

PPP Procurement Handbook

Public-Private Partnerships in the Western Balkans

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Table of Contents

Abbreviations	4
Background Note	5
1. Introduction	7
1.1 Aim and Structure of this Guide.....	7
2. Preparing for the PPP procurement process	9
2.1 Assessing readiness for procurement	9
2.2 Assessing PPP market readiness.....	10
2.3 Governance arrangements for the PPP procurement process.....	12
2.4 Choosing an appropriate procurement procedure (e.g. competitive dialogue) .	14
2.5 Structuring the procurement process.....	17
2.6 Main steps of a two-stage PPP procurement process	17
3. Stage 1 – The tendering process	20
3.1 Procurement notices, pre-qualification and shortlisting.....	20
3.2 Invitation to tender.....	45
3.3 Interaction with tenderers	61
3.4 Evaluation of tenders and selection of preferred tenderer	66
4. Stage 2 – The PPP contract and financial close	76
4.1 Introduction to Stage 2 of the tendering process	76
4.2 Finalising the PPP contract	77
4.3 Concluding the finance agreements	79
4.4 Contract award and financial close.....	83
Annex A – Overview of EU Directives and procurement procedures	87
Annex B – Main laws of the Region governing public procurement and Public Private Partnerships (PPPs).....	88
Glossary of main terms and expressions.....	89

Abbreviations

EIB	European Investment Bank
EPEC	European PPP Expertise Centre
EU	European Union
FYROM	Former Yugoslav Republic of Macedonia
ITT	Invitation to Tender
OJEU	Official Journal of the European Union
PPP	Public-private partnership
PQQ	Pre-Qualification Questionnaire
REOI	Request for Expressions of Interest
SLA	Service Level Agreement
TFEU	Treaty on the Functioning of the European Union
USP	Unsolicited Proposal
VfM	Value for Money
WBIF	Western Balkan Investment Framework

Background Note

This Guide has been prepared by the European PPP Expertise Centre (EPEC) of the European Investment Bank as part of its mandate from the Western Balkan Investment Framework (WBIF) for *Strengthening the Capacity of the Public Sector to Undertake PPPs in the Western Balkans* (Albania, Bosnia Herzegovina, FYROM, Kosovo*, Montenegro and Serbia).

This Guide to the PPP procurement process belongs to a series of EPEC guidance documents that aim to strengthen the capacity of the governments in the Western Balkans (the Region) to prepare and procure PPPs (Figure 1).

Additional guidance has been produced alongside this Guide as part of the WBIF EPEC assignment, namely:

- **A Guide to the Qualitative and Quantitative Assessment of Value for Money in PPPs**

This document consists of three parts. Part 1 provides an introduction to VfM with an overview of the main objectives of VfM assessment. Part 2 focuses on qualitative VfM assessment, illustrating evidence based approaches to examining the suitability of the PPP framework in respect of given project characteristics. Part 3 presents quantitative VfM assessment, providing guidance on quantitative approaches to comparative VfM assessment, including the use of a public sector comparator (PSC).

- **A Guide to Preparing and Procuring a PPP project**

This document presents current good practice from the European PPP market that is relevant to the public officials in the Western Balkan region, who are responsible for launching and implementing PPP projects. It provides a framework for making the many decisions that are required by a public authority when it is preparing and procuring a PPP project.

- **A Guide to the Main Provisions of an Availability-based PPP Contract**

This document provides guidance on good practice to be adopted by Public Authorities when considering the main provisions of an availability-based PPP contract. Whilst not specific to any sector, the guidance document considers the context of the PPP market in the Region and the legislative environment of the Western Balkans countries.

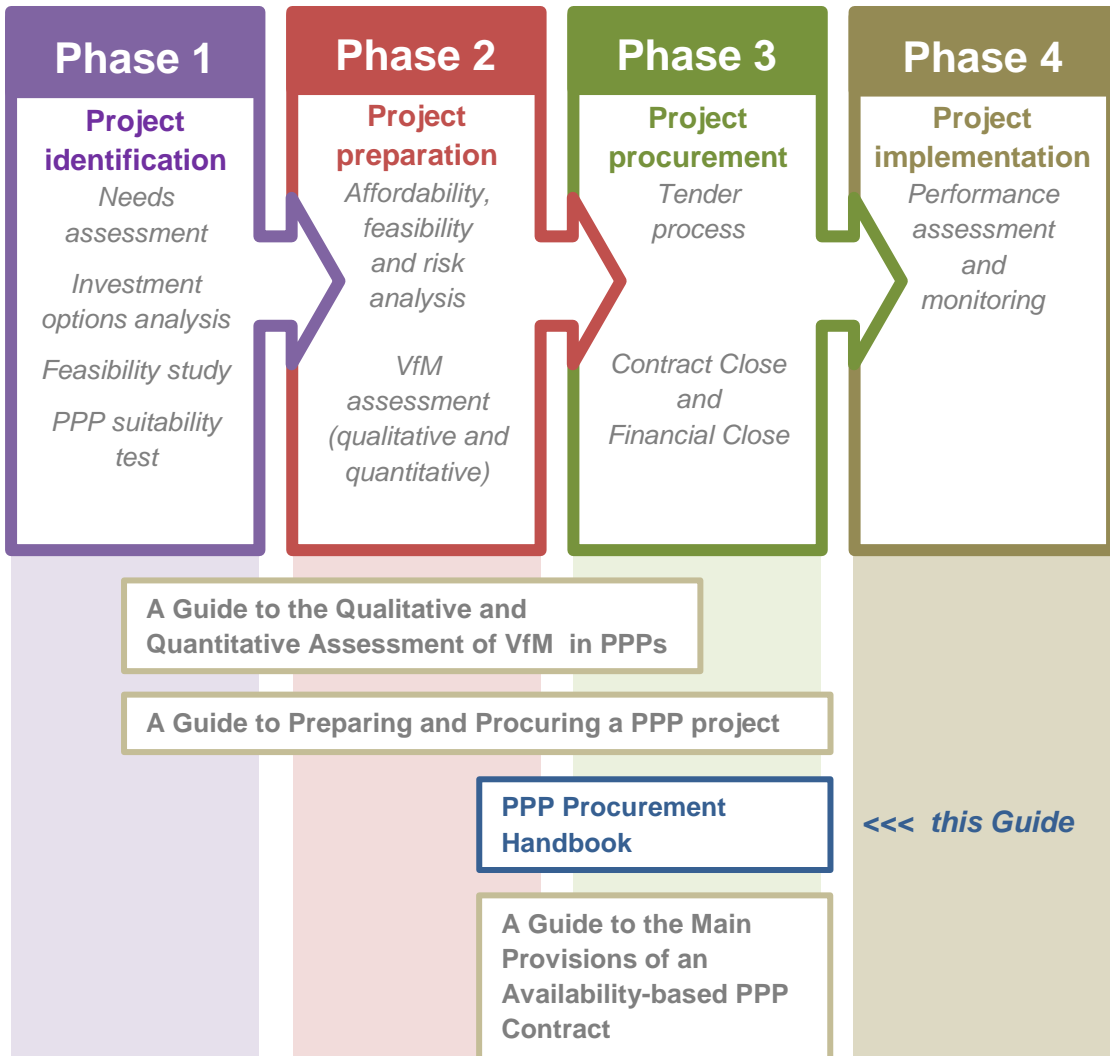
Figure 1 shows the applicability of the various guidance documents that have been prepared under the WBIF EPEC assignment to each of the phases of a PPP project cycle.

To assist the PPP practitioner, the Guide also provides details of other sources of information and guidance relevant to the subject, where individual issues and PPP

* This designation is without prejudice to positions on status and is in line with the United Nations Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo declaration of independence.

practices can be studied in greater depth. These are referenced throughout the Guide to VfM assessment and are summarised in Annex C at the end.

Figure 1 – EPEC WBIF Guidance documents facilitating PPP implementation



1. Introduction

Investment in social and economic infrastructure is crucial to accelerate sustainable, balanced economic growth and inclusive social development in Western Balkan countries. In the face of budgetary constraints, and in the expectation of benefitting from substantial efficiency gains through the participation of the private sector, governments in the Region are turning increasingly to public-private partnerships (PPPs) as one way to accelerate infrastructure investment, access private financing and improve service delivery.

At the end of the PPP project preparation phase, and once all the necessary approvals are obtained from the appropriate levels of the public authority, the project is ready to enter the procurement phase.

The PPP procurement process aims to select the most appropriate and competent private partner to deliver the public authority's desired service outcomes for the PPP project. The ultimate goal is to maximise value for money (VfM) through a competitive tender process for the award of the PPP contract, carried out in an open, objective and transparent manner. Stimulating healthy, competitive tension is conducive to the delivery of VfM. The European Union's procurement directives insist that the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency enshrined in the Treaty on the Functioning of the European Union (TFEU) are given practical effect by opening up public procurement to competition (see Recital 1 of Directive 2014/24/EU).

The success of the PPP procurement process therefore depends crucially on how effectively public authorities are able to communicate and interact with the private sector and interpret market capacity and appetite.

1.1 Aim and Structure of this Guide

This Guide focuses on the procurement phase for a PPP project. It is aimed at supporting public authorities in the Western Balkans to efficiently structure and manage the PPP procurement process, which is often more lengthy and complex than non-PPP procurement processes. It is based on international good practice, with special reference to the European Union's procurement directives and experiences.

This document provides:

- A concise illustration of the objectives, mechanics and challenges of the typical, two-stage PPP procurement process.
- A description of the first stage of the procurement process during which public authorities, after having issued a public notice:
 - o invite economic operators to submit their qualifications and substantiate their ability and competence to successfully execute the PPP project under consideration; and

- having pre-qualified a restricted number of suitable candidates, invite the submission of proposals from tenderers to substantiate how they propose to deliver the PPP project - including its financing needs - in order to meet the project requirements. At the end of this stage, the tenderer that submits the highest-ranked proposal (often referred to as the *preferred tenderer*) is identified.
- A description of the second stage of the process, the objective of which is to award the PPP contract after concluding any clarifications or negotiations with the preferred tenderer, to the satisfaction of the public authority. At this point the selected private partner will put in place the necessary financing that it has arranged for the PPP project, to enable it to fulfil its obligations under the PPP contract.
- In addition to describing the general processes, objectives and good practices for each of the procurement stages the guide also highlights the relevant current provisions of the procurement legislation in each Western Balkan jurisdiction (those sections are highlighted in mauve).

Acknowledgement

This document has been prepared with the support of Allen & Overy LLP, in association with Karanovic & Nikolic in respect of Bosnian, Macedonian, Montenegrin and Serbian law matters, and Boga & Associates in respect of Albanian and Kosovar law matters.

2. Preparing for the PPP procurement process

2.1 Assessing readiness for procurement

The PPP project will be ready for procurement once the project preparation phase is complete, which includes the public authority having put in place an adequate project governance structure (see Section 2.3 below).

To assess the readiness of the PPP project for the procurement phase, a checklist can be a useful device for a public authority to demonstrate to all relevant approval bodies that the necessary preparatory steps have been concluded properly and sufficiently.

The *EPEC PPP Project Preparation Status Tool* ('PPST' or 'Tool') is one such means of systematically checking the status of the multiple activities that contribute to the preparation of a PPP project. The PPST was developed under the 2014 EPEC WBIF Study specifically for use within the Region. It aims to assess the status of the preparations of a given PPP project by reference to a typical, good-practice PPP project development process, in order to determine if the project is ready for the launch of the procurement process. From an analysis of the answers provided by the public authority to a structured questionnaire, the PPST provides a summary of the status of the project preparation stage and highlights any potential gaps in its readiness for procurement.

To assess readiness for starting the project preparation stage, the public authority should have been able to answer the high-level questions in Box 1.

Box 1 – Readiness to start the project preparation stage

- *Has the need for the investment been demonstrated in terms of costs and benefits?*
- *Is there agreement on the scope and requirements of the investment?*
- *Is there the required approval to proceed with developing the investment as a potential PPP?*

Reference guidance documents



Extract from the *EPEC PPP Project Preparation Status Tool*, EPEC (2014)

A full conclusion may not have been reached on each of these three points, but the public authority should have carried out sufficient analysis to proceed to the preparation phase with a high level of confidence that conclusions will be reached in an acceptable period of time. The PPST can serve to help the public authority to identify at an early stage in the development of the project, any potential areas of weakness/incompleteness and to develop a structured approach to addressing these.

Once the project preparation phase is complete, the questions identified above should be capable of being answered in full, even if the responses may not be exactly the same as at the start of the preparation phase.

Box 2 presents a typical final checklist for public authorities to use to demonstrate readiness for the procurement phase (in accordance with the recommended steps of the PPST).

Box 2 – Readiness to procure the project

- *Has the analysis demonstrated that the project is affordable?*
- *Does the market sounding and bankability analysis confirm strong potential interest from the market in the project?*
- *Does the assessment confirm that the PPP option is expected to deliver the best value for money?*
- *Is the project team, including the external advisers, in a position to manage the procurement?*
- *Are all relevant powers, authorisations, permits, agreements and approvals to implement the project in place or obtainable within the required timetable?*
- *Are all the assessments up to date and consistent with each other—in particular, stakeholders' feedback, affordability, risk treatment, market sounding, bankability, value for money, capacity/availability of the team, timetable and the Authority's requirements?*
- *Has the steering committee and/or other relevant decision-makers approved the launch of the project procurement?*

Reference guidance documents



Extract from the *EPEC PPP Project Preparation Status Tool*, EPEC (2014)

Note that the steps that consider affordability and value for money are addressed separately in the companion documents to this Guide.

2.2 Assessing PPP market readiness

While in a strict sense the procurement phase commences with the publication of a legal notice to this effect (see Section 3), it is generally considered good practice for the public authority to initiate a market consultation process ahead of formally launching the procurement process. This consultation process can help to establish that there will be sufficient bids for the project to promote a healthy competition and to understand market appetite for the proposed contract terms (see Box 3).

Box 3 – Good practice in conducting preliminary market consultations

The success of the PPP procurement process depends on a number of factors, including the extent to which the public authority adequately assesses and stimulates market appetite for the project. Insufficient competition usually leads to sub-optimal terms and conditions for the public authority and users, thus jeopardising VfM.

The public authority can use market consultation to generate market appetite and to help it define the scope and structure of the project (including financing options) as well as the related PPP contract.

Market consultation can, for example, take the form of an industry forum, or pre-tender conference. Often interested parties will gather near the project location or the public authority conducts a roadshow (i.e. visiting groups of interested parties in locations remote from the project location), typically meeting in a way that allows multiple investors, contractors and/or lenders to be present in as efficient a manner as possible. The public authority may, for example, organise information days, technical briefings and the early public release of technical documents for consultation/public comment, etc.

All interested parties must be treated equally and a careful audit trail of all contacts between them and the public authority should be kept. The equal treatment principle dictates that information provided to one party should also be made available to the others in a timely manner.

Although this market consultation process is part of the general project preparation phase, it obviously requires interaction between the public and private sectors. Good practice therefore dictates that any consultation organised by the public authority is conducted in accordance with good procurement principles, as reflected in the 2014/24/EU Directive on public procurement, namely:

- *public authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner (Art. 18).*

The legitimacy of preliminary market consultations is explicitly recognised in the EU public procurement directives. Before launching a procurement procedure public authorities may:

- *conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements (Art. 40).*

Prior to initiating market consultations, public authorities might consider publishing a notice of their intention to consult with the market, giving details of any process that might be followed as part of this consultation (e.g. interviews or an open conference). Use of a *prior information notice* (PIN) (see Section 3) might be useful in this regard where the public authority is interested in consulting with a wider European or international market.

Reference guidance documents



See the checklist on “*Developing the PPP project*” in the *Project Preparation Status Tool*, EPEC (2014)

2.3 Governance arrangements for the PPP procurement process

The procurement and implementation of a major PPP project involves many challenges for the public authority. It requires the creation of clear lines of responsibility, accountability and authority for taking decisions during all the stages of the project cycle.

Good project governance creates decision-making mechanisms that empower people with knowledge, skills and experience to ensure that they are adequately empowered to implement the project effectively and efficiently. For larger PPP projects it is often necessary to bring in external resources in the form of experienced transaction advisers that possess the skills and competences that might not be readily available within the public authority.

2.3.1 Separation of approval and project management processes

A common way of implementing PPP processes effectively is to establish a dual project governance structure (see Figure 2), comprising:

- **a steering committee**, responsible for approving the principal decisions required at key steps in the procurement process. Typically this is composed of the main public sector stakeholders and led by a senior officer within the public authority that is responsible for delivering the project; and
- **a project team** responsible for managing the PPP project on a day-to-day basis (including managing any external transaction advisers) and reporting to the Steering Committee. A Project Director typically leads the Project Team supported by a Project Manager. The Project Director should be commercially aware and at the same time should have a good understanding of the workings of the public authority’s administration.

Reference guidance documents

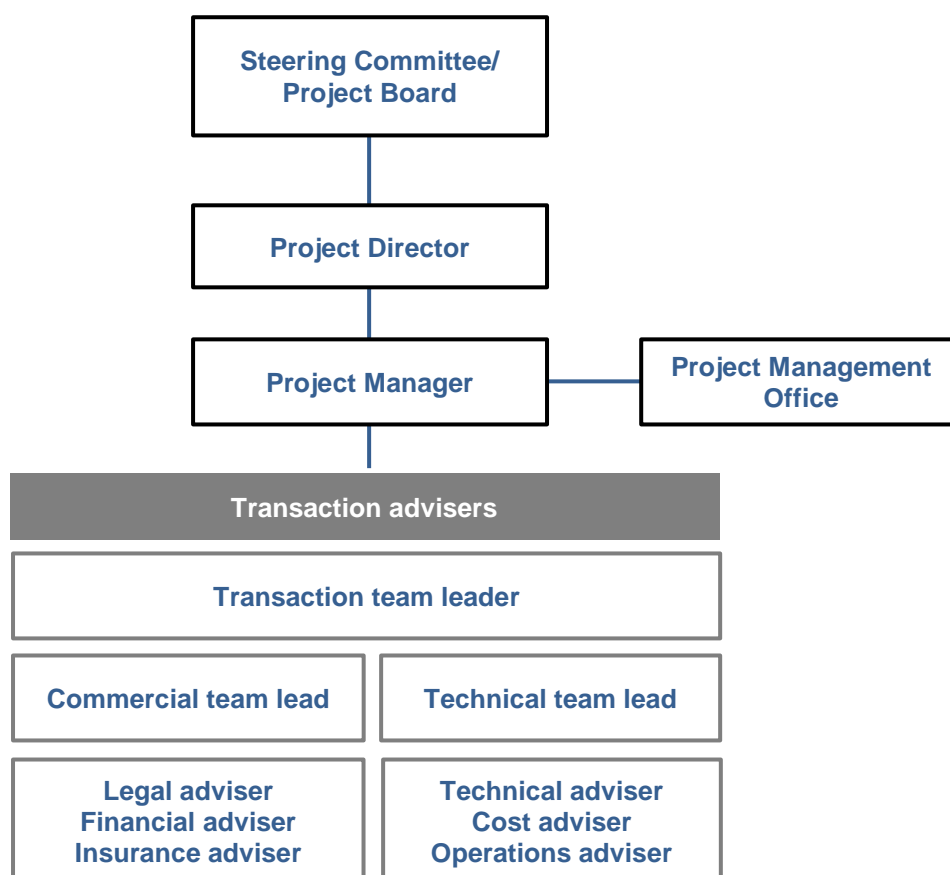
See the checklist on “*Managing and planning the process*” in the *Project Preparation Status Tool*, EPEC (2014)



The project team will often be supported by different types of advisers for the various phases of the PPP project preparation and procurement process.

Typically, the core team of transaction advisers for the procurement phase will consist of a financial adviser, a technical adviser and a legal adviser. Other consultants might be required for specific inputs, e.g. separate consultants for environmental, social impact, regulatory risk and insurance matters.

Figure 2 – Typical PPP project governance structure



Note to Figure 2: to avoid potential conflicts of interest and to protect the confidentiality of commercially sensitive information, it is good practice not to permit an adviser to the public authority on a given project (including an adviser to the project preparation stage) to advise a candidate, tenderer or lender on the same project during the procurement phase.

The project team, together with the advisers, is responsible for developing a detailed project plan, including a timetable for project preparation and the procurement activities. For the procurement process, the plan needs to take into account all the key steps associated with the specific PPP procurement procedure that has been chosen for the project in question, and to properly reflect what the various steps entail in terms of time, resources and cost.

Reference guidance documents



See the checklist on Managing and planning the process in the *Project Preparation Status Tool*, EPEC (2014).

The project team should ensure that procurement documents are prepared according to standards of good practice and in conformity with the prevailing legislation. It should also ensure that they are disseminated to the relevant approval authority, such as a steering committee, for any necessary agreement or prior approvals within required timelines.

Reference guidance documents



See: *Role and Use of Advisers in preparing and implementing PPP projects*, EPEC (2014).



See: *Project Governance: a guidance note for public sector projects*, UK Government (2007).

2.4 Choosing an appropriate procurement procedure (e.g. competitive dialogue)

One of the first choices for a public authority, following the decision on the use of PPP as a delivery model, is to select an appropriate procurement procedure. The choice of procedure, and its effective preparation and implementation, can determine the success of a PPP project.

Public procurement is the process by which public authorities purchase works, goods or services, intended for a public purpose. Within the EU, public procurement must comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular with the principles of *equal treatment, non-discrimination, mutual recognition, proportionality and transparency*.

The EU regulates public procurement within the European Union by issuing specific directives to its Member States. The most recent directive on public procurement is directive 2014/24/EU (the *2014 Directive*), which reforms and supersedes directive 2004/18/EC (the *2004 Directive*). It covers public procurement in general, laying down the principles that should apply to all public works, supplies or services contracts. The 2014 Directive contains no provisions specific to PPPs, but does refer to *mixed contracts* (defined as contracts that involve different categories of works, services or supplies). PPP contracts typically fall within this category.

The 2014 Directive provides for four procurement procedures:

- open;
- restricted;
- competitive dialogue; and
- competitive procedure with negotiation.

As with the 2004 Directive, the 2014 Directive contains specific rules that must be adopted when following a particular procedure (open, restricted, etc.). These rules apply to matters such as the need to publish notices, minimum periods for certain activities, minimum numbers of participants in a competition and the basis on which tenders are evaluated and a contract is awarded.

Legislation addressing public procurement within the Region conforms, in large part, to the 2004 Directive. National laws in the Region are therefore likely still to refer to the procedures that were available under that directive. These were the open, restricted and competitive dialogue procedures (all largely unchanged under the 2014 Directive)

and the negotiated procedure (now replaced by the competitive procedure with negotiation).

The choice and suitability of the procedure for PPP contracts is strongly influenced by how the procedures deal with the following:

- **restricting the number of tenderers by pre-qualifying applicants:** whether the procedure allows the public authority to limit the number of companies that participate in the tendering process;
- **the level of engagement with tenderers during the process:** whether the procedure allows the public authority to have discussions with tenderers about the PPP and their proposals for delivering the project; and
- **the relationship between price and quality in evaluating tenders:** the extent to which the procedure allows the public authority to consider qualitative aspects of tenders and not the tender price alone.

The size and complexity of PPPs means that the public authority is usually looking for a procedure that allows it to restrict the number of tenderers, engage in discussions with those tenderers on the details of the project and take account of the quality of tenderers' proposals as well as the prices that they offer.

Table 1 compares key features of the four current EU procurement procedures. It shows the different options that each procedure gives public authorities on how they plan and manage the procurement process (particularly regarding the three key issues mentioned above).

The limitations of the open procedure mean that it is not recommended for procuring PPPs and is therefore very rarely used. Furthermore, the restricted procedure is used in only a limited number of jurisdictions that have well developed civil codes governing public procurement and contract law. On that basis, the remainder of this guide deals with procurement using either the competitive dialogue procedure or the competitive procedure with negotiation.

Reference guidance documents



See the checklist on Preparing for procurement in the *Project Preparation Status Tool*, EPEC (2014).



See: *PPPs and Procurement Impact of the new EU Directives*, EPEC (2014).

Table 1 – Choice of procurement procedure: a comparison of EU procurement procedures (under the 2014 Directive)

	Open Procedure	Restricted Procedure	Competitive Procedure with negotiation	Competitive Dialogue
Possibility to limit the number of tenderers	No. Pre-qualification or pre-selection of tenderers is not permitted. Any interested company may submit a tender.	Yes. The number of tenderers may be limited, but to no less than five, in accordance with the criteria specified in the contract notice.	Yes. The number of tenderers may be limited, but to no less than three, in accordance with the criteria specified in the contract notice.	Yes. The number of tenderers may be limited, but to no less than three, in accordance with the criteria specified in the contract notice.
Discussions permitted during the tender process	No. The tender specifications may not be changed during the tendering process, and no negotiations or dialogue may take place with tenderers. Clarification of tender requirements is permitted.	No. The tender specifications may not be changed during the tendering process, and no negotiations or dialogue may take place with tenderers. Clarification of tender requirements is permitted.	Yes. Negotiations are permitted throughout the tendering process in addition to the normal clarification process. The tender specifications may be changed during the tendering process. Successive stages can be used to reduce the number of tenderers (i.e. further shortlisting of the number of participants).	Yes. Dialogue with tenderers is permitted on all aspects (similar to negotiated procedure, including further shortlisting). The tender specifications may be changed during the dialogue period. When the dialogue is concluded, this phase of discussion is formally closed and final complete tenders must be requested based on the solution(s) presented during the dialogue phase. During this second tender phase discussion is limited to clarifications (as in the restricted procedure).
Discussions permitted after the final tender is submitted	No.	No.	Yes. Some very limited negotiation is possible, until the contract is agreed.	Limited to clarification and fine-tuning. No changes are permitted to the basic features of the contract.
Basis for making the contract award	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Lowest price or most economically advantageous tender	Only most economically advantageous tender

2.5 Structuring the procurement process

The success of a PPP procurement is strongly influenced not only by the choice of procurement *procedure* (e.g. competitive dialogue), but also by the steps that the public authority takes (the *process*) to implement that procedure. The procurement process should aim to maximise competition between the private parties tendering for the project. This will result in better terms and conditions within the PPP contract and better VfM for the public authority (and the end-users of the services).

The structure of the procurement process can strongly influence the level of participation and the competitiveness of tenders. It is important, for example, not to create a process that is unnecessarily complex and demanding (and therefore too expensive and time-consuming for tenderers). It is also important to avoid a process that is too open to participation (and therefore reduces participants' chances of success or allows participation from companies not suitably qualified for a long-term PPP contract). Finding an appropriate balance can be difficult. As discussed earlier, a market consultation conducted before launching the competition (including on the planned procurement process) can be helpful in this regard.

In deciding on the structure of the procurement process, the types of issues that the public authority needs to consider include:

- What is the optimal number of candidates to pre-qualify and invite to tender?
- How many rounds of dialogue meetings should there be and on what aspects of the PPP?
- Should there be a reduction in the number of tenderers during the dialogue?
- If so, at what point in the dialogue should this reduction take place and on what basis?
- What qualitative aspects of the tenders are important for the evaluation, and how important are they relative to the tender price?

The steps of the procurement process will be constrained by the legal requirements of the chosen procedure (e.g. competitive dialogue). Annex A illustrates the processes available under each of the EU procurement procedures.

Reference guidance documents



See: *PPP Reference Guide, version 3*, PPP Knowledge Lab, World Bank (2017)

2.6 Main steps of a two-stage PPP procurement process

The procurement phase starts with the publication of a public legal notice (or 'contract notice') and ends with the award of the PPP contract and financial close. The selected private partner can then start the project activities, usually beginning with detailed design and construction.

The procurement process for the competitive dialogue procedure and the competitive procedure with negotiation can be considered in two main stages:

- **Stage 1** the tendering process (including any pre-qualification of candidates and selection of tenderers) up to the selection of the highest-ranking tender; and
- **Stage 2** the preferred tenderer negotiation period, leading to conclusion of the PPP contract, contract award and financial close.

These two main stages may comprise a number of sub-stages, which follow sequentially. Table 2 outlines these two main stages and the component steps of the procurement phase of a typical PPP project.

Table 2 – Main steps in a two-stage PPP procurement process

Stage 1: Tendering Process	
From the contract notice to the selection of highest-ranked tenderer	
Steps	Key activities
Procurement notice, invitation to pre-qualify and shortlisting of candidates	<ul style="list-style-type: none"> - Issue a public procurement notice or <i>contract notice</i> to advertise the competition. - Send an information document and invitation to pre-qualify to parties who express an interest in tendering. - Shortlist candidates who meet the pre-qualification criteria based on the quality of their submissions.
Invitation to tender	<ul style="list-style-type: none"> - Send tender invitation documents to the shortlisted candidates, including the tender evaluation criteria and the proposed draft PPP contract.
Interaction with tenderers	<ul style="list-style-type: none"> - Hold one or more meetings with each tenderer to develop potential tender solutions. - Provide any necessary clarifications to tenderers and update tender documents/draft PPP contract, if required. - Invite final tenders.
Evaluation of tenders and identification of the preferred tenderer	<ul style="list-style-type: none"> - Evaluate compliant tenders using the pre-published evaluation criteria and rank them. - First-ranked tender selected as preferred or successful tender.

Stage 2: PPP contract and financial close From selection of winning tender to contract award and signing of all PPP-related agreements	
Steps	Key activities
Finalise PPP contract	<ul style="list-style-type: none"> - Finalise/clarify/negotiate the PPP contract details with the preferred/successful tenderer. - Make any agreed non-material changes to the tender PPP contract, if necessary.
Conclude financing agreements	<ul style="list-style-type: none"> - Lenders to the preferred/successful tenderer carry out their due diligence checks and confirm financing terms. - With the preferred/successful tenderer, finalise the terms of the financing/ancillary agreements with the lenders.
Contract award and financial close	<ul style="list-style-type: none"> - Issue notice to unsuccessful tenderers of intention to award the contract (<i>standstill period</i>). - (Assuming no legal challenge) the PPP contract is signed (<i>contract close</i>) along with all related agreements and financing agreement (<i>financial close</i>). - All parties satisfy any remaining conditions precedent that are necessary to make the PPP contract effective.

The complexity of a PPP means that it is essential for the public authority to have a sound knowledge of the public procurement legal framework in advance of launching a procurement process.

A public authority has to apply skills and exert judgement when formulating and implementing its procurement strategy. The project team must therefore have the requisite expertise available, including a working knowledge of the relevant procurement legislation. It should also include, or have easy access to, a procurement specialist who can work closely with the legal advisers to ensure compliance with the relevant national procurement legislation.

A final decision on the most appropriate procedure to adopt and how to implement it should therefore be taken after having given proper consideration to all available alternatives and to the specifics of a particular PPP project. As previously stated, the public authority should take appropriate legal advice on this selection.

Reference guidance documents



See the checklist on preparing for procurement in the *Project Preparation Status Tool*, EPEC (2014)



See: *Procurement of PPP and the use of competitive dialogue in Europe*, EPEC (2010)

3. Stage 1 – The tendering process

3.1 Procurement notices, pre-qualification and shortlisting

3.1.1 Procurement notices

Ensuring adequate publicity and transparency of the procurement process is a pillar of international PPP good practice and a fundamental tenet of EU public procurement law. Publication by a public authority of a procurement notice (or **contract notice**) marks the start of the formal procurement process and gives legal effect to the proceedings that will lead to the award of a public contract.

- **The prior information notice (PIN)**

A pre-warning to the market of the publication of the contract notice can also be given, such as using a *prior information notice* or *PIN* (see Box 4).

Box 4 – Prior information notice (PIN)

Issuing a prior information notice in advance of the contract notice gives a warning to interested parties that the procurement competition will be launched shortly. It signals the planned call for competition, but without giving rise to the legal commitment to a process that the contract notice brings. The public authority should generally include the following in a PIN:

- *information about the contracting authority;*
- *a description of the type of procurement procedure it plans to use (e.g. competitive dialogue or competitive procedure with negotiation);*
- *a description of the project and the nature of activities to be undertaken by the private partner;*
- *a brief description of the criteria that may be used to select candidates;*
- *a brief description of the criteria that may be used for award of the contract (to the extent that they have been already established);*
- *the estimated value of the contract (to the extent that it is known);*
- *the timing of any information day for interested parties; and*
- *the expected time for publication of the contract notice and any time limit for the receipt of expressions of interest.*

For PPPs, where tender teams often need time to assemble, the use of a PIN can be useful in providing advance notice of a public authority's intentions and the opportunity the PPP presents.

▪ **The contract notice**

In most jurisdictions (including within the EU) the contract notice is required to follow a standard format for public contracts having a value above a certain threshold. The threshold can depend on the nature of the contract. See Box 5.

Box 5 – Contract notice

Based on the requirements set by the 2014 Directive and on good practice, a contract notice should include the following information:

- information about the contracting authority;*
- the nature of the contract and activities to be performed;*
- the estimated order of magnitude of the contract;*
- the expected duration of the contract;*
- the admission (or prohibition) of variant tenders;*
- the type of award procedure to be used;*
- the criteria that will be used to select candidates, including any minimum qualifying criteria;*
- the methodology that will be used to reduce the number of candidates (if one is to be used);*
- if a staged process will be used in order to gradually reduce the number of tenders;*
- the anticipated criteria to be used for award of the contract;*
- where information documents can be obtained in order to express interest;*
- the time limit for the receipt of submissions of expressions of interest; and*
- the procedure for review and body responsible for review/mediation.*

The information provided should be sufficiently precise to enable interested parties to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

A PPP will normally be of a size and complexity that requires such a notice to be published. To maximise participation by tenderers, it is beneficial to provide as much good quality information about the project as possible to potential tenderers.

EU Member States must publish all contract notices in the Official Journal of the European Union (OJEU). Accessible to non-EU countries, the OJEU is the gazette of record for the European Union. The EU's Publications Office publishes it daily in over twenty languages.

Publication of the contract notice may also take place on other public electronic platforms that target certain market sectors or jurisdictions. To attract the attention of a wider market (and increase competitiveness), it is also good practice to advertise larger, more significant contracts in relevant national and/or international newspapers and industry magazines. On completion of the competition and award of the contract, it is good practice to publish information giving details of the winning tenderer in a *contract award notice* (see Section 4.4.3).

▪ Use of E-procurement in the 2014 Directive

The 2014 Directive recognises the use of electronic information and communication, in particular for the availability of procurement documents, requests for participation and tender submission. This can increase transparency and lead to cost and time savings in the procurement process.

Reference guidance documents



See: *PPPs and Procurement Impact of the new EU Directives*, EPEC (2014).



See: *Public Procurement standard Forms Guidance*, European Commission (2017)



See: *Public Procurement Guidance for Practitioners*, European Commission (2018)

Legislation in the Western Balkan countries

National legislation in the Western Balkan countries gives detailed guidance on the steps to be followed in this phase of the procedure. In some Western Balkan jurisdictions, public authorities need to inform (or involve) national procurement agencies in these phases.

Albania

Standard tender documents are prepared by the Agency for the Treatment of Concessions (ATRAKO) in cooperation with the Public Procurement Agency (PPA). Based on the standard tender documents, a concession commission of the contracting authority prepares tender documents for a specific project in accordance with the concession/PPP law.

Each contract notice must be published¹:

- in the Public Notice Bulletin; and*

¹ Article 38 of Law No. 9643 dated 20.11.2006 "On Public Procurement", as amended.

- on the official website of the PPA.

If the value of the contract exceeds a certain threshold, the notice must also be published in at least one newspaper with European distribution.

Bosnia and Herzegovina

A procurement notice²:

- *must provide all potential tenderers with sufficient information to enable them to assess whether they are interested to participate in the public procurement; and*
- *include a summary of the relevant elements of the tender documentation.*

The contracting authority must publish each procurement notice in the public procurement portal. A summary of all procurement notices is published in the Official Gazette of Bosnia and Herzegovina. If the value of the procurement exceeds a certain threshold, the summary of the procurement notice must be published in English in the public procurement portal.³

Former Yugoslav Republic of Macedonia (FYROM)

In FYROM, in each type of procedure a public procurement notice must be published in⁴:

- *the Electronic System for Public Procurement and the Public Gazette of FYROM; and*
- *the OJEU, in respect of public procurement contracts with an estimated value exceeding EUR 50,000 for goods and services and EUR 200,000 for works.*

The requirement to publish the notice in the OJEU is a transposition of Articles 49, 51 and 52 of the 2014 Directive into Macedonian law. A procurement notice may be published in any international business publication or technical or professional newspaper.

Kosovo*

The public authority must immediately submit to the PPP Department at the Ministry of Finance the request for qualifications notice, the request for proposals notice and the contract award notice.⁵

² Article 35 of Laws No. 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10 on Public Procurement in Bosnia and Herzegovina.

³ Article 36 paragraph 1 of Laws No. 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10 on Public Procurement in Bosnia and Herzegovina.

⁴ Article 54 of the Law on Public Procurement, published in the Official Gazette of the Republic of Macedonia No. 136/2007, as amended.

⁵ Article 43 paragraph 1 of Law No. 04/L-045 "On Public-Private Partnership".

The notice must be published in the official languages of the Republic of Kosovo (i.e. Albanian and Serbian) in at least two daily newspapers distributed in Kosovo*.⁶*

Montenegro

Concessions are awarded based on an annual concession plan, which is adopted by either the public authority or local municipalities.⁷ Having adopted the concession plan, the awarding authority publishes a public announcement:

- in the Official Gazette of Montenegro;*
- in at least one daily printed media publication distributed throughout Montenegro;*
- on its website; and*
- if the project is strategic to Montenegro, in representative international economic print media.⁸*

Serbia

All tender procedures are initiated by publication of a public invitation in the Serbian language and a foreign language customarily used in international trade⁹:

- in the Official Gazette of the Republic of Serbia;*
- in public media distributed throughout Serbia;*
- on the internet page of the public body carrying out the procurement; and*
- in the public procurement portal.*

Prior to publication, the PPP project itself requires the approval of the competent public authorities, e.g. the PPP Commission.

3.1.2 Overview of the pre-qualification process

Throughout the Region, legislation on the procurement of PPPs includes the option to limit the number of suitable candidates invited to submit a tender.

This process of selecting a limited number of tenderers, who have sufficient technical and economic capacity and capability to undertake the project, is often referred to as *the pre-qualification stage*.

The formal document in which a public authority provides information on the project and invites interested parties to demonstrate their suitability to participate in the tender stage is often called a *pre-qualification information document*. The suitability of interested parties to be invited to tender is determined from an assessment by the public authority of their responses to a list of specific queries that are included in the pre-qualification information document. This list of queries is often called the *pre-*

⁶ Article 43 paragraph 2 of Law No. 04/L-045 "On Public-Private Partnership".

⁷ Article 18 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

⁸ Article 21, paragraph 2 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

⁹ Article 22 of Laws No. 88/2011, 15/2016 and 104/2016 on Public Private Partnership and Concessions in Serbia.

qualification questionnaire or PQQ. See Box 6 for an overview of the pre-qualification document, described in more details in Section 3.1.4.

Box 6 – Overview of the pre-qualification information document

The pre-qualification information document will provide parties interested in participating in the tendering process for the PPP project with the following information:

- an overview of the contract;*
- a description of the procurement process to be followed;*
- any minimum qualifications required of participants;*
- the pre-qualification questionnaire or PQQ. This is a pro-forma questionnaire document that requests the candidate to provide certain information to the public authority in a formal pre-qualification submission document;*
- any particular instructions on how to complete the questionnaire;*
- the rules of the competition, including any selection criteria;*
- the deadline for submission of the pre-qualification submission document;*
- the contact details of the contracting authority and process for handling queries.*

The information provided should be sufficiently precise and informative to enable interested parties to identify the nature and scope of the procurement and decide whether to participate in the procedure.

Reference guidance documents



See: *Public Private Partnerships – a Guide for Municipalities*, The Canadian Council for Public Private Partnerships (2011).



See: *National Public Private Partnership Guidelines - Volume 2: Practitioners' Guide*, Department of Infrastructure and Regional Development, Australia (2015).

3.1.3 Purpose of the pre-qualification process

The primary goal of the pre-qualification process is to confirm the capacity and experience of a candidate to undertake the contract and, from a group of suitable candidates, to identify those who are best qualified to prepare a tender for the project. At the end of the pre-qualification process, only candidates deemed capable of carrying out the PPP project in an adequate manner are invited to the next stage.

The next stage of the competition, when dialogue will be conducted with all tenderers and tenders received for evaluation, is the most complex. Dealing with a large number of tenderers and then evaluating their detailed proposals is an onerous and time-consuming task for the public authority and its advisers. The process of pre-qualifying and then shortlisting those candidates who will be invited to tender can therefore reduce what may be a large number of participants to a more manageable number, generally not less than three and no more than five.

Reducing the number of participants in the competition can therefore allow limited time and public resources to be used more effectively. Efforts can be concentrated on dealing with a smaller number of tenderers assessed as being more experienced and having greater capabilities when compared to other suitable candidates.

It can also ensure that candidates who are unsuitable, do not waste time and resources tendering for projects they are unlikely to win. Finally, by limiting the number of candidates at the tender stage, successful candidates are more likely to invest time and resources developing high quality tenders, as they stand a higher probability of success.

Candidates' pre-qualification submissions need to be evaluated and scored, in accordance with pre-determined *selection criteria*. Candidates are ranked according to the total score achieved. A *shortlist of candidates* is then identified, the number on the shortlist being equal to the limit indicated in the pre-qualification information document and the contract notice.

The remaining qualifying candidates are either disqualified or, alternatively, held in reserve to be invited to tender in the event that a shortlisted candidate withdraws at a later stage in the competition. The pre-qualification information document should state whether non-shortlisted candidates are to be held in reserve.

Legislation in the Western Balkan countries

Albania

In Albania, a pre-qualification request is included in a contract notice (see below under the heading 'Documents, studies, statistics'). There are no specific requirements as regards the content of a pre-qualification request (other than those normally indicated in a contract notice, which, among other things, shall provide¹⁰ for the description of the project that will be procured, and the selection criteria.

¹⁰ Article 24 of Law No. 125/2013 dated 25.04.2013 "On Concessions and Public Private Partnerships", as amended; Article 31 of Law No. 9643, dated 9643, dated 20.11.2006 "On Public Procurement", as amended.

Bosnia and Herzegovina

The applicable legislation does not indicate requirements for a request for pre-qualification. The tendering documentation should include clear and relevant information relating to the request for proposals.¹¹

Former Yugoslav Republic of Macedonia (FYROM)

Under the applicable FYROM legislation, a request for pre-qualification is part of a public procurement notice, which, among other things, must include¹²:

- information on the public authority and the object of the PPP contract;*
- legal, economic, financial and technical information;*
- evaluation criteria;*
- the minimum number of candidates intended to be invited and, if necessary, the maximum number; and*
- administrative information.*

Kosovo*

Under Kosovar PPP law, in order to qualify for the selection procedures, interested tenderers must meet:¹³

- the eligibility criteria;*
- the professional suitability, economic and financial standing criteria; and*
- the technical and professional capability criteria*

specified in the request for qualification.

Montenegro

The public announcement for pre-qualification must set out the pre-qualification criteria.¹⁴ Those criteria must be determined in an objective, non-discriminatory and transparent manner.¹⁵

Pre-qualification criteria depend on the subject of the concession, but in each case they must take into account:

¹¹ Article 44 of Laws No. 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10 on Public Procurement in Bosnia and Herzegovina.

¹² Article 2 of the Rulebook on the Form and Content of Public Calls and Notifications on Awarding of Public Procurement, published in the Official Gazette of the Republic of Macedonia No. 161/2009; and Article 19 of the Law on Concessions and Public Private Partnership.

¹³ Article 27 of Law No. 04/L-045 "On Public-Private Partnership".

¹⁴ Article 38, paragraph 3 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

¹⁵ Article 38, paragraph 4 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

- *tenderers' technical and financial capability to implement the project; and*
- *tenderers' experience in performing concession activities.*¹⁶

*A public announcement must set out a list of documents that a tenderer must submit as evidence that it meets all the pre-qualification criteria.*¹⁷

Serbia

*The contracting authority must publish a request for pre-qualification ('invitation to submit applications') in a restricted procedure, qualification procedure and competitive dialogue procedure.*¹⁸

*Each invitation to submit qualifications must indicate the following:*¹⁹

- *contracting authority's name, address and website;*
- *type of contracting authority;*
- *type of public procurement procedure;*
- *a description of the contracting authority's needs (in the case of competitive dialogue);*
- *if the contract is for goods and services, a description of the procurement subject, name and code or if the contract is for works, the nature and volume of works and basic features of the works and the works site;*
- *a number of lots (if the project is to be carried out in several lots);*
- *a special note if the contract is reserved for institutions, organisations or economic operators for job training, vocational rehabilitation or employment of disabled persons;*
- *in relation to electronic tenders, the basic data on the contracting authority's information system and necessary technical requirements for participation;*
- *in the case of a qualification procedure, the period taken into account in respect of tenderers' qualifications;*
- *how to obtain tender documentation or a website with available tender documentation;*
- *the manner and deadlines for submission of tenders;*
- *the time, place and manner of opening tenders;*

¹⁶ Article 38, paragraph 5 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

¹⁷ Article 38, paragraph 6 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

¹⁸ Article 60 paragraph 2 of Laws No. 124/2012, 14/2015 and 68/2015 on Public Procurement in Serbia.

¹⁹ Appendix B to Laws No. 124/2012, 14/2015 and 68/2015 on Public Procurement in Serbia.

- *conditions under which tenderers' representatives may take part in the opening of tenders;*
- *the deadline for selection;*
- *the contact person.*

3.1.4 The pre-qualification information document

The pre-qualification information document provides interested parties with:

- information about the duties and responsibilities of the public authority;
- an overview of the needs and requirements of the public authority in respect of the project. This may include, for example, information on the scope and location of the works and services, financing, land, utilities, third parties and other stakeholders, design requirements, works requirements, ground investigation, and health and safety, quality and environmental management systems;
- a description of the key technical requirements and services outputs for the project. This might include a copy of the documents which will comprise the public authority's technical requirements such as the construction and service output requirements;
- a brief description of the key terms of the PPP contract. (Note: Neither the information document nor any of the information provided in the document should form part of the final PPP contract.);
- an overview of the proposed procurement process, including any stages of dialogue, submission requirements, further reduction of the number of participants and the anticipated contract award criteria;
- the indicative time frame for the procurement competition;
- the rules for the pre-qualification process (covering procedural matters such as communications with interested parties, dealing with clarifications before and after the deadline for submissions, the manner of receiving and opening submissions); and
- the selection criteria and evaluation procedure which will be undertaken to pre-qualify and select those parties who will be invited to participate in the tender phase.

See Box 7 for a typical contents list for a pre-qualification information document.

Further information regarding the pre-qualification information document is provided in Section 3.1.5 and in Box 9.

Box 7 – Typical contents of a pre-qualification information document

1. *General overview and explanation of the process*
2. *General information*
 - *role and duties of the public authority*
 - *procedural matters concerning the conduct of the pre-qualification stage of the competition; e.g. right to reject and/or disqualify candidates, tender costs, conflicts of interest, confidentiality, publicity, etc.*
 - *official language and governing law of the process*
 - *the public authority's project team members and project governance structure*
3. *The PPP project*
 - *strategic context of the project*
 - *description of the location of the project and the site(s)*
 - *expected project outcomes and objectives of the public authority*
 - *services required to be delivered*
 - *performance indicators*
 - *data room*
 - *approach to design (e.g. use of a specimen or reference design)*
4. *The procurement process*
 - *outline of the expected procurement process and principles*
 - *indicative timetable for each step of the process*
 - *phases of dialogue planned*
5. *Pre-qualification, selection and shortlisting of candidates*
 - *conditions for participation, minimum qualifications required and selection criteria*
 - *instructions on how to complete the pre-qualification submission document*
 - *arrangements for a candidates' conference and dissemination of information on the project to candidates*
 - *arrangements for making enquiries and submitting responses, including deadlines (dates, times) for submissions*
 - *pre-qualification assessment and selection process*
6. *Next steps*
 - ***Annex to the pre-qualification information document***
 - *Definition of terms used in the document*

- *The pre-qualification questionnaire (PQQ) - to be completed by the candidate and returned to the public authority by the published submission date*
- *Draft PPP contract and contract schedules (optional) or heads of terms of the PPP contract*
- *Declarations to be signed by candidates*
- *Model forms and letters to be completed by candidates (e.g. tender bond, support letter(s) from financing sources, guarantees)*

▪ **Legal form of a candidate and grounds for exclusion**

A candidate may be an individual company or, more likely on a PPP project, a group or consortium of individual companies. A candidate that comprises a group of companies, including where the group is a temporary association, should not normally be required by the public authority to have a specific legal form in order to participate or to submit a tender. However, the public authority may require a group of companies (having become a tenderer) to assume a specific legal form in order to sign the final PPP contract.

The 2014 Directive (Article 57) includes the stipulation that public contracts should not be awarded to companies that have participated in a criminal organisation or have been found guilty of corruption, fraud, terrorist offences, money laundering or terrorist financing, and child labour and other forms of trafficking in human beings. The non-payment of taxes or social security contributions is also grounds for the mandatory exclusion of a candidate.

Prospective candidates therefore need to be given very clear instructions in the pre-qualification information document as to the rules that the public authority will follow in determining whether a candidate (being an individual company or, more commonly, a group or consortium of individual companies) may participate in the competition. These rules will address the circumstances of both a single candidate and the individual members of a candidate consortium (see Box 8).

Box 8 – Legal form and grounds for exclusion of a candidate

The pre-qualification information document will provide the public authority's conditions on the participation of a candidate (or individual member of a candidate consortium) in the tendering process. These will typically cover:

- *grounds for exclusion;*
- *grounds for disqualification;*
- *declaration of conflicts of interest;*
- *disclosure of any relevant legal proceedings;*
- *status and composition of a candidate (i.e. the individual members of a consortium);*
- *permissible changes to the composition of a candidate consortium; and*

- *whether it is permissible to participate in more than one candidate consortium.*

▪ **Reliance by candidates on the information given by the public authority**

The information contained in the information document is given in good faith by the public authority for the purpose of giving guidance to potential candidates in making a submission.

It is normal for the information document to state that the public authority makes no warranty or representation as to the accuracy or completeness of the information provided and that reliance on or use of information provided is entirely at the risk of the candidate. This notice may also exclude any liability on the part of the public authority and their advisers for any errors or omissions in the information contained in the document.

▪ **Timescale for responding to the pre-qualification information document**

Within the Region, the minimum permissible time limits for the each stage of the pre-qualification and subsequent tender periods are generally in line with the EU directives. It should be noted, however, that these are minimum allowable periods and, although they may sometimes be shortened (for example when using electronic means) it is not always in the public authority's best interest for the period to be too short.

It is therefore important that a public authority sets a realistic timetable for the pre-qualification process. It is important to bear in mind that most prospective candidates will be looking at establishing tendering consortia with other partners. This entails a negotiation process that requires some time in itself. The use of prior information notices and information days can help significantly in creating market awareness before the formal launch of the competition, allowing prospective candidates to mobilise teams in readiness (see Section 3.1.1). Experience shows that over-optimistic timetables can jeopardise the subsequent implementation phases of the project by limiting both the number and quality of submissions.

The pre-qualification information document will provide rules dealing with the eligibility or ineligibility of late submissions received after the published timelines.

Reference guidance documents



See: *Mutual Investment Model technical documents: Guidance for prior information notices and for contract notices, Standard form pre-qualification questionnaire*, The Welsh Government (2017)

Legislation in the Western Balkan countries

Albania

Albanian law provides for the following deadlines to submit an RfQ²⁰:

- in projects with a value exceeding a certain threshold, at least 20 days from the date of publication of the notice on the official website of the PPA; and
- in projects with a value equal to or below that threshold, at least 15 days from the date of publication of the notice on the official website of the PPA.

Those deadlines may be shortened by five days if the notice is drafted and published by electronic means.

Bosnia and Herzegovina

The contracting authority must indicate the time limits for receipt of the requests for participation and tenders, taking into account the complexity of the procurement and time necessary to prepare requests for participation and tenders. In any case, deadlines may not be shorter than the time limits provided for by applicable law.

- Restricted procedure, negotiated procedure with publication of a notice and competitive dialogue procedure—a minimum time limit for receipt of requests for participation is not less than 15 or 30 days (depending on the value of the project) from the day of publication of the notice on the public procurement portal.²¹
- If the contracting authority has published a prior information notice, it may indicate that the time limit for receipt of tenders may not be shorter than 13 or 25 days, depending on the value of the project.²²

Former Yugoslav Republic of Macedonia (FYROM)

In FYROM, in each awarding procedure, tenderers must be given not less than 30 days for submitting pre-qualification submissions. Depending on the estimated value of the PPP contract, that period can be shortened to 15 days in restricted and competitive dialogue procedures and to 12 days in negotiated procedures with a prior publication notice.

²⁰ Article 43 of Law No. 9643, dated 20.11.2006 “On Public Procurement”, as amended.

²¹ Article 40 of Laws No. 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10 on Public Procurement in Bosnia and Herzegovina.

²² Article 23 of Laws No. 88/2011, 15/2016 and 104/2016 on Public Private Partnership and Concessions in Serbia.

Kosovo*

Following the publication of the request for qualification, interested tenderers must be given not less than 20 days to prepare and submit their applications.²³

The public authority will then make a decision on the applications submitted by tenderers in the pre-selection phase and notify them accordingly. The pre-selected tenderers must be given not less than 40 days from that notification to submit their proposal to the public authority.

Montenegro

The deadline for submitting pre-qualification documents cannot be shorter than 20 days from the date of publication of the public announcement.

Serbia

In procedures conducted by a holder of exclusive rights who is performing the works, within the meaning of the law regulating public procurements, and in a restricted procedure, negotiated procedure with publication of a public invitation and competitive dialogue procedure conducted by a contracting authority:

- the shortest time limit for the receipt of tenders or applications for participation in a restricted procedure is 37 days from the date of dispatching the public invitation;*
- in restricted procedures, the shortest time limit for the receipt of tenders is 40 days from the date of the publishing of the public invitation.*

Under the applicable Serbian law, it is not entirely clear whether the specific deadlines apply to only a restricted procedure or rather all types of procedures provided for under applicable law i.e. a restricted procedure, negotiated procedure with publication of a public invitation and competitive dialogue procedure.

However, it seems that the deadline of 37 days applies to restricted procedures, and the 40-day deadline to the remaining two procedures (negotiated procedure with publication of a public invitation and competitive dialogue procedure). Those deadlines are in line with the minimum requirements set out in Articles 27 to 30 of the 2014 Directive.²⁴

²³ Article 26 paragraph 2 of Law No. 04/L-045 "On Public-Private Partnership".

²⁴ Article 34 paragraph 2 of Law No. 04/L-045 "On Public-Private Partnership".

3.1.5 Contents of the pre-qualification questionnaire (PQQ)

Box 9 provides an example of a typical table of contents of a PQQ. The questionnaire is often a separate document that is attached as an appendix to the information document. It is generally laid out in a tabular format with boxes in which the candidate is invited to provide the relevant information in response to the requests made. The forms are usually provided in electronic form or available to be completed electronically on line using a secure website. The information requested should be relevant to the project requirements.

Box 9 – Typical contents of a pre-qualification questionnaire (PQQ)

1. *Details about the candidate*
 - *Details of the internal organisation and relationships between candidate members, including their roles and key individuals*
 - *Details of the candidate members' financial and economic capacity (including the last three years' audited accounts)*
 - *Details of experience in raising finance*
 - *Information on the candidate's experience in project management and delivering PPP projects of a similar type and nature as the project in question*
 - *Information on the candidate's construction partner(s) and designer(s) including any supporting information on the proposed legal relationship with the candidate for the PPP, relevant technical experience and references*
 - *Information on the facilities management or services provider including any supporting information on the proposed legal relationship with the candidate for the PPP, relevant technical experience and references*
2. *Quality, health and safety, and environmental accreditation for the candidate and its constituent members*
3. *Employment and personnel information (including information on the experience and expertise of any key staff)*
4. *Declarations of conformity with any technical or financial minimum requirements (with supporting evidence of compliance)*
5. *Statement of Good Standing or compliance with rules on participation (e.g. tax compliance) (see Box 8)*
6. *Legal undertakings in respect of the pre-qualification process*

Legislation in the Western Balkan countries

Albania

Under Albanian law, there are no specific requirements regarding the content of a request for qualifications (RfQ) or documents to be provided to bidders. The contracting authority will decide on the pre-qualification method taking into account the characteristics of a given project.

Bosnia and Herzegovina

No specific documentation requirements apply at this stage.

Former Yugoslav Republic of Macedonia (FYROM)

There are no specific requirements as to what documents must be provided with the information document (request for qualification). In practice, the contracting authority attaches all available documents to the tender documentation that may be helpful for tenderers (e.g. a feasibility study).

Kosovo*

Under Kosovar PPP law, the following information at least must be made available by the public authority to candidates:²⁵

- a description of the project;*
- other essential characteristics of the project (e.g. services to be provided by the private partner, basic performance measurements and financial arrangements envisaged by the public authority);*
- a summary of the main terms and conditions of the proposed PPP agreement (if known);*
- the manner, place and deadline for submission of applications for pre-selection;*
- the manner, place and deadline for obtaining the pre-selection documents;*
- the pre-selection criteria;*
- the proposed timeline for the tendering process; and*
- the incorporation requirements for the successful tenderer.*

Montenegro

A public announcement for pre-qualification should indicate all information relevant for the project. The announcement should give a description of the concession, the specific location of the subject of the concession, basic provisions of the

²⁵ Article 26, paragraph 3 of Law No. 04/L-045 "On Public-Private Partnership".

*concession contract, pre-qualification criteria and other elements relating to the tender procedure.*²⁶

Serbia

*The mandatory content of tender documents depends on the type of public procurement process. For public procurement procedures that involve a pre-qualification process, the invitation documents must indicate:*²⁷

- the subject of the public procurement and description of each lot (if the project is subdivided into several lots);*
- participation requirements and instructions as to how to provide evidence in fulfilment of those requirements; and*
- a description of how participants may apply.*

Documents may also include other elements that, taking into account the subject of the public procurement and type of procedure, will be necessary for preparing tenders.

3.1.6 Format of the candidates' pre-qualification submission and required documents

The submissions received by the public authority in response to the contract notice:

- provide candidates with the opportunity to demonstrate to the public authority that they satisfy the required levels of economic and financial standing and professional and technical ability in respect of the project;
- allow candidates to describe their relevant experience on previous projects; and
- provide comparable information about each candidate in a consistent and structured manner.

To simplify the task of assessing each candidate's strengths, it is important that the pre-qualification submission documents follow the structure and format requested in the information document and as presented in the PQQ. This will facilitate the task of ensuring that the public authority has received all the information requested.

Note: It may be useful to include a checklist of the documents and information required to be provided by a candidate as part of the information document. A completed version of this should then be included by the candidate as part of its pre-qualification submission.

The submissions received should therefore provide sufficient information on each candidate (or candidate member, as appropriate) to describe:

²⁶ Article 21, paragraph 3 of the Law on Concessions ("Official Gazette of Montenegro" No. 08/09).

²⁷ Rulebook No. 86/2015 on mandatory elements of tender documentation in a public procurement procedure.

- the business activities of the candidate (e.g. number of projects of a similar nature the candidate has implemented over a specified number of years);
- financial information relating to the economic and financial capacity of the candidate (e.g. parameters such as turnover, net worth, gearing, etc.);
- legal and corporate information about the candidate, including any relevant litigation involving the companies that make up the candidate;
- the qualifications of key personnel proposed to be involved in the project; and
- bank references and (if required) the tender bond (see below).

The pre-qualification submission is therefore typically a combination of corporate documents (i.e. factual records that are usually a matter of public record such as audited financial statements, certificates of incorporation, corporate by-laws, minutes of relevant board resolutions, etc.) and descriptive documents, based on the candidate's own evidence of experience and expertise (i.e. that seek to demonstrate the qualifications of the candidate).

Most of the descriptive documents need to be either assembled or specially prepared by the candidate for the particular PQQ, as they will need to respond to the published selection criteria. This can involve considerable effort (and therefore expense) on the part of the candidate. Public authorities should therefore strive to achieve an optimal balance between the need to receive all the necessary information to be able to make an informed decision (based on genuine documentary evidence), and the need to avoid requesting excessive documentation or imposing unnecessarily complicated requirements.

Legislation in the Western Balkan countries

*Requirements in **Bosnia and Herzegovina, FYROM, Serbia, Albania and Kosovo*** generally extend to the request for the following types of documents:*

- *the profile of the organisation(s) making the submission;*
- *insurance details;*
- *financial information;*
- *health and safety qualifications;*
- *evidence demonstrating technical capacity;*
- *project references; and*
- *bank references.*

***Montenegrin law** does not specify the documents that must be submitted at this stage of the procedure. It rather generally requires candidates to submit all documents evidencing satisfaction of the pre-qualification criteria, referring to technical and financial conditions and professional references specified in the public notice and pre-qualification documentation.*

▪ Bank references and letters of support

Public authorities often require candidates to provide bank references to demonstrate their financial capacity to take on the risks associated with the project. Such references can sometimes also be used to demonstrate their ability to raise financing in the event they are awarded the PPP contract. This is not at the stage requiring evidence of the bankability of the project. Bank references will come from the candidates' own corporate bankers.

Letters of support for a candidate from other potential lenders to the project can serve to provide additional, objective, third party evidence that a candidate has the confidence and the backing of lenders. Public authorities that seek such letters of support will often provide mandatory standard text. The undertakings made in such letters will be demonstrative only and will not be binding on the candidate or lender.

Note: it is common practice that public authorities either permit or require lenders not to be exclusive in their support for an individual candidate at this stage of the PPP competition. This is important in a PPP market where there may be limited sources of project finance. It avoids the potential dominance of a few candidates, which would restrict the ability of others to secure the necessary expressions of support and thereby limit the extent of competition.

▪ Tender bonds

A public authority may require candidates to provide a tender bond. This will guarantee that, by making its pre-qualification submission and if shortlisted, the candidate will submit a valid tender and that it will accept and sign the contract if ultimately selected. A tender bond can provide the public authority with a level of assurance that the tenderer has the financial and other resources necessary to participate in the tender process.

The public authority may make a claim against the full or a partial amount of the tender bond if the candidate fails either to submit a valid tender or to enter into the PPP contract (due to the fault of the tenderer). The claim amount may be the cost difference between an accepted but lower-ranked (i.e. more expensive) tender or the cost of re-running the PPP competition if the withdrawal of the tender led to a cancellation of the procedure.

While requesting a tender bond at the pre-qualification stage can be useful in discouraging frivolous submissions, it is an additional cost for candidates on top of the cost of preparing the submission. Consequently, it can be dissuasive to respondents that would otherwise have proved to be perfectly adequate candidates. Public authorities should therefore consider carefully whether the circumstances of an individual competition require such a bond.

3.1.7 Selection criteria for pre-qualifying and shortlisting candidates

The EU directives deal very specifically with the criteria that a public authority may apply when determining the suitability of a candidate for the award of a public contract. These criteria fall into three broad categories:

- suitability to pursue the professional activity;
- economic and financial standing; and
- technical and professional ability.

Box 10 gives guidance on the main selection criteria to be used to shortlist candidates (in line with the 2014 Directive). All requirements must relate to and be proportionate to the subject matter of the contract (Art 58(1) of the 2014 Directive). The pre-qualification criteria and the scoring methodology used to assess them must be disclosed to candidates in the pre-qualification information document. The Public Procurement Guidance for Practitioners issued by the European Commission presents detailed guidelines on how to shortlist respondents to a PQQ.

Box 10 – Selection criteria (in accordance with the 2014 Directive)

1. Suitability to pursue the professional activity.

The public authority may require candidates to be enrolled in one of the professional or trade registers kept in their country of incorporation.

2. Economic and financial standing.

The public authority may require candidates to have achieved a certain minimum or minimum average yearly financial turnover in the preceding years (usually the last three years), including a certain minimum financial turnover in the area of activity covered by the contract (e.g. road construction). In addition, public authorities may require information on their audited annual accounts, showing key financial ratios, such as, for instance, the ratio between assets and liabilities.

3. Technical and professional ability.

The public authority may impose requirements ensuring that candidates possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. The public authority may require, in particular, suitable references from other public authorities for whom the candidate previously (or currently) performed services under a PPP contract. Finally, the ability of a candidate to execute the contract may be evaluated with regard to their skills, efficiency, experience and reliability as demonstrated by examples of contracts they have been awarded in recent years to provide similar activities to those required under the project (usually not less than three years for services and five years for works).

▪ Minimum acceptance criteria – Pass/fail tests

Pass/fail tests set minimum thresholds of technical and financial experience and/or capacity which all candidates are required to have. The thresholds should be

expressed in terms that are clear and objective and that can be applied transparently and objectively.

Minimum criteria may take a number of different forms, such as:

- financial capacity (for example, expressed in terms of average annual turnover measured over the last three years);
- financial experience (for example, having raised project finance for a project of similar value in the last three years); or
- technical capacity and capability (for example, having delivered a PPP road scheme of a minimum capital value in the last five years).

Care is needed when setting such thresholds to ensure that they are proportionate to the proposed PPP project. They should not be too onerous (and therefore unnecessarily limiting the number of candidates who are eligible to participate) or so light that there is no effective distinction between candidates. In setting thresholds (and financial capacity thresholds in particular), public authorities should also be mindful of the requirements that potential lenders to the project are also likely to have. Where a candidate is a consortium of individual companies, it is generally permissible for the candidate to rely on the experience and resources of other entities (see Box 11).

Box 11 – Ability of a candidate to rely on the resources of others

In line with public procurement legislation, a candidate may demonstrate its capabilities by relying on the committed resources of other entities, regardless of the legal nature of the links, which it has with them. A written confirmation from the party providing the experience may be required to demonstrate the intended participation of that party as part of the candidate in the next procurement phase.

To the extent that the party on whom reliance has been placed withdraws at a later stage, the candidate will then need to demonstrate by other means how it continues to possess the same or better experience before it can continue to participate in the competition.

Candidates who are selected to submit tenders will need to secure the necessary financing for the PPP and, to do so, will need to meet the creditworthiness requirements of the lenders. Assessing market readiness (as described in Section 2.2) can be a useful time to establish market strength and capacity to be able to calibrate the suitability criteria appropriately.

If the minimum qualification levels set are disproportionate to the subject matter of the contract, or are discriminatory (creating an unjustified barrier for potential tenderers), not only is there a risk of litigation by candidates excluded by the criteria, but there is a risk that the competition has been unnecessarily restricted because suitable candidates choose not to participate.

- **Minimum number of candidates that can be selected**

In order to ensure competition within the process, the EU directives require a minimum number of candidates to be invited to participate in the tender phase of the procurement process. In the restricted procedure at least five candidates must be invited while in the competitive procedure with negotiation and the competitive dialogue procedure the minimum number is three (Art. 65(2) of 2014/24/EU). Where a limited number of qualified candidates is to be invited to tender, this must be indicated in the pre-qualification information document.

If fewer candidates meet the pre-qualification criteria than the minimum number sought, the public authority may continue with the procedure with only those candidates who meet the criteria.

Note: Caution is strongly advised against proceeding with the competition if this is limited to just one tenderer.

- **Marking schemes and tie-break criteria**

Consideration should be given to the marking scheme that will be used to assess and rank candidates. This information should be included in the pre-qualification information document. Information gathered during the market consultation can guide what suitability criteria might be used and how. For example, if most respondents are expected to be largely capable of being sufficiently financially robust, then a marking scheme might be used to distinguish technical capacity and capability.

The distribution of points should reflect the relative importance placed by the public authority on different components of the candidate's capacity and expertise (the candidate usually comprising a consortium of equity investors, construction contractors, facilities management providers and designers). Some examples of approaches are given below by way of guidance. Whichever approach is adopted, it should be easily understood by potential candidates and capable of being applied in as objective and transparent a manner as possible.

Where two or more candidates are awarded the same number of points, and the inclusion of these candidates would mean a greater number of tenderers than planned, it may be useful to include within the pre-qualification information document a mechanism to rank such candidates (i.e. a tie-break criterion). This might be done, for example, by stating that in the event of equal total points, the candidate with the higher points for technical capability will be ranked higher.

Table 3 – Example criteria for assessing suitability of candidates

Candidate member	Example criterion	Example method of evaluation
Lead member	Experience in raising finance for PPP or project-financed infrastructure	<p>Qualitative (i.e. more marks given to candidate with more relevant experience):</p> <p>Amount raised in last 'x' number of years; or number of PPP projects for which finance raised in last 'x' number of years, where the amount of finance raised exceeded EUR 'y' amount.</p> <p>Pass/Fail:</p> <p>Raised finance of at least EUR 'y' amount in last 'x' number of years; or raised finance for at least 'y' number of PPPs/project finance infrastructure projects in last 'x' number of years</p>
Lead member	Experience in delivering PPP projects or infrastructure of same or similar size and type as the project	<p>Qualitative (i.e. more marks given to candidate with more relevant experience):</p> <p>Number/type of PPP projects project-managed and delivered (completed and in operation) in last 'x' number of years; or number of projects project-managed and delivered (completed and in operation) in last 'x' number of years where the contract value of the project exceeded EUR 'y' amount.</p> <p>Pass/Fail:</p> <p>Delivered (constructed and in operation) at least 'y' number of PPP projects of minimum contract value of at least EUR 'y' amount in last 'x' number of years.</p>
Construction member	Experience in constructing PPP projects or infrastructure of same or similar size and type as the project	<p>Qualitative (i.e. more marks given to candidate with more relevant experience):</p> <p>Number/type of PPP projects constructed (completed and in operation) in last 'x' number of years; or number of projects constructed (completed) in last 'x' number of years where the contract value of each project exceeded EUR 'y' amount.</p> <p>Pass/Fail:</p> <p>Completed construction of at least 'y' number of PPP projects of minimum contract value of at least EUR 'y' amount in last 'x' number of years.</p>
Design team member	Experience in designing PPP projects or infrastructure of same or similar size and type as the project	<p>Qualitative (i.e. more marks given to candidate with more relevant experience):</p> <p>Number/type of PPP projects designed (construction completed) in last 'x' number of years; or number of PPP projects designed (construction completed) in last 'x' number of years where the contract value of each project exceeded EUR 'y' amount; number of qualified designers/resources available with experience of</p>

Candidate member	Example criterion	Example method of evaluation
		<p>designing projects of same or similar size and type as the project.</p> <p>Pass/Fail:</p> <p>Completed design (construction completed) of at least 'y' number of PPP projects of minimum contract value of at least EUR 'y' amount in last 'x' number of years.</p>
Facilities management service provider member	Experience in delivering maintenance and facility management services in PPP projects or infrastructure of same or similar size and type as the project	<p>Qualitative (i.e. more marks given to candidate with more relevant experience):</p> <p>Number/type of PPP projects for which services have been provided (in operation) for at least 'x' number of years or completed within the last 'y' number of years having a contract value of at least EUR 'z' amount per year; or number of projects for which services have been provided (in operation) in last 'x' number of years where the contract value of each project exceeds EUR 'y' amount per year.</p> <p>Pass/Fail:</p> <p>Delivering or delivered services (within the last 'x' number of years) in at least 'y' number of PPP projects of minimum contract value of at least EUR 'z' amount per year.</p>

Legislation in the Western Balkan countries

Applicable laws in **Bosnia and Herzegovina, FYROM, Montenegro, Serbia, Kosovo* and Albania** (save for the exception identified below) do not provide for any specific guidance or requirements on the selection criteria. Instead, these laws indicate general guidance as to how those criteria shall be determined. It is a common general principle that public authorities must establish non-discriminatory qualification criteria capable of ensuring genuine competition.

Albania

In the specific case of concessions/PPPs in respect of public works and services **for the construction, operation, maintenance and rehabilitation of national roads**, Article 28 of Council of Ministers Decision No. 634, dated 1 October 2014 (as amended), provides for the selection criteria. In this case, the experience of the operators amounts to a selection criterion. To fulfil this requirement, the economic operators shall provide proof of works/and or projects similar to the one in question, such as contracts and/or certificates attesting due performance issued by the beneficiary.

3.2 Invitation to tender

3.2.1 Overview of the invitation to tender process

While the process and practices adopted to shortlist candidates are generally standardised and reflect the approach of non-PPP procurement processes, the process and practices used to seek PPP tenders from pre-qualified and shortlisted candidates vary much more widely. The approach adopted will often reflect national practice in other forms of procurement, e.g. those processes and customs that are accepted within the market and are familiar to both the public and private sector participants.

Adopting familiar practices can often help to create an environment where tenderers understand what is required of them in the process and avoids the lengthy explanation of new rules. It can also help to mitigate the risk of a legal challenge to the process when the public authority is relying on proven procedures. However, it can be a disadvantage where (as it is often the case in a PPP) innovation in the process is sought to assist in the development of a better VfM outcome.

3.2.2 Purpose of the tender invitation document

The tender invitation document contains all the information that tenderers will need in order to formulate and make a competitive offer to the public authority (see Box 12).

Box 12 – Tender invitation document

The tender invitation documentation, which is more extensive in detail and volume than the pre-qualification invitation document, will normally include information such as:

- *detailed information memorandum about the project;*
- *summary of the key commercial principles, including the obligations of each party and risk allocation;*
- *detailed output specifications and the minimum required technical design and technical features;*
- *level of commitment required from the candidate's lenders and investors;*
- *full draft PPP contract (which, in some countries, is based on mandatory standard contract terms or on required guidelines);*
- *instructions to tenderers concerning all the information they must submit and the detailed procedure for submission;*
- *evaluation criteria; and*
- *any requirements for tender bonds or equivalent security.*

The tender invitation document communicates to tenderers detailed information about the project and the service requirements sought by the public authority. It conveys to tenderers the main findings and conclusions of the previous research, analyses and feasibility studies undertaken by the public authority during the project preparation phase, making available all the relevant supporting documentation.

The documents should describe with precision and clarity all the steps of the process that the public authority intends to follow in leading to the appointment of a preferred tenderer. They will describe what is expected from tenderers during the course of any dialogue or interaction, how they must present their proposals to the public authority, and the criteria that will be used for evaluating and ranking interim and final tenders.

It is important for the public authority to allocate sufficient time and effort to develop the documentation to a level of detail that will ensure the tenderers clearly understand its requirements. This will make comparison of the different tenders easier during the evaluation process and will reduce the need for debate and later clarification with a tenderer before signing the PPP contract.

3.2.3 The tender invitation documents (ITT, ITN or ITPID)

The choice of the procurement procedure determines the type of tender invitation document that the public authority prepares in order to invite the selected candidates to participate in the final phases of the procurement process.

In the case of a standard procedure (open or restricted), a public authority will typically issue an *invitation to tender document*, sometimes also referred to as a Request for Proposals or Request for Tender.

When using either the competitive procedure with negotiation or competitive dialogue procedure, the public authority issues an invitation to participate in the next phase of the particular process – being, respectively, either an *invitation to participate in negotiation (ITN)* or an *invitation to participate in dialogue (ITPID)*. Within the competitive dialogue procedure, the public authority also subsequently issue an final tender invitation once the dialogue is complete and has been formally closed.

The procurement procedure selected by the public authority has obvious implications on how the tender invitation document is drafted, especially on those sections that explain to tenderers the mechanics of the competitive process and instruct them on how to respond.

Note: This Guide to the PPP procurement process gives only general guidance on how to draft a tender invitation document for a PPP project that uses a negotiation or dialogue process. The document prepared by a public authority will, necessarily, be more detailed to reflect the chosen procedure and the specific process selected to implement it. It is not possible to cover the number of variations possible in a guide such as this, but the principles to be adopted remain the same.

▪ Use of advisers to assist in preparing the tender documents

Preparing the tender documents is often a complicated exercise that requires multiple (including technical, commercial, legal and financial) skills. A public authority that is not frequently involved in PPP transactions is unlikely to have the required range of competencies in-house. This means that it is often essential for the public authority to hire experienced PPP transaction advisers to help prepare the procurement documents and then assist in the ensuing processes to contract award and financial close.

Further information on the appointment and use of transaction advisors is provided in Section 2.3, and Section 3.1 of *A Guide to Preparing and Procuring a PPP Project*.

3.2.4 Content of the tender invitation document

As outlined in Section 3.2.2 above, the tender invitation document (whether an ITT, ITN or ITPID) will usually comprise the following component parts (see also Box 13):

- a section giving information on the project and the requirements of the public authority;
- a section describing the procurement process and timetable;
- factual data and site survey information that can be used to prepare the tenders;
- a section providing instructions to tenderers; and
- the proposed draft PPP contract and associated technical and financial schedules.

Reference guidance documents



See: *Infrastructure version of tendering instructions for projects under standard Rijkswaterstaat DBFM Agreement*, Government of the Netherlands, (2012).



See: *Mutual Investment Model technical documents: Standard form descriptive document, Standard form invitation to participate in dialogue*, Welsh Government (2017).

Box 13 – Typical contents list for a tender invitation document for a PPP project using a dialogue process

- (i) *General overview and explanation of the process*
- (ii) *General information*
 - *role and duties of the public authority*
 - *addressing procedural matters associated with the competition e.g. the right to cancel or vary the process; right to reject and/or disqualify; tender costs; conflicts of interest; confidentiality; publicity, etc.*
 - *official language and governing law of the process*
- (iii) *The PPP project*
 - *expected project outcomes and objectives of the public authority*
 - *services required*
 - *performance indicators*
 - *approach to design (e.g. use of a specimen or reference design)*
 - *independent certification*
- (iv) *The procurement process*
 - *procurement process and principles*
 - *indicative timetable for each step of the process*
 - *phases of dialogue including arrangements for meetings with tenderers on legal/commercial issues, financial issues and technical issues*
 - *data room, document management and information exchange process*
- (v) *Dialogue phase(s)*
 - *objective of each dialogue phase*
 - *meeting(s) with the public authority*
 - *clarifications*
- (vi) *Submission requirements*
 - *general requirements for dialogue and tender submissions*
 - *format of submissions*
 - *arrangements for receipt of submissions*
- (vii) *Final submission evaluation*
 - *completeness and compliance check process*
 - *procedures for late, incomplete submissions and abnormally low tenders*

- *evaluation process*
- *communication of outcome*

(viii) Next steps

- *appointment of the preferred tenderer*
- *conclusion of the contract documents including finance documents*
- *process for award of contract, contract and financial close (including notices)*

Typical appendices

- *definition of terms used in the information document*
- *draft PPP Contract and contract schedules*
- *model form agreements (e.g. funder's direct agreement, collateral warranties, independent certifier contract)*
- *declarations to be signed by tenderers*
- *model forms and letters to be completed by tenderers (e.g. cost data included in financial model, support letter(s) from financing sources, guarantees)*

Legislation in the Western Balkan countries

Albania

The public authority must prepare the standard tender documents,²⁸ which for PPPs or concessions for civil works and for services (approved by the public authority) include the general and specific terms of the contract.

The standard instructions to tenderers require tenderers to initial/countersign the draft general and specific terms of the contract as part of their submission, thus confirming their agreement to the terms of the contract.

However, point 5.5.2 of the standard instructions to tenderers states that the public authority and the selected tenderer shall negotiate in good faith the final terms and conditions of the PPP/concession contract, thus allowing for certain changes to the general and specific terms of the contract to be made if needed.

Bosnia and Herzegovina

The public authority is required to prepare tender documentation in compliance with the Law on Public Procurement and relevant bylaws. Tender documentation must include, as a minimum, a draft of the PPP contract or main contract elements.

²⁸ Article 27 of Council of Ministers Decision No. 575, dated 10.07.2013 On Approval of Rules for Assessing and Granting Concessions/PPPs

Former Yugoslav Republic of Macedonia (FYROM)

The public authority must provide the tender documentation together with the request for tenders, which has to contain information on the mandatory provisions of the PPP contract. In practice, the tender documentation usually includes the full draft of the PPP contract.

Kosovo*

The public authority should include the main contract conditions in the request for proposals, indicating which of those conditions are not negotiable with the selected tenderer.²⁹

Montenegro

The first draft of the concession contract is a part of the concession act, which precedes the request for tenders. Thus, at the time of issuing the tender invitation documents, the draft of the concession contract will already be available. An exception to this applies in the case of competitive dialogue, since the concession act is drafted after the dialogue with qualified tenderers has closed.

Serbia

The public authority is obliged to provide the tender documentation together with the request for tenders. The tender documentation must include the PPP contract model, which in practice usually means a full draft of the PPP contract.

▪ **Information to be used by tenderers in preparing their tenders (Data Room)**

By the time the tender invitation document is issued, the pre-qualified and shortlisted tenderers will have already familiarised themselves with the main features of the project, as outlined in the pre-qualification stage information document accompanying the PQQ.

As some time may have passed since the issuance of the PQQ, however, and new information may have since become available to the public authority, the tender invitation documents will usually contain an updated version of the earlier information document.

As a rule, the public authority will make available to tenderers as much information as possible to facilitate the preparation of the tenders. This information for the use of tenderers is often placed in a *data room*. The data room may either comprise a physical space with hard copies of the data or, more usually, a secure web-enabled information platform to which tenderers are granted access to electronic copies of the data.

Tenderers should be advised that the public authority does not warrant the accuracy of the information contained in the tender invitation document and data room and, consequently, this must be verified by them in the course of their own due diligence process prior to signing the PPP contract. (See also section 0

²⁹ Article 31, paragraph 1.3 and Article 38 of the PPP Law

regarding a candidate's or tenderer's reliance on information provided in the information document.)

To introduce tenderers to the often extensive information that is available to support the tender preparation phase, the public authority may consider convening a tenderers' conference. This event usually takes place shortly after the procurement documents have been issued and it provides a forum where tenderers may ask questions of the public authority and its advisers. The answers and any clarifications provided by the public authority at the conference should also be provided in writing to all tenderers.

3.2.5 Minimum technical requirements

While the main focus of a PPP procurement is on the service outputs to be achieved (i.e. on the level of service requirements), the public authority will want to give some guidance to tenderers as to the minimum required features of the PPP project. These may comprise technical features of the physical infrastructure, the basic level of service to be delivered or any requirement to make the asset and services available by a specific date. Such minimum requirements may be described in summary form in the tender invitation document and will form part of a description of the essential characteristics of the project. The full requirements will be set out in the detailed user requirements document that forms a part of the draft PPP contract (see Section 3.2.7).

The tender invitation document may make reference to objective standards, which are measurable and consistent with industry norms and good practice, such as national or international ISO standards. For example, the technical requirements of the output specification may have been prepared with reference to national building specifications (e.g. a national design manual for roads and bridges) and relevant national design manuals, advice notes and guidance.

The tender invitation document should also specify the required minimum condition of the PPP assets at the end of the PPP contract term (e.g. as may be measured in years of service life remaining or residual asset value).

▪ Principle of non-discrimination to be maintained

The public authority should aim to use the tendering process to its best advantage and to encourage private sector innovation whenever reasonable and practicable.

When setting minimum technical requirements, attention should be paid in respect of the principle of non-discrimination. Unless compelled by extraordinary circumstances, public authorities should avoid specifying mandatory or proprietary products and systems. Care should also be taken to avoid specifying aspects that may disproportionately favour one tenderer at the expense of the others (e.g. when one of the tenderers would have a clear competitive advantage in the specification of a certain technology, such as in waste treatment, when this technology is not the only option to achieve the desired project output).

Accordingly, technical specifications '*shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a*

specific economic operator, or to trademarks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products' (ref. Art. 42(4) of 2014/24/EU).

▪ Specimen or reference designs

In some cases the public authority may have developed an outline design of the infrastructure and obtained outline planning approval based on this design. This is common, for example, in road PPP contracts where legal consents and licences can take a long period of time and the public authority takes the lead in obtaining them. The public authority may choose to require the tenderers to prepare solutions that conform with certain essential features of the outline design (including environmental impact assessments) so that any permissions already granted are not invalidated. In presenting the outline design as an example to be developed further (i.e. a specimen or reference design), the public authority should require the tenderers to take responsibility for all aspects of the design or any additional features that the proposed solution requires.

Any minimum technical requirements to be preserved in the outline design should be clearly stated in the tender documents, notwithstanding that responsibility for the design is being passed to the tenderer.

3.2.6 Procedural requirements

The instructions to tenderers should contain a list of all documents and information the tenderers are required to submit to the public authority during the tendering process, together with the detailed procedures for making submissions. Non-compliance with the terms set out in the instructions to tenderers may lead to disqualification.

Typically, instructions to tenderers cover routine administrative and procedural arrangements associated with the management of the tendering process, such as:

- whether candidates must be incorporated entities at the submission of the final tender or only if and when appointed as preferred tenderer;
- whether changes to the composition of the candidate presented at the pre-qualification stage are admissible and, if so, under what circumstances and limitations;
- whether unsuccessful tenderers can recover any portion of the cost of preparing their tenders (see Box 14);
- timetable for tendering;
- procedures for site visits and for accessing the data room;
- detailed guidance on the format, preparation, content and structure of the technical and financial tenders;
- procedures for submission of technical and financial proposals; and

- the public authority's procedures for the opening and evaluating tenders.

Note: *The importance of properly organising and managing these administrative and procedural aspects should not be underestimated by the public authority. Issuing clear instructions to tenderers facilitates the presentation of high-quality tenders.*

▪ **Managing minor procedural errors**

Most public procurement regulations acknowledge that minor procedural errors can occur and, generally, that these can be managed safely when they are clearly of an administrative or clerical nature. However, in some jurisdictions, even minor formal mistakes/inconsistencies in setting these aspects might result in the legal procedure being invalidated. Care must therefore be taken in devising rules that are easily understood by all and can be easily followed and applied.

Legislation in the Western Balkan countries

Albania

The PPP and Concessions Law does not provide for invalidation of the procedure in the event of non-compliance by tenderers with the request for proposals or instructions to tenderers. However, the standard tender documents for PPPs/concession contracts for civil works and for services provide for the right of the public authority to reject a tender if: (i) the tenderer does not submit all the documents and information required under the tender documents; or (ii) the submitted tender is not in compliance with the terms and conditions set out in the tender documents.³⁰ The Tender Commission may determine that a tender is valid even if it contains minor deviations that do not materially change or depart from the characteristics, conditions or other requirements set forth in the tender documents or mistakes that can be corrected without affecting the tender content.

Bosnia and Herzegovina

Formal mistakes/inconsistencies do not lead to invalidation of the procedure. The public authority may invite tenderers to explain delivered documents within three days, or to deliver original documents where there are discrepancies in the copy that was delivered attached to the tender, with the aim of eliminating any formal errors in the documents.

Former Yugoslav Republic of Macedonia (FYROM)

Under the applicable law of FYROM, in general the award procedure can be invalidated in the event of serious omissions regarding, among other things, the tender documentation and the procedures for opening and evaluating proposals. However, since in certain circumstances it is at the public authority's discretion to

³⁰ Point 2.1.2 of the standard tender documents for PPPs/concession contracts for civil works and for services

determine the level of seriousness of the omission, even minor mistakes/inconsistencies can be a reason for invalidation of the procedure in practice. The precise guidance on the format, preparation, content and structure of the technical and financial tenders is very important, since the award procedure can be invalidated if the tenders cannot be compared owing to different approaches in the technical or financial tender.

Kosovo*

A tender must comply with all the requirements listed in the contract notice and tender dossier.³¹

Montenegro

In the event that the Concession Commission finds irregularities in the procedure or determines that the valuation criteria have not been properly applied, the ranking list is to be returned to the tender commission to eliminate the irregularities.

Serbia

Minor formal mistakes/inconsistencies can lead to invalidation of the procurement procedure. The public authority may request from tenderers any additional explanations that will be useful in examining, evaluating and comparing tenders. Subject to the relevant tenderer's consent, the public authority may also correct arithmetic errors noted in the tenders after they are opened.

▪ **Timescale for the tendering process and response to the tender documents**

Public authorities should give clear instructions on the format and content required for the presentation of tenderers' proposals, bearing in mind that the various tenders should be easily comparable for evaluation purposes.

Public authorities should also set a *realistic timetable to allow tenderers adequate time to properly prepare their tenders*. Preparing a tender for a PPP project of a certain complexity requires a considerable investment of time and money, so over-optimistic timetables should be avoided.

Legislation does not necessarily give good guidance for PPP contracts on how much time tenderers should be allowed before they submit their tender. This is because legislation does not take into account the specific level of complexity that the procurement of PPPs often represents. Accordingly, the timescales indicated in the 2004 Directive, which mention a minimum deadline of 40 days from the publication of the procurement documents, cannot be considered a widely accepted benchmark for complex PPP projects.

³¹ Article 59.4 of Law No. 04/L-042 "On Public Procurement in the Republic of Kosovo", as amended

The optimum timetable should be determined in relation to the complexity of the project, keeping in mind that according to empirical evidence within European PPPs, most tender invitation documents indicate a deadline of 4-6 months.

Box 14 – Managing tender costs

In order to manage overall tender costs (for both the public authority and tenderers) the following should be considered:

- *provide project information to tenderers early and in a useful format;*
- *undertake physical surveys in advance of ITPID/ITN for use by tenderers (e.g. mapping, ground conditions, environmental, building condition, etc.);*
- *set a tight but realistic timetable and keep to it;*
- *undertake the procurement process efficiently and effectively, making sure that*
 - *the project team has the right skills, with sufficient capacity and capability;*
 - *the project team is available and properly prepared for the dialogue process;*
- *make approvals in a timely manner in accordance with the timetable;*
- *keep the level of information required in tender submissions to the minimum necessary for evaluation purposes; and*
- *share information electronically to the greatest extent possible.*

▪ Potential sharing of bid costs

In some cases, the public authority may choose to compensate losing tenderers for some of their tender costs. The purpose of doing so is to maintain a competitive environment where otherwise the cost of tender preparation would deter a suitable number of candidates from bidding.

This might be offered in a PPP market to encourage participation by new entrants, or in a market where there has been a history of project failures. It may also be appropriate where the procurement process is expected to be particularly lengthy and/or costly for tenderers. These payments are contingent on the receipt of a valid final tender. While they increase the project costs for the public authority, they can be justified in the circumstances outlined above to the extent that they serve to maintain competitive tension until the final stages of the procurement procedure.

Legislation in the Western Balkan countries

Albania

The PPP and Concessions Law provides that for concessions of public works, the deadline for submission of the tenders must be no less than 30 days from the date of publication of the contract notice (Article 22.4).

The PPP Law provides for a minimum deadline depending on the type of procurement procedure. It also states that the public authority should determine the deadlines for submission of tenders in consideration of the complexity of the project and timeline required for preparation of the tenders. The minimum deadlines for submission of tenders likely to be relevant to the scale and nature of PPPs as prescribed by Article 43 of the PPP Law are:

- (i) for an 'open tender procedure' having a value exceeding the higher monetary threshold - no less than 52 days from the date of publication of the contract notice in the website of the Public Procurement Authority;*
- (ii) for an 'open tender procedure' having a value in between the higher and the lower monetary thresholds - no less than 30 days from the date of publication of the contract notice on the website of the Public Procurement Authority;*
- (iii) for a 'restricted tender procedure' having a value exceeding the higher monetary threshold - no less than 20 days from the date of delivery to the prospective bidders of the invitation to bid;*
- (iv) for a 'restricted tender procedure' having a value in between the higher and the lower monetary thresholds, no less than 15 days from the date of delivery to the candidates of the invitation to bid;*
- (v) for any tender procedure having a value below the lower monetary threshold – no less than 10 days from the date of publication of the contract notice on the website of the public procurement authority.*

If the contract notice is drafted and published electronically, the deadlines in paragraphs (i) and (ii) above may be reduced by seven days and the deadlines in paragraphs (iii) and (iv) above may be reduced by five days. The deadline is postponed by 10 days if the tender documents or requested additional documents are not made available to the tenderers in due time or if a visit to the site or a verification of the documents is necessary for the preparation of the tenders (Article 43.4).

Bosnia and Herzegovina

The public authority must set the time limits for receipt of the requests for participation and tenders taking into account the complexity of the procurement and time necessary to prepare requests for participation and tenders.

In a restricted procedure, negotiated procedure with publication of a notice and competitive dialogue procedure, the minimum time limit for receipt of requests for participation is not less than 15 or 30 days (depending on the value of the project) from the day of publication of the notice on the public procurement portal.

Former Yugoslav Republic of Macedonia (FYROM)

There are different timescales depending on: (i) the type of procedure; (ii) the value of the contract; (iii) the type of public authority; and (iv) whether there was a prior information notice.

In a restricted procedure, the period for submission of tenders can be between 17 and 40 days from the issue of the tender invitation document, while during a competitive dialogue procedure this period cannot be shorter than the necessary minimum timescale determined with participants during the dialogue phase. The deadline for submission of tenders during a negotiated procedure is determined by the public authority since there is no statutory deadline for this procedure.

Kosovo*

The PPP Law provides for a minimum term for submitting a proposal of at least 40 days from the date on which the pre-selected tenderer received the tender invitation document.³²

Montenegro

The minimum term for submitting a proposal is 30 days from the date on which the RFP has been published.

Serbia

In a restricted procedure, the shortest time limit for the receipt of tenders or applications for participation is 37 days from the date of dispatch of the public invitation.

In a negotiated procedure with publication of a public invitation and in a competitive dialogue procedure, the shortest time limit for the receipt of tenders is 40 days from the date of publication of the public invitation.

³² Article 34 of the PPP Law

- **Requirement for a tender bond or equivalent security**

If the public authority does not require tenderers to provide fully committed tenders with the final tender (see section 0), it will nonetheless require tenderers to provide evidence that its tender is financeable. This evidence is usually in the form of a detailed letter of support from the tenderer's proposed lenders. A letter of support should confirm that, having reviewed and accepted the broad structure of the project and its main contractual provisions, they are interested in providing financing equal to a minimum proportion of the total financing needed, according to a realistically deliverable financing plan.

Notwithstanding such evidence, a risk remains that the tenderer (if selected as the preferred tenderer) will be unable to secure the required financing on acceptable terms. In order to mitigate this risk the public authority may require tenderers to provide a tender bond. A tender bond is a first demand guarantee instrument that can be called in the event that the preferred tenderer proves unable (or unwilling) to enter into the PPP contract on the terms and conditions set out in its own offer.

The size of the tender bond should offer some compensation to the public authority for the expected cost of retendering the project and the ensuing delays. The tender bond should be issued by a qualified financial institution and be in accordance with the terms indicated by the public authority. (See also section 0)

Note: the requirement for a tender bond (or any other form of security to be provided during the tender phase) represents another additional cost for tenderers that will ultimately be recovered through the tender prices.

3.2.7 Draft PPP contract

- **Main conditions of the PPP contract**

It is established good practice to include the draft PPP contract in the tender invitation documents. This should be as full a draft of the PPP contract as possible or, as a minimum a *heads of terms* of the draft contract. Even if the main commercial principles of the project, the risk allocation model (or risk matrix) and the payment mechanism are described in other parts of the tender invitation documents, tenderers need to know how such principles are to be reflected in contractual terms.

Disclosing the draft PPP contract with the tender invitation documents fully reflects the principles of transparency and equal treatment.

Where the public authority expects tenderers to accept the terms of a standard form PPP contract, the tender invitation document will outline the limited circumstances in which it will allow tenderers to propose project-specific amendments. This will usually take place during the dialogue period. Amendments should only be accepted if they offer VfM to the public authority or are required to take account of demonstrable changing market circumstances.

The tender document should make it clear that tenderers are responsible for ensuring that proposed lenders and principal sub-contractors carry out their own due diligence on the draft PPP contract and related agreements. Again, any material issues that may impact on the draft PPP contract or price should be dealt with during the dialogue phase and agreed prior to submission of the final tenders.

In certain jurisdictions, public authorities customarily ask tenderers to confirm their agreement to the terms of the contract by initialling or countersigning the draft PPP contract as part of their final tender submissions. This can reduce the length and scope of post-tender negotiations.

Note: Following selection of the preferred tenderer, it will not be permissible to make any amendment to the tender PPP contract that either (i) has the effect of materially affecting essential aspects of the tender or the tender documents; or (ii) risks distorting competition or causing discrimination.

- **Detailed output specifications (including the user requirements)**

The core focus of a PPP is the provision of an infrastructure service and not simply the construction of physical infrastructure. The tender invitation document should therefore indicate all the outputs required to provide that service.

The service specification usually forms part of the PPP contract and specifies the minimum level of the service to be provided by the private partner. This is set out in a service level agreement (SLA) which is included in the PPP contract.

The public authority should strive to express its required minimum levels of service clearly and unequivocally in the SLA, in order to allow the private partner to assess accurately the investment needed to provide the required level of service.

While minimum levels of service should be indicated by the public authority, the tender invitation document might encourage tenderers to propose variants allowing for enhanced levels of service.

Service and facilities specifications are generally expressed as outputs. As an example, in a light underground railway PPP project the public authority will consider indicating its service requirements in terms of the capacity of the trains (i.e. the maximum number of passengers), frequencies (how many journeys per hour or per day, or even a mandatory timetable), journey times, travel comfort (air conditioning/heating, cleanliness), etc.

- **Payment mechanism**

In availability-based PPPs, an essential component of the tender information document is the description of the payment mechanism, which will constitute the main (and in many cases the only) source of revenues for the private partner. It defines the allocation of financial risks between the public authority and the private partner. The underlying objective of the payment mechanism is to provide an incentive to the private partner to deliver the services. Incentivising performance is achieved where the payment mechanism strikes the right balance between

achieving good performance and applying proportionate penalties for poor performance.

Payment mechanisms usually express a periodic unitary (i.e. single) payment for full availability and performance of the services (the availability payment), often with a time-based adjustment to a portion of the payment using an appropriate price index. The output specifications and user requirements set out in the SLA the standards of availability and performance which the private partner is required to meet to entitle it to the full availability payment.

A formula is used to calculate the financial deduction to be made in a given performance measurement period for any partial or complete failure in the availability and delivery of the service. The deduction is made from either the availability payment or (under a user-pay concession type model) the private partner's toll/tariff revenues. (Of course, poor performance in a concession will be also reflected in lower usages and revenue).

As well as defining the payments and deductions, the tender invitation document will also describe the payment arrangements (e.g. monthly or quarterly), taxation issues and describe any other payments made by the public authority, e.g. capital contributions to be paid during or at the end of the construction period. The public authority may also choose to define any affordability threshold that is applicable to the annual payment.

The payment mechanism will also define the circumstances under which the PPP contract may be terminated for persistent poor performance and unavailability by the private partner (i.e. service standards below minimum requirements) and/or when the level of financial deduction over a given period exceeds certain thresholds. This is usually demonstrated by a termination points based system which records the total of the award of any termination points for persistent service failure.

Selecting an appropriate payment mechanism is an essential element to the success of the PPP. The mechanism should be strict but fair and based on objective, measurable and unequivocal parameters.

- **Required insurance coverage under the PPP contract**

The public authority typically requires that insurances are put in place to mitigate certain project risks. Determining which type of insurances to request is a specialised task, so it is important for the public authority to develop and negotiate its insurance requirements with the support of professional insurance advisers. As the project insurance requirements can affect the pricing of the final tender, it is important that any minimum coverage requirements are highlighted in the tender invitation document. It is often an item of discussion for the dialogue phase as different approaches to protecting the public authority's concerns may be available which offer better VfM. Some risk sharing generally takes place between the public authority and the private partner on this matter and it therefore warrants dedicated discussion during the dialogue phase. Most public authorities require that their interest is noted on the insurance policy. The lenders as a condition of providing

the debt finance, require an agreed level of project insurance to be maintained at all times. Failure will result in the calling in of the debt finance.

The main categories of insurance that the PPP contract would normally require include:

during the construction phase:

- contractors' all risks insurance (covering the physical loss of or damage to the works and equipment on the construction site);
- third party liability insurance; and
- delay in start-up insurance (covering the loss of revenue or profit due to a delay in project completion);

and during the operational phase:

- all risks property insurance;
- third party liability insurance; and
- business interruption insurance.

Specific environmental insurance may also be required for some projects.

▪ **Independent certifier contract**

In some PPP contracts, the public authority may choose to appoint an independent party (the independent certifier, sometimes also called independent engineer) who will monitor the performance of the construction stage for compliance with the PPP contract. Under an availability-based PPP, the independent certifier is required to confirm to both the public authority and the private partner (by way of a certificate) that the construction phase obligations under the PPP contract have been met and that the public authority should start making the payments required.

The appointment of the independent certifier is managed jointly by the public authority and preferred tenderer and is made prior to contract close. Both public and private partners must agree upon the appointment, the draft contract for which is usually included as a part of the draft PPP contract.

The tender invitation document should provide a description of the process that will be used during Stage 2 (see Section 4) to agree this appointment, including for identifying a shortlist of potential candidates. The cost of the services provided by the independent certifier should be included within the final tender offers.

3.3 Interaction with tenderers

3.3.1 Overview of requirements

The tender invitation document will include a section that describes the proposed interaction with the tenderer during the tendering process. This will usually take place during pre-planned dialogue or consultation meetings. Whether using the competitive dialogue procedure or a procedure with negotiation, these meetings are generally conducted in a similar manner, being phased through consultation defined and having specific items identified beforehand that are to be discussed.

This section of the tender invitation document will typically outline:

- the objective of each phase of the dialogue;
- any submissions required to be prepared by the tenderers at the start and/or end of the dialogue phase; and
- the timing of the dialogue and the administrative arrangements for the meetings.

Note: As a rule, tenderers must adhere strictly to the communication arrangements set out in the tender invitation document when there is interaction with the public authority. Tenderers are expressly precluded from seeking to unduly influence the public authority, or members of its project team in respect of the project and the tendering process. This extends to the lobbying of public officials in government or other administrative bodies associated with the promotion of the project.

3.3.2 First phase of dialogue

The purpose of the first phase of dialogue is initially to implement improvements in the tender invitation documents, optimising them for all tenderers in an identical manner. It starts following the issue of the invitation to tender document (ITPID or ITN) as described in Section 3.2.

For large projects, it is impracticable to attempt to deal with all issues associated with the contract, technical, legal, commercial and financial, in a single phase of dialogue. It is reasonable, therefore, to limit the dialogue (and information required from tenderers) during this first phase to the most important aspects and principles of the PPP contract and the project itself. No meaningful response can be required of tenderers in the subsequent phases if the basic principles are not first established and agreed.

It is good practice to agree an agenda with the tenderers for each dialogue in advance of the meeting and for any pre-meeting submission materials to be provided in advance to the public authority. This will usually enable a more informed discussion to take place at the dialogue meeting. A written record should be kept by the public authority of the dialogue meeting, including of any agreements reached on amendments to the draft contract and project requirements.

In general, no tenderer is eliminated during the first phase of dialogue where high-level principles are being addressed. This means that all the tenderers invited to the first phase of dialogue will continue to the second phase, unless, of course, one or more tenderers withdraw of their own accord. In this circumstance, the public authority may consider including a provision in the tender invitation document that allows it to invite

the next highest-ranked candidate from the shortlisting process. It will, of course, be necessary to allow this new entrant sufficient time to also engage in a first phase dialogue.

At the end of the phase, the draft contract documents will be amended to reflect the common agreements reached with the tenderers during the dialogue. This will form the basis of the dialogue in the second phase.

Note: If the number of candidates is reduced at this stage following an evaluation of the submission materials, it may be appropriate to issue an invitation document to continue with the dialogue. This should include an amended draft PPP contract setting out any new or modified arrangements following the first phase dialogue.

3.3.3 Second (and subsequent) phase(s) of dialogue

In the second phase of the dialogue, the public authority will finalise with tenderers the PPP contract that will form the basis of their final tender. Dialogue will also continue on more detailed aspects of the project requirements, allowing the public authority to discuss with each tenderer the particulars of their unique solution.

Care must be taken during each dialogue phase to protect the confidential information associated with each tender and to ensure that ideas from one tenderer are neither deliberately nor inadvertently transmitted to another tenderer.

In the case of complex projects or an immature PPP market, the dialogue might focus on the expected response to the main evaluation criteria, so that the public authority and tenderers are aligned on the requirements for the final tender submission. The most important principles of the contract (including the schedule of requirements) must be fully agreed and fixed before the last phase of dialogue concludes.

At the end of the phase, the draft PPP contract document will be further amended to reflect the common agreements reached during this second (or subsequent) phase of dialogue. The updated PPP contract produced at the end of the final dialogue phase will be the basis of final tender submissions (i.e. becoming the *tender PPP contract*).

There may be a process of selecting a reduced shortlist of tenders based on the dialogue submission materials. Such selection must be based on the same evaluation criteria (and relative weightings) as will be used for the final tender.

Reference guidance documents



See: *Guidance on using the competitive dialogue procedure (2008)* and *HM Treasury Review of Competitive Dialogue (2010)*, UK Government.

3.3.4 Final tender submission

The final tender submission phase follows the public authority's decision to close the dialogue and issue of a final tender invitation document. The final tender invitation document will generally repeat many of the rules and content of the earlier tender

invitation document (ITPID or ITN), but modified to reflect the conclusion of the dialogue and any changes agreed to the draft PPP contract (*the tender PPP contract*).

Tenderers must make a final tender submission in this phase. Tenders must satisfy all the minimum requirements stated in the final tender invitation document (and as previously identified in the tender invitation document). This generally requires that the final tender must be presented according to a defined format with certain minimum information to be included. If this minimum required information is absent or not in the correct format a final tender may, when submitted, be determined as incomplete and not complying with the rules and therefore may be rejected from consideration.

▪ **Financial parameters to be used in tenderers' financial models**

The public authority will often provide template forms for tenderers to complete and submit as part of the tender documents to identify the inputs used in their financial model. The use of templates can assist the public authority in its evaluation of the tenders and financial models. Having such input data presented in a standard format can make it easier to compare tenders and to assess where a tender may have a weakness in its overall financial robustness (see Section 4.3.2).

A number of parameters should, however, be fixed by the public authority to ensure a like-for-like comparison of the financial models (and therefore the prices), including:

- the planned start and end dates for the contract and provision of the PPP services;
- the term (duration) of the contract;
- the base interest rate (i.e. a reference rate such as LIBOR or EURIBOR) to be used in calculating the financing cost;
- the base assumption to be used on future inflation rates;
- the timing of availability payments; and
- the discount rate to be used when calculating the net present value of the contract and the estimated annual availability payment.

Some of these assumptions are better to be fixed at a point close to the date for final tender submission (such as the reference rate and discount rate), although sufficient time will need to be given to tenderers to be able to optimise and finalise their financial models with the final parameters.

The complexity of the financial aspects of a PPP generally requires that an expert financial adviser be used by the public authority to advise on the rules for tender submissions.

▪ **Option for inviting variant tenders**

Recital 48 of the 2014 Directive, in recognition of the importance of innovation, recommends that '*public authorities should be encouraged to allow variants as often as possible*'. At the same time, public authorities should try to '*define the minimum requirements to be met by variants before indicating that variants may be submitted*'.

In the case of a competitive procedure with negotiation or of a competitive dialogue procedure, variants are often permitted as they are seen as an intrinsic part of the competitive dialogue process.

A variant tender may be either an additional tender to the required standard (base) tender or an alternative to the base. This should be specified in the tender invitation document. Variant tenders must be evaluated in accordance with the same criteria as the base tender and conform to the same minimum tender requirements.

3.3.5 Managing tenderer queries and requests for clarification

The tender invitation document should describe the arrangements for handling formal requests for clarification and queries during the tendering process. In this respect, tenderers should only be permitted to make contact with the public authority in accordance with this formal process and not through any other channel of communication. (See also the note in Section 3.3.1)

Any request by a tenderer for clarification of the tender document should be made to the public authority using the defined communication protocol (such as a web-enabled document platform or dedicated e-mail). The public authority will restrict the timing for the receipt of any clarification in accordance with the timetable for the tendering process, reserving the right not to respond to any request for clarification after a certain date.

Where the query or request for clarification is common to tenderers or the response to the issue will affect all tenderers equally, then the public authority may transmit a copy of the request and its subsequent response to all tenderers participating in that phase of the tendering process.

▪ Rules for managing commercially sensitive queries and clarifications

Notwithstanding the above process, there may be occasions when the public authority considers a particular matter to be commercially sensitive to a single tenderer. The tender document should set out the procedure for managing such sensitive matters. Within PPP procurements, it is very common to encounter this type of query.

If a tenderer considers its request for clarification to be commercially sensitive, then the tenderer should be required to indicate this in its request. In those cases where the commercial sensitivity is clearly demonstrated, then the public authority's response should only be transmitted to that tenderer. If the public authority considers that the request is not in fact commercially sensitive, then it should offer the tenderer the opportunity to withdraw the request for clarification or have it treated as a non-commercially sensitive request.

3.4 Evaluation of tenders and selection of preferred tenderer

3.4.1 Tender award criteria

The tender award criteria constitute the basis on which a public authority chooses the best tender and awards a contract. These criteria must be established by the public authority in advance of the issuance of the tender invitation document and must not be prejudicial to fair competition.

The main purpose of establishing and formally disclosing the award criteria is to ensure that tenderers can prepare their tenders to best meet the requirements of the public authority. The tender documents should therefore indicate with clarity the award criteria it has chosen to adopt for the project and how such criteria will be applied.

The criteria for the awarding of contracts are either the lowest price or the most economically advantageous tender (MEAT).

▪ **Use of lowest price criterion in PPP procurements**

The lowest price criterion is simple and can be applied mechanically. However, it has the limitation of not allowing the public authority to take into account qualitative elements of the tender. Furthermore, to the extent that it can only be applied to compliant base tenders (i.e. no variants allowed), it does not incentivise tenderers to propose alternative and innovative solutions.

The complexity of PPP projects and the nature of the services being sought will generally mean that a price-only criterion is an insufficient basis for judging the relative merits of the tenders received.

Exceptions to this can sometimes be found in roads PPP projects, where a lowest price criterion is commonly used at the *best and final offer (BAFO)* stage. In these circumstances a preceding qualitative assessment usually takes place to determine whether the technical aspects of the tenders meet minimum requirements and/or achieve a minimum threshold quality mark. Tenders that succeed in this pass/fail test are then evaluated solely on the basis of price.

Note: In some jurisdictions, if the prices of the two highest ranking tenders fall within a very narrow band, then either the final ranking of tenders is determined using a combination of the quality mark and the price (with the weighting of quality and price pre-determined in the tender documents) or a further BAFO stage is held. The tender invitation document must be clear on the methodology that will be used for ranking tenders.

▪ **Use of most economically advantageous tender (MEAT) criterion in PPPs**

Within the European Union, the lowest price criterion for the award of complex public contracts is gradually falling out of favour, even in the context of traditional procurement. This is reflected in the 2014 Directive which encourages a greater focus on quality (see Recital 90). According to Article 67, “public authorities shall

base the award of public contracts on the most economically advantageous tender". This marks a departure from the previous 2004 Directive, which instead gave public authorities the choice between the most economically advantageous tender and the lowest price (Art. 53). In fact, some national laws only admit MEAT as the basis to award a PPP contract.

In the 2014 Directive, the concept of lowest price is not even mentioned, nor is it considered a criterion *per se*. It is permitted, however, that the most economically advantageous tender can be assessed in reference to "*cost only*". According to this approach, the financial offer would constitute the sole criterion for selection of a tenderer.

The most economically advantageous tender is generally identified through an assessment of *best price-quality ratio* which should always include a price or cost element. The non-cost related criteria for award typically relate to quality of design and construction, delivery time and the standards of service proposed.

The quality criteria to be evaluated should be relevant to the subject matter of the project and weighted to reflect their relative importance/priority (see Box 15).

Box 15 – Non-price related criteria in the 2014 Directive

- Quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- Organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- After-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Award criteria should not have the effect of giving the public authority an unrestricted freedom of choice. As far as possible, the criteria should be capable of being applied objectively and mechanically, with minimum margin for discretion. They should ensure the opportunity for effective competition.

It is important to reiterate that the criteria chosen reflect the requirements of the project. In this respect, and especially for complex projects, input and suggestions from competent project advisors should be sought. Transaction advisers can assist in proposing criteria regarding the technical, environmental and economic aspects of the project, such as quality of the design, technical robustness, relevance of technical solutions, demand and performance targets.

Reference guidance documents



See: *Support for Improvement in Governance and Management – Public Procurement Brief 8: Setting the Award Criteria*, Sigma (a joint initiative of the OECD and EU), (2011)

Legislation in the Western Balkan countries

Albania

Under the PPP and Concessions Law³³ the criteria for the award of PPP and concession contracts is the most economically advantageous tender. This is to be determined based on the following criteria: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, and concession fee to be paid to the public authority.

The criteria to be used for each specific project should be chosen in relation to the requirements of that project and must be set out in the tender documents.

Bosnia and Herzegovina

The contracting authority is required to award the contract on the basis of one of the following criteria: (a) the most economically advantageous tender, or (b) the lowest price.

When entering into a contract based on competitive dialogue, the decision on selection must be made solely based on the criterion of the most economically advantageous tender.

Former Yugoslav Republic of Macedonia (FYROM)

The standard award criterion is the lowest price, whilst the most economically advantageous tender could be used on an exceptional basis. This does not apply for competitive dialogue procedures, in respect of which it is mandatory to award the contract based on the most economically advantageous tender, except when no acceptable tender has been received or when the public authority uses an electronic auction.

Kosovo*

The relative weight of each of the evaluation criteria and the evaluation process should be described in the tender invitation document. The public authority is

³³ Article 23.1 of the PPP and Concessions Law.

*entitled to set minimum thresholds with respect to quality, technical, financial and commercial aspects and proposals to be met by the tenderers.*³⁴

Montenegro

The criteria for valuation of proposals are: (i) duration of concession; (ii) offered amount of concession fee; (iii) offered price or tariff for the services; (iv) tenderers' references (e.g. in relation to technical and/or financial conditions and previous experience in performing concession activities); (v) quality of services; (vi) degree of achievement of public interest; (vii) degree of exploitation of natural resources; (viii) effects on employment, infrastructure and economic development; (ix) programme and degree of environmental protection and measures for improving energy efficiency; (x) scope and amount of expected financial assistance and support to the public authority; (xi) other criteria determined by the public authority.

The number of points for each individual criterion is set out in the tender documentation, with the sum of all points being 100. In practice, the economic criteria prevail and bring the highest number of points to the tenderers.

Serbia

The criteria for evaluating tenders are: (i) economically most advantageous tender; or (ii) lowest price offered.

Under the competitive dialogue procedure, the contract is awarded by applying the criterion of the economically most advantageous tender.

3.4.2 Content of tender submissions

The content and structure of the final tenders will vary in relation to the specific nature, size and complexity of the PPP project.

Box 16 provides an example of a list of the main documents that will typically be submitted by tenderers as part of the final tender. In principle, information should only be requested if it is to be evaluated. Careful consideration should be given to the level of detail sought and the numbers of copies required to be submitted. This will help to reduce the amount of material that the public authority has to examine as well as to reduce the time and effort (and therefore cost) of tenderers in assembling the tender.

It is good practice for the financial and technical (i.e. quality) parts of the tender to be submitted in separate packages and to be evaluated by separate teams.

Note: Limiting the number of pages or words in the submission documents can be an effective way of limiting the amount of information that is received.

3.4.3 Period of validity of the tender

³⁴ Articles 35 and 36 of the PPP Law.

The tender documents should set out a defined period during which the tenders received (and, in particular, their prices) remain valid if accepted by the public authority. The duration of the period of validity will depend on the nature and size of the project and the circumstances of the market. The end date usually coincides with the planned date for contract close. Where tenders are accompanied by a committed offer of financing, then this period will also be influenced by the period during which the terms of the finance offer to tenderers remain valid (see section 4.3.2).

To protect tenderers against price increases involving construction costs during the preferred tenderer period, the public authority may choose to index the tender price from the end date of the validity period to the actual date of contract close.

The public authority usually assumes any risk in the movement of the reference rate during the period between submission of the final tenders and contract and financial close. The decision to declare a preferred tenderer should also carefully take into consideration the significant limitations to make further changes once this has taken place (see Section 4.2)

Box 16 – Typical list of documents to be submitted by tenderers

Technical proposal

- *Preliminary design and specifications (e.g. drawings, technical specifications, materials to be used, etc.)*
- *Construction delivery proposals and programme with key dates*
- *Operating programme and service proposals (e.g. method statements for delivering the required service levels)*
- *Maintenance programme*
- *Staffing plan*
- *Quality assurance, health and safety and environmental protection plans*

Financial proposal

- *Financial model and cash flow projections*
- *Sources of financing of the project: equity, mezzanine, senior debt*
- *Formal financial offer (e.g. proposed tariff/tolls/service charges, availability payment or requested amount of subsidy, as appropriate to payment arrangements)*

Legal proposal

- *Acceptance of terms of the tender PPP contract*
- *Draft shareholders' agreement, consortium agreement, joint-venture agreement*
- *Heads of terms of principal sub-contracts*
- *Power of attorney signed by the authorised representatives of the company or consortium submitting the tender*

Other documents to be provided

- *Formal offer of committed finance from proposed funding group (with form of funders' direct agreement)*
- *Letters of support from financing sources (if on committed financing)*
- *Declarations of conformity with ITT/ITN requirements and validity of tender*

Declaration of continued conformity with the requirements of the PQQ as a qualifying candidate

3.4.4 The tender evaluation process

Once the tenders are submitted, they must be evaluated by the public authority in order to arrive at the selection of the preferred tenderer. The tender invitation document should describe the process that the public authority will follow in its conduct of the tender evaluation process, including the arrangements for the receipt and opening of tender documents.

Good practice suggests that where MEAT criteria are being used, then the financial and non-financial (i.e. technical and legal) tender information should be submitted in separate packages and should be evaluated in confidence by two separate tender evaluation teams. This can help prevent accusations from unsuccessful tenderers that the financial aspect of a tender influenced the evaluation of its quality characteristics and so determined the award of the tender.

▪ Completeness and compliance check

Before the evaluation process starts, the tender submissions should be checked to ensure that they are complete (i.e. that no parts of the tender submission documents are missing or no key information has been omitted in error) and that the format of the tender submission complies with the rules of the tender invitation document. The public authority, in accordance with the rules described in the tender invitation documents, may reject any tender submission at this stage that is either incomplete or does not comply.

▪ **Minimum requirements check**

Tenders will generally be assessed first on a number of pass/fail criteria before the single preferred tenderer is decided on. For example:

- a determination must be made that the technical solution proposed by a tenderer is capable of being developed to meet the requirements of the PPP contract, i.e. it is deliverable and robust and is based on reliable technologies;
- that the solution meets all minimum technical requirements set out in the output specification, user requirements and programming (e.g. delivery dates);
- that the costs and financial structure are consistent with the technical solution;
- that the proposed project management arrangements and resources of the tendering consortium show the tenderer to be acting as a cohesive entity rather than just a collection of companies put together for tendering purposes;
- that the tenderer has accepted the terms and conditions of the tender PPP contract.

▪ **Qualitative assessment**

Having carried out the completeness and compliance checks and confirmed that the tenders meet the minimum requirements specified in the tender invitation document, the individual tenders should be assessed by the tender evaluation panel in accordance with the criteria set out in the tender documents. Box 17 lists a number of technical and service performance issues that might be evaluated. Any relative importance of an issue should be reflected in the weighting of the appropriate evaluation criteria.

The primary financial evaluation criterion is the price. This is normally expressed as a single net present value, being the sum of the cash flows throughout the term of the contract which are discounted at the defined discount rate). The public authority may also consider evaluating the *financial robustness* of the tender (see Box 18). This characteristic of the tender may be evaluated as a qualitative criterion (with weighted marks assigned as with the technical quality marks) or as a pass/fail criterion. The financial advisers may play a key role in supporting the public authority

Box 17 – Possible technical issues to evaluate in tender submissions

Design evaluation issues

Some of the issues that may arise as part of the design evaluation include:

- **Functionality of design.** The ability of the design to enable the public authority to deliver its core services is a key evaluation criterion. The design requirements of the ITPID/ITN will be the basis of this evaluation. The proposed solution should be measured to determine the extent to which it meets these requirements.
- **Performance specifications.** The evaluation should focus on how the proposed solution addresses the required outputs performance criteria as set out in the output specification and user requirement documents.
- **Flexibility.** The flexibility of the proposed solution and the opportunity to enable change might be evaluated. Given the long-term nature of PPP contracts, the ability to incorporate change can be critical to the success of the project. The ability of the design to enable this change without material amendment to the physical infrastructure may be a key consideration.

Service delivery evaluation

Some of the issues that may arise as part of the services evaluation include:

- **Management structure.** The proposed structure for the private partner's management of the delivery of the services over the operational period is integral to the project's success.
- **Impact on core public services.** The manner in which the services are proposed to be implemented and how this will impact on the delivery of the core public services should be assessed. For example, the proposed maintenance regime should be evaluated to assess how the timing and frequency of asset replacement activities are scheduled to avoid detrimental impacts on the delivery of the core public services.

Source: (Based on National PPP Guidelines, Practitioners' Guide Volume 2, Government of Australia)

▪ Notification of the outcome of the evaluation process

The application of the award criteria and their respective weightings determines the ranking of the tenders, thus serving to identify the preferred tenderer. It is good practice that the public authority, once it has formally validated the ranking of the tenders prepared by the evaluation panel, communicates the results of the tender to all respondents. This notification is not the same as the issue of the standstill notice, as described in directive 2007/66/EC (often called the *Remedies Directive*).

Box 18 – Possible financial issues to evaluate in tender submissions

- **Certainty of finance.** *Evaluation of whether the project cash flows and sponsor support show a proposal likely to meet the requirements of debt providers. Any unresolved matters may cause significant issues and delays during Stage 2 of the tendering process. The review should therefore be approached from the lenders' perspective. Note: Notwithstanding the letters of commitment received from lenders supporting the tender, it is entirely possible that the lenders may withdraw their support during the preferred tenderer stage.*
- **Sponsor support** (i.e. equity and key subcontractors). *The financing structure proposed by tenderers must indicate the equity contribution and the commercial arrangements with key subcontractors (e.g. builder and FM provider). Note: the tender document may demand a minimum level of equity participation in the PPP contract.*
- **Performance-based payments.** *The evaluation should consider any proposed changes that would alter the expected calibration of the payment mechanism.*
- **Cash flow profile.** *The profile of payments outlined in tenders should be assessed for any potential solvency issues for the private partner, e.g. whether sufficient cash flow is available in the early years to support operating costs and debt.*
- **Residual value/debt amortisation profile.** *To assess the rate at which debt finance is to be amortised and so understand the level of debt outstanding at each stage of the contract term.*
- **Tax assumptions.** *The PPP contract usually allocates all taxation risks to the private partner. The tender evaluation process should check the assumptions made about taxable income and rules applied.*

3.4.5 Abnormally low tenders

The tender invitation documents should describe the procedure that the public authority would follow in the event of a tender being considered as *abnormally low*. The public authority may consider a low price to be of significant benefit; however, it must satisfy itself that the tenderer will be able to undertake all the obligations of the contract within its price without unnecessary economic distress to itself or without jeopardising the delivery of the contract and associated public services.

While the separate technical, legal and financial due diligence carried out by the lenders should offer some comfort to the public authority that the contract can be delivered within the tender price, it nonetheless has an obligation to investigate any tender that it considers abnormally low.

The public authority will likely require the tenderer to explain the abnormally low price proposed in its tender. It will be important to determine if the reason is, for example, due to non-compliance with an aspect of the technical specifications, error in the financial calculations, misunderstanding of the requirements of the contract, non-conformance with applicable obligations in the fields of environmental, social and labour legislation, or some anomalies in the sub-contracting chain.

Where the tenderer cannot provide an adequate explanation, the public authority may be entitled to reject the tender. Rejection is likely to be mandatory in cases where the abnormally low price proposed is due to non-compliance with mandatory legislation in the fields of social, labour or environmental law.

At the same time, improved competitiveness of a tenderer resulting from the implementation of more efficient industrial processes or work methods, from optimal technical solutions, by the use of innovation in the work, supplies or services proposed should not be discouraged.

4. Stage 2 – The PPP contract and financial close

4.1 Introduction to Stage 2 of the tendering process

Stage 1 of the tendering process ends with the appointment of the preferred tenderer based on the evaluation of its tender in accordance with the published evaluation criteria.

The nature of PPP contracts is such that it is generally not possible to sign the contract immediately after identifying the winning tender (and after observing the normal standstill processes associated with the award of a public contract). Neither does the selection of the preferred tenderer lead automatically to the signature of the PPP contract and the entry into force of the financial agreements.

There are a number of important activities for the preferred tenderer to manage during this Stage 2 (*the preferred tenderer period*) to the satisfaction of the public authority.

The process leading to contract and financial close involves a series of steps summarised in Table 3 (see also Box 19).

Box 19 – Contract Close and Financial Close

The signing of the PPP contract between the preferred tenderer and the public authority (contract award or contract close) and the signing of the financing agreements between the preferred tenderer and the lenders (financial close) are separate activities that are dependent on each other.

Contract close occurs after the selection of a preferred tenderer and final award of the public contract. The date of contract signature marks the commencement of the obligations as laid down in the PPP contract. Provisions in the contract may defer its full effectiveness (i.e. conditions precedent), which will usually include achieving financial close. In principle, no material changes to the PPP contract are possible between final tender submission and contract close.

Financial close cannot occur before contract close. Financial close is the conclusion of the financing agreements by the preferred tenderer within the period established in the tender documents and PPP contract. Financial close can take place at the same time as contract close.

Table 4 – Main steps of Stage 2 of the PPP procurement process

Stage 2: PPP contract and financial close From selection of winning tender to contract award and signing of all PPP-related agreements	
Steps	Key activities
Finalise PPP contract	<ul style="list-style-type: none"> - Finalise/clarify/negotiate the PPP contract details with the preferred/successful tenderer. - Make any agreed non-material changes to the PPP contract.
Conclude financing agreements	<ul style="list-style-type: none"> - Lenders to the preferred/successful tenderer carry out their due diligence checks and confirm financing terms. - With the preferred/successful tenderer, finalise the terms of the financing/ancillary agreements with the lenders.
Contract award and financial close	<ul style="list-style-type: none"> - Issue notice to unsuccessful tenderers of intention to award the contract (<i>standstill period</i>). - (Assuming no legal challenge) the PPP contract is signed along with all related agreements (<i>contract close</i>) and financing agreements (<i>financial close</i>). - All parties satisfy any remaining conditions precedent that are necessary to make the PPP contract effective.

The expected Stage 2 activities should be set out in the tender invitation document together with a timetable indicating the planned date for award of the contract. The preferred tenderer will be expected to assign the required resources to undertake these tasks in a timely manner, including the mobilisation of resources of other parties on whom it is relying (e.g. its principal subcontractors, its lenders, the lenders' due diligence team).

The public authority must manage this process together with the preferred tenderer, taking responsibility for concluding the terms of the PPP contract and any matters on the public side that are essential to the performance of the contract (e.g. securing any other public approvals to sign the contract or obtaining final consents or permissions such as building permits).

This stage requires thorough organisation and management by both public and private parties for it to proceed efficiently. It should be planned carefully, generally making use of experienced advisers. Many PPP projects have experienced lasting difficulties as a result of a lack of adequate planning or expert advice during this critical stage.

Failure to conclude these activities successfully within a reasonable period of time may result in either the forfeiture by the selected tenderer of its preferred tenderer status (and potentially the cancellation of the procurement process) or the cancellation of the PPP contract in cases where it has been signed but not made effective.

4.2 Finalising the PPP contract

The private partner's main activities during Stage 2 will be focused on

- modifying any aspect of its tender in response to clarifications given to the public authority during the tender evaluation period (excluding the price);
- developing the tender proposals, where necessary, to a greater level of detail, for example for the purposes of making an application for planning consent, etc. (Any requirement for further development of the tender during Stage 2 should be described in the tender invitation document);
- finalising the subcontract terms with principal subcontractors (based on the final PPP contract);
- completing processes for incorporation of the preferred tenderer and associated corporate documentation; and
- agreeing (with the public authority) the final PPP contract terms and all its associated contract schedules.

The tender invitation document should describe what the public authority expects of the preferred tenderer during this step of the process. A time limit should be given to allow the preferred tenderer to conclude these activities in readiness for contract close. This should be a practical and realistic period, typically lasting between one month and three months, depending on the complexity and size of the project. The tender invitation document should indicate that these timelines must be adhered to, although the public authority should allow itself some ability to be able to review progress and permit an extension to this period, but only if it is satisfied that the preferred tenderer is able to complete its tasks in a reasonable and acceptable time frame. This period should fit comfortably within the tender validity period (see section 4.1 above.)

Note: The detailed description of this Stage 2 of the tendering process may be contained in the final tender invitation document or the notice of appointment of the preferred tenderer rather than in the initial invitation to tender document (ITN or ITPID), which may simply identify principles and indicative timelines. This approach could allow the public authority to develop the detailed process in tandem with the dialogue process, taking into account any matters and characteristics of the tendering process as it proceeds.

▪ **Updating and fine-tuning the PPP contract**

Even when the text of the PPP contract is part of the procurement documents and the tenderers have confirmed their acceptance of it, the tender PPP contract may still need some *fine-tuning*. This part of the process will be led by the public authority, who will produce the final PPP contract for signature.

The different procurement procedures imply varying forms and intensity of discussions once the preferred tenderer has been selected. Whatever the level of engagement, a general good practice principle is that any change to the tender PPP contract should not be material to the procurement. For example, changing a

fundamental aspect of the risk allocation would not be permissible under the procurement law.

When strictly adhering to the rules of the competitive dialogue, discussions with the preferred tenderer may only be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this does not have the effect of materially modifying *essential aspects* of the tender. This is because competitive tension is no longer available, it may provide an unfair advantage to the preferred tenderer and expose the process to the risk of challenge by unsuccessful tenderers.

- **Finalising other project documents forming part of the PPP contract**

In parallel with finalising the PPP contract, the preferred tenderer will also have to finalise the full set of contracts with its subcontractors, the most important of which are the subcontracts for the design, construction, operation and maintenance services. As the contracts are structured according to the *back-to-back* principle whereby the private partner transfers its obligations under the PPP contract to its subcontractors, they are finalised simultaneously with the PPP contract to avoid inconsistencies.

4.3 Concluding the finance agreements

4.3.1 Putting in place the financing of the project

There are a number of different ways in which PPPs can and have been financed. The tender invitation documents can anticipate particular types of financing arrangements, but it may be in the interests of the public authority to allow a degree of innovation in this aspect of the tenders if it has potential to offer a better value for money outcome.

For this reason alone, it is often necessary to retain flexibility in the structure of the draft PPP contract during the Stage 1 tender process, recognising that different capital and financing structures may require the draft contract to be amended. This aspect of a tender should be discussed during the dialogue stage only and any agreement on permissible adjustments to the draft PPP contract must be reached before the final tender is invited.

PPPs are typically financed through a combination of equity and debt (senior and/or subordinated/mezzanine). Tenderers will have already entered into provisional agreements with lenders to the effect of making the financing available as soon as the PPP contract is signed and made effective.

4.3.2 Timing of lenders' commitment to the financing terms for the project

- **Committed debt financing with the final tender submission**

In mature and normally functioning financial markets, where there is a sufficient number of financial institutions available to support a number of tenderers in a given competition, it may be possible to request tenderers to make a firm and binding offer with the final tender submission. This will be accompanied by a *committed financing* offer from one or more lenders which the tenderer will have negotiated and agreed prior to submitting its tender.

The terms of the debt financing agreement will be subject to a number of conditions to be satisfied by the tenderer, including being appointed preferred tenderer and finalising the tender PPP contract terms. It may also be subject to final technical, legal and financial due diligence pending the outcome of any discussions that may take place between the preferred tenderer and the public authority.

At the time final tenders are submitted, the equity portion of the financing arrangement must be committed and capable of being put in place if and when the tenderer is appointed preferred tenderer.

At the same time, it must be recognised that it may not be possible to require tenderers to offer committed financing when submitting their final tender. In an emerging market. Lenders might be reluctant to commit to the sometimes lengthy and costly processes of making a full binding offer before having a reasonable expectation that their client will be awarded the contract. Approaches taken here are described below. In an emerging market capacity constraints may in any case make it very difficult to receive financially binding offers

- **Expressions of support with final tenders and commitment to debt financing agreed during the preferred tender period**

Where the public authority determines that the market is unlikely to be in a position to give committed financing at final tender submission stages, letters of support equal to a stated minimum amount of financing (which may be 100% of the required financing) should be sought as part of the requirements of the final tender submission.

The finalising of the financing arrangements will therefore need to take place during Stage 2 when the lenders identified in the letters of support will undertake the deferred due diligence processes and negotiation of lending terms. These letters will typically follow a model form that should be provided with the tender invitation document. In any event, the wording of these letters should be agreed by the public authority in advance of the final tender submission to ensure that they offer a sufficiently reliable and dependable source of finance.

Multilateral financing institutions tend to prefer this approach. As they are generally agreeing to finance whichever tenderer is selected, it means they do not have to carry out their full due diligence on all the tenderers (a costly and resource-intensive exercise). Since the co-lenders to the project will sit *pari passu* on the terms of the loan agreement, there will need to be an opportunity during the Stage 2 process to allow these agreements to be negotiated and agreed. It is therefore

important that the tender invitation documents inform the tenderers of any planned or anticipated involvement of a multilateral institution and provide the necessary contact details of the institution to allow tenderers to engage with them.

However, whilst commitments on the pricing of the loan may be deferred until Stage 2 of the process, the contract price tendered by the preferred tenderer should not be open to adjustment. In other words, the preferred tenderer should take the risk of any change to the financing terms that it had provisionally agreed prior to final tender submission.

▪ Preferred tenderer debt funding competition

Where the capacity of the project finance market is limited (e.g. where the number of banks able to finance the project on competitive terms is insufficient to ensure an appropriate competitive process), the public authority may choose to have the financing of the project arranged during Stage 2 using a *preferred tenderer debt funding competition*. In this arrangement, the preferred tenderer invites a list of (usually pre-selected) financial institutions to tender to provide the debt finance required (either wholly or in part). The preferred tenderer, under the supervision of the public authority, manages this funding competition. In this instance, final tenders will have been submitted using a common term sheet established by the public authority. The contract price contained in the preferred tenderer's tender is adjusted to reflect the terms of the financing offer that is accepted following the funding competition. The use of funding competitions is usually limited to larger projects due to the additional complexities involved (e.g. the running of two, successive, competitive processes).

Typically, lenders will only firm up commitment upon the completion of their due diligence and once their internal credit committees have formally expressed their approval. However, the review of project documentation and the detailed due diligence processes may result in lenders requiring changes to the PPP contract.

The ability of the public authority to accept such requests will be limited, as material changes to the tender PPP contract are contrary to good procurement principles.

Note: An equity funding competition is also possible, although this approach is very rarely used. Again, any proposal to incorporate such an approach must be indicated in the tender invitation documents, preferably at the pre-qualification stage.

Reference guidance documents



See: *Preferred bidder debt funding competitions*, UK Government (2006)

4.3.3 The PPP financing documents

Financing a PPP is a complicated exercise, and the financing agreements have to capture all the implications of the relationships among all the stakeholders (the public

authority, the private partner and its subcontractors, the providers of equity, mezzanine and debt financing, and the insurers).

Note: A description of the structure and purpose of the various PPP financing agreements is outside the scope of this guide.

For large PPPs, the financing agreements will include the documents listed in Box 20, some of which will eventually become part of the PPP contract:

Box 20 – Main PPP financing agreements

- *Senior loan agreements: agreements between the senior lenders and the private partner*
- *Common terms agreement: an agreement between the financing parties and the private partner which sets out the terms that are common to all the financing instruments and the relationship between them*
- *Subordinated loan agreements (where subordinated or mezzanine debt is used in the financing structure)*
- *Shareholders' agreement (as part of the constitutive documents of the company forming the private partner)*
- *Direct agreement between the lenders and the public authority*
- *Accounts agreement: this involves a bank which will control the cash flowing to and from the private partner*
- *Inter-creditor agreement: an agreement between the creditors of the private partner that spells out aspects of their relationship with one another and the private partner company*
- *Hedging agreements: agreements which enable the private partner to limit its exposure to interest rate and foreign exchange rate risks;*
- *Security agreements (e.g. share pledge, charge over accounts, movables pledge, receivables pledge)*
- *Parent company guarantees and other forms of credit enhancement where the sponsors of the private partner or its subcontractors do not offer sufficient financial strength;*
- *Legal opinions from the lender's legal advisers on the enforceability of the contracts and the powers of the various parties (including the public authority) to enter into the transaction.*

Note: The public authority may wish to include a model form of the lenders' direct agreement, as part of the tender invitation documents (some of the terms of which may also be set out in the PPP law). Providing a model form that is generally acceptable to lenders can help to limit the scope of any discussion or negotiation between the public authority and the lenders over the terms of this agreement during the Stage 2 process.

Once the financing agreements have been signed, they will become fully effective once any conditions precedent have been satisfied (see Section 4.4.2).

4.4 Contract award and financial close

4.4.1 Timing of the contract close and financial close

▪ **Simultaneous contract close and financial close**

Once the financing arrangements are agreed, the signing of the financial agreements (i.e. financial close) may take place either simultaneously with the signature of the agreed PPP contract (i.e. contract close) or after that. The signature of the financing agreements and fulfilment of any conditions precedent to those agreements will usually be a condition precedent to the effectiveness of the PPP contract.

The preference in many cases is to sign the PPP contract and the financial agreements simultaneously. This has the advantage of mitigating the risk of potential unavailability of financing after the signature of the PPP contract. It also mitigates against the risk of inconsistency between the PPP contract and the financing agreements.

▪ **Separate (split) contract close and financial close**

In some markets the objective of agreeing and finalising the financing agreements simultaneously with the PPP contract can often prove ambitious.

A separation between financial close and contract close might be driven by the fact that certain activities are perceived as too complex, costly or time consuming to pursue during the tender process, but need to be complete before lenders will commit to the project. Examples include where the applicant for project permits needs to be the same legal entity that delivers the PPP contract, or where significant design development is needed in order to secure project permits. Where the public authority intends to separate the two close processes, this must be clearly and expressly described in the tender invitation documents. A description of the tasks to be performed and how their completion will be objectively demonstrated to the public authority should also be given.

It must be remembered that after contract close, the procurement process is complete and cannot be re-opened (e.g. to revert to the second-ranked tenderer).

In order to mitigate against the potentially severe consequences of not reaching financial close (and/or lenders seeking to amend aspects of the signed PPP contract), the public authority may require that tenderers provide evidence of a realistically deliverable financing plan as part of the final tender submissions. Tenderers should demonstrate that their lenders have reviewed and accepted the broad structure of the PPP and the major contractual provisions of the tender PPP contract (including the proposed risk allocation). This is why interrogation of

tenderers for their financability usually supported by the financial adviser, is so important (see Box 18).

The tender invitation document should also identify any required forms of additional security that the public authority may require during the intervening period (e.g. an enhanced bid or performance bond) and any sanction should the preferred tenderer not achieve financial close within a defined period (including the possibility to cancel the contract).

4.4.2 Satisfying the conditions precedent

- **Conditions precedent to the PPP contract**

As described earlier, there may be activities that the private partner is required to undertake, the performance of which is necessary before the PPP contract can take full effect. Typically, these relate to securing required permissions and consents from other public bodies that are linked to the design and construction of the project and to the delivery of services. The securing of finance for the project (if not already achieved) will also be a condition precedent.

- **Conditions precedent to the financing agreements**

The financing agreements may also contain conditions which must be satisfied to enable financing and funding (e.g. loans, equity, mezzanine, grants) to start flowing to the project partner so that full project implementation can take place. The private partner may be able to initiate certain limited activities using its own funds at the start of the project.

All conditions precedent contained in the PPP contract and financing agreements need to be fulfilled before the contract can take full effect. Box 21 lists a number of the most common conditions precedent in PPP contracts and financing arrangements. There may also be conditions precedent in grant funding to meet: usually the availability of the financing and of grant funding will be interdependent with the conditions precedent that all need to be fulfilled at the same time.

Box 21 – Common conditions precedent in PPP contracts

- *The main permitting and planning approvals have been secured;*
- *The key land acquisition steps have been achieved;*
- *The outstanding technical design issues have been clarified;*
- *Any remaining key project and financing documents have been finalised and signed;*
- *All funding approvals are in place;*
- *Proper registration of the security for the loans has been confirmed;*
- *The public authority has confirmed that all internal approvals have been satisfied.*

4.4.3 Notices to other tenderers, standstill period and Contract Award Notice

It is accepted good procurement practice to notify the losing tenderers of the public authority's intention to award the contract to the identified preferred tenderer. The issue of this notice is accompanied by a *standstill period* of 10 business days (under the EU directives) between the notification of the PPP contract award decision and the contract close. The rationale for this is to communicate the public authority's decision (and the basis of the decision) to the unsuccessful tenderers and allow them an opportunity, if dissatisfied with the decision, to request a review and to consider whether to challenge the award, within a time-limited period..

The tender invitation document should describe the public authority's arrangements for giving notice to tenderers on any aspect of the competition, including how it intends to manage any review process (which may be conducted by another public authority, including the courts). The tender invitation document should provide tenderers with the contact details of the review body and any procedural requirements, such as any time limits to making a review request. This information is also normally provided in the contract notice published at the start of the tender process.

Once the standstill period has elapsed and subject to any reviews having been concluded, the PPP contract and associated project documents may be signed and completed, so achieving contract close. As has been stated, financial close may take place either simultaneously or later than contract close.

Within 30 days after the conclusion of the contract (or as soon as practicable), the public authority should publish a contract award notice.

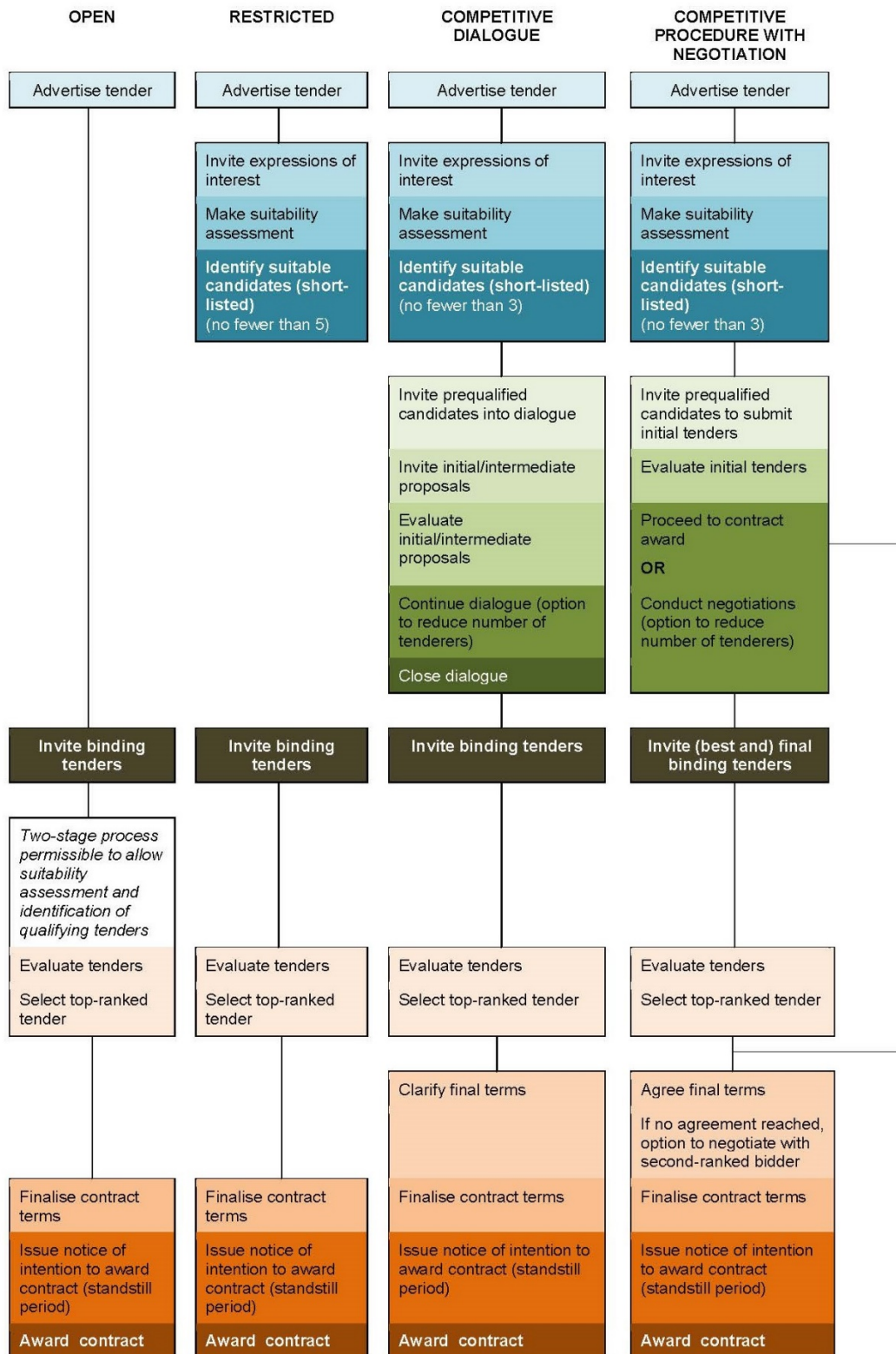
The 2014 Directive's requirements on the content of the contract award notice are summarised in Box 22.

Box 22 – Contract Award Notice

In summary, a contract award notice should include the following information:

- information about the contracting authority, including contact details;*
- the nature and place of the contract and activities to be performed;*
- the value of the contract (option for lowest/highest offer considered);*
- the type of award procedure used;*
- the award criteria used;*
- information if no award is made (discontinuation of the procedure);*
- name of the contractor awarded the contract;*
- information about subcontracting; and*
- procedure for review.*

Annex A – Overview of EU Directives and procurement procedures



Annex B – Main laws of the Region governing public procurement and Public Private Partnerships (PPPs)

Law	Web link	Date of entry into force
Albania		
Law No. 125/2013, dated 24.03.2013 "On Concessions and Public Private Partnerships", as amended	Updated version of the law (as at 2018) in Albanian	25 May 2013
Law No. 9643, dated 20.11.2006 "On Public Procurement", as amended	Updated version of the law (as at 2018): in Albanian	1 January 2007
Decision of the Council of Ministers No. 575, dated 10.07.2013 "On the approval of the rules for the evaluation and granting of concessions/public-private partnerships", as amended	Original version of the law (2013): in Albanian Amendments (as at 2018): in Albanian	15 July 2013
Decision of the Council of Ministers No. 634, dated 01.10.2014 "On the approval of rules for the evaluation and granting of public works and services for the construction, operation, maintenance and rehabilitation of national roads, through concession/public-private partnership", as amended	Original version of the law (2014): in Albanian Amendments (as at 2018): 2014 2015 2017	9 October 2014
Decision of the Council of Ministers No. 914, dated 29.12.2014 "On approval of rules regarding public procurement", as amended	Updated version of the law (as at 2018) in Albanian	12 January 2015
Bosnia and Herzegovina and Republic of Srpska		
Law on Public Procurement	Bosnian version English version	27 May 2014
FYROM		
Law on Public Procurement	Macedonian version English version	1 January 2008
Kosovo*		
Law No. 04/L-045 "On Public-Private Partnership"	In both Albanian and English	13 December 2011
Law No. 04/L-042 "On Public Procurement in Republic of Kosovo"	In Albanian	13 July 2011
Law No. 04/L-237 "On Amending and Supplementing the Law No. 04/L-042 On Public Procurement In the Republic of Kosovo"	In Albanian and English	4 March 2014
Law No. 05/L-068 "On Amending and Supplementing the Law No. 04/L-042 On Public Procurement Of The Republic Of Kosovo*, Amended and Supplemented with the Law No. 04/L-237"	In Albanian and English	29 December 2015
Law No. 05/L-092 "On Amending and Supplementing the Law No. 04/L-042 on Public Procurement in the Republic of Kosovo*, Amended and Supplemented by the Law No. 04/L-237 and the Law No. 05/L-068"	In Albanian and English	6 March 2016
Montenegro		
Law on Concessions	Montenegrin version English version	12 February 2009
Serbia		
Law on Public Procurement	In Serbian In English	1 April 2013
Law on Public Private Partnership and Concessions	in Serbian In English	2 December 2011

Glossary of main terms and expressions

Affordability

Affordability relates either to the ability of the public authority to make performance-based payments to the private partner from the public budget (in a *government-pay PPP*) or the ability and willingness of users to pay the tariffs/tolls charged by the private partner (in a *concession*).

Availability payment (and availability-based PPP)

In an availability-based PPP (a type of *government-pay PPP*), the public authority pays the private partner for the provision and use of public infrastructure and related public services. Payment is linked to the availability of the asset and/or the services for the duration of the PPP contract (the *availability payment* or *unitary payment/unitary charge*). The availability standards and service requirements of the public authority are defined in the PPP contract.

In most contracts of this type, payment to the private partner only starts once the construction phase is complete and the services can be delivered.

Bankable (and bankability)

A PPP project is considered bankable if lenders are willing to finance it.

Candidate

A company or group of companies (usually in the form of a consortium or joint venture) that submits a response to an invitation to pre-qualify for a project as part of the procurement process.

Concession

A concession (sometimes called a *user-pay PPP*) is a type of PPP in which the public authority grants a private partner the right to generate revenues from the provision of a service. The private partner is paid by the users of the service and normally assumes the risk of any change in the users' demand for the service. The service requirements of the public authority are defined in the concession contract. (e.g. keeping a bridge open to traffic, collecting tolls from users of a bridge).

Conditions precedent

Conditions that need to be fulfilled before the PPP contract becomes effective or before drawing on the debt. Either party might be responsible for fulfilling the conditions in a particular PPP contract, but the private partner usually has a greater responsibility in this respect.

Contract close (and commercial close)

Contract close (sometimes called *commercial close*) is the point at which the PPP contract is signed by the public authority and the private partner. The main terms of the PPP contract will be completed at financial close.

Credit enhancement

The credit profile of a project finance structure can be improved by various forms of credit enhancement; for example:

- **credit support** in the form of guarantees by the sponsors relating to the performance of the SPV's obligations, financing facilities that provide temporary liquidity to deal with specific risks and insurance against certain project related risks.
- **public sector support** such as direct funding through a capital contribution (e.g. from national, regional or other funds) or contingent support or guarantees for certain types of risks which cannot otherwise be effectively managed or mitigated by the SPV, lenders or subcontractors.

Default (and event of default)

A material breach of contract by one party (including persistent breach) which entitles the other party to terminate the contract. The PPP contract will often define defaults by reference to precise contractual provisions.

Direct agreement

A direct agreement is a contract, linked to the PPP contract, which creates a contractual relationship between participants in the project whose main contractual relationships are with the private partner. The principal direct agreement is between the public authority, private partner and lender and allows the lender to exercise step-in rights to the PPP contract. The public authority may also have direct agreements with the private partner's sub-contractors that allow it to step-in to the sub-contract in an event of private partner default.

Economic Cost Benefit Analysis (ECBA)

The ECBA assesses whether the benefits brought to society by a particular public investment justify and outweigh the implementation costs. It will usually consider the social, environmental, and economic advantages and disadvantages of the investment as well as to the actual monetary costs and revenues generated by the project.

Equity (and equity investors)

The equity in a PPP is the portion of the project's CAPEX that is contributed as share capital in the SPV (i.e. pure equity) and subordinated debt (usually through shareholder loans and sometimes also called *junior debt*). The equity investors (also sometimes

called *equity providers, sponsors or shareholders*) usually hold both the pure equity and subordinated debt and generally control the SPV. Some equity investors may not take an active role in the management of the PPP contract.

The public authority may sometimes provide equity to the SPV, either directly or through a public investment fund. Public participation in the equity of the SPV (including any rights of control) can influence the statistical treatment of the PPP contract.

Financial close

Financial close is the point at which the financing documents for the PPP contract (including the direct agreement between the lenders and the public authority) are signed and the financing becomes available for the project. It is usually the point at which the interest rate for the project is fixed using an *interest rate swap*. Financial close usually happens at either the same time as or shortly after contract close.

Fiscal risk

PPPs create long-term financial commitments that could (over time and when considered with other commitments) challenge the coherence of the public budget process and ultimately a country's fiscal sustainability and macroeconomic stability. Fiscal risks can exist when the actual and contingent commitments on PPPs are not clearly recognised or understood and where they have not been reported and budgeted for centrally.

Lenders

The term *lenders* in these WBIF EPEC Guides generally refers to the organisations who provide finance to the PPP in the form of senior debt to the private partner. They can include commercial banks, multilateral and bilateral development banks and finance institutions, and institutional investors such as pension funds and insurance companies.

Life-cycle costs (and whole-life costs)

This is the total cost of creating an asset and managing it to the end of its useful life (or for the duration of the PPP contract). It includes the initial cost of construction and the cost of all subsequent maintenance works that ensure that the asset continues to perform at an acceptable or minimum standard. The PPP contract defines the minimum standard of performance to be met by the private partner.

Needs assessment

Assessment of the gap between an agreed set of objectives and existing arrangements that the investment aims to address.

Net Present Value (NPV) and discount rate

The NPV is the discounted value of a project's cash inflows minus the discounted value of its cash outflows. It is calculated based on a *discount rate*. This subject is discussed more fully in the *WBIF EPEC Guide to the qualitative and quantitative assessment of Value for Money in PPPs*.

On and off balance sheet (statistical) treatment of PPPs

A public contract is recorded as either on or off the central government's balance sheet according to the national system of accounts (commonly referred to as the *statistical treatment* of a contract). The treatment of a PPP contract within the government's balance sheet can be an important consideration in the preparation of the project.

Optimism bias

Optimism bias is the systemic behaviour of public authorities (based on project experience) to both i) underestimate the duration of the construction phase of a project and its CAPEX and OPEX and ii) to overestimate the benefits/revenues it will produce.

Output specification (and user requirements)

These are the public sector's requirements defined as a clear set of outputs that are directly measurable in accordance with quality performance standards. The output requirements (sometimes also *user requirements* or *authority requirements*) can include technical requirements and service requirements. They are a distinctive feature of PPP projects in comparison to the input requirements normally used in traditional project procurement.

Payment mechanism

The payment mechanism is the principal means or mechanism within the PPP contract for remunerating the private partner. In a government-pay PPP the two main types of payment mechanism are

- *availability-based, in which the payments made by the public authority to the private partner are linked to the infrastructure being available for use and services being performed as defined by the PPP contract. The availability payment is subject to deductions if the infrastructure is unavailable or where the services are performed poorly. The public authority takes the risk of variation in the demand for the services; and*
- *demand-based, where the payments to the private partner are linked to the level of usage of the infrastructure.*

In a concession, the payment mechanism might regulate the basis on which the private partner is entitled to charge users and otherwise generate revenues.

Persistent breach

A persistent breach occurs when the private partner consistently fails to observe provisions of the PPP contract, e.g. fails to comply with the same provision on a repeated number of occasions or accumulates financial or contractual penalties over a defined period.

PPP contract

This is the main contractual document between the public authority and the private partner. It sets out the responsibilities of the private partner for the design, construction, finance, operation and maintenance of the asset and the delivery of the associated public services. The PPP contract allocates project risks between the parties and contains the payment mechanism.

The PPP contract is described more fully in the WBIF EPEC *Guide to the main provisions of an availability-based PPP contract*.

PPP unit

A specialised public organisation that provides PPP expertise in the public sector. This can include advice and support to public authorities in devising and implementing PPP projects and/or PPP policy. It may also have an assurance or approval role. It is usually a part of a government ministry or central public agency, such as the ministry of finance.

Preferred tenderer

The tenderer who has submitted the best compliant tender for a PPP project and with whom the public authority intends to sign the PPP contract. The preferred tenderer becomes the *private partner* when the PPP contract is signed.

Private partner

The private sector company that enters into the PPP contract, with responsibility for delivering and maintaining the public infrastructure and related public services for the duration of the contract. It usually takes the form of an SPV.

Procurement procedure

EU Directive 2014/24/EU (the 2014 Directive) provides four procurement procedures:

- the open procedure;
- the restricted procedure;
- the competitive dialogue procedure; and
- the competitive procedure with negotiation.

The 2014 Directive reforms and supersedes Directive 2004/18/EC (the 2004 Directive). It covers public procurement in general, laying down the principles that should apply to all works, supplies or services contracts. Legislation addressing public procurement within the Western Balkans Region conforms, in large part, to the 2004 Directive.

Procurement process

The WBIF EPEC guides use this expression to describe the steps and activities that the public authority adopts to implement its chosen procurement procedure. In defining the procurement process the public authority will consider matters such as timetable for the procurement (including key milestones), numbers of tenderers to pre-qualify, number and format of meetings with tenderers.

Project cycle

The project cycle is used in the WBIF EPEC guides to describe the series of steps that is followed by a typical PPP project from the time that the project scope is initially defined, through to its completion and delivery of the related services. The project cycle is divided into four phases:

- *Phase 1: Project identification phase*
- *Phase 2: Project preparation phase*
- *Phase 3: Project procurement phase*
- *Phase 4: Project implementation phase*

Project finance (and project finance structures)

PPP projects are generally financed using *project finance* structures. A project finance structure seeks to optimise the availability of finance and underpin the allocation of risks to the parties best able to manage those risks.

The project assets and revenues are usually ring fenced within an SPV. The SPV's lenders and investors rely either exclusively (i.e. *non-recourse* financing) or mostly (i.e. *limited recourse* financing) on the cash flow generated by the project as their security for the repayment of their loans or to earn a return on their investment. This is in contrast to corporate finance where lenders rely on the strength of the borrower's balance sheet as security for repayment of their loans.

Project identification phase

The identification phase is the first phase of the *project cycle*. At the end of this phase the public authority determines whether the selected project can (and should) be further developed as a PPP and whether to proceed to the project preparation phase.

Project implementation phase

The implementation phase is the fourth and final phase of the *project cycle*. It follows financial close and includes the management of the PPP contract and regular monitoring of the private partner's performance.

Project preparation phase

The preparation phase is the second phase of the *project cycle*. It includes the development of the potential project in readiness for the project procurement phase. The public authority will establish the project's governance structure (i.e. project team and steering committee), conduct further detailed assessments of the project and prepare relevant documents for the procurement phase. The assessments include the detailed affordability analysis, risk allocation and VfM assessment. The public authority defines the preferred procurement procedure and process, evaluation criteria and draft PPP contract.

Project procurement phase

The procurement phase is the third phase of the *project cycle*. It follows the preparation phase and starts with the publication of the procurement notice. It includes all the activities associated with the procurement process up to the award of the PPP contract through to contract close, and ends with financial close.

Public authority

The public sector body (sometimes called the *procuring authority* or *contracting authority*) that plans to enter into a PPP contract with a private sector partner. In an availability-based PPP, it is also the public body who is responsible for paying the availability payment to the private partner.

Public-Private Partnerships (PPP)

The term PPP describes a long-term contractual arrangement in which a public authority and a private partner collaborate to deliver public infrastructure (or assets) and related services. Under a PPP contract, the private partner bears significant risks and management responsibilities. The two main types of PPP contract are a *government-pay* PPP (which includes *availability-based* and *demand-based* PPPs) and a *concession* (sometimes called a *user-pay* PPP).

Public sector comparator (PSC)

The PSC is a risk-adjusted cash flow model of delivering a project using a traditional public procurement option (sometimes called the *public sector benchmark*, *PSB*). A comparison of the net present values of the PSC and PPP options for a particular project may be used as part of a quantitative VfM assessment.

Qualitative and quantitative VfM assessments

A *qualitative VfM assessment* often involves testing the PPP project delivery option against a set of pre-defined suitability (i.e. qualitative) criteria to determine the potential for the PPP option to provide VfM.

A *quantitative VfM assessment* usually involves estimating and comparing the costs of a PPP project delivery option with a traditional public project delivery option (i.e. a PSC) where the project risks have been valued. The estimated cost of each delivery option is calculated on a present value basis using an appropriate discount rate.

This topic is discussed more fully in the WBIF EPEC *Guide to the qualitative and quantitative assessment of Value for Money in PPPs*.

Risk management

Risk management is a process that helps to identify, analyse, price and allocate project risks. It starts during the project identification phase and continues for the duration of the PPP project (including the monitoring and review of risks during the implementation phase). This topic is discussed more fully in the WBIF EPEC *Guide to the qualitative and quantitative assessment of Value for Money in PPPs*.

Senior debt

This is the main form of debt raised by the private partner and ranks above other forms of debt (e.g. junior or subordinated debt). The senior debt lenders usually have first priority for loan repayment by the private partner and (in an event of default) over its assets or revenues. The senior debt lenders also have priority of decision-making powers if they exercise rights to step in.

Suitability (as a PPP)

Suitability refers to the appropriateness of using the PPP option to deliver a particular project. A project is, in principle, considered suitable as a PPP if it possesses certain project specific characteristics and the national legal, institutional and market environments are supportive. This topic is discussed more fully in the WBIF EPEC *Guide to the qualitative and quantitative assessment of Value for Money in PPPs*.

Special Purpose Vehicle (SPV) or Special Purpose Company (SPC)

See *private partner*. A legal corporate entity whose sole purpose is to implement the PPP project and which is generally incorporated in the country where the project is located.

Step-in rights

A step-in right is a contractual provision that allows someone to step into the place of a party that has defaulted on its obligations so that the party *stepping in* may rectify the default (and prevent termination of the contract). The two principal types of step-in

rights in a PPP are those given to the public authority and those given to the project's lenders.

Subordinated debt

Debt that is generally provided by the shareholders of the SPV and in the same proportion to their respective shareholdings. This debt is subordinated to other debt (i.e. ranks below senior debt).

Supervening event

A supervening event is an event that occurs during the course of the PPP contract that is outside the control of either party. Such events are treated in the PPP contract as either a *compensation event*, a *relief event* (or *delay event*) or as a *force majeure event*. These events are described more fully in the WBIF EPEC *Guide to the main provisions of an availability-based PPP contract*.

Tenderer

A company or group of companies (usually in the form of a consortium or joint venture) that has been pre-qualified (and perhaps also shortlisted) by the public authority as a candidate in the procurement process for the PPP project with the intention of being invited to submit a tender.

Traditional public procurement or delivery

A traditional public procurement or delivery approach involves the provision and funding of public infrastructure and related services by the public authority. The public authority is responsible for the long-term operation and maintenance of the infrastructure. The public authority also bears most of the risks associated with the integration and optimisation of the various activities within the project.

The most commonly-used traditionally procured contracts are:

- *a build (or construction) only contract (usually with a separate contract for the design of the infrastructure);*
- *a design-build contract;*
- *an engineering, procurement and construction (EPC) contract; and*
- *an operations and maintenance only contract.*

Value for Money (VfM)

VfM is considered as the relative balance between the *value* and the *cost* of the different delivery options that are available (i.e. as between a traditional delivery approach and a PPP approach), where:

- *the value aspect comprises the quality and quantity of the service (i.e. the performance level) of the different options, delivered over the period of the PPP; and*
- *the cost aspect usually represents the cost to the payer (i.e. the public authority and/or end-user) over the same period to deliver the different options (including the cost of managing the risks).*

A *VfM* assessment will identify the delivery option that represents the best balance of long-term risk-adjusted value and cost.

This topic is discussed more fully in the WBIF EPEC *Guide to the qualitative and quantitative assessment of Value for Money in PPPs*





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