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Chapter 5. Unsolicited proposals and direct negotiations

1. General

1.1 The Model Law[1] provides for the implementation of PPPs based on unsolicited proposals (USPs). A USP is a proposal for a PPP put forward by a private-sector entity (the "private initiator") on its own initiative and based on its own project concept, rather than in response to a government invitation. The private initiator hopes and expects to be selected as the private partner to implement the PPP if it is adopted by the government. The law precludes parties from putting forward proposals for PPPs which have already been identified in the government's "pipeline" of future developments, to prevent attempts to force the pace over what are in reality government-initiated projects.

1.2 The challenge for legislators, then, is to foster competitive tension around USPs while preserving the enthusiasm and legitimate interests of their originators. As the Model Law makes clear, there are circumstances in which direct negotiation may have to take place between the parties to them, as well as for certain other types of PPP projects, without applying (in whole or part) the competitive tendering mechanisms envisaged as the standard basis for procurement. USPs therefore should be handled with care in the PPP supporting documents. Clarity and precision are needed in the rules and guidelines applicable to their submission, preparation, review, approval and award.

1.3 USPs can be controversial. As the UNCITRAL Legislative Guide notes, they can raise concerns about transparency, accountability and value for money. Some commentators believe they should not be permitted at all and some PPP laws prohibit them. Some limit them to certain types of PPP only (for example, concessions, as in Georgia). There is a perception that they often involve or encourage corruption and that the lack of competitive pressure sometimes found behind their award and implementation can result in defective projects and poor results. They may also give rise to difficulties at the level of government fiscal planning if they have budgetary implications which have not been taken into account in the routine planning processes. And if the public sector is struggling to develop the capacity it needs to use and apply PPPs within its staff, they may become a further impediment if officials feel they can rely too heavily on them being put forward by the private sector. The absence of competitive tendering may heighten any political sensitivities associated with the project and make it difficult or impossible for bilateral and multilateral lending institutions to fund them. Appropriate safeguards therefore need to be put in place where they are permitted.

1.4 The more widely held view, however, is that USPs can be beneficial, if handled correctly. They can add to the country's total stock of viable PPPs and levels of PPP activity by accelerating "deal flow". They can thus help to develop its new PPP market and encourage the private sector's active participation in it. They can help overcome challenges related to early-stage project identification and assessment, while generating innovative solutions to infrastructure needs. The Model Law accordingly allows for them. It makes special provision for their submission, preparation and procurement. Nevertheless, contracting authorities should limit themselves to the more convincing, high-quality USPs which are likely to have successful outcomes. The law and the regulations should reinforce this by ensuring that proposals are subject to rigorous early-stage evaluation.

2. Process overview

The Model Law envisages six main stages for the submission, assessment, award and implementation of an unsolicited proposal. These are:

- submission of the proposal by the private initiator
- preliminary response and assessment by the contracting authority/oversight body
- preparing the project and carrying out the feasibility study and associated studies/reports
- review and approval of the project under the applicable formal procedures
- procurement of the unsolicited proposal project and contract award
- implementation of the project (the construction and operation phases)

It goes without saying that all the principles that apply to PPPs generally should also apply to PPPs procured from unsolicited proposals. They must meet all the relevant requirements and criteria, such as public interest, long-term risk sharing, value for money and affordability, social and environmental feasibility and sustainability, accountability and fair market pricing.[2] They should be just as compatible with the United Nations Sustainable Development Goals (SDGs) and the SDG Guiding Principles, as other types of PPP. The contracts for them should contain all the same types of provision as contracts for other types of PPP, reflecting the usual appropriate and rational allocation of risk, flexibility and partnering considerations. The same forms of

[1] See Articles 14 and 21.

[2] See Article 4 of the Model Law.

government support will potentially be available. The regulations and guidelines applicable to them should be drawn up on this basis and fully aligned with the rest of the PPP law. A separate policy framework may need to be drawn up on the subject, to sit alongside the wider PPP policy paper, and fully integrated with it. Institutional capacity building should include specific training in aspects of this process.

3. Submission and review of unsolicited proposals

3.1 **Preliminary review.** The supporting documents – and the implementing regulations in particular – should contain a clear, standard set of policy and legal requirements for assessing USPs when they are submitted, which the contracting authority can apply rigorously and efficiently. This will clarify and streamline the process and ensure it is properly aligned with the government's wider policy and objectives for PPPs. The regulations should include guidance as to whether the contracting authority should have a simple discretion to decline to consider the USP; the Model Law allows for this (in Article 14.1), on the basis that its resources may be too constrained at the time to consider it fully, or that its development priorities may lie in other directions at the time. It should be a simple matter, however, for a private initiator to take preliminary soundings from the contracting authority about its potential interest in the project before formal submission of the USP. This should help minimise the risk of resources being wasted by the former in preparing a proposal which then makes no headway. The Model Law makes it clear, in an "open door" provision, that discussions can take place at any point between public and private sectors about a potential project concept (Article 14.3).

If the contracting authority gives the USP initial consideration (a "preliminary review"), the regulations must be clear about what this process entails and by when it should be carried out. They should introduce (an) appropriate time limit(s) for doing so. They should include an exhaustive list of possible reasons for rejection of a submission, to avoid excessively subjective decisions or challenges based on a claim that the decision was not made on legitimate grounds. It may be helpful to charge the project initiator a reasonable review fee, to help discourage the submission of rushed, poor-quality or incomplete proposals.

3.2 **Qualifications.** The preliminary review will inevitably include at least an initial assessment of the private initiator's qualifications for undertaking the project. This should include many (sometimes all) of the tests included in a formal prequalification stage for a government-initiated PPP project (see further in Chapter 5, Tender Procedures and Requirements). The contracting authority will want sufficient information about the private initiator's corporate existence and capacity, good standing and reputation, relevant prior experience, technical skills, resources, management expertise, integrity, funding arrangements and so on, to be confident that it would be an effective private partner under a PPP contract for the project (if it is awarded it). In theory, some of these requirements could be left until a later tendering stage. But a tender may never take place, for one reason or another, and it would be sensible to cover them off before any detailed preparation work is carried out.

3.3 **Intellectual property and confidentiality.** The PPP law/regulations should be clear and explicit on the subject of the treatment of the private initiator's confidential and proprietary information and intellectual property (IP). In principle, these should be fully protected during the USP process. They are protected anyway by law, and the regulations should not change this. If there is doubt about this, private initiators may try to create unnecessary protections for themselves, which may affect the transparency of the process. Or they may be deterred altogether from submitting proposals. Any rights to transfer such data or property to other bidders for the project would need to be very carefully justified and circumscribed and very precisely stated in the law/regulations. (The Model Law provides for this in Article 14.5, in terms of "respecting" these rights.) They may have to be the subject of specific compensation if the private initiator does not win the tender (see further below). But contracting authorities should be wary of private initiators overstating their IP rights in a USP. The output specifications on which PPPs are fundamentally based may well mean that reliance does not actually need to be placed on any unique IP to achieve the outputs, as it may simply operate at the level of inputs.

3.4 **Assessments and feasibility.** The USP should be subject to essentially the same procedures and criteria for assessing project viability, efficiency and value as government-initiated PPPs, at both the preliminary review and project preparation stage. These should be subject to the self-same SDG criteria and considerations as other types of PPPs. Benchmarking can be an appropriate tool in this context, given that the project concept will have come from the private sector. This involves comparing the USP with similar projects in the same or similar sectors and market settings, on a qualitative and quantitative basis. The comparison can focus on the type of solution being proposed, cost components, proposed timelines, proposed risk allocation, the extent of market interest – indeed, on any aspect which seems to be relevant and informative.

3.5 **Monitoring authority.** It is recommended that the PPP law or regulations provide for an additional tier of approvals for USPs from an appropriate decision-making authority in addition to the contracting authority to which

the USP has been submitted (and which will become the public partner under its PPP contract). This helps to ensure full impartiality in assessing proposals, mitigate the risk of corruption and signal the transparency and fairness of the whole process to the market. Where such an authority exists, its approval should be sought at the preliminary review stage as well as at the time of final approval of the fully developed project. The authority need not necessarily be specially created for the purposes of the PPP system – unnecessary bureaucracy is always undesirable! It may make sense to use an existing body with more wide-ranging supervisory or anti-corruption functions. An authority of this kind can also develop dedicated expertise in this area, which can benefit all involved.

3.6 **Preparation.** Once the USP has passed the preliminary review stage, it will need to be fully developed and formally prepared as a project proposal, in the same way as any government-initiated PPP, so it can be awarded to a private partner and implemented. At this point, the law's procedures applicable to PPPs at the same stage come into full play (see Article 14.4 of the Model Law). The only difference is that it may be necessary or helpful for the private initiator to be involved in this process, to a greater or lesser extent, as Article 14.4 acknowledges. (Some countries also allow the private initiator to be charged for the cost of at least some of the preparation work, such as the feasibility study.) The advantage of this is that the private initiator is likely to be intimately familiar with the project, and to have many of the ideas, capabilities and skills needed to develop it effectively. The disadvantage is that this will further strengthen the private initiator's competitive advantage in relation to it, which may be problematic if the contracting authority launches a tender for it. Other potential bidders may feel that it is simply not worth competing for it, given the former's inside knowledge of the project. The contracting authority will also lose a degree of control over the project's structuring, and perhaps incur a loss of negotiating power due to information asymmetries.

3.7 **Direct negotiation permitted.** Partly for that reason, the Model Law creates an exception to the principle of competitive tendering for awarding PPPs for USPs which involve IP, trade secrets or other exclusive rights of the private initiator and are based upon new or unique technology or concepts that cannot be legitimately reproduced by third parties (see Article 21). The supporting documents may need to explain or elaborate on this exception, which needs precision if it is to be fairly applied. After all, the basic premise of the legislation is to encourage competitive tendering when possible. Where the exception applies – which in simple terms is when tendering is unlikely to be practicable or appropriate for the project in question – the PPP contract can be negotiated and entered into with the private initiator, once the project has been fully developed and approved in accordance with the applicable procedures. The regulations should provide for an early-stage decision to be made about whether the exception applies, during the preliminary review, as this would potentially obviate many of the concerns about the private initiator being closely involved in the development process where it does.

3.8 **Competitive tendering.** When the exception does not apply, the USP project should be subject to competitive tendering procedures in the usual way (Article 21(1) and (2)), so it can benefit from the competitive pressures they entail. The implementation resolution for the project should be published on the official website of the contracting authority and in any applicable official journal, and expressions of interest in implementing it invited from bidders. It should be made clear that the project is based on a USP. This usually involves a two-stage tender process, with a request for prequalifications, partly because of the uncertainty about the extent of competitor interest. If sufficient interest is expressed at this stage, the competitive tender can proceed in accordance with the usual procedures (under Article 21(5)) for selecting the private partner. If not, provided the contracting authority is satisfied (subject to any requisite approvals) that enough has been done to generate competing bids, it can go ahead with a direct negotiation of the PPP contract with the private initiator. If the contracting authority is not satisfied that adequate competitive pressures have been brought to bear, it can repeat the request for expressions of interest, under an extended deadline and modified documents (Article 21(4)).

3.9 **Compensation and incentive mechanisms.** It is widely accepted at a policy level that the use of competitive tendering to award USP projects means the private initiator behind a USP should normally be allowed some form of bonus/incentive arrangement, to reward it for the time and effort it has already invested in the project, or compensate if it loses, for fear that the private sector may otherwise be deterred altogether from putting USPs forward. The Model Law allows for this in general terms (Article 21(6)). Some mechanisms are more convincing and appealing than others, however. Governments should think carefully about which ones to make available and provide for them clearly and precisely in the regulations. The most common forms of incentive/compensation mechanism for private initiators are as follows:

(a) **Cash compensation.** One option is to provide for the payment of cash compensation to the private initiator for the (pre-tender) costs it has incurred in putting together and developing the USP, if it does not win the tender. The costs reimbursed should typically be reasonable, documented, direct costs actually incurred, up to a specified ceiling (which may, for example, be set

as a small percentage – perhaps 2 per cent or 2.5 per cent – of total project costs). The regulations should set out the options and the basis for calculating a maximum amount which will not have the effect of distorting competition. The tender documents should then state precisely how the calculation is made and who bears the liability (if it were the winning bidder, the PPP contract would need to provide for it).

(b) **Exemptions.** Another option is to exempt the private initiator from the need to provide security for its obligations during the tender process (for example, a bid bond), which will reduce its overall tendering costs, on the basis that it is not likely to walk away from its own project proposal, having invested in developing and submitting it to the public sector. Similarly, it may be exempted from certain other obligations at the stage of preliminary selection and/or competition, in particular the prequalification requirements (at least those which have already been satisfied – see above).

(c) **Bid bonus.** A third option is to provide the project initiator with a bid bonus, such as an additional percentage added to its evaluation score. This can be difficult to apply, however, and may distort the competitive process. If the private initiator's bid has only received a certain score from the application of the evaluation criteria and methodology, how will it help the process or its transparency and objectivity to increase that score artificially, and how exactly is the adjustment calculated? A clear and logical linkage would need to be found between the criteria and the value attributed to the initiator's project concept, which still maintains the fairness and balance of the overall process. And the use of this mechanism may also deter other potential bidders.

(d) **Automatic shortlisting.** Another possibility is to include the private initiator automatically in the shortlist of firms invited to submit final proposals for the project. This is likely to happen in nearly every case, given its previous involvement in defining the project and perhaps in its preparation.

(e) **"Swiss challenge."** Some countries give the private initiator the right to match the terms offered by the highest-scoring bidder, and allow the project to be awarded to it if it does so. This option (sometimes called a "Swiss challenge" option) may also be difficult to apply in practice, though, as the winner's evaluation score is likely to include marks that reflect its particular combination of capabilities for implementing the project, and quite possibly unique suggestions or designs for aspects of its implementation with which the private initiator may not be able to compete. It assumes that the final evaluation methodology puts financial and commercial criteria at the forefront. The mechanism also runs a serious risk of undermining the competitive process. Why should other bidders put serious resources and effort into shaping competitive proposals, if the private initiator can still take it from them at the very end of the process? For that reason, many countries strongly discourage this mechanism.

4. Direct negotiations

4.1 **Permitted circumstances.** The Model Law provides for direct negotiation of PPP contracts in Article 22. These are specific exceptions to the general requirement for competitive tendering laid down at the beginning of Chapter IV (Article 15), and the Model Law highlights their "exceptional" nature ("in and only in the following exceptional circumstances…"). These are:

(a) where only one bidder has prequalified or submitted a tender under Article 19

(b) where Article 21 so permits (in the case of USPs)

(c) where there is an urgent need to ensure the continuity of public services (such as an emergency), provided this is not the fault of the contracting authority (failure to anticipate or act swiftly)

(d) to protect the essential security interests of the state

(e) where it has been clearly established and confirmed, on the basis of an independent report, that there is only one source realistically capable of implementing the PPP project (due to the private partner's exclusive rights, such as IP, technology or trademarks) such that a tender would not be feasible

4.2 **Applicable procedures.** The Model Law then requires (para 2) the procedures and conditions governing such direct negotiations to be set out in the regulations, including approvals, monitoring and reporting. Some host countries may wish to lay down and describe the applicable procedures and terms in some detail, in their implementing procedures and/or guidelines, to address the matters discussed below and compensate for the loss of precision and rigour resulting from the disapplication of all the Model Law's carefully structured tendering provisions. It should be noted, though, that some countries are happy to leave a high degree of flexibility and discretion to the contracting authority as to what procedures will apply in these circumstances. As UNCITRAL points out (in Part III), this is only likely to be the case when the country concerned has a well-established tradition of structuring and negotiating PPPs successfully on this basis, such as France, as it calls for experience, sophistication, skill and judgement in its application. It presupposes deep PPP capacity within the public sector. Countries not in this position may prefer to provide in considerable detail for the applicable procedures and considerations concerned, notwithstanding the fact that a greater degree of flexibility will be present than in the case of formal

tendering (the Guide to the Enactment of the UNCITRAL Model Law on Public Procurement encourages this). These will include some of the emerging-market countries to which the Model Law is primarily addressed. The wording of para 2 calls for it. In any event, the fundamental procurement principles of fairness, transparency, efficiency and equal treatment should still apply. The supporting documents can provide for these procedures in whatever detail is thought desirable.

Paragraph 3 of the Article "starts the ball rolling" in structuring the process, with several requirements for notifications and publicity of the project and negotiations, the drawing up of applicable criteria and the application of competitive pressure. Paragraph 4 reinforces this by applying the Model Law's publication requirements to the resulting contract. Even though a formal tender is not to take place, the contracting authority is obliged to bring that pressure to bear by engaging in negotiations "with as many persons as it deems capable of carrying out the project as circumstances permit". There may, of course, be only one such person, and the security interests of the state may preclude any publicity of any highly confidential process. But the basic assumption is that at least some competition, publicity and transparency would be desirable and beneficial, if possible. The absence of formal tendering procedures should not automatically imply an absence of competition.

4.3 **Considerations.** The key factors that should be taken into account in preparing the supporting documents for the direct negotiations will include the following:

(a) **Flexibility.** As already noted, a high degree of flexibility is often found in the procedures applicable to direct negotiations. Host countries should decide how much to permit and make its ambit clear in the supporting documents. Which aspects of the process should the contracting authority be free to change and revise, and which should remain firm and settled? The regulations can provide for the latter, while the guidelines can discuss the former.

(b) **Procedural elements**. Whatever the scope of the contracting authority's freedom to modify them, the direct negotiations should be well-defined by it before they get underway. The supporting documents can explain and elaborate on this. As mentioned above, the absence of a formal tendering process does not necessarily mean the absence of competition. Quite the opposite. The Model Law provides for the application of competitive pressures to direct negotiations wherever possible. The laws of some countries require a minimum number of bidders to be included in the frame, where the process does not have to be limited to a single source. Others prefer to leave more discretion about numbers to the contracting authority, as a set figure may be hard to specify for all situations. The qualifications and capabilities of the bidders should be laid down. Bidders should be given adequate details of all the key elements of the process in advance, to ensure that it is a fair, clear, transparent, efficacious process that can be followed by all throughout. Relevant timescales, documentary requirements, critical bid elements (for instance, output specs and key performance indicators), formalities, evaluation criteria (such as technical aspects, innovativeness, pricing and economic aspects, operations and maintenance costs), and so on should all be particularised.[3] The final selection criteria should be absolutely clear and transparent (the "most economically advantageous offer' is the usual test in the case of complex PPPs). Scope for adjusting bids and requirements for best and final offers should be spelled out.

(c) **Approvals.** As we have seen with USPs, it may well make sense to subject the decision to use direct negotiation to the approval of a higher authority, to ensure no abuse is involved and that the correct procedures are being followed. Host countries will need to decide which this is (it could be a contracting authority, such as a municipality or line ministry). The approving body should have appropriate standing for this purposes, so a high-level body such as an inter-ministerial committee may need to be involved. The PPP unit is another obvious possibility. The question also arises as to whether the contracting authority should have to submit its entire negotiation procedure (once it has settled it) for approval, or simply the decision to use it. Specific aspects of it, such as the number and capabilities of the bidders to be included, the criteria to be applied and the final outcome, may also need to be approved. The formalities and timescales of this approval process should be made clear.

(d) **Notice of contract award.** The publication and disclosure provisions of Article 20 will then apply to the award of the PPP contract and its key terms (unless state secrecy considerations stand in their way). The supporting documents should also explain why direct negotiation can be used in these circumstances without tendering procedures. The Model Law's mechanisms for monitoring and reporting on the project's implementation and performance (see Article 37(4)) will provide an additional safeguard.

[3] See the more general discussion of these considerations in Chapter 4, Tender Procedures and Requirements (although in the context of the Model Law's formal tendering processes).