



PUBLIC-PRIVATE PARTNERSHIP MANUAL

PHASE 3

Tender Preparation and Procurement



WORLD BANK GROUP



2021

Acknowledgments

This PPP Manual for Ukraine was prepared as part of the World Bank project on Strengthening the Use of Public-Private Partnerships through Better Public Capital Investment Management in Ukraine, funded by the Good Governance and Investment Climate Reform (GGICR) Trust Fund which is housed in the World Bank and supported by the UK Government.

The World Bank's Strengthening the Use of Public-Private Partnerships through Better Public Capital Investment Management in Ukraine Project expresses appreciation to the Ministry for Development of Economy, Trade and Agriculture for their excellent collaboration in the development of this PPP Manual.

This work is a product of the staff of the World Bank in Governance Global Practice and Infrastructure Finance, PPPs and Guarantees Global Practice with external contributions. The findings, interpretations, and conclusions expressed in this work do not necessarily reflect the views of the Executive Directors of the World Bank or the governments they represent. The World Bank does not guarantee the accuracy of the data included in this work.

Table of Contents

Introduction	4
1. Forming a tender commission	8
2. Developing a procurement strategy	9
3. Developing a communication plan	11
4. Hiring advisors for tender preparation and execution	12
5. Incorporation of relevant authorities' instructions and recommendations on the PPP feasibility study and completing required pre-tendering preparations	13
6. Preparing tender documentation	15
6.1. Finalizing the commercial terms and drafting the PPP contract	15
6.2. Preparing and issuing a Request for Qualifications	21
6.3. Request for Proposals	28
6.4. Obtaining the approval for the tender documentation	37
7. Launching tender	38
7.1. Developing a launching strategy	38
7.2. Creating a data room	39
8. Interacting with bidders	41
8.1. Open meetings and presentations	41
8.2. Clarifications of the contract and the tender documents	42
8.3. Assessing potential changes to the contract and the tender document	43
8.4. Competitive dialogue	45
8.5. Probity considerations	46
9. Bidder preselection	47
10. Evaluating the proposals of preselected bidders	48
11. Contract award	50
12. Negotiation of the final contract terms	51
13. Commercial close	53
14. Financial close	54
15. Preparing for contract management: Developing a strategy and setting up contract management	58
15.1. <i>Contract management planning and strategy</i>	58
15.2. <i>Governance arrangements</i>	59
15.3. <i>Establishing the contract management team</i>	61

Appendix 1. Competitive dialogue and other extensive interaction processes for concession projects	64
a. Common forms of extensive interaction in PPP tender processes: Competitive dialogue (as conducted under EU procurement rules)	64
b. Interactive tender process under Australia’s National PPP Guidelines	65
c. Key considerations in designing a competitive dialogue or interactive tender process.....	65
Appendix 2. Financial model information requirements	66
Appendix 3. Procurement of unsolicited proposals	68

List of Boxes

Box 1. Bidder restrictions according to the Law on Concession of Ukraine	5
Box 2. Minimum content of a PPP Contract based on international good practice	16
Box 3. Minimum requirement for a PPP (concession) agreement in Ukraine	17
Box 4. RFQ Sample Content based on good international practice	22
Box 5. Pre-qualification criteria established by the Law on Concession in Ukraine	24
Box 6. Sample outline of Request for Proposals	28
Box 7. RfP evaluation criteria (concession and non-concession PPPs) established by the legislation in Ukraine	31
Box 8. Bid security (“bid bond”) in accordance with the legislation	36
Box 9. Examples of possible changes to the contract or the tender documents.....	44
Box 10. Guidance where only one or no compliant bids are received.....	49
Box 11. Examples of appropriate and inappropriate negotiation of the final contract	52

List of Figures

Figure 1. Procurement procedures for concession and non-concession PPPs	5
Figure 2. Two-stage open tender for concessions and non-concession PPPs	8
Figure 3. Competitive dialogue procedure for concession PPPs.....	8

Introduction

Scope of the PPP Manual Phase 3

This is the third of four PPP manuals on identifying, preparing, procuring, and implementing PPP projects.

The two previous manuals explained the steps in identifying and selecting a project, preparing a concept note, and completing the PPP proposal by carrying out a feasibility study. Phase 2 Manual concluded with the relevant authority's approval of the conclusion of the results of an efficiency analysis and the decision on the viability of the PPP delivery method, thus allowing the project to proceed to tender. The Phase 3 Manual presents the procedures and tools for tendering the PPP project and selecting the private partner to deliver the PPP project.

A series of specific tasks should be followed when managing a tender to procure PPP contracts.

- Forming a tender commission
- Organizing internally/governance and tender plan and hiring advisors
- Market sounding
- Developing tender documents, which includes designing and drafting the Draft PPP Contract, the Request for Prequalification (RFQ) document (including minimum qualification requirements), and preparing the Draft PPP Request for Proposal (RFP) document
- Submitting all PPP tender documents for review and approval by the public partner
- Launching the tender and interacting with applicants
- Preparing possible project physical site inspections (i.e., "bidder walk-throughs") of relevant data center locations or interconnection facilities for the project and preparing "virtual" data rooms for private bidders
- Evaluating PPP technical, financial, and cost bids and selecting a preferred PPP bidder
- Adopting a decision on the winner of the PPP bid by the state partner¹
- Final updating, negotiation, and signing of the PPP contract
- Designing and establishment of the procuring authority's PPP Project Management Unit (PMU) to monitor performance and manage the contract
- Reaching financial closure

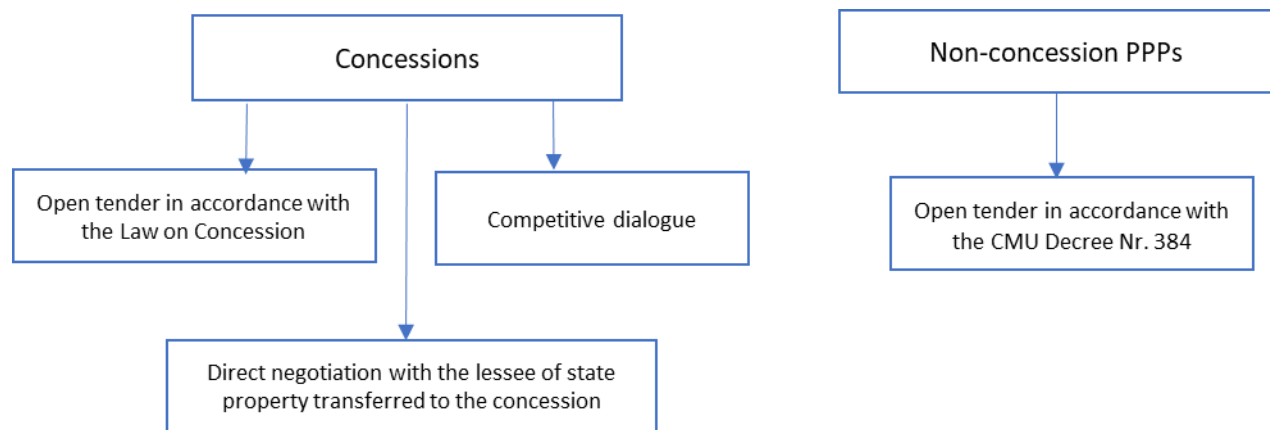
At the end of Phase 3, the private partner will have been selected and the PPP contract will have been reviewed, approved, and signed. After Phase 3, the public procuring authority's newly established PMU will then carry out the PPP contract management and performance monitoring tasks and responsibilities described in the Phase 4 Manual.

1. This decision is adopted by the appropriate ministry when the PPP object is a state asset or by the city council when the PPP object is a municipal asset.

Legal process

The procurement of PPP projects is governed by different pieces of legislation depending on whether or it is a concession (in which case the Law on Concession² applies) or a non-concession PPP (the Decree of the Cabinet of Ministers of Ukraine No. 384³ then applies). Procedures for selecting a private partner also differ depending on the legal framework, as illustrated in Figure 1. Three types of procedures are allowed for concession PPPs: two-stage open tender, competitive dialogue, and direct negotiation. For non-concession PPPs, the two-stage open tender is the only mechanism used to select a private partner.

Figure 1. Procurement procedures for concession and non-concession PPPs



In addition, for concession projects, open tender and competitive dialogue can be conducted using an electronic trading system (ETS).⁴

Persons listed in [Article 12\(4\)](#) of the Law on Concession of Ukraine may not be allowed to participate in the tender to select a private partner.

Box 1. Bidder restrictions according to the Law on Concession of Ukraine

Applicants who are not allowed to participate in the tender are [those that]:

- 1) on the date of filing the application have been declared bankrupt or in respect of which bankruptcy proceedings have been initiated
- 2) are in the process of liquidation or reorganization
- 3) are controlled by each other, are under joint control or are related parties (in case of submission of the application separately by each applicant)

2. [Law on Concession of Ukraine](#), Art. 6–20.

3. Please refer to CMU Decree No. 384, dated April 11, 2011, which governs [the procedure for conducting a tender to determine a private partner for public-private partnership on objects of state, communal property or belonging to the Autonomous Republic of Crimea](#), established by the Cabinet of Ministers of Ukraine.

4. Article 6 of the Law on Concession of Ukraine, CMU Decree No. 1210, dated December 12, 2020, "Some issues of using the electronic trading system for concession tenders."

4) have not provided complete information on persons exercising direct or indirect control over them, including the ultimate beneficial owners (controllers)

5) are legal entities, owners of 10 percent or more of shares (stakes) and / or the ultimate beneficial owner (controller) of which is a resident of a state recognized by the Verkhovna Rada of Ukraine as an aggressor state or a state recognized by the Verkhovna Rada of Ukraine as an aggressor state

6) are persons registered in the offshore zone, or persons whose shares (shares) in total are more than 50 percent owned directly or indirectly by such persons (the list of such zones is determined by the Cabinet of Ministers of Ukraine), or registered in countries included in the Development Group financial measures to combat money laundering and terrorist financing (FATF) to the list of countries that do not cooperate in the field of combating money laundering

7) are persons who are directly or indirectly under the control of persons, the ultimate beneficial owner (controller) of which are the persons specified in this part, or are related persons of such persons

8) are legal entities or persons related to them, registered in a state recognized by the Verkhovna Rada of Ukraine as an aggressor state, or against which sanctions have been applied in accordance with the legislation of Ukraine or international law

9) are state enterprises, institutions, organizations owned by the state of Ukraine, or communal enterprises, institutions, organizations

10) are advisors involved in the preparation of PPP (concession) project

11) are persons who are directly or indirectly under the control of persons, the ultimate beneficial owner (controller) of which are persons who are directly or indirectly related to the operator of the electronic platform through which the concession tender, competitive dialogue or publication of documents in the procedure of direct negotiations with the lessee of state property transferred to the concession

12) are persons whose consultants (individuals, legal entities that provide legal, financial or other consulting services to the applicant) are directly or indirectly related to the control relationship with the operator of the electronic platform through which the concession tender, competitive dialogue or publication of documents in the procedure direct negotiations with the lessee of state property transferred to the concession

Source: Para. 4 of Article 12 of the Law on Concession; para. 33 of CMU Decree No. 384.

The following articles from the PPP Law of Ukraine are applicable to the process of preparing and conducting the tender. Article 13 (2) states that the following main steps are to be conducted in preparing the tender process to select the private partner (they can be specified in the decision on the viability of the PPP delivery method):

- 1) Formation of a tender commission;

2) Preparation of the object for transfer to a private partner under an agreement concluded within the framework of a public-private partnership, in particular the formation and/or state registration of real rights to land required for public-private partnership and inventory (if necessary);

3) Organization of information support of the project, which is carried out on the terms of public-private partnership, in particular to study the interest among potential investors;

4) Involvement of advisers (if necessary);

5) Other measures decided by the state partner.

If the decision on the expediency of a public-private partnership is made by a body that will not be a public partner, that decision must specify the public partner.

The list of measures that may be included in the decision on the implementation of PPP in the form of a concession is similar and appears in Article 5 (2) of the Law on Concession of Ukraine.

Article 14 of the PPP Law establishes that determining a private partner for concluding a contract within the PPP framework is carried out on a competitive basis.

If after announcing a tender to determine a private partner for public-private partnership only one applicant has applied for participation in the tender, the relevant agreement may be concluded by the authorized body with this applicant by agreeing with it on the essential terms of the contract, provided that the applicant meets qualification requirements for bidders and other requirements of the tender documentation.

If the tender for determining a private partner is conducted in accordance with the proposal for public-private partnership submitted by persons who may be private partners under this Law, the initiator of the tender for public-private partnership may be recognized as the winner of the tender if its tender proposal received the highest score or if the applicant agrees to enter into a contract on the terms of the tender that received the highest score.

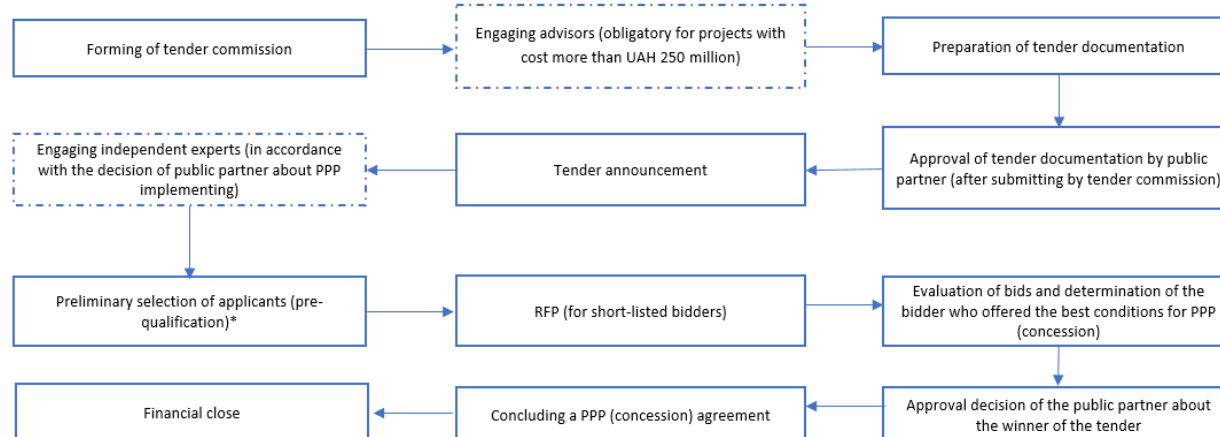
Obligation to reimburse the costs of preparing a proposal for public-private partnership, prepared by central, local executive bodies, local governments, bodies of the Autonomous Republic of Crimea, state, municipal enterprises, institutions, organizations, companies, 100 percent of shares (shares) owned by the state, the Autonomous Republic of Crimea, or a territorially documented community, the involvement of advisers, as well as the costs of making (manufacturing) land management documentation and conducting its examination in accordance with supporting documents may be included in the terms of the tender.

If the winner of the tender is a person other than the initiator of the proposal for public-private partnership, the winner of the tender must reimburse the initiator of the proposal reasonable, fair, and properly documented costs incurred in preparing the proposal for public-private partnership.⁵

5. Currently, the maximum level of reimbursement of the expenses of the initiator of proposal preparation for non-concession PPPs is 2.5 percent of the cost of project (see p. 20 of the "Procedure for Conducting a Tender to

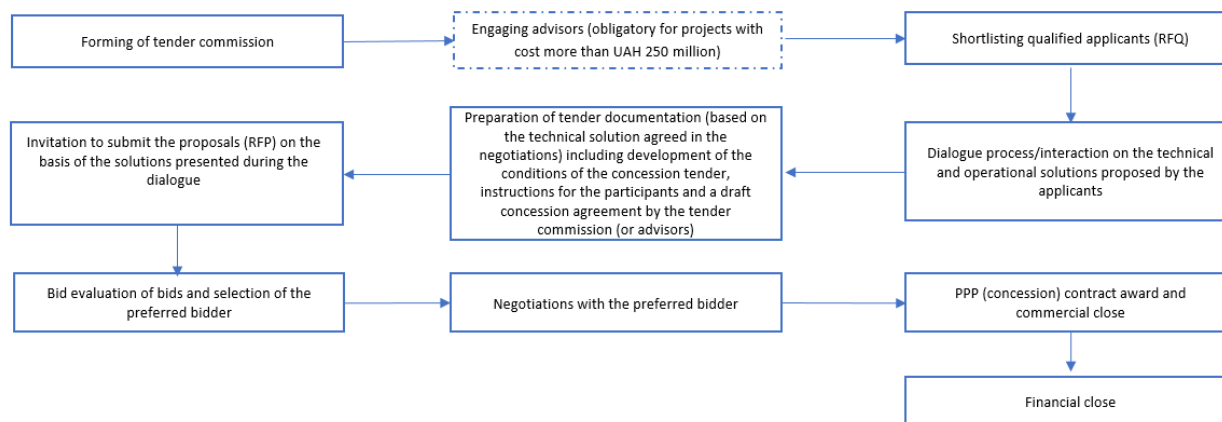
The Law on Concession of Ukraine has similar rules.

Figure 2. Two-stage open tender for concessions and non-concession PPPs⁶



*When conducting a concession tender in ETS cases as determined by the Cabinet of Ministers of Ukraine, the concession tender may be held without prior selection of applicants (prequalification). In this case, the documents of the winner of the concession tender are considered and checked.

Figure 3. Competitive dialogue procedure for concession PPPs



1. Forming a tender commission

The tender commission will be responsible for making or recommending key decisions during the PPP procurement process. The members of the commission require considerable technical expertise, as they will be evaluating the bids and PPPs are complex projects. The legal and regulatory framework of Ukraine establishes the composition of such commissions and the procedures for forming a tender commission

determine a private partner for public-private partnership in relation to objects of state communal property and objects belonging to the Autonomous Republic of Crimea (CMU Decree No. 384, dated April 11, 2011).

6. The procedure is conducted similarly between the concession and non-concession PPPs; however, the concession PPP tender can also be organized in a form of an electronic trade procedure.

(Article 7 of the Law on Concession for concessions, and pages 6–11 of the “Procedure for Conducting a Tender to Determine a Private Partner for Public-Private Partnership in Relation to Objects of State, Communal Property and Objects Belonging to the Autonomous Republic of Crimea (CMU Decree No. 384, dated April 11, 2011, for non-concession PPPs).

The required technical skills include relevant expertise and capacities in technical, legal, and financial areas at an appropriate level to enable commission members to analyze and evaluate tenders, including financial and legal documents concerning the owners/beneficiaries of bidders. At least one person on the commission should be experienced in public procurement. In Kenya, for example, the composition of the bid evaluation committee is regulated in detail, and the law requires the presence of members from different public agencies, including the attorney general’s office.⁷

It is important that the tender evaluation be performed by subject matter experts. In some cases, the subject matter experts may be government employees; in other cases they may be external advisers/consultants. For example, according to EU legislation, when subjective/qualitative assessment represents more than the 50 percent of the total weight of evaluation criteria, the authority must constitute an expert committee that includes independent experts. If the evaluation is conducted by external advisers/consultants, it is good practice to structure the process so that the decision to recommend a bidder to the awarding authority is a decision made by government employees on the advice of the external advisers/consultants.⁸ (Please refer to the Task 4 below on hiring advisors and independent experts.)

The process of selecting independent experts/advisors to support the commission in fulfilling its responsibilities related to tendering the project is described in Task 4.⁹

2. Developing a procurement strategy

The procurement strategy determines how the private sector partner will be selected, so as to obtain the best value for money outcome, and presents a good international practice. The general procurement strategy should be defined to include the following.

1. The forms of dialogue or interaction that will take place with bidders;
2. The timing for each step in the process, including for finalizing and issuing the RFP and draft contract in accordance with the relevant legislation;
3. An expected profile of the bidders in terms of experience and capabilities; and
4. A preliminary approach to prequalification criteria and evaluation criteria for the selection of the preferred bidder.

7. World Bank Group (2015), *Benchmarking Public-Private Partnerships Procurement: A Pilot in 10 Economies*.

8. ADB, EBRD, IADB, IDB, WBG (2016), *PPP Certification Guide*.

9. See CMU Decree No. 950, dated October 9, 2020, on the procedure for selecting advisors for preparation of projects carried out on a concession basis, and MDETA Order No. 2721 dated December 22, 2020, on the procedure of selection independent experts.

For a concession tender, the procuring authority should choose the type of tender process that best suits the specific project from the list of tender options available and allowed by the relevant legislation. These are:

- Open tender with pass/fail prequalification (also known as two-stage open tenders)¹⁰ in the usual format or in ETS
- Competitive dialogue or interactive process in the usual format or in ETS
- Direct negotiation (if the initiator of the proposal for the implementation of PPP in the form of a concession is the tenant of state property that is proposed to be transferred to the concession).

For non-concessional PPPs, the only competitive procedure for selecting a private partner is an open tender with prequalification.

In a two-stage open tender that commences with a prequalification stage, the applicants first submit their qualifications. The procuring authority preselects and short-lists applicants in accordance with the Request for Qualifications (RfQ) and then invites the preselected and short-listed bidders to prepare and submit proposals. All applicants can be included in the short list if they match the prequalification criteria.

The procuring authority should also determine the proposed timing for each step in the tender process in accordance with the relevant legislation, noting that projects of greater size, technical complexity, or risk will require more preparation time for the procuring authority, and bidders will require more time to prepare bids. If competitive dialogue becomes applicable, some projects may require deep and well-organized interaction with prospective bidders, which may only be done through a competitive dialogue process. This in turn requires a short-listing process so that the dialogue can be conducted with a small number of bidders, and a process to finalize the contract solution after the dialogue is concluded.

The procuring authority should revisit and update the project plan, which should cover the following:

- The project schedule, which must be rechecked for inconsistencies by the procuring authority, should use the information provided during the preparation to develop a more precise and realistic time schedule. For example, it should update the schedule with current estimates of the timelines for environmental approvals and legal due diligence. The schedule should also include all the foreseeable stages of the procurement process. The procuring authority should adopt a realistic approach and avoid optimism bias in respect of project timelines. The procuring authority should use the provisional schedule defined in this phase for its internal management and governance purposes and share the schedule with the market when conducting a market sounding during the next phase.
- An updated stakeholder strategy and communication plan.
- Details of the capacity and resources available and needed for the following phases of the project.

Depending on the type of tender process selected—a two-stage open tender (where an open tender follows after a prequalification is completed), a direct negotiation, or a competitive dialogue—different

10. In accordance with Ukrainian legislation, the two-stage approach with prequalification is mandatory for concessions and for non-concession PPPs, except for ETX concession procedures.

sets of documents may need to be developed prior to tender announcement and the Request for Proposals (RFP).

The draft contract must be finalized prior to release of the tender announcement, as it is a part of the package.

The key to preventing expensive cancellations of PPP contracts usually lies in the thoroughness and transparency of the many months (or years) of time spent by governments and by private bidders in conducting detailed project analyses and due diligence. Statistical reviews of build-operate-transfer (BOT) and concession-type PPPs have revealed that PPP contracts that are not competitively tendered and that have not had detailed due diligence analyses completed have a higher probability of being renegotiated or being cancelled, compared to openly tendered PPPs. This is because open competitive tendering requires both governments and private bidders to complete more detailed and thorough analyses of a PPP project's feasibility, the bankability of its risk-allocation structure, and the ability of the contract to manage the resolution of reasonable disputes. While these due diligence and tendering procedures can add up to a year to the implementation of a project, they provide very important long-term benefits to the PPP: they ensure that all possible material risks have been identified, analyzed, and properly allocated to avoid PPP contract cancellation.

3. Developing a communication plan

Based on good international practice, the procuring authority (with support from its advisors) should develop a communication plan for the stakeholders identified as part of Phase 2 and start to communicate project objectives and to gather feedback from relevant stakeholders, including the affected population and other community stakeholders. (For information on project marketing efforts, please see the PPP manual for Phase 2 on market sounding and this Manual's Task 7 on launching the tender for more information on the marketing efforts.) It is advisable to start developing a communication plan during the appraisal stage in Phase 2.

The importance of communication should not be underestimated. Many projects have failed to reach tendering or have been cancelled because of public resistance or opposition. This includes political opposition from other political parties or other governments (for example, a municipal government when a state government project is to be constructed in its municipal area). Examples of public and political opposition may include toll road projects in areas where users are not accustomed to paying tolls, a "waste-to-energy" management project opposed by environmental activists, and water supply concessions that raise concerns about potential increases in water tariffs. If tariff increases are necessary to ensure fiscal sustainability, the procuring authority should carefully and proactively communicate the benefits to be delivered by the project, such as improvements in quality and service coverage.

Approaches like the creation of a Community Advisory Group may be considered to coordinate local input into project planning. For example, in a social infrastructure project, such groups will usually include representatives from the procuring authority, the local community and local government, and the related public service (e.g., police force members for prison projects, medical service staff for a hospital, or

teachers for a school). The procuring authority should also consider developing fact sheets and brochures to be made available to the public and holding community information sessions to explain the project to interested or concerned community members.

The project communication exercise (as well as the market sounding conducted as part of Phase 2 and project marketing prior to the launch of the tender in Phase 3) will help build a high level of awareness of the project among potential bidders and provide the relevant authorities with confirmation that their tender strategy presents no significant obstacles for potential bidders. Furthermore, it will provide feedback from the market in relation to any unusual project features. The authorities should consider this feedback when developing the tender documents and contract. Finally, feedback will support the authorities in mitigating potential political or public opposition and gaining public support for the project.

4. Hiring advisors for tender preparation and execution

If the procuring authority's advisers were hired on the basis that they would only work on the project during Phase 2 (developing a project proposal, consisting of the feasibility study, and a communication strategy), the procuring authority should now develop specific Terms of Reference for the engagement of new advisors/independent experts for Phase 3 so that it can promptly engage those advisers upon receiving approval to proceed. If the procuring authority's advisers were hired on the basis that they would continue to work on the project during Phase 3, the procuring authority should refine the advisers' scope of work to reflect the updated project plan and any other needs of the project.

Involvement of an advisor is mandatory in Ukraine for procuring a PPP or concession contract valued over UAH 250 million. For projects with values under UAH 250 million seeking support of advisors to prepare tender documentation and subsequently to evaluate of bids is optional; the Tender Commission can instead hire an independent expert to assist it with specific questions or needed expertise. An independent expert is a subject matter expert and professional "who meets the requirements established by the Law, has special knowledge in a particular field and can provide explanations, recommendations, consultations, conclusions on issues requiring such special knowledge, during the PPP (concession) tender and under the agreement with the public partner (grantor) to the work of the tender commission with the right of advisory vote." There is a similar definition for non-concessional PPPs.¹¹

The tentative scope of work for the advisors during the Phase 3 should address the following key categories:

1. Review all PPP feasibility analyses and the recommended PPP risk structuring option and incorporate the comments and instructions received from the relevant authorities during the review process in

11. See p. 15 of Article 1 of the Law On Concession and p. 11 of the "Procedure for Conducting a Tender to Determine a Private Partner for Public-Private Partnership in Relation to Objects of State, Communal Property and Objects Belonging to the Autonomous Republic of Crimea" (CMU Decree No. 384, dated April 11, 2011).

Phase 2 into the revision of the PPP feasibility study (if necessary), PPP tender documents, and draft PPP/concession contract.

2. Support the Tender Commission to ensure that necessary preconditions are completed in advance of the tender (i.e., confirming government fiscal support, ancillary services, and infrastructure will be ready for the project, developing a communication strategy, etc.).
3. Draft and prepare any information announcements for the Official Gazette (if any), revised Request for Qualification (RFQ) documents and evaluation criteria, Requests for Proposal (RFPs) and evaluation criteria, and the final PPP contract.
4. Coordinate and manage tendering activities such as investment roadshows, pre-bid conferences, site inspections and walk-throughs, and setting up and managing physical and/or virtual project data rooms as needed.
5. Assist the Tender Commission in identifying interested potential private sector providers for similar projects (size, location, etc.).
6. Draft responses to all questions submitted by interested and short-listed firms, including making any needed amendments and or modifications to the PPP bidding documents.
7. Help ensure that the Tender Commission complies with all relevant PPP legal requirements and regulations.
8. Be available to support the evaluations of submitted statements of qualification and of final PPP proposals from private bidders.
9. Be available to assist the public partner in monitoring the progress of the PPP contractor during subsequent PPP contract management as well as monitoring its performance under the contract phase (Phase 4), including reaching financial closure, project construction and commissioning, and the initial operational/service delivery phase.

5. Incorporation of relevant authorities' instructions and recommendations on the PPP feasibility study and completing required pre-tendering preparations

The purpose of this task is to ensure the project is finally “ready” to be officially tendered to private bidders. Without this task, PPP projects may go to tender prematurely, only be delayed or even cancelled when it is revealed that some very important prerequisites are not yet finished.

This is the process of completing the key preparations necessary before the project can be tendered as a viable PPP. Often PPP feasibility analyses conclude that a project can only become feasible after certain tasks are completed, including acquiring land, obtaining licenses and permits, adjusting end-user tariffs, clarifying ownership of existing assets, determining how existing public employees should be treated, establishing a new official public procuring authority entity, and others. Because these types of required preparations can be quite challenging and time-consuming, they should be started well before the tender starts.

A specific action plan for the completion of each of these preparations should be designed, drafted, and approved by the Tender Commission and its PPP advisors. This should include a detailed description of all steps necessary, a listing and notification of the organizations whose approvals and/or decisions are required, and the proposed schedule for completing each task. This action plan should also identify any new human and financial resources required to complete the preparations.

The Tender Commission should review the feasibility study reports along with the results of the analysis of the efficiency of PPP with appropriate recommendations to identify all preparations that need to be completed prior to tendering. Examples of preparations commonly required include the following:

1. Retail tariffs or tolls for certain public services may need to be raised from their previous levels to a new baseline level at or near cost-recovery before a PPP in the sector can become commercially viable and financially sustainable.
2. Land, buildings, office space, or other existing assets necessary for the construction of the new project may need to be identified and a plan for their procurement drawn up by the public procuring authority prior to the PPP tender.
3. Confirmation that the institutional arrangement between two or more public authorities (such as municipalities, publicly owned enterprises, ministries, etc.) that are parties to the PPP/concession contract have been established as a new single public entity or under another arrangement allowing it to award and sign the PPP contract as part of the Phase 2 project appraisal and mentioned in the conclusion of the analysis of efficiency.
4. Debts owed by an asset holder (state-owned or municipal enterprise) to lenders or other public authorities may need to be fully paid up by the government; this includes long-standing accounts pending receivables owed by other asset holder's customers.¹²
5. Clarification may be needed of the official status of the asset holder's current workforce, including confirmation of severance packages, quantification of pension liabilities, and the completion of any changes in staffing levels or reassignments of personnel, etc.
6. Issues about the legal ownership of individual assets and equipment related to the new PPP project may need to be resolved. In some cases, the existing assets, equipment, and public facilities that will be transferred to private operation under the PPP contract might be co-managed by a combination of different public authorities, ministries, or other bodies.
7. Changes in legislation, regulations or directives may be needed to make the structure of the given PPP legal.
8. All other project-specific changes required for the tendering, award, and signing of the PPP contract to proceed must be completed.

12. In accordance with the Law on Concession (p. 3, Article 33), in exceptional cases, at the decision of the grantor, the terms of the concession tender may provide for full or partial succession of the concessionaire for the rights and obligations of the balance holder. The scope of succession, as well as the conditions and procedure for the transfer to the concessionaire of the rights and obligations of the balance holder are determined by the terms of the concession tender and the concession agreement.

Greenfield-type PPPs for the construction of all new facilities on vacant sites generally require far fewer pre-tendering preparations than do brownfield PPPs that require the private partner to take over the operation of existing public-sector assets, operations, and workforces. For this reason, greenfield projects often much easier to complete as PPPs.

6. Preparing tender documentation

The tender document packet includes:

1. Request for Qualification (RFQ), in a two-stage tender;
2. Request for Proposals (RFP), issued after the RFQ is completed in a two-stage tender;
3. Conclusion on the results of the analysis of the efficiency of PPP; and
4. PPP contract.

Haste in awarding the PPP projects (reasoning that the sooner the PPP tender documents are released, the sooner the contract can be awarded and the private partner can start delivering the needed public services) may result in public authorities issuing PPP tender documents that are unclear and/or incomplete (especially concerning how risks will be allocated, what the output standards are, and/or how bids will be evaluated). Expectation that these issues can be resolved later on during or after the tendering process can create more delays and problems during PPP tendering than if additional time had been spent resolving them prior to releasing the tender documents. Public authorities should expect that private bidders will review PPP tender documents and draft contracts in detail and that they will have questions that need to be resolved.

6.1. Finalizing the commercial terms and drafting the PPP contract

The PPP contract is a legally binding agreement between the procuring authority and the private partner that provides a clear and enforceable understanding of the risks to and responsibilities of all parties to the partnership, including the public procuring authority, private investor and their lenders, and end users and other stakeholders.

The procuring authority should have a well-designed contract that is clear and comprehensive and that creates certainty for the contracting parties, but also builds in some flexible mechanisms for dealing with changes. PPPs are long-term, risky, and complex projects. PPP contracts therefore cannot fully specify everything parties may need to do under all future circumstances. The procuring authority should allow some flexibility in the contract to deal with changing circumstances as to the extent possible within the bounds of the contract through clear mechanisms for resolving issues, rather than having to resort to renegotiation or termination of the agreement.

The PPP contract is drafted based on the feasibility study, which should have defined the project's key commercial parameters and financial elements, including the framework for obligations and technical requirements, the risk allocation, the payment mechanism or the right of the private party to collect user charges, and technical analysis (covering the output levels of the service and the construction and service requirements). Prior to drafting the PPP contract, it is important to ensure that the risk identification and

allocation matrix is complete and up to date. The draft PPP contract should address all material risks explicitly and should provide clear, legally enforceable requirements for how they will be allocated among the parties and mitigated.

It is good practice for the procuring authority to require the legal advisers to develop the contract in a form consistent with international standards and with contracts used in the procuring authority's previous projects and in PPP projects tendered by other procuring authorities, except where the needs of the particular project require a different approach.

The boxes below present the minimum content of a PPP contract. Box 2 includes the specific details a contract should include based on good international practice, and Box 3 presents the information as required according to the relevant legislation in Ukraine.

Box 2. Minimum content of a PPP Contract based on international good practice

In international practice, the PPP contract should contain a minimum of the following information:

1. Terms Sheet: Definition of terms used in the contract.
2. Scope of activities and standard of service performance (often described in detail in an Appendix or Attached Schedule to the contract).
 - In output-based contracts wording of the construction requirements and the service requirements should be focused on outputs. For example, if in a road project the technical advisers have specified inputs such as the type and thickness of asphalt that should be used to surface the road, the specification should be amended to specify the output in terms of the required pavement strength and durability.
3. Rights and obligations, including risk allocation, of each party.
 - Provisions related to reporting obligations and monitoring provisions to allow the public party to oversee and monitor the project.
 - The exceptions to risk transfer, i.e., the events that will provide a right for the private party to receive compensation or relief from its obligations (such as change in law, government events, and force majeure), and the actions required by each party in such circumstances.
4. Term of the contract.
5. Performance bond.
6. Payments: Tariff and mechanism of adjustment.
 - The rights of the private party to receive payments or collect fees from users, and the amount of those fees over time.
7. Availability payments or other payments to the private partner, if any.
8. Provisions regarding contract breaches, penalty system(s), and default events.
 - Penalties or sanctions for nonperformance of contractual stipulations.
 - Penalty to be imposed on the private partner in case of violation of its obligation (including the minimum amount, which shall be not less than 2.5 percent of the project estimated cost).¹³ Also, the PPP contract should specify the single penalty or multiple penalties imposed for violation of obligations unrelated to delay in fulfilling obligations.

13. There is no such limit established by the legislation in Ukraine.

- For non-concession PPP, a regime of penalties and possibly bonuses should be tied to performance targets in a way that should generate significant differences in revenue depending on quality and/or quantity performance.
- 9. Supervisory mechanism of business entity's performance per the agreement, and annual audit of the business entity's financial reports by independent auditor.
- 10. Other financial provisions, regulating the financial structure (the requirement for a minimum level of equity), changes in financing (refinancing) and ownership, insurance requirements, performance guarantees, and lenders' rights.
- 11. Severance or closure of agreement, including options for extension or renewal.
- 12. Official law, i.e., applicable law.
- 13. Intellectual property and confidentiality.
- 14. Changes in scope or requirements.
- 15. Mechanisms of dispute resolution (i.e., consultation, mediation, and arbitration, litigation, etc.).
- 16. Force majeure conditions: The PPP contract should include a regime under which a party is excused from performance and, after a lapse of time, may terminate the PPP contract if an unforeseeable event, beyond the control of the party, renders it impossible or excessively difficult or onerous for the party to carry out its contractual obligation.
- 17. Early termination: Compensation on termination, or single penalty or multiple penalties to be paid to the private partner or the lenders for each different case of early termination within an overall maximum amount to be fixed by contract either directly or calculated through a formula specified in the contract.
- 18. Responsibility for preparations: Interconnections, land acquisition, and ancillary services.
- 19. Ownership of assets during the period of agreement.
- 20. Hand-back provisions.

Box 3. Minimum requirement for a PPP (concession) agreement in Ukraine

The essential conditions of the PPP (concession) agreement are:

- Parties of the PPP (concession) agreement
- Object of PPP (concession) (composition of asset and / or technical and financial conditions of creation, construction of asset and period of its operation)
- Procedure and conditions for entry into force of the PPP (concession) agreement or its individual provisions
- Subject of the PPP (concession) agreement, including the type, scope and description of works and/or socially significant services performed/provided in accordance with such agreement
- Rights and obligations of the parties, which are determined, in particular, by taking into account the distribution of risks between the parties
- Procedure for providing land plots necessary for the implementation of PPP (concession) projects and the list of land plots necessary, if any, for the implementation of PPP (concession) projects (indicating the area and cadastral number)
- Term of the PPP (concession agreement)
- Procedure for changing and terminating the PPP (concession) agreement
- Procedure for returning the object of PPP (concession)

- Conditions for setting and changing prices (tariffs) for goods (works, services) created (performed, provided) by the private partner (concessionaire) in the case of PPP (concessions) on markets that are in a state of natural monopoly
- Conditions for providing state support (if any)
- Procedure for writing off property
- Procedure, amount, and conditions of payments by the parties of the agreement
- Grounds, procedures, and consequences of termination of the PPP (concession) agreement, including payments related to early termination
- Liability of the parties for nonperformance or improper performance of obligations arising from the PPP (concession) agreement
- Procedure for the public partner (grantor) to monitor the implementation of the agreement
- Requirements for reimbursement of reasonable, fair, and properly documented costs incurred as a result of the preparation of a PPP proposal, but not more than 2.5 percent of the cost of the PPP project, as well as reimbursement of costs advisers for the preparation of tender documentation and costs for the development (preparation) of land management documentation and its examination in accordance with supporting documents (for non-concession PPPs)
- Procedure for resolving disputes between the parties.

The PPP (concession) agreement may include other conditions agreed by the parties, in particular:

- Conditions of step-in rights
- Procedure and conditions of distribution between the parties of the agreement of income and/or products, if such distribution is provided by the terms of the agreement—for non-concession PPPs
- Providing benefits for users (consumers)
- Conditions of use of domestic materials
- Conditions of employment and employment of citizens of Ukraine
- Attracting innovations and energy-saving technologies during the implementation of the contract—for non-concession PPPs
- Conditions of use of intellectual property rights
- Conditions for financing by the private partner (concessionaire) of construction (new construction, reconstruction, restoration, overhaul, technical reequipment) of related infrastructure facilities (railways, highways, communication lines, means of heat, gas, water and electricity supply, utilities, etc.), which are not objects of the PPP (concession), but are necessary for the implementation of the PPP (concession) project and the conditions of return of investments made in the objects of adjacent infrastructure
- Terms of insurance of the object of PPP—for non-concession PPPs
- Conditions for ensuring the implementation of environmental impact assessment by a private partner in the cases and in the manner prescribed by the Ukrainian Law “On Environmental Impact Assessment”—for non-concession PPPs.

Source: Article 26 of the Law on Concession; para. 20 of CMU Decree No. 384.

The principal recommendations and the detail description of the clauses for consideration are provided in the World Bank's *Guidance on PPP Contractual Provisions*.¹⁴ However, it is recommended that the PPP contract be tailored to the specifics of a given project.

PPP/Concession contract and the technical schedules

For many PPP transactions, the content of the contracts could be relatively brief and focus primarily on legal definitions pertaining to the rights and obligations of the parties and risk allocation. The PPP contract should not change during the contract term. The important technical details of the PPP contract, such as language specifying the important output levels of service and the payment levels, are typically included in technical schedule volumes and attached to the contract. Therefore, the places in the contract, or especially in the schedule, on the key inputs such as the cost of the availability payments the bidder is proposing, the deadline for project start dates, etc., should be left blank. The specific data and inputs in the technical schedules maybe subject to some adjustments during the life of the contract (such as the inflation, population growth, GDP growth, world energy prices, and foreign exchange rates, all of which will fluctuate over the PPP contract term).

A requested change to a number included in a technical schedule generally constitutes an adjustment in costs and prices; these are not uncommon during the life of long-term PPP contracts and clear formulas and procedures for handling them should be included in the contract. However, a request to change the language in the body of a PPP contract constitutes a more serious renegotiation of the contract and usually indicates a threat to the overall sustainability of the project. Important restructuring and redefinition of the basic risk allocation is needed.

PPP/Concession contract and security package

Large PPPs may consist of a series of related contracts between a number of different parties; this set of agreements is referred to as a *security package*. An important distinction should be made between the contracts between the government and the private service provider and other required contracts that the government is not a party to, such as those between the private owner of the PPP and its own commercial lenders or suppliers, etc. While it is clearly not the responsibility of the procuring authority to draft or negotiate these agreements, it is recommended that the procuring authority be aware of the need for these contracts, their general contents, and their role in ensuring that the overall security package provides a bankable and sustainable PPP project. Such agreements may include:

- Incorporation agreement among private shareholders for the new PPP project company
- Loan agreements between the PPP project company and commercial lenders, including stand-by agreements whereby PPP project company owners pledge to lenders to contribute additional, limited equity to the project if needed
- Inter-creditor agreements between different commercial lenders to lend under common terms
- Design-build contracts between the PPP project company and a construction engineering firm

14. <https://ppp.worldbank.org/public-private-partnership/library/guidance-ppp-contractual-provisions-2019>.

- Equipment supply contract between the PPP project company and the supplier of long-term equipment assets
- Operating contract between the PPP project company and a specialized firm to operate and maintain the facility
- Insurance and other specific contracts between the PPP project company and its service suppliers
- Direct agreement.

When drafting the PPP contract, it is important to ensure that the technical requirements and the commercial terms provide a seamless legal framework for the project. As the technical requirements and the commercial terms will typically have been developed somewhat independently of one another by different people within the project team, a process must be in place to ensure that the different parts of the contract will work together seamlessly. For example, it may be necessary to change the terminology used in one part of the document to make it consistent with the terminology used in other parts of the contract and to add cross references or explain the relationship between the different parts. A legal advisor from the tender commission or the public partner should lead this work, consulting with the tender commission and other advisers.

The tender commission and each of the advisers should review the entire draft contract to ensure that it properly reflects approved project requirements, risk allocation, and structure. It is good practice for the tender commission and its advisers to discuss any identified issues in workshops at which they can all agree on a final position.

Other countries that have established long-term PPP programs, including the United Kingdom, South Africa, and India, have invested in the important, detailed task of drafting, reviewing, approving, and distributing model PPP contracts. Several have even developed a model for each sector, including for schools, hospitals, and housing (UK), for tourism-related PPPs (South Africa), and for roads, ports, and railways (India). While it took several months of planning, detailed reviews, approvals, and retaining specialized PPP lawyers, such model PPP contracts have made it much easier and clearer for line ministries to prepare, award, and sign PPPs. In each of these countries the Ministry of Finance, which must review and approve all major long-term PPP contracts before their tenders and before their final signing, can complete these important review and approval procedures much more easily when the contracts are based on clear models and where any variances from the model are clearly identifiable. By contrast, it can take much longer to review and assess PPP contracts that have each been designed and drafted according to a different, project-specific plan.

In practice, because many experienced corporate lawyers and law firms are often relatively expensive, compared to other analysts, public authorities preparing PPP transactions often seek to minimize their involvement to save on costs. This can mean that relatively late in the process, after significant analysis and structuring decisions have already been made during Phases 1 and 2, a lawyer or law firm with little or no familiarity with the project's purpose, risks, or requirements can quickly draft a PPP contract to fit the project's needs. As a result, draft contracts tend to be very general and do not specify risk allocations very clearly (in large part because the lawyers lack the technical, engineering, or financial backgrounds to adequately understand these risks). That is why it is recommended to make sure that the team of PPP

transaction advisors retained for the project includes experienced PPP lawyers and that the advisors responsible for ensuring that the contract and schedule drafters have the requisite skills and understanding of the project's needs.

6.2. Preparing and issuing a Request for Qualifications

Definition

If the procuring authority wants to receive and evaluate detailed proposals for the given PPP project from sufficiently qualified and experienced private bidders, it would first need to initiate the qualification process by preparing and issuing a Request for Qualifications (RFQ) and criteria for evaluating submitted qualifications prior to issuing a Request for Proposals (RFP). This process ensures that only bids from qualified parties with the capability, capacity, and other qualifications necessary to undertake the project will need to be evaluated. Advertising the document¹⁵ is the formal launch of the tender process.

Objectives

The objectives of the qualification process are:

1. Setting a minimum bar of capability for the applicant company or group of companies (applying consortium) entering into the PPP contract
2. Selecting a limited number of the technically, financially qualified application consortia that also exhibit sufficient experience, capacity, and commitment to prepare proposals and execute the project effectively
3. Setting out clear rules of participation in the procurement process
4. Disseminating project information
5. Collecting verifiable information on the applying participants

Rationale for having a two-stage process using an RFQ

The two-stage open tender is mandatory in Ukraine for procuring concession and non-concession PPPs.¹⁶ Process of the Request for Qualification offers a number of benefits for the procuring authority, such as saving time by having to review and evaluate only a limited number (three to five) full and detailed bids during the subsequent bidding phase. Moreover, the quality of these bids will be higher, as inexperienced or non-serious private bidders (whose bids are often more aggressive, unrealistic, risky, and therefore more time-consuming to evaluate), will not be invited to bid.

It gives more confidence to serious and experienced private PPP bidders who will invest resources into preparing their final PPP bids. If they know they are one of only three to five bidders invited to submit a full proposal, they will invest more time and resources into preparing an innovative and competitive final bid, as compared to being just one of 20 or more bidders.

15. See the instructions for applicants.

16. Except concession tenders conducted in ETS.

If serious and experienced PPP bidders have problems accepting the risk-allocation structure of a proposed PPP project or its legal, institutional, and regulatory framework, they will often signal this to the public partner early on either by declining to submit their qualifications or by submitting questions and comments on the proposed deal structure with their qualifications submission. Prequalification, therefore, provides the tender commission with an important opportunity to fix these problems before proceeding to the final tender.

Format

The format of RFQ is pass/fail criteria (to identify applicants with the minimum capability required to deliver the project and provide the services required under the PPP contract) in accordance with Ukrainian legislation. It is good practice for the Tender commission to develop the Request for Qualifications in a form consistent with those used in its previous projects and in PPP projects tendered by other procuring authorities, except where the needs of the particular project require a different approach.

Sample content

While an RFQ does not yet need to contain all of the detailed specifications for the final PPP, it should contain sufficient information about the project to allow private service providers to make a judgment about the fit between their experience and qualifications and the project's required output standards and risks. Generally, the information required by the RFQ should not ask respondents to incur significant expenses in preparing their response, but it should be sufficiently probing to supply the procuring authority with an informed evaluation.

Box 4. RFQ sample content based on good international practice

Sample Contents of a Request for Prequalifications (RFQ) for a PPP Project

- I. Letter of invitation to private firms and vendors to submit their qualifications
- II. Definitions of any special terminology used, as appropriate, including abbreviations glossary
- III. Description of the purpose and requirements of the PPP project
 - a. Background, objectives, and overview of the project, project timeframe, and indicative schedule (attach any relevant, completed feasibility studies as annexes)
 - b. Name and brief description of the procuring authority's functions and the sources of any statutory powers
 - c. The specific services that the private contractor is expected to deliver expressed as outputs and key performance indicators
 - d. Proposed risk allocation (summary matrix) and description of PPP modality (i.e., lease, concession, BOT, Design-Finance-Build-Maintain-Transfer, etc.)
 - e. Description of payment mechanisms, including amount and nature of any public fiscal support available
- IV. Description of the PPP procurement technique and process
 - a. Description of the procurement technique (i.e., short listing, competitive negotiations, best and final offers, etc.)
 - b. Specific legal requirements or restrictions associated with the RFQ or the project
 - c. Proposed timetable and key milestones for the tendering process

- d. Other procurement process requirements: Language and translation requirements, if any; any disclaimer of liability, including the cost of preparing the response, and reservation of rights, such as the right not to proceed with the project; period of validity of the responders' offer; grounds for disqualification, etc.
 - e. Invitation to interested firms to submit comments, questions, and recommendations on the proposed output standards and PPP risk allocation structure
- V. Instructions to interested private firms and vendors in submitting qualifications
 - a. Process for submission and evaluation: the time and date by which potential bidders must submit their qualifications; the physical location at which the qualifications must be submitted, or the process for electronic submission if this is allowed; the format in which potential bidders must submit their qualifications and the specific information and documents they must provide
 - b. Details of presubmission conference or meeting and of other opportunities to ask questions or seek clarifications
 - c. Overall selection criteria or minimum conditions to be met by the bidder and instructions for completing standardized qualification forms and templates
 - i. Technical experience and capacity: minimum technical capacity required and instructions for how to present technical experience using standard templates in forms (attached in an annex)
 - ii. PPP-related experience: minimum PPP risk management experience and capacity required and instructions for how to present PPP management experience using standard templates in forms (attached in an annex)
 - iii. Financial capacity: minimum financial capacity/size of the firm/consortia, including experience with limited recourse project finance (if necessary) for funding large PPP projects; instructions for how to present PPP financial capacity and project-backed financing experience using standard templates in forms (attached in an annex); bid bond requirements
 - iv. Legal Structure: legal requirements of vendor (such as incorporating locally); legal description of bidder (as a consortium or joint venture); ownership structure; proof of power of attorney for lead firm; statement of no existing conflict-of-interest; statement of litigation history
 - v. Personnel: Minimum technical, management, and other requirements for key personnel to work on the project
- VI. ANNEXES:
 - a. Standard forms and templates for interested firms to use in submitting qualifications
 - b. Relevant feasibility studies
 - c. A draft of the PPP contract can be included as an annex

Qualification criteria

The tender commission should develop a preliminary list of selection criteria for identifying qualified bidders. In developing these criteria, the tender commission should consider:

- Experience and areas of experience required to successfully deliver the project.
- An organization's role in a bidding consortium in order for its experience to be counted. For example, whether the tender commission should only take into account experience of proposed equity investors or also the experience of nominee contractors.
- Financial strength and corporate size needed for the specific project
- Relevant types of past projects and roles when assessing a bidder's experience

The tender commission should develop a set of selection criteria that define the minimum capability required to deliver the project under the PPP contract and provide competitive and innovative bids. This reduces the risk that the project will fail because a bidder with insufficient capability submits the highest-ranking bid. Overly restrictive criteria may limit competition. However, simply having more competition (in the sense of more prequalified bidders) does not necessarily mean better competition. Qualifications that are too lenient may discourage highly qualified bidders as they perceive they will have a very low chance of winning since a large number of low-quality proposals will be received from bidders with poor capability. All projects should customize the levels of qualifications needed to achieve an appropriate balance, bearing in mind the project's specific needs.

The selection criteria usually fall into three categories:

- Administrative and legal requirements
- Financial-economic capacity
- Technical capability and experience

According to the legislation in Ukraine, these criteria are evaluated on a pass/fail basis.

It is good practice for the tender commission to develop selection criteria based on those used in its previous projects and in PPP projects tendered by other public authorities. However, the tender commission should customize the selection criteria to suit the project's characteristics. For example, the financial capacity criteria should include a requirement that potential applicants demonstrate past experience in raising project finance of similar value to that required for the project, and the technical criteria should include a requirement that potential applicants demonstrate past experience in similar sectors.

Box 5. Prequalification criteria established by the Law on Concession in Ukraine

In accordance with Ukrainian legislation, an applicant must meet at least three of the five following criteria for qualification for concession and non-concession PPPs:

1. Availability of equipment and material and technical base for design, construction, and maintenance works and material and technical maintenance
2. Availability and appropriate level of professional and technical qualifications of employees
3. The presence of documented experience in implementing similar agreements
4. The availability of resources to ensure financing the PPP (concession) project or the experience of guaranteed funding in implementing such projects
5. Other criteria decided by the tender commission

For the purpose of confirming the applicants' compliance with the preselection criteria, supporting documents may be submitted both for the applicant himself and for the persons related to the applicant's control relations

Source: Para. 3 of Article 12 of the Law on Concession; para. 32 of CMU Decree No. 384.

Administrative and legal requirements

Legal qualification relates to the fundamental legal conditions that must be satisfied for an applicant to submit an application according to the local/market or country's common regulations. Therefore, legal qualification refers to the formal regularity of the applicant, particularly with respect to its legal personality. The required documentation will usually include the following:

- Evidence of the applicant's (including those applying in a consortium) existence and good standing under the relevant law.
- Evidence of the consortium agreement and the commitment of the respective members. Some countries and processes require the prospective bidders to constitute a SPV in this phase of the tender process. This is generally regarded as bad practice, as it imposes an unnecessarily expensive and time-consuming condition on bidders.
- Evidence of the power of the representatives of each member of the applicant-consortium to act on its behalf.
- In the case of a foreign company operating in the country, evidence of its registration or license to operate issued by the relevant government entity, when the activity requires it.
- Regarding tax and labor issues, both will usually be measured for each applicant, checking that the applicant is up to date with relevant tax commitments as well as with relevant labor laws. Evidence should be provided by the proposal's submission date.

It is general practice for the RFQ conditions to prohibit a prospective applicant from participating in more than one consortium (or for any of its subsidiaries or parent companies to participate in another consortium). It is also general practice to establish circumstances that prevent a company from applying if it already has a vested interest (for example, a company acting as advisor or consultant to the procuring authority in the same process). The Law on Concession, Art. 12 (4), which also applies to non-concession PPPs, establishes characteristics for applicants not allowed to participate in the tenders. (Please see the Introduction section for more details.)

Financial/economic requirements

Financial or economic capacity criteria are intended to guarantee that the company or group of companies (consortium) that are candidates for the project have a healthy financial situation. The criteria provide evidence that they will be capable of meeting the financial needs of the project, which may be summarized as having funds available to meet equity needs as well as capacity to raise third-party funds in the form of long-term debt.

Typical indicators include financial ratios such as debt to equity/leverage, liquidity ratios, specific ratios for the project such as equity-to-project CAPEX, and others, as well as magnitudes, such as the average revenues of “last three years,” level of profits of “last three years” (or evidence of being in profit), and so on. These indicators/benchmarks are calculated on the basis of audited financial statements, balance sheets, and profit-and-loss accounts of the previous year (or a number of recent years, normally three to five). It is good practice to include specific forms on which to present the financial information requested, including the information specifically used to calculate financial ratios, which should be clearly explained and defined. Some additional guidelines and principles include:

- Financial capacity may be easily confused with the experience in similar projects that demonstrate the capability to negotiate and raise significant amounts of funds in project finance schemes. This particular capability is better handled under the experience/technical capability criteria, which is separate from the financial or economic criteria that establish the capacity to raise funds.
- Any criteria should be as objective as possible. While some level of judgment may be unavoidable in evaluating qualifications (as well as proposals), in the case of financial capacity criteria, clear thresholds and a description of how to calculate and present the resulting values of each indicator is essential.
- It is customary to ask for bank “support letters” or “letters of comfort” reporting on the capacity of the companies or consortia to raise funds, as well as from firms to show lenders and the size, term, and structure of financings. This is generally regarded as good practice. However, the value of these as proof of financial solvency is quite limited and should not substitute for an active analysis of the capacity of the applicant.

Technical requirements

Technical criteria for qualification set out the profile of private partners that the authority is willing to have as a long-term partner, and it must cover all of the functions that will be undertaken by the private partner. Technical capacity or experience should be demonstrated/evidenced on several fronts:

- **Construction experience:** The candidate (individual or consortium) will be required to provide evidence of previous or ongoing successful experience in constructing a similar project (that is, in the same sector and, commonly, having similar features of the project in terms of size and complexity).
- **Operation and maintenance:** The candidate (individual or a consortium) will be requested to provide evidence of previous or ongoing experience in operating and/or maintaining similar infrastructure in the same sector and with similar features as the project in terms of size and complexity and/or volume or number of users.
- **PPP management, PPP investment, and financial close:** Evidence will be requested of the consortium’s experience in successfully developing similar projects, including successfully reaching financial close and/or successful development through the operational phase (relevant technical information on the size of previous projects, such as number of transactions, key performance indicators, size and nature of new investments required, etc.)

Generally speaking, there is no need for the investor and future owner of the SPV to be a contractor or to have qualifications related to construction, operations, or maintenance. Therefore, it is sometimes considered sufficient to rely on the technical experience or capability of third parties within the consortium. In other words, the named contractor who will contribute the construction, operations, or maintenance experience required for qualification is not required to be a future shareholder of the project company. But it is necessary to request evidence of the commitment of the named contractor to deliver the project with the future equity holder.

Issuing the RFQ

According to Ukraine's laws governing PPPs, the announcement of a tender to determine a private partner is published by the state partner in the newspaper *Governmental Courier* or *Voice of Ukraine* or in the official print media of the relevant local government or the Autonomous Republic of Crimea, if such bodies are the state partner, as well as posted on the official website of the state partner.¹⁷ Additional venues could be international media and, as appropriate, trade magazines. It may also be brought to the attention of parties deemed to be particularly qualified for the task. The notice will provide information on how to obtain the RFQ documents as well as how to officially register so that any subsequent communications, clarifications, and/or amendments can be sent to all those who obtain the RFQ documents.

Preselection methodology

A clearly documented and consistently understood preselection methodology for conducting the assessment against the qualification criteria is important for consistency purposes to ensure a fair application of the criteria, especially when more than one person will assess any particular criteria or sub-criteria. The procuring authority could develop its preselection methodology prior to the qualifications being submitted. This methodology should be documented in an assessment manual.

The assessment manual should identify the assessment team, which consists of the tender commission's members and advisers (independent experts) who will be involved in the assessment and should specify who will be responsible for assessing each particular criteria or subcriteria. The team members must have sufficient skills and knowledge to make an informed assessment of the relevant criteria.

The tender commission (through the support of its advisors or independent experts) should ensure that the assessment manual is consistent with the qualification criteria and the process described in the tender documents before the assessment manual is issued to the assessment team. The assessment team should be familiar with the methodology before the applicants' qualifications are received. This can be achieved by conducting a preassessment workshop, at which the assessment manual and methodology are explained to the assessment team.

The prequalification evaluation criteria should weed out the "brief case companies" and only let through those that can actually manage and sustain the entire PPP process. Therefore, the prequalification evaluation criteria must differentiate between such general descriptions of experience as "sector

17. Article 15 (3), PPP Law of Ukraine.

technical experience” and proven experience in managing important long-term PPP risks in the sector including design, installation, long-term operating contracts, and especially experience structuring and raising long-term limited recourse project finance.

For guidance on the process of evaluating the applicant qualifications and preselection of the bidders for the Request for Proposals (RFP) stage, please refer to Task 9, “Bidder Preselection.”

6.3. Request for Proposals

In a two-stage open tender, the RFQ process is followed by Request for Proposals (RFP), whereby the selected bidders who meet the qualification criteria are allowed to submit their proposals for evaluation.

RFP sample content

The RFP document should include all the information needed by qualified bidders to submit full and detailed bids for a PPP project to the tender commission. This includes instructions to bidders for how to present their bids, as well as other relevant background information about the project, including the contents or data room(s) (technical, economic, financial, legal, environmental, and other feasibility analyses) as well as the project’s detailed PPP risk allocation structure. Also included are instructions to bidders about the required formats for their bids and other requirements with which they must comply.

Although clarity is critical, the RFP should be written in a manner that does not overly limit the incentives for the private sector to submit creative and innovative PPP proposals.

The preparation of the RFP documents represents the culmination of all of the due diligence feasibility analysis and project structuring activities as well as the overall competitive process by which the government seeks to maximize the project’s value for money. Therefore, the bid documents need to be very clear about the project’s minimum output performance requirements, the allocation of key risks between the parties, and the rules by which bidders must present and submit their bids and the evaluation criteria against which those bids will be reviewed. Without this important step, private bidders would likely submit very different technical and financial bids to the government, proposing different levels of performance, assuming different allocations of project risks, and featuring different proposed prices. International experience has shown that while it can take a significant amount of time for a procuring authority to prepare clear, detailed, and good-quality PPP bid documents, it generally takes even longer to respond to numerous requests for clarification or protests from bidders and to evaluate vastly different PPP bids each based upon differing risk-allocation assumptions.

Box 6. Sample outline of Request for Proposals

The Tender Commission should prepare RFP that sets out:

- A summary description of:
 - The public partner (partners) and the project need
 - The project and the contract structure

- The construction requirements and the service requirements (details of which are contained in the draft contract)
- The payment mechanism or revenue to be received by the private partner (details of which are contained in the draft contract)
 - Expressed as outputs
 - Specific outputs not directly related to the overall service
 - Input specifications
 - Conditions-of-asset specifications
- The risk allocation that is inherent in the draft contract
- A complete draft of the full PPP contract that the preferred bidder will be expected to sign and fulfill; this draft contract should be complete and sufficiently detailed so very little remains to be negotiated once the preferred bidder selection has been announced
- Any government financial support to be provided, such as cofinancing, guarantees, or access to the debt assumption mechanism
- Detailed information derived from the assessments conducted in the previous phases. This information could be of assistance to bidders if is regarded as noncontractual or nonbinding. This information can be provided without putting the procuring authority in breach of any confidentiality obligation or creating unacceptable risk for the procuring authority if the information is later found to be incorrect. The intention is to create a contractual baseline, i.e., an archeological map that will be regarded as the baseline to consider a specific finding as unforeseen and thus yielding a right to receive compensation.
- A timetable for the following stages of the tender and award process
- Evaluation criteria that will enable the procuring authority to select the best value for money proposal (within the constraints of the applicable procurement rules)
- The proposal requirements, i.e., the specific information and documents that bidders must provide in their proposals and the formats in which they must be provided
- Administrative details, including:
 - General information required by bidders to prepare and submit their proposals; this should provide overall instructions to bidders regarding the format and organization of the information they submit
 - The time and date by which potential bidders must submit their proposals
 - The physical location at which the proposals must be submitted or the process for electronic submission if this is allowed
 - Rules in relation to the conduct of the Request for Proposals stage, including the length of time that a proposal must remain valid and binding on the bidder and rules related to access to any data room

According to the legislation in Ukraine, the Tender Commission should also include instructions and procedures for how bidders (who successfully pass the qualification stage) can access relevant documents (i.e., in the data room). Such information is also included in the RFP invitations.

RFP evaluation criteria

The tender commission must develop a clear list of technical and quality criteria. The evaluation criteria of the RFP will typically consist of:

- Technical and quality-based criteria that will be the subject of the technical evaluation
- A cost-based criterion that will be the subject of the financial evaluation

Technical and quality-based criteria

The tender commission should ensure that the technical and quality-based criteria review the key aspects of bidders' proposals that are likely to influence a successful project outcome. These will differ from one project to another, but will typically include criteria related to:

- **Construction matters**, including:
 - Quality and reliability of the bidder's design
 - The robustness of the bidder's construction program
 - Quality assurance methods proposed for construction oversight
- **Operational matters**, including:
 - The bidder's operating approach for the project
 - Quality and reliability of operating procedures and manuals
 - Quality management systems and plans
 - Quality of safety plans, including use of proven technologies.
- **Maintenance matters**, including:
 - Quality and reliability of the maintenance plans and programs
 - Programs for renewals and major maintenance programs
 - A specific plan for hand-back of the infrastructure at the end of the contract term
- **Environmental compliance and environmental-impact assessment**
- **Health and safety plans**

Financial criteria

The procuring authority, in consultation with its financial advisers, should consider whether the bidders' financing packages should be evaluated as part of the technical evaluation. A technical evaluation of financing packages should consider:

- The level of commitment shown by the equity investor
- The level of confidence that the necessary financing will be available
- The robustness of the project finance structure

In processes with staged evaluation, it can be difficult to manage the evaluation of the financial package without information on the reliability and robustness of the financial structure that would allow the appraiser of the offers to know in advance or infer the price offered. The tender commission should provide strict instructions to bidders to ensure that the financing package contained in the technical proposal does not disclose the overall price offered.

In developing the criteria, the tender commission should apply the following principles:

- For each of the criteria, the tender documentation should provide a general explanation of the matters that will be taken into account in evaluating proposals against that criteria.
- The list of criteria should not be too large, and the explanations provided should not be too detailed. Having too many criteria or too much detail creates undue complexity in the evaluation and makes it difficult for bidders to clearly understand the public partner's objectives.
- As PPPs focus on performance and PPP specifications are mostly based on outputs rather than inputs, the technical criteria should not relate to the inputs committed (for example, the number of workers the bidders will assign to particular functions) and should not be overly prescriptive. The criteria should focus on whether the bidders' proposals are likely to deliver the minimum requirements established in the RFP, including the expected quality and reliability of the output.

Additional criteria as established by the Law on Concession and Decree No. 384 are discussed below and align with good international practice as described above.

Box 7. RFP evaluation criteria (concession and non-concession PPPs) established by Ukrainian legislation

One or more of the following criteria may be used to evaluate the bids in the second stage of the tender:

- Term of PPP (concession)
- IRR (internal rate of return) of PPP (concession) project
- Net present value (NPV) of all cash flows of PPP (concession) project
- Net present value (NPV) of capital investments, operating costs, and maintenance of PPP (concession) object
- Reliability of the proposed financing mechanism
- Amount of possible state support (including availability payments) if it is provided
- Net present value (NPV) of the concession payment (if any)
- Net present value (NPV) of a one-off fixed payment and/or availability payment (if any)
- Other criteria that assess the financial and economic efficiency of PPP (concession) project, by the decision of the concessionaire

When applying several criteria, the specific weight of each is established by the instructions for participants. When determining the valuation criterion relating to the NPV, the instructions for participants set out clear requirements for calculating the weighted average cost of capital (WACC).

Source: Article 16 of the Law on Concession; para. 45 of CMU Decree No. 384.

Evaluation process: Least-cost or quality and cost-based selection

If the evaluation process will compare the proposals based only on price (also referred to as least-cost selection, where for example, the lowest size of availability payment required by the bidder, the lowest size of a grant financing in a user-pays PPP not commercially feasible on a stand-alone basis, or the highest concession fee offered by the bidder), technical and quality-based criteria are evaluated on a pass/fail basis. This means that only bids that meet the minimum bar of the technical criteria will be assessed in terms of price (financial and economic indicators), but among the technical qualifying bids, price (financial and economic indicators) will be the only factor considered. To avoid overly aggressive bids, it may be advisable to not only to set out an overall technical pass/fail, but to also include specific and relative high qualitative scoring for key quality/technical subcriteria. For example, a weighted average score of 6 out of 10 may be required for a technical pass, but a score of 7 or 8 or more may be required for key elements of the technical offer. Price may be in the form of more than one factor in addition to the basic price of the contract, that is, the payment requested by the bidder (or the price to be paid by the bidder in a high return user-pays PPPs). The RFP may request that bidders also present and bid for other quantitative aspects (for example, the percentage of certain revenues to be shared with the government above a revenue baseline, and so on). In some cases, the additional quantitative factors may relate to something other than strictly price. They may also be referred to as “numerical criteria” or “criteria scored under numerical formulas”, but usually referring to cost or measurable efficiency rather than quality. For example, bidders could be asked to propose the construction term required. In each of these cases, with a technical pass/fail evaluation and multiple quantitative factors, each numerical criterion should have its specific weighting clearly set out in the RFP as well as the scoring formula. Potential redundancies in some of these evaluation factors should be carefully considered (for example, scoring on the basis of the lower availability payment and also scoring on the basis of shorter construction terms is redundant in some projects, as the former evaluation factor also naturally incentivizes the bidder to consider a shorter construction term). In government-pays PPPs, the tender commission can ask bidders to submit the price in various forms. The most common alternatives are to quote a single price (for example, the shadow toll to be applied in the first year, the size of the availability payment to be made during the first year, or the maximum toll in a road project) or to require bidders to present (or have the authority calculate) an NPV of the revenues or payments. Generally, for government-pays projects where all bidders must base their payments on the same payment profile and indexation over the term of the contract, it may be more appropriate to submit one single price for the payment requested by the bidder, rather than relying on NPV calculations. If bidders can propose different payment profiles or different indexation factors, NPV calculations are necessary for comparison purposes.

If the evaluation process will compare the proposals based on price in combination with the technical and quality-based criteria related to the technical offer (approach to construction and project design and approach to operation and management), the procuring authority should give each criterion a specific weighting in the overall scoring.

In all cases, objectivity and transparency should be an essential driver when structuring and defining the evaluation methodology, even for pass/fail considerations, as the criteria are the basis on which the awardee will be selected and called for contract signature.

RFP evaluation methodology and manual

A clearly documented and cohesive evaluation methodology ensures a consistent application when more than one person is on the valuation team assessing any particular criterion or subcriterion. The tender commission should develop its evaluation methodology prior to the proposals being submitted and document it in an evaluation manual. It is important to ensure that the evaluation manual is consistent with the qualification criteria and process described in the tender documents.

In some projects, the evaluation criteria are such that the evaluation can be enhanced by developing a performance model to aggregate and systematically and objectively assess input data from bidders. This requires an up-front investment in development of the performance model, validation that the model correctly links the inputs to the evaluation criteria, and transparency in the process. In some cases, the evaluation criteria will be such that the performance model can be developed from the financial model for the project. In developing its evaluation methodology, the tender commission should consider whether a performance model will add value to the evaluation and, if so, explain in the evaluation manual how the model will be used in the evaluation.

The RFP should stipulate the process and evaluation methodology (broad categories of evaluation rather than detailed scoring methodologies or point allocations), since the latter lead to proposals being tailored to the evaluation, not to the best value for the project. Such an approach ensures that the bidders have the assurance of an auditable process with checks and balances.

The evaluation methodology should specify that the technical and price elements of the bid will each be scored out of 100 points. The scores achieved will be integrated into the bidder's overall score, using a simple mathematical weighted average formula:

$$A * (\text{technical score}/100) + B * (\text{financial score}/100) = C \text{ where:}$$

- A is the weighting for technical (between 50% and 70%);
- B is the weighting for financial (between 30% and 50%); and
- C is the total score achieved by the bidder.

For purposes of applying this formula, *technical* refers to all project factors under evaluation other than the financial. The alternative technical and price weightings will vary from project to project, determined during the comprehensive feasibility study and the preparation of the RFP. In all cases, the technical bid should carry more weight than the price bid.

When technical and economic criteria coexist, the appropriate weighting of each category of criteria (technical/quality versus economic) should depend up the type of project. For example, for projects regarded as very innovative, the proposed approach, means, and methods involved will be much more

important than for a more conventional project. Evaluation approaches with a significant weight on price or other objective/numerical factors are most common. In general terms, in addition to informing the weighting split between price versus technical/quality, each criterion (within these two groups) should have a specific weighting reflecting the relative importance of the different objectives and informing the bidders of the project's priorities. However, some projects may present a second layer of criteria (subcriteria), and in some cases the second layer has no weightings. When a weighting is not provided, it is customary to at least provide a list of factors that will be considered when assessing and scoring the respective criteria or subcriteria.

Furthermore, the evaluation manual should identify the evaluation team, which consists of the tender commission's members and advisers (independent experts) and the tender committee that will be involved in the evaluation, and it should specify who will be responsible for assessing each particular criteria or subcriteria. The team members must have sufficient skills and knowledge to make informed evaluations in respect of the relevant criteria.

Where the evaluation has significant subjective or qualitative elements, the tender commission should have that evaluation performed by subject matter experts. In some cases, the subject matter experts may be government employees; in other cases, they may be external advisers (independent experts). If all or part of the evaluation is conducted by external advisers (independent experts), the tender commission should structure the process so that the decision to recommend a bidder to the awarding authority is a decision made by government employees on the advice of the external advisers.

The tender commission should structure the evaluation team so that there is a separation between those involved in the technical evaluation and those involved in the financial evaluation. This reflects the different areas of expertise required and ensures independent consideration of the technical and financial merits of proposals. The evaluation team should include finance specialists who can conduct detailed analysis of the financial offers and ensure that they fully and robustly cost the proposal.

The evaluation team should be familiar with the evaluation methodology before the bidders' proposals are received. This can be achieved by conducting a preassessment workshop at which the evaluation manual and methodology are explained to the evaluation team.

There are different techniques for organizing and performing the qualitative evaluation work and for ensuring that processes and criteria are applied consistently across bids. Examples include having each evaluator consistently evaluate the same subcriteria across all bids; having each evaluator assess one bid under all subcriteria before discussing with other specialists the results, to ensure consistency; or having multiple evaluators jointly assess bids against subcriteria throughout a consensus process. The tender commission should ensure that the chosen technique is documented in the evaluation manual.

Proposal requirements

The Tender Commission should develop the proposal requirements after it has developed the evaluation criteria, as the proposal requirements must request all information that the Tender Commission will require to conduct the evaluation.

Deadline to submit

PPPs are complex projects, making it essential to grant bidders sufficient time to prepare the necessary due diligence, project analysis, and a high-quality offer. According to the Concession Law (Art. 14), “the deadline for submission of bids is set by the Tender commission and must be **at least** 60 days from the date of receipt of the invitation to participate in the tender.”¹⁸ In practical terms, to properly prepare sound bids in the context of complex projects the period may be up to 120 days. An even longer period is generally required for dialogue or interactive processes.

Period during which the proposals remain valid

While Ukraine currently has no formal limit of the validity of the proposal, it is a good international practice to require that proposals remain valid (that is, binding on the bidder) for a specific time (that is, limiting the validity of the proposal), so that the bidders are protected from undue delays in evaluation and awarding. After that period (for example, 180 days), the proposal is no longer binding on the bidder. If the tender commission has not yet awarded the contract but is continuing the tender process, the bidders will be asked to confirm their offers or they may choose to retire from the process at their discretion, without losing the bid bond (discussed below).

Submission of documents in different envelopes

The requirements should instruct the bidders to submit the bids in different envelopes:

- a. One envelope for legal and administrative matters (including qualifications when there was no prequalification).
 - i. Legal/administrative documents are similar to those requested in a qualification stage (or a reconfirmation of those), but some additional documents or evidence will be requested, including the following.
 - Bid bond (see below).
 - Insurance policies: It is good practice to request evidence of the policies/insurance being available, but it is not necessary to take out insurance until contract signature.
 - Articles of association of the future SPV. (It is not standard or good practice to request the establishment of the SPV until the contract is awarded.)

In addition to legal/administrative matters, some processes (for example, those based on a staged evaluation approach) differentiate between proposal documents related to purely objective criteria (only subject to numerical scoring) and documents linked to criteria subject to judgment (typically the technical proposal). The proposal documents required must be consistent with the evaluation criteria settled in the RFP. The rules for elaboration and presentation of the documents must be clear to allow proper

18. There are no deadlines for submitting bids for non-concession PPPs.

evaluation. A material lack of information or serious inconsistencies may result in disqualification of the offer. It is good practice to supply specific forms with the RFP for a number of documents and evidence such as certain statements (for example, committing equity investment) or guarantees to be constituted.

- b. One envelope for the technical proposal (which addresses the technical criteria).
- c. One for the financial proposal (which addresses the financial criteria).

Bid bond

The tender commission should require bidders to provide a “bid bond” along with the legal and administrative part of their proposals. A bid bond (usually in the form of a bank guarantee or insurance bond, both of which must be unconditional, irrevocable, and executable on demand or “first call”) is the instrument that enables the public partner to demand a cash payment from a bank or insurance company if the bidder is awarded the contract but does not proceed to sign the contract within a specified period of time. This provides security for the public partner. The bid bond indicates a degree of commitment to the bid submission, that is, in the event that the bidder is awarded the contract and then decides not to proceed with the contract signature, the bond will be executed/called. The bid bond in Ukraine is one percent of the capital cost of the project, which typically is determined from the official estimate of CAPEX provided by the authority, although the tender commission should seek advice from its financial adviser on whether this appropriate. The tender commission should also seek advice from its financial adviser on the range of acceptable providers of bid bonds (for example, whether guarantees from foreign banks are acceptable) and from its legal adviser on the required wording of the bond, which should be specified in the Request for Proposals. It is good practice to provide a sample/template for a guarantee to be regarded as valid.

Box 8. Bid security (“bid bond”) in accordance with Ukrainian legislation

According to the decision of the public partner (concessionaire), the participants of the tender may be required to provide a tender security.

The security of the tender offer is provided in the form of a guarantee or in another form in accordance with the terms of the tender (the instructions for bidders shall indicate the size, form, term of such security and the list of cases when the bid security is not returned to the bidder).

The amount of the tender security may not exceed 1 percent of the expected amount of capital investment of PPP (concession) project.

Securing the tender offer is realized:

- In case of withdrawal of the tender proposal by the bidder after the expiration of the term of its submission, but before the expiration of the term during which the tender proposals are considered valid.
- In case of the winner of the PPP (concession) tender does not sign the PPP (concession) agreement (except for cases of force majeure certified in accordance with Ukraine’s current legislation).

- In case the winner of the concession tender does not provide security for the implementation of the concession agreement after receiving an invitation to enter into a concession agreement, if providing such security is required by the instructions for participants (only for concessions).
- In other cases, specified in the instructions for participants.

Funds received as a result of the implementation of the tender security (if they are not returned to the bidder) shall be transferred to the state budget or to the relevant local budget.

In case of holding a concession tender in ETS without prequalification, the requirement to secure the tender security is mandatory.

Source: Article 15 of the Law on Concession; para. 19 of CMU Decree No. 384.

Submission of bidder's financial proposal

The bidder's financial model should be a bid requirement. Financial sustainability of the PPP company is something the government should be concerned about, and the financial model is a necessary tool for contract governance to regulate or govern the multiple calculations needed during the life of the contract (contract changes and compensation negotiations and disputes concerning risk events). The tender commission should ask its financial adviser to prepare a set of requirements detailing how the financial model should be constructed so that the evaluation team will be able to easily compare the financial models submitted by each bidder.

The requirements should specify standard assumptions to be used for macroeconomic variables, such as inflation and other ratios and calculations. It is good practice to include a template and/or "instructions to prepare the financial model" as an appendix/annex to the RFP so as to standardize the financial models submitted by each bidder. Please refer to the Appendix 2 for a checklist of the critical information that each financial model should contain.

The information requested should include the financial structure and amounts of debt (including the potentially different instruments and tranches), the financial terms agreed or under negotiation, letters from the lenders expressing their commitment to the project, and the terms offered or agreed. In most cases it will not be possible to require that the financing should be fully arranged and any financing offers be fully binding.

6.4. Obtaining the approval for the tender documentation

In accordance with the Law on Concession and CMU Decree No. 384, the tender commission raises the tender documentation for approval to the public partner.¹⁹ The public partner within 10 calendar days from the date of submission of the tender documentation (and for villages, settlements, cities, including united territorial communities, and district and regional councils at the next plenary session) makes a

19. In case of state property, an appropriate ministry or state agency must approve it. In case of municipal property, it should be done by the municipal council.

decision on the packet by either approving it or rejecting and providing the ground for such decision with a list issues that need refinement.

In accordance with the Concession Law, the decision to hold a concession tender shall be made by the grantor not later than 30 calendar days after the approval of the tender documentation. There is no similar limitation for non-concession PPPs.

The announcement of the tender, along with the conditions, is then published.

7. Launching tender

The objectives of launching the project are to comply with the relevant legal requirements for a valid tender process, to market the project to attract a highly competitive bidding field, and to make the Request for Qualifications available to potential bidders, followed by the Request for Proposals to applicants that successfully complete the preselection step. The tender commission should make the tender documents available in the manner and form required by the relevant legislation.

7.1. Developing a launching strategy

It is recommended that the tender commission (or the public partner) develop a launch strategy that encompasses both the formal launch of the project through publication of the tender notice and other measures to ensure that potential applicants are aware of the project and the planned timing of the tender process. This enables applicants to ready themselves for the launch and properly resource their application teams.

The strategy should also include specific marketing activities in advance of the formal tender process (e.g., announcing the project in specialized media or listing it on a global PPP project platform). It should provide the market sounding participants with details of the refined structure, the procurement strategy, and the tender process, including relevant parts of those reports and documents developed during appraisal to the extent they are not confidential. Documents that should be provided in whole or in part include the feasibility report, any revenue studies (or traffic, in case of transport projects), and any other studies that will assist potential bidders to understand the project needs, scope, and key risks.

If the public partner (or tender commission at the request of the public partner) has not conducted a comprehensive structured market testing process during a previous phase, these measures are particularly important. The public partner may also consider a “soft launch” of the project in advance of the formal launch by publishing a tender notice in the Official Gazette (*Governmental Courier* or *Voice of Ukraine*), on the official site of the public partner, and through other appropriate media such as newspapers and the internet. This will enable potential bidders to plan ahead for the work required to develop a bid and to consider potential consortium partners for the project. Other measures could include issuing a press release or conducting a press conference; conducting a road show, in which potential bidders in key markets are invited to project presentations; and providing information through embassies or industry associations.

The tender notice should:

1. Comply with the applicable legal requirements;
2. Provide sufficient information for potential bidders to assess whether they should further investigate the opportunity to bid for the project;
3. Include information on any proposed information meetings open to prospective bidders; and
4. Direct potential bidders to any other sources of information about the project, such as a project information page on the public partner's website.

7.2. Creating a data room

Through the previous phases of the project, the tender commission will have amassed a large amount of information that it cannot practically include in the tender documents but that may assist bidders (tender participants that successfully meet the qualification requirements) in preparing their proposals. To enable the bidders to prepare better quality proposals offering better value for money, the tender commission should consider making that information available to bidders through **a data room**, preferably an electronic data room through which the bidders can access the documents in electronic form over the internet.

Data rooms are typically libraries of numerous volumes of detailed records, reports, and plans relevant to a specific (usually large) infrastructure project that bidders may access while they are preparing their bids. For concession PPPs that require private partners to take over the operation and management of existing facilities, having access to historical design plans, asset registries, and operating and maintenance data will be critical. For PPP projects in which the bidders will be assuming end-user demand risks, having access to detailed demand, billing, collection, and revenue records will also be critical. Greenfield PPPs that feature the construction of brand-new facilities on vacant land and have a single public sector off-taker (such as for the construction of new schools or hospitals or public buildings) usually require smaller amounts of background information (and therefore smaller physical and/or virtual data rooms) than do brownfield PPPs or PPPs that transfer market demand risks to private partners.

Virtual data rooms use the data storage technologies of CDs and webpages to make this information available electronically to qualified bidders. Data room can also be physical: a room with access restricted to authorized bidders that contains hard copies of the documents. The benefits of providing such information must be weighed against the potential confidentiality of the information. In some cases, it will only be appropriate to provide access to the data room to bidders who have been prequalified and have given appropriate confidentiality undertakings. In addition to the PPP bidding documents (tender packet) and the draft PPP contract, private bidders for large and complex PPP projects often need access to additional, detailed, and specialized background information about the PPP project in order to prepare competitive and innovative bids. Clear protocols should be established for access to and use of the data room (including nondisclosure agreements (NDAs)), and bidders should be required to agree to these.

Some PPP projects that require complex construction activities, such as the construction of a new road along a lengthy corridor, include site inspections and walk-throughs hosted by the procuring authority

and their PPP advisor for the bidders' technical staff to physically inspect the proposed right-of-way and key project sites firsthand.

According to Ukrainian legislation, the tender documentation should also include instructions and procedures on how bidders that successfully pass the qualification stage can access relevant documents (i.e., in the data room). Such information is also included in the RFP invitations.

In addition, the public partner (or tender commission on the request of the public partner) should consider whether the tender documents, or any part of them, should also be made available in another form or in another manner that will be of greater convenience for bidders. For example, if the tender commission requires bidders to submit information in their bids a particular format or layout in their bids, the tender commission should consider providing bidders with electronic templates that can be completed using common software packages. This has several advantages:

- Bidders do not need to spend time recreating the required format.
- The likelihood of errors and omissions in the bids is reduced.
- The fact that the bids will be in a more consistent format can speed up the compliance checking and evaluation once the bids are submitted.

The typical content of the PPP project's virtual or physical data room made available for review by short-listed private bidders may include:

1. Existing project designs and construction engineering reports
2. Updated infrastructure network maps and expansion plans
3. Asset and equipment registries
4. Inventory records
5. Equipment maintenance and other maintenance records
6. Customer databases and cadastral studies
7. Existing service contracts held by the public authority or balance holder, etc.
8. Audited financial statements of the procuring authority or balance holder, if available
9. Information on other liabilities, such as debts, held by balance holder
10. Other detailed technical, financial, and legal reports and records relevant to the specific PPP project.

It is a good practice to develop a Project Virtual Data Room and Site Inspection/Walk-Through Report that covers the following:

1. A list of all documents included in the physical and/or virtual data room
2. Copies of each document included in the physical and/or virtual data room
3. A summary description of all site inspections and walk-through meetings conducted, including who attended and what information was provided
4. Copies of all questions posed by bidders during the site inspection(s) and walk-through(s)
5. Copies of all responses provided by the tender commission

As noted, PPP projects that require complex construction tasks, such as for lengthy roads, multiple new public buildings, etc., often feature site inspections and “walk-throughs” hosted by the tender commission and their PPP advisors for short-listed bidders. Usually the engineering-related specialists on the bid preparation teams responsible for project design and construction management attend these events (wearing safety helmets and steel-toed boots). The purpose is to allow them to see the proposed project sites firsthand and to prepare any new questions related to design and construction issues. Any questions that emerge from these visits should be submitted to the tender commission in writing, and both the full text of the question and the full text of the answer or response by the tender commission should be distributed to all short-listed bidders.

The questions received from bidders during the site inspection may indicate the need for modifications to the PPP bidding documents, including the RFP package and the draft PPP contract. Therefore, the outputs of this procedure should be coordinated with the inputs to clarification questions from bidders and modifications to the tender documents.

8. Interacting with bidders

Having launched the tender and while awaiting the tender submissions, it is advisable for the tender commission to interact with potential bidders to ensure that they correctly understand the public authorities’ (public partner’s/state entity or municipality) requirements and to respond to issues raised by applicants in relation to the tender requirements and the draft contract.

This interaction can take a number of forms:

- Open meetings and presentations
- Clarifications of the contract and the tender documents
- Handling requests for potential changes to the contract and tender documents and responding to these

In some projects, more extensive interaction with a small number of prequalified bidders, such as a competitive dialogue process, may be appropriate to better align the public partner’s requirements and the bidders’ proposals.

8.1. Open meetings and presentations

It is good practice for the tender commission to conduct an open meeting or presentation early in the tender process, at which the public authority (or tender commission at the request of the public authority) explains the objectives and key features of the project and the tender process. Potential bidders should be made aware of this meeting through the formal tender notice or the tender documents.

The information given at the meeting should generally reflect the content of the tender documents. Rather than providing new information, the primary aim of the meeting should be to reinforce the content of the tender documents by providing the same information through a different communication channel.

However, it may be appropriate for the tender commission to provide updated information on any other processes that are relevant to potential bidders (for example, if a government is procuring a site for the project, progress on this should be reported).

The key speakers at the meeting should be senior representatives of the public partner or even the government (in case of state equity), assisted where appropriate by advisers or other key stakeholders, which might include the Ministry of Development of Economy or the municipal government. The presence of senior representatives of the public partner at the meeting sends a strong message to potential bidders of the government's (municipality) commitment to the project. In some instances, it may be appropriate for the relevant minister (or mayor) to present the key project features and objectives.

The risks of conducting such meetings include the great demand placed on the time and resources of the government (municipal) team and the potential (either in reality or as matter of perception) for one applicant/bidder to be given information not provided to other applicants/bidders, thus compromising the fairness of the process. As a matter of good practice, a number of measures can mitigate this risk.

- Rules for conduct of the meetings are circulated to all participants in advance.
- If the meeting occurs prior to the release of the RFP, a project information memorandum is circulated to all participants in advance, and additional information is not given during the meetings.
- The tender commission uses a prepared script during the meetings to ensure that, as far as possible, the same questions are answered in the same way in each meeting.
- At least two government representatives attend each meeting (more than two may be appropriate to minimize the risk of allegations of impropriety).
- The process is well documented through records of attendance and minutes of the meetings.
- In some projects, the questions and answers are circulated to all applicants/bidders in anonymized form, without disclosing any information specific to an individual bidder.
- In some projects, an independent party is appointed to attend the meetings and to provide confirmation that no bidder was given an unfair advantage over other bidders.

Even if meetings with individual bidders are held, it is often beneficial to conduct a forum or presentation at which all applicants/bidders are present. This provides an efficient forum for the government (ministry, municipality) to convey key messages in relation to the project.

The information given at the meeting should be made available to all applicants/bidders immediately afterwards (for example, by posting it on a website made known to applicants/bidders through the tender documents). This ensures that potential bidders who did not attend the meeting are not disadvantaged, and it is particularly important if any information is provided at the meeting that was not contained in the tender documents.

8.2. Clarifications of the contract and the tender documents

It is good practice for the tender commission to allow requests for clarification of the contract and the tender documents. (One-on-one or group meetings between the tender committee and the bidders are

allowed in Ukraine under the Law on Concession only for the competitive dialogue procedure and for concession PPPs.) However, the tender commission should retain discretion as to whether it responds to any particular clarification request. The tender commission must provide a response whenever this will assist bidders to provide a better bid but not undermine the tender process.²⁰

A clarification in the true sense does not amount to a material change in the tender documents or the draft contract; it merely removes ambiguity or uncertainty in the mind of bidders as to the meaning of those documents. However, if the tender commission faces a situation in which prospective applicants/bidders request changes in order to make the project commercially feasible, the tender commission will have to decide whether such changes are really needed to avoid receiving no applications/bids or whether that risk is worth taking. Clarifications are important to ensure that applicants/bidders correctly interpret the tender commission's requirements.

Responses (and the relevant question) must be made available to all potential bidders (for example, by posting the questions and the responses on a website made known to applicants/bidders through the tender documents). If the wording of a clarification question identifies the applicant/bidder asking the question or states the issue in a narrow or unclear manner, the tender commission should ensure that the version of the question made available to other applicants/bidders has been edited so that it clearly explains the issue and does not identify which bidder asked the question.

Clarification responses will usually be regarded as part of the tender documents. However, they will not prevail over the original text of the tender documents unless the response states that the original text is specifically amended.

8.3. Assessing potential changes to the contract and the tender document

As a result of questions asked by applicants/bidders through the clarification process, it may become apparent that the tender commission should materially change aspects of the contract, tender requirements, or criteria. This risk can be minimized by properly assessing the project and carefully drafting the tender documents in the previous phases. However, given the complexity of PPP projects, it can be necessary to consider a change to the contract or the tender documents for the following reasons:

- The tender documents may include a requirement that potential bidders cannot reasonably comply with.
- The draft contract may have an irreconcilable ambiguity.
- The project, as presented in the tender documents and draft contract, may not be feasible for potential bidders.

When the tender commission receives a request for a change to the contract or the tender documents, it should consider if such change allows it to receive competitive bids that are affordable and offer value for money. The applicants/bidders requesting the change may be overstating the issue or seeking a change in the project that is advantageous to them but disadvantageous for the public partner or future users of

20. This is applicable to all tender procedures except for competitive dialogue.

the infrastructure. The tender commission may need to consult with its advisers to assess the validity of the request for the change.

The tender commission should also consider whether the change requires an extension to the bidding period. It is good practice to provide such an extension unless the change is very minor, it occurs early in the bidding period, or the legal framework forbids such changes. If the legal framework forbids such changes, it may be necessary to cancel the tender process and reissue the tender.

Once the tender commission decides to make a change to the contract or the tender documents and considers if an extension of the bidding period is required, these details should be made available to all potential bidders (for example, by posting the questions and the responses on a website made known to bidders through the tender documents). Box 9 sets out examples of possible changes to the contract or the tender documents.

Box 9. Examples of possible changes to the contract or the tender documents

A minor change to the tender requirements not requiring an extension of the bidding period

A tender commission tendered a PPP, with the tender documents requiring bidders to lodge four bound copies of their proposals, one unbound copy, and one electronic copy (on a CD-ROM formatted to Microsoft Windows Office 2010). The tender documents stated that the proposals should include audited financial statements for the last three years for each company in a bidding consortium.

Some potential bidders requested a change to the requirement to provide their audited financial statements in Microsoft Windows Office 2010 format, as they did not have these documents in this format.

The tender commission issued an addendum to the tender documents, modifying the lodgment requirements to allow financial statements to be lodged in PDF format. This change did not require an extension of the bidding period.

A major change requiring an extension of the bidding period

A tender commission tendered a toll road PPP. Several potential bidders advised the tender commission that the design requirements specified in the tender documents for one of the interchanges between the toll road and an existing road were inappropriate and would result in safety issues and traffic congestion.

After consulting with its technical advisers, the tender commission concluded that the issues raised by the potential bidders were genuine. Changing the design requirements would increase the project cost, but the project would still offer value for money and would provide a safer outcome with less traffic congestion.

The tender commission advised all potential bidders of new design requirements for the interchange and extended the date for submission of tenders by two weeks to allow bidders to incorporate the new requirements into their bids.

Please note that in the context of Ukraine, changes made to the tender documentation may not contradict the conclusion based on the results of the analysis of the effectiveness of the public-private partnership and must comply with the principles of openness, equality, and nondiscrimination (for concession and non-concession PPPs).

A requested change to the contract rejected by the public partner

A tender commission tendered a PPP with a dispute resolution clause in the draft contract that differed from the dispute resolution clauses in previous PPP contracts in that country. The tender commission had changed the dispute resolution clause because the clause in previous contracts had proven to be cumbersome to implement when disputes arose on past projects.

Several potential bidders requested that the dispute resolution clause be amended to match the clause seen in previous projects, as that was “market practice,” and they would not agree to a contract that differed from “market practice.”

After consulting with its legal advisers, the public partner on request of the tender commission was satisfied that the new clause was not so significant a change that it would be unacceptable to potential bidders who were otherwise interested in the project. The tender commission notified the potential bidders that it would not change the clause. Those bidders then submitted bids in which they accepted the new dispute resolution clause.

8.4. Competitive dialogue

Competitive dialogue is one of the procurement procedures allowed to tender a concession PPP project. It aims to ensure that:

- The tender commission’s requirements are realistic and achievable and will result in bidders offering value for money proposals; and
- The potential bidders have a strong understanding of all aspects of the project and of the tender commission’s requirements.

Competitive dialogue is usually only practical if the tender commission conducts a prequalification and short-listing process in which prequalified bidders are first ranked and then a small number of the highest ranked bidders are short-listed to proceed to the Request for Proposals stage (for concession PPPs).

The more extensive interaction typically takes one of two forms:

1. **The interaction occurs before the procuring authority finalizes the Request for Proposals and draft contract (the current practice in Ukraine).**

This is most useful in projects in which the public partner is uncertain as to whether its requirements are realistic and achievable and will result in bidders offering value for money proposals. The interaction enables the short-listed bidders to review a draft of the Request for Proposals, partially develop their bids, and provide feedback to the procuring authority. The procuring authority can then revise the Request for

Proposals based on the feedback received before issuing it in final form. An example of this form of interaction is the “competitive dialogue” process under EU procurement rules.

2. Alternatively, the interaction occurs after the procuring authority has finalized the Request for Proposals and draft contract (not currently the practice in Ukraine).

This approach is most useful for projects in which the public partner is confident that its requirements are realistic and achievable and will result in bidders offering value for money proposals but wishes to ensure that bidders have a strong understanding of all aspects of the project and the public partner’s requirements. The interaction enables the short-listed bidders to present aspects of their bids to the tender commission as the bids are developed and to receive individual feedback from the tender commission. The bidders can take the feedback into account in finalizing their bids, thus offering higher quality bids and a better outcome to the tender commission. An example of this form of interaction is the “interactive tender process” conducted under Australia’s National PPP Guidelines.

A public partner planning the tender process for a large and complex PPP should consider whether the tender process will be more effective if one of these forms of interaction is used. If that is the case, the public partner should:

1. Confirm whether extensive interaction is possible under the legal framework within which the tender process is being conducted.
2. If extensive interaction is possible, it should:
 - a. Include a prequalification and short-listing step in the tender strategy (which is established in its decision on the tender procedure as part of the analysis of efficiency); and
 - b. Develop a set of protocols for conducting the interaction and include these protocols in the tender documents as part of the rules of the tender process.

Appendix 1 provides detailed guidance on conducting the competitive dialogue and other extensive interaction processes and the protocols required.

8.5. Probity considerations

In good international practice, if significant interaction between the tender commission or the public authority and bidders is anticipated during the tender process, the public authority considers appointing an independent person to oversee the interaction process, monitor whether all bidders are being treated fairly, and assess the impact of any accidental or deliberate breaches of good practice in the conduct of the tender process. The independent person is often referred to as a probity adviser, probity auditor, or fairness auditor, and the person may also have an oversight role during the evaluation of the bids. More information on this role is provided in Appendix 2.

This is done mainly to avoid the risk of creating a perception that a particular bidder or bidders are getting an advantage in the tender process or to avoid a risk of accidental breaches of the rules of the tender process. For example, if open meetings that can be attended by bidders are held, there may be a perception that bidders who are able to attend those meetings will receive additional information that is

not available to bidders who are unable to attend the meetings. In another example, if a clarification process is managed through electronic mail, the tender commission might accidentally send confidential project information to a bidder.

9. Bidder preselection

Once applicants' qualifications have been received, the tender commission should apply the preselection methodology in accordance with the assessment manual and the tender documents.

CMU Decree No. 384 (paragraph 35) allows the tender commission to request clarifications from applicants in respect of their responses to the qualification criteria within 45 working days from the date of expiration of the deadline for submission of qualifications, during which the commission reviews them, prepares a draft decision on admission (non-admission) of applicants to participate in the competition, and submits it for approval to the state partner. The clarification process should be used to resolve any uncertainties as to whether an applicant has satisfied any of the criteria (please see more on the process of interacting with applicants, including providing the clarification in task Interacting with applicants). This is only applicable in case of non-concession PPPs.

The tender commission must ensure that the preselection is conducted in accordance with the qualification criteria and process described in the tender documents and using a consistent methodology as described in the assessment manual. Deviations from the criteria, process, or methodology are not consistent with principles of transparency and will likely result in challenges to the outcome.

If a consortium submits its qualifications, the team members should be evaluated individually as well as collectively for the suitability of their relationships, roles, and abilities to consistently meet the project needs and to work with government long-term. If the private consortia members have not worked together before, how well they will collaborate should be given special consideration. In such cases, it is recommended that interested applicants be required to describe their planned mechanisms for clarifying ownership of the project company as well for establishing a clear management structure that minimizes any potential disputes between firms.

One practical technique for limiting the number of private firms that submit qualifications, especially for larger-sized PPP projects, is to charge fees²¹ for interested private firms to purchase the RFQ documents. This tends to prevent non-experienced, "briefcase" companies from submitting qualifications that the tender commission's Technical Committee must spend time reviewing. It also helps provide funds that can pay for some of the costs of hiring the PPP transaction advisors. International experience has shown that for larger PPP projects, experienced and serious private potential bidders who expect to spend tens

21. In accordance with the Law on Concession, and the CMU Decree No. 384, the tender commission can establish a registration fee for bidders, but it should be paid only by those bidders who were selected for participation in RFP as a result of preselection process.

of thousands of dollars (or even more) preparing full bids, are generally willing to pay such additional costs if they know it will help the overall procurement process run more smoothly.

The outcome of the assessment should be documented in a preselection report that accurately records the assessment of each applicant against each of the criteria and states which bidders meet the qualification criteria. The preselected bidders are then invited to the RFP stage, providing them with the opportunity to prepare and submit project proposals.

Once the preselection report has been approved by the tender commission (by majority of votes of its members), the commission should promptly advise bidders of the outcome of the qualification process. According to the Law on Concession (para. 5, Article 12), the commission must make the decision on the admission or non-admission of bidders to participate in the tender within 14 calendar days from the date of expiration of the deadline to submit bids to participate in the preliminary selection. For non-concession PPPs, this decision may take longer (up to 45 working days; CMU Decree No. 384, para. 35).

If there is a long delay in advising applicants of the preselection outcome, their application teams may shift their focus to other projects and be less willing to bid for future projects tendered by the procuring authority. The preselection should be communicated in accordance with the tender documents to ensure that all potential bidders are treated fairly and in accordance with the rules for the tender process.

If only one or two responses are received, it may indicate that the PPP project was not well conceived or structured. The public partner should ascertain the possible reasons for such lack of private market interest. The PPP feasibility study and proposed PPP risk-allocation structure may have to be reviewed and amended. Another round of the RFQ process may be needed with revised RFQ documents or wider publicity to increase market interest.

10. Evaluating the proposals of preselected bidders

During the evaluation process, the tender committee reviews the received bids by applying a consistent evaluation methodology and identifies the preferred bidder. It first should conduct a compliance check to ensure that the formal requirements are met. Then the bids that pass this check can be evaluated.

Once preselected bidders' proposals have been received, the tender committee should first conduct a compliance check to ensure that each bidder has complied with the formal requirements of the tender process. This involves confirming that:

- The proposal was submitted as required by the RFP
- All signatures are valid, and the signatories have the authority to sign the proposal on behalf of their respective organizations
- The bid complies with other legal requirements, which may include checking that there are no unresolved issues with the tax authorities and no impending prosecutions for corruption or fraud.

The tender commission should carry out these checks before the evaluation (in strict terms) of the proposals commences.

While the initial compliance check will identify obvious issues, such as missing signatures or missing parts of the bid, more subtle noncompliance issues might only be identified during the evaluation itself. For example, a technical proposal may be missing some requirements, or an alternative bid may have been included where these were not allowed. The RFP and the evaluation manual should document the process for dealing with such issues.

In some projects, the tender commission may find that only one or even no compliant bids were received. Box 10 provides guidance on these situations.

Box 10. Guidance where only one or no compliant bids are received

Only one compliant bid

In accordance with Ukrainian legislation, it is possible to have one bidder at any stage of the tender process, in which case this bidder can be the selected private partner provided that the bidder meets all tender conditions. This may place the tender commission in a difficult position, however. It suggests that the project was unattractive to all other capable bidders, which may be because the project was poorly structured and is unlikely to succeed. The sole bidder may also be overly ambitious and have an unrealistic expectation that it can deliver the project.

The tender commission is in a weak bargaining position if it chooses to award the project to the sole bidder. That bidder may seek to negotiate the terms of the contract, or the tender commission may see a need to negotiate due to deficiencies in the bidder's proposal since there is no alternative bidder to turn to if a satisfactory outcome cannot be agreed.

The tender commission may seek to prevent this situation by limiting the aspects of the bid subject to negotiations. Nevertheless, negotiating with a sole bidder on this basis may not provide a good outcome (for example, because the bid offers very poor value for money). The procuring authority should therefore reserve the right to terminate the tender process and to retender the project or seek an alternative solution in these circumstances. This right, as well as other requirements that apply where there is only one compliant bid, should be specified in the RFP.

No compliant bids

A Tender commission may face a situation in which there are no compliant bids. The commission can best avoid this outcome by having a well-planned and well-structured tender process. If there are no bidders, the appropriate course of action will depend upon the cause:

- If there is evidence that this is due to the tender commission allowing insufficient time for potential bidders to prepare and lodge their proposals, the tender commission can consider extending the date for lodgment of bids if this is allowed under the legal framework.
- If there is evidence that this is due to the project structure or requirements being unacceptable to potential bidders, the tender commission can investigate whether the structure or requirements can be adjusted to be attractive to the market without compromising value for money, in which case the project can be retendered.

After the compliance check is completed, the tender committee may apply the evaluation methodology and conduct the evaluation process in accordance with the evaluation manual and the tender documents.

Deviations from the criteria, process, or methodology is inconsistent with principles of transparency and will likely result in challenges to the outcome. The rules of the tender process allow the Tender Commission to request clarifications from bidders regarding their proposals. The clarification process should be used to resolve any uncertainties or ambiguities in a proposal that affect the evaluation. (Please see Task 8 on interacting with bidders for more detailed information.)

The tender commission should separate the technical and financial evaluations using physical and information barriers. That is, those involved in the technical evaluation should not have access to details of the financial evaluation and vice versa. This ensures that evaluators' perceptions are not influenced by aspects of the bid that are not relevant to the specific criteria they are evaluating.

The process and outcome of the evaluation should be documented in an evaluation report that accurately records of the evaluation steps, discussions, and decisions; sets out the evaluation of each bidder against each of the criteria; and provides a conclusion as to which bidder has been identified as the preferred bidder. The evaluation report should be approved in accordance with the evaluation methodology and the governance arrangements for the project by the public authority making the approval decision on the winner or cancelling the tender. Only after completing these steps for all responsive offers will it be possible to announce the awardee under the final scoring calculation.

If the evaluation is complex and contains significant subjective or qualitative elements, following good international practice the tender commission will appoint a probity auditor to oversee the evaluation process. There is an increased risk that a losing bidder will claim that their proposal was not fairly and properly evaluated. A probity adviser, probity auditor, or fairness auditor can reduce this risk by providing independent oversight of the evaluation process and confirming whether it was conducted in accordance with the tender documents and the evaluation manual.

Having identified the preferred bidder, the tender committee should submit the evaluation outcome to the relevant public partner in accordance with Ukrainian legislation and the public partner (ministry or state agency for state property and city council, for municipal property) should approve the evaluation report and based on it adopt the decision it makes on the result of tender.

11. Contract award

After the tender evaluation is completed, the public partner makes the award decision. The public partner formally awards the contract to the winning bidder (except when the initiator of the PPP proposal agreed to recognize as the winner of the tender the bidder that received the highest grade), notifies the bidders of the outcome, ensures the other bidders that the transparency requirements were fulfilled, and resolves any challenges to the tender process. The parties are now ready to move forward to contract signature.

The tender commission should submit the evaluation outcome to the relevant public partner, confirming that all of the appropriate tender and evaluation processes were followed and providing a recommendation for the award of the contract to the winning bidder. The public partner awards the contract on this basis. The public partner should ensure that it complies with any transparency

requirements in respect of the award decision, including publishing the decision in the Official Gazette (government or municipal) and on the official site of the public partner.

Once the award decision has been made, the tender commission should promptly advise bidders whether they were successful. This should be communicated in accordance with the tender documents.

In international practice, the legislative framework may allow unsuccessful bidders to challenge the evaluation decision within a certain time limit, known as a *standstill period*. Challenges are prohibited after the standstill period expires, making it beneficial in ensuring that any challenges to the process are made promptly and not strategically deferred by the losing bidders. During the standstill period, if any, the tender commission should be prepared to process any challenges in accordance with the legal framework.

12. Negotiation of the final contract terms

Following the selection of the preferred bidder, the bidder will be invited to finalize and sign the contract. As PPPs are typically large and complex projects, the draft contract issued with the RFP may not neatly align with the details of the winning bidders' proposal. The winning bidder and the public partner will have a limited opportunity to change any contract term or conditions within a specified time period (if expressly provided for in the offer and if such changes do not affect the completion in any way) to bring about appropriate alignment between these documents and provide a clear and unambiguous contractual basis for the project to proceed. It is therefore not a negotiation process but a formal finalization of the contract terms after establishing the choice of preferred bidder and its bid. The public partner should carefully ensure that any formalization is conducted to align the contract with the proposal submitted by the bidder and evaluated during the tender process.

The negotiation should be limited to fixing the final details contained in the tender documents and satisfying the reasonable requirements of the selected bidder's lenders. The negotiations at this stage may not concern those terms of the contract deemed not negotiable in the RFP and should not change the nature of the project. In particular, finalization should not result in a more favorable outcome for the bidder and a less favorable one for the procuring authority and users than the outcome expected based on the tender documents and the proposal as submitted during the tender process.

The risk of reopening commercial terms at this late stage could be further minimized by insisting that the selected bidder's lenders indicate their comfort with the risk allocation embodied in the draft contract at a stage when there is still competition among bidders. The public partner's advisers might contribute to this process by advising whether bidders' proposals are realistic and what levels of financial commitment are appropriate at each stage.

Box 11 provides examples of appropriate and inappropriate negotiation of the final contract after award and prior to contract signature.

*Box 11. Examples of appropriate and inappropriate negotiation of the final contract**Appropriate negotiation*

A public partner tendered a PPP contract for the design, building, finance, and maintenance of a new hospital. The contract included an obligation to supply, install, and maintain expensive medical imaging equipment. The Request for Proposals stated that the public partner encouraged innovative financing proposals that offered value for money to the public partner.

The winning bidder had an arrangement with a medical equipment supplier under which the supplier would provide vendor finance for the equipment, so that the supplier would be paid in instalments over five years for the cost of the equipment, rather than requiring full payment up front. This arrangement was more cost-effective for the bidder than the alternative of borrowing to pay for the equipment in full up front, and it lowered the cost of the bidder's proposal.

When the winning bidder was awarded the contract, it made a request on behalf of the equipment supplier that the PPP contract be amended so that the equipment supplier received the same rights and protections that would be received by lenders to the special purpose vehicle. It justified this on the basis that the equipment supplier was, in effect, providing a form of finance that was similar in substance to a loan, even though it did not take the form of a loan.

After seeking advice from its legal and financial advisers, the public partner concluded that the requested amendment to the contract was appropriate, as it offered value for money to the public partner and would not alter the outcome of the bid evaluation process.

Inappropriate negotiation

A public partner tendered a PPP contract for the design, building, finance, and maintenance of a new hospital. The contract included an obligation to supply, install, and maintain expensive medical imaging equipment. The Request for Proposals and the contract specified the performance requirements for that equipment.

When the winning bidder was awarded the contract, it tried to negotiate a relaxation of the performance requirements for the medical imaging equipment, stating that it believed a lower-cost and lower-performing model of the equipment would be adequate for the hospital's needs, and the price of their bid assumed that the lower-cost, lower-performing model of the equipment would be acceptable to the procuring authority.

The public partner received the following advice from its advisers:

- The technical advisers confirmed that the performance requirements were specified in the Request for Proposals and the contract, and if the public partner accepted the lower-cost, lower-performing model of the equipment, there was a risk that care of patients could be compromised. The change therefore would compromise value for money for the public partner.
- The legal advisers identified a risk that unsuccessful bidders could claim they would have provided lower cost bids and hence would have scored higher in the evaluation had they known that they could offer the lower-cost, lower-performing equipment. Thus, there was a risk that by agreeing to the change the public partner would open up the possibility of challenges to the tender process and would lower private sector confidence in the ability of the public partner to conduct a fair and transparent tender process.

Based on this advice, the public partner rejected the winning bidder's request for relaxation of the performance for the medical imaging equipment and required the winning bidder to proceed on the basis of the performance requirements in the RFP and the contract.

13. Commercial close

Before the deadline expires, the successful bidder will have to meet certain prior conditions as established in the RFP. The following conditions are typically included:

1. The winning bidder must establish a new company, known as a special purpose vehicle (SPV), that will be the private sector party to the PPP contract.
2. The winning bidder or the SPV must take out insurance policies under the terms set forth in the RFP and the contract (or in some cases, they must prove that insurance is available to them on those terms).
3. The winning bidder or the SPV must provide any performance guarantees required in favor of the authority.

The public partner should establish processes to verify that the conditions precedent were satisfied by confirming the SPV registration,²² reviewing compliance with the insurance policy coverage requirement, and reviewing any performance guarantees required in favor of the authority to confirm that they meet the RFP and contract requirements.

If the winning bidder is not able to fulfil all of the conditions before the deadline specified in the RFP or refuses to sign the contract, the public partner should take the appropriate action allowed under the RFP, such as:

1. Demand liquidated damages from the bidder.
2. Make a call against any bid bond that was required with the bid submission.
3. Call for the next ranked bidder to sign the contract.
4. Reissue the tender.

Once the public partner is satisfied that the conditions precedent were fulfilled, the SPV should sign the contract. After satisfaction of the conditions precedent and contract signature, a legally binding PPP contract exists between the public partner and the special purpose vehicle.

Reaching a commercial close is not the end of the tender process and start of the contract management, however. Contract effectiveness depends on the financial close. It requires the involvement of the banks

22. In PPP (concession) agreements, the private partner (concessioner) can only be a Ukrainian company-resident. Therefore any winner that is nonresident must create a company-resident of Ukraine.

and international financing institutions, together with export credit agencies and insurances companies. Inability to reach the financial close may lead to renegotiation of the contract terms.

14. Financial close

Financial close takes place at the point at which all of the project documentation is signed, all the preconditions attached to the project's financing have been met, and the project funding becomes available. This typically succeeds commercial close, when the public partner has agreed to the commercial terms with the private partner through conditions precedent like the formal establishment of the project company or arranging finance before the contract becomes effective.

The financing agreements also usually contain a specific range of conditions that must be met before the private party can draw down on its loan; these are called conditions precedent to financial close. For example, the financiers may require the management of the private party to meet various identification and anti-money-laundering requirements. The management of the private party may be unable to meet these requirements until after the PPP contract or the financing documents have been signed. Financial close occurs when the financing arrangements have been negotiated and all of the precedent conditions have been satisfied. If financial close does not occur within a period specified in the PPP contract, the public partner is usually entitled to activate a default process or terminate the contract. In most PPPs, it is the private party's responsibility to satisfy most or all of the conditions precedent to financial close; however the public partner should promptly satisfy any conditions precedent that are its responsibility, as should be indicated in the PPP contract (for example, acquiring a certain percentage of the right of way for a road before financial close can occur).

In a PPP project, the private party usually will not have finalized its financing arrangements and be able to draw down on its loans at the time the PPP contract is signed. This happens partly because the financiers may be unwilling to agree on the terms of the financing (that is, to finalize negotiations or make a binding offer) until they know that a signed PPP contract is in place. Even if financiers are willing to agree on the terms of the financing before a signed PPP contract is in place, this may be costly and inefficient for the private party, which may prefer to finalize negotiations once the project is awarded and to rely at bid submission on indicative financial offers from one or more lenders. Furthermore, the lenders require extensive due diligence before financial close can occur. This includes reviewing all of the technical studies and business assumptions as well as legal due diligence and ensuring that the management of the private party meets various identification and anti-money-laundering requirements. It might not be possible for the lenders to conduct this due diligence before commercial close because there may be not sufficient time or the bidder and lenders may not be willing to commit the funds and resources until an award decision is made. In addition, there may be a number of precedent conditions that depend on or are to be met by the public partner or third parties, and this uncertainty will prevent lenders (and the bidder) from conducting a full due diligence process until these conditions are met.

The PPP contract should stipulate a reasonable timetable for financial close, taking into account precedent transactions, feedback from the investor and lenders, the complexity of the project, and the ability of the

investor and lenders to maintain the costs as indicated in the bid and satisfy the various conditions precedent to financial close. For larger, more complex, or “riskier” PPP projects, reaching financial close may take up to 6 to 12 months to complete. However, for smaller, simpler, or less risky projects that do not require project-backed financing, this procedure may only need only 1 to 3 months to complete. The tender process could allow bidders to submit financial proposals based on indicative terms received from lenders. The standards or recommendations for RFP should include the need to ask bidders to present evidence of the availability of finance, including financial offers with indicative terms.

The PPP contract may require the private party to commence design work immediately after contract signature and to commence construction work by a scheduled date, even if financial close has not occurred. In these circumstances, the private party uses the funds subscribed by the equity investors to meet the cost of this work. (Please refer to the PPP Manual Phase 4 on managing and implementing the PPP contract.)

The following is a list of potential stakeholders typically involved in the process of reaching PPP project financial closure:

1. SPV
2. Investors (owner of the new SPV)
3. PPP transaction advisors (financial, legal, tax and technical)
4. Underwriters/arrangers (debt and equity)
5. Commercial lenders (banks, insurance companies, pension funds, etc.)
6. Independent equity investors (equity/infrastructure funds)
7. Multilateral development banks
8. Donors

The process of negotiating the project’s financing agreements is done by the private contractor and by the lenders they choose to try to borrow from for the project. Therefore, this is not the direct responsibility of the public partner or of the PPP unit. However, the public partner should monitor the private party’s progress in negotiating the financing arrangements and satisfying its conditions precedent (and any conditions precedent that must be satisfied by third parties). The public partner has a clear interest in seeing that these negotiations between private investors and lenders achieve a successful and timely outcome. The public partner should ask to be informed about progress to ensure be able to successful conclusion.

1. *Making information readily available to lenders.* One specific thing that the public partner and its PPP advisors can do is to stand ready to respond to requests from lenders for additional information about projects. Typically, lenders will insist on hiring their own advisors and sector experts to carefully verify all background information about a project as part of carrying out their own due diligence. Public authorities can facilitate this process by making all relevant sources of information readily available to lenders as needed.
2. *Requiring regular progress reports from the private partner.* The public partner should ask for regular progress reports from the awardees on their project financing negotiations. If after

the first three to six months it appears that little actual progress has been made, and that there is little likelihood of a successful outcome by waiting another six months, the public partner may consider its options for mutually agreeing to terminate the contract, or to consider awarding the contract to the second-ranked bidder.

3. *Managing instances of failure to reach financial closure.* If the private contractor is unable to reach financial closure within the time limit set by the public partner under the PPP contract, the public partner has several options. For example, the public partner can call the performance bond that the contractor has posted. However, the public partner should carefully evaluate the real reasons why financial closure was not reached. These could include:
 - The selected private bidder did not have prior experience in actually raising project-backed financing for PPP projects and was thus unable to successfully negotiate with lenders.
 - The project appeared too risky to lenders to finance.
 - One of private sponsors of the new SPV dropped out of the consortium and the rest of members decided they could not proceed in both financing and operating the project without it.
4. Failure to reach financial closure is costly experience for all parties. While the private contractor risks losing the performance bond as well as writing off the value of several years of preparation and development costs, the public partner faces significant new delays in providing important new public facilities and services. Even lenders risk losing the value of their own time and expenses spent on due diligence and negotiating with investors.

Other key legal documents marking the progress of the PPP project and its financing that should be monitored by the public partner are included in the following list, which aims to be exhaustive regarding possible key legal agreements, even though they may not be applicable to all projects:

1. Articles of association
2. Memorandum of association
3. Certificate to commence business
4. Certificate of incorporation
5. Subordinated loan agreement
6. Standby loan agreement
7. Inter-creditor agreement
8. Equity option agreement
9. PPP contract
10. Performance bond
11. Joint venture agreement
12. Design and construction contract
13. Design and construction amendment agreement
14. Guarantees
15. Engineers' agreement

16. Resolution authorizing opening accounts
17. Equity arranging and underwriting mandate
18. Administration fee agreement
19. Minister of Finance Consent
20. Notarial general bond
21. Limited shareholders' guarantee
22. Tax opinion confirming tax treatment in base case
23. Initial project budget
24. Opening balance sheet
25. Audit report for opening balance sheet
26. Legal opinion
27. Certificate that there is no material outstanding dispute
28. Information memorandum
29. Environmental management plan
30. Public participation program
31. Social responsibility plan
32. Overloading prevention strategy
33. Relocation program
34. Letter evidencing that accounts opened with account bank
35. Insurance advisers' reports
36. Insurance brokers confirmation of insurance cover
37. Lender's technical advisers report

If the private party has difficulty finalizing its financing arrangements or satisfying any of the conditions precedent, it may use this as an opportunity to try to renegotiate the PPP contract. The public partner should carefully assess any renegotiation requests during the financial close process. In some cases, a minor change in the PPP contract that enables the private party to reach financial close may be in the best interests of the project. However, the public partner should not agree to changes that materially increase project costs or decrease the likely project benefits unless this offers net positive outcomes for the public partner and the community. (See Appendix 2 of the PPP Manual Phase 4 on contract management for further guidance on renegotiation).

In some projects, the public partner assumes or shares the base interest rate risk (that is, the risk of changes in the cost of funds in the inter-bank market) from bid submission to financial close. The private party will usually fix the base interest rate under an interest rate swap agreement at financial close. In these cases, the service payments during the term of the PPP contract will be increased at financial close to compensate the private partner for a part or all of the higher base interest rate (or decreased to transfer the benefit of lower rates to the procuring authority). This requires following certain protocols to ensure that (i) the final interest rate is properly agreed and reflects actual market values, and (ii) adjustment of service payments is accurately calculated.

The financial close process can be a relatively quiet time for the public partner. The public partner should use this as an opportunity to ensure it has properly set up its contract management function and is prepared for the greater workload that may occur during construction. (See Task 15 of this Manual for more information on preparing for the contract management functions.) Following the financial close, the responsibility for managing the PPP contract can be handed over to the contract management team.

15. Preparing for contract management: Developing a strategy and setting up contract management

After the PPP contract has been signed, responsibility for contract management is transferred to a contract management team established by the public partner. The public partner should develop a strategy for managing the contract prior to financial close. The objectives of developing the contract management strategy are to:

- Have a clear plan that identifies the tools, processes, and resources (including a dedicated contract management team), required to manage the contract;
- Identify the time constraints within which those tools, processes, and resources must be in place; and
- Identify the governance arrangements that will be required for project decision making and reporting over the life of the PPP contract.

15.1. *Contract management planning and strategy*

To develop the strategy, the public partner should consider the following:

1. *Contract management tools and processes required for the project.* Contract management tools and processes are described in Appendix 1 of PPP Manual Phase 4 on contract management.
2. *Required human, financial and technology resources.* If the public partner is developing the strategy for managing its first PPP contract, it should carefully review this Manual to identify the human, financial, and information and technology resources it will need. It should also consult with other public partners more experienced in managing PPP projects to gather advice on the resources required. If the public partner already manages existing PPP projects, it should identify the additional resource needs created by the new project.

Having identified the required resources, the public partner should then identify how it will make those resources available. This includes identifying how it will:

- Appoint the contract management team
- Secure the necessary budget
- Procure the necessary technology

3. *Time constraints set for developing contract management tools and processes.* Necessary tools should be matched to both the available resources and the expected project delivery dates and milestones. The strategy should describe how the project team responsible for the tender process will transfer responsibility to the contract management team who will be responsible for managing the contract through its life. The required tools and processes, resources, and timing will differ from one project to another. It is common in PPP projects that a specific team is set up to conduct the tender preparation and procurement tasks and a different team is established for implementing the contract following commercial and financial close, although some members could be on both teams. The public partner should therefore plan to put its contract management team in place prior to the end of procurement to prevent a loss of knowledge about the project. It is preferable to involve from the outset either the head of the proposed contract management team or an experienced contract manager of an existing PPP in the same sector to help develop the contract management strategy and draft the contract.

15.2. *Governance arrangements*

Governance is concerned with processes for project decision making and reporting. It defines who within the public partner is accountable for project processes and outcomes. To ensure good governance of the PPP contract, the public partner should ensure that the staff involved in managing and supervising the PPP contract have:

1. Clearly defined roles and responsibilities
2. An appropriate mix of skills, experience and training
3. Enough time, resources, and support from the public partner to fulfill their responsibilities

The public partner should identify the roles and responsibilities of staff listed in the Contract Administration Manual (discussed in Appendix 1 of the PPP Manual Phase 4). The roles and responsibilities defined in the governance arrangements should clearly specify who has the legal capacity to act on behalf of the public partner to exercise its rights and perform its obligations under the PPP contract.

Clauses in the PPP contract may specify that the person with a particular title or holding a particular position in the public partner may act on its behalf or it may be silent on the matter. In either case, the public partner should ensure that the governance arrangements give authority to appropriate representatives of the public partner to act on its behalf in all relevant contractual circumstances. For example, in a government-pays PPP, appropriately senior individuals within the public partner should be authorized to approve or reject invoices from the private party in accordance with the contract and to approve the necessary payments.

The governance arrangements should also identify when an approval or consent is required from another department within the public partner or from another government agency before the public partner can act. For example:

- If a toll road PPP contract allows the private party to temporarily close the road in order to conduct major maintenance activities provided the private party has the public partner's prior consent,

before giving that consent the contract manager should consult with the public partner's department responsible for overall operational management of the road network to ensure that the timing of the closure does not create unacceptable consequences for the rest of the network.

- If a central agency (for example, the Ministry of Finance) has provided a guarantee or other support for the project, the public partner should obtain the prior approval of that central agency before taking action under the contract that will materially change the amount, timing, or nature of the support.

A PPP contract typically contains time limits within which the public partner must perform the tasks for which it is responsible. For instance, there may be deadlines for validating documents submitted by the private partner (such as periodic reports or invoices) or for giving feedback on its proposals (such as a change in the specifications of a service to be provided). The governance arrangements should enable the public partner to make the necessary decisions quickly. To do so, decision makers must be properly informed on a regular basis. If the contract does not specify the time within which the public partner must perform a task, the public partner should consider establishing its own targets and documenting this in the Contract Administration Manual. This will ensure that tasks are not overlooked or left until too late. (Please see Appendix 1 of the PPP Manual Phase 4 for more information on the Contract Administration Manual.)

To ensure that all key decision makers, internal stakeholders, and other government or municipal institutions are properly informed and can have input to decisions, the public partner could consider adopting a committee-based approach that includes the following:

- A *steering committee*, responsible for the main strategic decisions for managing project risks and contractual events, which will include representatives of the public partner's departments involved in the project and, at least, the head of the contract management team. It will also be responsible for touching base with its counterparts from the private partner in jointly resolving project-related issues and concerns. The steering committee will also act as the final decision-making body within the public partner and will resolve any issues or disputes that cannot be resolved at the level of the PPP management team. The steering committee may be led by the public partner's chief official (or a high-level representative within the public partner chosen to helm the PPP project) and joined by some or all of the former members of the tender commission to leverage their historical knowledge and appreciation of the project.
- A *management committee*, responsible for the ongoing monitoring of the contract, which will include members of the contract management team and the head of the department most relevant to the project.

If the project involves guarantees or other support provided by a central agency, a municipality as the public partner, or two or more public partners, these entities should also be represented on the steering committee.

15.3. *Establishing the contract management team*

In all PPPs, the public sector always remains ultimately responsible for regulating the services being provided within the sector, regardless of whether the delivery of services is being provided by public or private sector providers. Without this function, it would not be possible to accurately determine if the original goals and the contracted requirements of the PPP project are actually being achieved. Establishing the contract management team specifies the process for designing the body that will be responsible for gathering the data necessary to determine what level of performance is actually being provided, for ensuring that the terms and conditions of the PPP contract are being properly enforced, and for ensuring that specific requested changes within the PPP contract, such as adjustments in tariffs or prices, are properly analyzed and decided upon.

The primary role of the contract management team relates to the PPP contract itself and the oversight exercised over the private partner to achieve the project objectives and VfM. The secondary roles relate to broader goals of fulfilling public policy and communicating across a range of stakeholders to whom the private partner is not accountable.

Primary roles include:

1. To act as the contractual representative of the public partner (to protect governmental or territorial interests) in performing obligations and enforcing the rights of the public partner in the PPP contract.
2. To monitor the performance of the private partner in providing the services specified in the PPP contract and to enforce the payment or penalty mechanism associated with the performance monitoring.
3. To liaise with the private partner in achieving the project objectives.
4. To ensure that financial instruments, such as securities and insurances, are properly maintained.
5. To manage any disputes that arise under the PPP contract.
6. To manage the changes (variations and amendments) to the PPP contract in accordance with public policy and law so as to achieve VfM through such changes.
7. To oversee the management of the project assets and to ensure that these are correctly maintained, accounted for, and reported on.
8. To ensure that user charges are amended in accordance with the PPP contract and public policy and law (if relevant).
9. To report on the financial performance of the project in accordance with generally accepted accounting practices applicable in the jurisdiction.
10. To report on the contingent fiscal obligations accruing to the government (municipality) from the project and any changes thereto.
11. To regularly coordinate with the PPP agency to provide updates as well as to seek guidance on contract management concerns, especially in cases of contractual events.
12. To report regularly to the public partner head and the steering committee on the progress of the PPP project.
13. To monitor, evaluate, and report on the progress of the project and to identify lessons learned for the project and for future PPPs.

Secondary roles include:

1. To liaise with and promote cooperation between governmental and municipal structures in all spheres of government in relation to the project.
2. To monitor the policy and legislative environment of the project.
3. To enhance the integration of the project with other public services, programs, and projects.

The roles and responsibilities of individual functions must be included in the formal mandate of the contract management team. They must also be well aligned with the PPP contract by incorporating reporting obligations on performance and assets (for example) that allow the contract management team to fulfil its role. The contract management team mandate must also be reflected in the dispute resolution process in the PPP contract, as a misalignment will diminish the ability of the contract management team to avoid costly disputes.

The contract management team should have the right skills and capabilities to manage the regular contract management workload and have flexibility to supplement the resources of the contract management team when required, including by bringing in external advisors. (Please refer to the Phase 4 manual for more information on the engagement with advisors on contract management.)

For smaller and less complex projects, the public partner should appoint a contract manager with a broad set of skills, including project management capability, risk management skills, negotiation skills, and other capabilities relevant to the project. For larger and more complex projects, the public partner should appoint a contract management team.

The composition of the team will depend upon the needs of the project. The team will often include:

1. A contract manager as head of the team, acting as the public partner's representative in dealings with the private partner;
2. One or more team members with a technical background (for example, a civil engineer in the case of a road PPP, a health service professional in the case of a hospital PPP), whose role will be to monitor the provision and quality of the services on a day-to-day basis; and
3. One or more team members with a commercial, financial, or legal background, who will deal with the administration of the legal and financial aspects of the contract.

When necessary, the contract management team should also draw on the support of other departments providing internal services within the public partner, such as an IT or human resources department.

The workload involved in managing a PPP contract will vary significantly over the life cycle of the project. The permanent contract management team appointed by the public partner should be of sufficient size to comfortably manage the regular contract management workload. The public partner should also be prepared to enlarge the team when greater resources are temporarily required. For instance, major change events are likely to require greater resources (see Appendix 2 of the PPP Manual Phase 4 on change management) and as hand back approaches. (See information on the tasks related to the hand back process in PPP Manual Phase 4.) During such events, the public partner should be prepared to increase the project's contract management team through one or more of the following strategies:

1. If the public partner is managing more than one PPP contract, it may be able to share team members across those contracts. For example, the Ministry of Economy and Trade forms a different team for each project, but some members might be on more than one team.
2. The procuring authority may have staff with relevant skills in other departments and may be able to temporarily reassign those staff to the contract management team.
3. If the public partner cannot provide sufficient contract management resources with the required skills using the options above, it will need to engage external advisors to assist it in managing the temporary increase in the contract management workload. (For additional information on engaging with the advisors, please see the PPP Manual Phase 4 Introduction and Appendix 3.)

The public partner should also establish a succession plan for the contract management team (addressed in Appendix 6 of the PPP Manual Phase 4).

Appendix 1. Competitive dialogue and other extensive interaction processes for concession projects²³

As PPP projects are often large and complex, extensive interaction between the public partner and potential bidders during the tender process can be beneficial to ensure the following:

- The public partner's requirements are realistic and achievable and will result in bidders offering value for money proposals; and
- The potential bidders have a strong understanding of all aspects of the project the public partner's requirements.

A range of different forms of interaction are possible, and the most appropriate form will depend on what is legally permitted, what is practical without compromising the integrity of the tender process, and the specific needs of the project.

If a public partner is planning the tender process for a large and complex PPP, it should investigate whether the forms of interaction described below (or some variation) are possible under the legal framework within which the tender process is being conducted; if they are possible, it should consider whether the tender process will be more effective if one of these forms of interaction is used.

a. Common forms of extensive interaction in PPP tender processes: Competitive dialogue (as conducted under EU procurement rules)

In the "competitive dialogue" process under EU procurement rules and also presently in Ukraine, the interaction occurs before the public partner finalizes the Request for Proposals and draft contract.

This is most useful in projects in which the public partner is uncertain whether its requirements are realistic and achievable and will result in bidders offering value for money proposals.

The interaction enables the short-listed bidders to review a draft of the Request for Proposals, partially develop their bids, and provide feedback to the tender commission. The key stages in the process include the following:

- A prequalification process is used to select a number of bidders who are invited to participate in the dialogue process.
- Successive stages of dialogue are conducted with the invited bidders.
- Following completion of the dialogue, the tender commission finalizes its request for proposals and proposed contracts, and the bidders submit their final proposals.

The earliest phase of dialogue typically focuses on the bidders' proposed technical solutions, which would include design issues.

23. Competitive dialogue as a form of procurement is only applicable in concession projects.

The tender commission can structure the process so that the number of bidders can be reduced through the dialogue stages by “down selecting” bidders whose solutions are not expected to meet the procuring authority’s needs.

During the dialogue process, bidders refine their proposed solutions, and the tender commission refines its contractual position with respect to each proposed solution. As a result, when the tender commission asks the bidders to submit their final tenders, it may ask each bidder to bid on the basis of a different contract. The tender commission then considers how to evaluate the bids on a consistent basis.

b. Interactive tender process under Australia’s National PPP Guidelines

In the interactive tender process conducted under Australia’s National PPP Guidelines, the interaction occurs after the tender commission has finalized the Request for Proposals and drafted contracts to issue these to short-listed bidders. This process involves holding a series of individual interactive workshops with short-listed bidders after the tender commission’s request for proposals has been issued. Separate workshops are conducted with each bidder.

The interactive tender process provides the short-listed bidders with an opportunity to discuss the development of their concepts and designs and to seek clarification and feedback in the context of the tender commission’s output requirements before lodging their proposals. The workshops also minimize the risk of any misunderstanding of the tender commission’s requirements.

This is most useful in projects for which the public partner is confident that its requirements are realistic and achievable and will result in bidders offering value for money proposals, but it wishes to ensure that bidders have a strong understanding of all aspects of the project and of the tender commission’s requirements.

c. Key considerations in designing a competitive dialogue or interactive tender process

i. The need for short-listing

Extensive interaction is resource intensive for both bidders and the public partner. It is therefore usually only practical if the tender commission conducts a prequalification and short-listing process in which the prequalified bidders are ranked. A small number of the highest-ranked bidders are then short-listed to proceed to the Request for Proposals stage.

ii. Clear rules and protocols are required

The tender commission should provide clear procedures, timetables, and protocols for interactions during the request for proposals. It should require the short-listed bidders to confirm in writing their acceptance of the procedures, timetables, and protocols before the interaction commences.

The tender commission should ensure that its legal advisers include appropriate protections concerning the interaction in the tendering terms and conditions. For example, if the bidders will be provided with drafts of the request for proposals before it is finalized, the terms and conditions of tendering should

ensure that the bidders' proposals are consistent with the final request for proposals and the tender commission is not bound by any inconsistent content from an earlier draft.

iii. Bidders should be treated equally

The tender commission should treat all bidders equally in the interactive process, in the sense of providing them with equal opportunities for interaction. For example, if the interactive process includes workshops in which bidders can seek clarification and feedback on their proposals as they are developed, the tender commission should offer the same number of workshops to each bidder at the same points in the tender process. Each bidder can then make its own decision as to how many workshop opportunities it uses.

Treating all bidders equally in an interactive process does not necessarily require the tender commission to provide identical information to all bidders if the information is not relevant to all bidders. For example, in a PPP water treatment project to provide drinking water for a public partner's water distribution network, different bidders may propose the use of different water treatment technologies that might have different performance outcomes and hence different implications for the public partner. If the public partner seeks specific feedback through the interactive process in relation to one particular technology, it may not be necessary to provide that information to other bidders who are proposing to use different technologies.

The tender commission should have processes in place to assess whether information is relevant to all bidders and therefore should be provided to all bidders, or whether it need only provide the information to one or some of the bidders.

iv. The interaction should not compromise the integrity of the bid evaluation

The tender commission should ensure that the interaction does not compromise the integrity of the bid evaluation. This means, for example, that information received from a bidder during the interaction but not contained in the bidder's final proposal should not be taken into consideration in evaluating that proposal.

v. Protecting bidders' intellectual property

The tender commission should take particular care to protect each bidder's confidential information and intellectual property during the interaction process. The tender commission should not communicate ideas from one bidder to other bidders and should put in place protocols to protect the confidentiality of any information provided by bidders to the tender commission during the interaction process.

Appendix 2. Financial model information requirements

Below is a general checklist of the key requirements for the financial model submitted by the private bidder. This checklist should be refined/customized for the needs and specifics of each project.

- Present the financial model in hard copy and electronic formats compatible with a specified software program.

- Accompany the submission with a thorough and detailed explanation of the model and how to operate it.
- Disclose clearly all macro, micro, and general assumptions.
- Provide a base date as specified in the RFP; as the value of money changes, the RFP must set a specific point in time common to all bids.
- Present the model on a monthly basis during the development period and thereafter on a semiannual basis.
- Supply annual summaries for each year through to the expiration of the PPP agreement.
- Present all required data in nominal, real, and net present value (NPV) terms (using the discount rate specified in the RFP).
- Include the bidding consortium structure, or corporate project structure, described in detail.
- Include a detailed source and application of funds table for the project, with capital expenditure, total operating and maintenance (including replacement) costs, and a detailed breakout of all revenue assumptions and calculations, whether from unitary payment or through user charges.
- Provide details on amounts to be paid to the public entity for land allocated to the project, or any other state-owned entity for assets allocated by any of them to be used in the project, and to the public entity for the legal rights to carry out the project, either as a specified sum or a percentage of earned profits.
- Include the financing structure of the project, including types and proposed levels of debt and equity, as well as a financing plan and financing assumptions schedule identifying all sources, amounts, and application of finance; conditions, terms, base costs, margins, and fees; and the likely equity input of each member of the consortium, with the percentage of total equity it represents.
- Address the basis and costs of proposed interest rate hedging arrangements.
- Include inflation assumptions.
- Identify any foreign-denominated goods or services and provide the foreign currency exposure, hedging strategies, and exchange rate computations.
- Provide a comprehensive and detailed explanation of all tax treatment assumptions.
- Provide balances of all reserve accounts and insurance structures.
- Provide forecast balance sheets, profit and loss, and cash flow waterfall.
 - a. Calculate the projected internal rate of return (IRR) before financing and tax, in both real and nominal terms.
 - b. Calculate real and nominal return on equity as compensation to reflect the base case return on equity for the entire duration of the PPP contract.
 - c. Provide sensitivity analyses of CAPEX, OPEX, interest rates, grace periods of principal repayment, maturity of debt, inflation, devaluation of Ukrainian hryvnia and currency treatments.
 - d. Indicate the basis and cost of risk pricing.
 - e. For project finance PPPs, set out the proposed debt to equity ratio, annual debt service coverage ratios (DSCR), loan life coverage ratio (LLCR), and project life coverage ratio (PLCR).

Appendix 3. Procurement of unsolicited proposals

The objective of procuring and awarding USPs is to create competitive tension while preserving the legitimate interest of the proponent. The USPs undergo the same evaluation of efficiency and approval process as projects solicited by government entities and should secure a decision on feasibility of the PPP procurement before procurement can start. The private partner should be selected in accordance with the same proceedings set out in the PPP Law through competitive bidding, and the process laid out in this Manual should be followed.

If the tender for determining a private partner is held in accordance with the PPP proposal submitted by persons who may be a private partner in accordance with the Law, the initiator of the tender for public-private partnership may be recognized as the winner of the tender if its tender proposal received the highest score or if the initiator agrees to enter into a contract on the terms of the tender that received the highest score (see PPP Law, Art. 14).

The intellectual property rights of the proponent shall in all cases be preserved. If the use of any such right is necessary for the performance of the unsolicited project, the proponent should agree prior to the initiation of the bidding proceedings on the compensation to be paid by the winning bidder for the use of such protected right for the duration of the project and for the sole purpose of the project if the contract is not awarded to the proponent.

Legal provisions for the protection of proprietary information and intellectual property rights encourage investors to submit innovative unsolicited proposals. At the same time, the public partner must be careful not to allow proponents to claim confidentiality of elements of their proposal too easily, with the sole aim of limiting competition.

Furthermore, intellectual property is typically protected by law. Whereas public partners should obviously respect intellectual property rights in the management of unsolicited proposals, this typically does not require specific additional protection.

Depending on the nature of the proposal different approaches can be taken to deal with intellectual property in USPs. Where possible, the public partner can competitively tender the project by specifying required outputs and not the required technology to deliver those outputs. This approach is consistent with good practice in defining output-based performance requirements. Alternatively, if intellectual property is crucial to the project such that it could not be implemented otherwise, UNCITRAL guidance suggests that it would be appropriate to authorize the public partner to negotiate the execution of the project directly with the proponent of the unsolicited proposal.²⁴

24. See the section in the UNCITRAL Legislative Guide for Privately-Financed Infrastructure Projects on unsolicited proposals (UNCITRAL 2001, 91–97).

Compensating private proponents

When a USP is awarded to a bidder other than the USP proponent, the USP proponent can be compensated without affecting competition through some form of premium for submitting the proposal. The maximal level of reimbursement of the expenses of initiator of proposal preparation is 2.5 percent of the cost of project.²⁵

While it is not currently practiced in Ukraine, some countries use a merit-point system for the evaluation of financial and technical proposals that fixes the premium as a percentage margin over and above the final combined rating obtained by that company in respect of both financial and nonfinancial evaluation criteria. However, this will risk setting the margin of preference so high that competing meritorious bids can be discouraged, thus resulting in the receipt of a project of lesser value in exchange for the preference given to the innovative bidder.

Alternatively, the private proponent can be reimbursed, in whole or in part, for the costs of preparing the unsolicited proposal. For purposes of transparency, any such incentives should be announced in the request for proposals. The PPP law (Art. 14) provides that if the procurement results in selection of a partner other than the private initiator, the winning bidder compensates the original proponent for reasonable, justified, and properly documented direct costs incurred in connection with developing and submitting the unsolicited proposal. In accordance with CMU Decree No. 384 (para. 20), the initiator of a PPP proposal can receive from the winner of tender the reimbursement of reasonable, fair, and properly documented costs incurred as a result of preparing the PPP proposal, but not more than 2.5 percent of the cost of the project implemented under a PPP (if it was mentioned in the tender documentation).

Other participants to the qualification should be made aware that the procurement is based on an USP. Since the cost of a PPP project is included in the conclusion of the result of the analysis of efficiency and is a part of tender documentation, the bidders will also be aware of the amount of compensation the winning bidder would need to pay to the initiator.

The project initiator may consider this level of compensation insufficiently attractive. However, it should be noted that the private initiator possesses intimate knowledge of the project, which in itself constitutes a significant advantage over other competitors.

25. Now it is defined only for non-concession PPPs (see p. 20 of the procedure for conducting a tender to determine a private partner for public-private partnership in relation to objects of state, communal property and objects belonging to the Autonomous Republic of Crimea (CMU Decree No. 384, dated April 11, 2011). The Law on Concession doesn't include this figure.