

# UNCITRAL Model Legislative Provisions on Public-Private Partnerships



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL  
Model Legislative  
Provisions on Public-Private  
Partnerships



UNITED NATIONS  
Vienna, 2020

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UNITED NATIONS PUBLICATION

Sales No.: E.20.V.4

ISBN 978-92-1-130401-5

e-ISBN 978-92-1-004808-8

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Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

# Preface

The UNCITRAL Model Legislative Provisions on Public-Private Partnerships and the *UNCITRAL Legislative Guide on Public-Private Partnerships* were prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted at its fifty-second session (Vienna, 8–19 July 2019).<sup>1</sup> In addition to representatives of member States of the Commission, representatives of many other States and of several international organizations, both intergovernmental and non-governmental, participated actively in the preparatory work. The Model Legislative Provisions translate into legislative language the advice given in the recommendations contained in the *Legislative Guide*.

The Model Legislative Provisions are intended to assist in the establishment of a legislative framework favourable to public-private partnerships (PPPs). The Model Legislative Provisions follow the corresponding notes in the *Legislative Guide*, which offer an analytical introduction with references to financial, regulatory, legal, policy and other issues raised in the subject area. The user is advised to read the Model Legislative Provisions together with the *Legislative Guide*, which provides background information to enhance understanding of the legislative recommendations.

The Model Legislative Provisions deal with matters that it is important to address in legislation specifically concerned with PPPs. They do not deal with other areas of law that, as discussed in the *Legislative Guide*, also have an impact on PPPs. More-over, the successful implementation of PPPs typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources and economic stability.

The Model Legislative Provisions and the *Legislative Guide* update, expand and replace two earlier texts prepared by UNCITRAL, namely the *Legislative Guide on Privately Financed Infrastructure Projects*, which was adopted by UNCITRAL at its thirty-third session (New York, 12 June to 7 July 2000),<sup>2</sup> and the Model Legislative Provisions on Privately Financed Infrastructure Projects, which were adopted by UNCITRAL at its thirty-sixth session (Vienna, 30 June to 11 July 2003).<sup>3</sup>

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<sup>1</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, chap. III and annex I.

<sup>2</sup> *Ibid.*, *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 372.

<sup>3</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 171.



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# **General Assembly resolution 74/183 adopted on 18 December 2019**

[on the report of the Sixth Committee (A/74/423)]

## **74/183. Model Legislative Provisions on Public-Private Partnerships of the United Nations Commission on International Trade Law**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Recalling also* its resolution 58/4 of 31 October 2003, by which it adopted the United Nations Convention against Corruption,<sup>1</sup>

*Recalling further* its resolution 70/1 of 25 September 2015, by which it adopted the 2030 Agenda for Sustainable Development, and its resolution 69/313 of 27 July 2015, by which it endorsed the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,

*Convinced* that public-private partnerships can play an important role in improving the provision and sound management of infrastructure and public services and in supporting government efforts to achieve the Sustainable Development Goals,

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<sup>1</sup> See also United Nations, *Treaty Series*, vol. 2349, No. 42146.

*Concerned* that the inadequacy of the legal framework and a lack of transparency may discourage investment in infrastructure and public services and lead to a greater risk of corruption and mismanagement of public funds,

*Emphasizing* the importance of providing efficient and transparent procedures for the awarding of contracts for public-private partnerships and of facilitating project implementation through rules that enhance transparency, fairness and long-term sustainability and remove undesirable restrictions on private sector participation in the development and operation of infrastructure and public services,

*Recalling* the valuable guidance that the Commission has provided to Member States towards the establishment of a favourable legislative framework in that respect, through its *Legislative Guide on Privately Financed Infrastructure Projects*<sup>2</sup> and the accompanying Model Legislative Provisions on Privately Financed Infrastructure Projects,<sup>3</sup> and the recommendation by the General Assembly, in its resolution 58/76 of 9 December 2003, that States give due consideration to those texts when revising or adopting legislation related to private participation in the development and operation of public infrastructure,

*Convinced* that the advice provided by the Commission will be of further assistance to States, in particular developing countries, in promoting good governance and establishing appropriate legislative frameworks for public-private partnership projects,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption<sup>4</sup> of the Model Legislative Provisions on Public-Private Partnerships<sup>5</sup> and the Legislative Guide on Public-Private Partnerships;

2. *Requests* the Secretary-General to publish the Model Legislative Provisions and the Legislative Guide, including electronically, in the six official languages of the United Nations and to disseminate them broadly to Governments and relevant international intergovernmental and non-governmental organizations, private sector entities and academic institutions;

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<sup>2</sup> United Nations publication, Sales No. E.01.V.4.

<sup>3</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, annex I.

<sup>4</sup> *Ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, chap. III.

<sup>5</sup> *Ibid.*, annex I.

3. *Recommends* that all States give due consideration to the Model Legislative Provisions and the Legislative Guide when revising or adopting legislation relevant to public-private partnerships, and invites States that have used the Model Legislative Provisions to advise the Commission accordingly.

*51st plenary meeting  
18 December 2019*



## I. General provisions

### Model provision 1. PPP guiding principles

#### *Option I*

WHEREAS the [Government] [Parliament] of [...] wishes to enable the use of public-private partnerships in infrastructure development and the provision of associated services to the public;

WHEREAS, for those purposes, the [Government] [Parliament] considers it desirable to regulate public-private partnerships so as to enhance transparency, fairness, stability and predictability; promote proper management, integrity, competition and economy; and ensure long-term sustainability;

[*Other objectives that the enacting State might wish to state*];

Be it therefore enacted as follows:

#### *Option II*

This law establishes the procedures for the approval, award and implementation of public-private partnership projects, in accordance with the principles of transparency, fairness, stability, proper management, integrity, competition, economy, and long-term sustainability.

### Model provision 2. Definitions

For the purposes of this law:

(a) “Public-private partnership (PPP)” means an agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the facility, including both those projects that entail a transfer of the demand risk to the private partner (“concession PPPs”) and those other types of PPPs that do not entail such risk transfer (“non-concession PPPs”);

(b) “Infrastructure facility” means physical facilities and systems that directly or indirectly provide services to the general public;

(c) “Infrastructure project” means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(d) “Contracting authority” means the public authority that has the power to enter into a PPP contract [*under the provisions of this law*];<sup>1</sup>

(e) “Private partner” means the private entity retained by the contracting authority to carry out a project under a PPP contract;

(f) “PPP contract” means the mutually binding agreement or agreements between the contracting authority and the private partner that set forth the terms and conditions for the implementation of a PPP;

(g) “Bidder” or “bidders” means persons, including groups thereof, that participate in selection proceedings for the award of the PPP contract;<sup>2</sup>

(h) “Unsolicited proposal” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(i) “Regulatory agency” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

### Model provision 3. Authority to enter into PPP contracts

The following public authorities have the power to enter into PPP contracts<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres

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<sup>1</sup> It should be noted that this definition relates only to the power to enter into PPP contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as “regulatory agency” in subparagraph (i), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

<sup>2</sup> The term “bidder” or “bidders” encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority’s request for proposals.

<sup>3</sup> The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see the *UNCITRAL Legislative Guide on Public-Private Partnerships*, chap. I, “General legal and institutional framework”, paras. 37–55).

<sup>4</sup> It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of PPP in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see the *Legislative Guide*, chap. II, “Project planning and preparation”, paras. 53–55). In addition, for countries that contemplate providing specific forms of government support to PPP projects, it may be useful for the relevant law, such as legislation or a regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see the *Legislative Guide*, chap. II, “Project planning and preparation”).



of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into PPP contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof*].<sup>5</sup>

#### **Model provision 4. Eligible infrastructure sectors**

PPP contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].<sup>6</sup>

## **II. Project planning and preparation**

#### **Model provision 5. PPP project proposals**

1. A contracting authority envisaging to develop infrastructure or services through a PPP shall carry out or procure a feasibility study to assess whether the project meets the conditions for approval set for in [*these provisions*].
2. The feasibility study shall:

(a) Identify the public infrastructure or service needs to be met by the proposed PPP project and how the project meets relevant national or local priorities for the development of public infrastructure and services;

(b) Assess the various options available to the contracting authority to satisfy those needs and conclusively demonstrate the comparative advantage, strategic and operational benefits of implementation as PPP, in particular that the project:

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<sup>5</sup>Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into PPP contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the states [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>6</sup>It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

- (i) Offers a more economic and efficient solution as a PPP than if it were to be procured and carried out by the contracting authority or another public body (“value for money”); and
  - (ii) Will not lead to unexpected financial liabilities for the public sector (“fiscal risk”).
3. In addition to the feasibility study, the request for approval of a PPP project shall:
- (a) Assess the project’s social, economic and environmental impact;
  - (b) Identify the technical requirements and expected inputs and deliverables;
  - (c) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority;
  - (d) Identify the licences, permits or authorizations that the contracting authority or any other public authority may be required to issue in connection with the approval or implementation of the project;
  - (e) Identify and assess the main project risks and describe the proposed risk allocation under the contract;
  - (f) Identify any proposed form of Government support for the implementation of the project;
  - (g) Determine the capacity of the contracting authority to effectively enforce the contract, including the ability to monitor and regulate project implementation and the performance of the private partner;
  - (h) Identify the appropriate procedure for contract award.

### **Model provision 6. Approval of PPP project proposals**

1. The [enacting State indicates the competent body] shall be responsible for [approving proposed PPP projects submitted to it by contracting authorities] [advising [the enacting State indicates the competent body] as to whether a proposed PPP project meets the approval conditions set forth in [these provisions]].

2. The [enacting State indicates the competent body] shall be responsible, in particular for:

(a) Reviewing PPP project proposals and feasibility studies submitted by contracting authorities for purposes of ascertaining whether a proposed project is worthwhile being carried out as a PPP and meets the requirements set forth in [these provisions];

(b) Reviewing the contracting authority's capability for carrying out the project and making appropriate recommendations;

(c) Reviewing the draft requests for proposal prepared by contracting authorities to ensure conformity with the approved proposal and feasibility study;

(d) Advising the Government on administrative procedures relating to PPPs;

(e) Developing guidelines relating to PPPs;

(f) Advising contracting authorities on the methodology for conducting feasibility and other studies;

(g) Preparing standard bidding and contract documents for use by contracting authorities;

(h) Issuing advice in connection with the implementation of PPP projects;

(i) Assisting contracting authorities as required to ensure that PPPs are carried out in accordance with [these provisions]; and

(j) Performing any other functions in connection with PPPs that [the enacting States indicates the competent body to issue regulations implementing the model provisions] may assign to it.

## **Model provision 7. Administrative coordination**

The [enacting State indicates the competent body] shall [establish] [propose to [the enacting State indicates the competent body] the establishment of] institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of PPP projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.

### III. Contract award

#### Model provision 8. General rules

The contract authority shall select the private partner in accordance with model provisions 9 to 22 (or exceptionally model provisions 23 to 28) and model provisions 29 to 32, and, for matters not provided for herein, in accordance with [the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive public procurement procedures equivalent to those set forth in the UNCITRAL Model Law on Public Procurement].<sup>7</sup>

##### 1. Pre-selection of bidders

#### Model provision 9. Purpose and procedure of pre-selection

1. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged project.

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<sup>7</sup>The reader's attention is drawn to the relationship between the procedures for the selection of the private partner and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of PPP projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the request for proposals, two-stage tendering, competitive negotiations and single-source procurement methods under the UNCITRAL Model Law on Public Procurement, which was adopted by UNCITRAL at its forty-fourth session, held in Vienna from 27 June to 8 July 2011. The model provisions on the selection of the private partner are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators in developing special rules for the selection of the private partner. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and challenge procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, *mutatis mutandis*, supplement the practical elements of the selection procedure described herein.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors].

3. To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors],<sup>8</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure, facility or service systems, as appropriate;

(b) An indication of other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the private partner);

(c) Where already known, a summary of the main required terms of the PPP contract to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors],<sup>9</sup> the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with model provision 10;

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 11;

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<sup>8</sup>A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 18, para. 3, of the Model Procurement Law.

<sup>9</sup>A list of elements typically contained in pre-qualification documents can be found in article 18, para. 5, of the Model Procurement Law.

(c) Whether the contracting authority intends to request only a limited number<sup>10</sup> of pre-selected bidders that best meet the pre-selection criteria specified in the pre-selection documents to submit proposals upon completion of the pre-selection proceedings in accordance with model provision 12, paragraph 2; if so, the maximum number of pre-selected bidders from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing the maximum number, the contracting authority shall bear in mind the need to ensure effective competition;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*the enacting State*] in accordance with model provision 35.

5. For matters not provided for in this model provision, the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification or pre-selection of suppliers and contractors*].<sup>11</sup>

## Model provision 10. Pre-selection criteria

Interested bidders must meet such of the following criteria as the contracting authority considers appropriate<sup>12</sup> and relevant for the particular contract:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) That they have sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

<sup>10</sup>In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four).

<sup>11</sup>Procedural steps on pre-qualification and pre-selection proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in articles 18 and 49, para. 3, of the Model Procurement Law.

<sup>12</sup>The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Legislative Guide* (see chapter III, "Contract award", paras. 44–45). The *Legislative Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they must be announced at the outset of the selection proceedings (i.e., in the invitation to the pre-selection proceedings).

- (c) That they meet ethical and other standards applicable in [*this State*];
- (d) That they have the legal capacity to enter into the PPP contract;
- (e) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;
- (f) That they have fulfilled their obligations to pay taxes and social security contributions in [*this State*];
- (g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of . . . years [*the enacting State specifies the period of time*] preceding the commencement of the contract award proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

### **Model provision 11. Participation of consortia**

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with model provision 10 shall relate to the consortium as a whole as well as to its individual participants.
2. Unless otherwise [authorized by . . . [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium<sup>13</sup> at a time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.
3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

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<sup>13</sup>The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

## Model provision 12. Decision on pre-selection

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria, requirements and procedures that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 13 to 22.
2. Notwithstanding paragraph 1, where the contracting authority has indicated through an appropriate statement in the pre-selection documents that it reserved the right to request proposals only from a limited number of bidders that best meet the pre-selection criteria, the contracting authority shall rate the bidders on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings up to the maximum number specified in the pre-selection documents but at least three, if possible. In drawing up the list, the contracting authority shall apply only criteria and the manner of rating that are set forth in the pre-selection documents.

### 2. Procedures for requesting proposals

## Model provision 13. Choice of selection procedure

1. A contracting authority may select the private partner for a PPP project by means of a two-stage request for proposals in accordance with [*the enacting State indicates the provisions of its laws that provide for a procurement method equivalent to the two-stage tendering provided for in article 48 of the UNCITRAL Model Law on Public Procurement*] where the contracting authority assesses that discussions with bidders are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under [*the enacting State indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement*], and in order to allow the contracting authority to obtain the most satisfactory solution to its procurement needs.
2. A contracting authority may select the private partner for a PPP project by means of a request for proposals with dialogue in accordance with [*the enacting State indicates the provisions of its laws that provide for a procurement method equivalent to the request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement*] where it is not feasible for the



contracting authority to formulate a detailed description of the subject matter of the procurement in accordance with [*the enacting State indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement*], and the contracting authority assesses that dialogue with bidders is needed to obtain the most satisfactory solution to its procurement needs.

### **Model provision 14. Content of the request for proposals**

1. The contracting authority shall provide a set of the request for proposals and related documents to each bidder invited to submit proposals that pays the price, if any, charged for those documents.

2. In addition to any other information required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],<sup>14</sup> the request for proposals shall include the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion or the descending order of importance of all evaluation criteria; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

### **Model provision 15. Bid securities**

1. When the contracting authority requires bidders to provide a bid security, the request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

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<sup>14</sup> A list of elements typically contained in a request for proposals can be found in articles 47 and 49 of the Model Procurement Law.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:<sup>15</sup>

(a) If so stipulated in the request for proposals, withdrawal or modification of a proposal or a best and final offer before or after the stipulated deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 22, paragraph 1 (a);

(c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 18, subparagraph (e);

(d) Failure to sign the PPP contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the PPP contract after the proposal or offer has been accepted or to comply with any other condition prior to signing the PPP contract specified in the request for proposals.

### **Model provision 16. Clarifications and modifications**

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 14. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

### **Model provision 17. Two-stage request for proposals**

(a) Prior to issuing the request for proposals in accordance with model provision 14, the contracting authority issues an initial request for proposals calling upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been rejected as

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<sup>15</sup> General provisions on bid securities can be found in article 17 of the Model Procurement Law.

non-responsive or for other grounds specified in law.<sup>16</sup> Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;<sup>17</sup>

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provision 14.

### **Model provision 18. Request for proposals with dialogue**

Where a request for proposals with dialogue is used in accordance with model provision 13, paragraph 2:

(a) The contracting authority shall invite each bidder that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The contracting authority shall ensure that the number of bidders invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition;

(b) The dialogue shall be conducted by the same representatives of the contracting authority on a concurrent basis;

(c) During the course of the dialogue, the contracting authority shall not modify the subject matter of the project, any qualification or evaluation criterion, any minimum requirements, any element of the description of the project or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals;

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<sup>16</sup>For example, corruption, collusion and conflict of interest.

<sup>17</sup>General provisions on clarification of request for proposals and the conduct of meetings with bidders can be found in article 15 of the Model Procurement Law.

(d) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a bidder shall be communicated at the same time and on an equal basis to all other participating bidders, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of [the enacting State indicates the provisions of its laws equivalent to article 24 of the UNCITRAL Model Law on Public Procurement];

(e) Following the dialogue, the contracting authority shall request all bidders remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

### **Model provision 19. Evaluation criteria**

1. The criteria for the evaluation and comparison of the technical elements of the proposals shall include at least the following:

- (a) Technical soundness;
- (b) Compliance with environmental standards;
- (c) Operational feasibility;
- (d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the financial and commercial elements of the proposals shall include, as appropriate:

(a) The present value of the proposed tolls, unit prices and other charges over the contract period;

(b) The present value of the proposed direct payments by the contracting authority, if any;

(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) The extent of financial support, if any, expected from a public authority of [the enacting State];

(e) The soundness of the proposed financial arrangements;

(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

- (g) The social and economic development potential offered by the proposals.

### **Model provision 20. Comparison and evaluation of proposals or offers**

1. The contracting authority shall compare and evaluate each proposal or offer in accordance with the evaluation criteria, the relative weight accorded to each such criterion or the descending order of importance of evaluation criteria and the evaluation process set forth in the request for proposals.
2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals or offers that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

### **Model provision 21. Further demonstration of fulfilment of qualification criteria**

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.<sup>18</sup>

### **Model provision 22. Contract award**

1. Where a two-stage procedure is used in accordance with model provision 13, paragraph 1:

(a) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the PPP contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals;

(b) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall

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<sup>18</sup> See Model Procurement Law, art. 9, para. 8.

inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer;

(c) If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a PPP contract or rejects all remaining proposals;

(d) The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

2. Where a request for proposals with dialogue is used in accordance with model provision 13, paragraph 2:

(a) No negotiations shall take place between the contracting authority and bidders with respect to their best and final offers;

(b) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

### 3. *Direct negotiation of PPP contracts with one or more bidders*

#### **Model provision 23. Circumstances authorizing direct negotiation**

Subject to approval by [*the enacting State indicates the relevant authority*],<sup>19</sup> the contracting authority is authorized to negotiate a PPP contract without using the procedure set forth in model provisions 9 to 22 in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 9 to 22

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<sup>19</sup>The rationale for subjecting the direct negotiation of a PPP contract to the approval of a higher authority is to ensure that the contracting authority makes use of this exception only in the appropriate circumstances. The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [*the enacting State specifies a monetary ceiling*]] [set forth in [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a project may be awarded through direct negotiations*]];<sup>20</sup>

(c) Where the use of the procedures set forth in model provisions 9 to 22 is not appropriate for the protection of essential security interests of the State;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In other cases where [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.<sup>21</sup>

#### **Model provision 24. Procedures for negotiation of a PPP contract**

Where a PPP contract is negotiated without using the procedures set forth in model provisions 9 to 22 the contracting authority shall:

(a) Cause a notice of its intention to commence negotiations in respect of a PPP contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*<sup>22</sup>];

(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;

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<sup>20</sup>As an alternative to the exclusion provided for in subparas. (b) and (c), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by allowing direct solicitation in the procedures described in model provisions 9 to 22, as envisaged in art. 35, para. 2, of the Model Procurement Law.

<sup>21</sup>Enacting States that deem it desirable to authorize the use of direct negotiation procedures on an ad hoc basis may wish to retain subparagraph (e) when implementing the model provision. Enacting States wishing to limit exceptions to the selection procedures envisaged in model provisions 9 to 22 may prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of direct negotiation procedures that may be provided for under specific legislation.

<sup>22</sup>See Model Procurement Law, art. 7.

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

#### 4. *Unsolicited proposals*<sup>23</sup>

### **Model provision 25. Admissibility of unsolicited proposals**

As an exception to model provisions 9 to 22, the contracting authority<sup>24</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 26 to 28, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

### **Model provision 26. Procedures for determining the admissibility of unsolicited proposals**

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall inform the proponent as soon as practicable whether or not the project is considered to be potentially in the public interest.<sup>25</sup>
2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the

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<sup>23</sup> Enacting States wishing to enhance transparency in the use of direct negotiation procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 23 and 24. An indication of possible qualification criteria is contained in model provision 10.

<sup>24</sup> The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the institutional and administrative arrangements of the enacting State, a body separate from the contracting authority may have the responsibility for handling unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 19 and the references cited therein).

<sup>25</sup> The determination that a proposed project is in the public interest entails a considered judgment regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.



contracting authority to make a proper evaluation of the proponent's qualifications<sup>26</sup> and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

**Model provision 27. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights**

1. Except in the circumstances set forth in model provision 23, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 9 to 22 if the contracting authority considers that:

(a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(b) The proposed concept or technology is not truly unique or new.

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

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<sup>26</sup>The enacting State may wish to provide in its regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 10.

### **Model provision 28. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights**

1. If the contracting authority determines that the conditions of model provision 27, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 9 to 22. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4 of this model provision.
2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].
3. If no proposals in response to an invitation issued pursuant to paragraph 2 of this model provision are received within [a reasonable period] [the amount of time specified in paragraph 2], the contracting authority may engage in negotiations with the original proponent.
4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 24. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its needs, the contracting authority shall request the submission of proposals pursuant to model provisions 9 to 22, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 27, paragraph 2.

### *5. Miscellaneous provisions*

#### **Model provision 29. Confidentiality**

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to

model provisions 17, 18, 21, 23, 24 or 28, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

### **Model provision 30. Notice of contract award**

The contracting authority shall cause a notice of the contract award to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*].<sup>27</sup> The notice shall identify the private partner and include a summary of the essential terms of the PPP contract.

### **Model provision 31. Record of selection and award proceedings**

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern the record of procurement proceedings*].<sup>28</sup>

### **Model provision 32. Review procedures**

A bidder that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the contracting authority with the law may challenge the decision or action concerned in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].

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<sup>27</sup> See Model Procurement Law, art. 23.

<sup>28</sup> The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, is set out in art. 25 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

## IV. Contents and implementation of the PPP contract

### Model provision 33. Contents of the PPP contract

The PPP contract shall provide for such matters as the parties deem appropriate,<sup>29</sup> such as:

- (a) The nature and scope of works to be performed and services to be provided by the private partner;
- (b) The conditions for provision of those services and the extent of exclusivity, if any, of the private partner's rights under the PPP contract;
- (c) The assistance that the contracting authority has undertaken to provide to the private partner in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;
- (d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 35;
- (e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 36 to 39;
- (f) Where the remuneration of the private partner consists of operational revenue such as tariffs and fees for the use of the facility or the provision of services: the amount and method of payment, their breakdown, the modalities of their variation and any public subsidies when applicable;
- (g) Where the remuneration of the private partner consists of payments made by the contracting authority: the overall cost of the service rendered to the public authority and its breakdown; the methods and formulas for the establishment or adjustment of such payments; the payment procedure, in particular the conditions under which, each year, the gross sums due by the contracting authority to the private partner are set off against any sums that the private partner may be liable to pay due to fines, contract penalties or liquidated damages if any;
- (h) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility;
- (i) The extent of the private partner's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its

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<sup>29</sup> Enacting States may wish to note that the inclusion in the PPP contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

continuity and its provision under essentially the same conditions for all users pursuant to model provision 43;

(j) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the private partner and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;

(k) The extent of the private partner's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations;

(l) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (i) and (j), including any compensation to which the private partner might be entitled;

(m) Any rights of the contracting authority to review and approve major contracts to be entered into by the private partner, in particular with the private partner's own shareholders or other affiliated persons;

(n) Guarantees of performance to be provided and insurance policies to be maintained by the private partner in connection with the implementation of the infrastructure project;

(o) Remedies available in the event of default of either party;

(p) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the PPP contract owing to circumstances beyond its reasonable control;

(q) The duration of the PPP contract and the rights and obligations of the parties upon its expiry or termination;

(r) The manner for calculating compensation pursuant to model provision 53;

(s) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the private partner (see model provisions 34 and 55);

(t) The rights and obligations of the parties with respect to confidential information pursuant to model provision 29.

### **Model provision 34. Governing law**

The PPP contract is governed by the law of [*the enacting State*] unless otherwise provided in the PPP contract.<sup>30</sup>

### **Model provision 35. Corporate structure of the private partner**

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*the enacting State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the time frame for establishing such legal entity, its minimum capital and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the PPP contract consistent with the terms of the request for proposals.

### **Model provision 36. Ownership of assets<sup>31</sup>**

The PPP contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private partner's own property. The PPP contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the private partner is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the PPP contract;

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<sup>30</sup>Legal systems provide varying answers to the question as to whether the parties to a PPP contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. 5–8), in some countries the PPP contract may be subject to administrative law, while in others the PPP contract may be governed by private law (see also chap. VII, "Other relevant areas of law", paras. 25–28). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of a PPP project (see generally chap. VII, "Other relevant areas of law", sect. B).

<sup>31</sup>Private sector participation in infrastructure and public service projects may be devised in a variety of different forms (see the *Legislative Guide*, "Introduction and background information on PPPs", paras. 48–55). The general policy typically determines the legislative approach for ownership of project-related assets. Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the private partner's ability to create security interests in project assets for the purpose of raising financing for the project. Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the private partner, upon expiry or termination of the PPP contract or at any other time.

(b) Assets, if any, that the contracting authority, at its option, may purchase from the private partner; and

(c) Assets, if any, that the private partner may retain or dispose of upon expiry or termination of the PPP contract.

### **Model provision 37. Acquisition of rights related to the project site**

1. The contracting authority or other public authority under the terms of the law and the PPP contract shall make available to the private partner or, as appropriate, shall assist the private partner in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*].<sup>32</sup>

### **Model provision 38. Easements<sup>33</sup>**

#### *Option I*

1. The contracting authority or other public authority under the terms of the law and the PPP contract shall make available to the private partner or, as appropriate, shall assist the private partner to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

#### *Option II*

1. The private partner shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State*

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<sup>32</sup>If the enacting State does not have such legislation, the specific law on PPP should so provide.

<sup>33</sup>The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the private partner directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure.

*indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws].*

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

### **Model provision 39. Financial arrangements**

1. Where the private partner operates a facility used by the public or provides a service to the public under the PPP contract, the private partner shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the PPP contract. The PPP contract shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].<sup>34</sup>

2. The contracting authority shall have the power to agree to make direct payments to the private partner as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services under paragraph 1.

3. Where the private partner operates a facility used by the public or provides a service to the contracting authority or other public body, the private partner shall have the right to the rental, usage fees or other payments set forth in the contract for the actual use or availability of the facility or its services in accordance with the PPP contract. The PPP contract shall provide for methods and formulas for the establishment and adjustment of those payments.

### **Model provision 40. Security interests**

1. Subject to any restriction that may be contained in the PPP contract,<sup>35</sup> the private partner has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required

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<sup>34</sup>Tolls, fees, prices or other charges accruing to the private partner, which are referred to in the *Legislative Guide* as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, “Project planning and preparation, paras. 56–86). The cost at which public services are provided is typically an element of the Government’s infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity”.

<sup>35</sup>These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.



to secure any financing needed for the project, including, in particular, the following:

- (a) Security over movable or immovable property owned by the private partner or its interests in project assets;
  - (b) A pledge of the proceeds of, and receivables owed to the private partner for, the use of the facility or the services it provides.
2. The shareholders of the private partner shall have the right to pledge or create any other security interest in their shares in the private partner.
  3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

#### **Model provision 41. Assignment of the PPP contract**

Except as otherwise provided in model provision 40, the rights and obligations of the private partner under the PPP contract may not be assigned to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the private partner under the PPP contract, including the acceptance by the new private partner of all obligations thereunder and evidence of the new private partner's technical and financial capability as necessary for providing the service.

#### **Model provision 42. Transfer of controlling interest<sup>36</sup> in the private partner**

Except as otherwise provided in the PPP contract, a controlling interest in the private partner or the interest of a shareholder whose participation in the project company is deemed as essential for the successful maintenance and operation of the project may not be transferred to third parties without the consent of the

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<sup>36</sup>The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

contracting authority. The PPP contract shall set forth the conditions under which consent of the contracting authority may be given.

### **Model provision 43. Operation of infrastructure**

1. The PPP contract shall set forth, as appropriate, the extent of the private partner's obligations to ensure:
  - (a) The modification of the service so as to meet the demand for the service;
  - (b) The continuity of the service;
  - (c) The provision of the service under essentially the same conditions for all users;
  - (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the private partner.
2. The private partner shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

### **Model provision 44. Compensation for specific changes in legislation**

The PPP contract shall set forth the extent to which the private partner is entitled to compensation in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

### **Model provision 45. Amendment of the PPP contract**

1. Without prejudice to model provision 44, the PPP contract shall further set forth the whether and to what extent the private partner is entitled to request the amendment of the PPP contract in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as

compared with the costs and the value of performance originally foreseen, as a result of:

- (a) Changes in economic or financial conditions; or
- (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

- Occur after the conclusion of the contract;
- Are beyond the control of the private partner; and
- Are of such a nature that the private partner could not reasonably be expected to have taken them into account at the time the PPP contract was negotiated or to have avoided or overcome their consequences.

2. Subject to the provisions of paragraph 5, the contracting authority and the private partner may agree to expand the scope of the PPP contract to include additional works or services to be provided by the private partner that were not included in the initial contract but have since become necessary and for the performance of which it would not be in the public interest to select another private partner:

- (i) Because of economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial contract; and
- (ii) Because the selection of another private partner would cause significant inconvenience or substantial duplication of costs for the contracting authority.

3. The PPP contract shall establish procedures for amending the terms of the PPP contract pursuant to paragraphs 1 and 2.

4. The contracting authority shall require the approval of [*the enacting State indicates the public body or entity*] for any amendments to the PPP contract:

(a) That exceed [*the enacting State indicates the percentage*] of the value of the original contract; or

(b) That provide for additional works or services to be provided by the private partner that were not included in the initial contract pursuant to paragraph 2.

5. The contracting authority may not accept any amendment or modification to the PPP contract of the type referred to in paragraph 2 that would render the contract substantially different in character from the one initially concluded. A modification shall be considered to be substantial where one or more of the following conditions is met:

(a) The total value of the remuneration of the private partner resulting from the amendment would exceed [*the enacting State indicates the percentage*] of the combined sum of the present value of the proposed tolls, fees, unit prices and other charges over the contract period and the present value of the proposed direct payments by the contracting authority, if any, as considered by the contracting authority to evaluate proposals in accordance with model provision 19, paragraph 2 (a) and (b). Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications, in a period of [*the enacting State indicates the desired time frame*];

(b) The modification introduces conditions which, had they been part of the initial contract award procedure, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure;

(c) The modification extends the scope of the contract considerably;

(d) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under model provision 47.

#### **Model provision 46. Takeover of an infrastructure project by the contracting authority**

Under the circumstances set forth in the PPP contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the private partner to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

#### **Model provision 47. Substitution of the private partner**

The contracting authority may agree with the entities extending financing for an infrastructure project and the private partner to provide for the substitution of the

private partner by a new entity or person appointed to perform under the existing PPP contract upon serious breach by the private partner or other events that could otherwise justify the termination of the PPP contract or other similar circumstances.<sup>37</sup>

## **V. Duration, extension and termination of the PPP contract**

### *1. Duration and extension of the PPP contract*

#### **Model provision 48. Duration of the PPP contract**

The PPP contract shall set forth its duration, which shall take into account the following factors:

- (a) The nature and amount of investment required to be made by the private partner;
- (b) The normal amortization period for the particular facilities and installations to be built, expanded, refurbished or renovated under the contract;
- (c) The contracting authority's needs and requirements in relation to the facilities or services concerned;
- (d) Any relevant policies concerning the competition and market structure for the infrastructure or service sector concerned, as laid down in applicable laws and regulations.

#### **Model provision 49. Extension of the PPP contract**

The contracting authority may not agree to extend the duration of the PPP contract except as a result of the following circumstances:

- (a) Delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;

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<sup>37</sup>The substitution of the private partner by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the PPP contract (see the *Legislative Guide*, chap. IV, "PPP implementation: legal framework and PPP contract", paras. 162–165). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the private partner company by selling those shares to a third party acceptable to the contracting authority.

- (b) Project suspension brought about by acts of the contracting authority or other public authorities;
- (c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the PPP contract, if the private partner would not be able to recover such costs without such extension; or
- (d) [Other circumstances, as specified by the enacting State].<sup>38</sup>

## 2. Termination of the PPP contract

### **Model provision 50. Termination of the PPP contract by the contracting authority**

The contracting authority may terminate the PPP contract:

- (a) In the event that it can no longer be reasonably expected that the private partner will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;
- (b) For compelling<sup>39</sup> reasons of public interest, subject to payment of compensation to the private partner, the terms of the compensation to be as agreed in the PPP contract;
- (c) [Other circumstances that the enacting State might wish to add].

### **Model provision 51. Termination of the PPP contract by the private partner**

The private partner may not terminate the PPP contract except under the following circumstances:

- (a) In the event of serious breach by the contracting authority or other public authority of its obligations in connection with the PPP contract and subject to a final finding by the dispute settlement body agreed by the parties in accordance with model provision 55 or in the contract;

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<sup>38</sup>The enacting State may wish to consider the possibility of having the law authorize a consensual extension of the PPP contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 31.

<sup>39</sup>Possible situations constituting a compelling reason of public interest are discussed in the *Legislative Guide*, chap. V, "Duration, extension and termination of the PPP contract", paras. 29–30.

(b) If the conditions for a revision of the PPP contract under model provision 45, paragraph 1, are met, but the parties have failed to agree on a revision of the PPP contract; or

(c) If it would be manifestly unreasonable to expect the private partner to continue performing under the contract as a result of:

- (i) Failure by a public authority to provide support or perform other acts which under the term of the PPP contract or the law are required for the implementation of the project; or
- (ii) A substantial increase in the cost of the private partner's performance of the PPP contract or a substantial decrease of the value that the private partner receives for such performance as a result of acts or omissions of the contracting authority or other public authorities, for instance, pursuant to model provision 33, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the PPP contract pursuant to model provision 33, subparagraph (l).

### **Model provision 52. Termination of the PPP contract by either party**

The PPP contract shall provide for either party to terminate the PPP contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The PPP contract shall also set forth the procedure for such termination, in particular the prior notice to be given to the other contracting party. The parties shall also have the right to terminate the PPP contract by mutual consent.

### *3. Arrangements upon termination or expiry of the PPP contract*

### **Model provision 53. Compensation upon termination of the PPP contract**

The PPP contract shall stipulate how compensation due to either party is calculated in the event of termination of the PPP contract, providing, where appropriate, for compensation for the fair value of works performed under the PPP contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

## **Model provision 54. Wind-up and transfer measures**

The PPP contract shall provide, as appropriate, for:

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority;
- (b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority;
- (c) The transfer of technology required for the operation of the facility;
- (d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the facility;
- (e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor private partner;
- (f) Mechanisms and procedures for the decommissioning of the infrastructure, including the preparation of a decommissioning plan and the parties' respective obligations for carrying it out and their financial obligations in that respect.

## **VI. Settlement of disputes**

### **Model provision 55. Disputes between the contracting authority and the private partner**

Any disputes between the contracting authority and the private partner shall be settled through the dispute settlement mechanisms agreed by the parties in the PPP contract.<sup>40</sup>

### **Model provision 56. Disputes involving customers or users of the infrastructure facility, or other parties**

Where the private partner provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require

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<sup>40</sup>The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of PPPs.



the private partner to establish simplified and efficient mechanisms for handling claims submitted by customers or users of the infrastructure facility, as well as by other parties affected by the project.

### **Model provision 57. Other disputes**

1. The private partner and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.
2. The private partner shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.





