

**UNECE**

**Standard on Public-Private Partnerships / Concession  
Legal Framework in support of the Sustainable  
Development Goals and its Accompanying Guide**



**UNITED NATIONS**



UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

Standard on Public-Private  
Partnerships / Concession  
Legal Framework in support  
of the Sustainable Development  
Goals and its Accompanying Guide



**UNITED NATIONS**

Geneva, 2023

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## FOREWORD

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At UNECE we recognise that the role of private finances, particularly in low and middle-income countries, is central to securing progress towards the 2030 Agenda and the related targets of the Sustainable Development Goals (SDGs). Sustainable and resilient Public-Private Partnerships (PPPs) are an important vehicle to mobilising private investment towards the realisation of the ambitions contained within the 2030 Agenda.

SDG 9 addresses the need to build resilient infrastructure and promote inclusive and sustainable industrialisation, reflecting the needs of future communities to avail of functioning, innovative and sustainable technologies, in order to promote and protect the wellbeing of people and the economies on which they rely. Achieving this ambitious objective requires significant and transformative investment, which the public sector alone is unable to meet. There is a strategic role therefore, for effective partnerships with the private sector, to catalyse positive change.

UNECE promotes “PPPs for the SDGs” and advocates for PPPs that are designed to uphold SDG advancement and value sustainability at their core. A model of PPPs which are attractive to the private sector and orientated to respond concretely to the evolving needs of our communities, can ensure PPPs are future-proofed and aligned with broader national and international SDG objectives. A modern and people-centred PPP model can serve to safeguard access to essential services for all while recognising the criticality of scaled-up action towards SDG realisation.

In order to support these efforts, UNECE has developed a set of guiding principles to assist governments with the development and implementation of PPPs which effectively contribute to sustainability. Foundational to these guiding principles, is the incorporation of more inclusive legal frameworks, with a view to demonstrating the developmental impact and potential of PPPs.

UNECE’s Standard on *Public-Private Partnerships / Concession Legal Framework in support of the Sustainable Development Goals and the accompanying guide*, aim to provide a pragmatic instrument towards safeguarding the needs of people and communities, while also providing rules of engagement which work effectively for the private sector, to contribute meaningfully to sustainable infrastructure development.

I believe that the Standard will be a valuable aid to member States who are committed to improving their PPP legal framework in support of green, circular, climate resilient, inclusive and fiscally sustainable infrastructure projects. The UNECE secretariat remains ready to assist its member States to implement this Standard through demand-driven capacity building and policy advisory services.



**Tatiana Molcean**

United Nations Under-Secretary-General  
UNECE Executive Secretary

## PREFACE

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The UNECE Standard on Public-Private Partnerships / Concession Legal Framework in support of the Sustainable Development Goals, with its accompanying guide, has been by far the most stimulating project that the Working Party on Public-Private Partnership has embarked on to date.

I am immensely proud that under my leadership, the Working Party and its hard-working Bureau, with the support of international experts, brought to a successful conclusion the work on the Standard. The Standard was first endorsed by the Working Party and subsequently approved by its parent body, the Committee on Innovation, Competitiveness and Public-Private Partnerships, with the latter recommending its publication and voluntary use in member States.

The Standard introduces for the first time in a legal text the UNECE PPP for the SDGs approach, with an emphasis on “value for people”: the overall, long-term, net value of a PPP project to consumers, governments, the host country and the broader public, taking into account the long-term quantity and quality of services delivered and whole-life costs and benefits to the economy, including fiscal, environmental and social costs and benefits in line with the UNECE Guiding Principles on PPPs in support of the SDGs.

There are two important characteristics that in my view distinguishes this Standard from other legal texts:

- Firstly, the Standard constitutes a complete document that member States could easily transpose into their national legislation. The Standard establishes the legal framework for PPPs and the contracts that give effect to them, in full alignment with the UNECE Guiding Principles; and
- Secondly, for the first time, the Standard comprehensively introduces the SDGs in a PPP legal text, thus enabling countries to ensure that their PPP projects contribute to achieving the 2030 Agenda.

I am grateful to all the member States for their active involvement in the development of the Standard. I am also grateful to my fellow Bureau members and observers for their hard and diligent work over several years to keep this project on track. My appreciation also goes to the numerous international experts and organisations listed below, for contributing their time and expertise towards the completion of this Standard and its accompanying guide. Last but not least, I wanted to thank the UNECE secretariat for their facilitating and advisory role, and by providing very useful guidance and expertise throughout the process.

I hope that the Standard and its accompanying guide will inspire member States to deliver high-quality PPP projects in support of the SDGs.



**George Katapodis**

Chairperson

UNECE Working Party on Public-Private Partnerships

## ACKNOWLEDGEMENTS

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The Standard on Private-Public Partnerships / Concession Legal Framework in support of the Sustainable Development Goals and the accompanying guide were developed under the auspices of the Bureau of the Working Party on Public-Private Partnerships (the Bureau) led by George Katapodis (Greece) with the substantive contribution of international experts.

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The Bureau would also like to acknowledge the contribution of the following Bureau members and observers: Steven van Garsse (Belgium), Frédéric Bobay (France), Arthur Smith (United States of America) and Doris Chevalier (Bureau observer).

# CONTENTS

---

- FOREWORD . . . . . I
- PREFACE . . . . . II
- ACKNOWLEDGEMENTS . . . . . III
  
- Standard on Public-Private Partnerships / Concession Legal Framework  
in support of the Sustainable Development Goals . . . . . 1**
- PREAMBLE . . . . . 1
  
- Chapter I. General Provisions. . . . . 3**
- Article 1. Scope of this Standard. . . . . 3
- Article 2. Key Terms and Definitions . . . . . 3
- Article 3. PPP Implementing Regulations and Guidelines . . . . . 7
- Article 4. PPP Criteria and Fundamental Requirements. . . . . 7
- Article 5. Authority to Award and Enter into PPPs . . . . . 8
- Article 6. Applicable Sectors and Activities for PPPs. . . . . 9
- Article 7. Parties to a PPP Contract . . . . . 9
- Article 8. PPP Term . . . . . 9
  
- Chapter II. Institutional Arrangements and Roles . . . . . 10**
- Article 9. Public-Private Partnership Unit and Administrative Coordination . . . . . 11
- Article 10. Information about PPPs . . . . . 14
  
- Chapter III. Initiation and Preparation of PPPs. . . . . 15**
- Article 11. Initiating, Identifying and Preparing PPPs . . . . . 15
- Article 12. Appraisal and Approval Procedures. . . . . 19
- Article 13. PPP Implementation Resolutions . . . . . 20
- Article 14. Unsolicited Proposals . . . . . 21
  
- Chapter IV. Selection of Private Partner. . . . . 23**
- Article 15. Procedures for Selection of Private Partner . . . . . 23
- Article 16. Tender Process and Procedures: General . . . . . 24
- Article 17. Tender Documents, Requirements, and Information . . . . . 26
- Article 18. Tender Committee . . . . . 27
- Article 19. Tender Stages . . . . . 28
- Article 20. Conclusion of the PPP Contract . . . . . 31
- Article 21. Conclusion of PPP Contract for Unsolicited Proposals . . . . . 32
- Article 22. Direct Negotiations. . . . . 33
- Article 23. Review and Challenge Procedures . . . . . 34



<b>Chapter V.</b>	<b>PPP Contracts</b>	<b>.35</b>
Article 24.	Main Terms and Conditions of PPP Contracts	.35
Article 25.	Amendment and Termination of PPP Contracts	.39
Article 26.	Property and Related Matters	.41
Article 27.	Types of Payment under PPP Contracts	.42
Article 28.	Liability of Parties to the PPP Contract	.42
Article 29.	Step-in Rights and Substitution of Parties to the PPP Contract	.43
<b>Chapter VI.</b>	<b>Support, Protections and Guarantees.</b>	<b>.44</b>
Article 30.	Protection of Parties' Interests under the PPP Contract: Miscellaneous	.44
Article 31.	Government and Public Support for PPPs	.45
Article 32.	Protection of Public Service Provision and Contract Equilibrium	.46
Article 33.	Protection of Lenders' and Investors' Rights and Interest	.48
Article 34.	Protection of End Users and the General Public	.48
<b>Chapter VII.</b>	<b>Governing Law and Dispute Resolution</b>	<b>.50</b>
Article 35.	Governing Law	.50
Article 36.	Dispute Avoidance and Alternative Dispute Resolution.	.50
<b>Chapter VIII.</b>	<b>Implementation and Monitoring of PPPs</b>	<b>.52</b>
Article 37.	Monitoring and Reporting on the Implementation of PPPs	.52
Article 38.	PPP Database and Register	.52
<b>Chapter IX.</b>	<b>Transitional and Final Provisions</b>	<b>.53</b>
Article 39.	Entry into Force	.53
Article 40.	Legislative Acts to be Invalidated upon Entry into Force of this Standard	.53
Article 41.	Consequential Revisions to Existing Legislation	.53
<b>Accompanying Guide to the Standard on Public-Private Partnerships / Concession Legal Framework in support of the Sustainable Development Goals</b>		<b>. 55</b>
INTRODUCTION AND COMMENTARY		.55
I. PREFACE		.55
II. TEXTUAL COMMENTARY		.58
<b>Chapter I.</b>	<b>General Provisions.</b>	<b>.59</b>
Article 1.	Scope of this Standard.	.59
Article 2.	Key Terms and Definitions	.60
Article 3.	PPP Implementing Regulations and Guidelines	.61
Article 4.	PPP Criteria and Fundamental Requirements.	.61
Article 5.	Authority to Award and Enter into PPPs	.62
Article 6.	Applicable Sectors and Activities for PPPs.	.62
Article 7.	Parties to a PPP Contract	.63
Article 8.	PPP Term	.63

<b>Chapter II.</b>	<b>Institutional Arrangements and Roles</b>	<b>.65</b>
Article 9.	PPP Unit and Administrative Coordination	.65
Article 10.	Information about PPPs	.67
<b>Chapter III.</b>	<b>Initiation and Preparation of PPPs.</b>	<b>.69</b>
Article 11.	Initiating, Identifying and Preparing PPPs	.69
Article 12.	Appraisal and Approval Procedures.	.72
Article 13.	PPP Implementation Resolutions	.72
Article 14.	Unsolicited Proposals	.73
<b>Chapter IV.</b>	<b>Selection of Private Partner</b>	<b>.74</b>
Article 15.	Procedures for Selection of Private Partner	.74
Article 16.	Tender Process and Procedures: General	.75
Article 17.	Tender Documents, Requirements, and Information	.76
Article 18.	Tender Committee	.77
Article 19.	Tender Stages	.77
Article 20.	Conclusion of the PPP Contract	.79
Article 21.	Conclusion of PPP Contract for Unsolicited Proposals	.79
Article 22.	Direct Negotiations.	.80
Article 23.	Review and Challenge Procedures	.80
<b>Chapter V.</b>	<b>PPP Contracts</b>	<b>.82</b>
Article 24.	Main Terms and Conditions of PPP Contracts	.82
Article 25.	Amendment and Termination of PPP Contracts	.84
Article 26.	Property and Related Matters	.85
Article 27.	Types of Payment under PPP Contracts	.86
Article 28.	Liability of Parties to the PPP Contract	.86
Article 29.	Step-in Rights and Substitution of Parties to the PPP Contract	.87
<b>Chapter VI.</b>	<b>Support, Protections and Guarantees.</b>	<b>.88</b>
Article 30.	Protection of Parties' Interests Under the PPP Contract: Miscellaneous	.88
Article 31.	Government and Public Support for PPPs	.89
Article 32.	Protection of Public Service Provision and Contractual Equilibrium	.89
Article 33.	Protection of Lenders' and Investors' Rights and Interest	.91
Article 34.	Protection of End Users and the General Public	.92
<b>Chapter VII.</b>	<b>Governing Law and Dispute Resolution</b>	<b>.93</b>
Article 35.	Governing Law	.93
Article 36.	Dispute Avoidance and Alternative Dispute Resolution.	.94
<b>Chapter VIII.</b>	<b>Implementation and Monitoring of PPPs</b>	<b>.95</b>
Article 37.	Monitoring and Reporting on the Implementation of PPPs	.95
Article 38.	PPP Database and Register	.95
<b>Chapter IX.</b>	<b>Transitional and Final Provisions</b>	<b>.96</b>

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# STANDARD<sup>1</sup> ON PUBLIC-PRIVATE PARTNERSHIPS / CONCESSION LEGAL FRAMEWORK IN SUPPORT OF THE SUSTAINABLE DEVELOPMENT GOALS

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## Preamble

The purpose of this Standard<sup>2</sup> is to establish the legal framework for Public-Private Partnerships for the Sustainable Development Goals (PPPs for the SDGs) and the contracts that give effect to them in [*host country*], including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and assist in the orderly and coordinated delivery of PPPs. This Standard applies to PPPs, with particular emphasis on those with a “PPPs for the SDGs” basis, but not to other types of commercial or contractual interface between public and private sectors.

When properly structured and implemented, PPPs can fulfil a range of valuable purposes and objectives for the benefit of society and the common good. They can advance the efficient and cost-effective development, provision and operation of public infrastructure and public services, by harnessing the skills, resources, know-how and/or finance of the private sector most effectively and sustainably on a long-term basis, and structuring projects in ways that allocate the risks and responsibilities involved most appropriately over their life. This can strengthen the efficacy of project delivery (whether of design,

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2 The Standard was endorsed by the UNECE Working Party on Public-Private Partnerships in December 2022 and adopted by the UNECE Committee on Innovation, Competitiveness and Public-Private Partnerships in May 2023. Following deliberations between the Bureau of the Working Party and the European Commission, the latter requested to add the following text of a disclaimer covering the entire text of the Standard: “The provisions of this Standard do not apply to the EU Member States. In case of conflict between the provisions of the Standard and the EU Member States’ legal provisions on public procurement and concessions, the national legislation shall prevail.” The Bureau would like to reiterate that the UNECE PPP standards, guiding principles, best practices, declarations and recommendations, including this Standard, do not impose any obligations on member States as their implementation is entirely voluntary.

construction, rehabilitation, operation and/or maintenance), stimulate new funding and investment opportunities, help bridge the public infrastructure and service gap, raise the quality of public services, improve the public's access to those services, and so help to achieve wider economic, environmental and social goals. It can enable projects to go ahead when they otherwise might not, advancing job creation and skills transfer. Ultimately, this can help to foster economic growth and social development in ways that promote the United Nations Sustainable Development Goals (SDGs), leading to a better and more sustainable future for all.

This Standard enshrines and gives effect to the Guiding Principles on PPPs in support of the SDGs, published by the UNECE in 2019<sup>3</sup> (the "Guiding Principles") and other documents endorsed by the Working Party on PPPs. This Standard is furthermore intended to be in accord with the UNCITRAL Legislative Guide on PPPs and related Model Legislative Provisions. The Guiding Principles represent a new model for PPPs, designed to achieve a range of sustainable development outcomes which are critical to the SDGs, and which build on the PPP attributes described above, including the following five outcomes:

- (i) Increased access to essential services and decreased social inequality and injustice;
- (ii) Improved economic effectiveness and fiscal sustainability;
- (iii) Enhanced resilience and responsibility towards environmental sustainability;
- (iv) Replicability and the development of further projects; and
- (v) Full involvement of all stakeholders in the projects.

PPPs structured and implemented in accordance with the provisions of this Standard can therefore be expected to promote those outcomes. They should thus represent enhanced "value for money" in the true sense of "value for people", in terms of their long-term, net value for consumers, government and the wider public, considered over their life cycle in the light of all their significant impacts, for the greater good of all.

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3 Guiding Principles on Public-Private Partnerships in support of the United Nations Sustainable Development Goals (ECE/CECI/WP/PPP/2022/7).

## CHAPTER I. General Provisions

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*This Standard has drawn heavily on both the existing published UNCITRAL materials and their recent revisions as well as the UNECE Guiding Principles on PPP in support of the SDGs, the UNECE Standard on a Zero Tolerance Approach to Corruption in PPP Procurement<sup>4</sup> and the UNECE PPP and Infrastructure Evaluation and Rating System (PIERS) An Evaluation Methodology for the SDGs.<sup>5</sup>*

### Article 1. Scope of this Standard

- 1. General.** This Standard establishes the legal framework for PPPs in [*host country*] and the contracts that give effect to them, the rules and procedures related to their selection, preparation, appraisal, procurement and implementation, and the institutional arrangements applicable to them, all in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability, and the Guiding Principles.
- 2. All PPPs.** This Standard applies to all forms of PPP, as defined in this Standard. It applies to all PPP projects implemented in [*host country*] after the date this Standard comes into force, whether carried out at national, federal, sub-national, regional or municipal level (except only in so far as the PPP regulations specifically provide otherwise).

### Article 2. Key Terms and Definitions

In this Standard, the following terms and expressions shall have the meanings ascribed to them below:

- (i) **“Applicable law”** means the laws of [*host country*] in force and effect at the relevant time, including all national, regional, and local laws and regulations, and including the country’s international obligations and commitments, and any judgments, decrees, orders or injunctions of any court or tribunal having the force of law.
- (ii) **“Bidder”** means any legal entity or person (or consortium thereof) participating in a tender in accordance with its terms and organised pursuant to this Standard.

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4 UNECE Standard on a Zero Tolerance Approach to Corruption in PPP Procurement (ECE/CECI/WP/PPP/2023/3).

5 UNECE PPP and Infrastructure Evaluation and Rating System (PIERS): An Evaluation Methodology for the Sustainable Development Goals (ECE/CECI/2023/4).

- (iii) **“Economic and financial viability”** means the maintenance of the contractual equilibrium of the commercial and financial terms as reflected in the contract.
- (iv) **“Closed Tender”** means and refers to a tender or selection process where the contracting authority pre-qualifies and/or selects the tenderer(s) permitted to participate by notice and without advertising the tender openly;
- (v) **“Competent body”** means the government, a line ministry, or any public authority either having the legal power and authority under Applicable law or specifically authorised by the government under this Standard or the PPP regulations to perform certain functions in the field of PPPs.
- (vi) **“Contracting authority”** means any competent body having the requisite legal capacity to enter into a PPP contract pursuant to this Standard.
- (vii) **“Direct agreement”** means an agreement between the contracting authority and the lenders, typically together with the private partner, setting out the terms on which (amongst other things) the lenders may be entitled to exercise step-in rights, prevent a threatened termination of the PPP contract, receive payments upon its early termination and/or exercise certain other specified rights.
- (viii) **“Feasibility study”** means the report drawn up for the purposes of [preparing and] authorizing a PPP project and which will be complemented with a final assessment before project award.
- (ix) **“Government”** means the government of [*enacting state*] and includes (where the context so requires) any public authority or competent body performing any function or exercising any power under this Standard.
- (x) **“Identification report”** means the preliminary report that a government develops to assist in assessing whether a potential PPP should be further assessed through a feasibility study.
- (xi) **“Implementing regulations”** means the government regulations applicable to the planning, preparation, selection, appraisal, procurement and all implementation of PPP (and other related matters) made pursuant to Article 3 from time to time and having binding legal effect.
- (xii) **“Implementation resolution”** means a resolution referred to in Article 13 confirming a formal decision by a contracting authority to implement a PPP project.
- (xiii) **“Interministerial Committee”** means the competent body made up of such authorities and/or departments at the national, state, and/or local level as appropriate for overseeing and approving key decisions and documents relating to the initiation, preparation, development, procurement and/or award of PPPs.
- (xiv) **“Lender”** means any bank, financial institution or other form of lender that provides (or intends to provide) financing to the private partner in connection with a PPP contract, including any related commitments such as guarantees.

- (xv) **“Official channels”** means the official journal(s) or vehicle(s) of communication used by the government (or any competent body) to publish certain information which it wishes to draw formally to the public’s attention, including in connection with tender proceedings it is organising (such as an official gazette or the official government website).
- (xvi) **“Open public tender”** means and refers to a tender or selection process where the contracting authority issues one or more public advertisement(s) to which in principle any legal entity or person meeting the specified criteria can respond.
- (xvii) **“Partnering”** means a procedure for structured and regular exchanges between the Contracting Authority and the private partner aimed at monitoring in a consensual manner the implementation of the PPP project over its life;
- (xviii) **“PPPs for the SDGs”** means the type of PPP stated in the UNECE Guiding Principles on PPPs in support of the SDGs:  
*“(…) Public-Private Partnerships (PPPs) designed to implement the Sustainable Development Goals and thereby to be “fit for purpose”. It is defined as an enhanced approach for PPPs that overcomes some of the weaknesses in the way the traditional PPP model has been implemented. PPPs are contract delivery tools for public infrastructure provision involving initial private financing. They include two types: “government-pay PPPs” which are primarily funded by taxpayers and “concessions” which are primarily funded by the users of the infrastructure.”*
- (xix) **“PPP contract”** means a mutually binding contract concluded between the contracting authority and private partner that set(s) forth the terms and conditions for implementing a PPP project, in accordance with the requirements and procedures provided by this Standard and its Implementing Regulations.
- (xx) **“PPP guidelines”** means any PPP-related explanatory, guidance, or advisory materials (or similar documents) including templates, model bidding documents and contracts issued and published by the Government from time to time, which may or may not have binding legal effect.
- (xxi) **“Private initiator”** means any legal entity or person (or consortium thereof) that submits an unsolicited proposal to implement a PPP project in accordance with Article 14.
- (xxii) **“Private partner”** means any legal entity or person [(including where applicable a public entity acting as a commercial entity] retained by the contracting authority to implement a PPP project under a PPP contract.
- (xxiii) **“Public authority”** means any local, national, or supra-national agency, authority, council, ministry, municipality, department, inspectorate, committee, court, official, or public or statutory person or any other executive, legislative or administrative entity of the government or under its control (or, where the context so permits, any combination of them), including a regulatory agency.
- (xxiv) **“Public infrastructure”** means any (tangible and/or intangible) asset(s) of public interest or benefit designed and operated for the purpose of delivering (directly or indirectly) public services, including physical facilities and systems.

- (xxv) **“Public-Private Partnership” or “PPP”** means a long term agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the [facility], including both those projects that entail a transfer of the demand risk to the private partner (“concession PPPs”) and those other types of PPPs that do not entail such risk transfer (“government-pay PPPs”) meeting the criteria and requirements set out in Article 4.3.
- (xxvi) **“Public service”** means an activity performed to or for the benefit of the general public or the public good or otherwise in the public interest which is customarily provided by and/or on behalf of public authorities and/or for which a public authority is primarily responsible.
- (xxvii) **“Public-Private Partnership unit” or “PPP Unit”** means the dedicated advisory and administrative body in the area of PPPs established pursuant to Article 9, having the functions and responsibilities related to the implementation of PPPs referred to therein.
- (xxviii) **“Regulatory agency”** means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the public infrastructure or the provision of public services to which the PPP project relates.
- (xxix) **“Stakeholder”** in relation to a PPP project, means and includes any persons who is or is likely to be involved with or materially affected or impacted by the implementation of the PPP project, whether directly or indirectly, positively or negatively, including the contracting authority, other relevant Public Authorities or Competent Bodies, the private partner, its owners, investors and lenders, contractors and/or suppliers, end-users of the relevant public infrastructure and/or beneficiaries of the relevant public services, the owners of property or assets affected by it, other providers of relevant services, and/or households and the wider community (including indigenous peoples) living in or near its place of implementation.
- (xxx) **“Sustainable Development Goals” or “SDGs”** means those goals and objectives for sustainable economic, social, and environmental development for the general good adopted and published by the United Nations in the General Assembly resolution 70/1 “transforming our world: the 2030 agenda for sustainable development” (A/RES/70/1), United Nations, 2015, and in the context of this Standard specifically refers to those goals and objectives related to PPPs (including the Guiding Principles) set out therein. In particular, PPPs should increase access to essential public services while lessening social inequality and injustice, be economically effective and bring transformational economic impact, deliver resilient and sustainable infrastructure, be replicable and scalable to allow the development of further projects, and bring all stakeholders together in partnership and consult those affected.
- (xxxi) **“Tender committee”** means the committee to be set up by the contracting authority [and the PPP Unit] for the purpose of evaluating the bid and proposing the award of the contract to the successful bidder in accordance with Article 19.
- (xxxii) **“Unsolicited proposal”** means a proposal for a PPP project submitted by the private initiator upon its own initiative to the contracting authority (and/or other relevant competent body) and not in response to a request or solicitation issued by the contracting authority in the context of a selection procedure under this Standard.



(xxxiii) **“Value for Money”** and **“Value for People”**, when used in this Standard, mean and refer to the overall, long-term, net value of a PPP project to consumers, government, the host country and the broader public, taking into account the long-term quantity and quality of services delivered and whole-life costs and benefits to the economy, including fiscal, environmental and social costs and benefits, in line with the Guiding Principles. It may be precisely measured in accordance with any detailed methodology (if any) set out in the PPP regulations. The underlying concept is that the more fully a PPP project gives effect to the Guiding Principles, the higher the value for people, the higher the value for money.

### Article 3. PPP Implementing Regulations and Guidelines

- 1. Issue.** The Government shall issue the implementing regulations required by this Standard and may also issue and publish any PPP guidelines it considers appropriate for the development of sustainable PPP projects. The Government may designate one or more Competent Bodies to issue the same on its behalf.
- 2. Purpose.** The purpose of the implementing regulations is to develop, adapt, and give effect to certain aspects of the operation and implementation of this Standard. Implementing regulations shall not contradict or supersede the provisions of this Standard, and in the case of any discrepancy or ambiguity between them, the provisions of this law shall prevail. The purpose of the PPP guidelines shall be to provide additional guidance and clarification to both public and private sectors as to the interpretation and workings of this Standard as well as to certain aspects of PPPs and their implementation but shall usually be without legally binding effect.
- 3. Revisions and Publicity.** The PPP regulations and guidelines may be revised as necessary by the Government (or any such competent body) from time to time and shall be published through the official channels.
- 4. Interpretation.** The provisions of this Standard should be construed in conjunction with any relevant PPP regulations relating to them (if any) where the context so requires.

### Article 4. PPP Criteria and Fundamental Requirements

- 1. PPP Requirements and Objectives.** Any PPP project undertaken in [host country] shall comply with all applicable requirements of this Standard, including the relevant procedural requirements for the selection, preparation, appraisal, procurement, and implementation of PPPs. It shall also be designed and structured to accomplish the relevant public interest purposes and objectives referred to in the Preamble to this Standard, and in particular to be compatible with and give effect to the relevant Guiding Principles characterised by five specific outcomes: access and equity; economic effectiveness and fiscal sustainability; environmental sustainability and resilience; replicability; and stakeholder engagement.

**2. PPP Main Characteristics.** Reference to PPP in this Standard apply to both concession and government-pay PPP and where concession is specifically mentioned it does not apply to government-pay PPP. The private partner's compensation is provided either by the contracting authority (in the case of government-pay PPPs) or by the end users (in the case of Concessions) or possibly through a combination of the two. The term of the project is established in such a way that the private partner may amortize applicable costs and make a reasonable profit. PPP projects may involve the creation of tangible or intangible assets that support the delivery of a Public Service.

**3. PPP Criteria.** Any PPP undertaken shall meet the following criteria and/or have the following features (as the same may be further elucidated or explained in the PPP regulations and/or PPP guidelines). It shall:

(a) Be long-term in nature (in accordance with Article 8) and implemented on the basis of a contract or contracts.

(b) [Have a minimum initial estimated value (if any) established and calculated in accordance with the relevant criteria and methodology set out in the PPP regulations].

(c) Involve the design, development, construction, reconstruction/rehabilitation, operation and/or maintenance of public infrastructure and/or relate to the provision of public services or similar services of general interest.

(d) Involve the long-term participation of a private partner on a risk-bearing basis, and a sharing or allocation of project-related risks as between the public and private partners throughout its term.

(e) Involve an element of private finance, unless deemed unnecessary.

(f) Be implemented in accordance with the terms of the contract relating to it, which shall include appropriate functional specifications and performance indicators.

## Article 5. Authority to Award and Enter into PPPs

**1. General.** Any public authority having the legal right to develop, procure and implement projects involving assets and/or services of the kind comprised in PPPs, in sectors in which PPPs are permitted under Article 6 below, and to enter into contracts with private sector persons in connection therewith, shall be deemed to have the power and authority under this Standard to award and enter into PPPs, except to the extent that this Standard, any other Applicable law or the PPP regulations specifically provide otherwise.

**2. Authorisation Mechanism.** The Government shall be entitled, within the scope of its existing competence and powers, to vest the specific power and authority under this Standard to award and enter into PPPs in certain designated public authorities or competent bodies, and to modify or cancel the same, as it deems necessary and appropriate from time to time.

## Article 6. Applicable Sectors and Activities for PPPs

- 1. Permitted Sectors and Activities.** PPPs may be undertaken in all sectors engaged in Public Service activity.
- 2. Prohibited Sectors and Activities.** PPPs may not be undertaken in the following sectors or areas of activity (except where and to the extent that PPP regulations may provide otherwise):
  - *[list any that might be excluded]*

## Article 7. Parties to a PPP Contract

- 1. Main Parties.** The parties to a PPP contract are the contracting authority and the private partner.
- 2. Acknowledgments.** It is acknowledged that, as parties to the PPP contract, the contracting authority may represent or include more than one public authority and that the private partner may have more than one owner or stakeholder.
- 3. Additional Parties.** The parties to a PPP contract may agree to include other parties to the contract where they deem it necessary to do so subject to any relevant conditions of this Standard and Implementing Regulations.

## Article 8. PPP Term

- 1. [Minimum Term.** Every PPP contract shall have a minimum term of [ ] years (or such other minimum term (if any) as may be determined in accordance with the PPP regulations)].
- 2. Duration.** The PPP contract shall set forth its duration, which shall take into account the purposes and objectives of the PPP project identified as part of its appraisal and approval process. It will also take into consideration the project business case, including the depreciation period for any permanent physical assets built or rehabilitated by the private partner in the PPP project, and any relevant policies concerning the competition and market structures for the infrastructure or service sector concerned, as reflected in any Applicable laws.
- 3. Extension of Term.** In exceptional circumstances specified in the PPP contract (or permitted by Applicable law), the duration of the PPP contract may be extended in accordance with its terms for any necessary time period(s), if any, provided for therein, but subject always to any relevant conditions or restrictions in the PPP regulations. [The duration of the PPP contract may also be extended in exceptional circumstances, when such circumstances lead to a substantial impact on the economic/financial terms of the Contract. The implementing regulations may specify an appropriate methodology and principles for determining any such extension.]
- 4. Asset Ownership Unaffected.** Where the private partner is permitted by the terms of the PPP contract to own any assets comprised within the PPP project outright and indefinitely, that right of ownership may continue beyond the end of the term of the PPP contract.

## CHAPTER II. Institutional Arrangements and Roles

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*PPPs for the SDGs are an innovative delivery form of global and inclusive contract for long-term participation of the private sector in the delivery of an infrastructure Public Service intended to meet public interest for a long-term period for the project duration. Many underlying conditions deriving from traditional procurement for construction of a public infrastructure or Public Service delivery by the private sector and related contract conditions are applicable to them.*

*In addition, several specific features and conditions aiming at organizing a long-term balance between the stakeholders' interests to be part of durable PPPs for the SDGs contracts (including social and economic objectives of the government as developed in this Standard) must govern the planning and development of PPPs for the SDGs projects.*

*Due to the decisive role that PPPs for the SDGs may play in bridging the public infrastructure service gap and helping to achieve the SDGs, the institutions that will be established to perform PPP planning and development should be carefully authorized and administered. The goal is to create an institutional system that will allocate the most appropriate form for PPP delivery of public infrastructure projects in an orderly and coordinated manner such that the Government's and Contracting Authority's objectives are met. For example, this includes that a process should be established for projects to be in alignment with national or sectoral infrastructure plans as well as with fiscal sustainability goals through quantitative fiscal assessments of the off-balance sheet sovereign debt and contingent liabilities resulting from private financing.*

*To this end, governments should include provisions in the law dealing with the respective powers, roles and responsibilities of different ministries and government bodies (including where appropriate parliamentary bodies) relating to the selection, preparation, approval, procurement and implementation of PPPs. These provisions may need to provide for the interface between them and any relevant procedures and processes involved. The purpose of such provisions, where they are necessary, is to provide administrative clarity and to help ensure that PPPs (and any government programmes for them) are properly integrated with the wider public investment process and other relevant decision-making or regulatory mechanisms and plans. In particular, they should be fully integrated with the country's wider strategic vision for infrastructure development, its long-term planning and prioritization processes and associated budgeting arrangements. These should include the country's long-term sustainable development and SDG plans (such as nationally determined contributions for carbon emissions under the Paris Climate-Change Agreement). Fiscal sustainability is always a critical aspect of these projects, and specific administrative or budgeting provisions may need to be included to provide for it.*

*Some countries choose to give a single public authority (such as a Commission or Cabinet of Ministers) overall responsibility for managing and running the entire PPP system. This may then become the "supreme authority" for all its purposes. This can offer certain advantages in terms of coherence, coordination and "single-point responsibility", which can facilitate decision-making processes and avoid conflicts or competition between different ministries or projects in the PPP area. Whether it is politically or constitutionally workable is another question. Line ministries may not be happy with the new tier of authority over their powers that it can represent.*

*The processes involved should be transparent and participatory. Accountability for decision-making at different stages and levels should always be clear, tied as appropriate to the challenge/redress of grievance mechanisms. Budgeting mechanisms and procedures, both long and short-term, need careful thought in this context; public sector undertakings and liabilities, including contingent liabilities, need to be properly accounted for and budgeted. A contingency fund may have to be put in place. This all tends to call for particular focus on the role of the Ministry of Finance (or other budget authority, such as a supreme audit institution) to safeguard public finances and the application of fiscal rules. The role of sector regulatory bodies may also need to be allowed for.*

*To this end, a PPPs for the SDGs institutional framework is created under Article 9 to organize in an orderly and coordinated manner the implementation of the four main PPP phases:*

- 1) An identification phase leading to the selection and establishment of PPPs for the SDGs projects to be prepared by the relevant Contracting Authority.*
- 2) A preparation and preliminary evaluation phase enabling the Contracting Authority to identify the economic, fiscal, environmental, financial, legal, and social justifications for developing the project under a PPPs for the SDGs delivery form.*
- 3) A procurement and contracting phase including the signature and approval of the PPPs for the SDGs contract.*
- 4) An implementation and operation phase including partnership provisions aimed at monitoring and implementing smoothly the PPPs for the SDGs contract.*

## Article 9. Public-Private Partnership Unit and Administrative Coordination

- 1. Interministerial Committee.** The Government shall establish an Interministerial Committee (or equivalent body) and determine its organisational and management structure and its operational regulations.<sup>6</sup>
- 2. Interministerial Committee Structure.** The Interministerial Committee shall be comprised of [*the host country specifies the relevant ministries or authorities*]. The chair of the Interministerial Committee shall be [*state position*], who shall be responsible for organising and coordinating the activities and operations. The Interministerial Committee may utilize appropriate support staff with a view to enabling it to perform its functions and responsibilities effectively and efficiently. A record of its composition and staffing shall be kept up to date at all times and publicly available.

6 Governments should fully comply with all integrity and transparency requirements. To achieve a high level of integrity and transparency, the activities of project preparation, procurement, and regulation of PPPs should be carried out independently. For this purpose, the UNECE has adopted and made available the UNECE standard “A Zero Tolerance Approach to Corruption in PPP Procurement”.

**3. Interministerial Committee Functions and Responsibilities.** The Interministerial Committee's functions and responsibilities [shall/may], subject to the PPP regulations, include the following:

- (a) [Approval of the PPP project at its main stages];
- (b) Establish the government's overall policy on PPP, guided by the Government's wider infrastructure development strategy, SDG compliance priorities and socio-economic growth plans.
- (c) Coordinate and promote PPP activity across the relevant Ministries.
- (d) Facilitate integrated PPP activity in accordance with applicable national, regional, sectoral, and other infrastructure and service plans.
- (e) Oversee and give effect to the Government's PPP policies.
- (f) Review and approve proposed policy and strategy changes and refinements relating to PPPs as required by the Government.
- (g) Facilitate the coordination of aspects of PPPs as may be provided for in this Standard or the PPP regulations, such as to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits, or authorisations required for the implementation of PPPs in accordance with relevant statutory or regulatory provisions under applicable; and
- (h) Assist with the constructive resolution of problems and issues during the implementation of PPPs.

**4. Creation of PPP Unit.** The Government shall establish the PPP Unit and determine its organisational and management structure and its operational regulations.

**5. PPP Unit Structure.** The PPP Unit shall report functionally to the [Interministerial Committee]. The director of the PPP Unit shall be [*state position*], who shall be responsible for organising and coordinating its activities and day-to-day operations. The PPP Unit shall be appropriately staffed based on a range of skills, expertise, and experience (including a grasp of the Guiding Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, public infrastructure and service procurement, engineering, economic and financial modelling, public accounting, and budgeting, social and/or environment impact, and public administration. Staff members may be drawn from both the public and private sectors. A record of its composition and staffing shall be kept up to date at all times and publicly available.

**6. PPP Unit Functions and Responsibilities.** The PPP Unit's functions and responsibilities shall include the following:

- (a) [Propose methodologies, procedures and guidelines for structuring and implementing PPPs, including the dissemination of international best practice and methodologies and tools facilitating the initiation and the development of sustainable PPPs.]
- (b) [Generally, facilitate the preparation, appraisal, award, and implementation of PPPs in accordance with the requirements of this Standard and the Guiding Principles and methodologies.]
- (c) [Assist in implementing and giving effect to the Government's PPP policies].
- (d) [Review and comment on proposed policy and strategy changes and refinements relating to PPPs as required by Government.]

(e) [Prepare (or assist in preparing) official documentation describing the methodologies, procedures and guidelines referred to above, including for the purposes of their publication, and assist with regularly up-dating them.]

(f) [Prepare standard bidding and contract documents for use by contracting authorities.]

(g) [Identify potential improvements and refinements to the structuring and implementation of PPPs, including those related to the Guiding Principles and/or the most common issues preventing the development of PPP projects, and make recommendations accordingly.]

(h) [Exercise such powers of appraisal and approval (and/or coordination of approvals), if any, over aspects of PPPs as may be provided for in this Standard or the PPP regulations.]

(i) [Review and confirm the proper completion of the feasibility study (and other key reports and studies) for individual PPPs and the conformity of preparation work with the law's requirements and procedures, as provided for in this Standard or the PPP regulations.]

(j) [Assist contracting authorities with the coordination and development of individual PPP projects and PPP-related activities.]

(k) [Maintain an up-to-date registry of all PPP projects, containing relevant details of their registration and that of the related PPP contracts.]

(l) [Act as a point of contact and source of information for parties implementing or seeking to implement PPPs (whether public or private); provide guidance, advice, consultations and/or clarifications to them as necessary.]

(m) [Assist with the quantitative and qualitative assessment of projects, including the potential impact of PPP projects (including any contingent liabilities) on public obligations and/or public debt.]

(n) [Organize and provide training for public sector staff involved in PPPs (including educational sessions and workshops).]

(o) [Keep track of the monitoring and oversight by contracting authorities of the implementation of PPPs for which they are responsible.]

(p) [Advise the Government on administrative procedures related to PPPs.]

(q) [Organise, collate, and continually refine and develop a knowledgebase (including an electronic database) of PPP-related know-how, information, guidelines, assessments, research, studies, precedents, model clauses, opinions, methodologies, and other documentation to aid the regular progress of PPPs and the PPP sector in [*host country*].]

(r) [Ensure that elements of the documentation referred to in this Article are publicly available and/or published as required or appropriate.]

(s) [Assist with the constructive resolution of problems and issues during the implementation of PPPs ("troubleshooting").]

(t) [Assist generally with the promotion of PPPs in [*host country*] and public education on the subject.]

(u) [Such other functions (if any) as may be provided for in the PPP regulations.]

**7. No Conflict.** Any such roles and responsibilities should, however, be defined and allocated to the PPP Unit in ways which at all times avoid any potential conflicts of interest between them.

## Article 10. Information about PPPs

- 1. Comprehensive PPP System Information.** The PPP Unit shall be responsible for preparing, collating, refining, maintaining and (subject to any confidentiality restrictions) publishing up-to-date information about PPPs in such form as it may deem helpful and informative to all stakeholders, other participants in the PPP industry and the general public, and as may be reasonably required to promote the effective operation of the PPP system in [*host country*] and the clarity and transparency of its workings, or as may otherwise be required by Applicable law. All such information shall be subject to a presumption of transparency and disclosure to the general public.
- 2. Matters Included.** Such information may include the contents of PPP policy papers, the PPP regulations, the PPP guidelines and practice notes, appraisal and evaluation criteria and procedures (including fiscal transparency considerations), the progress of PPPs being implemented, results of tenders, material contractual terms (subject to any confidentiality restrictions), recommended contractual terms and conditions, the “pipeline” of future PPP projects being planned or considered, the conclusions reached in reviews, studies and reports, the strategic, environmental and social impact assessments for PPPs, and any other matters it considers appropriate.
- 3. Specific PPP Information.** Each contracting authority shall be responsible for collecting, making available and where necessary publishing, such information concerning any PPPs it is implementing or plans to implement as may be required from time to time by the Government or otherwise pursuant to the PPP regulations or Applicable law, including information necessary to ensure that the stakeholders relevant to any such PPP (including local communities) are able to respond to the plans and proposals for it in a timely manner in accordance with their rights under Applicable law.
- 4. Tender Information.** Where tenders for PPPs take place in accordance with this Standard, such information containing such detail as the PPP regulations may specify concerning the relevant pre-qualification or tender requirements and results, the names and identities of any pre-qualified, short-listed, preferred or winning bidders, and (where applicable) the grounds on which they have been selected, shall be posted on the official web-site of the contracting authority and published as required through the official channels without delay, during or following the relevant stage(s) of the tender.
- 5. Maintenance of Information.** The contracting authority shall maintain any PPP-related information published on its official website for such period(s) of time and with such public accessibility as may be required by the PPP regulations.
- 6. Private Partner’s Information.** The private partner under any PPP shall be responsible for preparing, collating, providing and where necessary publishing such information relating to such PPP as may be required by relevant regulations or Applicable law or otherwise under the terms of the PPP contract.



## CHAPTER III. Initiation and Preparation of PPPs

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*This phase addresses the initial work of documenting, describing and specifying the project and setting out the main functional characteristics of the infrastructure and/or public service to be delivered. The identification of a project and assessing its feasibility are important components to appraising a project and developing an adequate basis for procurement of the opportunity (including providing sufficient information to the proposers/bidders in order to bid). For these reasons, it is important during project preparation to include an appraisal of the possible project delivery options taking into consideration the full project life cycle and assess the main issues, material elements, and key functionalities of a proposed project. These preparatory steps may include the review and/or approval by a relevant Competent Body, such as the PPP Unit or the Interministerial Committee, based upon one or more reports prepared to support such decision making.*

### Article 11. Initiating, Identifying and Preparing PPPs

- 1. General.** All work of defining, preparing, appraising, and approving PPPs (including those based on unsolicited proposals) shall be carried out in accordance with the procedures and methodology referred to in this Standard and/or specified in the PPP regulations.
- 2. Initiation of PPPs.** Any proposed PPP shall be initiated by the Contracting authority, except in the case of unsolicited proposals as provided for under Article 14.
- 3. Setting Up a PPP Project Team.** The contracting authority shall set up a project team comprising a range of skills, expertise, and experience (including a grasp of the Guiding Principles), with a view to enabling it to perform its functions and responsibilities effectively and efficiently. Appropriate skills, expertise and experience may include but shall not be limited to competency in PPPs, programming public infrastructure and services, procuring construction and/or service contracts, public administration, and comprehension of this Standard and its implementing regulations and/or guidelines, including the role of the Interministerial Committee and PPP Unit.
- 4. Responsibility for Identification and Detailed Preparation of a PPP Project.** The identification and detailed work of preparing any PPP (including one proposed by a private initiator) shall be carried out or managed by the contracting authority, except where and to the extent (if any) that this Standard or the PPP regulations provide otherwise.
- 5. Meaning and Scope of Identification and Detailed Preparation.** In this Standard, the expression “identification and preparation” refers to the action of starting the process of defining and assessing a potential PPP and seeking any preliminary approvals and consents needed under this Standard to progress it further, whilst the expression “detailed preparation of a PPP project” refers to and includes the detailed work of documenting, describing and specifying it, and setting out its principal scope, characteristics and features (including its Key Performance Indicators (KPIs)), in sufficient detail for it to be appraised in accordance with this Standard, to form an adequate

basis for detailed proposals by bidders or a private initiator, and for the procedures hereunder for approving and awarding it to be applied. The detailed aspects of such work (including documentation requirements and applicable appraisal criteria used in accordance with Article 12) and the steps and procedures applicable to them (including review and approval requirements) shall be set out in the PPP regulations and may differentiate between different types or scale of PPP and different project characteristics. For the avoidance of doubt, “preparation” shall not typically involve the work of final and definitive design of a PPP project which accompanies its actual implementation, which is generally carried out by the private partner).

**6. Identification Report.** The contracting authority shall develop an identification report. An identification report shall include but not be limited to:

(a) A summary of the scope of the proposed infrastructure and/or services to be improved or created, including their main functionalities and characteristics, including as applicable an assessment of issues that may arise over the life of the project such as proposed technological solutions becoming obsolete and/or socio-economic conditions evolving such that they would impact the project as contemplated.

(b) The project’s relative priority with respect to other public infrastructure and service obligations.

(c) Identification of the range of PPP delivery options with factors which would justify the choice between a PPP delivery or traditional public procurement, including but not limited to anticipated cost, complexity, capacity to deliver, sustainability, and social and economic benefits.

(d) The project’s principal anticipated technical and economic features and needs, including an order of magnitude of costs, revenues (if any), funding and financing requirements, and the market for the project.

(e) The acceptability of the proposed infrastructure and/or services to users, local communities, and other stakeholders, [including the main conditions for public acceptance]; and

(f) Any other relevant preliminary information deemed prudent for identifying and/or summarising the proposed project.

**7. Identification Report Approval.** The Identification Report shall be submitted to the PPP Unit [or other applicable Competent Body such as the Interministerial Committee] for its review [and approval] including an indicative assessment of whether it has been prepared in [general] accordance with the requirements of this Standard [and other applicable regulations and requirements], whether the proposed project is deemed worthwhile and appropriate to be carried out as a PPP, and whether PPP is the anticipated best option by comparison with other procurement methods.

**8. Preparatory Studies.** Except to the extent the PPP regulations provide otherwise, the detailed preparation of a PPP project shall include a comprehensive set of studies to be used to appraise a project, covering its material elements and aspects, including in particular those referred to in the relevant appraisal criteria set out in Article 12 and showing how those criteria will be satisfied.

**9. Studies to be included.** The work of preparing a PPP project for appraisal shall:

(a) Further elaborate, develop, and detail applicable items contained in the Identification Report.

(b) Assess its anticipated social, economic, and environmental impact, including a cost benefit analysis, a quantitative assessment of the positive and negative externalities, its “value for people”, and long-term sustainability (including the extent to which it gives effect to the Guiding Principles).

- (c) Without limiting the sub-para (b) above, assess its capital and operating costs, affordability, and long-term sustainability (including fiscal sustainability, budgetary implications and any public-sector contingent liabilities).
- (d) Assess the extent to which it will improve the quality and efficiency of the public services to which it relates.
- (e) Identify how the PPP project aligns with the Government's wider sector objectives, plans and strategies for infrastructure and/or service delivery.
- (f) Identify the technical requirements and expected inputs and deliverables, including any options relating to technological solutions and their long-term adaptability and affordability.
- (g) If practicable at this stage, identify the anticipated KPIs and the indicative payment terms.
- (h) Identify relevant stakeholders, any stakeholder consultations to be carried out, any known stakeholder issues and any stakeholder input or suggestions put forward, with particular emphasis on environmental and social impact and any vulnerable or marginalized persons or groups.
- (i) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority.
- (j) Assess the project's legal, regulatory, and institutional basis and its feasibility and viability.
- (k) Identify the licences, permits or authorisations that may be required in connection with the approval or implementation of the PPP project.
- (l) Identify conditions of land use and related issues concerning expropriation or resettlement as applicable.
- (m) Identify and assess the main project risks and describe the proposed risk allocation under the PPP contract, together with any steps or options to address or mitigate them.
- (n) Identify any proposed forms of Government support and guarantees needed for the implementation of the PPP project, and their budgetary implications.
- (o) Determine whether PPP is the best option for carrying out the project through quantitative and qualitative comparison with other procurement methods.
- (p) Determine the capacity of the contracting authority to enforce the PPP contract effectively, including the ability to monitor and regulate project implementation and the performance of the private partner.
- (q) Describe the preferred choice of procurement process and tender structure.
- (r) Include any other relevant background studies, taking account where appropriate of any other PPP project or public service with which the proposed PPP is closely associated or linked.
- (s) In the case of Concessions, particular attention shall be paid to the following (but without limiting their applicability to other types of PPP as well):
  - (i.) the potential impact of long-term economic and societal changes, including potential changes to individual behaviour, on the scope and pricing of the Public Service
  - (ii.) the possible development of other public services that may compete with the Concession project.

- (iii.) the acceptability of the proposed PPP Public service to end users, including the necessity for project promotion and communications strategies that demonstrate the long-term benefits to end users.
- (iv.) the different categories of users, if any, and their specific needs for service delivery (e.g., vulnerable or economically disadvantaged groups, priority users, the necessity for different prices for the service without infringing on the equality of treatment of users and non-discrimination principles, etc.).
- (v.) [methods for adapting the public service to future needs and affordability considerations, taking account of the possibility of substantial changes to the economic or political landscape over the life of the project and the need to resolve resulting issues and maintain the continuity of the public service.
- (vi.) [mechanisms for optimising the long-term service provision and relationship between the main parties to the PPP, including their organisation and staff.]
- (vii.) [mechanisms for reverting the public service to the contracting authority in order to maintain the public service and if justified by the public interest].
- (viii.) means of maintaining the financial and economic equilibrium in the event of exceptional circumstances.
- (ix.) Selection of a procurement process that is most likely to realize a project that delivers an essential public service adapted to the needs and affordability constraints of the end users for the life of the project.

**10. Review and Approval.** The compliance of such feasibility study and other studies and reports with the relevant appraisal criteria and approval procedures referred to herein shall be subject to review and approval by the PPP Unit [or other applicable Competent Body].

**11. Preliminary Studies.** The work of preparing a PPP project and assessing its feasibility may include other reports prepared and review procedures applied at earlier stages of preparation than the comprehensive feasibility study referred to in paragraph 9. The appraisal criteria to be applied at any such earlier stage shall be derived from the appraisal criteria set out in Article 12, adjusted as necessary and appropriate to suit the more preliminary nature of the information available at such stage.

**12. Consultations.** The work of preparing a PPP project shall be subject at the relevant stages to all requirements for formal consultation with stakeholders, other relevant authorities and the general public, including public hearings where appropriate, as may be required pursuant to Applicable law or the PPP regulations and/or as envisaged by the Guiding Principles. The consultation process shall be structured to enable a genuine dialogue to take place concerning all significant issues of concern to stakeholders, and available remedies to be pursued, and to allow suggestions from third parties for improving the PPP project to be put forward. Key points raised by stakeholders shall be accurately recorded and responded to as appropriate.

**13. Changes during Preparation.** A proposed PPP may be re-designed, changed or revised as often and in as many ways as necessary during its preparation under this Chapter III in order to ensure that it is fully compliant with the requirements of this Standard, including in particular Article 4, this Article and the appraisal criteria and review and approval procedures set out in Article 12.

## Article 12. Appraisal and Approval Procedures

- 1. PPP Compliance.** Any PPP implemented pursuant to this Standard (including pursuant to an unsolicited proposal) must comply with the requirements of Article 4 and the applicable appraisal criteria and approval procedures laid down for this purpose in this Standard and the PPP regulations.
- 2. Approval.** The PPP Unit [or other applicable Competent Body] shall be responsible for reviewing and approving proposed PPPs (and the preparation work carried out for them) submitted to it by contracting authorities in accordance herewith, [and for advising [the relevant competent body] as to whether a proposed PPP meets the appraisal requirements set forth herein]. In particular, it shall be responsible for:
  - (a) Ascertaining whether a proposed PPP is worthwhile being carried out as a PPP project and is expected to meet the purposes and objectives set out for it.
  - (b) Confirming that the PPP project has been prepared in accordance with the requirements of Article 11.
  - (c) Confirming that the PPP project meets the specific appraisal criteria applicable to it.
  - (d) Reviewing the contracting authority's capability for carrying out the proposed PPP and making appropriate recommendations.
  - (e) Reviewing and approving the draft tender documents prepared by the contracting authority to ensure conformity with the approved proposal.
- 3. Appraisal Criteria.** The appraisal criteria applicable to any proposed PPP (and referred to in Article 11) shall include such of the following as may be appropriate for this purpose:
  - (a) The PPP project's compliance with the criteria and requirements set out in Article 4.
  - (b) In particular, the PPP project's anticipated socio-economic and public-service net benefits and "value for people" (including inclusivity and accessibility) and the extent to which they satisfy and advance the Guiding Principles and the wider public good.
  - (c) The extent and urgency of the need and demand for the PPP project.
  - (d) The PPP project's alignment with the Government's wider sector objectives, plans and strategies for infrastructure and economic development and achievement of the SDGs.
  - (e) Its economic and financial feasibility and viability.
  - (f) Its technical feasibility and strengths (including implementation timescales).
  - (g) Its legal, regulatory, and institutional viability, including the procedures to be used for selection of a private partner and their timing.
  - (h) Its environmental and social sustainability and impact manageability, taking account of its long-term resilience and adaptability.
  - (i) The cost-effectiveness, acceptability, and affordability of the PPP project for both users (including vulnerable groups), on the one hand, and the host country from a budgeting/fiscal and sustainable debt perspective, on the other (including considerations relating to government debt and contingent liabilities).

(j) The need and scope for any anticipated public sector payments, finance, guarantees or other support for the PPP project.

(k) The appropriateness of the PPP project's proposed (preliminary) risk-allocation and incentive profile.

(l) The cost effectiveness and value-for-money/ value for people of implementing the project on a PPP basis relative to other procurement methods.

(m) Generally, the extent to which the PPP project is expected to meet the purposes and objectives set out for it in the documents drawn up as part of its definition and preparation under Article 11.

(n) Any other relevant requirements of Applicable law relating to public investments.

(o) Any other appropriate criteria arising from Article 11, and consistent with the foregoing as may be specified from time to time in the PPP regulations.

**4. Matters included in Appraisals.** In appraising the PPP project, due regard shall be had (inter alia) to the contents of the feasibility study and any related reports prepared under Article 11 and the extent to which it/they demonstrate(s) compliance with the applicable appraisal criteria, as reviewed and certified by the PPP Unit [or other applicable Competent Body]. Due regard shall also be had to the results of all public consultations and/or public hearings which have taken place at that stage of the appraisal process in relation to the PPP project in accordance with Article 11.

**5. Detailed Procedures in PPP Regulations.** The detailed procedures applicable to the proposed PPP during its identification, detailed preparation and appraisal and approval under this Chapter shall be set out in the PPP regulations and shall include (amongst other things) relevant timescales, documentation and reporting requirements notification and publicity requirements, relevant formalities, the relative weightings and priority of applicable criteria and tests, formal review and approval requirements and appeal procedures.

**6. Responsibility for Accuracy and Publicity of Process.** The Government shall be responsible for determining, revising (as necessary) and publishing all appraisal criteria and approval procedures, and ensuring that the PPP regulations accurately reflect them at all times.

## Article 13. PPP Implementation Resolutions

**1. Issue of Resolution.** Where a proposed PPP has complied with the applicable appraisal criteria and approval procedures referred to above, and a decision has accordingly been made by the contracting authority [or other applicable Competent Body] to implement it, a formal resolution to that effect shall be issued by the contracting authority ("implementation resolution") in the form and substance as may be required by this Standard and the Implementing Regulations.

**2. Contents.** An implementation resolution shall (subject to the PPP regulations) include the following information and components:

(a) The name and official address of the contracting authority responsible for the PPP project.

(b) A clear description of the public infrastructure and/or public services the subject matter of the PPP project.

- (c) The PPP project's principal commercial, financial and economic characteristics and features.
- (d) A summary of the material conclusions reached about the PPP project, identifying the key criteria applied in reaching them, including in particular the extent to which the PPP project is expected to satisfy and advance the Guiding Principles, the public benefits or goods expected to result therefrom, and the principal results of the feasibility study.
- (e) The rationale for implementing the project as a PPP, as opposed to any other form of procurement, and justifying the proposed PPP structure as the most appropriate basis for implementing it.
- (f) The anticipated (approximate) amount and nature of any private financing expected to be used.
- (g) The anticipated (approximate) amount and nature of any public funding or other public support (such as guarantees) expected to be used, together with the anticipated amount of any sovereign debt or contingent liabilities which may be implied by the private financing of the project.
- (h) The procedures to be used for selection of the private partner and their anticipated timing.
- (i) A summary description of the consultation procedures held pursuant to Article 11, the material issues raised, and the conclusions reached in response to them, as well as of the mechanisms available to stakeholders for addressing objections and grievances to the PPP project.
- (j) Any other matters which the contracting authority considers relevant.

**3. Publication and Copies.** After a project feasibility study has been appraised and approved, the project shall be registered on the official list of approved PPP projects and the implementation resolution shall (subject to any exceptions permitted by this Standard) be published on the official website of the contracting authority and in the official channels. In the case of an unsolicited proposal, it shall also be notified and copied to the private initiator. Where a competitive tender is being held pursuant to Chapter IV, a copy of the implementation resolution shall be included with the tender documents released to bidders.

## Article 14. Unsolicited Proposals

**1. Initiation.** A private initiator seeking to implement an unsolicited proposal for a PPP may at any time define and submit its proposal in preliminary form to the relevant contracting authority (and any other competent body authorised by the PPP regulations to receive such proposals), which shall have a discretionary power to consider and review it. An unsolicited proposal shall only be deemed eligible for consideration and review if it does not already appear in selection procedures that have been announced or a plan or pipeline of future PPPs developed on behalf of the contracting authority or the Government and if it is considered of public interest.

**2. Preliminary.** The proposed preliminary unsolicited proposal shall describe the proposed PPP project (including in terms of the infrastructure, technology, and scope of the public service it involves) in sufficient detail to enable it to be given a preliminary review by the contracting authority (and any such other competent body) and shall be accompanied by all documents necessary for this purpose. The contracting authority (and any such other competent body) shall carry out any preliminary review of the proposal that it decides to make, reach a preliminary decision about whether it is considered to be potentially in the public interest and intends to proceed further with it, and notify the private initiator accordingly.

**3. “Open Door”.** The private initiator may enter into discussions and an exchange of information at any time regarding the proposed PPP with the relevant contracting authority.

**4. Preparation.** Following a preliminary decision of the contracting authority to proceed further with the unsolicited proposal, the detailed work of preparation of the PPP project shall then be carried out in accordance with the requirements of Articles 11 and 12, [by the private initiator, by the contracting authority, or with the possible support of the contracting authority (to be given at its sole discretion)]. To this end, the contracting authority shall invite the private initiator to submit as much information on the proposed PPP as is necessary to allow the contracting authority (and any other relevant competent body) to make a proper evaluation of the private initiator’s qualifications and the technical and commercial feasibility of the PPP project, and to determine whether the PPP project is likely to be successfully implemented in the manner proposed on terms acceptable to the contracting authority (and any other relevant competent body). For this purpose, the private initiator shall, if and to the extent reasonably required by the contracting authority, submit a technical and commercial conceptual study, and satisfactory information regarding the concept, technology and public service contemplated in the proposal, and any other assessments reasonably necessary including preliminary social or environmental impact studies.

**5. Protection of Private Initiator’s Rights.** In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from, or referred to in the unsolicited proposal. When the decision to proceed has been made, the contracting authority shall not make use of information provided by or on behalf of the private initiator in connection therewith other than for the evaluation of that proposal, except with the consent of the private initiator, and shall, if the proposal is rejected, return to the private initiator all documents prepared and submitted by it during the evaluation process.

**6. Review, Appraisal, and Implementation.** When in the opinion of the contracting authority all the requirements of the preparation phase have been complied with in accordance with Article 12 and are duly contained in the feasibility study, it shall submit the report to the PPP Unit [or other applicable Competent Body] for approval under the same conditions as the ones applicable to any other PPP project.

**7. Implementation Resolution and Conditions of Conclusion of a PPP Contract.** After the PPP Unit’s [or other applicable Competent Body’s] approval has been received, the award of the PPP contract for the unsolicited proposal by the contracting authority shall be subject to testing the potential competition for the relevant PPP project by organising a competitive tendering procedure in accordance with Article 21, where required by the provisions thereof.



## CHAPTER IV. Selection of Private Partner

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*The provisions in this Chapter are intended to promote transparent and effective competitive procurement procedures except where this Standard specifically provides otherwise. The fundamental principles behind a transparent and effective competitive procurement process under this Standard include:*

- (a) *Open access to public procurement.*
- (b) *Equal treatment of candidates and bidders and the pursuit of a fair and credible outcome.*
- (c) *Transparency and confidentiality of procedures.*
- (d) *Free competition.*
- (e) *“Value for People and Society”, comprising the fundamental principle of “Value for Money” (economy and efficiency), alignment with the SDGs, and taking into account, in addition, the satisfaction of the users of the service during the project life cycle and the contribution of the project to economic development in accordance with the government’s objectives; and*
- (f) *Realizing a fair allocation of risks and rewards over the life of the project.*

*Note that in some countries there will be no need to implement this chapter because they will have existing sufficient procurement provisions. If this chapter is implemented, special care should be taken to harmonize where necessary these provisions with other relevant provisions addressing the selection of a private partner, e.g. EU directives, the WTO General Procurement Agreement or similar authority. For example, the treatment of unsolicited proposals as described in this Chapter may not be compatible with some legal frameworks.*

### Article 15. Procedures for Selection of Private Partner

- 1. Competitive Tenders Standard.** The contracting authority shall utilize electronic procedures where feasible and select the private partner for a PPP project on the basis of a competitive tender as set out in Articles 15 – 20, save only where Applicable law permits otherwise, including in the case of unsolicited proposals under Article 21 (to the extent provided therein) and direct negotiations as set out in Article 22.
- 2. Existing Procurement Laws.** The public procurement laws and regulations in force in [host country] [shall/shall not] apply to the award of PPPs, except where and to the extent that this Standard (or any subsequent law) specifically provides otherwise.
- 3. Detailed PPP Tendering Procedures.** The detailed procedures and requirements (including any specific approval powers) applicable to competitive tenders for PPPs, the nature of the processes involved (e.g. whether paper, electronic or otherwise), the contents of the procurement notices, the pre-qualification and selection of the private partner and the contents of the tender documents shall be as set out in the PPP regulations, shall be designed to promote effective and fair competition

leading to sustainable long-term outcomes, and shall be governed by the fundamental principles of transparency, equal treatment, non-discrimination, and efficient use of resources (including the cost and expense of bidding).

**4. Applicable Criteria.** The tender criteria and evaluation methodology applicable to the pre-qualification and selection of the private partner and award of the PPP contract shall be as set out in the tender documents and may include any of the following, as the contracting authority considers relevant for the particular PPP project:

**5. Pre-Qualification/Selection:** relevant experience and track-record, technical and professional proficiency and capabilities, financial and human resources, appropriate (dedicated) managerial and organizational capacity and skills covering the full range of relevant PPP tasks (including environmental responsibilities), ethical standards, legal capacity and standing, solvency, structure of consortium, relative consortium strengths.

**6. Tender Evaluation and Contract Award:** value propositions, technical quality (including soundness and innovativeness) of proposal, quality of services and measures to ensure their continuity, operational feasibility, relevant environmental and socio-economic criteria, risk allocation, pricing terms (including the value of the proposed tolls, and tariffs, fees or contracting authority payments, as the case may be, evaluated on an appropriate basis), other commercial terms, costs (whether capital or operational), the nature and extent of any public sector support sort, qualifications to terms and conditions of contract, structure and quality of management team, strengths of financial plan and availability of committed finance; together with such other matters as may be specified in the PPP regulations from time to time. The tender criteria and evaluation methodology shall be clear, transparent, non-discriminatory, reasonably appropriate for each PPP and consistent with the criteria applied and conclusions reached in appraising and approving the PPP project pursuant to Article 12 (as reflected in its implementation resolution).

**7. Non-Discrimination.** The contracting authority shall not discriminate as between local and foreign bidders for or participants in PPP projects or accord them unequal treatment, in connection with the award or subsequent implementation of any PPP, save only to the extent (if any) otherwise permitted under the PPP regulations or Applicable law.

## Article 16. Tender Process and Procedures: General

**1. Choice of Tender Process.** The detailed aspects of the tender process to be used for the award of each PPP shall be set out in the tender documents prepared and made available to potential bidders in accordance with Article 17. They shall also be summarised in the public announcement of the tender.

**2. Open and Closed Tenders.** An open public tender shall ordinarily be used, with or without a pre-qualification stage, and involving either a one- or two-stage structure (following any pre-qualification). Alternatively, a closed tender may be used, but only in exceptional cases of national defence or national security, or such other exceptional circumstances as may be provided for herein, where the use of an open public tender could reasonably be expected to give rise to serious concerns about state secrets, government confidentiality and/or other demonstrable adverse consequences for the national interest and therefore the feasibility of the processes involved.

- 3. Competition under Closed Tenders.** Where a closed tender is used, the contracting authority shall nevertheless take all reasonable steps to structure and organise it in a way which fosters genuine competition and shall invite offers from as many different sources as is practicable in the circumstances.
- 4. Eligible Participants.** Participants in tenders can in principle be any persons with legal capacity (whether domestic or foreign) under Applicable law, including companies, partnerships and natural persons, or combinations or consortia of such persons, but subject always to any relevant restrictions under this Standard or the PPP regulations as to such participation.
- 5. Consortium Qualifications.** Where bidding consortia participate, the information required from them to demonstrate their requisite qualifications shall relate to each consortium as a whole, as well as to individual members. The contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of all of them are adequate to meet the needs of all phases and aspects of the PPP project.
- 6. Decisions Compliant with Tender Documents.** Decisions by the contracting authority concerning pre-qualification, selection or rejection of bidders and award of the PPP contract shall be made on the basis of applying only those criteria, requirements and procedures set forth in the relevant tender documents.
- 7. Communications with Bidders.** The tender documentation shall provide as necessary for the organisation of transparent communication processes and methods with bidders, allowing as required for (inter alia) conferences, meetings and procedures for written communication, provision of comments on and proposed amendments to the tender documents (including the draft PPP contract), discussions of and modifications to technical requirements and specifications, discussion of risk allocation and commercial terms, clarification of financing proposals and other matters.
- 8. Tender Security.** The tender documents may require the provision of tender security, such as bid bonds, by the bidders, in an amount and on terms which are reasonable in the circumstances. In that event, the tender documents shall precisely specify the circumstances in which any such tender security may be forfeited by bidders. A bidder shall not forfeit its bid security in any circumstances other than those specified.
- 9. Certain Procedural Aspects.** No bidder may participate in more than one pre-qualification or tender submission, except where and to the extent that the tender documents so permit (including, for example, in the case of sub-contractors). Pre-qualification or tender submissions may be changed or revoked at any time before the relevant deadline for their submission in accordance with the relevant tender procedures.
- 10. Final Clarifications and Negotiations.** The tender documents may (or may not) allow for a final process of clarification or negotiation between the public and a bidder of certain aspects of the most favourable bid, judged by the relevant evaluation criteria and methodology, including amendments to the terms and conditions of the draft PPP contract, provided that any final amendments to the bid or the draft PPP contract are consistent with the overall tender and evaluation process, and would not have led to the selection of a different bidder if they had been made or agreed to at an earlier stage.
- 11. Exceptional Procedures.** It is acknowledged that the tender documents may contain specific provisions modifying aspects of the tender procedure otherwise applicable in specific circumstances, such as (a) where only a single bidder prequalifies or submits a compliant expression of interest or bid (e.g. by allowing the contracting authority to re-tender the PPP project or alternatively proceed with it on the basis of direct negotiations where it is satisfied that the process has already been sufficiently

competitive), or (b) qualifying or restricting the right and ability of different bidders to combine together during the tender process for the purposes of submitting a joint bid. The PPP regulations may also provide specifically for situations of this kind.

**12. Confidentiality.** Subject and without prejudice to Article 10, the contracting authority and the tender committee shall treat all proposals submitted in tender procedures conducted in accordance with this Standard in such a manner as to avoid the unnecessary disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications, and negotiations between the contracting authority and/or the tender committee and a bidder shall be confidential (subject as aforesaid). Unless required by law or by a court order, during any such tender procedures no party thereto shall disclose to any other person any technical, price or other confidential information in relation to such discussions, communications, and negotiations without the consent of the other party.

**13. Records.** The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings for the PPP project in accordance with the requirements of the PPP regulations.

## Article 17. Tender Documents, Requirements, and Information

**1. Contents of Tender Documents.** The contracting authority shall prepare the tender documents for any tender held in accordance herewith, which shall contain such information as may be required by the PPP regulations for the relevant tender structure being used, including as appropriate the following:

(a) A description of the envisaged PPP and the public infrastructure, facility, or services to which it relates.

(b) An indication of other essential elements of the PPP project that need to be identified at the relevant stage of the tender process, such as the services to be delivered by the private partner, the financial and commercial arrangements envisaged by the contracting authority (such as payment mechanisms and funding sources) and the nature and extent of any public sector support to be provided to the PPP project.

(c) A comprehensive and precise description of the applicable tender procedures.

(d) Project functional requirements and KPIs, as appropriate, including the contracting authority's requirements regarding safety and security standards, environmental protection, and the Guiding Principles.

(e) A draft of the PPP contract or, where preparing a full draft would not be practicable in the circumstances, a summary containing the main proposed terms and conditions and reflecting the allocation of key risks, including an indication of which terms, if any, are deemed to be non-negotiable.

(f) The detailed tender criteria and methodology, including relative importance or weighting, to be applied to the pre-qualification (if any) of bidders, the evaluation of bids and proposals and the final selection of the private partner and award of the PPP contract; and any relevant thresholds, if any, set by the contracting authority for identifying non-responsive proposals.

(g) Details on the communication process and methods for bidders, including any bidder conferences and process, if any, for making comments or requesting clarifications to the tender terms and conditions and/or documentation.

(h) Identification of any required tender security including the circumstances for forfeiture.

(i) Sufficient information to allow competent and/or qualified bidders to submit responsive bids in a timely manner, including identification of the deadline for submissions.

**2. Full Data.** The contracting authority shall provide in the tender documents (and/or in any supporting documents or data-room organised in connection therewith) all such information in its possession relating to the proposed PPP and the assets it will comprise, on a fully transparent basis, as can reasonably be considered to be necessary to enable bidders to participate effectively and on a properly-informed basis in the tender (or the relevant stage thereof), but subject always to any applicable confidentiality restrictions (if any).

**3. Amendments to Tender Documents.** The contracting authority may, save where this Standard or the PPP regulations provide otherwise, and whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise or amend any element of the tender documentation or the request for proposals during the tender process, including the draft PPP contract, provided it:

(a) Refrains from making material changes to the project such that the prequalification, evaluation criteria, and/or minimum requirements of the project would change;

(b) Notifies the PPP Unit [or other applicable Competent Body] of any amendments to the tender documents [and such body approves the amendments];

(c) Notifies all bidders of any such amendments without delay; and

(d) Where necessary, the deadline for the submission of proposals shall be prolonged to allow time for any such amendments and any responses to them.

The contracting authority shall indicate in its record of the selection proceedings to be kept pursuant to this Standard the justification for any such revision or amendment.

**4. Review of Tender Documents.** The tender documents and any amendments thereto shall be subject to the review and approval of the PPP Unit [or other applicable Competent Body]

## Article 18. Tender Committee

**1. Formation and Structure.** The contracting authority and the PPP Unit (and/or another competent body where the PPP regulations so require) shall form a tender committee for the purposes of conducting the PPP tender, evaluating tender bids and proposals, communicating with bidders, and determining the preferred or winning bidder. The composition, powers and procedures of the tender committee shall be determined in accordance with the PPP regulations (including a mechanism for addressing any conflicts of interest of its members).

- 2. Members.** The tender committee shall have an odd number of members [with a portion or all its members being independent of the PPP project team]. The contracting authority (and/or other competent body, as aforesaid) shall appoint its chairman. Other members shall be appointed as required by the PPP regulations but may include such independent consultants and experts as may be deemed necessary.
- 3. Minutes.** The tender committee shall keep minutes of all its meetings, which shall be subject to the approval of all members present and signed by the chairman and secretary of the committee.
- 4. Records.** The tender committee shall document the tender process and evaluation in reasonable detail and give reasons for its selection and award decisions.
- 5. Interpretation.** References in this Chapter IV to the contracting authority may be construed as including references to the tender committee where the context so requires.

## Article 19. Tender Stages

- 1. Tender Stages.** A tender shall include the following stages, subject to and in accordance with the PPP regulations:
  - (a) Tender announcement and request for expressions of interest and/or pre-qualification submissions;
  - (b) Expressions of interest and/or pre-qualification submissions and short-listing of bidders;
  - (c) Formal invitation to tender (one or two-stage);
  - (d) Preparation and submission of tender proposals (one or two-stage);
  - (e) Evaluation of tender proposals and selection of the winning or preferred bidder;
  - (f) Finalisation of the terms and conditions of the PPP contract and all other required aspects of the PPP project with the winning or preferred bidder; and
  - (g) Award and conclusion of the PPP contract.
- 2. Tender Announcement.** A tender announcement shall be followed by a request for expressions of interest and/or prequalification and subsequently (unless a single-stage tender is used) an invitation to tender, which shall each contain all information reasonably required to enable bidders to participate in that stage of the tender.
- 3. Single-Stage Tenders.** A single-stage tender may be used where the PPP regulations so permit, combining the pre-qualification and tender submission stages into one.
- 4. Closed Tender Exceptions.** A closed tender may be held where this Standard and the PPP regulations so permit, without the need for any tender announcement stage, tender participants being informed about the tender by written notice.

**5. Pre-Qualification Procedure.** For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority may engage in pre-qualification proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged PPP. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The invitation to participate in the pre-qualification proceedings shall be published in accordance with the requirements of the PPP regulations, containing all such information required thereby as may be necessary to enable bidders to submit responsive applications by the specified deadline.

(b) The contracting authority shall make a decision with respect to the qualifications of each bidder that has applied for pre-qualification, based on the criteria specified in the invitation to participate, and shall then invite all pre-qualified bidders to submit proposals for the PPP in accordance with the tender procedures and requirements.

(c) Where the contracting authority has reserved the right in the invitation to participate to request proposals from only a limited number of bidders that best meet the pre-qualification criteria, it shall rate the bidders accordingly and draw up a short-list of bidders that will be invited to submit proposals, up to the maximum number specified (but at least three, if possible). Those bidders shall then be invited to submit proposals for the PPP project in accordance with the tender procedures and requirements.

**6. Contents of the Request for Proposals.** The contracting authority shall provide a set of the request for proposals and related documents to each bidder (or pre-qualified bidder, as the case may be) invited in accordance with this Standard to submit proposals for the PPP project that pays the price, if any, charged for those documents. The request for proposals shall contain all such information as may be required by Article 17.1 and the PPP regulations to enable bidders to submit responsive proposals for the PPP project in accordance with the tender procedures and requirements by the deadline for submission of the same.

**7. Comparison and Evaluation of Offers or Proposals.** The contracting authority shall compare and evaluate each offer or proposal submitted for the relevant PPP in accordance with the evaluation criteria set forth in the tender documents, any relative weight accorded to each such criterion or the descending order of importance of the same. For this purpose, the contracting authority may establish thresholds with respect to the technical, financial, commercial, and quality aspects of the offers or proposals. Offers or proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

**8. Two-Stage Request for Proposals.** The contracting authority shall adopt a tender structure involving a two-stage request for proposals where the PPP Unit assesses that discussions with bidders are needed to refine aspects of the description of the subject-matter of the procurement and to formulate them with the requisite detail, in order to obtain the most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) Prior to issuing its final request for proposals, the contracting authority shall issue an initial request calling upon the bidders to submit, in the first stage of the procedure, their initial proposals and comments relating to project specifications, performance indicators, financing requirements or other relevant characteristics of the PPP project and the main contractual terms proposed by the contracting authority.

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been formally and properly rejected as non-responsive or unacceptable. Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders.

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting, adding to or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the PPP project, including the main contractual terms, and any specified criteria for evaluating and comparing proposals and ascertaining the successful bidder. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals.

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

(e) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria set out in the tender documents and invite the bidder that has attained the highest rating for final negotiation of the terms of the PPP contract (but excluding any terms, if any, that were stated to be non-negotiable in the final request for proposals).

(f) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a PPP contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

**9. Competitive Dialogue.** The contracting authority may adopt a tender structure involving a request for proposals with dialogue (“competitive dialogue”) where it is not feasible for it to formulate a detailed description of the proposed PPP needed for the purposes of an open public tender in accordance herewith, and it assesses that dialogue with bidders is needed to achieve the most satisfactory solution to its procurement needs. In that case, the following provisions shall apply (subject to the PPP regulations):

(a) The contracting authority shall invite each bidder that presented a responsive proposal in accordance with the initial tender invitation (subject to any applicable maximum) to participate in the dialogue. The contracting authority shall ensure that a sufficient number of bidders, and if possible, not less than three, is invited to participate in order to ensure effective competition.

(b) The dialogue shall be conducted by the same representatives of the contracting authority concurrently.

(c) The contracting authority shall clearly identify those aspects of the PPP project and the tender documents and process that are to be the subject of the dialogue.

(d) During the course of the dialogue, the contracting authority shall not modify any material aspect of the proposed PPP, any pre-qualification or evaluation criteria, any minimum requirements, any element of the description of the PPP project contained in the request for proposals, or any term or condition of the procurement process that is not itself subject to the dialogue.



(e) Any requirements, guidelines, documents, clarifications, or other information generated during the dialogue that is communicated by the public authority to a bidder shall be communicated at the same time on an equal basis to all other bidders, save only to the extent it contains information which is exclusive to the relevant bidder and its disclosure would breach any applicable confidentiality restrictions.

(f) Following the dialogue, the contracting authority shall request all bidders who have not withdrawn from the process to present their best and final offers with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place, and deadline for presenting best and final offers. Unless the PPP regulations and the tender documents otherwise permit, no negotiations shall take place between the contracting authority and the bidders with respect to their best and final offers.

(g) The winning bidder shall be selected from amongst the best and final offers submitted in accordance with this procedure, on the basis of the offer that best meets the needs of the contracting authority as determined in accordance with the applicable tender evaluation and selection criteria set out in the tender documents.

## Article 20. Conclusion of the PPP Contract

**1. Winning Bidder.** The winning bidder shall be the bidder who has submitted the most favourable compliant bid according to the evaluation criteria and methodology laid down in the tender documents. A formal announcement and publication of the identity of the winning bidder shall be made by the contracting authority promptly following determination of the same.

**2. PPP Contract Signatories.** The conclusion of the PPP contract shall not take place before the expiry of [fourteen days] from the date of publication of the identity of the winning bidder, inter alia to permit available procedures to be invoked for challenging the determination of the same where it is alleged that the procurement requirements of this Standard have not been met. The PPP contract shall be entered into by the contracting authority with the winning bidder (or with another private legal entity established by it for this purpose), which shall become the private partner in the PPP project for the purposes of this Standard. Any such other private legal entity or special purpose vehicle (SPV) established by the winning bidder shall meet any formal or substantive requirements for such entity specified by the tender documents or otherwise agreed with the contracting authority.

**3. Publication of Contract Award.** The contracting authority shall give notice of the contract award on its official website and publish the award through the official channels in accordance with the requirements of Article 10. The notice shall identify the private partner and include a summary of the essential terms of the PPP contract (subject to any applicable confidentiality restrictions).

**4. Public Disclosure of PPP Contracts.** Each PPP contract entered into pursuant to this Article shall also be subject to such public disclosure (but subject always to any applicable confidentiality restrictions) as may be provided for pursuant to this Standard (including Article 10) or the PPP regulations.

## Article 21. Conclusion of PPP Contract for Unsolicited Proposals

**1. Testing Competition.** Following a final decision by the contracting authority to implement an unsolicited proposal for a PPP project pursuant to Article 14 (either on the original or on any modified terms permitted thereby), the contracting authority shall, except in the circumstances set forth in Article 22, promptly initiate a competitive tendering procedure for the proposed PPP in accordance with this Standard, provided always that it considers that (a) the proposed PPP can be implemented without the use of unique intellectual property, trade secrets or other exclusive rights owned or possessed by the private initiator; and (b) that the proposed concept or technology involved is not truly unique or new.

**2. Requirements for Tendering Procedure.** If the contracting authority initiates a competitive tendering procedure in accordance with paragraph 1 above, it shall publish its implementation resolution for the PPP project on its website and the official channels in accordance with Article 13, together with a summary and description of the proposed PPP and its principal objectives, and any relevant documentation, inviting any third parties to submit expressions of interest in implementing the PPP project within a specified period of time.

**3. Exceptions: Contract with Private Initiator.** If the contracting authority does not consider that conditions (a) and (b) in the proviso to paragraph 1 have been met, or if no third party submits an expression of interest by the specified time limit referred to in paragraph 2, in circumstances where the contracting authority is satisfied that all reasonable steps have been taken to attract competing proposals, the contracting authority and the private initiator may proceed with the award of the PPP project and enter into a PPP contract for this purpose, subject to any direct negotiations permitted by Article 22 and the PPP regulations (and any specific procedure for this situation they may contain, including the need for any further approvals).

**4. Re-Testing Competition.** If the contracting authority is not satisfied that all reasonable steps have been taken to attract competing proposals, it shall be entitled to extend the time period for submitting third party expressions of interest, modify the documentation summarising and describing the proposed PPP as appropriate, and invite further expressions of interest.

**5. Tendering Proceedings.** If any third parties submit expressions of interest by the specified time limit(s) referred to above, the contracting authority shall organise tender proceedings for the PPP project in accordance with this Standard.

**6. Participation of Private Initiator in Tender.** The private initiator shall be invited to participate in any tender proceedings for the PPP project organised by the contracting authority, which may offer the private initiator any appropriate incentive, benefit, or compensation (if any) as may be provided for in the PPP regulations, in consideration of its development and submission of the proposal, including:

(a) Cash compensation (in a pre-agreed amount) for reasonable and documented costs and expenses incurred by it in connection with the development of the unsolicited proposal before the start of the tender proceedings, up to any specified maximum; and/or

(b) [Where applicable, an adjustment to the evaluation score of the private initiator under the tender documentation (in an amount pre-determined before issue of the tender documents)] and/or

(c) [Where applicable, waiver of certain specified bidding requirements].

**7. Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

## Article 22. Direct Negotiations

**1. Exceptions to Tendering Procedures.** The contracting authority may enter into a PPP contract with the private partner without conducting a competitive tendering process in accordance with this Standard (fully or at all, as the case may be), on the basis of direct negotiations between them, in and only in the following exceptional circumstances:

(a) [Where only a single bidder has pre-qualified and/or submitted a compliant bid in a tender process organised under Article 19];

(b) Where paragraph 3 of Article 21 so permits;

(c) [when there is an urgent need for ensuring continuity in the provision of the service and engaging in the competitive tendering procedures set forth in this Chapter would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part];

(d) Where the use of the competitive tendering procedures set forth in this Standard is not appropriate for the protection of the essential security interests of the state; or

(e) Where it has been clearly established to the proper satisfaction and confirmed by the contracting authority (and any competent body authorized by the PPP regulations for this purpose), following presentation of a thorough report to that effect by an independent expert, that there is only one source capable of implementing the PPP project as the private partner (such as in the case of indispensable patented technology or unique intellectual property, trade secrets or know-how, or other exclusive rights owned or possessed by such source), such that a competitive tender would not be feasible.

**2. Procedures Applicable to Direct Negotiation.** The detailed procedures, requirements, and conditions applicable to any such direct negotiations, including in the case of unsolicited proposals under Article 21, shall be specified in the PPP regulations, including in relation to any approvals required for the use of the same, the monitoring by and reporting of their progress and the terms and efficacy of any PPP project implemented as a result.

**3. Further Steps.** Where a PPP contract is negotiated on the basis of such direct negotiations, the contracting authority shall (except where a closed tender is necessarily required):

(a) Cause a notice of its intention to commence negotiations in respect of a PPP contract to be published in accordance with the PPP regulations.

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

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

**4. Publication and Disclosure of Contract.** Each PPP contract entered into pursuant to this Article shall be subject to the publication and public disclosure provisions of Article 20.

## Article 23. Review and Challenge Procedures

**1. Remedies for Public Authority Breach.** Any bidder or potential private partner that claims it has suffered or may suffer loss or injury as a result of any alleged breach or non-compliance of a decision or action of the contracting authority or other competent body of or with the requirements of this Standard, the PPP regulations or any other relevant Applicable law, in connection with the selection, preparation, appraisal, procurement or implementation of a PPP project, may challenge the decision or action concerned and pursue any available remedies in accordance with the relevant review and appeal procedures provided by this Standard or otherwise under Applicable law. The PPP regulations may provide specifically for such procedures.

**2. Grievance Procedures to provide for Effective Challenge.** Any such procedures specifically provided by the PPP regulations shall aim to ensure (inter alia) that any such decision or action can be effectively challenged and reviewed without delay and, if possible, before it is carried into effect in relation to the relevant PPP, and that powers to take appropriate interim or interlocutory measures and steps are accordingly available, with a view to correcting the alleged breach or non-compliance and mitigating the loss or injury concerned at the earliest possible stage. Such measures and steps may (subject to their terms) include the power to open up, review, revise and/or annul any decision, certificate, approval, document, order or resolution made or given hereunder, and/or to suspend or cancel any procedure or course of action being followed under this Standard. Such procedures may also (subject as aforesaid) include the power to award compensation or damages to the person suffering loss or injury and even to cancel or set aside a PPP project altogether in appropriate circumstances specified therein.

**3. Other Procedures to allow for Interim Measures.** The PPP regulations shall aim to ensure that the detailed procedures drawn up under this Standard, shall provide for sufficient time, following the taking of key decisions or the issue of key approvals or resolutions thereunder, to allow for the interim or interlocutory measures to be taken.

## CHAPTER V. PPP Contracts

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*A private partner's obligation to develop, finance, construct, rehabilitate, and/or maintain public infrastructure and/or deliver public services in a PPP project calls for a number of special rights and obligations not usually applicable to many other types of contracts between public and private sectors. As a result, PPP contracts often contain contractual and legal conditions designed to reflect their special circumstances and facilitate their success and this Chapter should be read in conjunction with Article 32, which contains special provisions addressing the delivery of public services in PPPs, such as one can find typically in Concessions.*

### Article 24. Main Terms and Conditions of PPP Contracts

**1. Contract Terms as agreed by the Parties.** PPP contracts shall contain such terms, consistent with the implementation resolution and tender documents for the relevant PPP, as the parties to them may deem appropriate and agree between them, or as may otherwise be prescribed by law (expressly or by implication), including terms relating to the following:

- (i) Recitals identifying the key premises upon which the parties are entering into the PPP contract.
- (ii) The parties to the PPP contract.
- (iii) The subject matter of the PPP contract, including the nature and scope of works to be performed and services to be supplied and the public infrastructure and/or the public services to which it relates.
- (iv) The (relevant) technical and economic characteristics and requirements of the public infrastructure comprised in the PPP project.
- (v) The specific rights and obligations of the parties in relation to the PPP project's implementation, including the nature and extent of exclusivity, if any, of the private partner's rights.
- (vi) Identification of the applicable contract documents, including an order of precedence where needed.
- (vii) Any conditions precedent to the parties' rights and obligations (in whole or part).
- (viii) The duration of the PPP contract and any mechanism for extending it (subject to Article 8).
- (ix) Applicable performance levels, volumes and/or standards for the works, good and/or services to be provided by the private partner, including KPIs and where applicable guarantees and any obligations of the private partner to modify public service levels to meet actual demand and ensure their continuity and provision under essentially the same conditions for all users.

- (x) The rights of the contracting authority to monitor the project and ensure that the project is being properly operated and/or that the services are being delivered to the stated requirements.
- (xi) Applicable performance penalties and other remedies payable by the private partner for failing to meet the requisite performance levels, volumes and/or standards.
- (xii) Where applicable, the private partner's rights (if any) to charge third parties (including end users) for its works, goods and/or services, any conditions applicable thereto (such as the amounts and methods of payment), any mechanisms for revising or modalities for varying them, and provision for any public subsidy where applicable.
- (xiii) Any payments (if any) to be made to the private partner by the contracting authority and/or any other public authority for its works, goods and/or services (such as availability payments, "shadow tolls", output-based payments, other types of performance-based payment, off-take payments or otherwise), the methods and formulae for calculating them, any other conditions applicable thereto, any mechanisms for revising or modalities for varying them, and any relevant cost breakdowns and the applicable payment procedures;
- (xiv) Any payments to be made by the private partner to the contracting authority (or the Government) for the PPP project (whether lump sum, regular, periodic or otherwise), including PPP fees and (where applicable) revenue sharing, and/or its obligations to collect tariffs on behalf of the Government.
- (xv) Any requirements relating to the incorporation of the private partner (including a special-purpose vehicle formed in accordance with this Standard) and its corporate structure, requisite parties, and capitalisation, and to subsequent changes to them.
- (xvi) Right of the contracting authority to review and approve certain contracts to be entered into by the private partner, or aspects therefor, such as contracts between the private partner and its major contractors and/or shareholders and/or affiliates.
- (xvii) The nature of and responsibility for funding and/or financing the PPP project (whether by means of public support, private finance, debt, equity and/or other sources).
- (xviii) Responsibility for obtaining relevant licenses, permits and consents from other public authorities and/or assisting with the processes involved.
- (xix) Coordination of activities comprised in the PPP project with other public authorities.
- (xx) Procedures for regular interfacing and co-operation between the parties, with a view to promoting collaboration and the amicable resolution of potential differences and disputes.
- (xxi) Requirements for regular interfacing and consultation with project stakeholders, including those impacted by or making use of the project.
- (xxii) Applicable design and construction (or reconstruction/ rehabilitation) obligations, requirements, and procedures (including where applicable procedures for the review and/or approval of plans and designs, resolving issues, testing and final inspection, approval and acceptance of the facility, and any requirements for the expansion or extension of an existing facility).

- (xxiii) Applicable operational and maintenance obligations, requirements, and procedures.
- (xxiv) Time periods for performance of specific obligations (and any mechanisms for extending them).
- (xxv) Procedures for determining or certifying completion of specific obligations.
- (xxvi) Identification of the respective physical assets and/or real property rights including responsibilities for acquisition, transfer, use and maintenance of the same for the PPP project and access to it, including any easements.
- (xxvii) Responsibilities for protecting and securing the PPP project and the site.
- (xxviii) The nature and allocation of property rights and interests relating to the PPP project, the site and the assets it comprises (including any assets which the private partner may be allowed to own outright or indefinitely).
- (xxix) The nature of any supporting infrastructure, transport linkages and/or utility supplies, and responsibility for their provisions and maintenance.
- (xxx) Development and use of facilities ancillary or incidental to the PPP project and any revenues generated from them.
- (xxxi) Employment and labour-related (including “local content”) requirements.
- (xxxii) Requirements to comply with Applicable laws.
- (xxxiii) The monitoring, review, inspection and approval rights and powers of the contracting authority throughout the term of the PPP contract.
- (xxxiv) Information-provisions and the extent of the private partner’s obligation to provide the contracting authority and/or other competent body with reports and other information on the PPP project including any applicable procedures.
- (xxxv) Obligations of each of the parties to engage with stakeholders and address their legitimate grievances through appropriate grievance mechanisms.
- (xxxvi) Sub-contracting and the private partner’s responsibility and liability for its sub-contractors.
- (xxxvii) Remedies available in the event of default by either party, including any “step-in rights” (as detailed in Article 29) granted to the contracting authority.
- (xxxviii) Any “step-in rights” (defined as aforesaid) granted to the private partner’s lenders.
- (xxxix) The private partner’s rights to grant financial security interests in and over its PPP-related assets and rights.
- (xl) Ownership and use of intellectual property.
- (xli) Transfer of assets and ownership and any provisions relating to their re-transfer as appropriate at the end of the contract term.

- (xlii) The rights and obligations of the parties with respect to confidential information and the disclosure of project information.
- (xliii) Mechanisms and procedures for exempting the parties from liability and/or providing appropriate protection and/or compensation (including by modifying the PPP contract) to allow for the impact of events beyond the control of the affected party, such as force majeure, change in law and other exceptional events.
- (xliv) Any variation (and related cost adjustment or recovery) mechanisms and procedures for making of other amendments to the PPP contract.
- (xlv) Termination of the agreement, including grounds for termination, procedures, the effect of lender step-in rights, and provision for any compensation payments.
- (xlvi) Appropriate steps to be taken with a view to minimizing the adverse impact of any early termination on the continuity of public service provision in connection with the PPP project.
- (xlvii) Responsibilities relating to expiry of the term, including any hand-over of the PPP project assets (except where the private partner owns them outright) and related training and transfer obligations, and where appropriate decommissioning and associated financing responsibilities.
- (xlviii) Insurance requirements (including if relevant insurance relating to climate-change events).
- (xlix) Environmental and social obligations, including any specific requirements relating to the SDGs and the Guiding Principles, together with obligations to manage, monitor and report on relevant impacts and to implement corrective actions as necessary throughout the life of the project.
- (l) Governing law and dispute-resolution and/or avoidance/settlement mechanisms, including any arbitration provisions and procedures.
  - (li) Liability and indemnities.
  - (lii) Waivers of sovereign immunity.
  - (liii) Representations and warranties.
  - (liv) Such other terms as the parties may agree.

**2. Available Contract Structures.** The parties to a PPP contract shall be entitled to agree on such contractual and commercial forms and structures as seem to them most appropriate for the PPP project concerned, and which they consider to be best suited to give effect to its principal characteristics and features, including any which are known and used as a matter of recognized international best practice.



## Article 25. Amendment and Termination of PPP Contracts

**1. Termination of Contract.** The PPP contract shall terminate upon the expiry of its term (subject to any provisions expressed to survive termination). An early termination may occur where the agreement so permits and in accordance with Applicable law.

**2. Amendments and Termination by Agreement.** The parties may amend or vary any terms of the PPP contract or terminate it by mutual consent at any time, but subject always to its provisions, the terms of any direct agreement and any conditions or restrictions under Applicable law or the PPP regulations, including as to any further consents or authorisations required.

(a) *[Alternative 1: In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would materially alter any of the [fundamental or essential elements or aspects] of the PPP project or its terms and conditions, and which played a significant part in either its appraisal and approval under Article 12 and/or the decision to award the project to the private partner pursuant to any competitive tendering process held under this Standard, shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. Such approval or endorsement may be subject to further specific conditions (including in certain cases even the re-tendering of the PPP contract). The basis on which any such competent body may give or withhold its approval or endorsement, and specify further conditions, shall be set out or reflected in the PPP regulations.]*

(b) *[Alternative 2: In particular, any amendment or modification (other than one already provided for in clear and precise terms in the contract) which would render the contract substantially different in character from the one initially concluded shall require the approval or endorsement of the competent body designated for this purpose (if any) herein or in the PPP regulations before such amendment or modification becomes effective. An amendment or modification shall be deemed to be substantial where it meets one or more of the following conditions:*

- (i.) The total value of the remuneration of the private partner resulting from the amendment or modification would exceed [ ] per cent of the total value of all remuneration which the private partner is expected and entitled to receive from the PPP project over its term, assessed on a comparable, present value basis. Where several successive amendments or modifications are made, such value shall be assessed on the basis of the net cumulative value of the successive modifications, over a period of [ ] *[months/years]*.
- (ii.) The amendment or modification shall not introduce conditions which, had they been part of the initial contract award procedure for the PPP project, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure.
- (iii.) The modification extends the scope of the works to be carried out and/or services to be supplied by the private partner under the contract by more than [ ] per cent.
- (iv.) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under this Standard].

**3. Unilateral Termination.** Where it so provides, the PPP contract may also be terminated unilaterally, by written notice from one party to the other, upon the occurrence of certain specified events (such as material unremedied breach of contract, insolvency, certain types of change in law or prolonged *force majeure*) and subject to the satisfaction of any relevant specified conditions specified in the agreement, such as the lapse of certain time periods, compliance with applicable procedures or, where Applicable law so requires, the decision of a competent court or tribunal.

**4. Termination Compensation.** Where the PPP contract so provides, either party shall be entitled to compensation from the other upon its early termination for any reason, in an amount and on a basis calculated in accordance with its terms and Applicable law. Due consideration shall be given by the parties concluding a PPP contract to the principles upon which any such compensation should be calculated, which may include or take account of (by way of illustration and without any double counting) any of the following:

(a) The fair, and where applicable non-amortized, value of any assets transferred to the contracting authority.

(b) Appropriate compensation for the value of equity investments in the PPP project and/or the returns expected by equity investors over the term of the agreement.

(c) Amounts necessary to discharge outstanding debt obligations at the time of termination.

(d) Compensation for costs and losses suffered by either party as a result of early termination, including lost profits.

(e) The amount of any outstanding liabilities of either party at the time of its termination.

The parties to the PPP contract shall be entitled to agree such terms for the payment of such compensation as seem to them most appropriate in all the circumstances, and which are consistent with Applicable law and any relevant constraints it may impose, such as the need to avoid unjust or undue enrichment or any disproportionate penalties for breach of contract.

**5. Other Termination Steps.** The PPP contract may provide, as appropriate, for any of the following upon or following its termination or expiry:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority.

(b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority.

(c) The transfer of technology required for the operation and maintenance of the PPP project.

(d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the PPP project.

(e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the PPP project to the contracting authority or to a successor private partner.

(f) Mechanisms and procedures for the decommissioning of the PPP project, including the preparation of a decommissioning plan, the parties' respective obligations for carrying it out and their financial obligations in that respect.

## Article 26. Property and Related Matters

- 1. Provision of Necessary Property.** The contracting authority shall be responsible for ensuring the effective provision to the private partner of any and all existing land, buildings, facilities, structures, parcels or plots of land, easements, rights of access and egress, and all other real property-related assets, which are needed by it for the purpose of implementing the PPP project (whether or not owned or controlled by the contracting authority), in accordance with the requirements of the PPP contract, except where such assets have already been acquired by the private partner or the PPP contract provides otherwise.
- 2. Rights of Access.** The contracting authority shall also make available to the private partner, or, as appropriate, assist it to enjoy the right to enter upon, transit through, do work or fix installations upon property of third parties, as appropriate and required for the purpose of implementing the PPP project in accordance with Applicable law.
- 3. Transfer of Contracting Authority Property.** The contracting authority shall be entitled to transfer to the private partner the use and occupation (with or without ownership) of any available real property in its possession and/or under its control or operational management and which it is not precluded by law from transferring, including public infrastructure and any related land, buildings or similar property, which is needed for the purposes of the PPP project, in accordance with the terms of the PPP contract and any related documents.
- 4. Third Party Property.** Where any property or assets referred to above are in the ownership or possession of third parties, the contracting authority shall (or shall procure that any other relevant public authority shall) either:

  - (a) Acquire or obtain the same by agreement with the relevant third parties;
  - (b) Arrange for their compulsory acquisition or alienation in accordance with Applicable law (and subject always to the requirements thereof, including as to appropriate planning, consultation, compensation, relocation, and monitoring duties); and/or
  - (c) Otherwise acquire or procure such other legal rights over and to such assets in accordance with Applicable law as may be necessary for the purposes of the PPP project and the discharge of its responsibilities under this Article.
- 5. Grant of Legal Interests and Rights.** The parties to the PPP contract shall be entitled to grant each other such legal interests and rights, consistent with Applicable law and the terms of the PPP contract, in or related to any property the subject matter of the PPP project, as may be necessary to implement the PPP project. Such interests and rights may include (for example) outright ownership, leases, sub-leases, licenses, easements, rights of use and such other rights and interests as the parties may agree. All such rights and interests shall be provided or allowed for as appropriate under the terms of the PPP contract and/or any related agreements.
- 6. “Back-to-Back” Interests and Rights.** The private partner shall be entitled to grant third parties equivalent or similar interests and rights in or related to any property to in this Article to those granted to it hereunder (including sub-contracts, sub-leases, sub-licenses, etc.) as may be necessary to implement the PPP project and permitted by the terms of the PPP contract and Applicable law.

**7. Identification of Assets.** The PPP contract may, if appropriate, identify which assets comprised in the PPP project are or shall be public property and which are or shall be the property of the private partner, and provide for the specific treatment thereof during its term or upon its termination or expiry. In particular, it may identify which assets belong in the following categories: (a) assets, if any, that the private partner is required to return or transfer to the contracting authority or another entity; (b) assets, if any, that the contracting authority may, at its option, purchase from the private partner; and (c) assets, if any, that the private partner may retain or dispose of.

## Article 27. Types of Payment under PPP Contracts

**1. Payments to Private Partner: General.** The PPP contract may provide for such payments to be made to and/or levied and retained by the private partner, for the performance of its responsibilities, in such form and amounts and subject to such conditions as may be agreed by the parties to the PPP contract and not prohibited by Applicable law. These may include (as applicable to Concession and/or government-pay PPPs, as the case may be):

(a) Payments from end users, such as tolls, tariffs, fees, and other forms of usage or “direct user” payments, subject to any applicable legal or regulatory restrictions.

(b) Payments from the contracting authority to the private partner, such as availability payments, other performance-based payments, shadow tolls, capacity payments, off-take payments, subsidies, and other forms of regular or periodic payment or “revenue stream”, subject to any applicable legal or regulatory restrictions.

(c) Any other legally available and permissible forms and types of payment.

The PPP contract may provide as appropriate for the methods and formulas for the establishment and adjustment of any such payments.

**2. Payments to contracting authority.** The PPP contract may also provide that the private partner shall make certain payments to the contracting authority, such as PPP fees, rents, royalty payments, revenue, or profit shares, whether lump-sum or periodic, or such other form of payment consistent with Applicable law as may be agreed by the parties to the PPP contract.

**3. Combinations of Payment.** The PPP contract may provide for a combination of any of the types or forms of payment referred to above.

## Article 28. Liability of Parties to the PPP Contract

**1. General.** The parties to the PPP contract shall have such liability for any breach of its provisions and be subject to such remedies (including damages and penalties) as may be provided for under its terms and/ or Applicable law.

**2. Sub-Contracts.** The private partner shall be entitled to sub-contract, sub-lease, or sub-license its rights and obligations under the PPP contract to third parties in accordance with the terms of the contract and shall have such liability for the acts and omissions of any such third parties as may be provided thereunder.

## Article 29. Step-in Rights and Substitution of Parties to the PPP Contract

**1. Step-In Rights Permitted.** The parties to the PPP contract shall be entitled to include provisions in the contract and/or any related documents (including in a “direct agreement” with the lenders) which allow the contracting authority and/or the lenders, in specifically-defined circumstances and subject to Applicable law, temporarily to take over and manage, in whole or part, the operation of the facility and/or provision of the services comprised in the PPP project (“step-in rights”) during the term of the PPP contract, to ensure their continued operation and/or provision, and the effective functioning of the PPP project, subject to the agreed conditions and procedures. Such conditions and procedures may (inter alia) require the parties to take all reasonable care to exercise any step-in rights in such a way as to avoid or minimise any material adverse impact on the provision of any relevant public services to end users or their use of any relevant public infrastructure.

**2. Lenders’ Associated Rights.** It is acknowledged that the lenders’ step-in rights under their direct agreement may include:

(a) The right to prevent any threatened termination of the PPP contract by the contracting authority from proceeding for specified periods of time and subject to specified conditions;

(b) The right to substitute the private partner, in whole or part, temporarily with another legal person, who shall be entitled to exercise the rights and obliged to perform the duties of the private partner under the PPP contract for a period of time, without transferring the PPP contract to another party;

(c) The right to replace the private partner altogether with another private partner on behalf of the lenders for the duration of the PPP contract term, and to transfer the PPP contract (and all the rights and obligations thereunder) to it; and/or

(d) The right to be paid termination compensation payments directly from the contracting authority in satisfaction of amounts owing to them in relation to the PPP project.

**3. No Further Tender.** It shall not be necessary for the contracting authority to hold any further public tender where any such step-in or substitution rights are exercised, provided that the relevant requirements and procedures are complied with.

## CHAPTER VI. Support, Protections and Guarantees

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### Article 30. Protection of Parties' Interests under the PPP Contract: Miscellaneous

**1. Exclusivity.** The contracting authority may grant the private partner exclusive rights to perform the activities specified in the PPP contract (subject always to Applicable law), in order to strengthen the technical, financial, and/or economic viability of the PPP project and facilitate the achievement of its objectives, including the public benefits envisaged for it.

**2. Licences and Permits.** The private partner shall have primary responsibility for obtaining and maintaining the necessary licences and permits for the PPP relating to its own activities, in accordance with Applicable law. The contracting authority shall provide all appropriate assistance to the private partner in connection therewith, including assistance with coordinating and facilitating their application and grant, and shall obtain or provide any relevant licences or permits in accordance with their terms for which it is itself responsible.

**3. No Undue Interference.** The contracting authority shall not take any steps or measures which would have the effect of unduly interfering with, obstructing or prejudicing the private partner's freedom to control and manage the assets and activities comprised in the PPP project and to exercise its rights and perform its obligations thereunder, including its rights to receive and enjoy the revenues and returns on investment properly derived therefrom, save only as permitted by the express terms of the PPP contract and/or Applicable law.

**4. Adequate Returns from Payments.** The parties to the PPP contract shall be entitled to agree on and include such payment terms, and such mechanisms for revising and adjusting them from time to time, as can be reasonably expected to provide adequate compensation and returns to the private partner (and its investors and lenders) for its (and their) costs, expenses, investments and commitments in connection with the implementation of the PPP project, based upon the efficient performance of the private partner in accordance with the contract's terms.

**5. Exceptional Events.** PPP contract may also contain such provisions as the parties thereto may agree identifying or listing certain types of "special event", including changes in law, *force majeure*, or other exceptional events, which may trigger certain consequences under the contract designed to protect the party affected by such event and compensate it for the costs or losses sustained as a result, including financial or economic costs or losses, such as:

(a) Relief from liability of a party prevented from performing its obligations under the agreement.

- (b) Amendments to the terms of the PPP contract, including (by way of illustration) amendments changing the scope of work, the time for performance, applicable standards or the contract's duration.
- (c) Adjustments to charging and payment rates, amounts, and levels.
- (d) Obligations to provide financial compensation.
- (e) Unilateral rights of early termination of the PPP contract and the payment of related compensation.

**6. Essential Shareholders.** Except as otherwise provided in the PPP contract (but subject always to the PPP regulations), a controlling interest in the private partner or the interest of a shareholder whose participation therein is reasonably deemed to be essential for the successful implementation of the PPP project, may not be transferred to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which the consent and approval of the contracting authority may be given.

## Article 31. Government and Public Support for PPPs

**1. General and Specific Forms of Support.** The contracting authority and/or the Government shall be entitled to provide, contribute, or make available to or for the benefit of any PPP such forms and means of public support, assets and/or commercial or financial commitments, as may either be generally permitted or available under Applicable law and/or as the PPP regulations may specifically provide for from time to time, such as:

- (a) Any of the forms of payment provided for in this Standard.
- (b) Construction and/or operational grants.
- (c) Subsidies.
- (d) Contributions of physical assets and property.
- (e) Guarantees and incentives, including guarantees of PPP revenues, whether from end users, off-takers or otherwise.
- (f) Guarantees of minimum quantities of off-take or consumption by the contracting authority.
- (g) State or municipal financial guarantees.
- (h) Loans and other forms of funding or investment.
- (i) Compensation or direct responsibility for certain types of costs and risks.
- (j) Tax and customs benefits and exemptions.
- (k) Other guarantees and/or indemnities and/or incentives.

**2. Support to be Compliant.** Any such support, assets and/or commitments must be consistent with the appraisal and approval criteria applied under Article 12, the implementation resolution, and the tender documents for the PPP project for which they are to be used. The terms and conditions applicable to any such support, assets and/or commitments shall be set out in the PPP contract (and/or in any related agreement).

## Article 32. Protection of Public Service Provision and Contract Equilibrium

*A PPP shall be based on a series of contractual clauses and underlying legal requirements as identified in Article 24, however, this Article contains additional provisions that, if applicable, are designed to maintain the integrity of the public service in PPPs and the fair equilibrium between the respective rights and obligations of the parties under the PPP contract throughout the life of the project.*

### 1. Conditions for the operation of PPPs.

(a) Equality of treatment for the users, continuity of the public service, and-if justified by the public interest-the adaptability of the public service to the needs of the project and users over time may be provided for as appropriate in the contract. More particularly:

- (i.) **Equality of treatment.** All users of the service in equivalent circumstances should be offered the same service on the same basis and for the same price without discrimination.
- (ii.) **Continuity.** The private partner should ensure the continuous delivery of the public service in accordance with the applicable performance parameters, save only where exceptional circumstances specified in the contract (such as *force majeure*) permit otherwise. A failure to do so may give rise to contractual and/or statutory remedies, including a right of the contracting authority temporarily to step in and take over the operation of the facility in order to ensure such delivery.
- (iii.) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political, and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate relief and/or compensation. These events may include certain changes in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of *force majeure*, as the contract may provide.
- (iv.) **Adaptability.** The private partner may be given certain obligations in the contract to change and adapt the public services as necessary in response to changing public needs during the term of the project, and/or to make proposals for the same to the contracting authority for its consideration. The terms of the contract may entitle the contracting authority, when public interest justifies it, to impose such changes and adaptations unilaterally, but subject to the economic equilibrium safeguards and mechanisms and other relevant conditions set out in the contract's terms (such as extensions of deadlines and/or increases in tariffs) and/or otherwise provided by Applicable law.



**(b) General Economic and Financial Provisions and Tariffs in Concessions.** The Project's economic and financial assumptions, and its investment and service provision requirements, as reflected in the PPP contract, should be designed in such a way as to make the PPP project practically, economically, and financially viable (including an appropriate return for the private partner). More particularly:

- (i.) **Tariffs and Charges.** The PPP contract should include principles and mechanisms for setting, calculating, and/or adjusting tariffs and charges payable under the contract so as to enable a reasonably efficient private partner to perform its obligations and deliver the public services over the life of the contract.
- (ii.) **Monitoring and restoring contractual equilibrium.** Unexpected changes in economic, political and/or financial circumstances which adversely impact the economic and financial viability of the Project (subject to any specified thresholds) may be addressed through contractual mechanisms which allow the parties to restore the economic and financial viability of the Project and provide for appropriate compensation. These events may include certain change in law, changes in the tax and/or customs regime, unforeseen economic circumstances that cause hardship, and/or events of force majeure, as the contract may provide.

**(c) Maintenance programmes.** The PPP project contract may include a maintenance and monitoring programme with respect to the delivery and operation of the public service and associated assets, subject to any requisite contracting authority approval. This may require the private partner to renovate, refurbish, and/or replace the relevant infrastructure on a multiyear basis with regular programme up-dates.

**(d) Cooperation.** The parties should, based inter alia on the common objective of satisfying the end users of the service, meet on a regular basis and in a structured manner to monitor the implementation of the contract and the project's practical, commercial and financial performance.

**(e) Reversion of the Assets.** In order to ensure the continuity of public services to the requisite standard on a hand-over of the PPP project to the contracting authority, whether at the end of its term or before, a PPP contract-especially one relating to a service-provision Concession-may need to contain specific provisions relating to:

- (i.) **Asset Transfer.** The identification of all assets to be transferred to the contracting authority on a termination or expiry of the contract, including fixed assets and infrastructure, movable assets, inventory, know-how, IP, supplies and equipment necessary for the continued delivery of the public service, and the condition in which such assets must be in (typically good operating condition, free of defects and of any liens, encumbrances, or other security). The transfer and/or training of staff may also need to be provided for. The contract may also distinguish between assets to be transferred without compensation and others which the contracting authority has an option to purchase from the private partner.
- (ii.) **Early Termination.** These provisions may also apply on an early termination of the contract before the expiry of its term, including where the contracting authority has a right of "public interest" termination, exercisable without fault on the part of the private partner.

## Article 33. Protection of Lenders' and Investors' Rights and Interest

- 1. General.** The PPP contract and/or any direct agreement may, for the avoidance of doubt, provide for such protections for and the rights and powers of the private partner's lenders and investors as the parties thereto may agree, consistent with Applicable law, as may be necessary and appropriate to ensure the successful financing of the PPP project.
- 2. Direct Agreements Permitted.** Such protections, rights and powers may (*inter alia*) set out the detailed procedures and conditions applicable to the exercise of any step-in rights and rights of substitution and/or replacement of the private partner (in accordance with Article 29), together with any other specific entitlements of the lenders permitted thereby (such as direct payment of termination compensation or insurance proceeds).
- 3. Permitted Security.** Subject to any restrictions that may be contained in the PPP contract, the private partner may grant or create any form of security interest over any of its assets, rights and interests comprised in or related to the PPP project, which are available under Applicable law, as may be required to secure any financing needed for the PPP project. These may include (by way of illustration) property mortgages, security over movable and immovable property and over tangible and intangible assets, enterprise mortgages, fixed and floating charges, assignments, pledges of bank accounts, pledges of the proceeds of the PPP project or of receivables owed to the private partner, and other available forms of security. No such security may be created over public property, or any other property, asset or rights needed for the provision of a public service where and to the extent that such security is prohibited by Applicable law.
- 4. Shareholder Security.** The private partner's shareholders and other owners may grant or create any form of security interest over their shares or ownership interests in the private partner that may be available under Applicable law.
- 5. No Replacement of Private Partner without Consent.** Save as otherwise provided in paragraphs 3 and 4 above and in Article 29, the rights and obligations of the private partner under the PPP contract may not (subject to its terms) be assigned and transferred to any third party in place of the private partner without the contracting authority's consent. The PPP contract shall set forth the conditions under which such consent and approval may be given, including valid acceptance by the relevant third party of all obligations transferred to it, their enforceability against it and evidence of its technical, managerial and financial capability to perform them. Provided always that no such restriction shall prevent the private partner from sub-contracting or sub-leasing its rights and obligations under the PPP contract in accordance with its terms.

## Article 34. Protection of End Users and the General Public

- 1. Detailed PPP Procedures: End Users and the General Public.** Any detailed procedures specified in the PPP regulations relating to the selection, preparation, appraisal, procurement and implementation of PPPs shall take due and reasonable account as appropriate of the legitimate needs and best interests of members of the general public and end users of the public services to which the relevant PPPs relate and who stand to be affected by the same.

**2. Grievance Procedures.** Such procedures shall provide as appropriate for the adoption of suitable mechanisms for lodging formal objections or other complaints or grievances by members of the general public and end users to or about any aspect of such implementation by which they may be materially adversely affected, including where appropriate a regulatory or parliamentary ombudsman procedure. No such mechanisms shall in any manner limit or prejudice any other rights and remedies available to such members of the general public or end users under Applicable law in relation to any PPP or its selection, preparation, appraisal, procurement or implementation. Any such procedures shall take account as appropriate of such other rights and remedies.

**3. Private Partner's Operational Grievance Mechanism.** Where the PPP project involves the provision by the private partner of services to the public or the operation of infrastructure facilities accessible to the public, the contracting authority shall require the private partner to establish simplified and efficient mechanisms for handling claims submitted by the members of the public receiving the services or using the infrastructure facility, as well as other parties affected by the PPP project. The PPP contract shall provide for any such requirements. The private partner shall maintain accurate and complete records of the operation of any such mechanisms and the claims submitted and handled thereunder.

**4. Rules for Use of Infrastructure Facility.** Where the PPP project involves or relates to the use by third parties or members of the public of an infrastructure facility, the private partner shall have the right to issue and enforce rules governing such use of the facility, which shall be subject to any requisite approvals of the contracting authority or other relevant public authority (such as a regulatory body). The PPP contract may provide for the making of any such rules and their enforcement.

## CHAPTER VII. Governing Law and Dispute Resolution

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*PPP contracts are often long term, complex partnerships for the provision of a public service. PPPs should therefore set out clearly the necessary provisions to maintain the contracted public service for the life of the project but include provisions that allow the parties to resolve differences in how the project is to be delivered. In all cases, such provisions should allow for resolution in accordance with any stated objectives or principles of the project, the contractual documentation, and in the spirit of partnering and dispute avoidance where possible.*

### Article 35. Governing Law

- 1. Governing Law of PPP Contract.** The PPP contract shall, subject to Applicable law, be governed by the system of law chosen by the parties, but subject to a presumption that, save in exceptional circumstances, the law of [host country] shall apply. The law of [host country] shall apply where the PPP contract does not provide otherwise.
- 2. Governing Law of Other Contracts.** Other contracts and documents entered into in relation to the PPP project (including any direct agreement) shall be governed by the systems of law chosen by the parties to them, taking account of any Applicable law requirements.

### Article 36. Dispute Avoidance and Alternative Dispute Resolution

- 1. Dispute Resolution Mechanisms as agreed.** Any differences or disputes arising out of the contracts or documents relating to a PPP project shall be resolved or settled through the mechanisms, processes and procedures agreed by the parties thereto, but subject always to any specific requirements relating thereto under Applicable law.
- 2. Freedom of Choice.** The parties to such contracts and documents may (subject as aforesaid) freely choose the mechanisms, processes, and procedures for resolving such differences or disputes, including mediation, binding or non-binding expert appraisal or determination, national or international commercial arbitration or investment arbitration, and the procedural rules relating to the same.

**3. Partnering.** The parties may agree on a partnering process to promote the long-term development and success of the project, which may include (for example):

- (a) Meetings organized on a regular basis.
- (b) Involvement of personnel with the necessary skills, specialisms, and levels of responsibility for the parties to resolve issues.
- (c) The establishment of any necessary procedures designed to foster a spirit of partnership, based on a consensus of the parties.
- (d) A duty to disclose any potential issues and discuss any actual or potential disputes during partnering meetings before any other dispute resolution steps may be taken.

**4. Dispute Board.** The parties may agree on the establishment of a formal disputes board to promote the long-term development and success of the project, which may (for example) bring in outside experts, hold regular meetings and consider issues in dispute and facilitate their resolution.

**5. Mediation.** The parties may agree on the establishment of a mediation process to promote the long-term development and success of the project, which may include (for example):

- (a) An optional or mandatory mediation process that may be invoked before referring a matter to arbitration.
- (b) One or more senior or other authoritative experts selected by the parties to facilitate the mediation.
- (c) The establishment of any necessary additional procedures by the facilitator(s) to structure the mediation, including the extent of due process to be used in the proceedings.

**6. Arbitration.** The parties may also (but subject always to Applicable law) agree on the use of arbitration, including domestic and/or international arbitration and related mechanisms, for the final determination/resolution of disputes, *inter alia* to enhance the long-term development and success of the project and allay any potential concerns (if any) about other available forms of judicial proceeding, which may include (for example) the following:

- (a) A requirement(s) that disputes first go to a dispute board and/or mediation prior to arbitration.
- (b) Three or more arbitrators selected by the parties to conduct the arbitration.
- (c) The establishment of any necessary additional rules or procedures based on accepted international arbitration standards.

**7. Waiver of Sovereign Immunity.** The contracting authority shall not be entitled to any state or sovereign immunity in relation to any differences or disputes under any such contract or document which it has properly agreed to waive thereunder.

## CHAPTER VIII. Implementation and Monitoring of PPPs

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### Article 37. Monitoring and Reporting on the Implementation of PPPs

- 1. Supervision by Contracting Authority.** Subject to the terms of the relevant PPP contract, the contracting authority shall be entitled to exercise such powers of supervision and monitoring of any PPP as may be necessary to satisfy itself that it is being implemented in accordance with its terms, including by means of regular reports, reasonable access to the site and physical assets comprised in it, access to and copies of any documentation relating to it and independent audits.
- 2. Contracting Authority Reports.** Each contracting authority shall prepare regular reports on the implementation of the PPP projects for which it is responsible, as required by the PPP regulations or otherwise by the Government from time to time, which shall be made available to the Government and copied where required to the PPP Unit [or other applicable Competent Body]. Copies of all such reports shall generally be publicly available.
- 3. Additional Information.** Each contracting authority shall also provide any additional specific information to the Government and/or the PPP Unit [or other applicable Competent Body] as it may reasonably require from time to time in relation to the implementation of any PPPs for which such contracting authority is responsible.
- 4. Contracting Authority Records.** Each contracting authority shall maintain accurate and complete records in reasonable detail of the procedures followed, decisions made, and conclusions reached by it in connection with the identification, selection, preparation, procurement, and implementation of any PPP for which it is responsible.

### Article 38. PPP Database and Register

- 1. PPP System Database.** The Government or the PPP Unit shall maintain a detailed database covering all PPPs implemented in [*host country*] [after the date of this Standard], containing such information as may be required by the PPP regulations. The database shall be designed to provide a reasonably comprehensive, up-to-date, and clear compendium of material information about the PPP projects that have been or are being implemented in [*host country*] at any one time.
- 2. Database Publicly Available.** The PPP database shall be publicly available, subject to any applicable confidentiality or non-disclosure restrictions permitted by the PPP regulations or Applicable law.

## CHAPTER IX. Transitional and Final Provisions

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### Article 39. Entry into Force

- 1. Effective Date.** This Standard shall enter into force on [ ] but shall not (save to the extent otherwise provided herein, including under paragraph 2 or in the PPP regulations) apply to any PPPs or equivalent or similar projects implemented, or tenders or similar procedures held and substantially completed for their award, or agreements or binding commitments entered into by the contracting authority in relation to them, before that date.
- 2. Monitoring Antecedent Projects.** The Government shall be entitled to require that any existing PPPs (or equivalent or similar projects) implemented before the date of entry into force of this Standard become subject to the monitoring and reporting requirements provided for in Article 37 (but without limiting any rights of cost recovery that the parties to any relevant agreements may have as a result of meeting any such requirements).

### Article 40. Legislative Acts to be Invalidated upon Entry into Force of this Standard

- 1. Invalidation.** The following legislative Acts shall be invalidated upon entry into force of this Standard: *[specify]*
- 2. Conflict with Antecedent Laws.** In the event of any conflict or inconsistency between this Standard and any extant prior laws relating to or applying to PPPs in *[host country]*, the provisions of this Standard shall prevail (unless specifically provided otherwise).

### Article 41. Consequential Revisions to Existing Legislation

- 1. Disapplication of Specific Laws.** The provisions of the following laws shall not apply to PPPs awarded or implemented after the date of entry into force of this Standard pursuant to Article 39 above, subject to the additional qualifications specified below:
- 2. [Alternative 1] Specific Amendments to Existing Laws.** The following amendments shall be made or be deemed to have been made to the following existing laws and legislative acts in order to give effect to the provisions of this Standard: *[specify]*

**3.** [Alternative 2] **Deadline for Consequential Revisions.** The Government shall, within a period of [ ] months from the date of entry into force of this Standard, amend, modify or repeal any other Applicable laws relating to or affecting PPPs as necessary to bring the same into conformity with this Standard.

[ENACTMENT FORMALITIES TO BE SET OUT BELOW]

End of the Standard



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# ACCOMPANYING GUIDE TO THE STANDARD ON PUBLIC-PRIVATE PARTNERSHIPS / CONCESSION LEGAL FRAMEWORK IN SUPPORT OF THE SUSTAINABLE DEVELOPMENT GOALS<sup>7</sup>

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## Introduction and commentary

### I. Preface

This Accompanying Guide (“Guide”) is a supporting commentary of the UNECE Standard on Public-Private Partnerships / Concession Legal Framework in support of the Sustainable Development Goals (“Standard”).

It provides additional elucidation of the text of the Standard, written in non-legal language, but does not attempt to address or re-state every provision.

The Standard proposes rules and procedures to resolve the most common issues a government will face with respect to designing a PPP/Concession Framework (hereinafter “PPP Framework”) and with a view to promoting a deeper understanding of the structures and issues involved and to assist governments seeking to create or develop a PPP Framework, especially those doing so for the first time. The development of the Standard relied upon empirical evidence and a wide-ranging corpus of guidance documents, studies and standards on the subject of PPPs. Further information on the sources and references used can be found on the UNECE website.

Governments seeking to launch or expand PPP systems often decide to put a PPP Framework in place. The real need for such a framework depends on the legal system and the type of PPP/Concession under consideration. For instance, Napoleonic civil law countries have a long tradition of Concessions (projects where the users pay for the respective services) and have developed related authoritative and equitable case law for such public contracts dating back over a century. Some jurisdictions have developed pipelines of Concession projects in the infrastructure/public service sector, often without a law for PPPs. Thus, needs will differ from country to country and from civil law systems to common law systems. In common law countries, Concession laws (for the same user pay model) can bring additional benefits, since this PPP delivery method may not have as long a history as other contracting methods and less developed case law. In contrast, some jurisdictions rely on existing procurement, legal and contractual principles which can constitute an adequate framework for projects including the “Non-Concession” models (referred to as Government Pay PPP or Public Payment PPP in the law. (The Standard covers both variants).

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7 The accompanying guide was finalised and endorsed by the Bureau of the UNECE Working Party on Public-Private Partnerships in July 2023.

Many PPP laws have been adopted though by countries around the world in the past few years. Others are now doing so or planning to do so. However, there is still a considerable disparity in the quality and efficiency of those laws. For instance, the definition of PPP in each legal framework is often inconsistent with tested practices and often triggers justified criticism. Moreover, many of these laws do not take into account the true challenges that have arisen in attracting private partners and investment to public infrastructure and service delivery, and especially to projects that aim to satisfy the UN 2030 Agenda, and in particular the “PPPs for the SDGs” principles. Lastly, many PPP/Concession projects end up being aborted before the selection of the bidder, or, if a contract is awarded, end up in distress after a few years. This reinforces the need for new and improved PPP frameworks.

In drawing up a new Standard that can be the basis for a national framework (PPP Framework), an extensive review has been made of existing laws, regulations, case law, and other leading precedents and international best practice in this field.

Moreover, UNCITRAL has recently revised and finalised their own Legislative PPP Guide (with template clauses) on this subject, which has been a leading authoritative text in this field for the past 20 years. The Standard has been developed on both the existing published UNCITRAL clauses and their recent revisions in structuring and wording of provisions, which cover a good deal of the same ground and the Standard is designed to be generally compatible with them. The main UNCITRAL distinction between projects that are structured as “Non-Concession” and those that are “Concession”/PPP and their practical consequences is reflected in the current Standard. Many of the same concepts and much of the same phraseology has been used where possible. The documents are accordingly very similar and intended to be consistent. Any differences between them come down largely to the individual judgment and style of the different authors behind them, and the slightly different approaches taken to their production.

It is also worth noting that there is no single perfect provision for any Standard, especially one designed for use by governments all over the world. There can only be strong suggestions and clear wording of the related provisions based on empirical evidence gathered from a wide array of sources and focused upon issues which are similar amongst countries, sectors and legal systems; (“Gold Standards” as referred to by the G20).

Readers should also be aware that a new vision or paradigm for PPPs was adopted by the UNECE and this new vision plays a prominent role in the Standard. Referred to under the rubric of “PPPs for the SDGs”, it’s a framework conceived specifically with a view to encouraging governments to design and structure their PPPs in ways which are likely to achieve the SDGs, and to stimulate and attract private-sector involvement on this basis. Above all, it aims to prompt governments to focus on the tangible and vital human aspects of PPPs, rather than simply approaching them as economic or financial constructs. It invites them to think hard about the impact of PPPs and their implementation at a social, environmental, ethical, and human rights level, in ways which are fully compatible with the SDGs, and in ways that would ensure that PPPs genuinely advance those objectives; hence the title “PPPs for the SDGs”. The principles behind the concept have been discussed and explained in a paper published by the UNECE in 2019 (ECE/CECI/WP/PPP/2022/6). They aim to ensure that PPPs are accessible, affordable, sustainable and resilient, and that they are implemented in ways which respond to environmental responsibilities, ensure proper stakeholder consultation and involvement, avoid corruption, and help to promote social justice. Hereinafter without any change in substance this Guide will refer to “PPPs for the SDGs” and “PPP/Concession in support of the SDGs” as one and the same.

It should be noted that the PPPs for the SDGs concept has been supported, and its use recommended, by four United Nations Regional Commissions, namely the United Nations Economic Commission for Africa (UNECA), the United Nations Economic and Social Commission for Western Asia (UNESCWA), and

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the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), which in May 2019 announced their decision to collaborate and work together to make PPPs “fit for purpose” for the 2030 Agenda. The Standard has been drawn up specifically with the PPPs for the SDGs objectives in mind and makes them intrinsic to its provisions, many of which have been crafted to give effect to the five core principles of PPPs for the SDGs which are cited in the Preamble. The evaluation methodology recently endorsed by the UNECE member States (PPP and Infrastructure Evaluation and Rating System (PIERS)) which includes inter alia more detail on the scope and application of PPPs for the SDGs to projects, is an important reference document that using governments should look to when implementing the Standard. In fact, some Articles of the Standard contain cross-references to PPPs for the SDGs materials.

The Standard is not, of course, a template piece of legislation which can simply be pulled down and enacted by any country introducing a PPP framework. It is designed to be inclusive and offer guidance for resolving issues common to most PPP Frameworks and that which public officials will encounter. The Standard aims to support the SDGs as well and provide a standardised approach to the design of the clauses that can support the SDGs and, in many cases, could be reproduced in the PPP/Concession regulations of a particular country. Careful thought will always be needed in making use of the Standard since there are different ways for introducing prescriptive or optional rules and approaching laws or regulation of this kind and the various provisions they contain.

Furthermore, any PPP law adopted by a country must be fully compatible with its wider legal system, jurisprudence and legislative traditions, as well as the idiosyncrasies of its PPP system.

The Standard represents the type of PPP framework, which aims to be relatively inclusive and comprehensive in scope, setting out a robust governing structure and fundamentals for a PPP system, the basic elements of PPP projects, and the procedures and regulatory mechanisms that could apply to their planning, preparation, award and implementation. It may not always be technically necessary at a legal level to do all that is proposed in the Standard. Some of the relevant legal concepts and arrangements may already be in place. The country’s existing procurement regime may be adequate for PPP purposes (for instance some procurement systems allow for Design and Build contracts in infrastructure projects which can rise to the level of a PPP) and it may already have a long history of successfully using PPPs. In that case, much shorter, more focused provisions on procurement may be appropriate. The advantage of the approach reflected in the Standard however, and the reason that approach is often taken, is that a new PPP framework can become a comprehensive enabling system, offering clarity and certainty and establishing what is feasible in the PPP context and how individual projects should be approached and implemented. This can work to the advantage of all stakeholders and improve a jurisdiction’s ability to attract the private sector to develop sustainable PPP/Concession projects.

It should also be noted that the Standard is not directed at member countries of the European Union (EU) or accession countries in the process of joining it. The EU already has a wide-ranging body of laws and requirements applicable (directly or indirectly) to PPPs and their procurement. Any EU accession countries (or even Member States) that do seek to draw on its provisions, then, should also think carefully about the need to harmonise their PPP laws with the EU *acquis* and adapt the clauses from the Standard accordingly.

Striking an appropriate balance between rigour and transparency, on the one hand, and flexibility and innovation, on the other, is never easy. However, one important factor which needs to be weighed in the balance, amongst many others, is fighting corruption. Countries concerned about rising levels of corruption may therefore wish to emphasise the former at the expense of the latter. In any event, they should consider strict compliance with the UNECE Standard on a Zero Tolerance Approach to Corruption in PPP Procurement (ECE/CECI/WP/PPP/2023/4) adopted by the UNECE member States.

## II. Textual Commentary

### Preamble

The Preamble of the Standard is designed as a simple introduction to the PPP Framework. It allows the host country to summarise the purpose of a PPP Framework and to capture some of its main policy objectives and priorities in making use of PPPs. It may be more appropriate to do this in a Preamble, which can be written in a less formal manner, than in the more precise and binding legislative-style language of the framework's provisions.<sup>8</sup> The Standard uses a short-form preamble, keeping the key messages brief and simple; however, some countries may prefer to discuss the background justification for PPPs at greater length.

It is also common for governments to put a detailed policy statement in place before a PPP Framework is adopted. If so, the policy statement can set out all the relevant policy priorities and objectives that are thought to be important or relevant, leaving any PPP Framework enacted to set forth the legally binding provisions. Either way, guidance notes or explanatory documents of some kind are likely to be invaluable to all those working under the new PPP Framework.

The Preamble mentions that the Standard is limited to the PPPs defined in its terms, and not to other types of commercial or contractual arrangements between public and private sectors. There may be many of these other arrangements in the relevant jurisdiction which should not be governed by a PPP Framework (such as simple out-sourcing contracts, design and construction contracts under traditional procurements mechanisms, certain types of franchises, consulting contracts, other standard commercial agreements, and perhaps even natural resource concessions. Care needs to be taken to ensure that arrangements which should not be governed by a PPP Framework are not inadvertently caught by the language of a PPP Framework and in ways that may give rise to confusion.

As explained in the Standard, the Preamble also highlights the importance of the "PPPs for the SDGs" values and objectives for PPPs. These are now accorded the highest priority by the UNECE. They are also being promoted by the EBRD through some of the obligatory environmental and social requirements for the projects it is funding, and in the Green Economy Transition ("GET") policy and dialogue it has adopted in its countries of operation. The Preamble proclaims that the Standard enshrines those principles and sets out a summary of them. Various references to them are also embedded in the text of the Standard and many of the Standard's provisions have been crafted with these principles in mind. They are therefore intrinsic to the document and cited in its title. Each host country should carefully consider how and to what extent it wishes to refer to these principles. The hope and expectation of the UNECE, under whose aegis this Standard is being published, is that every member State will adopt and underwrite them fully and wholeheartedly in their PPP frameworks.

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8 A country's jurisprudential traditions will also be important here. It may nevertheless be necessary to set out every "object" and rule in the law itself.

## CHAPTER I. General Provisions

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This Chapter of the Standard deals with the more general aspects of PPPs and the new PPP system that may need to be addressed for the PPP Framework to be understood and applied clearly, such as definitions, the use of regulations and guidelines, preliminary criteria and requirements, the authority to award PPPs, applicable sectors and some of the fundamentals of a PPP contract (such as its parties and term).

### Article 1. Scope of this Standard

This Article of the Standard summarises the scope. Some countries may prefer to leave this largely or even entirely to the Preamble.<sup>9</sup> The authors felt on balance that, notwithstanding the repetition, it was appropriate to make some of the same statements legally binding in an Article, to assist the interpretation and application of a new PPP Framework.

In particular, the Article makes it clear that the Standard applies to all forms of PPP, as defined by its terms, regardless of the labels that may be attached to them. Note that the purpose of this Standard is not to create a unique type, model, or format of PPP, but to bring together in a single reference all the key elements relevant to PPPs.

Some countries distinguish, formally and as a matter of jurisprudence between different types of PPP, in particular between “concession” and “non-concession” PPP models, with the latter being projects that are reliant upon government revenue streams and the former being those supported by direct user charges.<sup>10</sup> This can sometimes lead to the adoption of two different systems dealing respectively with each (as in Serbia, for example, and in some ways France). EU law also makes a formal distinction along these lines. Most countries, however, including common law ones, do not have such a distinction and tend to categorise them all as simply PPPs, and subject them to a uniform single set of statutory provisions and principles. As much as possible, that is the approach taken in the Standard as it allowed for greater simplicity, consistency and comprehensiveness in the document.

The Article, following UNCITRAL, mentions the fundamental general principles underlying its terms, but also includes a reference to the PPPs for the SDGs principles.

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9 The use of “Preambles” and other legislative drafting conventions will vary by jurisdiction; in all circumstances the scope of the law will need to be clear for interpretative purposes.

10 At least these days. Common “business speak” today often reflects this distinction. Historically, however, other factors were at least as important, such as scope and sector. In many countries in the past, the term “concession” was synonymous with “PPP” (or pre-dated it).

## Article 2. Key Terms and Definitions

While the Standard uses some defined terms, it is generally desirable to avoid using too many. This allows for each provision of the PPP Framework to be readily understood on its own terms. Nevertheless, most of the defined terms that are used in the Standard are self-explanatory however a few warrant specific comment and are addressed below:

- **“Applicable law”** is simply a generic term for all of the host country’s domestic laws which may be relevant to PPPs in one way or another. Where those laws give effect to international obligations (e.g. under public international law), those too may need to be taken into account in interpreting the Articles of the Standard. Domestic laws which are particularly relevant to the SDGs and the PPPs for the SDGs principles, such as laws relating to the environment, human rights, health and safety, indigenous peoples and citizens’ rights should be carefully reviewed and addressed as well.
- The expression **“Government”** is intended to be understood widely, as referring to any part of the administrative or executive branches of government legally entitled to exercise powers or perform functions under the PPP Framework. Some of these will arise by virtue of the PPP Framework’s provisions. Others will already be vested with certain authority under the country’s wider legal system (including perhaps its constitution). Therefore, careful thought needs to be given to the inter-relationship between the authority granted under a new PPP Framework and any existing authorities, and any possible conflict between them.

The Standard does not attempt to identify preferred administrative arrangements, so each host country may wish to be more specific about which Government bodies are being referred to in certain Articles of the Standard. If so, the necessary amendments can easily be made. The use of the generic term “competent body” in a number of places in the text allows for this possibility. There can also be uncertainties about the extent to which local or regional bodies are being empowered under the PPP Framework, especially where combinations of different Government bodies may be involved simultaneously in the exercise of certain functions (e.g. multiple contracting authorities under the same project); this, too, may need to be addressed expressly in the host country’s adoption of a PPP Framework.

- **“PPP guidelines”/ “Implementing regulations”** The host country should decide (unless local law requires it) whether it wishes to allow for the promulgation of regulations and/or guidelines to support its PPP Framework. The text assumes that both will be used, with the regulations containing legally binding secondary provisions that would fill in the details of many of the PPP Framework’s Articles, and the guidelines consisting of non-binding materials that facilitate an understanding of the workings of the PPP Framework and regime. Some countries may prefer to allow for only one or the other, or even to combine them in to a looser, joint term (e.g. “PPP enabling framework”).
- **“Public authority”**. Note that this term is not intended to refer simply to contracting authorities. It has a wider scope, designed to take in any public authority whose powers may affect or impact PPPs (including for example their identification, approval, initiation, selection, appraisal, procurement or implementation).
- **“Public infrastructure”**. Host countries should give thought to the breadth and scope of this definition and tailor it to their expectations for the range of PPPs it plans to use. The Standard defines the term very broadly, both to avoid any unintentional restrictions on its scope but also to make the Standard compatible with possible future developments. It includes intangible assets (such as intellectual property) and other types of assets and their operation which may be only indirectly related to infrastructure service provision (such as IT systems).

- **“Value for Money”/ “Value for People”.** The use of this term needs very careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. The definition in the Standard stresses the need for a wide perspective, looking at the value of a PPP in terms of its broader impact on the economy, society, the environment and the government’s finances over its life, and the net (e.g. financial and social) benefits it stands to generate. As such, it is very much a “value for people” test as well as a “value for money” test. The two terms are therefore treated as somewhat interchangeable but host countries should reflect carefully on the meaning they wish to give them and how they will be implemented and measured. The text allows for a detailed measurement methodology to be set out in the Implementing regulations. A narrow definition (e.g. lowest price) is *not* likely to be appropriate.

### Article 3. PPP Implementing Regulations and Guidelines

As explained above, the host country should decide whether it wants (or is legally obliged) to refer formally to both Implementing regulations and guidelines in the PPP Framework. The former will usually be necessary to complete the PPP legal regime, and so are made an obligatory feature of the text. The latter may or may not be, at least at a formal level, and so are mentioned in more permissive language. The text allows the Government to designate one or more “competent bodies” to issue them on its behalf. Allowance is made in paragraph 3 for revisions to each over time and to create the necessary flexibility for the long term. Paragraph 4 makes it clear that when regulations are in place the relevant related provisions of the PPP Framework are controlling but may be construed and interpreted through applicable regulations.

### Article 4. PPP Criteria and Fundamental Requirements

This Article of the Standard seeks to define the essential features and main characteristics of any PPP. It makes it clear that a PPP which complies with them is to be undertaken in accordance with all the PPP Framework’s requirements. This is necessary to create clarity about which type of project properly falls into the PPP category and is subject to the PPP Framework’s provisions and requirements, and which projects do not.

Paragraph 3 sets out the base criteria for judging whether a particular project is indeed a PPP. The tests are cumulative, not alternative, i.e. all of them should be met, and the following should be noted:

- Sub-paragraph (a) reminds officials that PPPs need to be long-term in nature (with a minimum term established in accordance with Article 8 (if included)) and implemented based on a PPP contract that accords with Chapter V.
- Allowance is made in sub-paragraph (b) for a possible minimum or threshold estimated value for PPPs. This option is afforded because some experts believe the complex nature of PPPs and the time and resource necessary to make them work require the project to be of a minimum value in order to attract private sector interest. Host countries may or may not want to do this, however, and if not, the sub-paragraph should be deleted. Also note, because it can be difficult to establish an exact minimum value, and how it should be calculated, the Standard suggests that this will be dealt with in the Implementing regulations, rather than being firmly set out in the main body of the PPP Framework. Placing such a threshold in regulations also allows for the threshold to

be modified over time without having to undertake more burdensome amendments to the overarching Framework.

- Sub-paragraph (c) is designed to allow for an appropriate degree of flexibility in terms of the combination of physical activities which a PPP may comprise. The long-term, risk-exposed nature of these activities should always be kept in mind. A PPP is not the same as a construction contract or simple contract for services. It needs to contain an appropriate element of long-term responsibility for the public infrastructure and/or public services;
- Sub-paragraph (d) highlights the all-important element of risk allocation between the parties throughout the life of the PPP project. There should be a clear element of risk-sharing between the parties throughout the project.
- A PPP usually includes the use of private finance, but, at least in theory, there may be some PPPs that may not. This is allowed for in sub-paragraph (e). Private finance may have to be used, or there may be a clear wish on the part of the Contracting Authority to see it used. However, since the wording acknowledges that it may or not be, the rationale for including the provision is that, if it is, it becomes another one of the cumulative tests confirming that the project is indeed a PPP.

## Article 5. Authority to Award and Enter into PPPs

This Article was included because there is often considerable uncertainty in some jurisdictions about which government body(ies) actually have the legal power and authority to award a PPP. In other jurisdictions, there may be no doubt about who has the power to award a PPP, in which case the Article may be unnecessary. It should be noted that many PPP regimes do not contain such a clause, however if the Article is thought to be necessary or helpful, it may be included in a PPP Framework so long as it is expressed in simple, clear terms, like the text of the Standard.

The Article states that any public authority which already has the right to develop projects involving assets and/or services of the kind comprised in PPPs (as most ministries and many municipalities will usually do), together with the right to enter into commercial contracts with the private sector, shall be deemed to have the right to award and enter into PPPs, except where any specific law or regulation provides otherwise.

The Article also gives the government the specific power (in paragraph 2) to vest, and if needed revoke, the necessary authority in individual bodies over the PPP duration. This is intended to function as a helpful fall-back provision.

## Article 6. Applicable Sectors and Activities for PPPs

This Article of the Standard allows PPPs to be used in any sector engaged in providing a public service.

Paragraph 2 then allows for certain specific sectors or areas to be excluded from the application of the PPP Framework, if the government considers it appropriate and necessary.



One sector which sometimes proves problematic in this context is the natural resource/ extractive industries sector, which is often distinguished and excluded from the scope of PPPs and a PPP Framework, although “concessions” may already have been in use in the sector for many years. This may be because (a) the sector is already subject to well-developed laws and procedures which have been in place for a long period, representing a self-standing and comprehensive body of applicable rules and regulations; and (b) PPPs are essentially about or related to public services and public infrastructure, which some believe extractive industries are deemed not to provide (at least not directly).<sup>11</sup> In that case, some jurisdictions depending on their circumstances may carve out specific sectors and industries from the scope of the new PPP Framework, even though the arrangements in use there may be conceptually very similar to PPPs, and subject to many of the same principles. This is an analysis each host country will need to carry out.

## Article 7. Parties to a PPP Contract

As in most contracts, there will generally be two parties to a PPP contract, e.g. the Contracting Authority and the private partner. However, there may be many stakeholders to the contract on both the public and private sides: Local authorities, other governmental bodies/ministries, lenders, investors, advisors, etc. This Article of the Standard acknowledges, however, that, on the one hand, there may occasionally be more than one public authority participating as Contracting Authority,<sup>12</sup> such as where several municipalities are involved, for example, or a SOE (state-owned enterprise) teams up with a line ministry, whilst, on the other, the private partner will often consist of a consortium of companies which become shareholders in the SPV (special purpose vehicle) company incorporated to fulfil this role under the contract. The two principal parties may also agree to bring in additional third parties to the PPP contract, where the project’s particular circumstances or needs call for it.

## Article 8. PPP Term

This Article of the Standard envisages a statutory minimum term for all PPPs. Host countries should think carefully about what this minimum term should be and how it should be calculated. Not all jurisdictions choose to specify a minimum, but if they wish, the period can be inserted (in years). A term of at least 5 years is likely to make sense, given that PPPs are inherently long-term structures, with increased complexity, and the importance in PPPs of long-term risk-sharing between the parties. In the end, there is no commonly recognised basis for establishing a minimum term, however, if a jurisdiction chooses to set one, the text leaves the details to be set out in the regulations. These details should be consistent with any minimum value (if any) specified under Article 4.

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11 In addition, some projects in this sector may not be able to satisfy the “PPPs for the SDGs” principles.

12 Where this happens, it may still be helpful to give one of these authorities a clear leading role in interfacing with the private partner under the PPP contract, to promote a “one-stop shop” effect.

Attention is paid to the duration of PPP contracts in paragraph 2. No figure is specified in the text, as there is much debate about what an appropriate term should be. Some take the view that very few PPPs need be longer than 25 or 30 years, as it is seen that this should be sufficient to make a project financeable and investible. Others believe that significantly longer periods can make sense and there are indeed examples of them in practice.

The basic principles to be taken into account with respect to setting contract durations are set out in paragraph 2. Host countries should add any further criteria that they regard as fundamental.

Notwithstanding the principles reflected in paragraph 2, PPP contracts usually contain mechanisms which allow their term to be extended in exceptional circumstances.<sup>13</sup> This may occur, for example, where events of *force majeure* seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works. Also, for example, it may be preferable for the Contracting Authority to afford an extension of the term to compensate the private partner for its resulting losses (by allowing it to earn revenues for longer) rather than paying it cash compensation. Paragraph 3 allows for this, together with the possibility of further conditions being specified in the regulations (*inter alia* to prevent the extension mechanism from being abused).

The expiry of the PPP contract should not, of course, affect the private partner's title to any assets comprised in the PPP of which it is entitled to retain ownership.<sup>14</sup> This is made clear by paragraph 4.

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13 These are not discretionary remedies available at the private partner's option. They typically represent objective grounds for modifying the contract in the specified circumstances, in a way which is arbitrable and legally enforceable.

14 As in a BOO (Build-Own-Operate) structure, for example, and even perhaps a BOT (Build-Operate-Transfer).

## CHAPTER II. Institutional Arrangements and Roles

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Well-planned and prepared PPP projects, in accord with national and local infrastructure plans, can play a key role in the development of essential public infrastructure and services. This is sometimes attributed to the belief the private sector can play a pivotal role in designing and operating improved infrastructure along with associated services. In addition, the use of private financing in a PPP can minimise the burden on public debt and help a government avoid over-reliance on international aid, i.e. funds that are oftentimes nevertheless insufficient.

The Standard defines the structure and functionality of institutions that are to be modified or newly established. Moving beyond traditional approaches, these institutions are critical in executing the key stages of planning and development of successful PPP projects.

The preamble specifically defines the four phases that projects typically navigate:

1. An identification phase to determine a candidate project and whether the Contracting Authority is authorised to develop the feasibility studies for the project.
2. A preparation phase including a set of feasibility studies to determine whether the project is feasible and the Contracting Authority will initiate the bidding phase.
3. An organisation phase including the bidding procedure and competitive selection procedures that identifies one or more candidate private partners.
4. An implementation phase including the construction, commissioning, operation, and maintenance of the project; the standard regulates the conditions for the implementation of the project from its detailed design work through the remainder of its project lifecycle

### Article 9. PPP Unit and Administrative Coordination

This Article of the Standard relates to two specialized bodies that would organize and supervise the development of PPP projects: The Inter-ministerial Committee and the PPP Unit. Typical organization and roles of these bodies are depicted in Diagram 1 and further elaborated below.

Paragraphs 2 and 3 clarify the role of the Inter-ministerial Committee as the principle body responsible broadly for, among other things, implementation of the policies for the development of PPP projects, consideration of national strategies and priorities, and cross-agency coordination. Its role is also to approve each key stage in the planning, preparation, and development of projects (after consideration by the PPP Unit).

The Standard indicates that the composition, organization, and personnel of the Inter-ministerial Committee must be such that they enable the committee to assume its functions and responsibilities effectively and efficiently.<sup>15</sup> To this end, a record of its personnel and activities should be kept up to date and made readily available to the public.<sup>16</sup>

Paragraphs 4 to 7 relate to the PPP Unit: the central body for the exchange of expertise and recommendations on project preparation, development, implementation, and monitoring. The Standard describes more than 20 functions from (a) to (u) that are assigned to the PPP unit and making it a body with a central role in, amongst other things, the implementation and improvement of methodologies and procedures, and the preparation of standardized tender documents including contractual terms. Its role extends to the potential impact of projects on public debt, risk assessment, and other financial and fiscal considerations. It is responsible for maintaining detailed records on projects, training officials, and maintaining a database on PPPs including template clauses and methodologies. It also participates in dispute prevention and resolution, etc. Finally, it facilitates and evaluates the reports and studies that must be prepared at various stages of the project to move it through its planning and development (including the choice of the private partner) and to transmit its opinion to the Inter-ministerial Committee for final decision.

The text of paragraph 5 specifies that the PPP unit operates under the supervision of the Inter-ministerial Committee and that it must be organized to carry out all the activities assigned to it effectively and efficiently; it specifically mentions the need for the PPP unit and staff to have appropriate qualifications in the sectors of public infrastructure, competition of services, engineering, economic and financial modelling, public accounting, social and environmental impacts, public administration, etc. Its members may come from the public sector or the private sector. The text finally specifies that a record of its personnel and activities should be consistently updated and made available to the public.

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15 Transparency and integrity must be ensured at all times. The standard specifically indicates that the activities of preparing a project, its competitive bidding, approval, and regulation must be carried out independently to avoid any conflict of interest. The practical conditions of transparency and integrity to be respected are more fully described in the Standard adopted by the member States: "Zero Tolerance for Corruption in Project Selection".

16 Required skills: the Committee should be staffed with appropriate expertise so that they may make final decisions both for (i) public payment PPPs, for which the essential required skills are quite similar to public contracts of the "design-build" or "turnkey" type, and (ii) PPP Concessions for which various additional skills, especially in socio-economic concerns, environmental and financial modelling, and weighing the economic balance of a project's ability to provide quality public service adapted to the evolving needs of society against the financial viability of the project to the private partner. In many cases, experienced external consultants with actual practice in each mode of delivering public infrastructure services will be necessary, especially in countries without a long experience of infrastructure concessions. Depending on the nature of the projects to be evaluated, sectoral experts will also be necessary. Two summaries of good practices in this area have been endorsed by the UNECE member States; "Involving reliable and independent experts to develop PPPs in support of the SDGs in low and middle-income countries" (ECE/CECI/WP/PPP/2023/9) and "List of essential clauses in concession contracts in PPPs in support of the SDGs" (ECE/CECI/WP/PPP/2018/11).

In smaller countries, particularly those which contemplate a limited number of PPP projects, the case for an Inter-ministerial Committee may be less compelling. It is not uncommon for the PPP Unit to report to a Minister/Ministry (e.g. Finance or Economic Development) or to the Office of the President/Prime Minister, and each host country should consider its specific context in determining appropriate administrative structures.

The text of paragraph 6 specifies that the definition of roles and responsibilities within the PPP unit must be organised in such a way as to avoid or manage the risks of conflict of interest.<sup>17</sup>

### Article 10. Information about PPPs

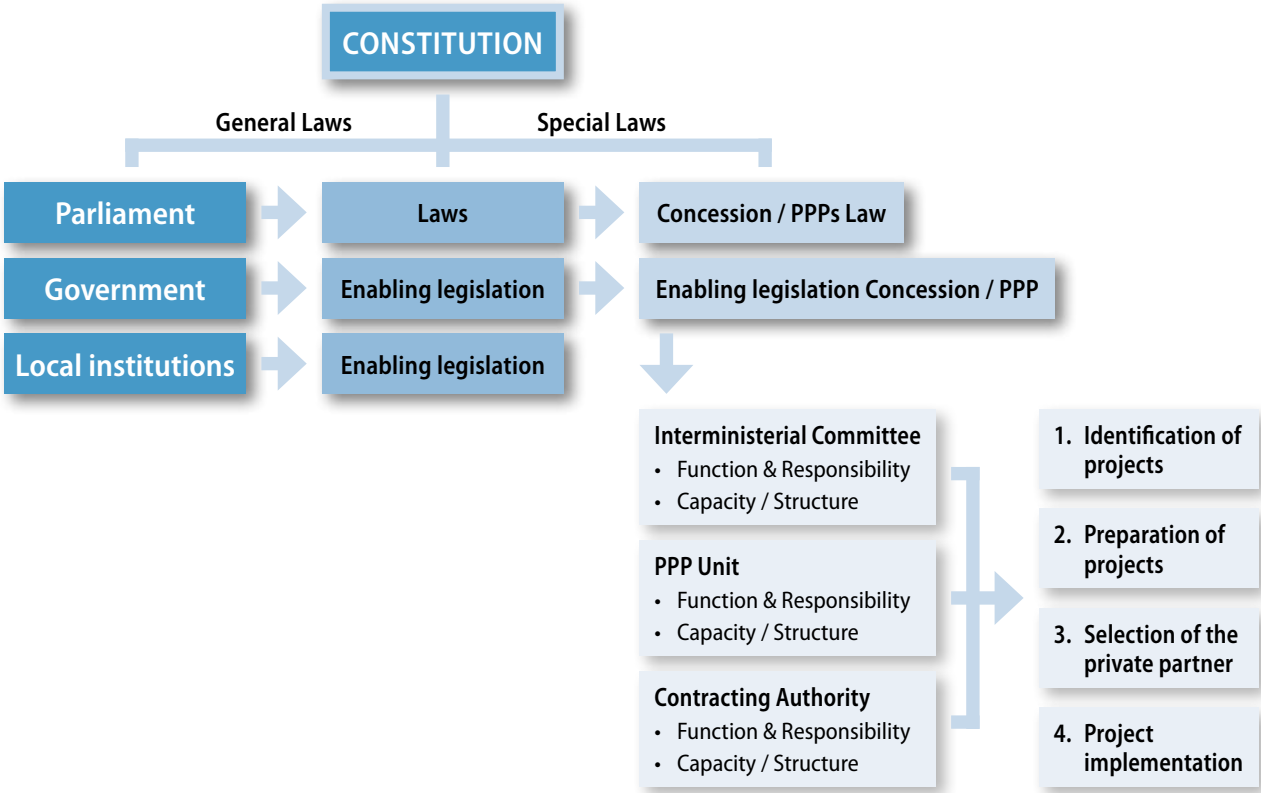
Paragraphs 1 and 2 contain detailed provisions on the PPP Unit's responsibility to maintain transparency and provide comprehensive information on their activities and projects and to make the information available to anyone interested. The provisions also detail the information to be collected and maintained.

Paragraphs 3 and 4, on the other hand, obligate the Contracting Authority to collect and publish any relevant information on the projects it is considering or developing and do so in such a way that anyone interested can access the information. This includes the responsibility to respond to inquiries and requests for information within reasonable timeframes. The Contracting Authority is also required to post (at a minimum on its website) information on ongoing projects, pre-qualification conditions, the list of bidder candidates, and the eventual selected private partner(s).

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17 Required skills. They must allow for the coordinated fulfilment of all the functions and responsibilities provided by the law. This requires concrete knowledge of the different types of Concessions/PPPs that contribute to the achievement of sustainable development goals, the guiding principles promoted by the UNECE, applicable texts and their practices, all while implementing the guidelines and directives developed by the Inter-ministerial Committee. This is a significant challenge in most countries that to date have limited experience with successful PPP/Concession projects and few stabilized, long-term tested procedures for a significant number of projects (and very little case law). They face serious difficulties in setting up functional organizational schemes so that the PPP Unit can correctly fulfil all its missions. Recruiting staff with the necessary expertise and perspective, and their costs, is another difficult problem to overcome in practice for emerging and developing countries, which therefore have real difficulties in proposing well-prepared lists of PPP concession projects in accordance with the provisions of the framework law and international best practices. However, it is observed that without such projects, countries have a lot of trouble attracting quality and responsible private partners. It should be noted that the team should at least have standards project management skills to which will be added PPP skills.

**Diagram 1: Institutional Organization and Role Distribution**



Source: Marc Frilet and Jean-Christophe Barth-Coullaré (June, 2023)

## CHAPTER III. Initiation and Preparation of PPPs

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The Framework regulates the initiation and preparation conditions for projects. It sets out a detailed procedure for identifying, planning, and evaluating projects at the first two key stages of their development and calls for an inclusive and rigorously controlled process. One of the objectives is to allow authorities to decide as early as possible, if the proposed public service infrastructure project is worth being prioritized and pursued either as a Concession (payment by the user) or as a PPP with public payment, or in another form of traditional or modern public procurement (including for example design build or turnkey). Authorities must carefully weigh multiple criteria in this analysis and look to the UNECE Guiding Principles on PPPs in support of the SDGs (ECE/CECI/WP/PPP/2022/7), the SDGs, the country's political-economic vision, and the state of its finances and those of the users while making such a determination.

### Article 11. Initiating, Identifying and Preparing PPPs

Paragraph 1 establishes the principle that initiating, identifying, and preparing projects, including the evaluation and approval of proposed projects, regardless of sectors and/or type is to be carried out according to the procedures and methodologies detailed therein.

As clarified in paragraphs 2 to 4, the Contracting Authority, as the authority that would ultimately oversee the delivery of the respective public service(s), is to initiate projects except in the circumstance of unsolicited proposals. The Standard suggests that unsolicited proposals are only to be considered for projects that are not already announced at the national or local level, and are to comply with the same detailed preparation procedures required of other Projects, i.e. from a requirements perspective they are to be treated the same as any other project initiated from within the government.

The Contracting Authority is furthermore required to assemble a proficient project team<sup>18</sup> with the capability to assess and discern the potential of proposed projects and methodically accumulate and evaluate all relevant information. To this point, the team should work in a coordinated manner and conduct or oversee the production of the various analyses and studies that are required by the Framework. This Article elaborates on the principal competencies and experiences that must be brought together within this project team.

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18 The skills required for the Contracting Authority's project team must be in accord with those required at the level of the PPP Unit to participate in the proper evaluation and recommendations of projects as well as those of the Inter-ministerial Committee which gives its final approval at the various stages of project development. These three bodies must in practice work closely together to propose realistic and resilient projects that are attractive to quality bidders, each from a different perspective (For the Contracting Authority; analysis and instruction activities that take place mainly in the field to evaluate and prioritize needs then develop a project concept before carrying out feasibility studies. For the PPP Unit; more global evaluation activities including recommendations and inspection. For the Inter-ministerial Committee (or similar competent authority); a more general inspection integrating the national policy of infrastructure development and contributing to the SDGs which ensures resilience to climate change.

The Standard calls for the Contracting Authority to formally consult stakeholders at various stages of project development. For purposes of this requirement, stakeholders include relevant administrative authorities and the public, and consultation includes holding public hearings when necessary and/or as prescribed by regulation and the UNECE Guiding Principles. The consultation process should allow for effective dialogue on the project and process, including any important and non-confidential issues arising from the accompanying proposals. A record of the engagement is to be created and should include the main questions and the responses provided.

Paragraphs 5 to 6 address the initial phase of a PPP project which involves defining and assessing the needs for the project. A process should be established for this stage which would include identifying all necessary approvals and consents that are necessary prior to commencing a project.

The Standard calls for the Contracting Authority to write a comprehensive **Identification Report** summarizing the concept for the infrastructure and services to be improved or created, along with their main functionalities, as well as an evaluation of the problems that could occur over the course of the project and their potential impact (e.g. the risk that technical solutions become obsolete, changes in socio-economic conditions and user needs, etc.). The report should also justify the priority of the project, as compared to others, and the reasons why the project should be delivered by way of a PPP rather than another type of public procurement. While weighing the options, the report should assess, among other factors, each alternative's estimated costs, complexity, likelihood of success, economic and social benefits, adaptability to the needs of the users, the order of magnitude of costs versus revenues, financing needs, acceptability of the project and services to users and local communities and other stakeholders, etc.

Paragraph 7 relates to the approval of the Identification Report. The Identification Report is submitted to the PPP Unit for review and approval with justifications indicating whether it has been prepared in accordance with all applicable requirements. The report, accompanied by the opinion of the PPP Unit, is then submitted to the Inter-ministerial Committee for final approval, in accordance with the provisions of paragraph 3.

Paragraphs 5 and 9 relate to the preparation phase and completing the pre-feasibility assessments.

Paragraph 5 indicates that this preparation phase should focus on the documentation and description of the project by specifying its purpose and main characteristics along with key performance indicators. This is an important step as it will serve as a basis for bidders to propose a complete and detailed response for the entire project and drive more accurate financing, design, implementation, and service delivery estimations. The provision clarifies that this phase does not include the detailed technical and financial specifications which are carried out by the private partner during the selection phase and in the detailed design part of the contract.

Paragraphs 8 and 9: These provisions of the Standard list the types of preparatory reports and studies that are to be prepared when considering a PPP.



Eighteen main studies are identified and labelled (a) to (r). These studies expand upon the conceptual analyses and approximations presented in the Identification Report, along with conducting a variety of additional studies. While some of these studies are conventional for assessing the feasibility of any infrastructure project, others are specifically geared towards incorporating characteristics essential for PPPs in support of the SDGs. Specifically, these studies include:

- Paragraph 9(b), report on the assessment of the social, economic and environmental impact of the project which includes a cost-benefit analysis, a quantitative evaluation of positive and negative externalities over the life of the project “the value for people”, and an assessment of the project’s implementation of the UNECE Guiding Principles.
- Paragraph 9(c), report on investment and operating expenditures, the capacity to implement it, the anticipated fiscal and budgetary impacts and the risks incurred.
- Paragraph 9(e), report justifying that the project fits into the wider objectives of the government in the sector under consideration, as well as the government’s strategies for developing service infrastructure.
- Paragraph 9(m), report identifying and evaluating the main risks of the project and how these would be contractually taken into account, including solutions to deal with or limit them.

The Standard also identifies additional reports for projects that are envisaged as a Concession (payment by the user).<sup>19</sup>

Paragraph 9(s)(iii), report on the acceptability of the proposed public service by users, including promotion and communication strategies that demonstrate the long-term benefits of the project.

Paragraph 9(s)(iv), report on the different categories of users and their specific needs such as economically vulnerable or disadvantaged communities and prioritizing differences in service prices without affecting the principles of equal treatment and non-discrimination.

Paragraph 9(s)(v), report on the ways in which the public service can adapt to future needs and take into account stakeholders’ ability to contribute. It should consider the potential for significant shifts in the economic and political landscape throughout the duration of the project. Moreover, it should highlight the importance of resolving issues amicably and ensuring the continuity of the public service.

Paragraph 9(s)(vii), report on mechanisms for returning public service management to the Contracting Authority at the termination of the project to ensure the continuity of public service.

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19 In contrast to PPP/Concession projects funded by public payment, where the private partner’s key responsibility is to design, build, and operate infrastructure, buildings, or production units, adhering to performance indicators for the project duration with little to no direct public interaction, Public Service Concession projects are different. Here, the private partner is paid directly by the user and assumes full responsibility for public service delivery, effectively taking over from the Contracting Authority. This private partner is typically bound by the same legal, economic, and user satisfaction conditions that govern the Contracting Authority. To implement such projects, additional studies are essential. These studies are based on a set of principles aimed at ensuring the project’s long-term viability, with an emphasis on achieving a sustainable economic and financial balance for all involved parties, and above all, ensuring user satisfaction. The Standard identifies nine studies in Article 11.9 (s) (i) to (ix) that would support this assessment.

Paragraph 9(s)(viii), report on maintaining economic and financial balance in the event of exceptional circumstances that are not attributable to the private partner.

## Article 12. Appraisal and Approval Procedures

Paragraph 1 of Article 12 of the Standard stipulates that all projects to be carried out under the Framework, including unsolicited proposals, are to conform to the PPP definition set forth within the Standard.

Paragraphs 2, 3 and 4 relate to the approval and evaluation criteria.

The Standard reflects that the PPP Unit is primarily responsible for evaluating the reports and feasibility studies that are developed by the Contracting Authority. Note that as indicated in the previous chapter, the PPP unit, after analyzing all the reports and studies, should issue a reasoned opinion to be transmitted to the Inter-ministerial Committee in charge of final approval.

Paragraph 3 lists 15 evaluation criteria focusing on the promotion of PPPs in support of the SDGs, in particular:

Paragraph 3(b) requires officials to evaluate whether the project's socio-economic projections and the net benefits to public services have had a positive impact on the populations, especially in terms of adequate empowerment and inclusivity. Furthermore, officials are to evaluate to what extent these outcomes align with the UNECE Guiding Principles and contribute to the overall public welfare.

Paragraph 3(g), calls on officials to assess the legal, regulatory, and institutional viability, including the procedures planned to select the private partner and their timing.

## Article 13. PPP Implementation Resolutions

Paragraph 1 relates to the issuance of a formal resolution announcing the intended implementation of a project.

Paragraph 2(a) to (j) clarifies that the Contracting Authority must issue an official resolution with specified key items of information related to an approved project.

Paragraph 3 relates to the publication of the resolution of approval and registration of the project on the official list of approved PPP projects. The Standard requires the Contracting Authority to publish the Project Resolution on its website and in official publication channels. In the case of an unsolicited proposal, the Project Resolution is also to be transmitted to the proposing entity.

## Article 14. Unsolicited Proposals

This Article of the Standard details that unsolicited proposals should be presented to the respective Contracting Authority that is responsible for delivering the relevant public services. Unsolicited proposals should also be presented at their conceptual stage. Under the Standard, the Contracting Authority is afforded the discretion to either consider or disregard the proposal and weigh its merits and the extent to which it aligns with the public interest. If a project is already announced or planned as a potential project, it is not permitted to consider as an unsolicited proposal.

However, it should be noted that these provisions are not intended to restrict a tender or the tender documents from allowing for variations from candidates (especially on matters where the public authority is expecting innovation from the private sector). Such variations are only to be allowed within a well-defined and transparent framework allowing the authority to fairly compare bids, and the variations are not allowed to significantly modify the project requirements as stated in the tender documents.

If the Contracting Authority decides to proceed with the unsolicited proposal, the proposing entity is obliged to conduct a set of initial studies mirroring those required of the Contracting Authority during a project's initiation phase (as stipulated in Article 12.6). This typically culminates in an Identification Report that is to be submitted to the Contracting Authority for review and determination whether the unsolicited proposal is favourable. If deemed favourable, the Contracting Authority is to then notify the proposing entity of their decision and detail the process for seeking further approvals or refinements.

Paragraphs 3 and 4 pertain to the project's preparatory phase, which involves the creation of study reports and documents mirroring those that would be created by the Contracting Authority in the detailed preparatory phase as outlined in paragraphs 5 and 9 in Article 11. During this preparatory phase, the Contracting Authority invites the proposing entity to furnish comprehensive details regarding their qualifications as well as the technical and commercial feasibility of their unsolicited proposal. The proposing entity is permitted to share any pertinent information with the Contracting Authority.

Paragraph 5 clarifies that the Contracting Authority is required to respect the intellectual property rights, trade secrets, and other exclusive rights of the proposing entity, contained or disclosed in the unsolicited proposal. It is prohibited from using this information other than to evaluate the various reports and feasibility studies (unless otherwise agreed to in writing by the proposing entity and/or holder of the rights). In the case where the proposal is rejected, the Standard requires the Contracting Authority to return to the proposing entity all the proposer's documents prepared and received during the assessment process. This obligation should be examined in light of any jurisdictional public information laws and retention/disclosure requirements.

Paragraph 6 clarifies that when the Contracting Authority believes that the detailed preparation phase (complete pre-feasibility) has been carried out in accordance with all applicable requirements, it is to submit the feasibility report to the PPP Unit for evaluation. The PPP unit then transmits its evaluation to the Inter-ministerial Committee, which may authorize the Contracting Authority to continue with the unsolicited proposal.

Paragraph 7 states that when the Contracting Authority has been authorized to continue with the proposing entity, it is to publish a Project Resolution as provided for by Article 13. It will then publish the unsolicited proposal for potential competition in accordance with Article 21 relating to the selection of the private partner.

## CHAPTER IV. Selection of Private Partner

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### Article 15. Procedures for Selection of Private Partner

Paragraph 1 of the Article requires competitive tendering to be used to select the private partner, save only where exceptions are expressly permitted, including in the case of direct negotiations under Article 22. It is widely recognised today that competitive tendering is generally the most efficient, effective, transparent and fair basis for awarding major contracts, and the best way of mitigating the risk of corruption. It is also often an explicit requirement of International Financial Institutions (IFIs),<sup>20</sup> such as the EBRD, and often a condition of their financing for particular projects. The Standard therefore assumes that, as a general rule, competition will be used.

The question often arises with PPP frameworks, to what extent is a country's existing procurement regime to apply to the award of PPP projects? This is something each country needs to consider carefully. Most countries will already have such a regime in place. It may be a sophisticated one which already caters specifically for PPPs (as in the EU, for example). Where it has been drawn up before the country has started to make extensive use of PPPs, however, it will often not be readily applicable to the very large, complex, high-value structures that PPPs typically represent.

It may also be possible to amend or modify the existing procurement regime to accommodate PPPs. This may be difficult to do though and may give rise to confusion about how exactly the revised provisions would apply in the context of a new PPP framework. For that reason, host countries often prefer to create a comprehensive, self-standing procurement regime under their PPP framework which will apply specifically to all PPP projects and carve out the award of PPPs from the existing procurement regimes either substantially or completely.<sup>21</sup> This is the approach reflected in many jurisdictions and is the approach suggested by the Standard, and paragraph 2 is drafted accordingly. If the host country decides to amend its existing procurement regime, or concludes that it can be used without amendment, the host country needs to be cautious as the provisions may differ significantly from the Standard and there may be difficulty reconciling the relevant requirements of the existing regime with those of the Standard. Nevertheless, the Standard allows for this possibility (as does UNCITRAL).

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20 That is development banks and similar international funding organizations, as opposed to private sector banks and investors. They include the World Bank Group, EBRD, the Asian Development Bank (ADB), the African Development Bank Group (AfDB), the Asian Infrastructure Investment Bank (AIIB), the Inter-American Development Bank (IDB) and others.

21 If the host country is an EU accession country or even an EU Member State, it would need to ensure that any bespoke procurement procedures for PPPs were fully consistent with EU law on procurement and state aid. However, as we have explained, the Standard is not primarily directed at such countries.

Paragraph 3 again makes it clear that the more detailed aspects of the applicable tendering procedures will be set out in the regulations but shall be governed by the principles set out in that paragraph. The host country should decide whether to include the word “proportionality” with these principles, which for these purposes refers to the efficient use of available tendering resources, at a level appropriate to the project concerned.

Paragraph 6 provides a clause where qualification criteria can be inserted. The exact criteria and evaluation methodology for the pre-qualification and selection of successful bidders, appropriate for the relevant PPP and the tender structure being used, will have to be chosen and refined by the Contracting Authority, and set out clearly in the relevant tender documents. The criteria are to be consistent with the criteria used to approve the PPP at the preparation stage and the implementation resolutions, as applicable.

Paragraph 7 places a standard non-discrimination duty on the Contracting Authority in relation to the award and implementation of PPPs.

## Article 16. Tender Process and Procedures: General

Article 16 deals with general matters that apply to any tender process that is adopted. The tender process for the award of any PPP will be determined by the Contracting Authority, however in accordance with the requirements and other necessary approvals set out in the Standard. The approved tender process and its pertinent details are to be set out in the tender documents.

Paragraph 2 provides that an open public tender shall normally be used (where any potentially interested bidders can respond to the published invitation) and provides flexibility as to the use of pre-qualification and a one- or two-stage process. Closed tenders-where bidders are specifically selected by the Contracting Authority without a public advertisement-are only permitted in the very limited circumstances described. Each host country should decide on the scope of these exceptions. Specifying them with precision in their framework is recommended and considered common best practice.<sup>22</sup> Where closed tenders are used, the Contracting Authority should still try to maximise the element of competition involved, as required by paragraph 3. There are many recognised methods of doing this.

Paragraph 4 provides that any person, or groups of persons, with legal capacity can participate in a tender, subject to any applicable legal restrictions. These restrictions are intended to refer in particular to rules excluding persons who may have been convicted of relevant offences, such as corruption, illicit employment practices (e.g. using child or slave labour) or similar prohibited acts. National security considerations may also come into play in this context. Where consortia are involved (as they usually will be), their joint qualifications to perform their responsibilities, as well as those of individual members, must be assessed (paragraph 5).

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22 Host countries which are EU Member States or accession countries must also take the possible exceptions under EU law into account, in particular under Articles 10 to 17 of the EU Directive 2014/23 on the award of concession contracts; under Articles 7 to 17 and Article 32 of the EU Procurement Directive 2014/24 as well as under Articles 18 to 35 and Article 50 of the Sector Procurement Directive 2014/25.

Under paragraph 6, the Standard requires all decisions during the tender process, concerning pre-qualification, selection (short-listing), rejection and final contract award to be made only on the basis of the criteria, requirements and procedures set out in the tender documents. This is an important component that supports the integrity and transparency of the process and provides clarity for the bidders thereby promoting efficiency.

The need for transparent processes and methods for communication with bidders is spelt out in paragraph 7, allowing for suitable bidder input into the tender documents and discussion of critical aspects of the project. The use of tender security, such as bid bonds, is allowed for in paragraph 8; where it is used, the security must only be forfeited where the tender documents so provide. Other specific aspects of a tender process which can sometimes prove problematic or uncertain are also addressed in the Article, such as restrictions on multiple or joint bids in paragraphs 9 and 11, and the consequences of receiving only one tender in paragraph 11. Bids can be changed or revoked before the final deadlines in paragraph 9. The scope for a final clarification or negotiation stage is specifically addressed in paragraph 10, and this step should be carefully handled in the regulations and tender documents.

Tenders are generally governed by the confidentiality restrictions set out in paragraph 12, as between competing bidders, although these are in turn subject to the transparency requirements of Article 10. The Contracting Authority is required to keep appropriate records of tender proceedings under paragraph 13, and in accordance with the requirements set out in any Implementing regulations.

## Article 17. Tender Documents, Requirements, and Information

This Article lays down the general requirements for the contents of any set of tender documents to be drawn up by the Contracting Authority. They are designed to ensure the documents are sufficiently complete and transparent to enable bidders to participate effectively on the basis of a “level playing field”.<sup>23</sup> The underlying principle is to maintain an adequate and sufficient level of competition throughout the process. Paragraph 1 summarises the typical essential components of the documents, which should be drawn on as appropriate.

Paragraph 2 obliges the Contracting Authority to provide all such information in its possession about the proposed PPP as may be necessary to promote the efficacy of the tender, either in the tender documents themselves or in a data room. This is designed to impart an additional element of rigour and transparency to the process.

The Article makes it clear in paragraph 3 that tender documents can be amended during a tender, before the applicable deadline(s), either on the Contracting Authority’s initiative or in response to bidders’ comments (but subject of course to the usual transparency principles). Deadlines may be extended as necessary to allow for this, and appropriate records kept of the justification for the changes.

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23 The article obviously needs to be read and interpreted in conjunction with all the other provisions of the Standard governing the tender process.

Paragraph 4 allows for the possibility of tender documents, as well as the preparatory work for a PPP, being reviewed and approved by another competent body, if that is what the enacting host country determines is their procedure.<sup>24</sup>

## Article 18. Tender Committee

The Article provides for the use of a tender committee to manage each PPP tender. The detailed requirements for the structure, composition and operation of the tender committees should be decided upon by each host country and set out in regulation. Some flexibility is advisable, allowing committees to be formed according to the needs of individual projects. The Article requires minutes to be kept and reasons given for key decisions, to promote the legitimacy and transparency of the processes involved.

Note that the tendering provisions of Chapter IV have been largely written in terms of what the “Contracting Authority” is entitled or obliged to do. This is at least in part in the interests of simplicity. However, because the exact role and powers of the tender committee will depend on the tender process and management structure in use and the requirements of the Implementing regulations, paragraph 5 states that reference to the Contracting Authority should be interpreted as including references to the tender committee, where the context so requires.

## Article 19. Tender Stages

This Article provides a framework for the various stages of a PPP tender, depending on which structure (open or closed, one- or two-stage, with or without pre-qualification) is used. Paragraph 1 summarises these stages. Certain provisions are then set out in the ensuing paragraphs in relation to each. Note, though, that these are not a comprehensive set of procedures; the Implementing regulations should set out the additional details required for each tender structure (e.g. processes, timescales and deadlines, applicable criteria and methodologies, details to be set out in the tender documents themselves, etc.). In this way, the aim of the PPP framework and this Article, as well as others, is to define the main “pillars” of the system, comprising its over-arching framework. These paragraphs therefore set out only a few statements about each tender stage, in terms very similar to those used by UNCITRAL,<sup>25</sup> and host countries will need to proscribe additional detail to the process.

Paragraph 2 provides context for the public announcement of the tender. Paragraph 3 discusses the possibility of a single-stage tender, while paragraph 4 addresses the use of closed tenders (in the limited circumstances that may be permitted). Paragraph 5 covers the basic requirements of a pre-qualification process, followed by paragraph 6 which describes the subsequent request for proposals. Paragraph 7 sets out the Contracting Authority’s objective approach in comparing and evaluating proposals.

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24 See comments under paragraph 2 of Article 12.

25 UNCITRAL does not cross-refer to Implementing regulations, but to a country’s existing procurements rules and laws, in many of its provisions. The equivalent UNCITRAL clauses are also somewhat more detailed.

The next two paragraphs, paragraphs 8 and 9, deal with procedures that are sometimes not allowed for, adequately or at all, in more general procurement regimes. They are particularly important for PPPs, which typically need longer and more tiered procedures than smaller, simpler projects. The first, set out in paragraph 8, is a so-called “two stage” procedure and is not to be confused with a pre-qualification step followed by a bid, which is common in many procurement regimes. Here, the “two stage” procedure refers to the proposal submission phase, which follows pre-qualification. It is used where the Contracting Authority needs to refine certain aspects of the project so that the project is more accurately defined and proposals for it can be more accurately developed. It is often used in PPP procurement and has two stages, with the first being where bidders are asked for their preliminary proposals and comments on the main project elements: specifications, KPIs, financing needs, available contractual terms, etc. The Contracting Authority can then refine and modify elements as necessary in discussion with bidders. In the second stage, bidders then submit firm proposals with the refined project details in place, which can still be negotiated, in order of their evaluated rankings, until a conclusion (e.g. award, further refinement, retendering, etc.) is reached.

The second procedure, summarised in paragraph 9, is more unusual. Known as the “competitive dialogue” procedure, it can be used where it is not feasible for the Contracting Authority to specify a PPP project in sufficient detail for a routine tender process to be followed. In essence, it allows certain aspects of the project to emerge from a constructive dialogue with a group of bidders, so that a straightforward competitive tender can then be conducted. As the provision makes clear, only certain aspects of the tender should be opened to dialogue in this way, i.e. those that require greater clarity and specificity which can only properly be achieved with input from bidders. The process can assist with understanding what options are available for a project and what solutions exist in the market, but it should not be used to open the tender to speculative discussion. Once all the details have been identified, the tender is finalised and the short-listed bidders are invited to submit their proposals, from which a winner may be selected.

Conceptually, the two processes, competitive dialogue and two-stage tender, are similar. The main difference lies in the level of uncertainty about fundamental project features, which can only be defined in dialogue with bidders. The two-stage procedure in paragraph 8 is more about simply refining, or fine-tuning, certain aspects of a project. In practice, the use of the competitive dialogue procedure is relatively limited and found more often in established PPP markets as it calls for a certain level of sophistication and depth of capacity on the part of contracting authorities and bidders for it to work.<sup>26</sup> It can also carry a higher risk of collusion or corruption if not properly handled, so its use may need to be authorised by a more senior and separate competent body (such as the PPP Unit following presentation of a report), which the Implementing regulations can provide for.

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26 In some of them—such as France—it has indeed become the norm.



## Article 20. Conclusion of the PPP Contract

This Article provides for the conclusion of a PPP contract with the winning bidder (or more usually with a special purpose vehicle (SPV) set up by the winning bidder) who has submitted the bid that is both compliant with the tender requirements and is ranking first according to the award criteria set out by the Contracting Authority. The Standard requires a formal announcement of the winning bidder to be published before the signature of the contract, and for a period of time that is sufficient to allow third parties to introduce administrative or legal challenges against the decision based on non-compliance with specified requirements.

Once the contract has been signed, a formal notice of contract award is then be posted on the Contracting Authority's website and published through other official channels. The Standard also allows for the public disclosure of PPP contracts (subject to applicable confidentiality restrictions) and in some jurisdictions the law may require it. It is assumed that governments may be slightly hesitant about publishing their contracts as their new PPP systems are taking shape, but in time it may be advantageous and so is allowed and may be provided for in the Implementing regulations or elsewhere. Again, disclosure requirements should be examined in light of any jurisdictional public information laws and retention/disclosure requirements.

(The same provisions apply to PPP contracts entered into under Articles 21 and 22).

## Article 21. Conclusion of PPP Contract for Unsolicited Proposals

This Article provides for the final stages of the award of a PPP project based on an unsolicited proposal. One of its main objectives is to bring competitive pressures to bear on an unsolicited proposal, notwithstanding the project's initiation by a single private sector source, who may hope to be awarded it without the need for a tender. The caveat to this requirement, however, is that the unsolicited proposal is not based on intellectual property (IP) or other exclusive rights of the private initiator, and its concept and technology are not truly unique or new. However, it should be noted, unsolicited proposals may contain a degree of IP or other exclusive rights, yet other options may still be available in the market, so subjecting an unsolicited proposal to competition is still encouraged.

Subject to these caveats, once a final decision to proceed with the unsolicited proposal has been made under Article 14, an implementation resolution is to be passed and published on the Contracting Authority's website and other relevant official channels, inviting third parties to compete for the project. If no third parties come forward, or if the unsolicited proposal is truly based on unique IP and cannot be achieved by other means, the Contracting Authority may proceed and seek award of the project (subject to any direct negotiations permitted under Article 22 and the Implementing regulations), provided it and the respective approving authority(ies) are satisfied that reasonable steps have been taken to attract competing proposals. Note, further amendments to the tender documents and requirements can be made and the process repeated if it is not so satisfied.

If third-party expressions of interest are put forward, tender proceedings are then organised in accordance with this Chapter. Paragraph 6 provides for incentives or compensation to be offered to the private initiator in these circumstances, in view of the effort and resources already invested by it in the project. Host countries should think carefully about whether they wish to include such a mechanism and how exactly it would work. The Article suggests a couple of options. Compensation for pre-tender costs incurred (up to a maximum amount) should be relatively straightforward. Finding

a suitable basis for adjusting tender evaluation scores or waiving some bidding requirements can be much more difficult. Some countries prefer not to provide for this at all; others may already address them in other regulations.

## Article 22. Direct Negotiations

This Article addresses the discouraged practice of awarding a PPP project on the basis of direct negotiations without holding a competitive tender. Host countries should think carefully about the exact circumstances in which they would permit this, if at all, and limit their use in their PPP framework. The reason for caution is that these situations are widely recognised as being vulnerable to corruption, as well as negatively impacting a country's pipeline of potential PPP projects.

The Standard treats only a few, specific classes of project as being viable in this regard (several of which are also listed in UNCITRAL): (a) where only a single compliant bidder has surfaced in the context of a tender process (subject to the relevant qualifications); (b) where the unsolicited proposal provisions allow it; (c) perhaps, where there is an urgent need to maintain public services and holding a tender would be impractical. (This exception is in square brackets, as some experts counsel against it); (d) where the state's vital security interests do not permit tendering; and lastly (e) where it has been clearly established, based on an independent expert report, that there is only one source actually capable of implementing the project (e.g. in the case of unique patented technology or IP).

The detailed procedures governing any such direct negotiation should be set out in any Implementing regulations. Close monitoring of the PPP implemented as a result, including its standards of performance, is encouraged by paragraph 2. Paragraph 3 obliges the Contracting Authority even then to try to introduce an element of competition into at least aspects of the procedure if it believes it can, for instance by publishing its intention to engage in a direct negotiation process. All negotiations should be duly recorded.

## Article 23. Review and Challenge Procedures

This Article confirms that bidders who feel they have suffered (or may suffer) loss or injury as a result of a contravention of the law or regulations by a government body in connection with a PPP's award or implementation can bring proceedings through available legal or administrative channels in the host country. The Article does not provide specifically for any such channels or proceedings, as these can vary widely from jurisdiction to jurisdiction. Many countries have established grounds for seeking "administrative" or "judicial" review and challenging governmental decisions that are alleged to have been improperly taken. The host country should consider whether the established channels are adequate for this purpose.

The Article acknowledges that these established channels and mechanisms may need to be reinforced or supplemented in the PPP Framework, Implementing regulations, or even within the tender documentation.<sup>27</sup> Careful thought should also be given to the question of the speed and efficiency,

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27 In many cases they will need to be, as the complexity of PPPs means that they often have to be subject to "bespoke" procedures and mechanisms at almost every level.

as well as efficacy, of any such channels, and the availability of suitable interim measures. It is much better to solve a problem caused by an abuse of process at an early stage than to have to wait until it has done damage to the project at a later or more advanced one.

Where the Implementing regulations provide for such procedures, the Article requires them to operate quickly and efficiently, using interim or interlocutory measures and powers, so that defective or unlawful decisions and actions can be challenged and overturned at speed, ideally before further implementation action is taken on a PPP project. The Standard allows for broad powers to open up, review and revise decisions and documents, and to suspend or overturn actions being taken, together with a power to award compensation for losses incurred and even to cancel an entire project in appropriate circumstances. However, because any such powers would be invasive and sweeping, and may well overlap with similar powers and mechanisms under other branches of law (such as procurement laws, judicial review, or the laws of tort or contract), great care should be taken by host countries in framing these available processes and potential remedies.

## CHAPTER V. PPP Contracts

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### Article 24. Main Terms and Conditions of PPP Contracts

This Article makes it clear that, under the Standard, the drafting and negotiation of the contents of a PPP contract shall be governed by an overriding principle of freedom of contract. The parties can agree essentially to whatever provisions they choose, subject to any requirements or constraints in the wider legal system. Host countries should give careful consideration to what these constraints might be. There will always be some, ranging from unfair contract terms, for example, to unenforceable provisions (such as the exclusion of certain forms of liability), to terms required or implied in certain circumstances, sectors or industries (especially extensively regulated ones).

Within those constraints, the Standard envisages that it will usually be most productive to allow the parties to a PPP contract to have wide latitude in settling its terms and contents. This allows the parties to come to the most reasonable terms under the circumstances but also reduces the risk of clauses being treated as unavailable or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated by the parties to them. In fact, the parties usually need the help of sophisticated professional advisers to get them right. In all circumstances though, the PPP framework should allow the parties to reach appropriate conclusions about the terms of the PPP contract, and the freedom to agree to the clauses they consider appropriate. It can be unduly restrictive or unhelpful for a PPP framework to attempt to prescribe individual clauses, and very challenging even to word them so they can apply to all types of projects across multiple sectors.

Note, legal, financial, technical, and/or other advisors are often necessary to tender and award successful PPP projects and the Contracting Authority can have those advisory costs repaid by the project as long as it is clearly stipulated in the tender document and duly and fairly substantiated.

The Standard sets out a list of provisions typically found in PPP agreements, to help focus minds on the relevant ones and remove possible doubts about their legitimacy, but leaves it to the parties to make the final decisions about which to use and how to word them. Many other types of clauses are also possible in a PPP contract. The list touches on the PPPs for the SDGs principles in a number of places where they are likely to be highly relevant to the contract terms, including key performance indicators (KPIs), but also in areas where novel clauses may have to be thought through and structured in ways that are perhaps less obvious or familiar. These include providing for adequate dialogue with stakeholders and exercising step-in rights or rights of early termination in a manner which maintains public services and minimises potential harm to end users.

Nevertheless, countries which take a more prescriptive approach to commercial agreements with government, or which see a need for a higher degree of regulation of the whole PPP sector, may wish to include tighter controls over the contents of PPP contracts. Great care does need to be taken, though, in the way such clauses are worded, as deficient wording may make the provision and projects unworkable and/or “un-bankable”.

The Standard's approach is also consistent with the drawing up and publication of model clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards, promotes an understanding of the system, and can accelerate the negotiation and finalisation process. Model clauses should, however, usually not be made legally binding or compulsory. Their role is to furnish constructive guidance, not to remove or constrict the important freedom of contract discussed above. They may otherwise prove counter-productive and an obstruction to the success of projects and evolution of the system.

The list of items covers 5 big categories: 1. Parties, rights and obligation, penalties and caps; 2. duration, condition precedent, entry into force, amendment, modification termination; 3. project monitoring including Environmental, Social, and Corporate Governance (ESG) monitoring and relationship amongst parties; 4. payment mechanism and lenders' rights; and 5. property rights.

A key component of getting these components right is a public authority with a clear view of their objectives before they launch a competition (e.g. objectives that reflect the population's needs and PPPs for the SDGs and/or other ESG-style criteria). A PPP team with the combined skills to develop the terms of such provisions is also important. Both steps will help the public authority to define a clear scope together with objective, quantifiable performance expectations, which will subsequently shorten the tender period, help in fairly comparing competitors' bids and crafting a successful agreement and project.

It should also be noted, the Contracting Authority is fully entitled to have discussions on any of the items with the private sector and/or in an industry forum before launching the tender process. Such information sessions and gathering of feedback can help the public authority to better design their project and benefit from private sector experience from similar projects. Any such sessions should be open and transparent and have a written record produced.

It is recommended that before launching the tender process the granting authority converts the items in the list into a business model that will evidence the financial viability of the project and highlight the KPIs that will be necessary to monitor the performance.

Paragraph 2 contains a reference to the wide range of possible PPP structures that the industry has evolved over the past few decades, with the many familiar acronyms used to describe them (e.g. BOT, BOOT, BOO, DBFO, BLT,<sup>28</sup> etc.). It is designed to reinforce the sense that the parties will have maximum freedom to use the structure which seems to them most appropriate for the project in question: in terms of financial affordability for the country, in terms of available skills to monitor the project all through its life, and in terms of market availability to maximise competition (technical and financial) to get both value for money and value for people. If host countries have any serious reservations about any of them, they should modify the provision accordingly before launching the tender.

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28 Build Operate Transfer, Build Own Operate Transfer, Build Own Operate, Design, Build, Finance Operate, Build Lease Transfer. There are many others. The standard texts on PPPs should be consulted for fuller explanations.

## Article 25. Amendment and Termination of PPP Contracts

Article 25 makes it clear that the PPP contract will terminate on the expiry of its term, which may be extended in accordance with its provisions (see comments under Article 8 above). It can be amended or terminated by mutual agreement, but subject to any relevant restrictions in the contract, the regulations or otherwise by law (paragraph 2). Unilateral amendments may need to include fair compensation solutions. Some countries may wish to specify applicable conditions and criteria for contract amendments with precision in the Implementing regulations. Others, particularly those from a common law tradition may prefer to leave more discretion to the parties. In all cases, any elements of the PPP contract which require the initial approval of any competent bodies or relevant authorities besides the Contracting Authority will need further approval before they can be amended.

The next paragraphs address the parties' potential freedom to agree on contract amendments, if that is the course the enacting state wishes to follow. One suggested possible approach is set out in square brackets as "alternative 1". It provides a separate tier of approval for any amendments to the "essential" or "fundamental" aspects of a PPP, especially ones which weighed heavily in the original approval process. Some countries may wish to translate these terms into percentage figures or monetary amounts that would trigger reapproval, and others may wish to specify the applicable approval mechanisms in considerably more detail.

Alternative 2 is an example of how to do this (based closely on the UNCITRAL approach). It contains tighter and more detailed definitions of what amounts to a material amendment, requiring further approvals, or even (as in the UNCITRAL original) subject to outright prohibition. These clauses may be considered too long and elaborate by some host countries so they have been placed in square brackets. It should also be remembered that most PPPs will be subject to amendments during their life -as will any major project-and the parties' freedom to agree to them should be facilitated. All changes should be duly substantiated, legally, technically, financially, etc., before being approved and the changes should not result in deviation from the initial project objectives.

Changes may also be necessary to reflect technological or demographic evolution over the contract term. It is recommended that the contract include a process that will allow the parties to find a mutually agreeable solution. Generally, these processes relate to the financial equilibrium of the project (level of revenues that allows repayment of the lenders and remuneration of the investor consistent with the risk level of their investment) and fair profit sharing between public and private sector.

Early termination of the PPP contract can also happen unilaterally in the circumstances specified in the agreement, subject again to the relevant conditions and procedures, such as the lapse of time or by decision of a court or tribunal. Paragraph 4 also provides details for the payment of compensation on an early termination of a PPP contract as this subject is highly challenging and contentious when contracts are being negotiated.

The Article makes it clear that either party may be entitled to compensation on an early termination of the contract for any reason, in accordance with its terms and those of any direct agreement(s) with the lenders. The notion that a defaulting party may be entitled to compensation where it is itself at fault can often meet with great scepticism on the part of government bodies attempting PPPs for the first time. The Article therefore spells out that this may, indeed, be the case, since the assets transferred to the Contracting Authority on an early termination will usually have a long-term value far in excess of the amount of any losses suffered by it as a result of any default. Moreover, they will usually have been funded largely or wholly by the private partner which would be lost and written off in the absence of any compensation.

Project agreements typically call for the payment of at least some compensation for those assets and costs, an approach reinforced by the fact that project finance lenders will nearly always insist on being paid down in these circumstances when investors are generally accepting the risk not to be compensated (with an impact on their remuneration expectation). This is also consistent with the relevant legal principles of many jurisdictions (e.g. rules against unjust enrichment). The Article does not specifically require such compensation to be payable, however. The final decision about that question is again left to the parties negotiating the PPP contract. It simply obliges them to give due consideration to the principles governing any such compensation when they are concluding it and lists several likely to be relevant in paragraph 4. The applicable details will have to be worked out and specified in the contract.

Paragraph 5 then lists some of the other matters that may need to be specifically addressed or provided for in connection with a termination of the agreement, such as transfer or purchase of certain assets (e.g. technology), training of government personnel, residual support services (e.g. spare parts), and decommissioning. These should be covered as appropriate in the PPP contract.

## Article 26. Property and Related Matters

This Article addresses some of the main property (e.g. real estate, intellectual property, equipment, trademarks, etc.) issues likely to arise in a PPP. The Contracting Authority is given general responsibility in paragraph 1 for ensuring that the physical property (typically, the site or the intellectual property of engineering solutions) and associated rights (such as easements) and assets needed for the PPP are provided to the private partner. The terms of the PPP contract will set out the relevant details on the property rights being afforded. Paragraph 2 makes it clear that this must extend to the crucial but sensitive subject of rights of access to and from, and rights to fix installations on, third-party property. Under paragraph 3, these rights can apply to any real property in the Contracting Authority's use, occupation, or control, and which it is entitled to transfer to the private partner, including public infrastructure. If such property belongs to third parties, the Contracting Authority is obliged under paragraph 4 to acquire it (using any available compulsory purchase powers as necessary), together with the necessary legal rights and interests.

The underlying rationale for these provisions is that the Contracting Authority will typically be in a better position to take on these responsibilities, and so should bear the risk of discharging them for the project's benefit. As far as intellectual property from suppliers is concerned, generally, suppliers will not accept pledging their intellectual property rights to lenders nor investors as this property constitutes the basis of their business. So, the Contracting Authority will typically have to ensure the right to use the property is guaranteed or the lenders will be compensated in case the project is unable to access to the property. Any doubts or uncertainties about these matters can threaten the viability of a PPP.

Paragraph 5 makes it clear that the parties to the PPP contract can grant each other in accordance with the terms of the contract whatever property-related rights or interests are needed for the purposes of the project. These may include outright ownership, leases, licences, rights of use and so on. The private partner is in turn entitled under paragraph 6 to grant the same rights and interests to its third-party contractors. Yet the private partner will seek to keep control and a balanced agreement should be sought in order not to deprive companies of their intellectual property rights. Paragraph 7 acknowledges that the parties may decide in the PPP contract to identify and list different classes of assets and list restrictions on accessing property such as how it is to be treated on termination, which

assets are to be transferred or sold to the Contracting Authority, and which assets the private partner may freely dispose of or retain. It is worth noting, though, that a complete categorisation of this kind in the initial terms of the contract may be impracticable and/or impossible depending on the project and assets involved.

## Article 27. Types of Payment under PPP Contracts

This Article confirms that the PPP contract may contain such forms, conditions and amounts of payment for the proper performance of the private partner's responsibilities as the parties may agree. Local law or regulation may impose certain constraints in this area such as when and how payments are to be made, and the Standard allows for this. The Article contains a broad, illustrative list of the types of payment that may be used, including direct user charges (typical of a "Concession" structure) and payment streams from the Contracting Authority, making it clear that any available form of permissible payment may be used. Payments to the Contracting Authority from the private partner may also be included, such as PPP fees, royalty payments or profit shares. The Article is written broadly in this regard and with a view to eliminating any unnecessary restrictions or doubts on the forms and types of payment that can be made.

## Article 28. Liability of Parties to the PPP Contract

This Article details the liabilities and remedies of the parties for breach of the terms of a PPP contract. The terms of the contract and the rights provided by a country's wider legal system will normally apply, without the need for further legislative detail. Host countries should consider whether existing law contains any unusual or problematic restrictions in this context and add to the Article as necessary.

The penalty regime generally reflects the typical remedies afforded for a public contract. In addition to this regime, lenders and investors may add extra penalties for each obligation which is not satisfied and has or could have an impact on the project's performance. These penalties are calculated in proportion to the risks of occurrence of a default in satisfying the obligations (usually with the support of the Lender's technical advisor). The level of the penalty is expressed as a percentage and the levels vary from one sector to another and are negotiated depending on each project's risk profile or performance goals. Penalties can be backed by parent company guarantees or other bank guarantees. Those guarantees bear a cost to the PPP Company and which may become a cost of the project. The total of the penalties is typically capped under an aggregate liability cap which needs to be reasonable in order to motivate the private sector to the success of the PPP and maintain the attractiveness of the project for the private sector. Each host country needs to also make sure that the cap of liability does not weaken competition, favour only large companies that can afford high caps on liabilities, and/or endanger the local companies and local economy with too high caps.



## Article 29. Step-in Rights and Substitution of Parties to the PPP Contract

“Step-in rights” are a common feature of PPPs, especially those funded by project finance. They can work in favour of the Contracting Authority, allowing it to take over temporary control and operation of a project in defined circumstances, such as where an emergency endangering the public or public services is occurring. Alternatively, they can operate in favour of the lenders, allowing them to pre-empt a threatened termination of a PPP contract by the Contracting Authority where the private partner is failing to perform. This allows them to temporarily take over control of the project in order to rescue the project, put right a default, and perhaps restructure or replace the private partner, in order to keep the project functioning to the benefit of the users and to keep its revenues flowing. Such rights are often vitally important to the bankability and long-term viability of a project.

Article 29 therefore expressly entitles the parties to include step-in rights in the PPP contract (and in a “direct agreement” with the lenders), although without imposing any obligation to do so. The rights to be considered for step-in are mostly rights of the shareholders of the PPP company. The relevant details, procedures and conditions for a step-in will have to be agreed and set out in the contracts. In line with the PPPs for the SDGs principles, the Article requires those procedures and conditions to be drawn up with the aim of ensuring that step-in rights are exercised in a way which does not adversely affect the provision of public services to end users.<sup>29</sup> Because the nature and effect of lenders’ step-in rights can be unfamiliar to contracting authorities in some jurisdictions, paragraph 2 summarises the main powers they typically bestow on those lenders. Paragraph 3 again makes it clear that it shall not be necessary to hold any additional public tenders where step-in rights are properly exercised since they will have formed part of the contractual matrix at the time of the original PPP award.

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29 This is a novel requirement, reflecting the novel nature of some of the PPPs for the SDGs principles. It is worded as simply a qualified aspiration, as it were, for the relevant contractual provisions (“aim to ensure...”), since step-in rights are often considered fundamental components of PPP contracts, by both contracting authorities and project-finance lenders. A more restrictive, unqualified obligation along these lines might be considered unacceptable by both. The Standard seeks to work with the grain of both government expectations and concepts of “bankability” in the international finance markets, not against it.

## CHAPTER VI. Support, Protections and Guarantees

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The purpose of this Chapter is to confirm the viability of certain types of clauses in PPP contracts which can often prove problematic or uncertain for host countries when they are being structured or negotiated, as well as to clarify certain general responsibilities.

### Article 30. Protection of Parties' Interests Under the PPP Contract: Miscellaneous

Paragraph 1 confirms that exclusive rights can be granted in a PPP contract. This could be in the best interests of the project and the public depending on the sector and the project in question, but whether this is appropriate in individual cases, or will create an undue monopoly or tie up competition unnecessarily, is something the relevant contracting authorities will need to determine.

Paragraph 2 gives the private partner primary responsibility for obtaining the permits and consents needed for the project, whilst giving the Contracting Authority an obligation to provide all appropriate assistance in this context, as well as granting any for which it is itself responsible. This "risk" is a shared one though, with the private partner also bearing some risk and taking the lead role, as permits and consents will have conditions attached to them which it will be primarily responsible for satisfying.

Paragraph 3 prohibits the Contracting Authority from taking steps which may unduly interfere with or get in the way of the private partner's rights and obligations under the contract, including its management autonomy. This is subject to, however, any specific rights of intervention that the Contracting Authority may have under the contract (e.g. certain approval rights) or at law (e.g. step-in rights). This is designed to allow the private partner the freedom to deliver the project while respecting the roles and rights of contracting authorities as governmental entities.

Paragraph 4 again confirms that the parties are allowed to agree on such payments terms as may offer the private partner and its lenders and investors adequate cost coverage and returns in compensation for the proper performance of the private partner's obligations, even where any regulated tariffs or prices in the host country may not otherwise ensure it.

Paragraph 5 allows for "exceptional" or "special" event provisions to be included in a PPP contract, offering protections against and compensation for the impact of certain major events beyond a party's control, such as force majeure or material change of law. The provision includes an illustrative list of the sort of consequences that may be specified in the contract. These clauses again tend to be challenging ones for the parties in negotiation, but the Standard highlights their availability in principle.

Paragraph 6 is designed to protect the position of the Contracting Authority by requiring its consent before any disposal of a controlling or “essential” interest in the private partner, at least for a specified period of time and subject to appropriate conditions.

## Article 31. Government and Public Support for PPPs

This Article clarifies that the full range of government support, assets or commitments which the host country government is entitled to provide under applicable law shall also be available to PPPs. These will of course also be subject to any relevant constraints under applicable law.<sup>30</sup> Under paragraph 1, the Government can also provide for these specifically in the Implementing regulations and explain them in the guidelines. Examples of them are given in the Article. Paragraph 2 states the terms and conditions applicable to them must be set out in the PPP contract. Host countries should add references to any other specific forms which they think need to be included (if any) or qualify or remove any they regard as inappropriate.

## Article 32. Protection of Public Service Provision and Contractual Equilibrium

This Article contains a set of principles, rights, and obligations relating to the conditions under which public services are provided and typically paid for by users. It is underpinned by the notion that all of the details of the conditions under which a public service is to be provided over such a long-term contract will be difficult to establish at the outset of the PPP agreement.

The Article recognises that the duly justified public interest must prevail over private interests in order to sustain essential public services. On the other hand, when public interest unbalances the contractual relationship to the detriment of the private partner, and through no fault of the private party, the Article allows for rebalancing of the financial obligations in the contract. To do this it lays down a series of principles that will guide this process and maintain this balance over the life a PPP project.

The first part of this Article concerns the main characteristics of any public service that is organised in the interests of users during the term of the contract. It also addresses the contractual balances that will enable the private partner to respect these characteristics without being prejudiced. It contains inter alia an obligation to respect three main characteristics applicable to any public service. These three characteristics are: equality of treatment for users; continuity of public service; and, where justified by the public interest, adaptation of the service to the needs of users.

Equality of treatment for users implies that all users of the service in a similar situation are entitled to benefit from the service on an identical basis, in particular as regards to price, without discrimination.

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30 For example, EU Member States and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions.

Continuity means that the private partner must ensure the proper provision of the service in accordance with the performance indicators, except in specific cases (such as force majeure). In the event of a failure seriously affecting the continuity of the service, the Contracting Authority has the right to automatically, but temporarily, replace the defaulting partner and provide the service at its expense (if necessary by requisitioning the partner's assets and personnel).

Adaptability is a requirement for the private partner to improve, technically modify, and/or adapt the service (e.g. geographically, economically and/or in terms of time), to reflect changes in the needs of the public during the course of the project or to make proposals to this effect to the Authority. The Contracting Authority may also have a unilateral right to impose changes to the characteristics or conditions of delivery of the service, provided that this is duly justified by the public interest. In these situations, the private partner is entitled to a rebalancing of the economic equilibrium, which may be re-established in a variety of ways (compensation, extension of the contract term, increase in tariffs, etc.).

This idea of rebalancing can also be found in the provisions on the monitoring and restoring of the contractual equilibrium due to unexpected changes.

The Article also contains a specific provision on tariffs in concessions. It stipulates that the economic and financial conditions for carrying out the project (including investment obligations for investment and service provision) must be drawn up and agreed between the parties in such a way as to ensure that the project is practically, economically and financially viable throughout the duration of the contract, including an appropriate rate of return on investment for the Concessionaire.

- (i) Tariffs and charges. The contract should define the principles and mechanisms used to establish, calculate and adjust the tariffs or the fees for services rendered and other charges due to the Concessionaire and allow a reasonably efficient Concessionaire to honour its obligations and deliver the public service throughout the duration of the contract.
- (ii) Monitoring and restoration of the contractual equilibrium. Unforeseen changes in economic, political, and/or financial circumstances that have a negative impact (beyond a certain threshold) on the economic and financial viability of the project may be taken into account through contractual mechanisms leading to the restoration of this economic and financial viability (e.g. granting compensation or modifying other appropriate contractual rights or obligations). These events may include, e.g., *force majeure*, changes in general regulations, tax provisions, customs regimes, or changes in economic circumstances (unforeseen circumstances), etc.

Paragraph (c) Maintenance programmes. The contract should provide for a programme of maintenance and control of the equipment and assets necessary for the proper performance of the service, subject as necessary to approval by the Contracting Authority. The private partner may be required to renovate, rehabilitate and or replace the infrastructure on a duly updated multiannual basis.

Paragraph (d) Cooperation. The parties are encouraged to specify the conditions under which they decide to achieve their common objectives, which is to satisfy the users of the infrastructure/service. In this context, they should meet regularly in accordance with specified requirements in order to monitor the successful completion of the technical and financial aspects of the project.

Paragraph (e) Reversion of the Assets. In order to ensure the continuity of the Public Service at the end of the contract, or in the event of early termination, the Contracting Authority needs to be able to obtain and/or dispose of a set of assets created by the private partner. The text clarifies that in case of Concession contracts the contract may need to contain specific clauses related to:

- (i) The identification of all the assets of any kind that are necessary for the proper provision of the public service to be transferred to the Contracting Authority. It may also provide a provision for the transfer or training of personnel required to provide the service.
- (ii) Early termination. The provisions relating to the (re)transfer of assets may also apply in the event of early termination, including situations in which the Contracting Authority has the right to terminate the contract early for reasons of public interest even if the partner is not at fault.

### Article 33. Protection of Lenders' and Investors' Rights and Interest

This Article allows the parties to a PPP contract to include such protections in favour of lenders, either in the PPP contract or in the direct agreement, as they may agree to be necessary to secure the successful financing of the PPP. These can include step-in rights and their associated powers (see above) but may also be rights arising from credit agreements that afford the lenders' approval to the exercise of specific rights and powers under the PPP contract, and preventing the taking of certain steps without their consent. The Article also confirms that within the boundaries of applicable law the private partner can grant the full range of financial security interests over the assets and rights comprised in a PPP and provides examples.

The Article addresses the doubts and uncertainty that may arise in countries first attempting PPPs regarding the extent to which the rights and powers of commercial lenders can or should be protected or prioritised, either contractually or through security interests, and where public infrastructure, publicly owned assets and public services are involved. The Article acknowledges the possible need to do so, and the parties' rights to provide for them where necessary. Step-in rights, however, can prove problematic in some jurisdictions, so where a host country does indeed wish (or is legally obliged) to qualify those protections, it should modify the Article accordingly. In that case, careful thought should be given to the danger of applying principles or imposing restrictions which may threaten the "bankability" of PPP projects. If new principles need to be crafted and restrictions disapplied, the PPP Framework may represent a vehicle for doing so. Existing laws may have to be modified or repealed as a result.

Paragraph 3 starts from the assumption that in a host country a PPP can be subject to all forms of available security over its assets, other than those public property assets that are specifically designated as exempt from such security. Paragraph 4 confirms that the private partner's shareholders can grant similar security over their ownership interests in the project company. Paragraph 5 however, provides (following UNCITRAL) that any transfer of the private partner's rights *and obligations* will require the consent of the Contracting Authority, and as provided for under the PPP contract. Care needs to be taken with this provision, however, and it should not stand in the way of what is known in common law countries as assignments by way of security (i.e. lenders can enforce the private partner's rights under its contracts, without having to perform its obligations). It is designed to prevent a full transfer of those *obligations*, as well as rights, which would mean in effect substituting another party for the private partner. Such direct or indirect transfers of the obligations of a PPP contract should always require the Contracting Authority's consent, even where that consent is automatically provided for as in a direct agreement. Sub-contracts and sub-leases of part of those obligations are also allowed.

## Article 34. Protection of End Users and the General Public

This Article alerts governments that as PPPs are implemented it is important to ensure adequate protection for the general public and the end users of the public services. In fact, it is a fundamental aspect of the PPPs for the SDGs principles. The Article obliges governments to take due account in their PPP projects (and regulations) of the needs and best interest of members of the general public and end users who stand to be affected by such implementation. It requires suitable mechanisms to be put in place for lodging and addressing complaints, grievances and objections, including where appropriate a regulatory or parliamentary ombudsman. The legal systems of host countries may already contain a range of procedures, rights and remedies designed to achieve a similar objective. If so, they may simply need to be extended to or accommodate PPP projects.

Paragraph 3 allows the Contracting Authority to require the private partner to put in place an “operational-level grievance mechanism”, which will be designed to facilitate the efficient handling of complaints and claims by the public. This would need to be provided for in the PPP contract. Paragraph 4 allows the private partner to make rules governing the use of public infrastructure by third parties and the public.

## CHAPTER VII. Governing Law and Dispute Resolution

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### Article 35. Governing Law

Paragraph 1 allows the parties to a PPP contract to choose and agree on the system of law which governs it. While an emphasis should be placed on use of the host country's legal framework, it may at times be beneficial, particularly during the early stages of a PPP program, to apply the law of another jurisdiction (e.g., when concepts essential to the success of the project are not recognised by host country law). As the host country's legal framework for PPP evolves, either to reflect international practice or to facilitate implementation of PPPs within local jurisdiction, such exceptions should become unnecessary. However, when by referring to or using a law other than local law (for example, to facilitate the bankability of the project), an effort should be made to ensure that the capacity of local citizens or private partners to defend their interests will not be impaired by the use of a foreign and perhaps unfamiliar law. Care should also be taken to ensure that dispute or arbitration clauses refer to means of defence and local courts located in the country hosting the project so as not to hinder the freedom of local companies or citizens to defend their interests.

Where the PPP project is a cross-border one, with parties, funding/financing, and/or assets straddling different jurisdictions, a "neutral" system of law may have to be applied to the contract. This can be done by agreement of the parties and may be law which (by definition) is not that of one or more of the jurisdictions involved.<sup>31</sup> Therefore, the Standard allows the parties to choose a different system of governing law other than that of the host country.

While the choice of a foreign system of governing law is a possibility, PPP contracts are often governed to some degree by local law. For example, the underlying assets of a project like real property will be governed by local law. Public infrastructure and public services will also typically be governed by local law, and it may be very difficult politically for a government to accept the use of foreign law on a large-scale, high-profile infrastructure project. The Article therefore builds in a "presumption" that local law will be used, save in exceptional circumstances. Finally, if the contract does not expressly provide otherwise, local law will be applied.

Other agreements and documents relating to the PPP are unlikely to be subject to the same choice of law sensitivities as the PPP contract. Paragraph 2 allows the parties to choose the law governing them, subject to any applicable legal restrictions. These are likely to be local law for the security documents and purely domestic commercial sub-contracts, and an internationally recognised system of foreign law for the credit agreements and the other major commercial contracts.

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31 The most famous example is the Channel Tunnel, the concession agreement for which was made subject to (in crude terms) "common principles" under both English and French law, with specific provision for resolving inconsistencies between them.

## Article 36. Dispute Avoidance and Alternative Dispute Resolution

This Article again applies the principle that the parties should have freedom of contract with respect to crafting appropriate dispute resolution mechanisms in the PPP contract. The Article mentions a wide range of possibilities, but some legal systems will prescribe specific procedures, as the Article acknowledges. If they do so, in ways which are perceived as problematic, the relevant legislation may have to be amended in accordance with Article 40. International arbitration under a well-recognised system or set of rules (e.g. the International Criminal Court (ICC), UNCITRAL, the International Centre for Settlement of Investment Disputes (ICSID), or the London Court of International Arbitration (LCIA)) is usually a "*sine qua non*"<sup>32</sup> of any bankable PPP contract. Paragraph 7 confirms the efficacy of any waivers of sovereign immunity included in the contract; these will usually be essential for legal proceedings to be successfully brought against the Contracting Authority or other sovereign body.

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32 This is very often an unavoidable condition.



## CHAPTER VIII. Implementation and Monitoring of PPPs

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The accurate compilation of full, detailed information about the implementation and operation of PPPs, including the challenges they face during their life, is essential to the successful development of the wider PPP system. PPP projects and systems need to be consistently reviewed and assessed by the governments advancing them. These Articles and the Standard seek to provide for that.

### Article 37. Monitoring and Reporting on the Implementation of PPPs

Paragraph 1 confirms that the Contracting Authority is entitled to exercise such powers of supervision and monitoring of its PPPs as may be necessary to satisfy itself that they are being implemented in accordance with their terms. Reports, documentation and physical access to the site are allowed for. The detailed requirements and procedures will all have to be set out in the PPP contracts, as these powers must be exercised in ways which do not interfere with the efficient implementation and management of the projects. But the Article encourages the parties to make proper provision for them.

Paragraph 2 obliges the Contracting Authority to provide regular reports about its PPPs to central government, copies of which shall generally be publicly available, as well as any specific information requested from time to time.

Paragraph 3 relates to the provision of additional information by the Contracting Authority to other government bodies in regard to the PPP project.

Paragraph 4 requires contracting authorities to keep accurate and complete records of the decisions made and procedures followed by them in connection with all aspects of PPP implementation under the PPP Framework. This is considered important from the perspectives of both transparency and accountability (both of which constitute PPPs for the SDGs principles).

### Article 38. PPP Database and Register

This Article mandates the creation and maintenance of a central database of PPPs in the host country, containing information that is reasonably comprehensive, up-to-date and clear, as well as generally publicly available. It aims to promote the transparency of the whole system, which is likely to be in the best interests of all involved. The detailed workings of the database can be set out in the regulations.

## CHAPTER IX. Transitional and Final Provisions

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The last three Articles deal with the formalities of the PPP Framework entering into force. They provide for the cancellation of certain existing laws (which can be listed), the disapplication of provisions of existing laws to subsequent PPPs, and the consequential amendment of others as necessary (allowing for example either a list in the law itself, or a deadline for making the amendments, or both). As a backstop, Article 40 also provides for the primacy of the Standard over other laws relevant to PPPs in the event of a conflict between them. Host countries should conform these Articles to their legislative customs and style as appropriate.



# Standard on Public-Private Partnerships / Concession Legal Framework in support of the Sustainable Development Goals and its Accompanying Guide

When properly structured and implemented, Public-Private Partnerships (PPPs) can fulfil a range of valuable purposes and objectives for the benefit of society and the common good. They can advance the efficient and cost-effective development, provision and operation of public infrastructure and public services, by harnessing the skills, resources, know-how and/or finance of the private sector most effectively and sustainably on a long-term basis, and structuring projects in ways that allocate the risks and responsibilities involved most appropriately over their life. This can strengthen the efficacy of project delivery (whether of design, construction, rehabilitation, operation and/or maintenance), stimulate new funding and investment opportunities, help bridge the public infrastructure and service gap, raise the quality of public services, improve the public's access to those services, and so help to achieve wider economic, environmental and social goals. It can enable projects to go ahead when they otherwise might not, advancing job creation and skills transfer. Ultimately, this can help to foster economic growth and social development in ways that promote the United Nations Sustainable Development Goals (SDGs), leading to a better and more sustainable future for all.

The purpose of this Standard is to establish the legal framework for "PPPs for the SDGs" and the contracts that give effect to them in countries, including the rules and procedures governing their selection, preparation, appraisal, procurement and implementation, the contractual principles and institutional arrangements applicable to them, and assist in the orderly and coordinated delivery of PPPs. This Standard applies to PPPs, with particular emphasis on those with a "PPPs for the SDGs" basis, but not to other types of commercial or contractual interface between public and private sectors.

The Accompanying Guide is a supporting commentary of the Standard and provides additional elucidation of the text of the Standard, written in non-legal language, but does not attempt to address or re-state every provision.

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