

Basic Elements of a Law on Concession Agreements



MULTILATERAL CENTRE
FOR PRIVATE SECTOR DEVELOPMENT
ISTANBUL

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of a Law on
Concession Agreements

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PREFACE

For nearly a decade the Organisation for Economic Co-operation and Development (OECD) has made a contribution to the development of legal frameworks for market economy reforms of transition economies.

There is now a significant trend toward the formation of private-public partnerships for the purpose of financing infrastructure and natural resource exploitation. Often these are quite large in their investment requirements and by nature must attract foreign capital. Often, too, governments find it expedient to offer “project financing” in which the income from the investment is earmarked to reimburse the initial funding. More and more, the basis of such financing takes the form of “concession agreements” between the government, the operating company and the financial institution involved.

The following set of basic elements for Concession Agreements for corporate law and foreign direct investment legislation is the result of a joint project between the Istanbul Stock Exchange (ISE), the OECD and a group of experts from NIS, Black Sea and South-East European Countries. This study is a contribution to facilitating private sector investment in the infrastructure of transition countries.

Initial work by the OECD and the Istanbul Stock Exchange on Project Financing in Eurasian transition economies focused on project-financing arrangements that were the most common framework for private financing of large infrastructure projects in the region. For launching such projects, private special-purpose companies are normally created that potentially tap international capital markets. The legal arrangements should ideally be based on concession agreements between foreign investor consortia and host governments in order to allow for reliable long-term financial planning. Yet most Eurasian countries are still in the process of developing legislation on concession agreements. Therefore the OECD and the ISE decided to convene an expert group that would formulate basic elements in light of international experience so as to assure that project financing becomes a more viable option for the much needed infrastructure financing in the region.

The study was implemented with the following three practical objectives, (a) to provide information to Eurasian legislators on the guiding legal principles and best international practices with respect to concession agreements; (b) to contribute to the harmonisation of the relevant legislation in the Eurasian region; and (c) to elaborate on these principles and practices with a view to providing assistance to Eurasian Governments in the negotiation of actual concession agreements. This document contributes to these objectives by providing a text that sets out in legislative language the guiding principles of a modern law on concession agreements and comments on these principles in light of best international practices.

The Expert Group met several times in Istanbul to discuss successive drafts of the basic elements. The discussions and the resulting document benefited greatly from the insights and experience of international advisers, in particular José Faria of the United Nations Commission on International Trade Law, Roger McCormack of the London law firm Freshfields, Brockhaus and Deringer, and Dr. Jürgen Voss of the United Nations Mission in Kosovo. The document reflects the views of the experts and not necessarily of the institutions they are affiliated with. It is published under the responsibility of the OECD and the Istanbul Stock Exchange.

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INTRODUCTION

Concession agreements can, and ideally should, accompany all public-private partnerships entered into for the purpose of financing infrastructure and natural resource exploitation projects.

In 1999 and 2000, a group of experts from eight Eurasian transition economy governments, UNCITRAL, the OECD, the EBRD, the British Export Credit Guarantee Agency and the Freshfields law offices prepared “Basic Elements of a Law on Concession Agreements” (hereinafter the “Basic Elements”). This project was a part of the programme of the Multilateral Centre for Private Sector Development, Istanbul, managed by the OECD in co-operation with the Turkish International Co-operation Administration (“TICA”) and with the financial support of the Istanbul Stock Exchange.

The Basic Elements are reproduced here, followed by a synopsis of the main concepts by Roger McCormick of Freshfields and a discussion of the Basic Elements’ main chapter dealing with the selection of contractors by José Angelo Estrella Faria of UNCITRAL.

The vast capital investments needed to rehabilitate the ailing infrastructures of the transition economies of Central/Eastern Europe and the Former Soviet Union and to reconstruct the Balkans after a decade of war and neglect can neither be financed from local budgets nor from development assistance alone. The magnitude of investment requires mobilising and bundling all potential resources, public and private, for economic reconstruction and development purposes. “Public-Private Partnership” has become a catchword for development financing throughout transition economies in practically all regions of the world.

This partnership is usually facilitated by various modalities of Project Financing, i.e., financial devices in which the capital investments made into an infrastructure project are recouped from the cash flow generated by the project. Projects traditionally funded by governments from public budgets are at least in part financed privately and, accordingly, designed in a way that they earn the invested funds back from users’ fees or other charges. Along with private financing usually comes private management of the

facilities, introducing commercial disciplines and thus ensuring sufficient revenues for debt service and investment amortisation.

The legal relationship between host governments and private partners in infrastructure projects are frequently set out in concession agreements. These typically involve three principal interested parties, i.e., the host government, the contractor (usually a consortium of construction and other companies with requisite technical expertise) and the contractor's financiers (which may include not only private sector banks but also international financial institutions, export credit agencies and other institutions). In recent years, many countries, and many transition economies in particular, have developed laws on concession agreements. These usually pursue three main purposes, namely to:

1. set out the parameters of the host government's authority for concluding concession agreements;
2. establish the agency or agencies within the host government authorised to conclude concession agreements and its co-ordination with other government authorities involved; and
3. provide guidance to the negotiation of actual concession agreements.

As concession agreements frequently involve international consortia and financiers, the negotiation of such agreements can be eased and the attendant costs reduced by internationally widely recognised best practices.

To define and promote such practices, the United Nations Commission on International Trade Law (UNCITRAL) in June/July 2000 adopted a "Legislative Guide on Privately Financed Infrastructure Projects" (United Nations, New York, 2001 United Nations Publication sales No. E. 01. V. 4 ISBN 92-1-133632-5). The Guide sets out recommended legislative principles, so-called "legislative recommendations", together with explanatory notes, with a view to assisting governments in creating a legislative framework favourable to privately financed infrastructure projects.

This Guide provided a point of departure for the preparation of the Basic Elements presented here, together with actual laws on concession agreements and pertinent EC legislation. The Basic Elements are couched in the form of legal provisions that could be found in relevant actual laws. While not purporting to qualify as a model law, the Basic Elements are meant to:

- provide a source on which countries might draw in shaping their laws on the subject matter;
- offer a point of reference for the negotiation of actual concession agreements;

- suggest solutions to some typical problems arising in the negotiation of concession agreements;
- establish a basis for co-ordinating advice to transition economies on legal issues related to concession agreements;
- help improve the harmonisation of concession agreement legislation with pertinent international standards and best practices; and
- promote a common approach and terminology with respect to concession agreements.

UNCITRAL's "Legislative Guide" was prepared by representatives of Governments and international organisations from around the globe and thus has official status (even though it is not binding). In contrast, the Basic Elements were crafted by Government experts from eight transition economies of the Former Soviet Union and the Balkans as well as international experts from UNCITRAL, the OECD, the EBRD, the British Export Credit Guarantee Agency and the London law offices of Freshfields, Bruckhaus, and Deringer – all acting in their personal capacity rather than as representatives of the institutions with which they are affiliated. Their non-official status notwithstanding, the Basic Elements reflect the cumulative experience and agreement in principle of these experts and thus merit serious consideration – both when drafting actual legislation on the subject matter and when negotiating concession agreements.

While UNCITRAL's Legislative Guide furthermore focuses on infrastructure projects alone, the Basic Elements apply to both infrastructure and natural resource projects. They are focused on the salient features of legislation. Concession agreements are used for myriad projects in various sectors with different parties. Any attempt at codifying the divergent scenarios in legislation would unduly constrain parties in tailoring their arrangements to the exigencies of individual projects and thus curtail the potential of public-private partnerships. Concentration on essentials is a major quality feature of concession legislation – less is more.

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BASIC ELEMENTS OF A LAW ON CONCESSION AGREEMENTS

[Preamble]

I. SCOPE OF THE LAW AND DEFINITIONS

Scope of the Law

13.2 This Law is concerned with the powers of Contracting Authorities to enter into Concession Agreements, the procedures for the selection of Contractors, the content of Concession Agreements and related matters.

Definitions

13.2 For the purposes of this Law:

- (a) ***Bidder*** means, in Article 6, any person interested in making a proposal in relation to a proposed Concession Agreement and, in Articles 7, 8, 9 and 10, any such person who has satisfied the criteria for pre-selection;
- (b) ***Concession Agreement*** means an agreement pursuant to which a Contracting Authority grants rights and agrees the obligations to be undertaken in relation to the construction, refurbishment or provision of Infrastructure or the exploration for and/or exploitation of Natural Resources (including any related treatment or transport facilities);
- (c) ***Contractor*** means the entity or entities other than the Contracting Authority which is party to the Concession Agreement;
- (d) ***Contracting Authority*** means [name, individually or by class, relevant authorities] acting on behalf of [_];
- (e) ***Designated Loan Financing*** means any financing agreement or arrangement (including any refinancing), relating to the financing of work (including services)

done or to be done pursuant to a Concession Agreement which is designated as such by written instrument by [*competent body to be indicated*];

- (f) **Infrastructure** means any facility or service which is used by and/or provided for the benefit of members of the public (or any section of the public) and shall include, without limitation:
- (i) Facilities for the provision of power or electricity (whether provided directly to the public or to any intermediate entity) including generation, transmission, distribution and supply;
 - (ii) Facilities and systems for the delivery or treatment of water or waste water;
 - (iii) Sewerage and sewage treatment facilities;
 - (iv) Waste treatment or disposal facilities;
 - (v) Roads, bridges, tunnels and other road transport facilities;
 - (vi) Facilities and systems in the rail (including light rail) sector;
 - (vii) Airport facilities;
 - (viii) Facilities in the health sector (including hospitals);
 - (ix) Facilities in the education sector (including schools and colleges);
 - (x) Port or harbour facilities (and any ancillary facilities);
 - (xi) Telecommunication facilities (including facilities related to the launching, operation or use of satellites);
 - (xii) Broadcasting facilities; and
 - (xiii) Any other service or facility which is designated by [*describe relevant authority*] as Infrastructure for the purpose of this Law.
- (g) **Natural Resources** means reserves, reservoirs or deposits of whatever nature of oil, gas, gold, silver, coal or any other minerals, hydrocarbons or other resources and whether in their natural state or after any kind of treatment.

II. THE CONCESSION AGREEMENT

Powers of Contracting Authorities

3.1 Contracting Authorities shall have the power to enter into Concession Agreements with any person or persons and to enter into ancillary or related agreements, including for the purpose of facilitating any related financing, as may be deemed appropriate by a Contracting Authority.

Binding Force of Concession Agreements

3.2 Any agreement executed by a Contracting Authority pursuant to Article 3.1 shall, unless otherwise stated on its face, be binding on *[the enacting State]* and/or, as the case may be, the *[Municipal or Provincial or Federal State Authority]* on whose behalf the Contracting Authority enters into the agreement.

[Exclusions]

4. No Concession Agreement may be entered into with respect to the following: *[the enacting State should indicate precisely the excluded sectors, if any].*

III. SELECTION OF THE CONTRACTOR

General

5.1 The Contractor shall be selected in accordance with *[enacting State to indicate existing laws relating to tendering of public contracts etc.]*, subject to the provisions set forth below in Part III of this Law.

5.2 The Contracting Authority shall treat all Bidders fairly and without discrimination.

Pre-Selection

6.1 The Contracting Authority shall, in such manner as it deems appropriate and in accordance with any prevailing legal requirements, publicly announce *[in the*

Official Gazette] that it is interested in receiving proposals in relation to any proposed Concession Agreement. Bidders shall be required to demonstrate that they meet the criteria for pre-selection, which criteria may include the provision of evidence that they have (a) adequate professional and technical qualifications, equipment and other facilities for all phases of the activity to be undertaken under the proposed Concession Agreement; (b) adequate financial resources for all phases of the activity to be undertaken under the proposed Concession Agreement; and (c) appropriate managerial and organisational capability. The Contracting Authority shall ensure that Bidders are notified of the criteria that the Contracting Authority considers appropriate.

- 6.2 The Contracting Authority shall draw up a list of those Bidders who will be invited to submit proposals, once the Contracting Authority has determined which Bidders satisfy the criteria for pre-selection.
- 6.3 If only one Bidder meets the pre-selection criteria, the Contracting Authority shall follow the procedure set forth in Article 11.

Procedures for requesting proposals

- 7.1 The Contracting Authority shall, once the list referred to in Article 6.2 has been drawn up, request Bidders to submit detailed proposals or, if the Contracting Authority determines that it is not practicable to formulate sufficiently detailed and precise project specifications, output requirements or contractual terms for inclusion in a request for detailed proposals, the Contracting Authority shall first follow the procedure set forth in Article 8.
- 7.2 The Contracting Authority shall supply all Bidders with the same information on which to base their detailed proposals. The manner in which such information is supplied shall be determined by the Contracting Authority but it shall be supplied in the same manner to all Bidders. All Bidders shall be given the same period of time in which to submit detailed proposals.
- 7.3 In addition to other information required to be provided under [*enacting State to indicate existing laws relating to tendering contracts etc.*], the request for detailed proposals shall include at least the following:
- (a) Project specifications and output requirements, as appropriate, including the Contracting Authority's requirements regarding safety standards and environmental protection;
 - (b) An indication of the contractual terms proposed by the Contracting Authority;
 - (c) Criteria for evaluating and comparing the technical, financial and commercial content of the proposals and the manner in which the criteria are to be applied in the evaluation of proposals.

- 7.4 The Contracting Authority shall determine the manner in which proposals shall be submitted and considered and any related requirements but the same procedure and requirements shall apply to all Bidders and all Bidders shall receive the same information in relation to the procedure to be followed and any related requirements, including when detailed proposals must be made.
- 7.5 The Contracting Authority may convene meetings with Bidders for the purposes of clarification or addressing questions regarding the detailed proposals as the Contracting Authority determines to be appropriate.
- 7.6 The procedures for the submission and consideration of proposals shall be published in [the Official Gazette].
- 7.7 The Contracting Authority may modify its requirements or any part of them and request proposals to be made on the basis of those modified requirements if such request is made at a reasonable time prior to the time for submission of proposals or the time for submission of proposals is extended for a reasonable period.
- 7.8 The Contracting Authority shall determine what, if any, principles should apply as to whether any proposal should be regarded as non-compliant.

Procedure for Complex Projects

- 8.1 The Contracting Authority shall request the Bidders to submit detailed initial proposals in relation to the output specifications and other relevant characteristics for the project, including the proposed contractual terms as appropriate.
- 8.2 The Contracting Authority shall supply all Bidders with the same information on which to base their detailed initial proposals. The manner in which such information is supplied shall be determined by the Contracting Authority but it shall be supplied in the same manner to all Bidders. All Bidders shall be given the same period of time in which to submit proposals.
- 8.3 The Contracting Authority may convene meetings with Bidders for the purpose described in Article 7.5.

Evaluation criteria

- 9.1 The criteria for the evaluation and comparison of technical proposals may include the following:
- (a) Technical soundness;
 - (b) Operational feasibility;
 - (c) Quality of services and measures to ensure their continuity;
 - (d) Environmental protection;

(e) Social and economic development potential offered by the proposals.

9.2 The criteria for the evaluation and comparison of the financial and commercial proposals may include the following:-

- (a) The present value of the proposed amounts to be charged by the Contractor under the Concession Agreement;
- (b) The present value of any payments to be made by the Contracting Authority under the Concession Agreement;
- (c) The present value of any payments to be made by the Contractor under the Concession Agreement;
- (d) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs;
- (e) The extent of financial support, if any, expected from the Contracting Authority or any other public sector entity;
- (f) The soundness of the proposed financial arrangements and the acceptability to the Authority of any documentation relating to the proposed financial arrangements;
- (g) The extent of acceptance of proposed contractual terms and any conditions related to such acceptance.

9.3 The criteria for the selection of the Bidder or Bidders, as the case may be, shall be determined by the Authority, taking into account the objectives to be achieved by the proposed Concession Agreement and all relevant facts, including proposals which have been received. Such criteria shall be applied by the Contracting Authority fairly and without discrimination as amongst all Bidders.

9.4 The Contracting Authority shall determine to what extent to make available to Bidders details of the criteria referred to in this Article 9 but it shall ensure that all Bidders receive the same information in relation to such criteria.

Selection of Bidder or Bidders

10.1 The Contracting Authority shall, at such time as it deems appropriate and in accordance with procedures already published, rank proposals received from Bidders in accordance with the evaluation criteria and invite for final negotiation, the Bidder that has obtained the highest rank. In addition to the Bidder that has obtained the highest rank, the Contracting Authority may also invite for final negotiation the Bidder that has obtained the next highest rank.

10.2 The Contracting Authority may at any time cease negotiations with any Bidder and invite other Bidders, in the order of their ranking, to enter into negotiations for the

award of the Concession Agreement. The following paragraph of this Article 10 shall apply to any such Bidder.

10.3 The Contracting Authority shall ensure that the Bidder or Bidders, as the case may be, are aware of the manner in which negotiations for, and signing of the Concession Agreement shall be concluded.

10.4 The Authority shall be authorised to make such arrangements as may be appropriate in order to finalise contractual terms regarding the Concession Agreement and any ancillary documentation, provided that all Bidders are treated fairly and without discrimination.

Award of Concession Agreements without competitive procedures

11.1 A Contracting Authority may enter into a Concession Agreement without using the procedures described in the foregoing Articles of Part III of this Law in the following situations:

- (a) where there is an urgent need for ensuring continuity in the provision of a service, and engaging in a competitive selection procedure would be impractical;
- (b) in the case of Concession Agreements where the anticipated present value of amounts to be charged by the Contractor, payments to be made by the Contracting Authority or payments to be made by the Contractor under the Concession Agreement do not exceed [];
- (c) where the Concession Agreement relates to matters involving national security;]
- (d) where there is only one source reasonably capable of providing the service or facility required pursuant to the Concession Agreement;
- (e) where a competitive tendering procedure has already been followed but no satisfactory applications or proposals were received, and in the opinion of the Contracting Authority the use of a further competitive tendering procedure would not result in the award of a Concession Agreement;
- (f) where the entering into of the Concession Agreement is consequent upon the default of a Contractor and the transaction is with a different Contractor who has been invited (pursuant to rights contained in the Concession Agreement entered into with the defaulting Contractor or related documents) to enter into the Concession Agreement by banks or other financial institutions who have advanced loans to the defaulting Contractor and one of the principal purposes for the transaction is in order to enable such loans to be discharged from revenues which would be paid to the new Contractor.

11.2 Where the Contracting Authority intends to award a Concession Agreement pursuant to this Article 11:

- (a) The Contracting Authority shall publish [in the Official Gazette] notice of its intention to make the award together with the reasons for making the award;
- (b) The Contracting Authority shall take such steps as it deems to be appropriate in order to secure the best value for money from the Contractor, taking into account all relevant factors, including the degree of risk to be assumed by the Contractor;

provided that nothing in this Article 11.2 shall require the Contracting Authority to publish information which it deems to be adverse to the interests of national security.

Notice of award

12.1 The Contracting Authority shall cause notice of the award of any Concession Agreement to be published [in the Official Gazette]. The details to be published shall include the name of the Contractor and a summary of the principal terms of the Concession Agreement (but shall not include any information which is confidential to the Contractor).

IV. VALIDITY

Review of project award and validity of the Concession agreement

13.1 The [the enacting State indicates the competent body] shall have the power to review the selection procedure and the contract documentation for any Concession Agreement and to certify that the procedures provided for in this Law as well as any other relevant legislation of (the enacting State) have been complied with and that the Concession Agreement has been validly entered into.

13.2 No Concession Agreement in respect of which a certification in accordance with Article 13.1 has been issued shall be deemed invalid or void by reason of any failure to comply with any requirement referred to in Part III of this Law or any other reason related to the award or entering into of the Concession Agreement for as long as any moneys under a Designated Loan Financing remain outstanding.

13.3 Article 13.1 and 13.2 shall not affect or limit (i) any provision in any Concession Agreement relating to termination or otherwise concerned with the consequences of any impropriety or defect in the procedure for the award or entering into of any

Concession Agreement or (ii) any liability of any person or persons for any wrongful act relating to the award or entering into of a Concession Agreement.

V. CONTENTS OF THE CONCESSION AGREEMENT

Party autonomy

14. Provided the requirements of the selection procedures under Part III of this Law are complied with, the terms of any Concession Agreement shall be a matter for negotiation. Nothing herein shall restrict the power of the Authority to agree an amendment to the Concession Agreement if it deems it to be in the public interest to do so.

Elements of the Concession Agreement

15. The Concession Agreement shall, unless the Contracting Authority determines otherwise, contain provisions, *inter alia*, on the following matters:

- (a) Nature and scope of works to be performed and services to be provided by the Contractor;
- (b) Any conditions precedent to the entry into force of the Concession Agreement;
- (c) Duration of the Concession Agreement;
- (d) Degree of exclusivity;
- (e) Nature of the property interests of the parties in real and personal assets which are to be constructed or provided (if any) or which are the subject of any works or services to be provided pursuant to the Concession Agreement;
- (f) The date or dates by which any works have to be completed;
- (g) Such restrictions or conditions as may be agreed on the transfer of a controlling interest in the capital of a Contractor;
- (h) Any payments that the Contracting Authority is required to make in consideration for services provided or work done by the Contractor;
- (i) The obligations, if any, of the Contractor to ensure continued and non-discriminatory access for third parties to the facility and/or services provided pursuant to the Concession Agreement;

- (j) The rights, if any, of the Contractor to charge third parties for services provided pursuant to the Concession Agreement;
- (k) Methods for the adjustment of payments due to the Contractor by the Contracting Authority or by third parties;
- (l) The rights of the parties to assign their rights, whether by way of security or otherwise and any conditions applicable thereto;
- (m) Any requirements concerning guarantees of performance that the Contractor may be required to provide or any insurance policies that the Contractor may be required to maintain in connection with the construction or the operation of the facility;
- (n) Obligations of the Contractor, if any, relating to the protection of the environment;
- (o) Obligations of the Contracting Authority to provide land and/or other facilities;
- (p) Any rights of the Contracting Authority to monitor the performance of the Contractor's obligations, including the Contracting Authority's rights to inspect the relevant facilities;
- (q) The circumstances under which either party may terminate or seek renegotiation of the Concession Agreement;
- (r) Any payments required to be made by either party to the other or for any reason other than as consideration for works or services;
- (s) Remedies available to the Contracting Authority and the Contractor in the event of default by the other party;
- (t) The circumstances under which the Contracting Authority or a designated third party may (temporarily or otherwise) take over the operation of the facility or any other function of the Contractor for the purpose of ensuring the effective and uninterrupted supply of services or goods which are the subject of the Concession Agreement in the event of serious failure by the Contractor to perform its obligations;
- (u) Taxation and fiscal matters;
- (v) The relationship between the Concession Agreement and other relevant agreements;
- (w) Any applicable provision on *force majeure* and the consequences of changes in law;
- (x) Governing law;
- (y) Settlement of disputes;

- (z) In relation to Natural Resources, provisions, inter alia, on the following matters;
- (i) A description of the geographical area covered by the Concession Agreement;
 - (ii) The determination of and provisions for the payment of royalties and other fees payable or for the quantities of product shared by the Contractor;
 - (iii) Ownership rights in relation to the relevant Natural Resources;
 - (iv) Arrangements regarding marketing and sale of the relevant Natural Resources.

Security Interests

16. The Contractor may create security over its rights to any payments of any kind received or receivable by it pursuant to or in connection with a Concession Agreement without prejudice to its right to create security over any other part of its property.

Settlement of disputes

17. The Contracting Authority shall have the power to agree to dispute settlement procedures and provisions regarded by it and other relevant parties as suited to the needs of any project which is the subject of a Concession Agreement, including international arbitration.

Stabilisation Clause

18. A Contracting Authority is authorised to enter into a binding commitment on behalf of the State which shall have the effect of providing appropriate assurances in favour of the Contractor that it will be protected against the financial consequences of legislation which becomes effective after the date of the Concession Agreement subject to the following limitations:-
- (a) the financial consequences must be clearly and precisely described;
 - (b) the commitment shall terminate upon the termination of the Concession Agreement;
 - (c) the nature of the legislation must be described.

EXPLANATORY NOTES

SCOPE OF BASIC ELEMENTS

The following explanatory notes refer to sections I. Scope of the Law and Definitions; II. The Concession agreement; IV. Validity; and V. Contents of the Concession Agreement.

The Basic Elements deal with the following principal areas:

1. The powers of government entities (referred to in the Provisions as “Contracting Authorities”) to enter into Concession Agreements and the binding effect of Concession Agreements on the host state.
2. Procurement procedures.
3. The effect of corrupt practices or other defects in the award procedure on the validity of the Concession Agreement.
4. The contents of the Concession Agreement.
5. The creation of security over the Concession Agreement.
6. Dispute resolution.

The public private partnership structure frequently involves the use of debt finance, on a limited recourse basis, from the private sector. As a result, the negotiation and implementation of Concession Agreements usually involves three principal interested parties, i.e. the host government, the Contractor and the Contractor’s financiers (which may include not only private sector banks but also institutions such as export credit agencies and multilateral development institutions). These transactions tend to be extremely complex and the successful conclusion of them can take a protracted period of time. Because the transactions involve issues which are by no means predictable and each transaction tends to be *sui generis* the Basic Elements are, for the most part, of a framework nature and have avoided being prescriptive (for example in relation to what the Concession Agreement provides) as far as possible.

Powers of Contracting Authorities

Article 3.1 of the Basic Elements provides that Contracting Authorities shall have the power to enter into Concession Agreements with any person or persons and also to enter into ancillary or related agreements, including any such agreements which are for the purpose of facilitating any related financing. There is thus no restriction on a Contracting Authority entering into a Concession Agreement with any person of any kind (including a company, an individual or a foreign national) as long as the person has legal personality under the law of the host state. It is left for the host state to describe fully which entities may be Contracting Authorities (see Article 2 (C)). Host states should, wherever possible, use language which is precise and unambiguous for the description of a Contracting Authority in the definitive Law. Article 3.1 provides that any entity which satisfies the definition of Contracting Authority will have the power to execute the documentation typically used in a public private partnership, including, for example, direct agreements with the Contractor's financiers. Article 3.2 confirms that an agreement executed by a Contracting Authority shall, unless otherwise stated on its face, be binding on the host state or, as the case may be, a specific municipal, provincial or federal state authority. To the extent that there may be constitutional or other doubts as to the effect of a Contracting Authority entering into an agreement of the kind described in Article 3.1, host governments are recommended to adopt a provision of the kind set out in Article 3.2. Contractors and their financiers will wish to know that the contracts they enter into are legally binding and that there is no doubt as to the nature of the counterparty which is bound by that contract.

Article 4 may be used for host states that wish to exclude Concession Agreements in particular sectors. Some countries have particular sensitivities about using public private partnerships in certain sectors of the economy (e.g. defence) where as others have tended to be relatively permissive. The definition of Concession Agreement in the Provisions (see Article 2 (b)) refers to construction, refurbishment or provision of Infrastructure as well as the exploration for/and exploitation of Natural Resources. The Provisions also include a definition of Infrastructure which is very widely drawn and open ended (see Article 2 (e) throughout and especially sub paragraph xiii). Natural Resources is also defined in Article 2 (f).

Procurement procedures

Articles 5 – 12 inclusive deal with procurement procedures. Most host states will wish to consider such procedures as an inherent part of any legislative framework for new capital projects. Article 5.2 sets out the basic requirement that all Bidders must be treated fairly and without discrimination.

Article 6.1 sets out the publicity requirements for any new project and incorporates the concept of “preselection” i.e. the basic thresholds which Bidders must surmount if they are to be considered for the competition proper. Following pre-selection, Article 7 requires Bidders to submit detailed proposals. In certain cases (for example complex privately financed public private partnerships), Contracting Authorities may use the procedures described in Article 8 which allows Bidders to submit proposals based upon “output specifications” rather than extremely detailed project specifications.

The Basic Elements facilitate the procedure commonly followed by host states in connection with new, privately financed, infrastructure and energy projects but do leave host states a certain amount of latitude as to the precise procedures (e.g. the use of draft documentation on which Bidders must base their comments) so that the exact rules of the competition can be framed according to the specific circumstances.

Evaluation criteria are suggested in Article 9 and these include the technical suitability of any particular proposal and its cost as well as “the extent of acceptance of contractual terms and any conditions related to such acceptance”. It is not a requirement that the Contracting Authority reveals all criteria to Bidders as long as it ensures that all Bidders receive the same information regarding such criteria (Article 9.4).

Article 10 permits the selection of more than one preferred Bidder and also provides for the possibility of Bidders dropping out of any particular competition and being replaced by other Bidders.

Article 11 sets out a limited number of circumstances where the host state may wish to enter into arrangements for a new project without using competitive procedures e.g. where there is an urgent need for the facility and engaging in a competitive selection procedure would be impractical. Article 11.1 (f) specifically disapplies the competitive procedures in the situation commonly described as “step-in” (see 6 below) where financial institutions, as part of the enforcement of security, substitute the Contractor to whom they have lent funds with a new Contractor (which is sometimes a special purpose vehicle controlled by the lenders).

The effect of corrupt practices on the Concession Agreement

Article 13 attempts to deal with the constitutional and ethical dilemma produced by fraud or other corrupt practices on award procedures where innocent third parties have relied on a Concession Agreement which they believed had been validly entered into. It is in the interests of the international community as well as the interest of any particular host state that:

- (a) fraud and corrupt practices are eradicated as far as possible from award procedures for new capital projects and, when they are discovered, are appropriately punished; but also that:
- (b) the legislative framework for foreign (and domestic) investment is such that those who invest very substantial sums of money in a country's infrastructure can do so with reasonable certainty that the complex contractual structure on which they rely for a return of their investment and its repayment is reasonably secure; investors will be prepared to take certain kinds of project risks but very few investors are prepared to take the technical risk that fundamental project contracts such as the Concession Agreement may be void or invalid.

Article 13 attempts to address the problem in the following manner:

- (1) Host states reserve to themselves the power to review any particular selection procedure and contract documentation and to have a competent body (say the Department of Justice or equivalent) issue a certificate that the relevant procedures for the award have been complied with and that the Concession Agreement has been validly entered into;
- (2) The certification referred to in (i) would not be a compulsory requirement for any Concession Agreement to be valid; it is intended to be optional. However, where a Concession Agreement is financed by funds from private sector banks and/or international institutions and where there is any significant risk under the local law that a Concession Agreement might be regarded as void if there has been any defect in the procedure, it is likely that such financiers would insist upon the certification procedure to be followed as a condition precedent to advancing any funds;
- (3) The issue of a certificate pursuant to Article 13.1 would provide a "safe harbour" for innocent investors since Article 13.2 provides that the Concession Agreement could not then be "deemed invalid or void by reason of any failure to comply with the procurement procedures" or "any other reason related to the award or entering into of the Concession Agreement for as long as any monies under a Designated Loan Financing remain outstanding";
- (4) The important element in Article 13.2 is the reference to monies under a "Designated Loan Financing". The latter expression is defined in Article 2 (d) to mean "any financing agreements or arrangement (including any re-financing) relating to the financing of work (including services) done or to be done pursuant to a Concession Agreement which is designated as such by written instrument by (for example) the Department of Justice (or whichever entity a host state may choose for the purpose)". This definition therefore requires a further "designation" and this would take the form of a designation of a specific financing agreement or arrangement.

In order to obtain the protection of the safe harbour therefore two important documents have to be obtained from senior host government representatives i.e. (a) the certification of the validity of the Concession Agreement pursuant to Article 13.1 and (b) the designation of the financing pursuant to the definition of “designated loan financing”. No doubt host states would wish to adopt appropriate administrative procedures which must be satisfied prior to any such certificates or designations being issued. With these safeguards it is thought appropriate that the “safe harbour” would operate for the benefit of investors – but only so long as debt finance remains outstanding¹.

It is important to note, however, that these safe harbour provisions do not “affect or limit (i) any provision in any Concession Agreement relating to termination or otherwise concerned with the consequences of any impropriety or defect in the procedure for the award or entering into of any Concession Agreement or (ii) any liability of any person or persons for any wrongful act relating to the award for entering into of a Concession Agreement” (see Article 13.3). As a result, if a Contractor’s financiers advance funds on the security of a Concession Agreement which *on its face* contains provisions entitling a host state to terminate if some fraud in the award is discovered then those financiers accept the risk of such termination because it is apparent to them from a reading of the document on which they have relied (and on which, in all likelihood, they would have had an opportunity to comment prior to its conclusion). Article 13 does not therefore protect a financier against a known risk which is apparent from the terms of the documentation. It also enables host states to negotiate clauses of this nature if they think that, with appropriate conditions and qualifications, such clauses might be acceptable or “bankable” in the light of any specific circumstances.

Article 13.3 also makes it clear that the safe harbour does not avail any person or persons who have actually been involved in any wrongful act; their liability under criminal law or otherwise is completely unaffected by Article 13.

Contents of the Concession Agreement

Article 14 states the basic principle that the terms of a Concession Agreement “shall be a matter for negotiation”. However, the legislative tradition in many countries is such that Laws concerned with Concession Agreements frequently do describe the content of such documents. Because, as stated above, transactions for public private partnerships are complex and unpredictable it is generally not desirable for Laws to be too prescrip-

1. The safe harbour provisions do not therefore assist projects which are financed only by equity. The rationale for this is that, generally, equity investors or “sponsors” of projects are more likely to be able to protect themselves against the risk of fraud or other corrupt practices than third party lenders.

tive as to the specific content of the documentation. Article 15 of the Provisions therefore contains a list of topic headings which might frequently be found in typical Concession Agreements but clearly states that the Contracting Authority can “determine otherwise” if it does not think it appropriate that a particular matter should be addressed in a Concession Agreement; it also leaves open the possibility of other Provisions being contained in Concession Agreements which are not specifically listed.

Security interests, settlement of disputes and other matters

Article 16 specifically states that a Contractor can create security over its rights to any payments received or receivable by it pursuant to or in connection with a Concession Agreement “without prejudice to its right to create security over any other part of its property”. Article 15 (1) also refers to the rights of the parties to assign their rights whether by way of security or otherwise. Public private partnerships are typically financed on the basis of a security arrangement in favour of third party lenders which involves a Contractor giving security over its rights (including rights to receive payments) under a Concession Agreement. Naturally, this security would be of little value if project lenders did not also have contractual assurances from the host state that, if they needed to enforce that security, appropriate procedures could be followed which would allow the Concession to continue and allowed them to “step-in” to the Concession Agreement causing it to be performed in a manner which enabled their investment to be realised. These “step-in” procedures would also typically be invoked if the Contracting Authority itself had the right to terminate the Concession Agreement (whether or not this coincided with an enforcement event in relation to the lenders’ security). These arrangements are usually contained in “direct agreements” or similar documents (see 2 above and the reference in Article 3.1 to “ancillary or related agreements”).

Article 17 enables Contracting Authorities to agree dispute settlement procedures and provisions, including international arbitration, “as suited to the needs of any project which is the subject of a Concession Agreement”. It is important, if international funding is to be attracted, that Contracting Authorities should not be forced by law to accept only domestic dispute resolution (whether courts or arbitration).

Article 18 contains a “stabilisation clause” which permits Contracting Authorities to enter into binding commitments on behalf of the host state which protect Contractors against financial consequences of future legislation provided specific limitations are observed e.g. the financial consequences must be “clearly and precisely described”.

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SELECTION OF THE CONTRACTOR

The following explanatory notes refer to Section III: Selection of the Contractor.

General remarks

The present chapter deals with methods and procedures recommended for use in the award of privately financed infrastructure projects. The Model Law expresses a preference for the use of competitive selection procedures, while recognizing that, under exceptional circumstances, concessions may be awarded without competitive procedures (see Article 11.1).

Competition within structured, formal procedures helps achieve economy in the award of public contracts. In connection with infrastructure projects, economy means the selection of a Contractor that is capable of performing works and delivering services of the desired quality at the most advantageous price or that offers the best commercial proposal. In most cases, economy is best achieved by means of procedures that promote competition among bidders. Competition provides them with incentives to offer their most advantageous terms, and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so.

Article 5.1

The selection procedures set forth in articles 5.1 to 12.1 of the Model Law are not intended to displace, but merely to supplement the methods normally used for the award of government contracts in the enacting State, such as tendering or other form of competitive bidding. Nevertheless, the Model Law proposes a number of adaptations to take into account the particular needs of privately financed infrastructure projects

Article 5.2

One of the paramount objectives of rules governing the selection of government contractors is to promote the integrity of and confidence in the process. Thus, an adequate selection system will usually contain provisions designed to ensure fair treatment of bidders, to reduce or discourage unintentional or intentional abuses of the selection process by persons administering it or by companies participating in it and to ensure that selection decisions are taken on a proper basis.

Promoting the integrity of the selection process will help to promote public confidence in the process and in the public sector in general. Bidders will often refrain from

spending the time and sometimes substantial sums of money to participate in selection proceedings unless they are confident that they will be treated fairly and that their proposals or offers have a reasonable chance of being accepted. Those which do participate in selection proceedings in which they do not have that confidence would probably increase the project cost to cover the higher risks and costs of participation. Ensuring that selection proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable terms to the contracting authority.

In addition to ensuring fair and equal treatment of bidders, the host country should have in place an effective system of sanctions to guard against corruption by government officials, including employees of the contracting authorities. These could include sanctions of a criminal nature that would apply to unlawful acts of officials conducting the selection process and of participating bidders. Conflicts of interest should also be avoided, for instance by requiring that officials of the contracting authority, their spouses, relatives and associates abstain from owning a debt or equity interest in a company participating in a selection process or accepting to serve as a director or employee of such a company. Furthermore, the law governing the selection proceedings should obligate the contracting authority to reject offers or proposals submitted by a party who gives or agrees to give, directly or indirectly, to any current or former officer or employee of the contracting authority or other public authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of or procedure followed by the contracting authority in connection with the selection proceedings.

Pre-selection

Given the complexity of privately financed infrastructure projects the contracting authority may wish to limit the number of bidders from whom proposals will subsequently be requested only to those who satisfy certain qualification criteria. In traditional government procurement, the pre-selection proceedings may consist of the verification of certain formal requirements, such as adequate proof of technical capability or prior experience in the type of procurement, so that all bidders who meet the pre-selection criteria are automatically admitted to the tendering phase. The pre-selection proceedings for privately financed infrastructure projects, in turn, may involve elements of evaluation and selection.

Article 6.1

In order to promote transparency and competition, it is advisable that the invitation to the pre-selection proceedings be made public in a manner that reaches an audience wide enough to provide an effective level of competition. The laws of many countries identify publications, usually the official gazette or other official publication, in which the invitation to the pre-selection proceedings is to be published. With a view to foster-

ing participation of foreign companies and maximizing competition, the contracting authority may wish to have the invitations to the pre-selection proceedings made public also in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

Pre-selection documents should contain sufficient information for bidders to be able to ascertain whether the works and services entailed by the project are of a type that they can provide and, if so, how they can participate in the selection proceedings, in addition to general information similar to the information typically provided in pre-selection documents under the enecating State's general rules on public procurement.

Generally, bidders should be required to demonstrate that they possess the professional and technical qualifications, financial resources, equipment and other physical facilities, managerial capability, reliability and experience necessary to carry out the project. Additional criteria that might be particularly relevant for privately financed infrastructure projects may include the ability to manage the financial aspects of the project and previous experience in operating public infrastructure or in providing services under regulatory oversight (for example, quality indicators of their past performance, size and type of previous projects carried out by the bidders); the level of experience of the key personnel to be engaged in the project; sufficient organizational capability (including minimum levels of construction, operation and maintenance equipment); capability to sustain the financing requirements for the engineering, construction and operational phases of the project (demonstrated, for instance, by evidence of the bidders= ability to provide an adequate amount of equity to the project, and sufficient evidence from reputable banks attesting the bidder=s good financial standing). Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance, where appropriate. In addition, the bidders should be required to demonstrate that they meet such other qualification criteria as would typically apply under the general procurement laws of the host country.²

2. For example, that they have legal capacity to enter into the project agreement; that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing; that they have fulfilled their obligations to pay taxes and social security contributions in the State; that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a certain period of years preceding the commencement of the selection proceedings or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings (see UNCITRAL Model Law on Procurement of Goods, Construction and Services, art. 6, para. 1 (b)).

Qualification requirements should apply equally to all bidders. A contracting authority should not impose any criterion, requirement or procedure with respect to the qualifications of bidders that has not been set forth in the pre-selection documents. When considering the professional and technical qualifications of bidding consortia, the contracting authority should consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

Article 6.2

The award of privately financed infrastructure projects typically involves complex, time-consuming and expensive proceedings, and the sheer scale of most infrastructure projects reduces the likelihood of obtaining proposals from a large number of suitably qualified bidders. In fact, competent bidders may be reluctant to participate in procurement proceedings for high-value projects if the competitive field is too large and where they run the risk of having to compete with unrealistic proposals or proposals submitted by unqualified bidders. Therefore, Article 6.2 requires the Contracting Authority to limit the number of prospective bidders, by drawing up a list of those bidders who will be subsequently invited to submit proposals.

In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). For that purpose, those countries apply a quantitative rating system for technical, managerial and financial criteria, taking into account the nature of the project. Quantitative pre-selection criteria are found to be more easily applicable and transparent than qualitative criteria involving the use of merit points. However, in devising a quantitative rating system, it is important to avoid unnecessary limitation of the contracting authority's discretion in assessing the qualifications of bidders. The contracting authority may also need to take into account the fact that the procurement guidelines of some multilateral financial institutions prohibit the use of pre-selection proceedings for the purpose of limiting the number of bidders to a predetermined number. In any event, where such a rating system is to be used, that circumstance should be clearly stated in the pre-selection documents.

While the criteria used for pre-selecting bidders should not be weighted again at the evaluation phase, the contracting authority may wish to reserve itself the right to require, at any stage of the selection process, that the bidders again demonstrate their qualifications in accordance with the same criteria used to pre-select them.

Article 6.3

This provision authorises the Contracting Authority to negotiate a contract directly with one bidder, under the procedures set forth in Article 11.2 in cases where only one of the candidates has met the pre-selection criteria established by the Contracting Authority.

Procedures for requesting proposals

Following the pre-selection of bidders, it is advisable for the contracting authority to review its original feasibility study and the definition of the output and performance requirements and to consider whether a revision of those requirements is needed in the light of the information obtained during the pre-selection proceedings. At this stage, the contracting authority should have already determined whether a single or a two-stage procedure will be used to request proposals.

Article 7.1

The decision between having a single or a two-stage procedure for requesting proposals will depend on the nature of the contract, on how precisely the technical requirements can be defined and whether output results (or performance indicators) are used for selection of the Contractor. If it is deemed both feasible and desirable for the contracting authority to formulate performance indicators or project specifications to the necessary degree of precision or finality, the selection process may be structured as a single-stage procedure. In that case, after having concluded the pre-selection of bidders, the contracting authority would proceed directly to issuing a final request for proposals.

When using a single-stage procedure, the contracting authority should invite the bidders to submit final proposals with respect to the revised project specifications, performance indicators and contractual terms. The request for proposals should generally include all information necessary to provide a basis to enable the bidders to submit proposals that meet the needs of the contracting authority and that the contracting authority can compare in an objective and fair manner.

Article 7.2

This provision reflects the general rule stated in Article 5.2., that the Contracting Authority should ensure the transparency of the process and the fair and equal treatment of all bidders. At the same time, it gives the contracting authority some latitude in determining how the information is to be supplied to bidders.

Article 7.3

General information to bidders should cover, as appropriate, those items which are ordinarily included in solicitation documents or requests for proposals for the procurement of goods, construction and services. Particularly important is the disclosure of the criteria to be used by the contracting authority in determining the successful proposal and the relative weight of such criteria (see commentary to Articles 91. And 9.2).

Paragraph (a)

The level of detail provided in the specifications, as well as the appropriate balance between the input and output elements, will be influenced by considerations of issues such as the type and ownership of the infrastructure and the allocation of responsibilities between the public and the private sectors. It is generally advisable for the contracting authority to bear in mind the long-term needs of the project and to formulate its specifications in a manner that allows it to obtain sufficient information to select the bidder that offers the highest quality of services at the best economic terms. The contracting authority may find it useful to formulate the project specifications in a way that defines adequately the output and performance required without being overly prescriptive in how that is to be achieved. Project specifications and performance indicators typically cover items such as the following:

- (i) Description of project and expected output. If the services require specific buildings, such as a transport terminal or an airport, the contracting authority may wish to provide no more than outline planning concepts for the division of the site into usage zones on an illustrative basis, instead of plans indicating the location and size of individual buildings, as would normally be the case in traditional procurement of construction services. However, where in the judgement of the contracting authority it is essential for the bidders to provide detailed technical specifications, the request for proposals should include, at least, the following information: description of the works and services to be performed, including technical specifications, plans, drawings and designs; time schedule for the execution of works and provision of services; and the technical requirements for the operation and maintenance of the facility;
- (ii) Minimum applicable design and performance standards, including appropriate environmental standards. Performance standards are typically formulated in terms of the desired quantity and quality of the outputs of the facility. Proposals that deviate from the relevant performance standards should be regarded as non-responsive;
- (iii) Quality of services. For projects involving the provision of public services, the performance indicators should include a description of the services to be pro-

vided and the relevant standards of quality to be used by the contracting authority in the evaluation of the proposals. Where appropriate, reference should be made to any general obligations of public service providers as regards expansion and continuity of the service so as to meet the demand of the community or territory served, ensuring non-discriminatory availability of services to the users and granting non-discriminatory access of other service providers to any public infrastructure network operated by the Contractor, under the terms and conditions established in the project agreement (see Article 15 (i)).

Paragraph (b)

It is advisable for the bidding documents to provide some indication of how the contracting authority expects to allocate the project risks. This is important in order to set the terms of debate for negotiations on certain details of the project agreement (see Articles 10.1 and 10.2). If risk allocation is left entirely open, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project. Furthermore, the request of proposals should contain information on essential elements of the contractual arrangements envisaged by the contracting authority, such as: (a) The duration of the concession or invitations to bidders to submit proposals for the duration of the concession; (b) Formulas and indices to be used in adjustments to prices; (c) Government support and investment incentives, if any; (d) Bonding requirements; (e) Requirements of regulatory agencies, if any; (f) Monetary rules and regulations governing foreign exchange remittances; (g) Revenue-sharing arrangements, if any; (h) Indication, as appropriate, of the categories of assets that the Contractor would be required to transfer to the contracting authority or make available to a successor Contractor at the end of the project period; (i) Where a new Contractor is being selected to operate an existing infrastructure, a description of the assets and property that will be made available to the Contractor; (j) The possible alternative, supplementary or ancillary revenue sources (for example, concessions for exploitation of existing infrastructure), if any, that may be offered to the successful bidder.

It is useful for the contracting authority to require that the final proposals submitted by the bidders contain evidence showing the comfort of the bidder's main lenders with the proposed commercial terms and allocation of risks, as outlined in the request for proposals. Such a requirement might play a useful role in resisting pressures to reopen commercial terms at the stage of final negotiations. In some countries, bidders are required to initial and return to the contracting authority the draft project agreement together with their final proposals as a confirmation of their acceptance of all terms in respect of which they did not propose specific amendments.

Paragraph (c)

Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the technical soundness of proposals, their operational feasibility and responsiveness to standards of quality and technical requirements, including the following information: (a) preliminary engineering design, including proposed schedule of works; (b) project cost, including operating and maintenance cost requirements and proposed financing plan (for example, proposed equity contribution or debt); (c) the proposed organization, methods and procedures for the operation and maintenance of the project under bidding; (d) description of quality of services.

Bidders should be instructed to provide the information necessary in order for the contracting authority to evaluate the financial and commercial elements of the proposals and their responsiveness to the proposed contractual terms. The financial proposals should normally include the following information:

- (i) For projects in which the Contractor's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility, the financial proposal should indicate the proposed price structure. For projects in which the Contractor's income is expected to consist primarily of payments made by the contracting authority or another public authority to amortize the Contractor's investment, the financial proposal should indicate the proposed amortization payments and repayment period;
- (ii) The present value of the proposed prices or direct payments based on the discounting rate and foreign exchange rate prescribed in the bidding documents;
- (iii) If it is estimated that the project would require financial support by the Government, the level of such support, including, as appropriate, any subsidy or guarantee expected from the Government or the contracting authority;
- (iv) The extent of risks assumed by the bidders during the construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees against those risks.

Article 7.4

This provision is designed to ensure fair and equal treatment of all bidders, while affording the Contracting Authority sufficient flexibility in determining the manner in which proposals have to be submitted.

In practice, proposals are typically need to be submitted in writing, signed and placed in sealed envelopes. A proposal received by the contracting authority after the deadline for the submission of proposals should not be opened and should be returned to

the bidder that submitted it. For the purpose of ensuring transparency, national laws often prescribe formal procedures for the opening of proposals, usually at a time previously specified in the request for proposals, and require that the bidders that have submitted proposals, or their representatives, be permitted by the contracting authority to be present at the opening of proposals. Such a requirement helps to minimize the risk that the proposals might be altered or otherwise tampered with and represents an important guarantee of the integrity of the proceedings.

In view of the complexity of privately financed infrastructure projects and the variety of evaluation criteria usually applied in the award of the project, it may be advisable for the contracting authority to apply a two-step evaluation process whereby non-financial criteria would be taken into consideration separately from, and perhaps before, financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria.

To that end, in some countries bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. The two-envelope system is sometimes used because it permits the contracting authority to evaluate the technical quality of proposals without being influenced by their financial components. However, the method has been criticized as being contrary to the objective of economy in the award of public contracts. In particular, there is said to be a danger that, by selecting proposals initially on the basis of technical merit alone and without reference to price, a contracting authority might be tempted to select, upon the opening of the first envelope, proposals offering technically superior works and to reject proposals offering less sophisticated solutions that nevertheless meet the contracting authority's needs at an overall lower cost. International financial institutions, such as the World Bank, do not accept the two-envelope system for projects financed by them because of concerns that the system gives margin to a higher degree of discretion in the evaluation of proposals and makes it more difficult to compare them in an objective manner.

As an alternative to the use of a two-envelope system, the contracting authorities may require both technical and financial proposals to be contained in one single proposal, but structure their evaluation in two stages. At an initial stage, the contracting authority typically establishes a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the criteria as set out in the request for proposals, and rates each technical proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The contracting authority then compares the financial and commercial proposals that have attained a rating at or above the threshold. When the techni-

cal and financial proposals are to be evaluated consecutively, the contracting authority should initially ascertain whether the technical proposals are prima facie responsive to the request for proposals (that is, whether they cover all items required to be addressed in the technical proposals). Incomplete proposals, as well as proposals that deviate from the request for proposals, should be rejected at this stage. While the contracting authority may ask bidders for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making a non-responsive proposal responsive, should be sought, offered or permitted at this stage.

Article 7.5

The contracting authority may find it useful to convene meetings with bidders to clarify questions concerning the request for proposals and accompanying documentation. The contracting authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders. Any discussions need to be confidential and one party to the discussions should not reveal to any other person any technical, financial or other information relating to the discussions without the consent of the other party.

Article 7.6

With a view to ensuring transparency and equal treatment of bidders, this provision requires the Contracting Authority to publish the procedures to be used for submission and consideration of proposals.

Article 7.7

The right of the contracting authority to modify the request for proposals is important in order to enable it to obtain what is required to meet its needs. It is therefore advisable to authorize the contracting authority, whether on its own initiative or as a result of a request for clarification by a bidder, to modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals. However, when amendments are made that would reasonably require bidders to spend additional time preparing their proposals, such additional time should be granted by extending the deadline for submission of proposals accordingly.

Generally, clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated promptly by the contracting authority to all bidders to whom the contracting authority provided the request for proposals. If the contracting authority convenes a meeting of bidders, it should prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request

for proposals and its responses to those requests and should send copies of the minutes to the bidders.

Article 7.8

This provision allows the Contracting Authority to establish minimum requirements in order for proposals to be regarded as responsive. When the technical and financial proposals are to be evaluated consecutively, the contracting authority should initially ascertain whether the technical proposals are prima facie responsive to the request for proposals (that is, whether they cover all items required to be addressed in the technical proposals). Incomplete proposals, as well as proposals that deviate from the request for proposals, should be rejected at this stage. While the contracting authority may ask bidders for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making a non-responsive proposal responsive, should be sought, offered or permitted at this stage.

Procedure for Complex Projects

This procedure should be used in situations where it is not feasible for the contracting authority to formulate its requirement in sufficiently detailed and precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. This may be the case, for instance, when the contracting authority has not determined the type of technical and material input that would be suitable for the project in question (for example, the type of construction material to be used in a bridge). In such cases, it might be considered undesirable, from the standpoint of obtaining the best value, for the contracting authority to proceed on the basis of specifications or indicators it has drawn up in the absence of discussions with bidders as to the exact capabilities and possible variations of what is being offered. For that purpose, the contracting authority may wish to divide the selection proceedings into two stages and allow a certain degree of flexibility for discussions with bidders.

Article 8.1

Where the selection procedure is divided into two stages, the initial request for proposals typically calls upon the bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms. The invitation for bids would allow bidders to offer their own solutions for meeting the particular infrastructure need in accordance with defined standards of service. The proposals submitted at this stage would typically consist of solutions on the basis of a conceptual design or performance indicators without indication of financial elements, such as the expected price or level of remuneration.

To the extent the terms of the contractual arrangements are already known by the contracting authority, they should be included in the request for proposals, possibly in the form of a draft of the project agreement. Knowledge of certain contractual terms, such as the risk allocation envisaged by the contracting authority, is important in order for the bidders to formulate their proposals and discuss the Abankability@ of the project with potential lenders. The initial response to those contractual terms, in particular the risk allocation envisaged by the contracting authority, may help the contracting authority assess the feasibility of the project as originally conceived. However, it is important to distinguish between the procedure to request proposals and the negotiation of the final contract, after the project has been awarded. The purpose of this initial stage is to enable the contracting authority to formulate its requirement subsequently in a manner that enables a final competition to be carried out on the basis of a single set of parameters. The invitation of initial proposals at this stage should not lead to a negotiation of the terms of the contract prior to its final award.

Article 8.2

This provision stresses the need for the contracting authority to ensure the transparency of the process and the fair and equal treatment of all bidders (see also Article 5.2). At the same time, it gives the contracting authority some latitude in determining how the information is to be supplied to bidders.

Article 8.3

The contracting authority may then convene a meeting of bidders to clarify questions concerning the request for proposals and accompanying documentation. The contracting authority may, in the first stage, engage in discussions with any bidder concerning any aspect of its proposal. The contracting authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders. Any discussions need to be confidential and one party to the discussions should not reveal to any other person any technical, financial or other information relating to the discussions without the consent of the other party.

Following those discussions, the contracting authority should review and, as appropriate, revise the initial project specifications. In formulating those revised specifications, the contracting authority should be allowed to delete or modify any aspect of the technical or quality characteristics of the project originally set forth in the request for proposals and any criterion originally set forth in those documents for evaluating and comparing proposals. Any such deletion, modification or addition should be communicated to bidders in the invitation to submit final proposals. Bidders not wishing to sub-

mit a final proposal should be allowed to withdraw from the selection proceedings without forfeiting any security that they may have been required to provide.

Evaluation criteria

The award committee should rate the technical and financial elements of each proposal in accordance with the predisclosed rating systems for the technical evaluation criteria and should specify in writing the reasons for its rating. Generally, it is important for the contracting authority to achieve an appropriate balance between evaluation criteria relating to the physical investment (for example, the construction works) and evaluation criteria relating to the operation and maintenance of the infrastructure and the quality of services to be provided by the Contractor. Adequate emphasis should be given to the long-term needs of the contracting authority, in particular the need to ensure the continuous delivery of the service at the required level of quality and safety.

Article 9.1

Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental and financing viability of the proposal vis-à-vis the prescribed specifications, indicators and requirements prescribed in the bidding documents. To the extent practicable, the technical criteria applied by the contracting authority should be objective and quantifiable, so as to enable proposals to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. Regulations governing the selection process might spell out how such factors are to be formulated and applied. Technical proposals for privately financed infrastructure projects are usually evaluated in accordance with the following criteria:

- (i) **Technical soundness.** Where the contracting authority has established minimum engineering design and performance specifications or standards, the basic design of the project should conform to those specifications or standards. Bidders should be required to demonstrate the soundness of the proposed construction methods and schedules;
- (ii) **Operational feasibility.** The proposed organization, methods and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards and should be shown to be workable;
- (iii) **Quality of services.** Evaluation criteria used by the contracting authority should include an analysis of the manner in which the bidders undertake to maintain and expand the service, including the guarantees offered for ensuring its continuity;

- (iv) Environmental standards. The proposed design and the technology of the project to be used should be in accordance with the environmental standards set forth in the request for proposals. Any negative or adverse effects on the environment as a consequence of the project as proposed by the bidders should be properly identified, including the corresponding corrective or mitigating measures;
- (v) Social and economic development potential. Under this criterion, the contracting authority may take into account the potential for social and economic development offered by the bidders, including benefits to underprivileged groups of persons and businesses, domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills.

Article 9.2

In addition to criteria for the technical evaluation of proposals, the contracting authority needs to define criteria for assessing and comparing the financial proposals. Criteria typically used for the evaluation and comparison of the financial and commercial proposals include, as appropriate, the following:

- (i) The present value of the proposed tolls, fees, unit prices and other charges over the concession period. For projects in which the Contractor=s income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed tolls, fees, rentals and other charges over the concession period according to the prescribed minimum design and performance standards;
- (ii) The present value of the proposed direct payments by the contracting authority, if any. For projects in which the Contractor=s income is expected to consist primarily of payments made by the contracting authority to amortize the Contractor=s investment, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications;
- (iii) The present value of the proposed payments to be made by the Contractor under the Concession Agreement. For projects involving research and exploitation of natural resources (oil, minerals and the like) the Contractor is often required to make payments or offer a share of its revenue to the Contracting

Authority. Evaluation of this aspect of the proposal is typically based on the global amount offered over the contract period;

- (iv) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs. It is advisable for the contracting authority to include these items among the evaluation criteria so as to permit an assessment of the financial feasibility of the proposals;
- (v) The extent of financial support, if any, expected from the Government. Government support measures expected or required by the bidders should be included among the evaluation criteria as they may entail significant immediate or contingent financial liability for the Government;
- (vi) Soundness of the proposed financial arrangements. The contracting authority should assess whether the proposed financing plan, including the proposed ratio between equity investment and debt, is adequate to meet the construction, operating and maintenance costs of the project;
- (vii) The extent of acceptance of the proposed contractual terms. Proposals for changes or modifications in the contractual terms circulated with the request for proposals (such as in those dealing with risk allocation or compensation payments) may have substantial financial implications for the contracting authority and should be carefully examined.

A comparison of the proposed tolls, fees, unit prices or other charges is an important factor for ensuring objectiveness and transparency in the choice between equally responsive proposals. However, it is important for the contracting authority to consider carefully the relative weight of this criterion in the evaluation process. The notion of *Aprice@* usually does not have the same value for the award of privately financed infrastructure projects as it has in the procurement of goods and services. Indeed, the remuneration of the Contractor is often the combined result of charges paid by the users, ancillary revenue sources and direct subsidies or payments made by the public entity awarding the contract.

It flows from the above that, while the unit price for the expected output retains its role as an important element of comparison of proposals, it may not always be regarded as the most important factor. Of particular importance is the overall assessment of the financial feasibility of the proposals since it allows the contracting authority to consider the bidders' ability to carry out the project and the likelihood of subsequent increases in the proposed prices. This is important with a view to avoiding project awards to bidders that offer attractive but unrealistically low prices in the expectation of being able to raise such prices once a concession is obtained.

Selection of bidder or bidders

Article 10.1

The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite the best rated bidder for final negotiation of certain elements of the project agreement. In order to enhance competition, the Contracting Authority may also wish to invite for negotiations the bidder that has obtained the next highest rank. The final negotiations should be limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected bidder=s lenders. One particular problem faced by contracting authorities is the danger that the negotiations with the selected bidder might lead to pressures to amend, to the detriment of the Government or the consumers, the price or risk allocation originally contained in the proposal. Changes in essential elements of the proposal should not be permitted, as they may distort the assumptions on the basis of which the proposals were submitted and rated. Therefore, the negotiations at this stage may not concern those terms of the contract which were deemed not negotiable in the final request for proposals. The risk of reopening commercial terms at this late stage could be further minimized by insisting that the selected bidder=s lenders indicate their comfort with the risk allocation embodied in their bid at a stage where there is competition among bidders. The contracting authority=s financial advisers might contribute to this process by advising whether bidders= proposals are realistic and what levels of financial commitment are appropriate at each stage. The process of reaching financial close can itself be quite lengthy.

Article 10.2

The contracting authority should inform the remaining responsive bidders that they may be considered for negotiation if the negotiations with the bidder with better ratings do not result in a project agreement. If it becomes apparent to the contracting authority that the negotiations with the invited bidder will not result in a project agreement, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the next bidder on the basis of its ranking until it arrives at a project agreement or rejects all remaining proposals. To avoid the possibility of abuse and unnecessary delay, the contracting authority should not reopen negotiations with any bidder with whom they have already been terminated.

Award of concession without competitive procedures

Negotiations outside structured competitive procedures may have a number of disadvantages that make them less suitable to be used as a principal selection method in a number of countries. Because of the high level of flexibility and discretion afforded to the contracting authority, negotiations outside structured competitive procedures require

highly skilled personnel with sufficient experience in negotiating complex projects. They also require a well structured negotiating team, clear lines of authority and a high level of coordination and cooperation among all the offices involved. The use of negotiations for the award of privately financed infrastructure projects may therefore not represent a viable alternative for countries that do not have the tradition of using such methods for the award of large government contracts. Another disadvantage of those negotiations is that they may not ensure the level of transparency and objectivity that can be achieved by more structured competitive procedures. In some countries there might be concerns that the higher level of discretion in those negotiations might carry with it a higher risk of abusive or corrupt practices. In view of the above, the host country may wish to prescribe the use of competitive selection procedures as a rule for the award of privately financed infrastructure projects and to reserve concession awards without competitive procedures only for exceptional cases.

Article 11.1

For purposes of transparency as well as for ensuring discipline in the award of projects, it might be generally desirable for the law to identify the exceptional circumstances under which the contracting authority may be authorized to select the Contractor without using competitive selection procedures. They may include, for example, the following:

- (i) When there is an urgent need for ensuring immediate provision of the service and engaging in a competitive selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part. Such an exceptional authorization may be needed, for instance, in cases of interruption in the provision of a given service or where an incumbent Contractor fails to provide the service at acceptable standards or if the project agreement is rescinded by the contracting authority, when engaging in a competitive selection procedure would be impractical in view of the urgent need to ensure the continuity of the service;
- (ii) In the case of projects of short duration and with an anticipated present value of amounts to be charged by the Contractor, payments to be made by the Contracting Authority or payments to be made by the Contractor under the Concession Agreement do not exceed a specified low amount;
- (iii) Reasons of national defence or security;
- (iv) Cases where there is only one source capable of providing the required service (for example, because it can be provided only by the use of patented technology or unique know-how);

- (v) When an invitation to the pre-selection proceedings or a request for proposals has been issued, but no applications or proposals were submitted or all proposals were rejected and, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award. However, in order to reduce the risk of abuse in changing the selection method, the contracting authority should only be authorized to award a concession without using competitive selection procedures when such a possibility was expressly provided for in the original request for proposals;
- (vi) Where the entering into of the Concession Agreement is consequent upon the default of a Contractor and the transaction is with a different Contractor who has been invited to enter into the Concession Agreement by banks and other financial institutions who have advanced loans to the defaulting Contractor and one of the principal purposes of the transaction is in order to enable such loans to be discharged from revenues which would be paid to the new Contractor. It has become a practice in large-scale project financing to include in the relevant loan documentation clauses that allow the lenders to select, with the consent of the contracting authority, a new Contractor to perform under the existing project agreement have been included in a number of recent agreements for large infrastructure projects. Such clauses are typically supplemented by a direct agreement between the contracting authority and the lenders who are providing finance to the Contractor. The main purpose of such a direct agreement is to allow the lenders to avert termination by the contracting authority when the Contractor is in breach by substituting a Contractor that will continue to perform under the project agreement in place of the Contractor in breach.

Article 11.2

For the purpose of enhancing transparency, paragraph (a) requires that a notice of the negotiation proceedings to be given to bidders in a specified manner. For example, the contracting authority may be required to publish the notice in a particular publication normally used for that purpose. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of bidders than might otherwise be the case, thereby promoting competition. Given the magnitude of most infrastructure projects, the notice should normally contain certain minimum information (a description of the project, for example, or qualification requirements) and should be issued in sufficient time to allow bidders to prepare offers. Generally the formal eligibility requirements applicable to bidders in competitive selection proceedings should also apply in negotiation proceedings.

Procedures to be followed in procurement through negotiation outside structured competitive procedures are typically characterized by a higher degree of flexibility than the procedures applied to other methods of procurement. That flexibility is upheld by paragraph(b), which gives the Contracting Authority the power to conduct negotiations as it sees fit. Nevertheless, it reminds the Contracting Authority of the need to secure the best value for money from the Contractor.

In order to make the award proceedings as competitive as possible, it is advisable to require the contracting authority to engage in negotiations with as many companies judged susceptible of meeting the need as circumstances permit. Beyond such a general provision, there is no specific provision in the laws of some countries on the minimum number of contractors or suppliers with whom the contracting authority is to negotiate. The laws of some other countries, however, require the contracting authority, where practicable, to negotiate with, or to solicit proposals from, a minimum number of bidders (three, for example). The contracting authority is permitted to negotiate with a smaller number in certain circumstances, in particular, when fewer than the minimum number of potential bidders were available.

Another useful measure to enhance the transparency and effectiveness of negotiations outside structured competitive procedures consists of establishing general criteria that proposals are requested to meet (for example, general performance objectives or output specifications), as well as criteria for evaluating offers made during the negotiations and for selecting the winning Contractor (for example, the technical merit of an offer, prices, operating and maintenance costs and the profitability and development potential of the project agreement). Where more than one proposal is received, some elements of competition may be usefully introduced in the negotiations. The contracting authority should identify the proposals that appear to meet those criteria and engage in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the contracting authority. The price of each proposal does not enter into those discussions. When the proposals have been finalized, it may be advisable for the contracting authority to seek a best and final offer on the basis of the clarified proposals. It is recommendable that bidders should include with their final offer evidence that the risk allocation that the offer embodies would be acceptable to their proposed lenders. From the best and final offers received, the preferred bidder can then be chosen. The project would then be awarded to the party offering the Amost economical@ or Amost advantageous@ proposal in accordance with the criteria for selecting the winning Contractor set forth in the invitation to negotiate.

Notice of project award

Project agreements frequently include provisions that are of direct interest for parties other than the contracting authority and the Contractor and who might have a legitimate interest in being informed about certain essential elements of the project. This is the case in particular for projects involving the provision of a service directly to the general public. For transparency purposes, it may be advisable to establish procedures for publicizing those terms of the project agreement which may be of public interest. Such a requirement should apply regardless of the method used by the contracting authority to select the Contractor (for example, whether through competitive selection procedures, direct negotiations or as a result of an unsolicited proposal). One possible procedure may be to require the contracting authority to publish a notice of the award of the project, indicating the essential elements of the proposed agreements, such as: (a) the name of the Contractor; (b) a description of the works and services to be performed by the Contractor; (c) the duration of the concession; (d) the price structure; (e) a summary of the essential rights and obligations of the Contractor and the guarantees to be provided by it; (f) a summary of the monitoring rights of the contracting authority and remedies for breach of the project agreement; (g) a summary of the essential obligations of the Government, including any payment, subsidy or compensation offered by it; and (h) any other essential term of the project agreement, as provided in the request for proposals.

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ANNEX

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