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Chapter 4.

Recommendations for the development of legal terms and incentives to increase the attractiveness and transparency of unsolicited proposal mechanisms

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1. General

1.1 This guidance document has been designed to offer recommendations to governments on how to develop formal regulations under the country's PPP act (or equivalent), in line with best practice.¹

1.2 Unsolicited proposals provide several potential benefits to the state government authorities (SGAs) and municipal authorities of CIS member countries. They may:

- allow SGAs to better identify and prioritise projects in their pipeline of public-private partnership (PPP) projects
- generate innovative solutions to infrastructure challenges
- help overcome challenges related to early-stage project assessment.

1.3 However, they also introduce potential challenges. Unsolicited proposals often worsen a lack of technical capacity to evaluate, prepare, procure and implement PPPs. They might also create difficulties with fiscal planning if they were not part of normal infrastructure-budgeting processes.

1.4 SGAs shall consider the main principles of unsolicited proposals recognised by the Commonwealth of Independent States (CIS) Model PPP Law: availability of unsolicited proposals, the right of the private initiator to negotiate with the considered public partner, the obligation of the relevant authority to consider the unsolicited proposal, and the requirement of justified refusal in accordance with the law.

1.5 Other challenges relate to creating competitive conditions and aligning public and private interests. Lastly, the relevant SGA may need to overcome adverse perceptions associated with unsolicited proposals, including perceptions of corruption. SGAs shall avoid poor projects (for example, projects that are badly planned, provide unjust enrichment on the private partner's side, or represent poor value for money) and accept only well-planned and high-quality PPP initiatives, because only they can bring success. To overcome these challenges, there are key recommendations for SGAs that plan to develop and operationalise unsolicited proposals for infrastructure projects based on international best practice.

2. The main stages of implementing an unsolicited proposal

Unsolicited project proposals typically follow a five-stage cycle:

- 1) submission of the proposal by the private initiator
- 2) evaluation of the unsolicited proposal by the public partner
- 3) development of the studies for the unsolicited proposal project
- 4) procurement of the unsolicited proposal project
- 5) implementation of the project (the construction and operating phases).

3. Principles and recommendations for the development of legal conditions for the mechanism of unsolicited proposals

3.1 The following principles should be considered when developing an unsolicited proposal mechanism in CIS countries:

- 1) **Public interest:** Initiated projects must comply with national infrastructure priorities and meet a real social and economic need.
- 2) **Value for money:** SGAs should only structure privately initiated projects as PPPs if they are expected to generate greater value for money under PPP delivery than under conventional delivery or procurement.
- 3) **Affordability:** SGAs must understand the impact of an unsolicited proposal mechanism on public finances, including whether fiscal liabilities are acceptable and risks are sufficiently manageable.
- 4) **Fair market pricing:** SGAs should ensure that PPP agreements (PPAs) resulting from unsolicited proposals reflect market prices, avoid excessive private returns and include a risk allocation appropriate for the SGAs.
- 5) **Transparency and accountability:** SGAs should disclose all relevant project information to allay stakeholder concerns regarding transparency and accountability.
- 6) **Alignment of PPP and unsolicited proposal mechanism procedures:** SGAs are advised to align PPP and unsolicited proposal mechanism policies

¹ For detailed examples of best practice, see World Bank (2018), Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects, Volumes I- III, Washington, DC.

to increase stakeholder support, enhance market interest and ensure consistency in public decision-making.

7) Public accountability: SGAs and the government are accountable to the public for their activities in the areas of PPP, public infrastructure and public services.

8) Necessity to reconcile interests: Harmonisation of the interests of the SGAs and the private sector should be ensured when implementing projects through the mechanism of unsolicited proposals, including the clear establishment of the obligations of the parties on the basis of mutual responsibility, trust and respect.

3.2 A common set of recommendations can be presented to the SGAs to improve their PPP frameworks and capacity to manage unsolicited proposals:

- **Develop an unsolicited proposals policy framework** – policies for steps and timelines to manage the unsolicited proposal mechanism, covering minimum submission requirements, reimbursement and protection of intellectual property, procedures for introducing competition and reward systems (bonus system, direct compensation, automatic shortlisting and so on), and eligibility for and types of government support, if any.
- **Build institutional capacity** – build capacity and empower PPPs or similar units to manage unsolicited proposals, conduct feasibility studies independently or in-house, design and implement clear regulations for the assessment of fiscal risks and liabilities, incorporate blind reviews of unsolicited proposals, seek assistance from multilateral development banks and use transaction advisers for due diligence and the selection of proposals.
- **Follow competitive procurement processes and procedures** – establish communication with initial unsolicited proposal proponents and competitors, develop stakeholder coordination, ensure commitment for contract enforcement and follow typical PPP processes and procedures.

3.3 The CIS member country's government needs to consider the most important decisions to shape the unsolicited proposal mechanism:

- Government should determine the extent to which it will define the parameters of unsolicited proposals. The government may choose to encourage unsolicited proposal submissions that provide for particular types of PPPs and/or address specific infrastructure challenges, geographies, sectors or technologies. Defining parameters too narrowly, however, may limit the scope for innovation.

- Government should determine how to incorporate the unsolicited proposal regulation into the existing regulatory framework. The government may incorporate it into procurement laws for conventionally delivered projects, into PPP-specific laws, regulations or policies, or as a standalone act. In any case, the main principles of the unsolicited proposals framework shall be set out in the law.

- Government should determine the extent to which the project initiator may be involved in project development. Involving the project initiator in project development has major disadvantages for SGAs, including loss of control over project structuring, loss of negotiating power due to information asymmetries, and difficulties generating competition during a competitive tender. They have two options: project development by the SGA (with external advisers) or project development by the SGA and project initiators, whereby the SGA (and its external advisers) undertake specific public-interest studies, and the SGA and its advisers undertake a detailed review of any studies developed by the project initiator.

- Government should determine which procurement methods and incentives will be allowed. Governments are advised to tender unsolicited proposals competitively whenever possible. Some SGAs may opt to negotiate directly with the project initiator when market interest is limited to the project initiator, but the project is in the public interest. The legislation should clarify whether direct negotiation is acceptable and, if so, in what circumstances. In case of a competitive tender, the legislation should also specify whether the project initiator will be given any advantages over competing bidders. These recommendations strongly go against the right-to-match mechanism, given its potential to discourage competition compared with the bonus mechanism and automatic shortlisting.

4. Possibility of using unsolicited proposals

4.1 The mechanism of unsolicited proposals, if properly structured and fine-tuned, is an effective way of implementing PPP projects.

In the CIS member states, PPP projects implemented through the unsolicited proposal mechanism are, by and large, innovative and socially oriented, as they typically already have some legal framework for unsolicited proposals, aided in part by the 2017 Eurasian Economic Commission's PPP Guidelines. This mechanism also reduces the duration of procurement procedures and lets investors propose self-developed projects to public partners. Nevertheless, SGAs should realise that not all

privately initiated PPPs are really innovative, unique or contain new technologies. They must be aware that unsubstantiated claims of intellectual property or innovation by private initiators may lead to challenges in terms of transparency and competitive procurement.

At the same time, it is important to find a balance between the interests of all PPP parties and provide them with transparent procedures on unsolicited proposals that will not substitute competitive procedures for the selection of the private partner.

4.2 Unsolicited PPP proposals may be permitted as a way of accelerating PPP deal flow in accordance with the recommendations outlined in section 3. A person who qualifies as a private partner can submit an unsolicited PPP proposal. As there are risks for the public side, legislation shall establish other requirements for a private investor submitting an unsolicited proposal. These can include technical expertise and qualifications, level of investment and resources behind the proposal, non-liquidation, financial stability and, perhaps, funding confirmation requirements. The legislation should also establish the SGA for the receipt of unsolicited proposals and procedures and terms for its consideration, as well as regulate in detail the decision-making process involved. This ensures fair competition, as any other interested investors may apply to have the opportunity to bid for the project.

5. Submission and substantiation of unsolicited proposals

5.1 When the proposal is submitted, the SGA has to verify whether it meets all the requirements. These requirements must not be complicated or ambiguous; they must be clear and standardised. The SGA is advised to adopt an exhaustive list of reasons for denying a submission. Legislation should provide a dedicated timeframe for consideration of unsolicited proposal submissions to streamline their processing. It may be feasible to require the project initiator to pay a review fee to discourage private partners from submitting poor-quality, incomplete or opportunistic proposals. Another effective measure is to require criteria for assessing the project initiator – including integrity or due diligence criteria and requests for past qualifications. This information would help the relevant authority evaluate the reputation, experience and integrity of the project initiator. Moreover, specifying how the SGA addresses requests to protect proprietary or confidential information from the project initiator will minimise unnecessary safeguards that reduce transparency.

5.2 It is recommended that the unsolicited proposal undergo the applicable procedure for assessment of the PPP project. This should be initiated by the public partner according to the CIS member countries' approved methodology for evaluating the effectiveness of PPP projects, in line with Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS) Resolution No. 48-7 of 29 November 2018. Recommendations for evaluating proposals include:

- Introduce clear evaluation criteria and procedures to help the relevant authorities process unsolicited proposals efficiently and ensure that these proposals are aligned with public objectives.
- The evaluation criteria should cover public interest, project feasibility (including affordability considerations), PPP suitability for implementation of the project and the provision of related services.
- The use of benchmarking to evaluate the initiated project, so the relevant authority can compare its terms with those of similar projects. Benchmarking refers to identifying and qualitatively and/or quantitatively analysing projects in similar sectors and market settings. The comparison can focus on the type of solution being proposed, the cost components, the proposed timelines, the proposed risk allocation and the extent of market interest.
- Disclose parts of the submission and evaluation process to boost transparency and accountability.



Disclosure should cover material elements of the submission, the process and findings of the evaluation process, and a description of the proposed project development and procurement process.

- Seek approval from a decision-making authority before moving to the next stage.

5.3 If the proposal passes all stages successfully and the public partner considers it unique and innovative (the legislation may list other criteria), a PPPA may be entered into with the project initiator without tendering. Tendering procedures will be held if the project passes all the approvals but is not considered unique or innovative (or when the public partner believes it necessary to initiate a tendering process). In any case, an investor proposal to initiate the PPP project shall be published on the public partner's official website and/or the official website about the tendering procedure (if applicable) and/or in the official publication about tendering procedures (if any). If other parties are interested in implementing the project, the relevant authority shall conduct competitive procedures to select a private partner for the project.

5.4 To ensure balanced regulation in terms of unsolicited proposals, legislation should generally lean towards competitive tendering for unsolicited PPP proposals and provide the project initiator with certain bonuses or incentives in any tendering process (such as bonus bid points or a waiver of the requirement to submit bid security).

6. Incentives for developing unsolicited proposals

6.1 Incentives and bonuses may be offered to the project initiator during tendering procedures to find a balance between the interests of the parties, ensure competition and transparency, and increase the attractiveness of the unsolicited proposal mechanism. Incentives could include the following:

- The right to demand that the bidder that has entered into an agreement with the public partner (if this bidder is not the project initiator) reimburse the project initiator's costs for preparing the project in the amount established by the tender documentation. The SGA is to decide whether, upon entering into the PPPA, the winning bidder (if not the project initiator) remunerates the project initiator in full for its reasonable expenses in connection with (pre-tender) project preparation. Alternatively, the SGA itself may reimburse the project initiator.
- Exemption from the need to provide security to fulfil its obligations at the preliminary selection and/

or competition stage (which means not requiring the project initiator to provide security during tendering), or exemption from performing other obligations at the preliminary selection and/or competition stage. This will reduce the expenses for the project initiator (which has already borne the costs of preparing the project and is not likely to walk away from its own proposal).

- Giving the project initiator a bid bonus – an additional percentage added to its evaluation score, though this can be difficult to apply and may distort the competitive process unhelpfully.
- Other benefits and incentives.

Lastly, the project initiator may be automatically invited to the final stage of the tendering procedures.

6.2 The public partner will choose which of the above support measures to use based on the methodology to be adopted by the relevant SGA. The amount of compensation shall not be excessive and shall not affect the competition between bidders. The SGA should adopt rules specifying the maximum level of compensation.

6.3 A project initiator should be able to contact the public partner before submitting an unsolicited proposal (and even before preparation begins) to discuss key aspects of the proposed project and determine whether it interests the public partner. The project initiator may also discuss its proposal with the SGA at any stage during its submission and/or review.