

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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31 **SOURCE:** Zero Tolerance Approach to Corruption in 'People-First' PPP Procurement  
32 Project Team

33 **ACTION:** Interim draft

34 **STATUS:** Draft v1.0  
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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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70 **Contents**

71 **Terms .....5**

72 **Introduction.....6**

73 **Part one. Procurement Context of PPPs**

74 **I. Risk across all stages of PPP Procurement..... 10**

75 Public Contracts..... 10

76 The Three stages of PPP procurement..... 10

77 Risk areas across the three stages of PPP procurement..... 11

78 Corruption in PPP procurement..... 11

79 **Part two. Transparency and Integrity in PPP Procurement**

80 **II. Transparency and Integrity in PPP Procurement Standard ..... 14**

81 A. Institutional elements that promote transparency and integrity in PPP procurement..... 14

82 Compliance with Laws and a Code of Ethics ..... 14

83 Avoidance of Conflicts of Interest ..... 15

84 Disclosure of Information..... 16

85 B. Standard implementation tools that support transparency and integrity in PPP  
86 procurement ..... 18

87 PPP Units, Committees and Boards..... 18

88 Consultants and Experts..... 18

89 Confidentiality and Maintenance of Information ..... 20

90 Unsolicited Proposals ..... 21

91 Tender Notices and Bidding Documents..... 22

92 Tender Evaluation Committee ..... 23

93 Pre-Qualification Process ..... 24

94 Dialogue-based PPP Procurement ..... 25

95 Probity and Fairness Mechanisms..... 26

96 Whistle-blowing ..... 28

97 **Part three. Effective Implementation of the Standard**

98 **III. Effective Implementation of the Standard ..... 31**

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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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117

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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***

<sup>1</sup> McKinsey analysis; McKinsey Global Institute Analysis, 2016

<sup>2</sup> World Bank Governance Brief Anti-Corruption. May 2016

<sup>3</sup> 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).<sup>4</sup>  
 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.<sup>5</sup>

### 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

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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.<sup>6</sup>

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.<sup>7</sup> The qualifying step is where qualified bidders are identified and

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<sup>6</sup> 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>

<sup>7</sup> 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.<sup>8</sup>

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.

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## 295 **Corruption in PPP procurement**

296 There are many opportunities in a PPP procurement for corruption<sup>9</sup>, but some of the more  
 297 prominent risks include:

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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.

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

<sup>9</sup> 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**

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**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.*

357

*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.

380

*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.*

401

*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.*

426  
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.

429  
430 *Action Notes*

- 431 • Establish a conflict of interest system that incorporates international models  
432 and includes procedures for identification, disclosure, and mitigation prior  
433 to the initiation of any PPP procurement.
- 434 • Publish the conflict of interest system (ideally available online) and  
435 incorporate it in the bidding conditions and terms of tender.
- 436 • Implement procedures for individuals working on a PPP project to identify  
437 direct and indirect personal, professional, and/or financial interests related to  
438 the project and the appropriate remedial steps that will be taken to eliminate  
439 or mitigate such conflicts.
- 440 • Identify a list of entities currently engaged in contractual relations with the  
441 Public Authority and working on the PPP project and put controls in place  
442 for their interaction with or providing assistance to bidders.
- 443 • Require conflict checks at the outset of the PPP formulation and  
444 procurement and then at regular intervals throughout procurement process.

445  
446 **Disclosure of Information**

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

451 *Recommendations*

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

460  
461 17. Governments should create training and  
462 awareness programs that ensure the public disclosure  
463 requirements are met and utilized.

464  
465 18. As an extension of any public disclosure rules, governments should establish an  
466 information disclosure framework for the PPP that spans the entirety of the project.

467  
468 19. While attention should be paid to robust disclosure requirements, PPPs often invite  
469 bidders to propose innovative solutions which can involve proprietary technology or trade  
470 secrets, therefore governments should put systems in place to protect these sensitive  
471 materials.

*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.

483

- 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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500 **PPP Units, Committees and Boards**

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502 *Challenge: Clear lines of reporting and responsibility for the*  
503 *contracting authority as well as the designation or existence of a*  
504 *high level coordinating and decision making body is a key factor*  
505 *for success.*

506

507 *Recommendations*

508

509 22. Governments should separate the activity  
510 of preparation, evaluation, awarding and of  
511 decision making in PPP procurement and  
512 organize it into PPP Units, Committees and/or  
513 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.*

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

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

523 *Action Notes*

524

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

532

533 **Consultants and Experts**

534

535 *Challenge: Because of the influence consultants and experts can exert*  
536 *on the decision making processes of governments, including such basic*  
537 *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).

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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.

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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.

571

572

### *Action Notes*

573

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

599

### **Confidentiality and Maintenance of Information**

600

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

612

613

#### *Recommendations*

614

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

617

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

623

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

627

628

#### *Action Notes*

*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.*

629

630

631

- Implement a secure communication system and depository of information and documents that is in accord with the public information disclosure rules and 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**

637  
 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*

- 645  
 646  
 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.

682  
683

#### *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.
- 691

### **Tender Notices and Bidding Documents**

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693  
694  
695  
696  
697  
698  
699

*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.*

700  
701  
702

#### *Recommendations*

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

706

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

710

711 47. Governments should use tender notices  
712 that are simple and accurate, contain all the  
713 main information relating to the tender, and  
714 give sufficient information for any potential  
715 bidder to understand the functional  
716 specifications that are required by the project,  
717 as well as all pertinent information on the  
718 process, conditions and criteria for selection.

719

*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.*

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

723

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.

736

737

#### *Action Notes*

738

- 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.

756

757

### **Tender Evaluation Committee**

758

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*

765

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.*

785  
786 *Action Notes*  
787

- 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.

807

808 **Pre-Qualification Process**  
809

810 *Prequalification*  
811

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

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.*

820

821

*Recommendations*

822

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.

843

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.

846

847

*Action Notes*

848

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

851

**Dialogue-based PPP Procurement**

852

853

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).*

860

861

*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.*

862

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.

884

885

#### *Action Notes*

886

- 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.

892

893

### **Probity and Fairness Mechanisms**

894

895

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.*

900

901

#### *Recommendations*

902

903

#### *Probity Officer*

904  
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*

924  
925  
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*

942  
943 .

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

960

**Whistle-blowing**

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964

*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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971

*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.

981

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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.

985

986

987

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.

991

992

*Action Notes*

993

- Establish whistle-blowing rules.

994

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

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*Part three*

1005

**Effective Implementation of the Standard**

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1007

### 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.

1016

1017

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.

1018

1019

1020

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.

1021

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1023

#### 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.

1029

1030

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

1031

1032

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

1033

1034

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

1035

1036

1037

#### 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.

1044

1045

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

1046

1047

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.

1058

1059

1060

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