

Dealing with Intellectual Property and Confidentiality

Full Description

Legal provisions for the protection of proprietary information and intellectual property rights encourages investors to submit innovative unsolicited proposals. At the same time, the government needs to be careful not to allow proponents to claim confidentiality of (elements of) their proposal too easily, with the sole aim to limit competition.

Intellectual property is typically protected by law. Whereas governments should obviously respect intellectual property rights in the management of unsolicited proposals, this typically does not require specific additional protection.

There are different approaches to dealing with intellectual property in an unsolicited proposal, which may depend on the nature of the proposal. For example, the **UNCITRAL Legislative Guide for Privately-Financed Infrastructure Projects** section on unsolicited proposals ([UNCITRAL 2001](#), 91–97) describes two options:

- Where possible, the government can competitively tender the project by specifying required outputs and not the required technology to deliver those outputs. This approach is consistent with good practice in defining output-based performance requirements for [Performance Requirements](#).
- In cases where intellectual property is crucial to the project, such that it could not be implemented otherwise, the UNCITRAL guidance suggests direct negotiation may be warranted, along with procedures to benchmark project costs.

The **Partnerships Victoria Practitioner's Guide** ([VIC 2001](#)) also provides guidance, and takes a slightly different approach. Proponents must identify any confidential information they wish to protect (subject to agreement with government). The project is then tendered based on output specifications without revealing technology information if possible. If the intellectual property is “crucial to the existence of the service need,” the government negotiates with the proponent to obtain the rights to the necessary intellectual property, before procuring the project competitively.

Information that does not strictly qualify as intellectual property can still be considered commercially sensitive or confidential. In general, governments are encouraged not to protect such information and disclose all information included in an unsolicited proposal. By doing so, governments create an incentive for the proponents to not include the information they deem confidential in the unsolicited proposal, which would then avoid any further disclosure and confidentiality issues.

To the extent that exceptions to this approach are strictly necessary, governments are advised to reach agreement with the proponent on non-disclosure of specific elements of the unsolicited proposal prior to moving on to the next phase of project implementation. Where governments decide not to disclose information that is considered confidential (based on the arguments provided by the proponent), the perception of corruption by stakeholders may increase. This challenge is particularly relevant in the case of USPs that include innovative technologies or alternative technical solutions. Guidance on intellectual property and confidentiality concerns is further provided in the **World Bank report on the Framework for Unsolicited Proposals** ([WB 2017d](#)).

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