

RESTRICTED

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10 UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE
11 TEAM OF SPECIALISTS ON PUBLIC-PRIVATE PARTNERSHIPS (TOS PPP)
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Proposed Draft

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17 UNECE PPP STANDARD FOR
18 ZERO TOLERANCE APPROACH TO CORRUPTION IN 'PEOPLE-FIRST' PPP PROCUREMENT
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32 Project Team

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47 **Draft Standard on a Zero Tolerance**
48 **Approach to Corruption in ‘People-First’**
49 **PPP Procurement**

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65 **Implementing the United Nations 2030 Agenda for Sustainable Development**
66 **through effective**
67 **“People-First Public-Private Partnerships”**
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Terms

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105	AAAA	Addis Ababa Action Agenda
106	OECD	Organisation for Economic Co-operation and Development
107	O&M	Operation and Maintenance
108	PFI	Privately Financed Infrastructure
109	PPP	Public Private Partnership
110	PfPPP	People First Public Private Partnership
111	SDG	Sustainable Development Goal
112	ToR	Terms of Reference
113	UNECE	United Nations Economic Commission for Europe
114	UNCITRAL	United Nations Commission on International Trade Law
115	USD	United States Dollars

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Introduction

118 The United Nations Sustainable Development Goals (SDGs) come with a huge price tag.
119 Recent reports have estimated that global infrastructure will need USD 3.3 trillion of
120 investment per year just to keep pace with projected growth.¹ This massive sum will need
121 to be mobilized from many sources, including from the private sector. And governments
122 scaling up investment and infrastructure development of this magnitude will need to make a
123 strong commitment to transparency and integrity, and a plan to fight corruption, otherwise
124 the investment required for meeting the UN SDGs will not be mobilized.

125

126 *Cost of Corruption and its impact on the*
127 *Sustainable Development Goals*

128 The cost of corruption, the other name for
129 lack of transparency and integrity in public
130 and private activity, is staggering.

131

132 • The World Bank recently
133 highlighted that about USD 1 trillion
134 is paid each year in bribes around the
135 world.² The European Union
136 estimates that corruption costs EUR
137 120 billion per year.

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

140 • Transparency International, in its Global Corruption Report 2005, noted that
141 corruption in construction can add as much as 50 per cent to a project's cost. It
142 further estimated that 10 to 30 per cent of investment in a publicly funded
143 construction project may be lost through mismanagement or corruption (COST
144 2011 Research).

145 • The European Commission has stated that “annual losses in global construction
146 through mismanagement, inefficiency and corruption could reach USD 2.5 trillion
147 by 2020.

148 • The World Bank has further noted that corruption disproportionately impacts the
149 poor while undermining growth and prosperity by siphoning away resources from
150 their intended purposes *and* exacerbating the long-term effects of those services not
151 being delivered.³ Corruption erodes the social contract between state and citizens.
152 Furthermore, economic activity is seriously harmed by corruption acting as a strong
153 disincentive to foreign investment.

154

155 Apart from the sheer scale of its impact, the impact of corruption at the level of projects is
156 also deeply concerning: Corruption.

157

158 - Diverts value from the project and the expected outcomes of the initiative.

***“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***

¹ McKinsey analysis; McKinsey Global Institute Analysis, 2016

² World Bank Governance Brief Anti-Corruption. May 2016

³ World Bank Group President Jim Yong Kim, Anti-Corruption Summit 2016, London, United Kingdom

- 159 - Discourages participation, skews competition and raises barriers for entry, all the
 160 while stripping away stakeholder
 161 confidence in the public process.
 162 - Lowers the capacity of governments
 163 to do PPPs, by undermining
 164 professional competencies.
 165 Encourages rent-seeking.
 166 - Produces a quick money mentality
 167 that diverts officials and projects
 168 away from a people-first focus and
 169 the goal of bringing the maximum
 170 benefit to all through public
 171 expenditures (see the Guidelines of
 172 UNECE of good governance in people first PPPs).⁴
 173

Empirical studies have consistently demonstrated that the poor pay the highest percentage of their income in bribes. (World Bank stats: Paraguay & Sierra Leone.) Thus corruption discourages people from accessing health services for example and can negatively impact health outcomes such as infant mortality.

174 Given the scale and scope of the impact of corruption, not surprisingly the UN SDGs give a
 175 strong priority to fighting corruption:

- 176 • SDG 16 is dedicated to the promotion of peaceful and inclusive societies for
 177 sustainable development, the provision of access to justice for all, and building
 178 effective, accountable institutions at all levels. SDG 16.5 and 16.7 further target a
 179 substantial reduction in corruption and bribery in all their forms, and development
 180 of effective, accountable and transparent institutions at all levels.
 181 • SDG 17 calls for strengthening the means of implementation and revitalization of
 182 the global partnership for sustainable development. Its SDG 17.17 calls for
 183 encouraging and promoting effective public, public- private, and civil society
 184 partnerships, and building on the experience and resourcing strategies of
 185 partnerships.

186 The Addis Ababa Action Agenda (AAAA), a global framework for financing development
 187 post-2015, also calls on governments to combat corruption at all levels and in all its forms,
 188 and to implement effective, accountable and inclusive democratic institutions.⁵

189 *Objectives of the Standard*

190 The overall objectives of the Standard are the following:

- 191 - Provide a voluntary set of recommendations that collectively set a standard for
 192 transparency and integrity in PPP procurement and are in full compliance with
 193 governments' commitments to the United Nations Sustainable Development Goals
 194 (SDGs).
 195 - Assist policy makers to improve the regulatory response to corruption in PPPs.

⁴ In furtherance of the SDG agenda, the UNECE is promoting a new generation of PPPs, "People First PPPs" (PfPPP). PfPPP are partnerships that achieve the SDGs, yet and foster trust and accountability between all stakeholders, and go beyond simply "transferring risks and bringing value for money" to the public sector, but bring a renewed focus on putting People First.

PfPPP also therefore require a focus on Good Governance and a new take on Transparency and Integrity and overall compliance. The UNECE's upcoming "Guiding Principle for Good Governance in PPPs for SDGs" is one piece of this new framework for Member States as is this Transparency and integrity and Standard.

⁵ Addis Ababa Action Agenda, Financing for Development, Section II. B. 48; UN Sustainable Development Goals, Target 17.17

- 196 - Integrate new technologies for more transparency, into procurement processes and
197 regulation.
- 198 - Inform and educate ALL stakeholders, including civil society, about ethical
199 behaviour in governmental practices and foster a culture of integrity and
200 transparency in PPPs that can be shared by all individuals, companies, and
201 institutions participating in a PPP project or procurement process.
- 202 - Strengthen the social contract between citizens and their public systems.

203 Specifically, the document will:

- 204 - Identify the ‘high risk’ areas within PPP procurement and respond to those risk
205 areas with appropriate recommendations and action points for governments.
- 206 - Map some of the key recommendations and core elements of a robust anti-
207 corruption system that governments can easily implement.

208 *Organization of the Standard*

209 Part 1 discusses the three (3) stages of PPP procurement, why PPPs are particularly
210 susceptible to corruption, and the moments in the procurement where the risks of corruption
211 are greatest.

212 Part 2 elaborates further the core areas where corruption in the procurement process occurs
213 and sets out in detail several recommendations to address these specific issues and adds
214 some action points for the implementation of the same.

215 Part 3 identifies steps for effective implementation of the standard.

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Part one

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Procurement contexts of PPPs

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227 **I. Risk across all stages of PPP Procurement**

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229 PRELIMINARY OBSERVATIONS

230 **Public Contracts**

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232 PPPs are a type of public contract and the same rules can apply for both a PPP and other
233 forms of public procurement contracts.

234

235 PPPs however do have some distinguishing characteristics that make them somewhat novel
236 and different from traditional public contracts. For example, a PPP can place a number of,
237 normally separate, contractual activities under one agreement, or include financing
238 arrangements that go beyond the traditional role of the Treasury, or perhaps require new
239 performance and partnering approaches between public and private partners. Despite these
240 differences, in the end, they remain a public contract arising from a public process, and are
241 aimed at fulfilling a public need. In this sense, a PPP will benefit from a well-designed
242 procurement just as any traditional governmental contract would.

243

244 The UN Commission on International Trade Law (UNCITRAL) Model Law on Public
245 Procurement states that a well-designed procurement a) maximizes economy and
246 efficiency, b) fosters and encourages participation in the process, c) promotes competition
247 for the subject matter of the procurement, d) provides fair, equal, and equitable treatment of
248 those involved, e) promotes integrity, fairness and confidence in the process by
249 stakeholders, and (f) achieves transparency in the process.⁶

250

251 **The Three stages of PPP procurement**

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

- 254 • Stage 1 is the public entity's effort to identify its needs, examine its available
255 resources versus those that it will need to obtain, then identify potential sources
256 and solutions in the market, and finally set out the parameters of its proposed
257 tender.
- 258 • Stage 2 is putting the contracting opportunity out to bid subjecting it to
259 competition, and awarding the contract. PPPs can be large projects with complex
260 interconnected operational elements, and sometimes equally complicated
261 financing, so the cost and time to generate a responsive bid can be very high. As a
262 result, PPP procurement is often broken into two steps, a qualifying step and then a
263 bidding step.⁷ The qualifying step is where qualified bidders are identified and

⁶ 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>

⁷ Note, pre-qualification is not without controversy. Some believe on large PPP projects pre-qualification is necessary because of the high cost of generating bids and the amount of interaction with bidders that is

264 the number of overall bidders invited to bid on the contract may be narrowed. The
 265 bidding step is then to have those pre-qualified bidders compete on the contracting
 266 opportunity and bid. In the end, the public entity, through an evaluation process,
 267 awards the contract to the bidder who proposes the best solution in terms of
 268 approach and cost.

- 269 • Stage 3 is after a winning bidder has been identified and the contract has been
 270 awarded. This is the long-term performance of the bidder under the contract. In
 271 infrastructure projects this is sometimes referred to as the operations and
 272 maintenance (O&M) phase.

273

274 **Risk areas across the three stages of PPP procurement**

275 Corruption in PPP procurement is often seen as gaining an unfair advantage in the
 276 ‘competition’ or Stage 2 of the process, that is, influencing the competition such that one
 277 bidder wins or gains an unfair advantage amongst the pool of other potential bidders.

278 A comprehensive view of corruption in PPPs however needs to focus on all three of the
 279 PPP procurement Stages. This is not only because corruption can occur at any stage of the
 280 process, but because corruption tends to go wherever the system is weakest – that is,
 281 wherever it is easiest to get away with and in some cases where the least amount of scrutiny
 282 is being applied.

283 For example, empirical evidence shows that bribes and other collusion with public officials
 284 occurs frequently at the outset of procurement, or that companies are underperforming,
 285 unfairly seeking adjusting to performance requirements, or padding invoices for services
 286 years into a long-term contract.⁸

287 These cases of corruption that occur at the beginning and after the contract is awarded
 288 might imply that a government has a robust Stage 2, e.g. the tendering process.

289 Unfortunately this may not be true, many governments still lack basic institutional elements
 290 and good practices to conduct a robust tender, especially when the intensity and complexity
 291 of a PPP presents itself. Government procurement systems therefore need improvement, but
 292 governments need to be more aware of the risks associated with PPPs and make
 293 improvements that are targeted to improving PPP procurement.

294

295 **Corruption in PPP procurement**

296 There are many opportunities in a PPP procurement for corruption⁹, but some of the more
 297 prominent risks include:

necessary to refine the scope of the project. Another school of thought is opposed to pre-qualification as it inherently limits competition and the belief is all qualified bidders should be permitted to participate regardless of how many or burdensome that may be for the public entity administering the procurement.

⁸ See, *Curbing Corruption in Public Procurement: A Practical Guide*, Transparency International, 24 July 2014

⁹ 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

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- When the government lacks strong institutions – the underpinning of procurement with integrity and transparency is a government with structures, authority, and review and approval processes all clearly established and demarcated, and with robust checks and balances on that decision making authority.
 - When a PPP is market tested - where the public body goes out and interacts with the market and potential bidders to see what solutions are available. This interaction is often a necessary step in a PPP procurement, yet it also opens opportunities for improper conversations or influence between the bidder and public officials, or simply for the private sector to steer the public party's 'needs'.
 - When competitive dialogue and negotiation is used - which may be necessary to fine tune the public service, but it also provides opportunities for improper conversations or influence, behind the scenes arrangements, or schemes to gain an upper hand against competition.
 - When projects are very large and/or technical in nature - certain sectors that compete on these types of public contracts are actually small communities, with a finite number of companies, employees, experts, and contractors working in that sector. The result being -- the risk of conflicts of interest are greatly enhanced, especially when employees tend to move from public to private, and then private to public service.
 - When projects involve significant amounts of money - the desire to win such opportunities can be intense, and the incentive to get access to the contract, even if for example it is simply helping a friend or family member gain a subcontracting opportunity on a lucrative project, can be great.
 - When PPPs are long term - public contracting opportunities of significant length do not come around that often, and as noted, certain sectors have a limited number of players who are able to provide such a service and for such a long term, so the need to gain an advantage over your competitors and/or win the contract can be acute.
 - When governments are technically ill equipped – governments often have to retain sophisticated, front-end transactional, financial, technical, and/or legal consultants and experts to handle complex PPPs. These relationships, many of which the government relies upon heavily, present windows of opportunity to control the process or influence the outcomes of the procurement and consultants and experts, while necessary, need to be managed appropriately.

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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.)

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Part two

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**Transparency and Integrity in PPP
Procurement**

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344 **II. Transparency and Integrity in PPP Procurement**
345 **Standard**

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347 **A. Institutional elements that promote transparency and integrity in**
348 **PPP procurement**

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350 **Compliance with Laws and a Code of Ethics**

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Challenge

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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 conduct throughout the PPP process.

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Recommendations

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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 strengthen the underlying social compact between government and its citizens.

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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.

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

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4. The Tender documents should incorporate and refer to all applicable international and national laws, regulations and codes relating to anti-corruption.

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5. Governments should have a code of ethics governing public entities, employees, and public advisors, consultants, contractors, and subcontractors that either incorporates, or is based upon, international models and ethics instruments.

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6. The code of ethics should set out the standard of ethical behaviour of public and private participants involved in the procurement process as well as set out participation restrictions for employees leaving public service.

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

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

379

9. The code of ethics should be enforceable.

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Action Notes

- 381 • Establish anti-corruption laws, regulations and codes.
- 382 • If existing anti-corruption laws, regulations and codes exist, review, revise
- 383 or extend in anticipation of PPP activity.
- 384 • Establish a code of ethics.
- 385 • Publish the code of ethics (ideally available online) and incorporate it in the
- 386 bidding conditions and terms of tender.
- 387 • Require the public authority sponsoring the PPP on behalf of itself, and the
- 388 various public entities involved in the process, and by bidders, and both
- 389 public and private affiliates, contractors and subcontracts participating in the
- 390 bidding process, to endorse the code of PPP ethics.
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Avoidance of Conflicts of Interest

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Challenge

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

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Recommendations

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10. Governments should avoid conflicts of interest in PPPs where the interests of a person or entity are incompatible with or competing with their obligations occurring in their official public capacity.

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11. Governments should define conflicts of interest broadly and, although primarily focusing on public sector representatives acting in their official capacity, should include situations where bidders or their affiliates, contractors, or subcontractors receive or provide, or agree to receive or provide, a gift, gratuity, commission or consideration of any kind as an inducement for favour or disfavour in the PPP process.

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

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

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

Conflicts of interest are ‘red flags’ for 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 purposefully hidden.

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427 15. Governments are particularly at risk of conflicts of interest during exchanges with
428 bidders and in a process of evaluating or optimizing the bids.

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Action Notes

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- Establish a conflict of interest system that incorporates international models and includes procedures for identification, disclosure, and mitigation prior to the initiation of any PPP procurement.

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- Publish the conflict of interest system (ideally available online) and incorporate it in the bidding conditions and terms of tender.

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- Implement procedures for individuals working on a PPP project to identify direct and indirect personal, professional, and/or financial interests related to the project and the appropriate remedial steps that will be taken to eliminate or mitigate such conflicts.

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- Identify a list of entities currently engaged in contractual relations with the Public Authority and working on the PPP project and put controls in place for their interaction with or providing assistance to bidders.

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- Require conflict checks at the outset of the PPP formulation and procurement and then at regular intervals throughout procurement process.

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Disclosure of Information

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Challenge: Governments are challenged to provide access to the essential facts and information that public officials use to make decisions and undertake their official responsibilities.

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Recommendations

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

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

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18. 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.

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19. While attention should be paid to robust disclosure requirements, PPPs often invite bidders to propose innovative solutions which can involve proprietary technology or trade secrets, therefore governments should put systems in place to protect these sensitive materials.

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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.

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473 20. The framework should include other disclosure procedures, such as timing and
474 violations of the framework through failure to disclose or other wrongful withholding of
475 materials that were subject to disclosure.

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477 21. The disclosure rules and framework should be well publicized and set out clearly for
478 public and private participants and stakeholders to the PPP process.

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Action Notes

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- Establish and publish public disclosure rules.

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- Implement a system for training and awareness of the public disclosure rules.

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- Establish a disclosure framework that begins no later than the PPP project conceptualization and continues through procurement, award and operations.

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- Provide instructions and specific disclosure procedures for public servants to follow during the PPP, including mandatory and discretionary disclosure requirements and procedures for protecting the proprietary, confidential, and personal/private information of bidders.

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- Reference and incorporate the disclosure rules and the disclosure framework in tender documents.

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497 **B. Standard implementation tools that support transparency and**
498 **integrity in PPP procurement**

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PPP Units, Committees and Boards

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Challenge: Clear 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.

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Recommendations

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22. Governments should separate the activity of preparation, evaluation, awarding and of decision making in PPP procurement and organize it into 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.

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23. Governments should create these entities at appropriate levels in the governmental approval path and/or within or alongside existing governance structures such that the entities with authority to take action and make decisions regarding the PPP procurement is clear.

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24. Governments should make public and reference in the bidding documents the functions, responsibilities, roles, and decision making process of the review and approval structure.

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Action Notes

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- Specify and publish (ideally online) the role and scope of responsibilities, including terms and conditions of appointment of members, and decision making and requisite authority of each of the PPP Units, Committees and Boards.
- Specify the reporting activity and timing of deliverables of PPP Units, Committees and Boards and implement compliance mechanisms to ensure their adherence with the same.

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Consultants and Experts

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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

538 *PPP contract, governments are challenged to clearly specify and*
 539 *carefully control the basis for retention, input and deliverables of*
 540 *consultants and experts.*

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542

Recommendations

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544 25. Governments should implement guidelines and open vetting of the necessity of and
 545 terms of reference (TOR) for PPP consultants and experts.

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547 26. Consultants and Experts should be competent to handle each stage of the project from
 548 evaluation of the needs of the public partner, up to final award of the PPP agreement(s).

549

550 27. Governments should give due consideration to the capacity of consultants and experts
 551 to work within a team of public officials and deal with the specific, yet diverse
 552 competencies needed within a PPP project or series of projects.

553

554 28. Consultants and experts should be independent and free from conflicts of interest with
 555 individuals, companies and institutions, financial or otherwise, having an interest in the
 556 Project.

557

558 29. Governments should use open, clear, and consistent invitations, TOR, and evaluation
 559 systems to retain consultants and experts.

560

561 30. Governments should consider using a value for money (VFM) approach to evaluate
 562 consultants and experts and balancing the cost of their retention against the retention budget
 563 and the size, complexity, and cost of the project.

564

565 31. Governments should identify cost controls, such as the ability to increase, decrease, or
 566 eliminate specified services, prior to the retention of consultants and experts and
 567 incorporate them into their retention contracts.

568

569 32. Governments should actively monitor consultant and expert performance and their
 570 maintenance of the conflict free advisory role.

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Action Notes

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574 • Use standard contract terms & conditions for consultants and experts, and
 575 those that are structured to the particular deliverables required (such as cost
 576 plus, lump sum, schedules of rates and estimated quantities).

577 • Identify grounds for retaining consultants and experts, memorialize them in
 578 writing and include them in the public record associated with the project.

579 • Post consultant and expert tenders at the same time and with the same
 580 information. Specify the necessary skills and experiences that are required
 581 for effective assistance, and evaluate bids according to the same criteria.

582 • Require consultants and experts to attest in writing to being conflict free,
 583 commit to any applicable code of conduct, and maintain the same
 584 throughout the procurement process.

585 • State contracts deliverables and milestones clearly such that an objective
 586 external assessment of the service provided can be made. Require detailed

- 587 cost breakdowns in the tender so that costs can be monitored and
- 588 minimized.
- 589 • Use contracts that allow the contracting authority to adapt or limit the scope
- 590 of the services being provided, and that provide remedies for breach of
- 591 contract, grounds for termination and dispute settlement mechanisms.
- 592 • Appoint a project officer with a significant amount of experience in dealing
- 593 with consultants and experts to manage the activities of consultants and
- 594 experts including their respective external affiliations, adherence to key
- 595 personnel requirements, relationship with the public sector and stakeholders,
- 596 control of the methodology for implementing the contract, draft notes and
- 597 reports, and insure compliance with timelines and deliverables.
- 598

Confidentiality and Maintenance of Information

Challenge: In a competitive PPP procurement environment, information is essential. Information that the public provides to the private sector that forms the basis of the PPP competition, and information the private sector may share with the public sector that forms the basis of their competitiveness. Governments are therefore challenged to hold this key public and private information confidential throughout the process because the disclosure of which could impact the objectives of the PPP and the competitiveness of the procurement, while unfairly affecting the decision making of the public authorities or willingness to participate of the participants.

Recommendations

33. Governments should protect and preserve the confidentiality, integrity and safe custody of information and documents that are shared during the bidding process.

34. Governments should establish a clear chain of responsibility, with parameters and timing for retention and/or disclosure of information, in accordance with the public information disclosure framework.

35. Governments should maximize the use of electronic procurement and document management systems.

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.

Action Notes

- 629 • Implement a secure communication system and depository of information and
- 630 documents that is in accord with the public information disclosure rules and
- 631 framework yet facilitates exchanges between the authority and bidders.

- 632 • Use electronic procurement systems to the extent feasible and those that are
 633 certified by external experts to guarantee the accuracy, confidentiality and
 634 integrity of the information exchanged.
 635

636 **Unsolicited Proposals**

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 638 *Challenge: Governments are challenged to bring innovative*
 639 *solutions to the task of providing public services, however they*
 640 *must do so in a cost-effective and responsible manner, therefore*
 641 *governments must be cautious when dealing with unsolicited*
 642 *proposals that seek to avoid the open and competitive tendering*
 643 *processes.*

644 *Recommendations*

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 647 36. Governments should be cautious with unsolicited PPP proposals, and if choosing to
 648 allow them, put in place stringent controls on their receipt, review and approval.
 649
 650 37. Unsolicited PPP proposals should demonstrate uniquely innovative solutions that are
 651 fit for purpose to the government's needs and are solutions that could not be otherwise
 652 acquired by normal competitive means.
 653
 654 38. If other solutions exist, governments should organize a competitive procurement that is
 655 open to all potential bidders and invite competing proposals.
 656
 657 39. If the unsolicited PPP proposal contains elements of private finance, governments
 658 should evaluate whether the financial aspects can be put to open bidding and competition.
 659
 660 40. Governments should consider unsolicited
 661 proposals only if the proposal fits within the
 662 overall strategic service plans of the
 663 government.
 664
 665 41. Governments should protect confidential
 666 or proprietary information within an
 667 unsolicited proposal, however all other
 668 information and data, including the existence
 669 of the unsolicited proposal, should be
 670 disclosed according to the government's
 671 public disclosure framework.
 672
 673 42. Governments should provide public notice, in an open and easily accessible location,
 674 that an unsolicited proposal has been received and is under review.
 675
 676 43. Governments should institute a multi-step review and approval process for unsolicited
 677 proposals that includes a second public notice being provided prior to award.
 678

Unsolicited proposals not only circumvent the competitive process but can divert public time, attention, and resources away from the strategic plans of the government that could be undertaken in an open and transparent manner.

679 44. Governments should allow potentially responsive bidders and other interested
680 stakeholders the right to challenge and/or seek termination of unsolicited proposal contracts
681 that have been awarded.

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Action Notes

- 684 • Establish an unsolicited proposal receipt, review and approval process.
- 685 • Implement a multi-step review and approval process that includes no less
686 than the using authority, the financing authority, and an independent
687 supervising tender board.
- 688 • Require unsolicited proposals to provide sufficient information and detail to
689 support that it is clearly unique and fits within the Government’s strategic
690 service plans.

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Tender Notices and Bidding Documents

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

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Recommendations

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45. Governments should apply the underlying requirements of transparency contained in the 2011 UNCITRAL’s Model Law on public procurement implementing the UN Convention against Corruption.

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46. Governments should design tender notices to seek responsive candidates and provide the highest possible degree of public information related to the project that is necessary to bid.

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47. Governments should use tender notices that are simple and accurate, contain all the main information relating to the tender, and give sufficient information for any 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.

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 to skewing the competition in a PPP.

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48. 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.

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

727

728 50. Governments should provide within the tender notices and bidding documents for the
729 disqualification of a bidder when a conflict of interest or other improper behaviour is
730 identified.

731

732 51. Governments should indicate in tender notices and bidding documents that the bidders
733 are to refrain from influencing the awarding process and avoid any direct or indirect contact
734 with the contracting or administering authority and its agents unless such contact is
735 expressly authorized and organized by the public authority.

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Action Notes

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- 739 • Use standard notice and bidding documents, including templates that take
740 into account both local and international standards and best practices.
- 741 • Publish uniform tender notices and bidding documents through channels
742 having the best chances to reach potential bidders, including electronically
743 or on an e-procurement system of the contracting authority.
- 744 • Publish tender notices and bidding documents for a sufficient amount of
745 time to allow bidders to prepare their bids, taking into account the nature
746 and complexity of the project and other sector expectations.
- 747 • Require bidders to sign the code of ethics and provide proof of being free
748 from conflicts of interest.
- 749 • Specify in bidding documents when a conflict of interest or other improper
750 behaviour exists, including prohibitions on employees, consultants, experts
751 or firms having left the contracting authority within a specified period of
752 time (e.g. 1 year, 2 years) and working on behalf of bidders.
- 753 • Specify in bidding documents the anticipated schedule for bidder interaction
754 with the public authority and prohibit communications or interaction outside
755 the specified schedule.

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Tender Evaluation Committee

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759 *Challenge: Governments are challenged to create a transparent*
760 *system of review and evaluation of bidders that is uniform, based*
761 *only on the merits of a proposal, and awards a contract to the*
762 *entity that prevailed in the competition.*

763

764

Recommendations

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766 52. Governments should appoint members of the Tender Evaluation Committees after
767 giving due consideration to the particulars of the project, the procurement method and the
768 nature and timing of the evaluation, and the skills and resources necessary for permitting
769 the committee to carry out a fair, independent and professional evaluation.

770

771 53. Governments should bind each member
772 and the Tender Evaluation Committee to a
773 code of ethics and require that they be
774 conflict free.

775
776 54. The Tender Evaluation Committee should
777 memorialize in writing all deliberations and
778 decisions.

779
780 55. The Tender Evaluation Committee should
781 make all decisions based on objective criteria
782 and only using information derived from the
783 bidding materials and bidder responses
784 provided during the course of the PPP procurement.

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.

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786 *Action Notes*

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- 788 • Establish a Tender Evaluation Committee comprised of members who in the
789 aggregate possess the respective technical, organizational, operational and
790 financial background necessary to effectively review and evaluate bids.
 - 791 • Specify and publish the role, scope of responsibilities, code of conduct and
792 other terms and conditions of appointment of committee.
 - 793 • Provide instructions to each member on conflicts of interest and the
794 requirement to disclose in writing any existing or potential conflict of
795 interest as per the terms of the conflict of interest policy.
 - 796 • Require each member to continually monitor the risk of conflict of interest
797 and disclose the same for corrective action.
 - 798 • Implement and publish measurable reporting activities and timing of
799 deliverables, with consequences for non-compliance specified.
 - 800 • Require a written record of the deliberations and evaluations of each step of
801 the evaluation process.
 - 802 • Require all members of the evaluation committee to sign a written report of
803 the proceedings of the evaluation that specifies the findings, basis and
804 recommendation(s) for award.
 - 805 • Require a summary of the evaluation to be transmitted to the body in charge
806 of approving the choice of the successful bidder.

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Pre-Qualification Process

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Prequalification

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Challenge: PPP Procurement is designed to attract bidders that on one hand are responsive, responsible and able to tender competitive offers, but on the other not be so burdensome as to negatively impact timeliness or cost effectiveness of the procurement. Governments are therefore challenged to create a

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817 *fair and just pre-qualification process that permits qualified*
 818 *bidders to compete, yet assists in streamlining and expediting the*
 819 *administration of the procurement.*

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Recommendations

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823 56. The purpose of prequalification is to advertise
 824 the project to the largest number of potential
 825 bidders with sufficient information to allow the
 826 candidates to evaluate their interest for the project,
 827 informed of the criteria for prequalification and if
 828 interested, submit qualifying documentation with
 829 the objective of being pre-qualified.

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

830 57. Governments should allow pre-qualification to be open and unlimited, however in some
 831 two-step procurements, competitive dialogues, and/or those projects involving functional
 832 specifications that are very complex or costly in nature, governments may limit the number
 833 of pre-qualified candidates taking into account the cost of preparing and bidding, number of
 834 available providers in the market, and overall ability to maintain competition.

835 58. Governments should require bidders to maintain their prequalified status throughout the
 836 procurement process and organize a pre- and a post-qualification check for the successful
 837 bidder.

838

839 59. Governments should sanction a bidder who has provided inaccurate information related
 840 to the pre-qualification criteria and disqualify the bidder from the pre-qualified group, and
 841 depending of the intent and nature the misleading information, be able to seek further
 842 penalties or sanctions.

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844 60. The contracting authority may at any moment, and after the award verify the accuracy
 845 of the relevant pre-qualification information provided by the winning bidder.

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Action Notes

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- 849 • Require prequalified bidders to maintain their prequalified status and the
 850 successful bidder to undergo a pre and post qualification check.

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Dialogue-based PPP Procurement

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854 *Challenge: Governments are challenged to maximize the*
 855 *opportunity that dialogue-based procurement provides, which is to*
 856 *assist governments to identify project specifications that are fit for*
 857 *purpose and achieve the objectives of the public entity, yet limit the*
 858 *window of opportunity for improper interactions or the provision of*
 859 *unfair competitive advantage to a bidder(s).*

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Recommendations

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

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863 61. Governments should use dialogue-based PPP procurement when the contracting
864 authority does not have sufficient expertise to set up technical specifications, has limited
865 financial capacity to generate full specifications, and/or where a range of options may be
866 possible to satisfy the functional requirements and performance criteria of the public body.

867 62. Dialogue-based procurement may include a two-stage tendering process where a first
868 phase determines the technical specifications and characteristics of the service to be
869 provided, a second phase with bidders capable of delivering the technical solution
870 submitting a financial bid, and the successful bidder being the one having the best
871 composite score aggregating the technical and financial evaluation.

872 63. Governments should tightly scope and control dialogue between the contracting
873 authority and one or more selected bidders and focus the dialogue only on the technical
874 (which may include certain financial requirements) of the PPP and where the public
875 authority expects contribution from the bidders.

876 64. Governments should permit dialogue to revisit functional specifications, performance
877 parameters, or standards or norms which are clearly specified in the tender documents
878 and/or are of the essence of the project as determined by the procuring authority.

879 65. Governments should put in place a tender evaluation committee that has the necessary
880 capacity to evaluate technical proposals and make quick and fully documented decisions
881 during the technical dialogue phase.

882 66. The contracting authority should ensure confidentiality on dialogue intellectual property
883 and know-how, including financial and contractual innovation.

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Action Notes

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- 887 • Specify the scope of the dialogue clearly in the tender documents and include
888 a traceable and transparent procedure that is shared with potential bidders
889 before any dialogue or negotiation begins.
- 890 • Establish a system of informing all candidates of all the same information during
891 the dialogue stage.

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Probity and Fairness Mechanisms

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896 *Challenge: Governments are challenged to recognize that projects*
897 *involving assets of particularly high value, complexity, or political*
898 *sensitivity may require additional mechanisms for ensuring*
899 *protection against corrupt practices.*

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Recommendations

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Probity Officer

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905 67. Governments should consider use of Probity Officers when extra-ordinary mechanisms
906 for ensuring probity and fairness are warranted.

907 68. Governments should appoint Probity Officers to participate in and certify that the
908 procurement proceedings comply with the applicable laws and regulations, tender
909 documentation and procedures, and other requirements such as codes of ethics or
910 information disclosure and confidentiality rules.

911 69. Probity Officers should have sufficient
912 professional capacity, skills and
913 independence, from all public and private
914 parties involved in the PPP.

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.

915 70. The Probity Officer certificate should be
916 a comprehensive report that comments on all
917 pertinent activities and communications in
918 light of the procedural requirements, and
919 certifies compliance with the same (rather
920 than for example stating an opinion).

921 71. Governments should make the probity certificate and any associated reports or materials
922 part of the documents reviewed by the body(ies) approving the choice of the successful PPP
923 bidder.

Fairness Auditor

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926 72. Governments may also appoint Fairness Auditors to audit the process, but unlike
927 Probity Officers, include the substance of the proceedings, including deliberations of the
928 evaluation committee and other sessions of the tendering entities, to ensure that a fair
929 evaluation and neutral assessment was conducted.

930 73. Governments should ensure that Fairness Auditors have similar professional capacity,
931 skills and independence as Probity Officers.

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

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

938 76. Governments should make the Fairness Auditor report part of the documents reviewed
939 by the body in charge of approving the choice of the successful bidder.

940 77. Governments should require that the Probity officers and Fairness auditors be different,
941 independent individuals.

Action Notes

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- Specify clear and measurable responsibilities for Probity Officers and Fairness Auditors, including identification of their role, scope of inquiry and reporting and timing responsibilities, and any governing laws, regulations, codes, rules, procedures, etc. upon which they are to base their probity certificate or audit, respectively.
 - Specify and publish terms of reference for Probity Officer and Fairness Auditor that are based on their capacity, skills and independence, including a compensation scheme that ensures their independent.
 - Require reports to be in writing and reporting on all pertinent activities and communications of the process. In the case of a Probity Officer require the report to certify compliance or lack thereof to the approving body. In the case of a Fairness Auditor, require the report to confirm compliance or non-compliance with applicable procurement procedures and rules and state any reservations identified in the audit.
 - Require the Probity Report to be confidential unless and until challenged and/or disclosed by court order.

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Whistle-blowing

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Challenge

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

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Recommendations

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78. A whistle-blower is any person from the public, and potentially the private sector, witnessing a conflict of interest, corruptive manoeuvres or other fraudulent practices that is detrimental to public interest and deciding to report it in accordance with a, recommended, whistle-blowing framework.

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79. Governments should establish whistle-blowing rules and procedural framework in order to enable and encourage proactive disclosure of conflicts, corruptive manoeuvres and other fraudulent practices.

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80. Governments should incorporate whistle-blower rules and framework, and ensure that it be easy to initiate by a whistle-blower, and provides a sufficient degree of confidentiality of the information and protection of the identity of the whistle-blower.

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81. Governments should provide protection against personal and professional retaliation and against criminal and civil liability to a whistle-blower reporting in good faith.

988 82. Governments should not protect a whistle-blower when a disclosure does not meet the
989 requirement of good faith, and in such case governments should be able to hold the whistle-
990 blower liable to specified penalties.

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Action Notes

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- Establish whistle-blowing rules.

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- Implement a whistle-blowing framework that begins at project conceptualization and continues through PPP procurement, award and operation.

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Part three

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Effective Implementation of the Standard

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1008 **III. Effective Implementation of the Standard**

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Presentation and Publication of the Standard

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1013 83. Governments seeking to implement this standard should adopt the standard and then
1014 adapt its recommendations through various actions that may include making them binding
1015 and subject to judicial review and criminal penalties in case of major infringement.

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

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85. 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.

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Non-compliance with Transparency and Integrity Standard and Sanctions

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86. 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.

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87. Governments should sanction any infringement above a certain threshold with civil or
criminal penalties as necessary and as determined by the jurisdiction.

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88. Governments should establish a transparent, independent, efficient and fair procedure of
inquiry and enforcement.

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

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Misprocurement and Protests

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

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

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92. Governments should allow protests to be filed with an independent authority or a court
having the power to make a full or interim decision to, among other things, suspend the

1048 awarding process upon proof of prima facie evidence that the protest has sufficient merit,
1049 cancel the procedure, and/or take other appropriate remedial action.

1050 93. In the event of a protest, governments should be provide to the aggrieved bidder any
1051 special report certified by a Probity Officer, or other transcript or procurement record
1052 generated by the public authority in accordance with the public disclosure rules. This is
1053 particularly important in scenarios where the procurement involved competitive dialogue or
1054 negotiation and/or there is a greater risk of improper communications.

1055 94. The Public Authority may proceed with the signature of the contract without prejudice
1056 of the right of any aggrieved bidder to initiate court proceeding for damages with a
1057 competent court.

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