



European Bank
for Reconstruction and Development

EBRD PPP regulatory guidelines collection
Volume I



Chapter 9.

Review and challenge procedures

© 2024 European Bank for Reconstruction and Development

This publication has been produced with the assistance of the European Bank for Reconstruction and Development (EBRD). The contents of this report are the sole responsibility of the authors and contributors and do not necessarily reflect the views of the EBRD. Nothing in this publication should be taken as legal advice. The publication rights belong to the EBRD.

1. Introduction

An important aspect of laws providing for the creation and implementation of complex, high-value infrastructure projects and systems, such as a procurement law or a PPP law¹, is a mechanism for overseeing and, if necessary, enforcing the application of the law's rules and procedures.

The host country will usually have legal tools in place for this purpose, some of them under its wider legal and administrative system. They will include rights and remedies under its civil and criminal legal systems, such as judicial review (or its equivalent) for breach of public administrative process, competition law powers, civil law sanctions or prosecutions for criminal offences. But they can also include "internal" mechanisms, forming part of the law itself, comprising challenge and grievance procedures, whereby specified persons are given the right to challenge or lodge complaints about the decisions, actions or omissions of bodies exercising powers or performing functions under the law. This chapter of the supporting documents focuses solely on this last category of provision. Other areas of a country's wider legal system are not discussed in any detail (as a PPP Law will not need to address them). Nor are the other forms of dispute resolution² which are found in the main contracts governing implementation of a PPP, such as the PPP contract and related agreements comprising the project's "contractual matrix", including design and construction, off-take, supply and operation, and maintenance contracts. These are essentially a matter of contractual provision and are addressed in Chapter VII of the Model Law.

Internal mechanisms of this kind reinforce the law's efficacy (as the UNCITRAL Guide to its Model Law on Public Procurement Law points out³), by giving it self-enforcing and self-policing tools. Mistakes can be corrected, and failures put right, in a rapid and efficient way. This avoids time-consuming and costly legal proceedings through the courts and perhaps serious disruption to the lengthy and intricate process of preparing and awarding a major project or PPP. It also helps to build confidence in the law's provisions and operation, and to prevent and deter their abuse. In the words of the UNCITRAL Legislative

Guide on PPPs: "The existence of fair and efficient review procedures is one of the basic requirements for attracting serious and competent bidders and for reducing the cost and the length of award proceedings."

Giving bidders rights to seek review of the acts of competent bodies in violation of the law's rules is an important safeguard of the adherence to those rules and their proper application. For that reason, the United Nations Convention against Corruption (Article 9.1(d)) requires procurement systems to include them, structured around a mechanism of "domestic review" and appeal.⁴ The World Trade Organization's Government Procurement Agreement (GPA) encourages a similar approach. The Model PPP Law reflects these principles and invites host countries to elaborate on them in their PPP laws and regulations.

The Model Law contains two articles providing for mechanisms of this kind:

- **Article 23 Review and Challenge.** Article 23 deals with decisions by government bodies in connection with the structuring and award of a PPP. It provides (in summary terms) that any bidder or potential private partner that suffers loss or injury as a result of a breach or non-compliance of a decision or action of a contracting authority (or other competent authority) with the law's requirements, in connection with essentially any aspect of the process of selecting, preparing or awarding a PPP project, may challenge the decision or action and pursue any available remedies, in accordance with the review and appeal procedures laid down by the PPP law or applicable law.

Those procedures can be drawn up under the implementing regulations. They should aim to ensure (para 2) that any such decision or action can be challenged without delay and, if possible, before goes into effect. Appropriate powers to apply interlocutory and interim measures can accordingly be included. Any decision or document can be opened up, reviewed, revised and annulled, and any procedure or course of action (not excepting the implementation of the project) suspended or cancelled. Powers to award compensation or damages are also permissible (subject to applicable law). The Article further provides

¹ A PPP law is essentially a form of public procurement law.

² Including court mediation, arbitration and court proceedings.

³ The summary procedures set out in this regulation draw extensively on the Model Law on Public Procurement and its helpful and detailed accompanying Guide to Enactment, adapted to the provisions of this Model PPP Law (which differ in certain respects from the UNCITRAL Model PPP Legislative Provisions).

⁴ This is also echoed in the UNECE Working Party on PPPs' standard on zero tolerance for corruption.

(para 3) that detailed procedures drawn up under other articles of the law and regulations should make allowance for such powers as appropriate.

• **Article 34 Grievance Procedures.** Article 34, dealing with protection of the general public, then provides for a specific grievance procedure. It states (in para 2) that the procedures drawn up in the implementing regulations shall provide as appropriate for the adoption of suitable mechanisms for lodging objections, complaints or other grievances by users or members of the general public in relation to any aspect of implementation of a PPP project by which they may be adversely affected. This can include an ombudsman or similar regulatory procedure. No other available rights or remedies under applicable law are to be in any way restricted or qualified by any such procedures, however. Paragraph 3 then requires the contracting authority to ensure that a PPP contract which involves public services or infrastructure facilities accessible to the public contains simplified and efficient mechanisms for handling claims of this kind by members of the public.

These two articles are summary provisions setting out the key elements of effective challenge and grievance procedures. Host countries should develop them in detail as appropriate in their regulations and guidelines. They also help to give effect to the transparency, fairness, access and equity, and consultation principles of the SDGs (and the SDG Guiding Principles). The following sections of this chapter of the supporting documents indicate how that might be done.

2. Review and challenge procedure

There are various ways in which the implementing regulations can build on Article 23. The extent to which they do so will depend on how prescriptive the host government wishes them to be, and what other provisions of the PPP law and the wider legal system – especially its general procurement regime – allow for or prescribe. The general procurement regime may already contain procedures of this kind (following UNCITRAL), in which case it may be a simple matter of carrying them over or cross-referring to them in the PPP law and regulations.⁵ Equally, the country's administrative or judicial review procedures may contain the essential elements of this type of procedure. As explained above, however, Article 23

is designed as an “internal mechanism” within the framework of the PPP law, which should be a self-standing tool, largely obviating the need to use other legal fora and procedures.⁶

It should be kept in mind that the PPP law will also contain other provisions designed to safeguard the smooth and effective operation of the PPP preparation and award process, and to reduce the risk of challenges or disputes. These include broad information provision and transparency requirements, clear phasing, closely defined procedures and review and approval roles and powers. The “standstill period” under Article 20.2, between selection of a preferred bidder and the entry into force of the PPP contract, is also designed to have this effect, by creating a window of opportunity for bringing legitimate challenges before the commitments and expense of performing the contract are incurred.

The essential components of an effective challenge procedure would typically include⁷ a general right of challenge and appeal, an (optional) right to require a competent body to reconsider a decision or action it has taken, and provision for review and intervention by a suitable independent body and/or court (following an appeal). As Article 23 states, the procedure should ideally allow for:

- The opening up, review and revision, modification or reversal of any decision or action (or failure to decide or act) by the competent body under the PPP process
- Rapid intervention (where possible)
- Power to suspend or cancel the relevant proceedings and to forestall the execution (or entry into force) of the relevant PPP contract while the dispute is continuing
- The power to apply interim/interlocutory measures, such as restraining orders, directions to perform specific steps and financial sanctions
- Power to award compensation or damages (especially where reversing the decision or step is no longer possible)
- Generally, rapid/compressed timescales for these measures
- The original challenge and any appeal respectively should be the subject of separate proceedings involving two different bodies, such as an independent

⁵ The country's procurement laws may have been disappplied by the PPP legislation, but it should be a relatively simple matter to reproduce the challenge procedures in the PPP implementing regulations.

⁶ Which are accordingly not discussed here.

⁷ See the UNCITRAL Guide to Enforcement of its Model Public Procurement Law (“Guide to Enforcement”) <https://uncitral.un.org/en/texts/procurement>.

body and the courts (or, if necessary, two independent bodies)

Note that some jurisdictions do not allow contracts to be cancelled once they have been awarded. As the UNCITRAL Guide to Enforcement points out, the mechanism always needs to strike an appropriate balance between protecting the integrity of the system and minimising disruption to the procurement process. Certain aspects of the procedure need careful structuring from that perspective, including limits on who can invoke them (that is, bidders and potential private partners), tight timeframes and discretionary powers to suspend proceedings or cancel contracts.

Set out below is a set of summary procedures for a challenge mechanism based on Article 23⁸ and designed to meet these objectives. Host countries should develop them into a set of comprehensive and fully drafted legal procedures, compatible with local law and legal traditions. These should address matters such as documentary and evidential requirements, precise timeframes, the place of hearings, detailed rules of operation and procedure, rights of attendance and so on. It should be borne in mind that there are wide differences in the way countries approach these challenge mechanisms and the subject of administrative review generally, some of them involving “fundamental conceptual and structural aspects of the legal system and system of state administration”.⁹ Detailed provision may therefore be very different from country to country. There is not a single perfect model. The framework options and elements set out below should be used and adapted as host countries judge best.

The summary procedures below allow for three main options for hearing a challenge at first instance. The first (para (3)) is by the competent body itself. The advantage of this is that it gives the competent body an opportunity to correct the mistake or breach in question. This will only be appropriate when the competent body can still correct or reverse the act or decision (for example, when the PPP contract has not yet come into force). This option is appealing in terms of simplicity and efficiency. It is likely to constitute the quickest, most straightforward solution, which avoids the trouble and expense of burdening third-party tribunals with formal proceedings. The challenge procedure should be primarily about finding rapid remedies involving fair and constructive results and minimising “litigation risk”. It may also facilitate matters that the competent body will be fully aware

of the practical and factual context of the challenge – that is, the events in question – and may be keen to find a helpful, amicable solution if possible. But the competent body may also act defensively and obstructively, which is why having an alternative route available for mounting a challenge is essential. This is why it is also likely to make sense for the detailed procedures to include a system for monitoring or overseeing the functioning of this “peer review” option.

Accordingly, the second option is for an independent third party to hear the challenge. This procedure is summarised in para (4) below. It may be possible to base this, at least to some extent, on the country's existing administrative review procedures (if there are any) or to adapt and extend those procedures in this context. On the other hand, some countries may prefer simply to use their judicial review system and dispense with an independent body altogether.

Under this option (assuming it is adopted), the review body can be given a somewhat broader scope and range of powers than the competent body under the reconsideration mechanism in para (3) below, together with a longer time horizon in which to apply them. (The viability of those powers under local law should be carefully considered and verified.) The body selected for this purpose should be genuinely independent of the relevant competent body and of any standing procedures for confirming or approving its decisions, as these are likely to have already been applied to the decision or action being challenged. It should also be insulated from political pressures. This may call for the involvement of independent experts, removed from the legislative and executive functions. The host country will need to identify this body clearly and ensure that its functions and powers are well-deliberated. Its operating procedures will need to be closely defined. A permanent body to oversee the country's entire procurement system or handle administrative review cases in general may be appropriate.

Allowance is made in the summary procedure under the first two options for the possible suspension of any procurement proceedings taking place at the time of a challenge. This is a discretionary power, not an automatic device, as it may be impractical or counter-productive to use it in the circumstances of the claim, and an automatic requirement to suspend could lead to abuse of the system by unscrupulous or overly aggressive bidders or participants, or to unnecessary delays and disruption. The competent

⁸ Based on the UNCITRAL model statutory provisions for public procurement, adapted to the PPP Model Law.

⁹ Cf UNCITRAL Guide to Enforcement (<https://uncitral.un.org/en/texts/procurement>).

body or independent third party (as the case may be) is accordingly given power to order a suspension, in whole or part, which it must decide to exercise or not, in response to the application. The regulations should be very precise about the steps and criteria involved. Additional regulatory controls may need to be superimposed. It may also be appropriate to identify very limited circumstances in which suspension should, in fact, be compulsory, at least in the case of an application to an independent body.¹⁰ The summary below allows for this.

A third option is to allow the challenge to go straight to the courts (or a specified court) if – again – the country's legal system permits this and includes a well-defined administrative or judicial review procedure¹¹ (ideally one which is consistent with recognised best practice and investor expectations and is sufficiently reputable and trusted). As that option would need to be a matter of formal procedure under local law, its elements are not summarised in the outline regulations, which only cover rules and requirements that are “internal” to the PPP law. Host countries should be encouraged to ensure that all the powers and remedies available to an independent third party will also be available to the court(s) hearing a challenge application or appeal.

The summary procedures below also allow for appeals against first-instance challenges, to either the independent review body or the courts, depending on where the challenge being appealed was heard and the confidence that can be placed in an appeal through the courts. It is likely to make sense to give the complainant an option to choose between the different possibilities, although countries may differ about how much freedom of choice should be available to complainants in this context.

3. Summary procedure

3.1 Rights to challenge and appeal

General provision: The regulations should allow challenge proceedings under Article 23 of the PPP law to be brought either by way of an application for reconsideration to the competent body being challenged (contracting authority or other body) under para (3) below, an application for review to an independent body under para (4) or an application or appeal through the courts. (The regulations might specify the relevant court, if necessary.) Any decision

taken in challenge proceedings should also be capable of being appealed to the independent body (where appropriate) or in the court(s).

3.2. Effect of a challenge

The competent body being challenged should not be permitted to take any step that would bring into force a PPP contract in the PPP proceedings concerned, where it has received notice that these challenge procedures are being invoked and in process. This is to avoid a challenge or appeal being unfairly nullified by being overtaken by events. This restriction should lapse within a specified number of days of the challenge being decided. However, a contracting authority should be allowed to seek special permission from an independent body or court to go ahead and bring the PPP contract into force if urgent public interest considerations justify it. Decisions on these matters should be promptly notified to all participants in the PPP proceedings and made part of the formal record.

3.3 Application for reconsideration before the competent body

3.3.1 The section addresses the option of asking a competent body to reconsider a decision or action it has taken. The regulations should specify the deadlines by which an application must be submitted. For example, these could be:

- where the application relates to a key stage in the PPP process (such as the solicitation of Expressions of Interest (EoIs) or proposals, prequalification or preselection, or to decisions or actions taken during those stages), before the final deadline for concluding the relevant stage
- where it relates to any other decisions or actions, within any applicable standstill period identified and applied by the PPP law, following the PPP contract award,¹² if there is one, or, if no such period applies, before the entry into force of the contract.

3.3.2 The competent body should publish notice of the application promptly after its receipt and decide whether it is to be entertained or dismissed within a specified number of days (three, for example) of its submission. If it is to be entertained, a decision should also be made (by the contracting authority) whether any procurement proceedings in process are to be suspended in the meantime. The competent

¹⁰ See the UNCITRAL Guide to Enforcement (<https://uncitral.un.org/en/texts/procurement>).

¹¹ Adequate judicial and administrative review procedures are a requirement of the UN Convention against Corruption.

¹² See Article 20.2 of the Model Law.

body may dismiss the application if it decides that it is manifestly without merit, the application was not submitted within the specified deadlines or the applicant does not have the necessary standing to submit it (a dismissal would also constitute a decision on the application). All other participants in the PPP process should be notified of the application and the decisions made, with reasons.

3.3.3 In deciding on an application, the competent body may open up, review, revise, overturn, correct or uphold any decision or action it has taken in the PPP proceedings to which the application relates. Its decision must be issued within a specified number of working days from receipt of the application and immediately communicated to the applicant, all other parties the challenge proceedings and all other participants in the relevant PPP proceedings.

3.3.4 The applicant should have a right of appeal against the decision of the competent body, or its failure to comply with the procedural requirements above, by immediately starting proceedings before the independent body (as provided below) or the courts. The start of any such proceedings should immediately vitiate the authority of the competent body to entertain the application any further.

3.3.5 All decisions of the competent body under this article should be in writing, should state the action taken and the reasons for them, and should promptly be made part of the record of the procurement proceedings (together with the application itself).

3.4. Application for review before an independent body

3.4.1 The bidder or potential private partner should also be entitled to take its challenge to a specified independent body, by applying for a review of the decision or action of the competent body or its failure to issue a decision under para (3) above within the prescribed time limits (or at all).

3.4.2 The regulations should again specify the time periods within which any such review application should be submitted. This should be essentially the same as under para (3) above, except that allowance can also be made in this context for submissions after the PPP contract has come into force. In that case, the time limit should be a specified number of days or weeks after the applicant became (or should have become) aware of the circumstances giving rise to the application, and in any event no later than a specified number of days or weeks after the PPP contract has come into force. The time periods can be “flexed” to some extent, where the independent body is asked to entertain the application at a (somewhat) later stage

on the grounds that it raises significant public interest considerations, and it is satisfied that those grounds justify it.

2.4.3 The regulations should spell out the powers of the independent body once it has received an application for review. These could include – as a preliminary matter – the power to order the suspension of the relevant PPP proceedings before the PPP contract has come into force, or to order the suspension of the contract’s performance where it has already done so, if and for as long as the suspension is thought necessary to protect the applicant’s interests (unless urgent public interest considerations demand otherwise). There should also be an express power to extend or lift any such suspension (taking account again of any urgent public interest considerations). The issue of a suspension order can be made virtually automatic and obligatory in certain circumstances (subject to the applicable time limits). Conversely, the independent body may dismiss the application and lift any suspension applied if it decides that the application is manifestly without merit, was not presented in compliance with the applicable deadlines or the applicant does not have the requisite standing to submit it.

3.4.4 The independent body should be obliged to decide about any suspension promptly on receipt of an application, and to notify the relevant competent body and all other identified participants in the PPP proceedings of the application and its substance, and of its decision, with details and reasons. It should publish a notice of the application.

3.4.5 The competent body being challenged should have to provide the independent body with prompt access to all documents in its possession relating to the relevant PPP proceedings, in an appropriate manner. In deciding on an application which it agrees to entertain, the independent body should have the right to declare the legal rules or principles governing the application. Its other available powers can include the following:

- Prohibit the competent body from acting, taking a decision or following a procedure that is not in compliance with the provisions of the PPP law
- Require the competent body to act, to take a decision or to proceed in a manner that complies with the provisions of the PPP law
- Overturn (in whole or in part) a non-compliant act or a decision of the competent body
- Open up, review and revise any non-compliant decision by the competent body
- Confirm a decision of the competent body

- Overturn the award of a PPP contract that has entered into force in a manner not in compliance with the provisions of the PPP law (and order the publication of the decision if appropriate)
- Order that the relevant PPP proceedings be terminated
- Dismiss the application
- Require the payment of compensation for any reasonable costs incurred by the person submitting the application and resulting from the non-compliant act, decision or procedure, together with any loss or damages suffered (which may be subject to specified limits, such as the costs of preparing the relevant submission or those relating to the application)
- Take such alternative action as is appropriate in the circumstances

The independent body should have an express obligation to take one or more of these actions. All its decisions under this para (4) must be taken within specified time limits (for example, within 20 working days after receipt of the application), and immediately communicated to the applicant, the competent body and all other participants in the application for review and the PPP proceedings. All decisions must be in writing, state the action taken and the reasons for it, and become part of the record of the PPP proceedings.

4. Rights of participants in challenge proceedings

4.1. Any bidder or potential private partner participating in the PPP proceedings to which the application relates, as well as any other competent body whose interests could be affected by the application, should also have an explicit right to participate in challenge proceedings under this Article of the PPP law. Any such person who fails to do so having been duly notified of the proceedings should be barred from subsequently challenging the decisions or actions the subject matter of the application.

4.2. The participants in challenge proceedings under this Article should have explicit rights in the regulations to be present, represented and accompanied at all hearings during the proceedings; to be heard; to present evidence, including witnesses; to request that any hearing take place in public; and to seek access to the record of the challenge proceedings (subject to the provisions of para (6) below).

5. Confidentiality in challenge proceedings

The regulations should provide for the confidentiality of proceedings under the Article. For example, no information should be disclosed in challenge proceedings, and no public hearing under this Article should take place, if doing would impair the protection of essential security interests of the state, be contrary to law or impede law enforcement, prejudice the legitimate commercial interests of the bidders or impede fair competition.

6. Grievance procedures

Article 34 of the Model Law calls for rather less precise and legalistic procedures than Article 23. Its aim is to ensure that users of the infrastructure facilities or public services in question – and especially members of the public – have a suitable mechanism available for “lodging objections, complaints or other grievances” in relation to “any aspect of implementation of a PPP project” that may affect them adversely. This is essential to the SDG principles of ensuring access and equity to the beneficiaries of public services, as well as transparency and accountability.

There are various ways to do this. The supporting documents¹³ should describe the options and explain their pros and cons. Formal legal procedures are not envisaged so much as relatively simple and usable arrangements by which people can bring their concerns and complaints to the attention of those responsible for the design, award and implementation of PPPs. This is also an essential aspect of the public consultation requirements which are now considered fundamental to the good governance of PPPs and their environmental, social and governance/SDG credentials. It is about ensuring that the public’s interests are properly protected and considered at each stage of the process of implementing a PPP.

The Article recognises that mechanisms of this kind can be worked into a range of different procedures to be developed in the supporting documents. They can be brought out in the processes for identifying and preparing PPPs, for example (prefeasibility and feasibility studies), where they focus on the social and environmental impact assessments of projects. They can be worked into the formal consultation processes with stakeholders and/or mentioned in the approval procedures that apply to a prepared PPP and its tendering (to ensure that any grievances and complaints have been properly considered). They are

¹³ These procedures and mechanisms are likely to be somewhat less legalistic than the challenge procedures discussed in the previous section, so it may be more appropriate to set them out and explain them in the guidelines rather than the regulations.

obviously relevant to the implementation of the PPP project by the private partner once the PPP contract has been entered into. In all of these, the draftsman should think carefully about the ways they can most effectively reflect the SDGs and the SDG Guiding Principles.

During the implementation phase, the relevant procedures can be set out more fully in the PPP contracts than in the supporting documents, although the latter can also helpfully indicate what form they might take. The PPP contracts can contain a schedule setting out the structure and requirements of a complaints procedure which the private partner must put in place and operate competently throughout the term of the contract. Indeed, Article 34 obliges contracting authorities to ensure that PPP contracts provide adequately for such procedures when the project involves public services or infrastructure facilities accessible to the public.

These mechanisms will always be additional to – and not a substitute for – the rights, remedies and protections that members of the public will normally have in any event under the host country’s wider legal system. These may include sanctions under both criminal and civil law (for instance, for dangerous or harmful acts or breaches of regulations) and rights to bring individual claims through the courts for negligence, nuisance (or their equivalent), breach of statutory duty or judicial review. Consumer protection law will often contain protections of this kind. Users of facilities or the beneficiaries of services may also have certain contractual rights and claims against the private partner if the service or facility gives rise to a contract between them (as it sometimes will). Breaches may give rise to injunctions, restraining orders, conduct orders and claims for damages and compensation. Article 34 makes it clear that the procedures must not limit or qualify these wider rights and remedies in any manner. Equally, the supporting documents should not need to provide for them or (necessarily) discuss or explain them in any detail.

The grievance procedures should make it clear how exactly a user or member of the public can lodge an objection or complaint, with precise contact details (including e-mail and postal addresses and telephone numbers), especially if a special office has been created to handle them; provide for written and oral statements as appropriate (with a standard online claim form); state what details need to be provided in connection with the objection or complaint; spell out the rights and remedies to which a complainant may be entitled under the procedure; set specific, efficient time limits for responding, with clear indications of the officials responsible for doing so; and provide for an appropriate appeal mechanism if the complainant is dissatisfied with the response.

This last step would usually call for a form of ombudsman or similar regulatory agency for dealing with appeals by a dissatisfied user or customer. If an ombudsman is to be effective, however, it needs an additional set of rules and procedures of its own, underpinning its creation, functions, powers and staffing. It needs to be adequately staffed by people with suitable qualifications and experience, its duties and powers in relation to appeals made crystal clear, and its precise legal standing properly defined. A poorly defined, empowered and manned ombudsman’s office will have little value and is likely to discharge its responsibilities tentatively and ineffectually, which can undermine confidence in the wider system. To work well, it needs “teeth” and decisiveness. Once a PPP system reaches a certain size and complexity, having a well-structured, standing office of this kind is likely to be an advantage. The supporting documents can provide for it.