



UNECE

United Nations Economic Commission for Europe

UNECE PPP STANDARD FOR ZERO TOLERANCE APPROACH TO CORRUPTION IN PPP PROCUREMENT

Revised Draft v2.0
March, 2017

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

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RESTRICTED
WP PPP/LEGISLATION/01
March 2017

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE
WORKING PARTY ON PUBLIC-PRIVATE PARTNERSHIPS (WP PPP)

Revised Draft

UNECE PPP STANDARD FOR
ZERO TOLERANCE APPROACH TO CORRUPTION IN PPP PROCUREMENT

Implementing the United Nations 2030 Agenda for Sustainable Development
through effective
“People-First Public-Private Partnerships”

SOURCE: Zero Tolerance Approach to Corruption in PPP Procurement Project Team

This revised draft is based on an initial draft prepared by an international project team led by Mr. Marc Frilet after it had undergone a rigorous public and peer review.

The UNECE is currently consulting major stakeholders before a final document is released.

ACTION: Revised draft

STATUS: Draft v2.0

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Terms

74		
75		
76	AAAA	Addis Ababa Action Agenda
77	DB	Design and Build contract
78	DBO	Design Build and Operate contract
79	EPC	Engineering, Procure and Construct contract
80	OECD	Organisation for Economic Co-operation and Development
81	O&M	Operation and Maintenance
82	PFI	Privately Financed Infrastructure
83	PPP	Public Private Partnership
84	PfPPP	People First Public Private Partnership
85	SDG	Sustainable Development Goal
86	ToR	Terms of Reference
87	UNECE	United Nations Economic Commission for Europe
88	UNCITRAL	United Nations Commission on International Trade Law
89	USD	United States Dollars
90		

91

Introduction

92 The United Nations Sustainable Development Goals (SDGs) come with a huge price tag. Recent
 93 reports have estimated that global infrastructure will need USD 3.3 trillion of investment per year
 94 just to keep pace with projected growth.¹ This massive sum will need to be mobilized from many
 95 sources, including from the private sector. And governments scaling up investment and infrastructure
 96 development of this magnitude will need to make a strong commitment to transparency and integrity
 97 and in particular implement plans to fight corruption, in order to attract the requisite investment,
 98 efficiently and effectively partner with the private sector, and accelerate their initiatives to meet the
 99 UN SDGs.

100

101 While the potential of PPPs to fill the development gap is great, and the UN SDGs call on
 102 governments and officials to rise up to this challenge, corruption continues to pull governments
 103 down.

104

105 In 2015 alone, the Honduran Social Security Institute was accused along with a number of its top
 106 officials of awarding USD 200 million of contracts to phantom companies; Nigerian officials were
 107 accused of awarding phantom contracts for military supplies, including helicopters, fighter jets,
 108 bombs, and ammunition, that never arrived and caused estimated losses exceeding USD 2 billion;
 109 and senior Malaysian officials were accused of diverting upwards of USD 1 billion from a public
 110 fund intended to promote economic development and revitalize Kuala Lumpur.²

111

112 These are just some of the high-profile cases. In less sensational circumstances, and in countries
 113 around the world, there are compromised public processes, bribes being paid for basic public
 114 services, friends and relatives of officials being awarded contracts, and other abuses where public
 115 authority is leveraged for personal gain.

116

117 And the damage is not only monetary. Corruption slows the provision of public services, impairs
 118 economic growth and activity, and undermines the time, energy and resources applied by those
 119 attempting to provide actual good governance and public services.

120

121 Governments embracing the UN SDGs, however, in particular those seeking robust development
 122 programmes that include PPPs, should not measure corruption simply on the toll that it takes, or how
 123 it undermines their efforts; instead, governments should measure corruption by what they have to
 124 gain in successfully combating it and implementing a zero tolerance approach. How much could be
 125 saved? How many more people could be served? How would the world look with far less corruption?

126

127

The potential savings in fighting corruption

Saving Money

129

130 The potential savings in fighting corruption in public procurement can be massive.

131

- 132 • The 2014 OECD Foreign Bribery Report estimates that bribery consumes 10.9 per cent of the
 133 total transaction value in public procurement globally.

¹ McKinsey analysis; McKinsey Global Institute Analysis, 2016

² Foreign Policy, *The Worst Corruption Scandals of 2015*, Siobhan O'Grady, D

- 134 • The World Bank estimates that about USD 1 trillion is paid each year in bribes around the
135 world.³
136

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

- 142
- 143 • Transparency International, in its Global
144 Corruption Report 2005, estimated that
145 corruption in construction could add as much as
146 50 per cent to a project's cost. It further
147 estimated that 10 to 30 per cent of investment in
148 a publicly funded construction project may be
149 lost through mismanagement or corruption
150 (COST 2011 Research).
151

“We will work to strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions, of the corporate sector as well as of public administrations”.

*Addis Ababa Action Agenda
Declaration 2015*

152 The European Commission has stated that “annual losses in global construction through
153 mismanagement, inefficiency and corruption could reach USD 2.5 trillion by 2020. And yet the
154 savings are perhaps better measured not by the monetary savings, but by the increased impact that
155 programmes and projects could have in a corrupt free environment.
156

157 Saving Lives

158

159 The World Bank has stated that corruption disproportionately impacts the poor while undermining
160 growth and prosperity by siphoning away resources from their intended purposes *and* exacerbating
161 the long-term effects of those services not being delivered.⁴ Corruption also erodes the social
162 contract between state and citizens.
163

164 For example, in the healthcare sector, corruption can in very real terms harm people. Corruption
165 diverts time, attention, and resources away from the care that is to be provided and the health of the
166 population that are to be served. This means, among other impacts, increases in child mortality,
167 decreases in the availability of critical medicines, and failures to prevent otherwise preventable
168 illnesses.
169

170 People First PPPs

171

172 Corruption is therefore of a particular concern for the UN SDGs and “People First PPPs” (PfPPPs)
173 because a core aim of PfPPPs is to not just deliver value for money and have routine public services
174 provided to the people, but for PPP projects and programmes to have the maximum positive
175 transformational effect on the lives of those people⁵. This is especially critical for projects that aim to
176 improve conditions in low and middle income countries and where budgetary and capacity
177 constraints are most acute.
178

³ World Bank Governance Brief Anti-Corruption. May 2016

⁴ World Bank Group President Jim Yong Kim, Anti-Corruption Summit 2016, London, United Kingdom

⁵ UNECE is currently preparing guidance materials and criteria for People First PPPs.

179 Consequently, there is an urgent need to build upon existing anti-corruption and anti-bribery
 180 resources and develop materials that a) are universal in nature, b) contain anti-corruption principles
 181 and recommendations specifically targeted toward PPPs, c) may be readily incorporated by countries
 182 and public authorities into their systems to combat corruption, and d) enhance a government's
 183 overall anti-corruption efforts. Doing so will offer all stakeholders of PPP projects a comprehensive
 184 and substantially increased level of protection against corruption and pave the way for pipelines of
 185 projects that bring real development to the users of these standards while saving money and saving
 186 lives.

187

188 The purpose and implementation of this standard is also important because the UN recognizes that
 189 corruption has a unique potential to undermine the SDGs, and reference should be made in particular
 190 to:

- 191 • SDG 16 is dedicated to the promotion of peaceful and inclusive societies for sustainable
 192 development, the provision of access to justice for all, and building effective, accountable
 193 institutions at all levels. SDG 16.5 and 16.7 further target a substantial reduction in
 194 corruption and bribery in all their forms, and development of effective, accountable and
 195 transparent institutions at all levels.
- 196 • SDG 17 calls for strengthening the means of implementation and revitalization of the global
 197 partnership for sustainable development. Its SDG 17.17 calls for encouraging and promoting
 198 effective public, public- private, and civil society partnerships, and building on the
 199 experience and resourcing strategies of partnerships.

200 The Addis Ababa Action Agenda (AAAA), a global framework for financing development post-
 201 2015, also calls on governments to combat corruption at all levels and in all its forms, and to
 202 implement effective, accountable and inclusive democratic institutions.⁶

203

204 *Objectives and drafting considerations for the Standards*

205 1. Objectives

206 The overall objectives of the Standard are the following:

- 207 - Provide a voluntary set of principles and conditions that government and public authorities
 208 could incorporate in their regulations or policies in undertaking PfPPP procurement in
 209 compliance with the SDGs.
- 210 - Assist law makers and public authorities to improve the opportunities to use PPPs in ways
 211 that mobilise their potential and reduce risk and complexity while improving the regulatory
 212 response to corruption in Peps.
- 213 - Inform and educate all parties, including civil society, on how PPPs may be entered and
 214 operated that are of high quality and not compromised by unethical behaviour and defects
 215 caused by the lack of integrity or corruption.

216 2. Drafting considerations

217 To achieve the above-referenced objectives, this document has been based on:

⁶ Addis Ababa Action Agenda, Financing for Development, Section II. B. 48; UN Sustainable Development Goals, Target 17.17

- 218 - An identification by a multidisciplinary team of public and private PPP experts from various
219 organisations and countries, of the 'high risk' areas within a PPP procurement process; and.
220 - An integrated drafting process aimed at producing a standard more or less of universal nature,
221 drafted in plain language, and which is easy to understand, simple to apply, and requires little
222 to no judgement in determining a means for effective implementation.
223

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Effective Implementation of the Standard

Presentation and Publication of the Standard

a. Governments seeking to implement this standard should adopt the standard and then adapt its recommendations through various actions that may include making them binding and subject to judicial review and criminal penalties in case of major infringement.

b. Governments should make elements of the standard and its recommendations and actions publicly and freely available and accessible and put systems in place to keep them up to date.

c. Governments should make all other authoritative information relating to a PPP procurement, notably legal rules and procurement procedures, easily accessible and free of charge to access this information.

Coordination with UNECE

d. Governments should consult with UNECE as needed on the implementation and compliance with the Standard.

e. Governments should exchange with UNECE to resolve any issues of implementation and compliance with the Standard.

f. Governments should utilize any accompanying UNECE materials, standards, guidance, and/or checklists for better implementation of the Standard.

Voluntary Certification of the Governmental Entity Responsible for Procurement of the PPP

g. Governments should work to bring their respective administrative and procuring entity(ies) into compliance with the standard and build the necessary institutions, procedures, and capacity to combat corruption.

h. Governments should consider a voluntary review and consultation with UNECE to evaluate the entity(ies) responsible for Procurement of PPP compliance with the standard and progress toward the award of a UNECE certification of compliance.

Non-compliance with Transparency and Integrity Standard and Sanctions

i. Governments should investigate allegations of misconduct, conflict of interest, or other acts of corruption and utilize an independent authority having the power to take interim measures to safeguard the integrity of the procurement process.

265 j. Governments should sanction any infringement with civil or criminal penalties as necessary and as
266 determined by the jurisdiction.

267 k. Governments should establish a transparent, independent, efficient and fair procedure of inquiry
268 and enforcement.

269 l. Governments should establish, publish, and maintain a debarment list within an independent
270 authority and make the list judicially reviewable.

271

272

273 **Misprocurement and Protests**

274

275 m. Governments should implement an effective protest mechanism for bidders. A mechanism which,
276 for example, can include a prohibition on the contracting authority signing the PPP contract for a
277 specified period of time while the name of the preferred bidder and the basis for award is disclosed to
278 all prospective bidders, and/or resolution of the protest has occurred.

279 n. Governments should allow any bidder, or prospective bidder justifying an interest, who fails to be
280 selected, to protest the award for misprocurement.

281 o. Governments should allow protests to be reviewed by a Fairness Auditor and/or filed with an
282 independent authority or a court having the power to make a full or interim decision to, among other
283 things, suspend the awarding process upon proof of prima facie evidence that the protest has
284 sufficient merit, cancel the procedure, and/or take other appropriate remedial action.

285 p. In the event of a protest, governments should provide to the aggrieved bidder any special report
286 certified by an Integrity Officer and any other transcript or procurement record generated by the
287 public authority in accordance with the public disclosure rules. This is particularly important in
288 scenarios where the procurement involved competitive dialogue or negotiation and/or there is a
289 greater risk of improper communications.

290 q. The Public Authority may proceed with the signature of the contract without prejudice of the right
291 of any aggrieved bidder to initiate court proceeding for damages with a competent court.

292

293 **Organization of the Standard**

294

295 **Part 1** discusses the three (3) stages of PPP procurement and highlights the potential for corruption
296 in PPPs.

297 **Part 2** elaborates further the core areas where corruption in the procurement process may occur and
298 sets out recommendations on implementing a zero tolerance to corruption approach in People First
299 PPP procurement.

300

301

I. Corruption Risk in PPP Procurement

Preliminary Observations and Public Contracts

PPPs belong to the category of public contracts. As such, the core principles underlying the procurement of ‘traditional’ public contracts are also applicable to PPP contract procurement. This includes competitive bidding, transparency and non-discrimination throughout the tender. The UN Commission of International Trade Law (UNCITRAL) Model Law on Public Procurement provides that a well-designed procurement a) maximizes economy and efficiency, b) fosters and encourages participation in the process, c) promotes competition for the subject matter of the procurement, d) provides fair, equal, and equitable treatment of those involved, e) promotes integrity, fairness and confidence in the process by stakeholders, and (f) achieves transparency in the process.⁷

While of the same family, PPPs have certain distinguishing characteristics from ‘traditional’ public procurement contracts. One main distinction is that a PPP often aggregates under one composite contract, the financing, design and construction (or rehabilitation) of public infrastructure, together with the delivery of part or all of the associated public services by the private partner. In addition, PPPs need to accommodate changing needs of the people they serve due to the longer period of the venture. This triggers a “partnership situation” where the public and private sector partners must truly work together over long periods of time and fine tune the services, economic conditions, and other contractual obligations and performance of the project. Parties must therefore build a fair and equitable approach to future contingencies and operational and maintenance issues that is uncommon, or at least of a much different magnitude, from other types of public contracts.

One of the procurement challenges of PPPs is to evaluate and plan for, well in advance the various issues and risks that will be encountered during the life of the contract. It is also difficult to choose a partner that is able to make long term commitments for financing, designing, building and operating infrastructure, under rigorous performance parameters and contractual clauses, capable of real partnership with the public sector, and who places the interest of the people first. This is arguably the most important distinguishing characteristic, that is, to find the right counterpart and bring public and private parties together in a lasting partnership that is not just a short term ‘deal’, but is grounded partnership law and traditional contract and procurement law.

The impact of this type of contracting on public procurement is manifold. For instance, one of the main selection criteria in traditional public procurement is the price to be paid upon acceptance of the work or upon completion of certain performance specifications. By contrast, in the majority of PPP cases, the price to be paid for the work or the infrastructure, while certainly important, is not the only selection criterion. Indeed, the price is commonly just one criteria among many others; criteria such as the optimum design commensurate with innovation, improvement, and adaptation of the service, the overall ability to limit maintenance costs, a robust asset replacement plan, a responsible and limited impact on the public budget, etc. In fact, this “basket” of performance criteria, along with appropriate weighting ratios, is the recommended procurement approach to selecting the private partner in PPPs.

⁷ UNCITRAL Model Law on Public Procurement , January 2011, available here:
<http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

345 Nevertheless, despite a range of differences, PPPs remain a public contract, arising from a public
346 process, and aimed at fulfilling a public need. In this sense, a PPP will benefit from a well-designed
347 procurement and a rigorous anti-corruption framework just as any traditional governmental contract
348 would.
349

350 **The Three stages of a PPP procurement**

351 PPP procurement operates much like traditional public procurement, either in concept or in fact, with
352 the procurement process unfolding across three conceptual stages:

353 **Stage 1** is the public entity's effort to identify its needs, examine its available resources
354 versus those that it will need to obtain, then identify potential sources and solutions in the
355 market, measure impacts and benefits, and risks of the PPP option, including identify
356 budgetary capacity versus the potential liabilities of solutions due to the anticipated allocation
357 of risks or rights of an approach, and finally set out the parameters of its proposed tender. A
358 key goal of these Stage 1 activities is to ensure awareness by the public and private sectors of
359 each other's problems and preferences.

360
361 **Stage 2** is putting the contracting opportunity out to bid thus subjecting it to competition, and
362 evaluating and awarding the contract. PPPs can be large projects with complex interconnected
363 operational elements, and sometimes equally complicated financing, so the cost and time to
364 generate a responsive bid and evaluate offers can be very high. As a result, PPP procurement
365 is often broken into two steps, a qualifying step and then a bidding step.⁸ The qualifying step
366 is where qualified bidders are identified and the number of overall bidders invited to bid on
367 the contract may be narrowed. The bidding step is then to have those pre-qualified bidders
368 compete on the contracting opportunity and bid. In the end, the public entity, through an
369 evaluation process, awards the contract to the bidder who it judges has proposed the best
370 solution in terms of approach and cost, providing the services needed, and is capable of
371 achieving the declared benefits for citizens' lives and sustainable development goals.

372
373 **Stage 3** is after a winning bidder has been identified, contract finalization occurs, and the
374 contract starts beginning has been awarded. This is the long-term performance of the bidder
375 parties under the contract. In infrastructure projects this is sometimes referred to as the
376 operations and maintenance (O&M) phase. This is also when governments may review and
377 identify variations in the expected and declared benefits of a project on citizens' lives and the
378 identified sustainable development goals through an ex-post evaluation (and update any
379 standardized tools, approaches, or risk allocation expectations used in the process.)
380

381 **Risk across all three stages**

382 Corruption in PPP procurement is often seen as gaining an unfair advantage in the 'competition' or
383 Stage 2 of the process, that is, influencing the competition such that one bidder wins or gains an
384 unfair advantage amongst the pool of other potential bidders.

385 A holistic view of corruption in PPPs however needs to focus on all three of the PPP procurement
386 Stages and their linkages. This is not only because corruption can occur at any stage of the process,

⁹ See, *Curbing Corruption in Public Procurement: A Practical Guide*, Transparency International, 24 July 2014

387 but because corruption tends to go wherever the system is weakest or unregulated – that is, wherever
388 it is easiest to get away with and in some cases where the least amount of scrutiny is being applied.

389 For example, empirical evidence shows that when extortion or bribes and other collusion with public
390 officials occurs it is frequently at the outset of procurement, or, that one of the parties is
391 underperforming, unfairly seeking adjustment to performance requirements, or distorting regulatory
392 procedures, reporting, or invoices, years into a long-term contract.⁹

393 The fact that these examples demonstrate corrupt practices at the outset of a PPP and at the end
394 during operations, might suggest that governments have a robust and well executed Stage 2, e.g. the
395 tendering process.

396 Unfortunately, this less than absolute, many governments still lack basic institutional elements and
397 good practices to conduct a robust tender, especially when the intensity and complexity of a PPP
398 presents itself.

399 As a result, Government systems need improvement across all three stages. And in order to provide
400 value for people through PPPs and follow the findings of the Addis Ababa Action Agenda of the
401 Third International Conference on Financing for Development, governments (and their private
402 partners) need to be thoughtful in the design and implementation of PPPs in order to prevent the
403 pitfalls from the past and rise up to the ambitious goals of the UN SDGs.

404

405 **Corruption potential**

406 Corruption in PPPs is not a certainty. Many PPP projects are undertaken and executed with integrity
407 and transparency and result in very positive outcomes. In fact, in some ways PPPs can be better
408 insulated from corruption than traditional public procurement contracts. Because PPPs often involve
409 the creation or rehabilitation of large or signature pieces of infrastructure, the project can receive a
410 greater amount of attention and scrutiny than many routine or smaller public contracts. PPPs can also
411 benefit from well-structured agreements that are negotiated at length and in detail, and have
412 customized incentives to ensure a project is constructed to high standards and has long term
413 durability; thus, reducing the risk of questionable contracts being awarded, contractors cutting
414 corners, and bribery influencing the outcomes or performance.

415 Despite these potential upsides, PPPs can also be more at risk for corruption¹⁰, with some of the
416 more prominent causes being:

- 417 • When the government lacks strong institutions –government structures, authority, and
418 review and approval processes that are all clearly established and demarcated, and operate
419 with integrity and transparency under robust yet efficient checks and balances on decision
420 making.

421

⁹ See, *Curbing Corruption in Public Procurement: A Practical Guide*, Transparency International, 24 July 2014

¹⁰ Most institutions, the UN, the World Bank Group, OECD recognize the corruption risks, and that it can come in different forms. from unfairly determining the winners, to awards favouring friends or relatives of government officials, to simply skewing how the institution or competition works. These large institutional players recognize that corruption is important and tackling them is critical to making their and governments' efforts effective and achieving sustainable change. (For example, the World Bank Group has debarred more than 370 companies, governmental organizations and individuals over the past 7 years.)

- 422 • When a PPP concept is market tested and the public body goes out and interacts with the
423 market and potential bidders to see what solutions are available - this interaction is often a
424 necessary step in a PPP procurement, yet it also potentially opens opportunities for improper
425 conversations or influence between the bidder and public officials, or simply for the private
426 sector to steer the public party's 'needs'.
427
- 428 • When competitive dialogue and negotiation is used - which may be necessary to fine tune
429 the public service, and if not well-organised with appropriate safeguards, it also provides
430 opportunities for improper conversations or influence, behind the scenes arrangements, or
431 schemes to gain an upper hand against competition.
432
- 433 • When projects are very large and/or technical in nature - certain sectors that compete on
434 these types of public contracts are actually small communities, with a finite number of
435 companies, employees, experts, and contractors working in that sector. The result being --
436 the risk of conflicts of interest are enhanced, especially when employees tend to move from
437 public to private, and then private to public service.
438
- 439 • When projects involve significant amounts of money - the desire to win such opportunities
440 can be intense, and the incentive to get access to the contract, even if for example it is
441 simply helping a friend or family member gain a subcontracting opportunity on a lucrative
442 project, can be great.
443
- 444 • When PPPs are long term - public contracting opportunities of significant length do not
445 come around often, and as noted, certain sectors have a limited number of players who are
446 able to provide such a service and for such a long term, so the need to gain an advantage
447 over your competitors and/or win the contract can be acute.
448
- 449 • When governments are technically ill equipped – governments often have to retain
450 sophisticated, front-end transactional, financial, technical, and/or legal consultants and
451 experts to handle complex PPPs. These relationships, many of which the government relies
452 upon heavily, present windows of opportunity to control the process or influence the
453 outcomes of the procurement and consultants and experts, while necessary, need to be
454 managed appropriately.
455
- 456 • When a project is ambitious but performance measurement is weak - governments can
457 benefit from the outcome based approach of PPPs, yet, when there are no clear or applicable
458 methodologies in the tender and/or contract to measure those outcomes and performance,
459 such as reliable base year data, the project can be made to appear successful, but ultimately
460 fail in its purpose.

462 II. Zero Tolerance Approaches to Anti-Corruption in 463 PPP Procurement

464

465

Stage 1

466

467 **Stage 1** of a PPP procurement encompasses all the activities and period of time prior to a public
468 entity putting a PPP contract out to bid. Anti-corruption measures implemented during this stage
469 are often some of the most important because they establish many of the key elements of an anti-
470 corruption environment and mentality that will span from project inception, to tender of the
471 contract, and through the long term operational activities that will be carried out under a PPP
472 contract. The following approaches are procurement related, institutional elements that promote
473 the overall transparency and integrity of PPPs and the governmental systems within which they
474 occur.

475

476

A. Compliance with Laws and a Code of Ethics

477

478

Challenge

479

480

481

482

The challenge for governments in a PPP procurement is to promote predictability in an open and fair competitive process with public and private participants adhering to high ethical standards and clean conduct throughout the PPP process.

483

Recommendations

484

485

486

487

1. Governments need to set boundaries, benchmarks and expectations for public and private sector participation in a PPP, and establish legal and ethical controls that build trust in, and between, the public and private participants and a framework that ultimately strengthens the underlying social compact between government and its citizens.

488

489

2. Governments should have anti-corruption laws, regulations and codes in place that either incorporate or are based upon international models and anti-corruption instruments.

490

491

492

3. Public and private sector participants to a PPP procurement process should endorse and/or commit to complying with all domestic and applicable international laws, regulations and codes relating to anti-Corruption.

493

494

4. The Tender documents shall refer to such applicable laws, regulations and codes and include an undertaking by the Public Authority and by the bidders to comply with them.

495

496

5. Governments should have and incorporate into their PPP activity a code of ethics setting up the standards of behaviour of public and private participants involved in the procurement process.

497

6. The Tender documents should incorporate and refer to the code of ethics.

498 7. The code of ethics should be formally endorsed by the public authority sponsoring the PPP, on
499 behalf of itself and the various public entities involved in the process, and by bidders.

500 8. Violations of the law, regulations or codes relating to anti-corruption should be enforced and
501 punishable or sanctionable, with such remedies as fines, civil or criminal penalties, and removal or
502 disbarment of the offending person or entity.

503 9. Governments should have an independent anti-corruption entity providing oversight, guidance,
504 administration and enforcement of anti-corruption systems.

505 10. Governments should require private sector companies bidding for PPPs to have their own
506 published code of ethics and internal anticorruption procedures that can be independently audited.

507

508 **B. Avoidance of Conflicts of Interest**

509

510

Challenge

511 *In order to put “people first”, it is important for governments to ensure that*
512 *their PPP projects are protected from those seeking to extract improper*
513 *personal gain from the initiative. Conflicts of interest are one of the key*
514 *indicators of just such an opportunity therefore governments are challenged*
515 *to implement strong identification and remedial measures for conflicts of*
516 *interest.*

517

518

Recommendations

519 11. As part of their anti-corruption efforts and ethics
520 system, Governments should avoid conflicts of interest
521 in PPPs where the direct or indirect economic, financial
522 or personal interests of a person or entity are
523 incompatible with or perceived to compromise their
524 impartiality, independence, or that arise from
525 obligations occurring in their official public capacity
526 and the PPP.

527

528 12. Governments should define corruption broadly and
529 include conflicts of interest where bidders or their
530 affiliates, contractors, or subcontractors receive or
531 provide, or agree to receive or provide, a gift, gratuity, commission or consideration of any kind as
532 an inducement for favour or disfavour in the PPP process.

533

534 13. Governments should be particularly aware of conflicts of interest that arise as the result of
535 economic interest, political or national affinity, family or emotional ties, or any other relevant
536 connection or shared interest.

537

538 14. Governments should take preventative steps or institute corrective measures even when there is
539 merely an appearance of a conflict of interest.

540

Conflicts of interest are ‘red flags’ indicating the risk of corruption and a general threat to the integrity of the process. Because conflicts can be identified they are important tools to an anti-corruption system that attempts to uncover conduct that is often purposefully concealed or hidden.

541 15. Early identification, rapid disclosure, and appropriate mitigation are key to an effective system
542 for handling conflicts of interest.

543
544 16. Governments are particularly at risk of conflicts of interest during exchanges with bidders
545 and in a process of evaluating or optimizing the bids.

546

547 **C. Disclosure of Information**

548

549 *Challenge*

550 *Governments are challenged to provide access to the essential facts and*
551 *information that public officials use to make decisions and undertake their*
552 *official responsibilities.*

553

Recommendations

554

555 17. Public disclosure rules are essential to promoting transparency and integrity in the PPP process.
556 Governments should institute robust disclosure practices at the outset of a PPP program or project
557 and continue through general awareness and use of tools such as electronic disclosure, public
558 information access systems and other disclosure practices.

559

Imbalanced sharing of information can lead to opportunities for corruption. Because corruption is often concealed, stakeholder access to procurement information is critical to holding public and private sector participants accountable.

18. Governments should create training and awareness programs that ensure the public disclosure requirements are met and utilized.

19. As an extension of any public disclosure rules, governments should establish an information disclosure framework for the PPP that spans the entirety of the project. The framework should offer, preferably by electronic means, unrestricted and full direct access free of charge to relevant PPP documentation, abstracts, and

571 accessible format and updated on a regular basis. to the civil society of key project parameters
572 updated on a regular basis.

573

574 20. While attention should be paid to robust disclosure requirements, PPPs often invite bidders to
575 propose innovative solutions which can involve proprietary technology or trade secrets, therefore
576 governments should put systems in place to protect these sensitive materials from unauthorized
577 disclosure and use by public and private parties.

578

579 21. The framework should include other disclosure procedures, such as timing and violations of the
580 framework through failure to disclose or other wrongful withholding of materials that were subject to
581 disclosure.

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583 22. The disclosure rules and framework should be well publicized and set out clearly for public and
584 private participants and stakeholders to the PPP process.

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D. PPP Units, Committees and Boards

Challenge

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

Recommendations

23. Governments should isolate the activities of preparation, evaluation, awarding and decision making in a PPP procurement and have each activity administered discretely by PPP Units, Committees and/or Boards that are independent from one another.

Division of responsibilities and division of authority within a PPP procurement act as both i) a deterrent to corruption because no single actor can control the outcomes of the process and ii) an oversight function because the entities can monitor the activities of the others.

24. Governments should establish PPP Units, Committees and Boards at appropriate levels in the governmental system such that there is a clear authority, competency, scope of decision making and/or dispute resolution, and a clear approval path for projects to navigate.

25. Governments should publish and reference in the bidding documents the applicable PPP Units, Committees and Boards and their respective functions, responsibilities, roles, and decision making authority

E. Consultants and Experts

Challenge

Because of the influence consultants and experts can exert on the decision-making processes of governments, including such basic decisions as whether to initiate a PPP, or on what grounds to award a PPP contract, governments are challenged to clearly specify and carefully control the basis for retention, input and deliverables of consultants and experts.

Recommendations

26. Governments should implement guidelines and open vetting of the necessity of and TOR for PPP consultants and experts.

27. Consultants and Experts should have a high level of integrity and competent to handle each stage of the project or tender for which they have been engaged, from evaluation of the needs of the public partner, up to final award of the PPP agreement(s) and oversight of the service provision.

- 629 28. Governments should give due consideration to the capacity of consultants and experts to work
630 within a team of public officials and deal with the specific, yet diverse competencies needed within a
631 PPP project or series of projects.
632
- 633 29. Consultants and experts should be independent and have no conflicts of interest with individuals,
634 companies and institutions, financial or otherwise, having an interest in the Project.
635
- 636 30. Governments should use open, clear, and consistent invitations, TOR, and evaluation systems to
637 retain consultants and experts.
638
- 639 31. Governments should consider use a value and/or quality based selection approach to evaluate
640 consultants and experts and to balance the cost of their engagement with their available budget and
641 the size, complexity, and cost of the project.
642
- 643 32. Governments should identify cost controls, including the ability to increase, decrease, or
644 eliminate specified services, prior to the engagement of consultants and experts and incorporate them
645 into their engagement contracts.
646
- 647 33. Governments should actively monitor consultant and expert performance and their maintenance
648 of the conflict free advisory role.
649

650 **F. Whistle-blowing**

651 *Challenge*

652
653 *Governments are challenged to establish a framework for whistle-blowing*
654 *that can act as a check and balance on improper conduct that is often*
655 *difficult to track or identify and is purposely concealed from disclosure.*

656 *Recommendations*

- 657
658
- 659 34. A whistle-blower is any person from the public, and potentially the private sector, fairly
660 witnessing a conflict of interest, corruptive manoeuvres or other fraudulent practices that is
661 detrimental to public interest and deciding to report it in accordance with a, recommended, whistle-
662 blowing framework.
663
- 664 35. Governments should establish whistle-blowing policies, rules and procedural frameworks that are
665 easy to initiate by a whistle-blower, protect duly substantiated whistle-blowers, and enable and
666 encourage proactive disclosure of conflicts, corruptive manoeuvres and other fraudulent practices.
667
- 668 36. Governments should incorporate whistle-blower rules and frameworks that verify the identity of
669 the whistle-blower but provide confidentiality of the information involved and protect the identity of
670 the whistle-blower from disclosure.
671
- 672 37. Governments should provide protection against personal and professional retaliation and against
673 criminal and civil liability to a duly substantiated whistle-blower reporting in good faith.
674

675 38. Governments should not protect a whistle-blower when a disclosure does not meet the
676 requirement of good faith, and in such case governments should be able to hold the whistle-blower
677 liable to specified penalties.

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Stage 2

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682 **Stage 2** is the actual tender of the PPP opportunity and awarding the contract to the private
683 partner by the public entity. Anti-corruption measures implemented during Stage 2 are focused
684 on procurement procedure and carrying out the tender. They are designed to ensure a fair and
685 transparent bidding process while promoting a competitive environment so the public entity
686 receives the best offer from all participants. Stage 2 conceptually ends with award of the contract
687 and when the project moves into the contract performance and operational stage. The following
688 are key procedural elements that promote transparency and integrity in Stage 2 of a PPP
689 procurement.

690

691 G. Unsolicited Proposals

692

693 *Challenge: Governments are challenged to bring innovative solutions to the*
694 *task of providing public services, however they must do so in a cost-effective*
695 *and responsible manner, therefore governments must be cautious when*
696 *dealing with unsolicited proposals that may be intended to avoid the open*
697 *and competitive tendering processes.*

698

699 *Recommendations*

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702 39. Governments should be cautious with unsolicited
703 PPP proposals, and if choosing to allow them, put in
704 place stringent controls on their receipt, review and
705 approval.

706

707 40. Unsolicited proposal may only be considered for
708 PPP projects which are not part of PPP programs
709 already published at national or local level and for
710 projects which demonstrate unique innovative solutions
711 that are fit for purpose to the government's needs and
712 which could not be otherwise acquired by normal
713 competitive means.

714

715 41. If other solutions exist, governments should organize a competitive procurement that is open to
716 all potential bidders and invite competing proposals.

717

718 42. If the unsolicited PPP proposal contains elements of private finance, governments should
719 evaluate whether the financial aspects can be put to open bidding and competition.

Unsolicited proposals by their very nature circumvent the competitive process, and if not managed properly can divert public time, attention, and resources away from the strategic plans of the government and initiatives that could otherwise be undertaken in a competitive and open and transparent manner.

- 720
721 43. Governments should protect confidential or proprietary information within an unsolicited
722 proposal, however all other information and data, including the existence of the unsolicited proposal,
723 should be disclosed according to the government's public disclosure framework.
724
- 725 44. Governments should provide public notice, in an open and easily accessible location, that an
726 unsolicited proposal has been received and is under review.
727
- 728 45. Governments should institute a multi-step review and approval process for unsolicited proposals
729 that includes a second public notice being provided prior to award.
730
- 731 46. Governments should allow potentially responsive bidders and other interested stakeholders, upon
732 a showing of substantiated grounds, the right to challenge an unsolicited proposal prior to award and
733 the right to seek termination of unsolicited proposal contract after award.
734

735 H. Tender Notices and Bidding Documents

736
737 *Challenge: Procurement is most effective when there is competitive tension*
738 *amongst the bidders. Governments are therefore challenged to ensure their*
739 *PPP procurement process includes fair and transparent communications*
740 *with all potential bidders such that it invites the greatest amount of*
741 *participation and competition to PPP procurement.*

742 Recommendations

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745 47. Governments should apply the underlying requirements of transparency contained in the 2011
746 UNCITRAL's Model Law on public procurement implementing the UN Convention against
747 Corruption.

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Tender and bidding documents that are vague, provide too little time to respond, have criteria that favour one bidder, are intentionally inconsistent, or not universally circulated, are all approaches that can be used to skew the competition in a PPP.

48. Governments should design tender notices to seek responsive candidates and provide the highest possible degree of public information in proportion to the purpose, nature, subject and value of the PPP project.

49. Governments should use tender notices that are simple and accurate, contain all the main information relating to the tender, and allow any responsive potential bidder to understand the functional specifications that are required by the project, as well as all pertinent information on the process, conditions and

criteria for selection.

50. Governments should ensure that all candidates are able to have access at the same time, to the same information, and same documentation necessary for preparing responses and for participating in the tender procedure.

765 51. Governments should not include requirements of technical, professional or financial capabilities
766 which are disproportionate or excessive in relation to the requirements and feasibility of a project,
767 nor those that would favour any of the candidates.

768
769 52. Governments should provide within the tender notices and bidding documents for the
770 disqualification of a bidder when a conflict of interest or other improper behaviour is identified.

771
772 53. Governments should indicate in tender notices and bidding documents that the bidders are to
773 refrain from influencing the awarding process and avoid any direct or indirect contact with the
774 contracting or administering authority and its agents unless such contact is expressly authorized
775 and organized by the public authority.

776

777 I. Pre-Qualification Process

778

Challenge

779 *PPP Procurement is designed to attract bidders that on one hand are*
780 *responsive, responsible and able to tender competitive offers, but on the*
781 *other not be so burdensome as to negatively impact timeliness or cost*
782 *effectiveness of the procurement. Governments are therefore challenged to*
783 *create a fair and just pre-qualification process that permits qualified bidders*
784 *to compete, yet assists in streamlining and expediting the administration of*
785 *the procurement.*

786

Recommendations

787

788 54. The purpose of prequalification is to advertise the
789 project to the largest number of potential bidders,
790 provide the information necessary to allow potential
791 bidders to evaluate the reliability and quality of the
792 preparation of the project, inform potential bidders of
793 the criteria for prequalification and if interested, submit
794 qualifying documentation with the objective of being
795 pre-qualified.

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

796 55. Governments should allow pre-qualification to be open and unlimited, however in some certain
797 circumstances such as two-step procurements, competitive dialogues, and/or those projects with
798 unique characteristics or involving functional specifications that are very complex or costly in nature,
799 governments may limit the number of pre-qualified candidates, taking into account the cost of
800 preparing and bidding, number of available providers in the market, and overall ability to maintain
801 competition.

802 56. Governments should require bidders to maintain their prequalified status throughout the
803 procurement process and may perform a timely post-qualification check of the successful bidder.

804

805 57. Governments should disqualify a bidder who has provided inaccurate or forged information
806 related to the pre-qualification, and depending of the intent and nature the misleading information, be
807 able to seek further penalties or sanctions, including after award annulling the contract.

808

809 58. The contracting authority should verify in a timely manner the accuracy of the relevant pre-
810 qualification information provided by the winning bidder.
811

812 **J. Dialogue-based PPP Procurement**

813 *Challenge*

814 *Governments are challenged to maximize the opportunity that dialogue-*
815 *based procurement provides, which is to assist governments to identify*
816 *project specifications that are fit for purpose and achieve the objectives of*
817 *the public entity, yet limit the window of opportunity for improper*
818 *interactions or the provision of unfair competitive advantage to a bidder(s).*

819 *Recommendations*

822 59. Governments should use dialogue-based PPP
823 procurement when the contracting authority, after
824 having set up preliminary functional specifications
825 and key performance parameters, is unable or does
826 not have sufficient expertise to establish the design
827 that meets the functional specifications and
828 performance parameters over the lifetime of the
829 project

*Dialogue based procurement that does not
have strict controls in place allows for
direct interaction and potential collusion or
corruption between the public entity(ies)
and the private bidders.*

830 60. Dialogue-based procurement may include two stage tendering including a first phase where the
831 technical specifications and the characteristics of service meeting the functional requirements are
832 discussed with preselected bidders and where only selected bidders having passed the technical
833 evaluation are authorized to submit a financial bid. The successful bidder is the one having the best
834 composite score aggregating the technical and financial evaluation.

835 61. Due to the elevated risks of corruption and potential abuse with open dialogue, Governments
836 should tightly scope and control interactions between the contracting authority and one or more
837 selected bidders, and focus the dialogue only on the technical (which may include certain financial
838 requirements) of the PPP and where the public authority expects contribution from the bidders.

839 62. Governments should not permit dialogue to revisit functional specifications, performance
840 parameters, or standards or norms which are clearly specified in the tender documents and/or are of
841 the essence of the project as determined by the procuring authority.

842 63. Governments should put in place a tender evaluation committee that has the necessary capacity to
843 evaluate technical proposals and make quick and fully documented decisions during any technical
844 dialogue phase.

845 64. The contracting authority should ensure confidentiality of bidder information in any dialogue
846 where intellectual property and know-how, including proprietary financial and contractual
847 innovation is shared.

848

K. Confidentiality and Maintenance of Information

849

Challenge

850

851 *In a competitive PPP procurement environment, information is essential.*
852 *Information that the public provides to the private sector that forms the basis*
853 *of the PPP competition, and information the private sector may share with*
854 *the public sector that forms the basis of their competitiveness. Governments*
855 *are therefore challenged to hold public and private information confidential*
856 *throughout the process because its disclosure could impact the objectives of*
857 *the PPP and the competitiveness of the procurement, while unfairly affecting*
858 *the decision making of the public authorities or willingness to participate of*
859 *the participants.*

860

Recommendations

861

862 65. Governments should protect and preserve the
863 confidentiality, integrity and safe custody of
864 information and documents that are shared during the
865 bidding process.

866

867 66. Governments should establish and publish a clear
868 chain of responsibility, with parameters and timing for
869 retention and/or disclosure of information, in
870 accordance with the public information disclosure
871 framework.

872

873 67. Governments should maximize the use of electronic
874 procurement and document management systems.

875

876

Leaking of bidder information is a common approach to providing a competitive advantage to a preferred bidder. This is particularly true in procurement involving dialogue where clarifications and modifications may be frequent and entities are forming their competitive solutions and value propositions in real time.

877

L. Tender Evaluation Committee

878

Challenge

879 *Governments are challenged to create a transparent system of review and*
880 *evaluation of bidders and their bids that is uniform, based only on the merits*
881 *of their proposal, and awards a contract to the entity that was judged to*
882 *have submitted the best offer.*

883

Recommendations

884

885 68. Governments should appoint members of the Tender Evaluation Committees after giving due
886 consideration to the particulars of the project, the procurement method, the nature and timing of the
887 evaluation, and the skills resources, and necessary capacity for the committee to carry out a fair,
888 independent and professional evaluation.

889

890 69. Governments should bind each member and the
891 Tender Evaluation Committee to a code of ethics and
892 require that they have no conflicts of interest.

893
894 70. The Tender Evaluation Committee should memorialize
895 in writing all deliberations and decisions.

896
897 71. The Tender Evaluation Committee should have a
898 clear threshold for decision making (e.g. simple
899 majority, highest score, etc.), and make all decisions
900 based on objective criteria and only using information
901 derived from the bidding materials and bidder
902 responses provided during the course of the PPP procurement.
903

Evaluation criteria can be tailored to favour one bidder, bias the decision making against a bidder, or simply cause a strong bid to be unresponsive. The criteria can also be over burdensome or unreasonable such that certain responsive bids are rejected.

904 **M. Integrity and Fairness Mechanisms**

905 *Challenge*

906 *Governments are challenged to recognize that projects involving assets of*
907 *particularly high value, complexity, or political sensitivity may require*
908 *additional mechanisms for ensuring protection against corrupt practices.*

909 910 *Recommendations*

911 *Integrity Officer*

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914 72. If a system for reviewing the integrity of a procurement does not exist, Governments should
915 consider the use of Integrity Officers to ensure and review the integrity of a procurement.

916 73. Governments should appoint Integrity Officers to participate in and certify that the procurement
917 proceedings comply with the applicable laws and regulations, tender documentation and procedures,
918 and other requirements such as codes of ethics or
919 information disclosure and confidentiality rules.

920 74. Integrity Officers should have proven professional
921 capacity and skills and remain independent from all
922 public and private parties involved in the PPP.

923 75. The Integrity Officer certificate should be a
924 comprehensive report that comments on all pertinent
925 activities and communications in light of the procedural
926 requirements, and certifies compliance with the same
927 (rather than for example stating an opinion).

Probity and fairness inquiries provide a check and balance on procurement practices and authority that is largely consolidated in the public entity. They also act as a deterrent to corrupt behaviour because of the threat of an audit and exposure.

928 76. Governments should make the integrity certificate
929 and any associated reports or materials part of the documents reviewed by the body(ies) approving
930 the choice of the successful PPP bidder and/or the body settling claims of misprocurement.

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Fairness Auditor

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77. If a system or tribunal for handling claims of misprocurement does not exist, Governments may also appoint Fairness Auditors to audit the process, but unlike Integrity Officers, audit the substance of the proceedings, including deliberations of the evaluation committee and other sessions of the tendering entities, to ensure that a fair evaluation and neutral assessment was conducted.

78. Governments should ensure that Fairness Auditors have similar professional capacity, skills and independence as Integrity Officers.

79. Governments should allow the appointment of a Fairness Auditor at the request of any of the parties claiming misprocurement and/or as preliminary step to a claim of misprocurement.

80. The Fairness Auditor(s) is empowered to audit the full procurement process and should issue a report confirming compliance or non-compliance with applicable procurement procedures and rules and stating any reservations about the process identified in their audit.

81. Governments should make the Fairness Auditor report part of the documents reviewed by the body in charge of approving the choice of the successful bidder and/or the body settling claims of misprocurement.

82. Governments should require that the Integrity officers and Fairness auditors be different, independent individuals.

Stage 3

Stage 3 is the contract performance period of the PPP procurement where the public entity is actively engaged in contract management and working with the private partner to undertake the PPP activity. Anti-corruption measures implemented during this Stage are focused on sound contract management practices and procedures and are designed to support full and compliant performance of the contractual obligations and realization of the project's full potential and value for money. The following are key elements that promote transparency and integrity in Stage 3 of a PPP procurement.

N. Contract Management

Challenge

Governments are challenged to adapt to their new role as contract managers rather than contract implementers, and create contract management systems that will enable them to effectively oversee their private partners' activity, endure and adapt to the substantial length of many PPP projects, and track the range and complexity of performance and payment activities undertaken in PPPs.

973

Recommendations

974 83. Governments should employ experienced technical and operational project managers who are
975 knowledgeable in the applicable sector and project performance parameters and empowered to verify
976 and interpret contract performance related issues.

977

978 84. Governments should establish multiple layers of review and approval, including non-
979 consolidated approval authority and cross monitoring, for contract management activities such as
980 payment of invoices, acceptance of materials and performance, and interpretation and modification
981 of contractual obligations.

982

983 85. Governments should implement, preferably electronic, records management systems to provide
984 comprehensive project tracking and record keeping, facilitate performance monitoring and
985 management, retention of project documentation and materials, control billing and payment
986 practices, and provide a transparent and traceable contract administrative record.

987

988 86. Governments should institute real time contract performance monitoring to manage the partner
989 and project and identify necessary project modifications and/or performance adjustments.

990

991 87. Governments should institute real time accounting practices that respect and reconcile project
992 expenditures with budgetary limitations and obligations, and allow officials to consider financial
993 modifications and performance adjustments on an as needed basis.

994

995 88. Governments should authorize periodic self and external accounting and auditing functions, by
996 officials or entities with clear oversight authority, that encourages, among other things, proactive
997 review and reconciliation of contract documentation, performance compliance verification, and
998 billing and payment practices.

999

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