough preparation, with all the guidance required, but with sufficient flexibility to allow for the variations that will inevitably arise between one project and another and between projects of very different sizes and sectors.

Key elements and requirements of the tender documents are set out in the main text of the Model Law (Article 17). The tender documentation package will usually include the following principal elements:

1. Project and tender procedure summary
2. PPP contract
3. Request for qualifications (RFQ), where a two-stage tender is used
4. Request for proposals (RFP), issued after the RFQ stage in a two-stage tender
5. Conclusions/key documents from feasibility study

Each of these is outlined below.

3.1 The project and tender summary

This should contain a relatively brief description of the project and its key features to enable potential bidders to judge their possible interest in participating. These are likely to include the sector, background and objectives, core infrastructure, relevant public service, PPP modality (for instance, concession, build-operate-transfer or government-pay structure), estimated capital cost, outline risk allocation and KPIs, timeframes, indicative schedule, elements of public sector support and any other essential features. SDG-related requirements might also be highlighted here. It should be possible to extract many of these details from the project’s implementing resolution, which will already have been published (see Article 13.3 of the Model Law). Certain documents may also be annexed to the tender document package, such as the PPP contract, the feasibility study and standard formal templates.

The summary should also describe the procurement process being applied, including procurement method and evaluation criteria, timetable and milestones, other relevant details (such as language and cost) and legal parameters (for example, disclaimers, period of validity of bids or grounds for disqualification) and the scope for bidders to submit questions and comments on the tender documents.

3.2 The PPP contract

The PPP contract will be the project’s “cornerstone” document. PPPs are fundamentally contract-based structures, as their definition in the Model Law makes clear. It will set out the respective rights and responsibilities of the parties, the assumed risk allocation, the main commercial and financial terms, the principal technical parameters and performance requirements, SDG-related requirements, the payments provisions, key deadlines and the mechanisms for responding to unanticipated events and resolving disputes. It will be based on the feasibility study. Experienced outside legal advisers, working in collaboration with the technical and financial consultants, normally draft the PPP contract.

It should take account as appropriate of helpful existing precedents and any model clauses in the host country and (ideally) provisions which reflect international best practice, especially as most larger PPPs these days have a cross-border dimension of one kind or another. If the project is privately financed, it will also need to be “bankable”, and therefore acceptable to lenders as a basis for their (typically non-recourse) loans. Article 24 of the Model Law contains a summary of the main terms often found in a PPP contract. The Commentary on the Model PPP Law provides further explanation. Perhaps the key recommendation in this context is that the better structured and drafted the PPP contract is, the more beneficial it will be to the wider tendering process.¹

The draftsmen of the PPP contract should make allowance for the wider contractual matrix which will be put in place to give effect to the whole project structure. PPPs comprise a kaleidoscope of interlocking agreements and documents, all of which need to be consistent with the PPP contract. These may include contracts with main contractors, designers/engineers, suppliers, off-takers (where relevant), landowners, other third-party contractors (for example, an operator), investors and shareholders, insurers and, of course, lenders. They will typically be divided into “project contracts”, on the one hand, and “financing and security documents”, on the other. All of them will have to be mutually consistent and symbiotic, down to the terminology used. The final corpus of documents will have to constitute a seamless whole. Drafting and negotiating them will be the task of the private partner and its lenders, not the contracting authority’s advisers, and will largely happen after the PPP is awarded to the successful bidder. The drafting team behind the tender documents should be aware of their likely contents and requirements, however, and take account of them as appropriate. A major impediment in the PPP contract could threaten the project’s ability to close. The tender committee should closely review the PPP contract to ensure that all the above requirements have been adequately met.

4. Request for qualifications

It is often in the best interests of both the PPP project and the tendering procedure to limit formal proposals for its implementation to a relatively small group of private bidders with the skills, credentials, experience and resources to carry it out. PPPs are complex, sophisticated structures which can usually only be undertaken by experienced, well-resourced companies.

The bidding process also tends to be lengthy and demanding. Throwing the door open to any interested party can therefore be pointless and time-consuming.

A contracting authority that takes a more restrictive approach will need to issue a request for qualifications and manage the preliminary qualification process before it gets to the proposal stage. Only the qualified, shortlisted bidders will then be invited to submit proposals. They, in turn, are likely to put more resources and effort into their bids than they otherwise might if the field is left wide open to competitors and any interested party can submit a proposal. A two-stage process may also allow bidders to highlight any unacceptable or unworkable aspects of the project, which can lead to a healthy dialogue with the contracting authority and/or tender committee at an early stage, and constructive, corrective action (see further below). The supporting documents should set out the key elements of this process.

The format of the RFQ can be either a pass/fail test or based on more complex criteria which produce a smaller shortlist of leading bidders. It will not yet contain a comprehensive project specification, but should describe the PPP in sufficient detail for bidders to make an informed decision about their participation, identify their most relevant qualifications and make preliminary judgements about the key risks and performance standards and their ability to handle them. The information sought from bidders should not place too heavy an administrative burden on them, but at the same time provide the tender committee with sufficient detail to apply its evaluation criteria accurately.

The RFQ should then set out instructions to interested parties for submitting their qualifications. These are likely to include:

- Process (time, date and place for submitting qualifications) and formalities (documentary/electronic)
- Questions and clarifications (meetings/conference/documentary)
- Selection criteria or minimum conditions to be met by bidders, including detailed instructions as to how credentials and qualifications are to be identified, presented and verified.

Careful thought and precision are needed in defining the selection criteria that will apply to the process, as determined by the tender committee. Prequalification

¹ See also the EBRD PPP Regulatory Guidelines Collection Chapter 3 of Volume III on Structuring, Negotiating PPP Contracts for a detailed discussion of their provisions and issues. See also the model heads of terms and commentary for a seaport concession contract and a healthcare sector PPP in Chapters 14 and 15.

is a sensitive phase, where particular attention should be given to avoiding excessive and/or overly precise requirements (which may exclude potentially qualified bidders) and, conversely, unduly vague requirements (which may include inadequately qualified ones). The principle of proportionality should apply, especially when the tender is carried out through an auction or is essentially price-based.

The prequalification criteria should accurately define the minimum capabilities needed to be confident of delivering the PPP project in all its aspects, while attracting innovative and competitive bids. A balance should always be struck between the high standards sought and the intensity of the competition. Allowance should also be made for the idiosyncrasies of individual projects. Each project is likely to have at least some unique features; the criteria should always be customised to fit them properly. They should also be defined with sufficient precision and rigour to filter through only those bidders that are genuinely likely to be able to add value to the project, in all its aspects.

As we have seen, a pass/fail evaluation basis can be used, or a ranking system whereby only a given number of highest-scoring bidders are shortlisted. This should, of course, be made clear in the tender documents. The criteria are likely to fall into three broad categories:

a. **Technical capabilities.** Evidence/proof of the bidder's experience and ability to meet and perform all the project's technical needs and requirements, such as:

- **Design and/or construction:** Experience designing and/or constructing projects of a similar size, complexity and difficulty as the present one, taking account in particular of its SDG-related objectives.
- **Operation and maintenance:** Experience operating and/or maintaining projects of a similar size, complexity, duration and user numbers as the present one, with particular emphasis on long-term sustainability (a key SDG requirement).
- **PPP implementation:** Experience in successfully implementing similar PPP projects to the present one, including reaching commercial and financial close, managing the associated investment and financing arrangements, and seeing the projects through the construction phase to operation and revenue generation. This will also highlight the project's "replicability", which is a specific SDG Guiding Principles test.

b. **Financial standing and capabilities.** Evidence/proof of the bidder's financial health and credibility and commercial viability. This ranges from financial

good standing to adequate funding resources to cover equity investments and the ability to raise long-term (limited recourse) bank debt. Applicable tests may include audited financial statements (balance sheets/profit and loss accounts) covering a number of years and financial ratios such as leverage and debt-to-equity ratios. The criteria should be as objective as possible, which means the instructions to bidders about how to present the data must be clear and precise.

c. **Legal and administrative requirements.** This covers any requirements under the host country's applicable laws or regulations which bidders must satisfy to submit proposals, together with relevant commercial agreements. They can include:

- Evidence of legal **existence, capacity and good standing**
- Evidence of the **power and authority** of named individuals to act on behalf of their companies (for instance, power of attorney)
- Copies of any requisite **registration documents or licence** to operate (especially if a foreign company is involved)
- Evidence of **tax returns** and up-to-date **corporate filings**
- A **consortium agreement** where a bidder consists of a group of companies (as it often will)
- Conversely, any **ineligibility or disqualification criteria** should also be identified (for example, conflicts of interest/vested interests or previous breaches of procurement laws involving criminal offences).

Consortia. With each of these criteria, allowance will have to be made for their application in appropriate ways to consortia rather than simply individual companies. No individual company may be able to satisfy them all, but a consortium can – hence the frequency with which consortia put forward PPP bids. This calls for an evaluation of individual consortium members for the qualities and strengths they represent, together with those of the consortium in terms of their combined qualifications, respective roles, the relationships between them and their ability to meet the project's needs over the long term. Their management arrangements for the project company and commercial incentives to collaborate over time will need careful scrutiny, especially if they have not functioned as a consortium in the past. A consortium and/or shareholders' agreement among them would need to be reviewed, as well as the heads of terms for the future project contracts that they (some of them) will enter into with the project company. The tender documents should also be very clear about

any restrictions on members of one consortium participating in another in the same process.²

Application. A clear and rigorous methodology should be used to evaluate submissions from bidders against the qualification criteria (including their SDG-related criteria). This can be documented in a (project specific) evaluation guide or manual. The evaluation team, drawn from the tender committee's members and advisers, should be identified, with clearly defined responsibilities matching their professional skills, and properly prepared for the process. The formal issue of the RFQ would, in effect, be the beginning of the public tender process.

5. Requests for proposals

The request for proposals must include all information needed by bidders (either those prequalified where (typically) a two-stage open tender is used, or any interested and eligible bidders in an (unusual) single-stage process) to submit complete, detailed, compliant bids for the PPP project being tendered. This should include:

- All the information described in the project and tender summary referred to above, but in sufficiently final form to remove any uncertainties or lack of clarity about the project's main features and components. SDG-related components should be spelled out. Construction and service requirements should be complete and specific. The output specification, performance indicators/KPIs and payment mechanisms should be precise. The risk allocation should be comprehensive and clear. The PPP contract should be fully drafted and complete, leaving little or no scope for further negotiation once the preferred bidder has been selected.
- Any other relevant background information about the project about which bidders should be aware
- A process description for the following stages of the tender. This should include a timetable, applicable rules, instructions to bidders and relevant administrative details (for instance, the documents and information to be submitted, their format, time, date and location/form of submission, period of validity of bids, procedures for communications and questions, access to the data room).

- The evaluation criteria, any relevant weightings/thresholds and the (disclosable) methodology for their application, ideally emphasising their SDG-related elements

- Any bid security required

Evaluation criteria. The tender committee will need to develop a cogent set of evaluation criteria by which proposals will be judged. They should be clear and precise enough for both parties to be able to work with them confidently. At the same time, they should not be so detailed or extensive that they over-complicate the process. PPP projects are, by definition, based on output specifications, not inputs. The emphasis should be on “deals not rules”,³ on outcomes and performance results, more than how they are achieved.

When a single-stage process is used, the criteria described in the RFQ stage above would, in effect, need to be combined with the RFP ones. More generally, however, when a two-stage tender takes place, the latter are condensed into a smaller set of critical quality-based and cost-based factors that will determine the selection of the most favourable bid. These will need to be suitably project-specific, and so will differ from one type of project to another. They are generally divided into two broad categories, labelled “technical” and “financial”.

Technical criteria. These will focus on the key quality elements of each bid that are likely to lead to optimal results for the project, including at the level of design and construction (for instance, reliability/innovation/timing and sequencing/quality assurance factors), operation (for instance, operating regime/resourcing/management systems/quality of KPI assurance undertakings) and maintenance (for instance, quality and robustness of maintenance plans/major maintenance programmes/hand-back and transfer arrangements). In practice, the term “technical criteria” tends to refer to all project elements being evaluated, other than the financial and price elements. Most of the elements reflecting the SDGs and the SDG Guiding Principles are likely to be included here. In particular, it may be helpful for the project team to draw on elements and aspects of the evaluation methodology for PPPs for the SDGs published by the UNECE Working Party on PPPs; this is designed to provide governments and sponsors with a range of tests, outcomes and indicators that will help them to ensure that PPP projects are SDG compliant.⁴

² For example, the EBRD's consulting procedures usually allow subcontractors to appear in more than one consortium, but not main contractors.

³ Cf the Treasury Taskforce in the context of the Private Finance Initiative in the United Kingdom.

⁴ See the discussion of this subject in Chapter 7, Criteria and Requirements.

Financial criteria. These will test the assurances given to the contracting authority that the bidder will be able to invest and/or arrange the financing (if any) that it is being asked to provide. Considerations will include the quality and robustness of the overall financial plan, the identity and standing of the proposed equity investors, the identity and reputation of the commercial and/or multilateral lenders, confidence in the availability of the funding sought, the nature of any partial guarantees or contributions sought from the public sector, and so on. Bidders should be instructed, however, not to disclose the overall price being offered in these more specific components of their financial proposals.

Evaluation methodology. The proposal evaluations need to be based on a clear and well-conceived methodology. This needs to be as robust, transparent and objective as possible, if it is to do its job effectively of selecting the most favourable bid(s). The tender committee should define it well in advance of submission of the proposals. At least certain aspects of it will have to be disclosed to bidders in the tender documents (although not necessarily all the details, to avoid enabling bidders to “game the system” too much). The methodology determines how the various evaluation criteria are applied to each bid and how their respective marks are combined into a single final score, which then allows each bid to be compared to others. It determines the balance between the different criteria, in other words, their respective importance, as well as their individual calculation.

Typically, a weighted average mathematical formula is used to reach a final result. An example⁵ would be:

$$A * (\text{technical score} / 100) + B * (\text{financial score} / 100) = C \text{ where}$$

- A is the weighting for technical criteria (for example, 50-70 per cent)
- B is the weighting for financial criteria (for example, 30-50 per cent)
- C is the bidder's total score

The technical score should usually have a higher weighting than the financial one. But the exact balance between them, like the components of each, will differ from project to project. Technically challenging projects, for example, may call for much greater emphasis on the former, more conventional ones a higher weighting for the latter. Sub-weightings may also be used within each category on more complex projects, or at least clear sets of relevant factors to take into account (such as the criteria and

indicators to take into account for the SDGs, listed in the evaluation methodology for PPPs referred to above).

Occasionally, price alone (“least-cost selection”) will be the final determinant. There are various ways to approach this, such as lowest user charges (where charges are not regulated), lowest construction or operation and maintenance costs (where they are), lowest availability payments or shadow tolls on a government-pay project, highest concession fee payable to the contracting authority, highest revenue share offered to the contracting authority, minimum levels of government support required, and so on. Several different “numerical criteria” may be brought to bear simultaneously, rather than a single one. Where least-cost selection is used, the technical and quality-related criteria may then be applied on a simple pass/fail basis, although weighted in ways which allow appropriate comparisons to be made between bidders in this context. The price test is then used to choose between the bidders with the highest technical scores. The price test on some projects may also have to be considered on the basis of net present value or internal rate of return, especially where bidders can propose differing payment profiles or structures.

More usually, however, contracting authorities choose to apply a more mixed and complex final test than pricing. This makes eminent sense in the PPP world, where projects are unusually complex and long-term. The most familiar test of this kind is the “economically most advantageous offer” (or an equivalent phrase). PPPs depend on a range of factors and qualities for their success. This more inclusive and sophisticated test allows them to be drawn together and their combined significance gauged in the evaluation process.

Applying the evaluation criteria. The members of the tender committee and the evaluation team will need to be intimately familiar with the evaluation methodology, so it can be applied efficiently and objectively. This means documenting it clearly and carefully, perhaps in a comprehensive evaluation manual. Some prior training of the team may be helpful. The manual is sometimes supplemented by a performance computer model, where this strengthens the process, into which inputs from bids can be fed and specific evaluations quickly carried out.

The evaluation team should be organised according to members' relevant skills and experience. Where evaluation criteria are particularly qualitative or subjective, subject matter experts should apply them;

⁵ Often used by the EBRD in its consultancy evaluations.

these may be external advisers. Final decisions nevertheless remain the responsibility of the contracting authority (or other awarding authority, if there is one). The team's work should be structured and managed in such a way that criteria are applied consistently, accurately and reliably across all bids.

Proposal requirements. These need to be itemised very clearly in the tender documents, as they will elicit all the information needed by the tender committee to evaluate the bids, while non-compliant bids can be disqualified. They will include precise statements of all documents to be provided and rules for their presentation, including forms, guidance notes and evidential requirements (for instance, letters of commitment/comfort, formal proposals or undertakings from lenders, investors, insurers). In addition:

- **A deadline for submission** must be given. PPPs are complex projects and bidders must be allowed sufficient time to carry out their project analysis and due diligence and prepare high-quality, compliant bids. A minimum of 60 days is normal, and up to 120 days far from unusual. Tenders involving dialogue or detailed interaction with bidders will need longer.
- The **formalities of submission** must be specified. These may be documentary, electronic or a combination of the two. Technical and financial proposals (covering the technical and financial criteria respectively) must usually be kept rigidly separate. Mixing the two is usually against the rules and can result in disqualification. Legal and administrative documents may also need to be supplied, if they have not already been (fully or at all) at any prequalification stage; these may include company formation and registration records, for example, or a shareholders' agreement for a special-purpose vehicle to be formed if the bid succeeds. Separate envelopes may be required for the various categories of document, if physical submission is used.
- **Bid security** may be required, with its form, amount, duration and applicable terms set out in the tender documents. The regulations should clarify the factors that determine its use, value and content. Bid bonds are frequently demanded from tenderers in competitive tenders. They are irrevocable, unconditional bank or surety guarantees, in favour of the contracting authority, callable on demand in specified circumstances. The usual circumstance is that the project has been awarded to a bidder who then fails to enter into the PPP contract within a specified period of time, or (more unusually) abandons the tender before the validity period has expired. The cash payment helps defray the administrative cost of continuing or even redoing the tender, and

provides a disincentive to bidders from walking away from the process. It therefore also further tests the bidder's seriousness of purpose and capabilities. The contracting authority will set the bond's value, but it is often around 1 per cent of the project's estimated capital cost. A pro-forma bond should be included with the tender package.

- A **validity period** should be specified for the proposals, making clear the period of time for which tenderers must hold them valid. This helps to drive the efficient management of the process and prevents bidders' resources and offered terms from being tied up for unrealistic periods. If the tender needs to continue beyond that time, the contracting authority can always try to negotiate extensions with bidders who wish to remain involved.

- Modern tenders frequently require a **financial model**, at least for the more complex projects. Financial models are often an intrinsic part of PPP contracts, determining how certain critical financial calculations are made, such as compensation amounts following unforeseen circumstances/special events or termination compensation payments. Their use can therefore enhance the adaptability and flexibility of the contract during its term, and so the sustainability and governance of the project. They also facilitate an analysis of important fundamentals of a bidder's financial proposal, such as its financial structure, debt-to-equity ratios, internal rate of return, net present value, capital expenditure, operating expense assumptions and so on. When the submission of the financial model is made a bid requirement, the tender documents should provide precise instructions to bidders about how it should be constructed, which standard assumptions and calculations to include, and what data and calculations it should display. It is vitally important that all bidders' models are prepared on a consistent basis, so the financial evaluation criteria can be applied fairly and objectively.

6. Launching the tender

Once the tender documents have received all the approvals they need, the contracting authority can proceed to the formal launch of the tender. This needs to be handled with care, as the requisite legal formalities must be satisfied and the process marketed in a way which generates maximum interest from a competitive spectrum of potential bidders.

Publication. The supporting documents should be precise about where and how tender announcements and any RFQ/RFP are to be published, and the range of their contents. The website of the contracting

authority and any national or regional print media ordinarily used for this purpose (such as an official gazette) are the obvious choices. Trade magazines and certain international media may also be used. The notice should explain where the tender documents can be obtained and how to register for subsequent communications.

Tender strategy/pre-launch. It will probably make sense to work out a tender launch strategy and conduct preliminary marketing activities before the formal launch of the tender. This allows each step involved to be thought through and planned in advance, and potential bidders to be informed about the process, so they can gear themselves up to respond. (It can take months for consortia to be formed and their teams lined up for a bid.) This may go as far as a “soft launch” of the project ahead of the formal one. Key information about the project and its defining features (for example, nature and size, main risks, revenues) can helpfully be disclosed, together with any available (non-confidential) studies which will promote an understanding of it. Again, industry journals and notices are usually the most appropriate media for publishing data of this kind. National/international newspapers can also be used and press releases/conferences organised.

Data access. The tender documents should make it clear to bidders how they can access all the documents and data they will need to prepare their bids. The supporting documents should describe the available options. Where bids are to be presented in a particular form, as they usually are, it may help to provide electronic templates.

A data room is usually set up, at least for the larger projects. This consists of a store of relevant information about the project, which is too extensive to be included in the tender documents and which bidders can investigate as they develop their tenders. It can be voluminous. Generally, the higher its quality, the higher the quality of the proposals put forward, provided the information is well-organised and pertinent. When a brownfield project is involved, with existing facilities, operations and staff which are to be taken over by the private partner, exhaustive information about the project's arrangements as they stand will be critical to bidders. Similarly, if the private partner is to take demand risk on a user-pay (concession) PPP, full data about the state of existing demand, usage, charges and collections will be indispensable to the formulation of viable proposals (although bidders will also have to carry out their own market analysis). It is also likely to be helpful to identify those aspects of the project which embody SDG values and the SDG Guiding Principles very clearly in the data room.

The data room may be physical or virtual or (occasionally) a combination of the two. A virtual one is the norm these days, using webpages to provide electronic access to bidders. Security of access needs to be protected, as does the confidentiality of elements of the data. Bidders should be required to sign non-disclosure agreements. A typical data room might have the following contents:

- The feasibility study
- Existing design and construction reports/preliminary design studies
- Diagrams/maps/plans/cadastral studies
- Inventories/asset registers
- Existing operations and maintenance regime and records
- Any existing service contracts/third-party contracts
- Customer database
- Audited financial statements of the contracting authority
- Any relevant regulatory requirements
- Other legal/financial/technical/commercial records and reports

When the project involves major construction works, allowance should also be made for a site inspection or “walk through” by bidders and their advisers, hosted by the tender committee. This may prompt further detailed questions from bidders about design and construction issues. A record should be maintained of all such visits and the questions and answers they elicit.

Buying the tender documents. Given the time and effort that must be invested in pulling together all the tender documents and data room, it is not unusual for contracting authorities to charge bidders a fee for providing and/or granting access to them. This is particularly so with larger projects, where a two-stage process is used. The practice also helps to weed out the more inexperienced, “fly-by night” participants, who are not likely to win the tender, but whose submissions would nevertheless need to be properly assessed by the tender committee. The cost of purchasing the documents is also likely to be insignificant compared to the cost of preparing a final submission, and so is not going to deter the serious qualified “players”.⁶ Indeed, they may take it as a sign of the seriousness of the process.

⁶ In the competitive tender for the Channel Tunnel Rail Link in the United Kingdom, for example, at the time perhaps the largest infrastructure project in the world, the four shortlisted consortia spent an estimated £5 million each to prepare their final proposals. The process took around 12 months.

6.1. Interaction with bidders

Allowance should always be made within the tender process for suitable interaction with bidders between the launch of the tender and the submission of proposals (and thereafter if a dialogue process is involved). This is to ensure that they fully understand the tender requirements and have an opportunity to ask questions about the tender documents and comment on them as appropriate.

Questions and clarifications. It should be possible to raise questions with the tender committee about the tender documents and process at essentially any point during the prequalification/tender preparation phase. There should be a formal channel of communication (for example, questions should be addressed by e-mail to [name] at [electronic address]) and a final deadline for doing this. The opportunity should be about clarifications, not changes of substance (although the latter cannot be entirely ruled out if mistakes have been made or unexpected material improvements come to light). It is primarily about removing uncertainties about what bidders are being asked to provide, when and how. Both the questions and the responses should be made available to all bidders in a consistent, transparent way, without disclosing the identity of the bidders raising them.

Meetings. Meetings can be an important part of this process. It is good practice for the contracting authority and/or tender committee to organise a formal presentation or “bidder’s conference” at the outset of the tender process, at which the main aspects and priorities of the project and tender can be explained and discussed. Its purpose is to elucidate the information reflected in the tender documents and perhaps provide any significant updates. Suitably senior representatives of the contracting authority (and perhaps other relevant authorities) should speak, to signal the public sector’s commitment to the project. The meeting should be carefully prepared and structured in advance by the tender committee, with a protocol or rules of conduct circulated to bidders, to help ensure its efficient management and avoid any accusations of bias. It may be helpful to single out and explain the project’s SDG-related aspects. A project information memorandum may also be circulated. A prepared script covering key points usually makes sense (there could be many), with several public sector delegates present. Full attendance records and minutes should be kept. It is critical to ensure that all information supplied at the meeting is made available to all bidders, including those who were unable to attend it. This may mean posting it on the contracting authority/tender website.

Meetings should generally be open to all bidders (or shortlisted bidders) simultaneously. Separate meetings with individual bidders can immediately raise concerns about unfairness or bias, and so should only happen where an element of dialogue is structured into the process (see further under “Competitive dialogue” below).

Material changes. Even when the tender documents have been drafted and the process structured with all due skill and care, interactions with bidders before proposals are submitted may suggest ways either can be improved. Fatal flaws or major deficiencies may have been spotted in the documents or ways identified to modify the proposal requirements that will benefit the project (for example, certain design or standard changes, perhaps, or rephrasing some aspects of it or redrafting some clauses of the PPP contract). The tender committee should consider requests for such improvements or changes fairly and with an open mind, taking advice from its professional advisers. If accepted, all bidders will have to be notified and instructed to modify their bids accordingly. The bidding period may have to be extended as a result, if the legal framework permits it (the Model Law allows this in Article 17.3).

Competitive dialogue. The Model Law allows for competitive dialogue to be one of the options for structuring a competitive tender (Article 19.9).⁷ This entails extensive, structured interaction between bidders and the tender committee/contracting authority during the tender. It can be well-suited to the complexity and sophistication of large PPPs, although the refined dialogue involved can make it impractical in countries which do not yet have advanced PPP systems. It is used:

- (a) primarily (as in the case of EU procurement) when it is not feasible for the full project requirements to be defined in detail before a dialogue with bidders has taken place, or
- (b) sometimes (as in Australia), when the contracting authority can see an opportunity to refine and strengthen bids in discussion with tenderers before they are finalised.

The process can help ensure that the project’s requirements are feasible in all their aspects and that bidders fully understand them and can embody maximum value for money in their proposals. Both the importance and novelty of making projects SDG-compliant may reinforce the relevance of this option. By definition, it will form part of a two-stage tender, whereby only certain bidders are prequalified and a

⁷ As with all the tendering provisions in the Model Law, the text is close to the UNCITRAL PPP Model Legislative Provisions, as requested by both UNECE and UNCITRAL itself.

small group of the highest-scoring ones pre-selected to prepare proposals and take part in the dialogue. Contracting authorities should consider whether the tender structure for their larger, more demanding projects may be made more effective by using it.

In situation (a), the contracting authority needs the dialogue to take place to tie down a realistic and feasible set of requirements. The bidders are given a draft of the request for proposals, begin preparing their bids and provide feedback to the contracting authority. The contracting authority then refines the RFP and PPP contract based on the responses received, and issues them in final form as an invitation for final proposals.

In situation (b), the contracting authority has already finalised its RFP, project requirements and PPP contract. It then wants to encourage bidders to put forward their most attractive proposals on the basis of a full understanding of its objectives. Bidders are allowed to submit elements of their proposals to the tender committee as they are developed and receive individual feedback, which they can then take into account as their final bids are prepared. The idea is to elicit the highest-quality bids and greatest value for money by this means.

Any competitive dialogue procedure will need careful planning and definition, which must be set out very clearly in the tender documents. Clear rules and protocols will be necessary, with timetables and detailed procedures. There is a heightened risk of collusion or corruption where parallel discussions are taking place about central features of the project, which the process definition should try to minimise. Successive stages of dialogue may be conducted with participating bidders, usually starting with technical and design issues. Contractual provisions may have to be adjusted in response to different proposals, resulting in somewhat different contracts for each. Separate workshops may need to be organised with individual bidders.

Bidders should be treated equally at each stage of the process, with equal opportunities to interact, although a “tapering” mechanism may be used to allow bidders whose proposals do not convincingly meet the contracting authority’s requirements to be “selected down” (that is, dropped from the process). Differences in information released to bidders may also open up as the differences between solutions widen. The tender committee should take great care to respect each bidder’s confidential information and intellectual property rights and not disclose them to other bidders, except in very well-defined and accepted circumstances. Great care also needs to be taken to treat all bidders equally and fairly. The transparency of the process remains critical.

Probity safeguards. It is common these days, at least at an international level and where extensive interaction with bidders is to take place, for contracting authorities to appoint an independent observer to oversee the tender process and monitor the fair and equal treatment of bidders. Sometimes labelled a “probity adviser” or “fairness auditor”, the observer’s main task is to ensure that no particular bidder or group of bidders is gaining an unfair advantage and that the rules of the tendering procedure are being observed and obeyed.

6.2. Evaluation and selection

Once pre-qualification submissions and tender proposals (or simply the latter, in the case of single-stage tenders) have been received, the process of assessing and evaluating them in accordance with the applicable criteria is carried out. This must always be done in strict accordance with the tender documents and the process and methodology described both there and in the preselection/evaluation manuals. As we have seen, the tender documents will reveal aspects of the criteria, but not necessarily all their details, to prevent bidders from “gaming” the system. But the evaluation team must scrupulously follow all aspects of the process, as any departure from the criteria, methodology or system may breach the principles of transparency and fairness, and lead to the result being challenged.

The process is conducted primarily by the tender committee, although suitably senior responsible officers of the contracting authority will need to be closely involved (if they are not already members) in decisions which have serious commercial implications or call for negotiation with bidders and/or changes to the project requirements or PPP contract. Ultimately, the contracting authority, which must retain overall “ownership” of the PPP, should make or endorse all decisions relating to the structure of the project and the applicable commercial terms and risk allocation.

Bidder preselection. The tender documents must specify a time limit for assessing prequalification submissions. The regulations should set out the available options. Periods of between 30 and 45 days from the due submission date are fairly standard. There should be sufficient time for the tender committee to examine the submissions, ask for any clarifications it needs and prepare a draft decision on a shortlist which it then submits to the contracting authority for its approval. The timescale should be tight nevertheless, so bidders and their resources are not tied up in a state of “limbo” for too long, which may be detrimental to the whole tender process and the future interest of potential bidders. Bidders should be notified of the prequalification decision promptly after it is made.

The results of the prequalification assessment should be recorded in a log or report which documents the application of the criteria to each bidder and the basis for the conclusions reached. The shortlisted bidders are then invited to the RFP stage, where they will prepare and submit their detailed project proposals.

The question always arises as to what consequences can follow if fewer than expected submissions are received in response to an RFQ (for example, only one or two). There may be legal restrictions about what is permissible in this situation, which the regulations can spell out in detail. Subject thereto, the contracting authority should be left with at least some discretion as to how to react. If it is fully confident of the viability and appeal of the project nevertheless, it may decide to proceed to the next stage with just one or two bidders. If it has significant doubts about the market's response to the project, it may decide to re-tender it after amending those aspects of the project or process which appeared to be off-putting or unacceptable to bidders. Perhaps elements of it were not feasible after all, or too technically ambitious or commercially restrictive? Perhaps the risk allocation needs to be re-examined or even a more effective marketing programme undertaken, to ensure it is receiving sufficient exposure in the eyes of potential bidders? The Model Law provides a flexible legal framework to address this situation, allowing for both possibilities (see Articles 16.11 and 22.1(a)).

If only one bidder is left in the loop, however, this will inevitably weaken the contracting authority's bargaining position in any negotiations that have to take place. That is not something the bidder will necessarily exploit, as the main parameters of the project will already have been set and the contracting authority will have a statutory duty (or equivalent) not to agree to arrangements which are inconsistent with its public-interest responsibilities, which will limit the scope for commercial exploitation of the project. Nevertheless, the contracting authority should always reserve the right (in the tender documents) to terminate the process and re-tender the project, just in case the bidder's final proposal turns out to be too problematic or to represent poor value for money. It should also place clear limits in advance on any aspects of the project that are actually subject to negotiation (see further below). In the end, it is not obliged to accept any of the proposals on offer.

Evaluating bidders' proposals. The tender committee then carries out its evaluation of the proposals received, again in strict conformity with the defined criteria, methodology and tender documents.

The first step is to carry out a compliance check, to ensure that each bid has observed all formal requirements. This will be about checking that the

information called for has been provided, in the required format; verifying the authority of signatories to bind the parties they represent; confirming that any legal preconditions have been met (local incorporation/licences and registers, bid security and so forth); and perhaps carrying out certain due diligence enquiries, such as good standing, absence of legal proceedings for winding up, fraud or tax evasion. The compliant bids (or those that are not materially non-compliant) are then taken through to the evaluation stage. If no compliant submissions are received, the tender committee should investigate whether this is down to flaws in either the project definition or the tender process, which can be rectified, allowing a new tender to take place.

As the evaluation of the proposals received proceeds, the tender committee should seek any clarifications it needs of any of their aspects, to clear up uncertainties or omissions and resolve any ambiguities. The technical and financial elements of each proposal should be evaluated separately, to ensure that the judgements made on the basis of one set of criteria are not influenced by those applicable to the other. Both physical and information barriers should be put in place for this purpose, ideally with different teams allocated to each part. Objectivity is the aim. On the more complex projects, as mentioned, it is a matter of international best practice these days to appoint a probity or fairness adviser or auditor to monitor the evaluation and confirm that due process has been followed. This reduces the risk of challenges by losing bidders to the way it was conducted, by bringing to bear an element of independent oversight.

The tender committee should carefully record the evaluation process in a detailed evaluation report, listing the actions taken, the discussions and meetings held, and the decisions made. This will map the evaluation scores obtained by each bidder against the applicable criteria and show how the conclusion on the selection of a preferred bidder (tender winner) was reached. Host countries may wish to require the evaluation report to bring out the SDG-related aspects of the conclusions (and the application of SDG Guiding Principles to them,) specifically; if so, the supporting documents should make this clear. It will be subject to the approval of whichever governance body is responsible for approving the process⁸ before final award. The tender committee will then submit the report to the contracting authority for its own approval and adoption, confirming that the applicable procedures were followed and recommending the award of the project to the preferred bidder. The final (formal) decision is the contracting authority's. The regulations (or the PPP law itself) need to be clear and precise about this stage of the process. Once it has been reached, the tender award decision can be announced.

7. Contract award

Once the tender evaluation process has been completed, the contracting authority formally notifies its decision to all bidders and awards the PPP contract to the winning tenderer selected accordingly. The regulations should specify the publicity requirements for this announcement, such as entering it on its official website and/or publishing it in an official gazette or equivalent media outlet. The PPP law or regulations may provide for a limited time following the announcement during which unsuccessful bidders can challenge the award on the basis of a procedural breach or omission (see Article 20.2 of the Model Law). This standstill period should be short enough to bring out any planned challenges promptly and avoid them being strategically delayed. The contracting authority and/or tender committee will have to deal with any claims launched during its duration in accordance with the applicable legal framework.⁹ Once it is over, the parties can move on to contract signature.

Finalising the PPP contract/commercial close.

Signature of the PPP contract should follow as soon as possible after contract award, but some final matters will inevitably have to be dealt with before this can happen. Some detailed aspects of the tender documents may still remain to be negotiated; these will ideally have been carefully identified and circumscribed by the time proposals were submitted. These should not change the fundamentals of the project or those terms of the contract indicated as non-negotiable in the RFP. For example, the preferred bidders' lenders (if they are involved at this stage) may have some reasonable requirements which need to be addressed.

There may also be certain inconsistencies between the contract form issued with the tender documents and the preferred bidder's final proposal. These would need to be ironed out, ensuring that the final contract was fully consistent with the proposal. Strictly speaking, this is not a negotiation, but simply a process of finalising the documents. It should not lead to a (significantly) more favourable outcome for the bidder and/or a less favourable one for the contracting authority or the public. It should not have the effect of changing any of the evaluation marks awarded to the proposal, especially ones that might have made it less competitive than rival bids or resulted in a different outcome. In other words, the scope for any negotiation at this stage should be severely limited.

Certain additional steps will need to be taken before or by the time of signature of the PPP contract (although some of them may instead take the form of "conditions subsequent", to be satisfied promptly during the development period following signature). These should be spelled out in the tender documents so the winning bidder is in a position to line them up rapidly following contract award. They may include (almost invariably) formation of a special-purpose vehicle to execute the PPP contract with the contracting authority and become the private partner counter-party to it; issue of a performance guarantee of the private partner's obligations in favour of the contracting authority, replacing the bid bond; the injection of at least a portion of the equity funds committed to the project into the project company; and perhaps taking out certain insurance policies under a specified insurance programme. The PPP contract can be executed once these conditions have been met. Some of its provisions – though typically not all – will then become binding and enforceable. This stage is commonly referred to as "commercial close". A further period then typically follows, often taking a good six months, during which all the finance and security documents are drafted, negotiated and executed, the remaining project contracts placed with contractors and subcontractors, permits obtained, the site prepared (if it has not already been) and any remaining conditions precedent to drawdown of the finance satisfied. Once the (initial) funds have been drawn down, the private partner can start implementing the project in earnest. The supporting documents may touch on this area, particularly in terms of descriptions and explanations of it in the guidelines, in the interests of clarity and understanding. They are unlikely to provide for it in much detail, however, as this development period is very much about the private partner's responsibilities vis-à-vis its own lenders and contractors.



⁸ See further in Chapter 8, Appraisal and Approval Procedures.

⁹ See further in Chapter 9, Review and Challenge Procedures.