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Building

Creating Competitive Tension

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Many private companies submit unsolicited proposals with a view to directly negotiate a contract for the proposed project—creating the problems described in Benefits and Pitfalls of Unsolicited Proposals. Competitive Procurement or Direct Negotiation describes some circumstances in which entering into direct negotiations may make sense, as well as some less well-founded arguments often presented for doing so. Direct negotiation of unsolicited proposals describes several preparation requirements for those procuring authority that wish to directly negotiate an unsolicited proposal.

Direct Negotiation of Unsolicited Proposals

A report on USP policy by PPIAF outlined four key criteria for procuring authorities to follow to successfully manage a direct USP negotiation when they cannot enforce the preferred competitive procurement:

- **Public negotiating capacities:** Utilize internal staff with significant negotiating experience related to similar infrastructure projects. These negotiators should be supported by qualified external advisors and technical experts. If either negotiators or technical experts are not available within the government, an independent third party should be consulted.
- **Focus on information equality:** Project proponents will typically have greater knowledge of the proposal; therefore, it is advisable that the procuring authority consult external advisors to support the government's interest and provide independent advice.
- **High degree of transparency:** Publicly disclose most elements of the PPP contract as soon as possible; engage relevant government agencies, decision makers, and technical experts early on in the negotiation process, and at significant decision points (as applicable).
- **Direct negotiation protocol:** Direct negotiations should be governed by a direct negotiation protocol. This should include details on, inter alia, the rights and obligations of the procuring authority and USP proponent; the criteria that the procuring authority will use to evaluate the bid; timelines; termination modalities; and communication modalities.

Source: (WB 2017d)

The alternative is to subject unsolicited proposals to a competitive process. Some countries accept proposals and simply follow the normal competitive procurement process. However, this is relatively unlikely to generate large numbers of USPs, since the proponent receives no direct return on its investment in the project idea other than the benefits of more familiarity with the project than potential competitors in a tender and potential reputational benefits.

Other countries adapt the competitive tender process, to provide some advantage or compensation to the project proponent for developing a project, while retaining competitive tension and ensuring transparency. There is no international consensus on the best way to subject unsolicited proposals to competition and at the same time allow sufficient incentives for the private sector to submit USPs. Several approaches have been adopted to incentivize the USP proponent:

- **Automatic short-listing**—a two-stage bid process is used, in which the highest-ranked bidders from the first stage are invited to submit final proposals in a second stage (see Managing the Bid Process). The proponent is automatically included in the second stage. This approach is used in the **South Africa** roads sector, as set out in a **South Africa Roads Agency policy note** (ZA 2004a).
- **Bid bonus**—the proponent receives a scoring advantage—typically defined as an additional percentage added to its evaluation score—in an open bidding process. This approach is used in **Chile**, where the bid bonus can be between 3 and 8 percent of the financial evaluation score (in addition, the proponent is reimbursed for the cost of detailed studies (CL 2010c).
- **Right to match**— The **right to match** (also known in some countries as 'Swiss challenge') has presented significant anti-competitive properties—in the **Philippines** under the right to match approach, all 11 PPP contracts awarded from unsolicited proposals by 2006 went to the original proponent. It operates like this: Following an unsolicited approach, an open bidding process is conducted. If unsuccessful, the proponent has the option to match the winning bid and win the contract.
- **Developer's fee**—the proponent is paid a fee by the government or the winning bidder. The fee can simply reimburse some project development costs, or be defined to provide a return on developing the project concept and proposal. This is one option for dealing with unsolicited proposals permitted in **Indonesia under the presidential regulations governing PPP** (ID 2005). It is to be noted that the developer's fee option is different from the other incentives presented above in the sense that it does not apply as an advantage during the bidding process.

Examples of Procurement Strategies for Unsolicited Proposals provides further examples and references. These alternatives have not all proved equally effective at enabling competition. **Chile**, for example, is a clear exception—of 19 concessions awarded from unsolicited proposals as of 2015 only seven were awarded to the original proponent.

Examples of Procurement Strategies for Unsolicited Proposals

JURISDICTION	REFERENCE	KEY FEATURES
Chile	Public works concession regulations (CL 2010b, Title II: Bids Submitted by Private Parties)	• Two-stage process for accepting unsolicited proposals—initial proposals are screened; if accepted, the private party must conduct detailed studies and prepare a detailed proposal. The government then prepares bidding documents based on the detailed proposal, and puts the project out to competitive tender. • Costs of carrying out studies are reimbursed (paid by the winning bidder; or by the government if project never proceeds to bid stage). Costs agreed at initial project approval stage. • Proponent receives a **bid bonus** of a pre-defined percentage (between 3 and 8 percent depending on the project) added to financial evaluation score.

Colombia	National PPP Law (CO 2012a, Law 1508, Title III)	• Unsolicited proposals that do not modify existing projects or pertain to a project that has already been promoted by a state entity are accepted.
		• There is a two-stage process for accepting unsolicited proposals:
		  ○ Pre-feasibility—Private party must submit documents detailing the proposed project (including project scope, estimated cost and specifications). If accepted, private parties begin the feasibility stage.
		  ○ Feasibility—Private party must prove their capability to implement the project and conduct multiple project studies (i.e. risk, environmental and social, technical feasibility).
		• If their proposal is accepted, private party will be informed of the project conditions and granted an additional amount to compensate study costs.

Indonesia	Presidential Regulation 56 (ID 2011, Chapter IV)	• Unsolicited proposals welcomed for projects not already in priority list. Accepted proposals are put through normal competitive process. Proponents may either be awarded a **bid bonus**, of up to 10 percent, or paid a **developer's fee** for the proposal. The approach is set by the contracting authority, based on an independent appraisal.
Italy	Legislative Decree no. 163 (IT 2006, Articles 153–155)	• Contracting authorities publish three-year plans on an annual basis; private companies are invited to make proposals for infrastructure listed in these plans (following clear content requirements—including detailed studies—and timeline). Proposals are evaluated by the contracting authority. • A type of **right to match** process is used to procure the project. A first stage is used to identify two competing bidders, who together with the proponent enter into a negotiated procurement procedure. If a competing proposal is preferred, the proponent is given the right to match that proposal, in which case the proponent is awarded the concession.

Mexico	Ley de Asociaciones Público Privadas –amended (MX 2012, chapter 3)	• Unsolicited proposals will be accepted for non-existent/completed projects. • Proponents must submit a feasibility study outlining the project with their proposal. • If accepted, the proponent will be compensated for study expenses and may receive up to 10 percent **developer's fee** and a competitive bidding process will begin.
Philippines	BOT Law 1994 (Republic Act No. 7718) Rules and Regulations (PH 2006, Rule 10) – last amended with Executive Orders 8 (PH 2010) and 136 (PH 2013).	• Unsolicited proposals welcomed for projects not already in priority list. • The contracting authority must advertise the opportunity for at least three weeks, and invite competing proposals within a 60-day time limit. • If competing proposals are received, a **right to match** process is followed—if the proponent is not the winning bidder, it is given the opportunity to match the winning bid and win the contract. • If no competing proposal is received, the authority may negotiate with the proponent.
South Africa (roads sector)	SANRAL policy for unsolicited proposals (ZA 1999a); USPs specifically addressed in National Treasury Practice Note No 11 of 2008/2009	• Unsolicited proposals must comply with clear content requirements, and are evaluated by the Agency. • If the proposal is accepted the Agency and the developer enter into a Scheme Development Agreement, under which the private party is responsible for detailed development of the PPP, including developing tender documentation. The agreement includes a **developer's fee** payable by the winning bidder to the proponent. • The project is put out to competitive tender, in a two-stage **best and final offer** process. The top two bidders from the first round are invited to re-submit best and final offers; the proponent is also invited, if not already in the top two.
South Korea	ADB review of PPP experience in the South Korea (Sanghoon n.d., 67–69)	• Unsolicited proposals must be evaluated by the contracting authority and the PPP unit (PIMAC). • The opportunity is published and alternate proposals are requested, within a 90-day time limit. • The proponent receives a **bid bonus** of up to 10 percent, added to the overall bid evaluation scores. The proponent may modify its original proposal at the bidding stage, but its bonus is reduced to a maximum of five percent. Bonuses are disclosed in the request for alternate proposals. • Losing bidders are compensated in part for proposal costs, to encourage competition.

Uruguay	Article 37 of Law Number 18.786 (UY 2011) – last amended in 2015	• Proponent is entitled to a **bid bonus** of up to 10 percent of the final evaluation score. • Proponent is reimbursed for the cost of detailed studies only if not successful in winning the contract.
Commonwealth of Virginia, United States of America (highways sector)	Virginia PPP Implementation Guidelines (VA 2005)	• Proposals are welcome that comply with the detailed requirements set out and are evaluated in the same way as government-originated projects. • Proposals for PPPs requiring no government oversight or support are advertised for 90 days; those for PPPs requiring government support for 120 days. If no competing proposal is received, the government may negotiate directly with the proponent.

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