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## **ECONOMIC COMMISSION FOR EUROPE**

### **COMMITTEE ON INNOVATION, COMPETITIVENESS AND PUBLIC-PRIVATE PARTNERSHIPS**

Team of Specialists on Public-Private Partnerships

Seventh session  
London (United Kingdom), 18 June 2015  
Item 3 of the provisional agenda

#### **Developing international standards and best practices in Public-Private Partnerships (PPPs)**

Conference room paper submitted by the Secretariat

#### **Charter on Zero Tolerance to Corruption in PPP Procurement**

##### **Note by the secretariat**

The following paper contains a draft of the Charter on Zero Tolerance to Corruption in PPP Procurement prepared by Mr. Marc Frilet, Project Team Leader. The draft Charter is circulated for information under Item 3 of the annotated provisional Agenda.

The draft Charter on Zero Tolerance to Corruption in PPP Procurement is expected to be developed further by the Project Team on Zero Tolerance to Corruption in PPP Procurement in the coming weeks.

This paper is being circulated by the secretariat as received.



# **An initial draft of the UNECE Charter on Zero Tolerance to Corruption in PPP Procurement**

## *Scope*

These initial set of sample standards are designed to identify, define and prevent corruption in key issues during any PPP procurement process from project origination up to final award. This initiative is part of the comprehensive “work in progress” aiming at issuing a complete set of standards for Zero Tolerance on Corruption in PPP procurement.

The proposed standards are particularly relevant for PPP Projects in the core infrastructure service sector including both public payment PPP (PFI PPP or availability payment where the public service is not fully transferred to the private party) and the Concession PPP family (where public service is under the full responsibility of the private partner recovering its investment entirely or mostly from users fees).

These standards are divided into general governance standards of particular relevance for PPP and standards more specific to each procurement phase.

They include and develop PPP concepts, rules and guidelines originating from anti-corruption regulation published by international institutions and from procurement rules and policies from leading institutions, regions or States.

The underlying objective is to propose standards more or less of universal nature which are easy to understand, simple to apply and subject to little or no judgment in determining their effective implementation.

An additional objective is to inform and educate the stakeholders about ethical behavior and a culture of integrity and accountability shared by all for individuals, companies and institutions participating to the PPP procurement process.

## **GENERAL GOVERNANCE STANDARDS**

### **I. Avoidance of conflicts of interest and related undertakings**

Conflict of interest arises where a person mixes up or is confused by his/her roles. They may arise in a particular context as the result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest.

Any conflict of interest which may arise for personal reason or institutional organization during the procurement process must be disclosed by the individual or institution as soon as it becomes aware of them.

Public and private sector participants to the procurement process, agents or personnel shall not abuse of their powers for private gain more particularly during exchanges and dialogue which may take place in a process of evaluating or optimizing the bids.

The bidder or any of its sub-contractors, agents or personnel shall not receive or agree to receive from any person or offer or agree to give to any person or procure for any person, gift, gratuity, commission or consideration of any kind as an inducement or reward for performing or refraining from any act relating to the performance of the contract or for showing favor or disfavor to any person in relation to the contract.

Any infringement to the above standards shall be sanctioned by criminal penalties and a transparent, independent, efficient and quick procedure of enforcement shall be organized

## **II. Compliance with laws and code of PPP ethics**

Private and public sector participants to the procurement process shall comply with all applicable local and international laws and regulations and codes relating to anti-bribery and anti-corruption.

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

A code of PPP ethics clarifying the standards of behavior of public and private participants involved in the procurement process (individuals, companies, institutions) shall be made public incorporating international best practices and become part of the bidding conditions and Terms of Tender. The Code of PPP ethics shall be formally endorsed by the Public Authority on behalf of itself and the various units and committees involved in the process and by the bidders both for themselves and the various contractor advisors, consultants and contractors participating to the bidding process.

## **III. STANDARDS APPLICABLE TO UNITS, COMMITTEES AND BOARDS INVOLVED IN THE PREPARATION, EVALUATION AND AWARDING OF PPP PROJECTS**

The activity of preparation, evaluation, awarding and of resolving dispute in PPP procurement shall always be separated and organized by independent Units, Committees and Boards fully independent from each other.

Specialized Units, Committees and Boards shall be created at appropriate level commensurate with the needs and international best practices (national, local, sector specific depending of the nature and complexity of projects). The functions/responsibility and decision making process of those Units, Committees and Boards shall be made public and in all cases part of the bidding documents

Individuals including consultants, advisors and experts participating to those Units, Committees and Boards shall comply with the code of PPP ethics and shall not participate directly or indirectly, nor at the same time, to the activity of more than one of these Units, Committees and Boards. This prohibition shall remain valid for one year after termination of the assignment in any of these structures.

## **STANDARDS RELATING TO THE PPP PROCUREMENT PROCESS**

### **IV. Probity Officer**

Probity Officers justifying of professional capacity, skills and independence and compensated in such a way that they will remain independent from all public and private parties involved in the procurement process, shall be appointed for participating to the process, and more particularly to the proceedings of the evaluation committee, in all situations, where the procurement is divided in two stages including a multi criteria evaluation and in competitive dialogue situations.

The Probity Officer is not authorized to give any opinion on the evaluation. His/her main role is to control that the proceedings fully comply with the applicable procurement laws and standards and the Code PPP Ethics.

The Probity Officer reports which must be comprehensive and comments on all streams of communication. It shall be part of the documents reviewed by the body in charge of approving the choice of the successful bidder.

### **V. Fairness Auditor**

Fairness Auditors justifying of professional capacity, skills and independence and compensated in such a way that they will remain independent from all public and private parties involved in the procurement process, shall be appointed for monitoring the process, and more particularly, the proceedings of the evaluation committee, in all situations, where the procurement is divided in two stages including a multi criteria evaluation and in competitive dialogue situations.

The Fairness Auditors shall be also appointed at the request of any of the parties claiming misprocurement.

The Fairness Auditor(s) is empowered to audit the full procurement process and shall issue a report confirming compliance with the applicable procurement rules or otherwise issuing reservations about the process. The Fairness Auditor report shall always be part of the document reviewed by the

### **VI. Standards for drafting the terms of reference for consultants and experts**

The objective is to aggregate to the extent necessary the skills and experience of independent consultants and experts for each stage of the project from evaluation of the needs up to final award. Due consideration should be given to the capacity of consultants and experts to work within a team able to deal with the interactions of the studies in different areas which is one of the distinctive feature of PPP.

- Transparency: as much information as possible relative to the project is made available.
- Fairness: the same information should be received at the same time and evaluations are made based on the same criteria.
- Cost-effectiveness: costs should be minimized by requesting detail breakdowns easy to compare and providing for remuneration of the service adapted to the particular conditions of deliveries (such as cost plus, lump sum, schedules of rates and estimated quantities...).

- Avoidance of conflict of interest: independence from companies or institutions, financial or other having a potential interest in the Project. Mandatory reference to the Code of PPP Ethics.

## **VII. Standards for drafting the consultancy and experts contracts**

- Contracts based on standards and contract terms & conditions to be published from time to time by the government or international institutions.
- Contract conditions permitting the Contracting Authority to adapt or to limit the scope of the services of the consultant or expert to a particular phase in the preparatory or tendering process.

## **VIII. Standards for monitoring consultants and experts**

- The contracting authority shall appoint a Project Officer with a large experience in dealing with consultants and experts in charge of monitoring the activities of consultants and experts including their respective organization, human resources, relationship with the public sector and the stakeholders, control of the methodology for administrating the contract, drafting notes and reports and meeting the date or time lime for deliverables.

## **IX. Transparency in tender notice and bidding documents**

### **i. Tender notice**

The Tender notice objective is to seek responsive candidates by ensuring the highest possible degree of public information in proportion to the purpose, nature, subject and value of the Public-Private Partnership project.

Tender notices shall:

- be simple and accurate and contain all the main information relating to the tender which are required by the objective and purpose of the Project in order to give sufficient information for any potential bidder.
- in all cases be published through information channels having the best chances to reach responsive candidates and in all cases on the website of the contracting authority.
- be published in a time frame permitting the bidders to have sufficient time to prepare their bids, taking into account the nature and complexity of the project and international best practices.

### **ii. Bidding documents**

All candidates shall have access to the same information and same documents for preparing applications and for participating in the procedure, as well as to information on the conditions and criteria for selection.

Guidelines and standardization of documents such as template contracts shall be issued taking into account both local and international laws, situations and best practices

Standardized bidding documents shall aim at enabling a common approach to undertaking PPPs across all sectors and provide a transparent process for the benefit of all stakeholders.

### **iii. Proportionality**

The tender procedure shall not include any requirements of technical, professional or financial capabilities which are disproportionate or excessive in relation to the requirements and feasibility of a Project at any of its stages.

iv. Integrity

Bidding documents shall provide for the disqualification of a bidder when its bid may lead to a direct or indirect benefit to any current manager or employee of the Contracting Authority or to any manager or employee having left the Contracting Authority for less than two years or to any consultant or expert involved in the Project. Ex parte communication between a member or the Committee and any of the bidders and their advisors is prohibited unless disclosed and agreed by all bidders.

The document shall also indicate that the bidders shall refrain from influencing the awarding process through any direct or indirect contact with the Contracting Authority or with any member of the evaluation committee or any consultant or expert involved in the Project.

Each bid shall include a Code of PPP Ethics to be signed by each Bidder as a condition of acceptance of its bid.

**X. Standards for the Tender Evaluation committee**

Members of the Tender Evaluation Committees shall be appointed after giving due consideration to the particulars of the Project, the procurement method, the nature and timing of the evaluation process, and the skills and resources necessary for permitting the Committee to carry out a fair, independent and professional evaluation. Each member and the Committee shall be bound by the Code of PPP Ethics or to a charter to the same effect.

The aggregation of the respective technical, organizational, operational and financial background of the members shall be such that each Tender Evaluation Committee has the capacity to organize itself in order to be able to discharge its duty efficiently and proportionally free of conflict of interest.

i. Proceedings of the Committee

The Secretary shall keep a record of the evaluation sheet used at each step of the evaluation process. A summary of the evaluation sheets shall be annexed to the report transmitted to the body in charge of approving the choice of the successful bidder.

The proceedings of the Committee and its recommendation for awarding the bid shall be recorded in a report signed by all its members and kept in safe custody

ii. Integrity

Upon acceptance of their appointment, each member shall disclose in writing in a disclosure statement duly signed by him/her and to be kept confidential by the chairman, any existing or potential conflict of interest. He/she must continually monitor the risk of conflict of interest and if he/she feels that such a conflict crystallizes during its term of appointment, he/she must disclose it to the Chairman at short notice and resign from the Committee.

The Committee and each member of the Committee undertake to keep strictly confidential all information submitted by the bidders whether in writing, orally and otherwise. The Committee and

each member shall organize itself in such a way that the confidential information is not divulged directly or indirectly to non authorized person.

Upon acceptance of their appointment, each member shall sign a confidentiality agreement.

## **XI. Qualification and evaluation process**

### **i. Prequalification, post-qualification and pre-selection**

In all situations of two steps procedure and competitive dialogue, the number of candidates invited to bid shall take into account the cost of preparing and bidding.

With the exception of simple or repetitive Project where functional specifications are of standards nature, the number of candidates invited to bid shall be comprised between 3 to 6.

The purpose of prequalification and pre selection is to advertise the project to the largest number of potential bidders with sufficient information to allow the candidates to evaluate their interest for the project, to be informed of the criteria for prequalification and pre selection and if interested, to submit a complete bid and documentation with the objective of being pre qualified or pre selected.

Prequalified or pre selected bidders shall be informed in the invitation to tender that the successful bidder will have to update the prequalification or pre selection documentation submitted and be required to provide additional evidence for complying with the criteria. If appears that the criteria having been taken into account for qualifying the bidder are not met, the bidder shall be disqualified.

### **ii. Competitive dialogue standards**

- General standards

In case of particularly complex PPP Project where the Contracting Authority may not have sufficient financial and technical expertise to evaluate the bids on the basis of the functional requirements tender documents submitted, a competitive dialogue procedure may be organized.

The purpose of the dialogue is to identify and define the best means to satisfy the Public Authority needs. During the dialogue, the Public Authority shall ensure inter alia, that all candidates are provided with exactly the same information. The dialogue is not permitted for functions, which are of the essence of the project and described as intangible in the tender documents.

Technical and financial solutions proposed by the candidates and all proprietary information submitted by a bidder, shall remain confidential and shall not be communicated to any other bidder.

- Competitive dialogue Charter (Published on January 18th 2007 in France under the auspices of the French Senate )



1. Conduct a traceable and transparent procedure respecting tenderers' equal treatment.	6. Monitor a fair and optimized distribution of risks between the public contractor and private partner according to their respective capacities to cover or mitigate said risks, and prior definition of contract modification terms.
2. Ensure that steering and quick-decision capacities are well organized to enable responsible and fruitful dialogue without excessive delays.	7. Comply with the propositions and dialogue's confidentiality, including intellectual property and know-how in whatever forms, and financial and contractual innovations.
3. Specify the rules for conducting Competitive Dialogue, thereby enabling tenderers to master the stakes of their dialogue participation with sufficient clarity.	8. Cease pointless and costly discussions with tenderers as soon as their solutions no longer appear liable to be selected at the final stage.
4. Specify, on the basis of operating specifications and/or project items and via a Competitive Dialogue, the principal issues on which the public contractor expects contributions from tenderers.	9. Provide compensation for unsuccessful tenderers according to their contribution and the project's context.
5. Draw up, during the Competitive Dialogue, the operational program in terms of results to be achieved and requirements to be complied with, specifying the items which may or may not be modified.	10. Call to remit final bids shall not constitute either a new consultation or a new negotiation.

## **XII. Misprocurement and protests**

Effective protest mechanism is a major remedy against misprocurement and fighting corruption.

The Public Authority must 30 days least before the date of signing the PPP contract disclose to all the prospective bidders having contacted the authority and all the bidders, the name of the preferred bidder.

During that period, any bidder who fails to be selected as well as prospective bidders justifying an interest may protest for misprocurement.

The protest must be filed with an independent authority or a court having the power to make an interim decision to suspend the awarding process if prima facie, the protest has sufficient merit.

If it is the case, the independent authority or competent court may decide the cancellation of the procedure leading to the launch of a new tender.

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