



Government of the Lao People's Democratic Republic

IPP Hydropower Procurement Manual for Lao PDR

Government of Lao PDR

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Prepared for

Government of Lao PDR

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Acronyms and Terminology

ADB	Asian Development Bank
BCEL	Banque pour le Commerce Exterieur Lao
BGB	Bürgerliches Gesetzbuch, the German Civil Code
BOT	Build, operate, transfer – the term “BOT” is used in this report as a generic term to describe the family of private project implementation modalities that includes BOOT, BOO, BTL, BTF, ROT, ROO, RLT, etc.
BT	Build-Transfer
BTF	Build-Transfer-Finance
BTL	Build-Transfer-Lease
CA	Concession Agreement
CCGT	Combined Cycle Gas Turbine
CDM	Clean Development Mechanism
CISG	United Nations Convention on Contracts for the International Sale of Goods
COD	Commercial Operation Date
The company	the project company that finances, designs, procures, constructs, commissions, operates and maintains the Project facilities and, at the end of the concession term, transfers them to GOL.
Contracting Authority	has the meaning described in Section 3.1
DOE	Department of Electricity (of the Ministry of Industry and Handicraft)
DSCR	Debt Service Coverage Ratio
EdL	Electricité du Laos
EGAT	Electricity Generating Authority of Thailand
EIA	Environmental Impact Assessment
ECA	Export Credit Agency
EPC	Engineering, Procurement and Construction
EVN	Electricity of Vietnam
Financing Documents	All material financing agreements entered into between the Company and the lenders for the sole purpose of financing the development, construction, operation and maintenance of a project, including loan agreements, security agreements, bonds, hedging instruments and insurance policies.

GMS	Greater Mekong Subregion
GOL	Government of Lao PDR
GOL Agency	Government of Lao PDR or any authority, ministry, department or inspectorate in Lao PDR
GPA	Government Procurement Agreement (WTO)
GWh	gigawatt-hour
ICB	International Competitive Bidding
IFI	International Financial Institutions, comprising public multilateral agencies (namely, World Bank Group, Inter-American Development Bank, Asian Development Bank African Development Bank, European Bank for Reconstruction and Development Bank for International Settlements Group of Seven/Eight, IMF)
Investor Authority	has the meaning described in Section 3.1
IPP	Independent Power Producer
ITB	Instructions to Bidders
kW	kilowatt
LCB	Local Competitive Bidding
LIBOR	London Inter-Bank Overnight Rate
LNCE	Lao National Committee for Energy
kWh	Kilowatt hour
Manual	IPP Hydropower Procurement Manual for Lao PDR
MIH	Ministry of Industry and Handicraft
MLA	Multilateral Agency
Model Bid Document	is the model form of the bid document for soliciting competitive bids for hydropower concession contracts in Lao PDR as provided in Annex 3 and described further in Section 8.3
Model Concession Agreement	is the model form of the concession agreement provided iAnnex 6 and described further in Section 4.2.
Model Documents	has the meaning described in Section 4.2.
Model MOU	is the model form of the memorandum of understanding provided in Annex 4 and described further in Section 4.2.
Model Pre-selection Document	The document provided as Annex 2 and titled, <i>Pre-selection of Applicants for the Concession to Develop the [.....] Hydropower Project.</i>
Model PPA for EDL Off-take	is the model form of the power purchase agreement to be executed by a developer and EDL in respect of off-take by EDL from a project, as provided in Annex 7 and described further in Section 4.2.
MOF	Ministry of Finance

Monitoring Authority	has the meaning described in Section 3.1.
MOU	Memorandum of Understanding
MV	Medium Voltage (22 kV in Lao PDR)
MW	Megawatt
OECD	Organization for Economic Cooperation and Development
O&M	Operation and Maintenance
PDA	Project Development Agreement
PDP	Power Development Plan (prepared by EdL)
PECL	Principles of European Contract Law (Commission on European Contract Law)
PFI	Private Financing Initiative, a term derived from the UK program of this name established to promote and manage Public Private Partnership projects. The term "PFI" is used synonymously with "PPP".
Power Purchase Authority	has the meaning described in Section 3.1
PPA	Power Purchase Agreement
PPP	Public Private Partnerships (a term used synonymously with "PFI")
PRI	Political Risk Insurance
PRG	Political Risk Guarantee (ADB) or Partial Risk Guarantee (World Bank)
Project Agreements	All material agreements, excluding the Financing Documents, entered into by the Company, for the sole purpose of facilitating the development of a project, which agreements include the EPC contract(s), off-take agreement(s) and O&M contract(s).
RFP	Request for Proposals
Regulatory Guide	The document provided as Annex 1 and titled, <i>Regulatory Guide on Procurement of Concession Contracts for Privately Financed Power Generation Projects</i> , prepared under the ADB-funded IPP Development and Institutional Strengthening Project (2005) and issued in draft form for comment
RLT	Rehabilitate-Lease-Transfer
ROT	Rehabilitate-Operate-Transfer
SPC	State Planning Committee, or Special Purpose Company according to context.
SPP	Small Power Producer (developers of small power generation projects)
STEA	Science, Technology and Environment Agency
TOR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
UNIDO	United Nations Industrial Development Organization

UNIDROIT	refers to UNIDROIT Principles of International Commercial Contracts 2004
USD	United States Dollars
WB	World Bank
WTO	World Trade Organization

1.0 Introduction

1.1 Purpose of the Manual

The IPP Hydropower Procurement Manual (“the Manual”) is intended to contribute to the strengthening of IPP procurement in Lao PDR by encouraging system, rigor, transparency and competition. The Manual and its annexes provide a set of guidelines and documentation for the procurement of medium and large hydropower projects on a Build-Operate-Transfer (“BOT”) basis. It has been prepared to guide Government Agencies in the selection of developers, solicitation and evaluation of IPP proposals, and the drafting and execution of Project Agreements.

The track record of BOT hydropower procurement in Lao PDR and elsewhere is still relatively short and inconsistent. Internationally-accepted and well documented procedures of the sort that govern traditional ICB procurement have not yet emerged. The IPP procurement procedures and documentation contained in this Manual are in many senses ground-breaking and must be considered to be a work-in-progress. With experience gained from each new concession award, and with changing expectations of governments, investors, lenders, and International Financing Institutions (IFIs), the Manual will need to be updated regularly to maintain compliance with prevailing rules.

It is also important to note that procurement processes for IPP hydropower projects cannot be defined too rigidly. A balance is needed between flexibility and control. Flexibility allows sponsors to room to optimize projects for the physical conditions at the site to meet changing requirements of power purchasers, lenders and other parties; control is needed to prevent sponsors from appropriating a disproportionate share of a project’s benefits or inflicting undue damage on the environment.

1.2 Scope of the Manual

The Manual describes the procurement environment in Lao PDR for implementing BOT hydropower projects and sets out general principles and procedures that govern the process of inviting and evaluating proposals, negotiating Project Agreements and awarding concessions.

The Manual is organized under the following sections:

- **Section 1: Introduction** (this section)
- **Section 2: Legal Framework for IPP Procurement** – an overview of key legislation applying to the private financing of hydropower development is provided.
- **Section 3: Institutional Framework for IPP Procurement** – this section describes the GOL Agencies with primary responsibilities in BOT procurement.
- **Section 4: Project Agreements** – an overview of the Project Agreements that define the relationship between GOL and the Company is provided.
- **Section 5: IPP Procurement Procedures** – the development and application of IPP Procurement Guidelines is outlined.
- **Section 6: IPP Project Development Process** – the sequential steps in developing an IPP project are described.

- **Section 7: Pre-selection of Developers** – pre-selection procedures are described and the circumstances when they apply are stated.
- **Section 8: Open Competitive Procedure** – open, competitive award procedures are outlined and relevant issues discussed.
- **Section 9: Alternative Methods of Procurement** – alternative methods of procurement, namely restricted, competitive procedure, two-stage procedure and negotiated procedure, are outlined and relevant issues discussed.
- **Section 10: Unsolicited Proposals** – procedure for considering and implementing unsolicited proposals is outlined.
- **Section 11: Small Privately Financed Hydropower Projects** – the procurement procedures and documentation for privately financed projects of 10 MW or less under a Small Power Producer program is discussed.

2.0 Legal Framework for IPP Procurement

2.1 Overview

The last decade has seen extensive development of the legal framework to accommodate private sector investment in infrastructure. The objective is to develop a balanced and effective framework that gives due consideration to the reasonable rights of all parties. Legislative milestones since the introduction of NEM in 1986 include:

- Law on Foreign Investment (1988)
- Contract Law (1990)
- Commercial Bank and Financial Institutions Law (1992)
- Customs Law (1994)
- Labor Law (1994)
- Business Law (1994)
- Secured Transaction Law (1994)
- Water & Water Resources Law (1996)
- Electricity Law (1997)
- Environmental Protection Law (1999)
- Rules for Consideration and Approval of Foreign Investment Projects in Lao PDR (2002)
- Law on Promotion and Management of Foreign Investment (2004)

Features of key recent legislation are discussed below.

(i) Foreign Investment Law

The Law on the Promotion and Management of Foreign Investment in Lao PDR came into force on 22 October 2004 and supersedes the 1994 foreign investment law. The salient provisions of the Law are:

- Property and investments of foreign investors are protected by the laws of Lao PDR and cannot be requisitioned, confiscated or nationalized except for a public purpose and upon prompt and adequate compensation.
- Foreign investors can invest either as business cooperation by contract, as a joint venture with local partners or as a wholly foreign-owned enterprise;
- Foreign investors may lease land and transfer leasehold interests and they may own and transfer land improvements and other moveable property;
- Foreign investors will give priority to Lao citizens in recruiting employees but will have the right to employ skilled foreign personnel when necessary;
- Foreign investors may repatriate earnings through a Lao bank or a foreign bank established in Lao PDR;
- Foreign investors may use land rights and assets as security;
- Disputes will be by arbitrated through the economic arbitration authority of Lao PDR.

To provide a security package that will support project financing of a large IPP hydropower project in Lao PDR, a developer will normally need additional rights and these are generally dealt with in the project's concession agreement, e.g. rights of lenders in the event of

default, foreign jurisdiction over offshore assets, assignment of debt, use of escrow accounts and international arbitration.

(ii) Electricity Law

The application of the Electricity Law (1997) to generation projects depends on which of the following four categories the projects belong to (Article 9):

- **Less than 100 kW:** Approved by provincial, prefectural or special zone authorities
- **Between 100 and 2,000 kW:** Proposed by provincial, prefectural or special zone authorities and approved by MIH
- **Between 2,000 and 50,000 kW:** Approved by GOL
- **Greater than 50,000 kW:** Proposed by GOL to National Assembly for approval

Features of the Electricity Law as it pertains to BOT hydropower development include:

- Concessions for electricity activities are to be held by the state alone, by the state electricity utility, or in collaboration with or foreign parties using BOOT, BOT, BTF or other modalities (Article 10);
- The physical resources for generating electricity are the property of the national community and under State control (Article 3);
- The procedure for applying for a concession is administered by MIH and involves the execution of investigations and studies including a feasibility study, EIA and topographical surveys (Article 12).
- GOL shall “participate in the shareholding when there is a concession for an electricity enterprise”. Neither minimum shareholding nor the type of share is prescribed (Article 12).
- The term of a concession is no more than 30 years from the date it was issued, after which the facility must be transferred to GOL in a “good and operational” condition without compensation (Article 16). The license may be extended for up to 10 years.
- Obligations of the concessionaire are stated in Article 18 and include protecting the environment, paying taxes and charges, lodging a performance bond with the Bank of Lao PDR, adhering to currency regulations, maintaining proper accounts, and adhering to labor laws. For marginal projects, tax rates may be eased in early debt repayment years so that lenders’ debt service criteria can be met.
- Developers are allowed access to privately-owned transmission lines (Article 28).
- Regional transfers of electricity involving transmission through Lao PDR must also use the National Grid unless the grid has not been developed to facilitate such transfers, in which case private investment in transmission is permitted (Article 37).

(iii) Water and Water Resources Law

The Water and Water Resources Law divides water use into small, medium and large scale projects (Article 14), and defines rights, obligations and procedures appropriate for each category. Mini-and micro-hydropower projects fall within the “medium” category provided that their structures do not seriously disrupt watercourses (Articles 16 and 27). Run-of-river

projects involving no inter-basin diversion of water could be classified as medium scale use. IPP hydro projects would be classified as “large” (Article 17).

IPP projects must observe approval and implementation requirements specified elsewhere in the Law, including:

- The sponsor of the project shall submit a feasibility study, an EIA and action plans defining mitigations (Article 18);
- The sponsor of the project shall obtain GOL approval (Article 19). The form of GOL approval is the concession as defined in the Electricity Law;
- Projects must be consistent with the “Socio-Economic and Environmental Development Plan, master plans and development plans from time to time” (Article 21);
- Project sponsors are obliged to contribute to the cost of watershed management and protection (Article 24);
- Hydropower projects must be planned and built in a manner that protects the environment and conserves water resource and provides, where appropriate, for multipurpose use including flood mitigation, water supply, irrigation, water transportation and aquaculture (Article 25);
- Project sponsors must assist in and must fund the effective resettlement of people displaced by the project.
- Logging in catchments is “absolutely prohibited for any individual, juristic entity or organization” (Article 31).

(iv) Environmental Protection Law

EIA procedures and responsibilities are defined in Article 8 of the Environmental Protection Law. STEA issues regulations setting out procedures and actions and the responsible line ministries, MIH in the case of hydropower, issue guidelines or regulations for EIA mechanisms based on the Environmental Protection Law. EIA regulations for hydropower projects are developed and implemented by MIH.

Hydropower projects are required to submit an EIA. This provision applies retrospectively with existing projects also obliged to submit an EIA to the relevant agency for issuance of an environment compliance certificate. Such projects must propose mitigation measures for impacts caused.

Article 15 addresses the issue of biodiversity. STEA is responsible for introducing legislation to establish biodiversity management measures.

Owners of dams and managers of reservoirs have obligations to maintain safe structures and cooperate with the National Disaster Prevention Committee in planning and executing responses to disasters.

An Environment Protection Fund will be set up (Article 30) and “development projects” are nominated as a source of funds (Article 31). Hydropower projects fall within the ambit of “development projects”

3.0 Institutional Arrangements for IPP Procurement

3.1 Power Sector Organization

A systematic division of institutional responsibilities for PFI / PPP projects would see, as appropriate, a separation of contracting, monitoring, off-take and investor functions under a Contracting Authority, a Monitoring Authority, an Off-take Authority and an Investor Authority respectively. In the context of the Lao IPP program, the functions of the agency, or agencies, performing the role of each of these would include:

- a. In respect of the **Contracting Authority**:
 - Advise GOL agencies and provide input into power policy development, project planning, procurement processes and regulatory issues;
 - Promote viable projects to the investor community;
 - Make available to developers information on IPP project pipeline;
 - Make available to developers all laws and regulations of general application to IPP projects;
 - Confirm investment incentives for IPP concessionaires in line with Lao PDR law;
 - Stipulate and, where appropriate, obtain on behalf of a developer the licenses, approvals and permits required under the project concession agreement and other project agreements;
 - Procure projects in line with set procurement procedures and rules;
 - Lead the GOL team in negotiating MOU, PDA and CA with developers;
 - Provide support in GOL negotiations with EGAT, EVN and other foreign power purchasers;
 - Engage, manage and coordinate specialized financial, legal and technical advisors in the evaluation of IPP proposals and negotiation of IPP documentation;
 - Negotiate with developers and sign the Project Development Agreement (PDA) on behalf of GOL;
 - Initial Concession Agreement on successful conclusion of concession negotiations;
 - Administer the Concession Agreement during the construction, operating and transfer phases of a project.
- b. In respect of the **Monitoring Authority**:
 - Advise GOL with respect to IPP procurement policies;
 - Set procedures and rules governing procurement of IPP;
 - Monitor compliance of IPP procurement with Lao law;
 - Recruit and manage independent assessors and advisors;
 - Settle disputes between developer and GOL agencies.
- c. In respect of the **Off-take Authority**:
 - Negotiate PPAs providing for off-take by a GOL agency (EdL);
 - Administer EdL PPAs during the construction, operating and transfer phases of a project.
- d. In respect of the **Investor Authority**:
 - Hold shares in IPP projects on behalf of GOL and administer GOL interests under project Shareholder Agreements;
 - Raise capital to meet GOL equity commitments;

- Manage GOL's IPP share portfolio, prudently acquiring and divesting equity holdings to optimize shareholder benefits;
- Manage and disburse GOL receipts from dividends, re-financings, etc.

The institutional framework for IPP procurement in Lao PDR is still developing and the allocation of Contracting, Monitoring, Off-take and Investor responsibilities is not yet in a settled form. The distribution of these responsibilities among GOL agencies is outlined below.

3.2 GOL Agencies' Role in IPP Procurement

The current organization of the power sector in Lao PDR is represented diagrammatically in Figure 1. IPP responsibilities are shared among a number of GOL committees, departments and agencies. Institutional arrangements are varied from time to time as GOL develops and refines its policies for private sector participation in electricity projects.

The functions of the key agencies and their role in IPP procurement are outlined below.

(i) Ministry of Industry and Handicrafts

Overall responsibility for power sector development is vested with the Department of Electricity (DOE) within the Ministry of Industry and Handicrafts (MIH). DOE reports through a Vice Minister to the Minister of Industry and Handicrafts.

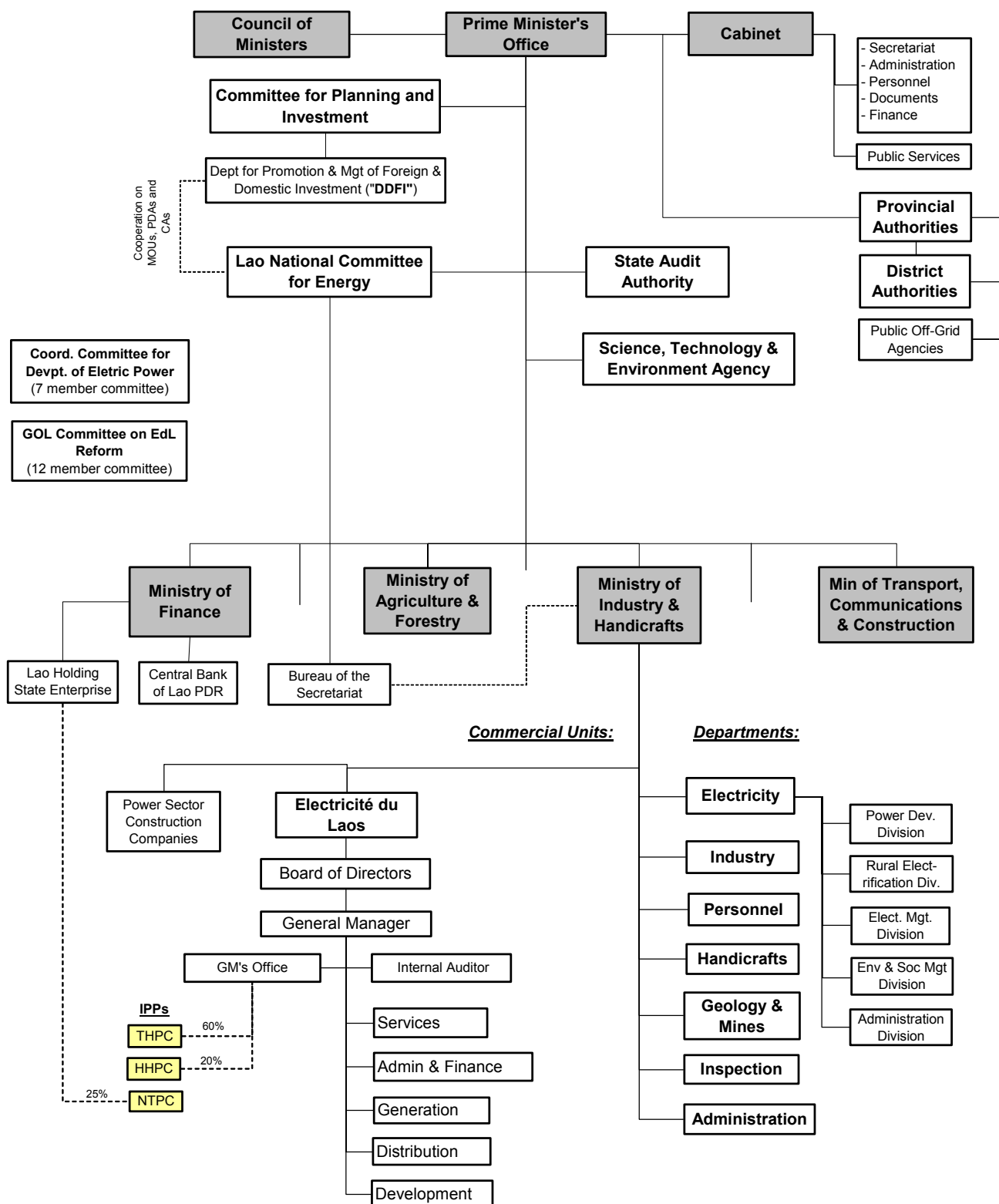
Under the Electricity Law (Article 43), MIH has primary responsibility for policy formulation and strategic planning which are undertaken jointly with the STEA, the Committee for Planning and Investment (CPI), and other agencies as relevant to the situation. It is also has responsibility for preparing and implementing legislation and regulations, collecting and processing data on electricity generating potential, preparation of recommendations on tariff levels for submission to GOL, administration and inspection of electricity enterprises.

MIH has a number of planning and regulatory functions in the development of IPP which include:

- Promotion of pipeline of projects (database);
- Formulation of power sector policy and procedures;
- Reviewing IPP studies and agreements;
- Participation in tariff negotiations with foreign investors (LNCE/CDEP);
- Monitoring environmental impacts and Environmental Management Plans in cooperation with STEA and other relevant ministries, agencies and local authorities;
- Establishment and monitoring of technical standards.

After reviewing technical studies prepared by developers promoting IPP projects, DOE formally issues a certificate of no objection to CPI.

Figure 1 - Lao Power Sector – Existing Power Sector Institutional Framework



(ii) Electricite du Laos

EdL is a state-owned corporation under MIH that owns and operates the main generation, transmission and distribution assets in Lao PDR, and manages electricity imports to its grids and electricity exports from its generating stations. EdL answers to its board which includes GOL appointees.

EdL has a project development role as the implementing agency for GoL's main generation, transmission and distribution projects. EdL's system planning office performs system expansion planning and analyses potential generation and transmission projects.

EdL is involved in the Lao IPP program in several capacities:

- EdL is an off-taker from IPP projects and is the Off-take Authority as described in Section 3.1. Though EdL off-take from IPP projects has been small to date, it will become an increasingly important source of generation for EdL in future and larger commitments from new projects are planned.
- The General Manager, EdL is a member of the Coordinating Committee for the Development of Electric Power (CDEP) charged with negotiating tariffs with foreign power purchasers for export IPP projects.
- Historically, EdL has been designated by GOL to hold its shares in IPP investments. and it is the current holder of shares in the Theun Hinboun Power Company and Houay Ho Power Company. These shares are administered by a special unit under the General Manager's office. Responsibility for GOL's shares in existing and future projects is under discussion. GOL's shares in the Nam Theun 2 Power Company are held by LHSE, a special purpose holding company.

The GOL Committee on EdL Reform, a high-level committee appointed by GOL, is currently considering options for restructuring EdL and the Lao power sector. Changes flowing from the committee's deliberations may alter EdL's role in IPP development.

(iii) Science, Technology and Environment Agency

STEA was established in 1999 as the main coordinating agency for environmental planning and management across all sectors. Its responsibilities are set out in Article 36 of the Environmental Protection Law and include implementing the National Environmental Action Plan, forming environmental policy, issuing and revoking of licenses to organizations involved in providing environmental services, receiving and evaluating EIAs and other environmental reports, and regulating agencies to curtail or modify activities that are having an adverse effect on the environment.

STEA has a significant role in IPP project procurement. It evaluates IPP feasibility studies and EIAs and, if approved, it issues environmental certificates. It performs these responsibilities in cooperation with DOE. STEA then monitors the environmental management plans of IPP projects and issues and revokes environmental licenses of IPP sponsors.

(iv) Lao National Committee for Energy

The Lao National Committee for Energy (LNCE) was established under Presidential Decree in 1999 to improve coordination between MIH and CPI in the evaluation, negotiation and approval of IPP projects. LNCE is chaired by the Deputy Prime Minister and the Minister of

Industry and Handicraft serves as Vice Chairman and permanent member. Permanent members also include senior ministers and officials from other ministries and agencies.

LNCE represents the sovereign interests of Lao in IPP projects and presently undertakes many of the functions of a Contracting Authority.

A "Bureau of Secretariat" (BS) supports the committee and performs many of the Contracting Authority functions described in Section 3.1. It negotiates on behalf of GOL, reporting to it on matters concerning investment in power projects, regional grid interconnection, export sales of electricity and contracts with project sponsors. It is also responsible for the promotion of investment in the power sector and meeting market demand for power in neighboring countries.

In the Lao PDR government hierarchy, LNCE's position is equivalent to ministerial status under the auspices of the Prime Minister's Office. The BS therefore has department status. The BS has three divisions, viz. (a) Project Support, (b) Database and Project Study, and (c) Contract Negotiations, and a fourth "Monitoring" division is currently being formed.

The authority to approve and sign IPP project agreements resides with CPI. CPI relies on the recommendations of LNCE in entering into these contracts. The Chief of the BS presents projects to cabinet and on satisfying cabinet the Prime Minister may then issue a notification to CPI to proceed with approval/signature of the document.

LNCE cooperates with CDEP in the negotiation of export tariffs and PPAs. It also cooperates with CPI / DDFI in the negotiation of IPP mandates (MOU / PDA / CA) and with GOL's designated shareholder.

(v) Lao Holding State Enterprise

The Lao Holding State Enterprise (LHSE) was established under the Business Law as a State Enterprise. Prime Ministerial decision of 27 January 2005 empowered MOF to establish the organization. The registration certificate was issued on 23 February 2005 designating LHSE as GOL's designated holder of its shares in the Nam Theun 2 project.

LHSE currently shares with EdL the Investor Authority responsibilities as described in Section 3.1. It is governed by a Board of Directors chaired by the Vice Minister of Finance. The General Manager of LHSE and the Chief of the Bureau of the Secretariat (BS) of LNCE are also board members.

LHSE's role is initially to represent the GOL's shareholder interests and to establish the revenue management framework for Nam Theun 2. As a holding company it could own shares in other projects and could establish them in a separate legal entity in order to escape revenue management covenants applying to Nam Theun 2.

(vi) Coordinating Committee for the Development of Electric Power

The Coordinating Committee for the Development of Electric Power (CDEP) is an ad hoc interagency committee involving senior representatives of LHSE, LNCE, EdL, Ministry of Foreign Affairs and STEA. Its single purpose is to negotiate export tariffs with EGAT, EVN and other foreign power purchasers. The committee does not have any established staff or office but is supported by LNCE. CDEP is the successor committee to the Committee for Energy and Electric Power (CEEP) and is the counterpart to equivalent committees in Lao PDR's export markets, e.g. the Committee on Electricity Cooperation and Development in Lao PDR (CECD-L) of Thailand.

(vii) Committee for Planning and Investment

The Committee for Planning and Investment (CPI) is a high level committee established within the Prime Minister's Office. CPI is chaired by the Deputy Prime Minister and includes the Minister of Industry & Handicrafts and Minister of Finance as permanent members together with other ministers as appropriate.

CPI is the agency charged with the responsibility for entering into commitments with IPP developers and it therefore signs MOUs, Project Development Agreements and Concession Agreements on behalf of GOL. It also performs some of the Monitoring Authority functions outlined in Section 3.1.

Reporting to CPI is the Committee for Investment and Cooperation (CIC), and under the CIC is the Department for the Promotion and Management of Domestic and Foreign Investment (DDFI), the working arm of CPI with responsibility for the administration and regulation of foreign and domestic investment in Lao PDR.

DDFI is the first point of contact for foreign investors seeking a license to invest in an enterprise in Lao PDR. Its role in promoting and managing foreign investment is set out in the Law on the Promotion and Management of Foreign Investment (2004) ("Foreign Investment Law"). All foreign investments are licensed and monitored through DDFI as the single interface between investors and the various arms of central and provincial government (Art.22 and 23). The Foreign Investment Law lists the activities to be promoted by DDFI (Art. 16), and these include export projects and infrastructure projects. DDFI receives applications and issues investment licenses, enterprise registration certificates and a tax registration certificates.

(viii) Ministry of Finance

The Ministry of Finance (MOF) is responsible for putting GOL's fiscal and monetary policies into effect, either by direct control or through the Central Bank of Lao PDR. In this capacity, MOF approves loans and issues sovereign guarantees on behalf of GOL and in compliance with GOL's international covenants, including those entered into with the IMF. MOF holds accounts at the Central Bank that receive soft loans that are on-lent to power sector projects.

Where GOL equity in IPP projects is financed by IFI loans the loans are channeled through the Ministry of Finance before being on-lent to the agency designated as the GOL shareholder.

(ix) Central Bank of Lao PDR

The Central Bank is effectively a ministry in its own right. It is independent of the Ministry of Finance and reports directly to the Prime Minister's office.

The bank was established in June 1990 through the Central Banking Law. The Central Banking Law provides for:

- Regulation and supervision of commercial banks, regional banks and other providers of financial services;
- Managing foreign exchange reserves; and
- Issuing money and managing the money supply;

The Central Bank has sole responsibility for setting and managing the exchange rate. Banque pour le Commerce Extérieur Lao is a subsidiary of the Central Bank and acts in this capacity.

Currently the Central Bank of Lao's role in IPP is limited. The Bank approves the establishment of foreign exchange accounts of the project companies in line with provisions of the various project agreements. The bank also holds accounts on behalf of the Ministry of Finance to receive soft loans from IFIs.

(x) Lao Banking Sector

The banking sector in Lao PDR is emerging. Savings capacity is still low and local banks are unlikely to sustain a traditional equity capital market for IPP investments in the foreseeable future. The banking sector consists of a several types of banks, ranging from state-owned commercial banks, local joint venture banks and branches of foreign banks. There are three state-owned commercial banks: Lao May Bank, Lane Xang Bank and Banque pour le Commerce Extérieur Lao (BCEL). BCEL, the largest bank in Lao PDR in both assets and market share, has traditionally dominated international banking activity in the country.

There are two local joint venture banks: Joint Development Bank and Vientiane Commercial Bank, which tend to focus on lending to local corporations. There is also a relatively new foreign joint venture bank, the Lao-Viet Bank, and five foreign bank branches, three being the major Thai commercial banks (Bangkok Bank, Siam Commercial Bank and Thai Military Bank), and the Public Bank of Malaysia and Standard Chartered Bank making up the five. Standard Chartered, with a permanent branch in Vientiane, is the only active international bank in Lao PDR.

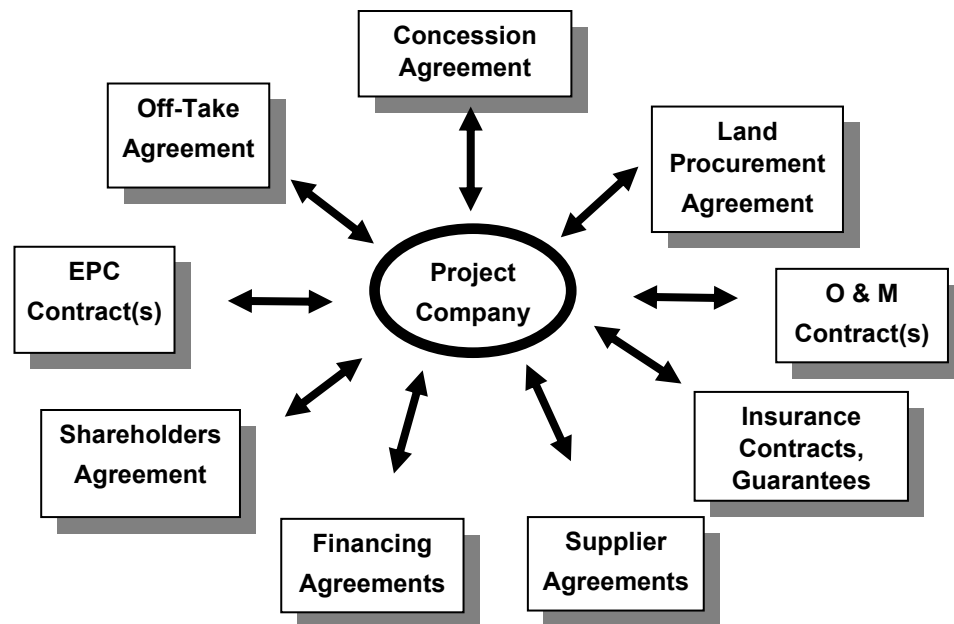
The local banking sector has not yet had a chance to participate in any IPP projects.

4.0 IPP Project Documentation

4.1 Overview

IPP project development is founded on an intricate web of interlocking contracts and security instruments. Project sponsors will register a project company (“**the Company**”) which will execute Project Agreements and Financing Agreements in accordance with Lao law, as applicable (refer Figure 2):

Figure 2 - Principal Project Agreements and Financing Documents



(i) Project Agreements to which GOL Agencies are a signatory:

- **Concession Agreement (CA)** – to be executed with the Committee for Planning and Cooperation on behalf of GOL for the concession to develop the Project.
- **Power Purchase Agreement for EdL Off-take (“EdL PPA”)** – to be executed with EdL for the sale of a portion of the output from the project;
- **Shareholder’s Agreement** – to be executed by the shareholders of the Company, including the Investor Authority designated by GOL to hold shares in the project on its behalf.
- **Direct Agreements** – direct agreements between project participants may be needed to manage the relationships between shareholders, off-takers, contractors, lenders, guarantors and GOL.

(ii) **Project Agreements to which GOL Agencies are not a signatory:**

- **Power Purchase Agreement for Export Off-take** (“Export PPA”) – to be executed with the foreign power purchaser for the sale of a portion of output from the project;
- **Engineering, Procurement and Construction Contract(s)** – usually executed as a single turnkey contract, it defines the Company’s requirements for the project facilities, and specifies a fixed price and a set time subject to narrow opportunities for relief.
- **Operating and Management Contract(s)** – to be executed with contractor(s) for the operation and maintenance of the project facilities for a defined period of the operating phase of the project.

(ii) **Financing Documents:**

- **Loan Agreements for Project Debt** – to be executed by the Company and its lenders to define the terms and conditions under which the lenders agree to provide debt finance for the project.
- **Loan Agreements for GOL Equity Contributions** – to be executed by the Ministry of Finance and GOL’s lenders to define the terms and conditions under which GOL’s lenders agree to fund GOL’s equity subscriptions (as defined in the Shareholders’ Agreement).
- **Security Documents** – to define the security arrangements and the rights of the Company’s lenders and GOL’s lenders to enforce them or rely upon them (e.g. disposal of assets, cross default and step-in rights, guarantee support, protection from actions of unsecured creditors).

The Project Agreements and Financing Documents together provide an interdependent contractual web with interlocking, back-to-back provisions to transfer project risks, rights and responsibilities to the parties according to their intentions. Interface issues, in particular with regard to the Concession Agreement, off-take agreements, EPC contract(s) and Financing Documents must be addressed in the procurement rules or in the Concession Agreement. In accordance with the new EU Directive, Article 68, and the EU Utility Directive, Article 27, the Regulatory Guide proposes some procurement rules with regard to the EPC contract(s), which rules may be essential for effective risk-allocation and competition under PPP / PFI concession contracts.

4.2 Model Project Agreements

Model project agreements drafted by government authorities are needed in particular:

- To ensure that GOL’s policies on IPP projects are implemented effectively and on equal terms in every project;
- To reduce the very high legal costs, including delay and development cost for preparing and negotiating agreements project by project;
- To prevent developers and their advisors from exploiting their often superior resources and experience in contract drafting and negotiation, and thus protect the country against unfair contract terms, onerous risk allocation and other contract terms biased against national interest;
- To facilitate the financing of IPP projects and reduce the time needed for financial closing. The familiarity of the lenders with the risk allocation embodied in model concession

agreements enhances lenders' understanding of the project structure, which reduces the time and cost of lenders' due diligence;

- To increase familiarity and understanding of GOL Agencies of project agreements and thus facilitate administrative approvals, control and supervision of the IPP project;
- To ensure that project documents promote the cost-efficient advantages inherent in IPP concepts to the benefit of the public interest; and
- To ensure higher legal quality of the project agreements which will make IPP projects more attractive to developers and their lenders, facilitate the implementation of the project and reduce future disputes.

It is, however, important to keep in mind that government-drafted model documents are to facilitate the development of IPP projects in Lao PDR to the benefit of all parties involved and should not include terms biased against the interest of the private developers and their lenders. Some provisions of the Model Agreements are standard and non-negotiable, while others are project-specific and open to negotiation. Model documents must strike a careful balance between the need to promote and protect the interest of Lao PDR and the need to offer commercially attractive projects to the developer.

Model Agreements for BOT hydropower projects developed under the Lao IPP program are listed in Table 1 and provided in Volume II (*Annexes*) of this Manual

Table 1 – Model Agreements for Privately financed Hydropower Projects in Lao PDR

Model Agreement	Prepared	Reviewed	Annex
Memorandum of Understanding	ADB Loan 2005-LAO(SF)	ADB Loan 2005-LAO(SF)	Annex 4
Project Development Agreement	UNIDO	ADB Loan 2005-LAO(SF)	Annex 5
Concession Agreement	UNIDO	GOL	Annex 6
PPA for EdL Off-take	ADB Loan 2005-LAO(SF)	ADB Loan 2005-LAO(SF)	Annex 7
PPA for hydropower projects < 10 MW	To be prepared under WB funding		Annex 8

The Model Agreements are based on international conventions and principles of commercial law (CISG, UNIDROIT, PECL, etc.). This ensures that:

- Contract terms *per se* are fair and balanced;
- The scope for contract negotiations is reduced considerably to the negotiation only of particular project terms;
- Contract terms are well-known and acceptable to lenders;
- Contract terms, being developed and reviewed over a period of time, are usually of a higher legal quality and authority than terms drafted for individual projects.

The following paragraphs list some features of the drafts of the Model Agreements.

(i) Model Memorandum of Understanding

Instruments such as letter of intent, memorandum of understanding (MOU), memorandum of intent, heads of agreement, letter of understanding, memorandum of agreement etc. in business transactions usually reflect preliminary undertakings of one or more parties to

larger, future contracts. In other words they are pre-contractual instruments representing initial steps towards final contracts.

a. Legal Effect of the Model MOU

The law that determines the legal effect of MOUs and other pre-contractual documents is not yet structured either in the civil law or in the common law countries. Under the law as it presently exists in the different legal systems, the treatment of pre-contractual instruments varies substantially, which creates potential for misunderstandings and disputes. Documents labeled “MOU” are viewed by many as merely preliminary with no legal force and effect and there is some support for this general proposition in case law and in scholarly works. However, the legal effect of such documents depends not only on the label given to it by the parties but also on its content. Under the law as it presently exists, civil law and common law systems agree in providing the parties with considerable party autonomy with respect to the legal effects of pre-contractual instruments. This means that most of the uncertainties in the law that governs pre-contractual documents can be eliminated by properly drafting of the documents.

b. Purpose of the model form of MOU.

The model form of MOU for private financed hydropower projects in Lao PDR has is provided in Annex 4. Minor customization is necessary to define the boundaries of the mandate and address any other matters as may be applicable for a particular project.

The Model MOU is drafted to:

- Constitute a legally binding contract with respect to the transactions it describes and within the mandate period;
- Define the mandate and describe the developer’s obligations in studying the project to better understand the characteristics of the project;
- Ensure that the GOL or any GOL Agency is not responsible for the costs and expenses of the private developer, including the costs of feasibility and technical studies;
- Ensure the developer exclusive and enforceable rights with regard to the project development before the developer invests in feasibility and technical studies;
- Address those issues identified as relevant by the experience of earlier MOUs in Lao PDR; and
- Establish a good faith obligation to conclude a Project Development Agreement (PDA) within the mandate period.

c. Negotiation of successor agreement

The good-faith obligation in the Model MOU (Article 7) does not commit the parties to conclude a successor agreement (PDA) within the mandate period but it does commit them to conduct negotiations in accordance with the terms set forth in Article 7 and with recognized commercial standards of fair conduct. For example, the good-faith obligation bars a party from unilateral refusal or postponement of negotiations or from insisting on terms that:

- Are not customary or internationally recognized for this type of transaction;
- Do not substantially conform with those outlined in Article 7 (a-c); or
- That are so unreasonable that they cannot expect acceptance.

Violation of Article 7 constitutes a breach of contract entitling the damaged party to receive compensation and/or to terminate the MOU in accordance with Article 12.

To facilitate the good-faith negotiations, a copy of the Model PDA is included as a schedule of the Model MOU, providing a clear indication to the parties of the nature of the terms to be agreed in negotiations.

(ii) Model Project Development Agreement

The Model PDA is provided in Annex 5. The PDA is an interim agreement between the MOU and Concession Agreement, and is generally a step in the procurement sequence if concessions are negotiated directly and exclusively with a developer. Without the PDA step, the execution of a Concession Agreement would need to be sooner in the development cycle and its effectiveness conditioned by conditions precedent.

a. Purpose of the model form of the PDA.

In an exclusively negotiated mandate, a PDA provides an interim step between MOU and Concession Agreement in the award of an IPP hydropower concession. The inclusion of the PDA stage in the award sequence allows greater certainty and detail to be developed in the terms of the mandate before large project preparation expenditures are incurred and power purchase commitments are made.

b. Features of the Model PDA

Some customization of the Model PDA is necessary to introduce information and terms and conditions specific to a particular project. Matters addressed in the Model PDA include;

- Provision for specifying the mandate including key project parameters;
- Obligation of the developer to lodge a PDA bond;
- Actions and obligations of the parties during the mandate period;
- Agreement by the parties on a project development timetable;
- Establishment and structuring of the Company;
- Agreement by the parties on taxes and royalties payable by the Company;
- Management and accounting of project development costs.

c. Negotiation of successor agreement

The good-faith obligation in the Model PDA (Article 6) commits the parties to negotiate successor agreements to the PDA including the Concession Agreement.

Failure to execute all relevant Project Agreements within the mandate period of the PDA will trigger its automatic expiration.

To facilitate the good-faith negotiations, a copy of the Model CA is included as a schedule of the Model PDA, providing a clear indication to the parties of the nature of the terms to be agreed in negotiations.

(iii) Model Concession Agreement

The Model Concession Agreement is provided in Annex 6. It is the key legal instrument granting the concession to the developer, specifying the rights and obligations of the parties, and providing GOL with control of the complex implementation issues. The Model CA It is contained in 3 volumes:

- Volume 1 contains the basic, operative provisions of the agreement.
- Volume 2 contains the Schedules to the Model CA, typically addressing particular condition for each project.
- Volume 3 contains documents of informative nature.

Volume 1 and Volume 2 will together comprise the legal rights and obligations of the parties.

a. Model CA based on international contract principles

In order to ensure that the terms of the Model CA are balanced and fair to both parties, the document embodies internationally recognized contract principles as far as applicable. To a considerable extent it relies on the legal principles set forth in international conventions such as the CISG, UNIDROIT's Principles of International Commercial Contracts, internationally applied standard forms of contracts (for example, FIDIC Silver Book 1999) and the legal solutions common for the large codifications such as Code Civil and BGB.¹

The Model CA also draws on the vast body of laws on unfair contract terms promulgated in most industrialized countries over the last thirty years (e.g. the laws on unfair contract terms or on general conditions of business contracts of Sweden (1974), Germany (1976), UK (1977), France (1978) and Norway (1983); also the United States Uniform Commercial Code, sec 2-302.)

The international principles are well known, or should be well known, to foreign developers and their lenders and are difficult to reject since in most cases they will have been ratified or recognized by their home-countries. Their international acceptance give them authority which tends to narrow the scope for contract negotiations reduce transaction costs and time.

b. The Model CA covers the general conditions of the concession terms

The Model CA sets forth the General Conditions for hydropower concessions. Specific terms ("Technical Specifications") such as a project's physical characteristics, design and construction specifications, specific operational requirements, off-take arrangements, etc. must be addressed, project by project, and attached as schedules to the Model Concession Agreement. The General Conditions of the Concession Agreement may need to be changed, supplemented or clarified by Particular Conditions due to the requirements of each project.

c. Preceding agreements

The Model CA is drafted on the assumption that its execution is preceded either by an international, competitive bidding procedure or by a negotiated procurement procedure involving progressively MOU and PDA contracts. If a negotiated procurement

¹ Taking force majeure, one of the more contested provisions in IPP contract, as an example, the Model CA, Article 18, applies the force majeure concept defined originally in Code Civil, Article 1148, applied by Anglo-American courts (e.g. Eastern Airlines. Inc. v. Gulf Oil Corp.) and now reflected in CISG, Article 79

procedure is used without the use of a PDA, Article 2 of the Model CA should be modified to specify a number of conditions precedent to be satisfied before the CA becomes effective.

d. Form and structure of the Model CA.

The proposed structure of the Model CA is strictly “functional”. This means that the provisions of the agreement are ordered in accordance with the development phases of the project. From the signing of the agreement, to the construction phase (design, construction and commissioning), to the operating phase and to provisions on transfer of the project. Finally, the Model CA contains provisions on breach of contract and on the position of third parties. The functional structure is designed for ease of use by non-legal persons.

In order to avoid repetition and overlapping, provisions applicable to all phases of the project are listed in chapter V (“General Obligations”). This chapter includes such issues as changes in law, environmental protection and insurances. Note that this structural approach is adopted in international conventions, e.g. the United Nations Vienna Convention of 1980.

e. Bankability of the Model CA.

A model concession contract must be bankable. Foreign investors may not regard the credit rating of Lao PDR as attractive and to facilitate foreign financing the Model CA accommodates many lender concerns including security arrangements, charge over off-shore accounts, step-in rights, insurance requirements, etc. The Model CA is an evolving document and the document may need further development to address reasonable lender concerns.

f. Domestic Preference

The proposed provisions on domestic preferences and review procedures may require some clarifications with regard to the administrative system of Lao PDR and the industrial and commercial policies of Lao PDR. International experience shown that PPP / PFI projects may have considerable and positive impact on the development of national industry and research

(iv) Model Power Purchase Agreements

Off-takers from Lao IPP projects will include foreign buyers (e.g. EGAT, EVN) and EdL. Current GOL policy contemplates some domestic off-take for all projects. Projects can be classified according to their off-take arrangements:

- Export project with some domestic off-take: The Company will enter into PPAs with one or more foreign power purchasers and with EdL for the sale of a project’s output. A project’s financing is normally secured on the sales revenue of the foreign buyer only and export sales will therefore account for the greater part of a project’s production.
- Domestic project: Where financing can be secured on EdL sales revenue, IPP projects selling exclusively to EdL can be promoted. In such cases, the Company would enter into a PPA with EdL only.

The Company will therefore contract for the sale and purchase of electricity from the project as follows:

a. PPA for foreign off-take

GOL Agencies are involved at a government-to-government level in negotiating umbrella power trading agreements between Lao PDR and its neighbors and are also participants in tariff negotiations for individual export projects. However, they are not signatories to any PPA between a project company and a foreign power purchaser. The practice of foreign buyers to date is to negotiate PPAs individually for each project without the use of a model document.

If a competitive tendering process is employed in awarding an IPP concession, a draft PPA may be negotiated between GOL and the foreign buyer in advance of the solicitation and a copy provided with the Request for Proposals (RFP) suite of documents. This would alert bidders to the terms and conditions covering the portion of a project's output committed to the foreign buyer.

b. PPA for EDL off-take

The Model PPA for EDL off-take (Model EDL PPA) is provided in Annex 7. It sets out sale and purchase terms and conditions as they apply to off-take by EDL.

Matters addressed in the Model EDL PPA generally parallel those in the PPA for foreign off-take. However, Model EDL PPA and the PPA for export off-take should be carefully coordinated in respect of the following:

- The Company's total electricity sale commitments are consistent with site hydrology, project design and water rights under the Concession Agreement;
- Transmission and interconnection arrangements with the foreign buyer's system and the EDL system;
- Minimum technical requirements of project elements supplying each market;

The tariff payable by EDL for domestic off-take is generally set at a level to achieve a revenue neutral position for the Company between export and domestic sales. Accordingly, the Model EDL PPA stipulates a tariff based on the opportunity cost of export sales foregone but leaves open the level of domestic electricity sales.

5.0 IPP Procurement Procedures

5.1 Introduction

To date, systematic formal IPP procurement procedures for Lao PDR have not been issued.

Reputable private developers are sometimes discouraged by public sensitivity to hydropower projects, in particular with regard to environmental and resettlement issues for reservoir schemes and social impacts of basin transfer schemes. This sensitivity may provoke international reaction which could disrupt and delay procurement and financing proceedings. Public sensitivity to hydropower cannot be deflected by procurement procedures alone but structured and transparent procurement proceedings that meet adequate standards of public consultation and accountability will allay many of the concerns of international lenders.

5.2 Development of the Procurement Regulations

In response to the need for structured and transparent procurement procedures, the *Regulatory Guide on Procurement of Concession Contracts for Privately Financed Power Generation Projects* (“**the Regulatory Guide**”) has been prepared and issued to GOL in draft form for comment.² The Regulatory Guide on Procurement of Concession Contracts for Privately Financed Power Generation Projects is attached as Annex 1. The Regulatory Guide provides for public accountability in Articles 8, 18, 51 and 64.

Competitive and transparent bidding has proved to be the most effective procurement method to ensure cost-efficient and timely IPP projects world wide. Experience from developing countries clearly indicates that to promote competitive and transparent bidding for IPP projects and to attract reputable foreign investors a legal or regulatory framework for procurement is needed. Such a framework should also promote transparency and regulate exceptional cases where procurement methods other than competitive bidding are applied.

The proposed regulatory framework for procurement of IPP hydropower projects in Lao PDR, as set out in the Regulatory Guide, is developed in four stages:

- Fundamental procurement principles are drawn from the procurement rules published by prominent international organizations;
- These fundamental principles are adjusted to specific procurement requirements for PPP / PFI projects as identified by research;
- These principles are adapted to accommodate the special requirements of hydropower projects.
- The principles are further adjusted to harmonize with the procurement traditions of Lao PDR

² The proposed *Regulatory Guide on Procurement of Concession Contracts for Privately Financed Power Generation Projects* was drafted under the ADB-funded IPP Development and Institutional Strengthening Project (2005).

(i) Procurement Principles drawn from International Procurement Rules

The first stage of the drafting process involves the distillation of key principles from international procurement rules.

The international trend is towards transparent and competitive project procurement as the major method for procurement of concession contracts for PPP / PFI projects. All treaties and other international rules governing public procurement, such as WTO's Government Procurement Agreement (1994), the EU Directive on the Coordination of Procedures for Award of Public Contracts (2004), the UNCITRAL Model Law on Procurement (1994), the OECD Procurement Regulations, as well as the mandatory guidelines for government procurement under loans from multilateral agencies (e.g. Guidelines On Procurement under Asian Development Bank Loans and the World Bank's Guidelines, Procurement under IBRD Loans and IDA Credits) set forth transparent and competitive procedures as the major method for public procurement. These provide often very detailed rules for the procurement proceedings and the permitted exceptions to competitive procedures.

(ii) Adaptation of Procurement Principles for PPP / PFI Projects

The second stage of the drafting process involves adaptation of the general rules for procurement of works and goods to take into account the particular needs related to procurement of PPP / PFI concessions, irrespective of the type of project.

Generally the specific rules on public procurement of PPP / PFI projects are less developed and less uniform than the traditional rules for procurement of works and goods as embodied in the International Competitive Bidding (ICB) procedures.

Thus the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (in the following "the UNCITRAL Guide") set forth only twenty provisions to assist governments in developing specific laws governing the procurement of PPP / PFI projects (refer the UNCITRAL Guide, Section II). The new EU Directive, while recognizing the particular procurement needs for PFI projects, provides only ten provisions on the subject (cf. Title V), and these provisions are far from uniform with the corresponding provisions of the UNCITRAL Guide.

The World Bank Guidelines (cf. Section 3.13) and the ADB Guidelines (cf. Other Forms of Procurement, Section I) "do not insist" on traditional competitive bidding procedures when participating in financing of a PPP / PFI project. The banks only require that either of the following procurement procedures "shall be used":

- "a. The project sponsor for a BOO/BOT/BOOT or similar type of project shall be selected in a transparent manner, preferably through competitive bidding procedures acceptable to the bank,... ..; or
- b. If the project sponsor has not been selected in the manner set forth in subparagraph (a) above, the goods and works required for the facility.....shall be procured... .. in a transparent manner, through competitive bidding procedures acceptable to the bank ”.

Given the lack of a comprehensive and uniform legislative approach to procurement of PPP / PFI projects, a tailored framework is required that meets the particular procurement needs for such projects.

(iii) **Adaptation of Principles for PPP / PFI Procurement of Hydropower Projects**

The third stage of the drafting process deals with particular procurement issues raised by the specific nature of hydropower projects.

Most contracts for privately financed hydropower generation projects have been awarded by direct negotiations. It is argued that competitive procurement of hydropower would be a difficult, costly and lengthy process due to such causes as:

- The site specific nature of hydropower projects, which makes them very difficult to define with the certainty required for competitive bidding without significant expenditures on river basin studies, site investigations and the like; and
- Uncertainty in project outputs due to seasonal and annual streamflow variability and a lack of reliable hydrological data for estimating long term mean flows; and
- Environmental and social sensitivity of hydropower projects; and
- For Lao PDR, the location of the principal off-taker in another country, putting such matters as tariff and PPA terms and conditions outside the control of the Contracting Authority.

Few serious private developers, and there are few hydropower developers in the market, will consider submitting a final and binding bid against such project characteristics and uncertainties. They are unwilling to engage in the high front-end expenditures needed to reduce the uncertainties without a negotiated, agreed position on the project.

Significantly, however, competitively bidding processes have been, or are being, applied in the award of concessions in respect of a number of hydropower projects including those in Table 2. A significant public element was involved in some of the listed projects and in others the post-tender negotiations detracted from the effectiveness of the competitive process; nevertheless, the experience suggests that competitive bidding is a better procurement option where the project can be defined to a satisfactory level of precision.

Table 2 - Competitive Bidding of Hydropower PPP / PFI Projects

Project	Country	№ of Bidders	Project Status
San Francisco	Ecuador	4	Bids evaluated but project cancelled due to political intervention
San Roque	Philippines	1	Concession awarded and project implemented
Bakun	Philippines	n/a	Alternative bid negotiated. Project implemented
Ita	Brazil	2	Concession awarded and project implemented
Bujagali	Uganda	3	Preferred bidder declared; final negotiations in May 2005
Bumbuna	Sierra Leone	-	Existing project – O&M concession bid in progress

(iv) **Adjustment of the Regulatory Guide to Procurement Traditions of Lao PDR**

As the fourth drafting stage, the Regulatory Guide has been adjusted to fit into the procurement tradition and current, overall PPP / PFI conditions of Lao PDR.

To date, all concessions for larger, privately financed hydropower projects in Lao PDR have been awarded by negotiated procedure. The features of the negotiated procedure generally include the following:

- The potential developer is offered an exclusive MOU for a period of 12 to 18 months to conduct preliminary investigations of the project and feasibility studies;
- The Contracting Authority and the developer signs a project development agreement (PDA) providing the developer with the right to develop the project further on a BOT basis and confirming the agreement of the parties to draft and negotiate the necessary project agreements;
- A tariff and a PPA are negotiated with the foreign power purchaser through a government to government committee and between the developer and the foreign utility. In the case of domestic off-take, a tariff and PPA are negotiated with EdL;
- The Contracting Authority and the developer sign the final concession agreement before the project is submitted for approval to the National Assembly of Lao PDR.

This model for award of privately financed concession contracts has exposed the Contracting Authority to closed-door negotiations against developers that are better resourced and at a natural advantage in terms of access to project technical and cost data. The model has led to commercial arrangements and risk allocations onerous to Lao interests and clearly contrary to the basic principles of the PPP / PFI concept. There has been no competition under the negotiated procedure to extract the best possible technical, commercial and contractual terms from the developers and power purchasers.

It is likely that the negotiated procedure will continue to be applied in the award of hydropower concession contracts in Lao PDR for the time being. Without external support, the contracting authorities of Lao PDR lack the experience and funds to manage complex, competitive procurement proceedings for larger hydropower projects. Also, Lao PDR does not possess the credit rating, the legal framework and other conditions necessary to attract qualified foreign developers willing to participate in a competitive contest in the numbers needed for a successful competitive procurement process.

The reality of the Lao market, as described above, has had two major influences on the Regulatory Guide. Firstly, while proposing transparent, competitive procedures as the major procurement methods of the Regulatory Guide, the scope defined in the Regulatory Guide, Article 15, for a negotiated procedure is rather wide and flexible compared with the exceptions to competitive bidding accepted by internationally recognized procurement agencies (with the possible exception of the catalogue set forth by the WTO in its GPA, Article XV). Secondly, the Regulatory Guide introduces some transparency, competition and quality elements in the structured proposal for negotiated procedure. These measures are outlined in Section 5.0 of this Manual and set forth in Articles 62 and 63 of the Regulatory Guide.

5.3 Procurement Procedures

The Regulatory Guide embodies research-based elements that take account of essential features of PPP / PFI projects to which the traditional public procurement methods must be adjusted in order to ensure efficient, transparent and competitive procurement of concession contracts for PPP / PFI projects. To the extent a particular PPP / PFI procurement issue has been addressed by the UNCITRAL Guide (or the EU Directives), the Regulatory Guide usually follows the international lead. Internationally recognized procedures and provisions have a value of their own, particularly in the context of a developing country without a strong market position. They provide compelling grounds for rebuttal if challenged by developers.

Though confidence in the award of PPP / PFI contracts is best achieved within a structured and formal procurement framework that promotes transparency and competition, there are situations

where traditional, competitive procedures for public procurement are not entirely suitable for procurement of concession contracts for PPP / PFI projects. The Regulatory Guide proposes open, competitive bidding as the general procurement method for IPP projects, but permits, under special conditions, other methods of procurement to be applied. The procurement procedures and the conditions for their use are set forth in Part III of the Regulatory Guide.

5.4 Structure and Form of the Regulatory Guide

The Regulatory Guide has been structured and drafted in the form and language of legal rules so that they could be used by GOL not only as procurement guidelines for specific IPP hydropower projects, but also as guidelines for the development and promulgation of a PPP / PFI procurement law or general PPP / PFI procurement regulations. The higher status of a law or regulations would provide benchmark promotion of the PPP / PFI sector in Lao PDR in a competitive international market and give greater comfort to prospective reputable foreign investors by giving legal force to GOL's policies for effective procurement proceedings for PPP / PFI concessions.

The PPP / PFI procurement law or general regulations would, amongst others, bind the Contracting Authority to certain minimum requirements and facilitate consistency and completeness in the drafting of pre-selection and procurement documents between projects;

Such a PPP / PFI procurement law or general regulations should be supported by article-by-article remarks to promote an understanding and practical application of the rules.

5.5 Monitoring and Review of IPP Procurement

Effective safeguards to monitor and review the acts and decisions of the Contracting Authority and the procedures followed by the Contracting Authority are essential keys to achieve the objectives and the proper functioning of a procurement system and to promote confidence in that system.

Those safeguards rest primarily on two parts of the Regulatory Guide:

- a. Provisions that provide for the fair treatment of bidders, facilitate the work of audit and oversight bodies, and encourage transparency of process. In particular, it provides a framework in which the Monitoring Authority can monitor and safeguard the procurement proceedings.
- b. The presence of a framework for bidders to seek review if they claim to have suffered, or may suffer, loss or injury due to the failure of the Contracting Authority to act in accordance with the provisions of a procurement system. The Regulatory Guide, chapter VIII, provides for the type of challenge procedure set forth by the Government Procurement Agreement of the WTO, Article XX, as regards involvement of an independent administrative review body, the right to judicial review, publicity of the review procedure, time limits for filing challenges or appeal, possibility of suspension of procurement proceedings and other remedies. The objectives of the Regulatory Guide, chapter VIII, have been to balance the need to establish the aggrieved Bidder's right to meaningful review and at the same time to take into account the need to protect the procurement proceedings against undue disruption.

6.0 IPP Project Development Process

6.1 Objectives of IPP Project Development

The primary objectives of an IPP development process are to facilitate investments as quickly, efficiently, reliably and beneficially as circumstances allow. Specific objectives of the development process are:

- Maximize system efficiency (domestic) and GOL revenues (export)
- Minimize project cost, mitigate impacts and maximize GOL benefits
- Maximize certainty in operating dates
- Assure construction quality standards
- Allocate and manage risks effectively
- Maximize acceptance by lenders and guarantors
- Apply effective governance to promote transparency in the development process and equality among participants.

To achieve these objectives, the development process must be designed to account for variations in:

- The legal and regulatory framework in force at the time;
- The institutional framework;
- Type and size of the project;
- Source of finance and securities;
- Characteristics of a market in which the off-take from hydropower projects may be sold into national or international markets, or both.

Where IFI support is involved, development processes should comply with the procedures of the relevant agency.

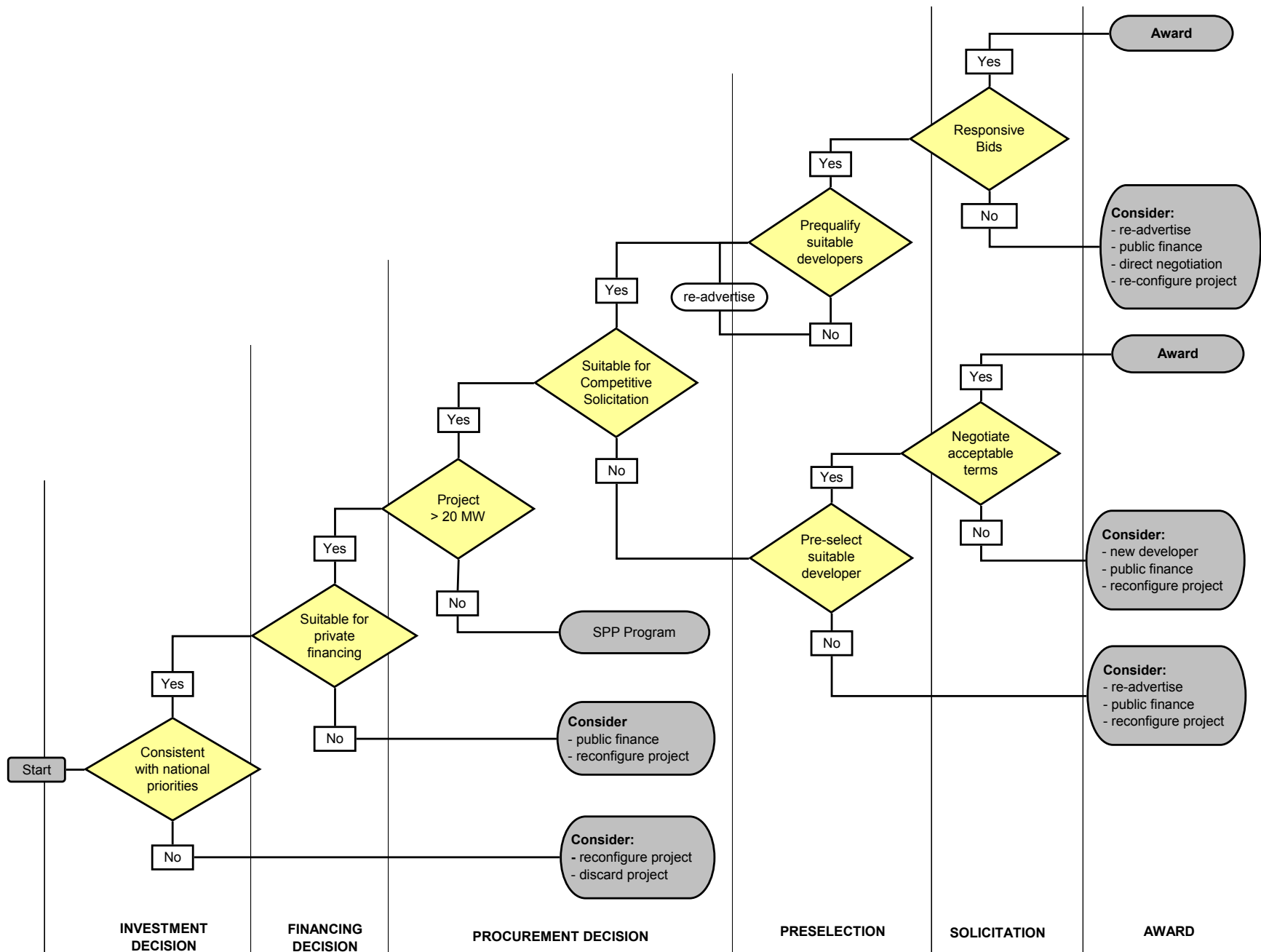
6.2 Stages in IPP Project Development

The way in which projects are selected, prepared and procured will determine the extent to which the objectives of the IPP program are met. Projects should be developed in the following sequential stages:

- Investment decision
- Financing decision
- Procurement decision
- Pre-selection of developer
- Project evaluation / preparation of proposal
- Negotiation and award of concession
- Post-award activities

An appropriate decision making process for hydropower project development, embodying the procedures for privately financed projects set forth in the Regulatory Guide, is outlined diagrammatically in Figure 3. The Regulatory Guide admits a range of procurement procedures that might be applied according to the circumstances but, for clarity, Figure 3 is based on a simplified distinction between competitive and non-competitive procurement models.

Figure 3 –IPP Development Process



6.3 Investment Decision

6.3.1 Decision Process

The first step in the IPP project development cycle is to decide whether an investment should be made and in which project. The investment decision is based on an economic analysis of project alternatives using appropriate assumptions and parameters to facilitate fair comparison.

Article 15 of the Electricity Law stipulates that IPP concessions may be awarded for projects that provide demonstrable benefits to the economy and society and are consistent with national planning. Any decision to invest should therefore follow a two-step process in determining, firstly, which project out of a number of alternatives is the best investment and, secondly, whether the favored project provides a return that justifies the investment taking into account alternative applications of GOL's scarce resources.

The analysis is performed A decision to invest will follow where an economic analysis shows the project is the best use of scarce capital and is likely to generate adequate returns.

6.3.2 Selection of the Best Investment

The objectives of an IPP investment will vary depending on the perspective of the party, be it investor, lender or government. A developer will, for instance, have a single-project, commercial focus whereas GOL will have a broader macroeconomic and program focus.

GOL's investment objectives are optimal generation augmentation (domestic off-take) and revenue maximization (export off-take). Selection of the optimal project requires, amongst others:

- Identifying projects in the context of the relevant optimal river basin development plan;
- Sequencing and configuring projects for domestic supply according to least-cost hydro-thermal generation expansion principles;
- Sequencing and configuring projects for cross border off-take according to GOL revenue maximization criteria.

Power system planning and project ranking studies are periodically prepared by DOE and EdL and the choice of project to offer to the market should be consistent with the sequencing and timing of projects set out in the current editions of these studies.

6.3.3 Adequacy of Returns

It is not sufficient that a project is the best available; it must further be shown that the GOL benefits generated by the project are adequate. Although the private sector contributes most of the capital, the public sector also has a considerable stake in an IPP project and should proceed only if the commitment promises an adequate return. The public commitment includes:

- Opportunity cost of site: The land and water resources tied up by the project may have alternative uses, and the returns from these uses are foregone in the decision to develop the project.
- Risks are borne by GOL: Many project risks are borne by GOL, its agencies, IFI supporters and local communities. The capacity of GOL to cover project risks is not unlimited and the decision to proceed with one project may imply an inability to support another.

- GOL share participation: GOL's decision to participate in the shareholding of the ownership company may require the investment of significant capital.

In demonstrating that the investment is a justified application of GOL's scarce resources, it is necessary to show that hurdle EIRR rates of return are achieved.

6.4 Financing Decision

The investment decision is followed by a decision on the manner of the project's financing.

Financing options include:

- Public sector financing
- Private financing (BOT)
- Mixed public / private financing

The choice of financing plan is based on the most attractive realistic financing option. Factors to be considered in designing an appropriate financing plan include:

- Project characteristics (e.g. single or multi-purpose, type of impacts, nature of the infrastructure service, specific cost of capacity and energy);
- Cash flow projections and project financial performance;
- Project risk profile and risk management strategies (e.g. insurance, risk transfer to EPC contractor, political risk cover);
- Security of revenue stream and creditworthiness of off-takers, particularly those on which lenders will rely on for bankability;
- Capital market characteristics (local and regional market liquidity, cost and availability of equity and debt).
- Extent of equity participation by GOL and the likely source and cost of capital for GOL's equity contributions.

To assist in the formulation of a financing strategy, spreadsheet financial modeling of the project should be conducted to calculate cash flow projections and calculate financial performance indicators under various financing assumptions.

6.5 Procurement Decision

6.5.1 General

Following the financing decision, a choice is made about the procurement procedure to use to engage parties to assist GOL in developing the project. The method of procurement takes into account the size of project and whether it is publicly or privately financed:

- Procurement of publicly financed projects follows ICB / LCB procedures, as appropriate;
- Procurement of privately financed projects is in accordance with the Regulatory Guide:

- (1) Except as otherwise provided in the following paragraph (2), privately financed generation projects are procured in accordance with the procedures set forth in the Regulatory Guide.
- (2) Small hydropower projects (installed capacity of [10 MW] or less) are procured in accordance with the principles of the Small Power Producer (SPP) program as outlined in Section 11.0 (refer Regulatory Guide, Article 3 (2)).

6.5.2 Procurement for Privately Financed IPP Projects

The methods of procurement and the conditions for their use are set forth in chapter III of the Regulatory Guide and comprise:

(i) Open Competitive Procedures for IPP Procurement

The Regulatory Guide proposes open competitive bidding as the general procurement method for IPP projects. The procedure is specified in chapter IV of the Regulatory Guide and outlined in Section 8.0.

(ii) Alternative Methods of Procurement

The contracting authority may use procurement procedures other than open, competitive bidding where the approval of GOL's monitoring authority is obtained (Regulatory Guide, Article 12). Procurement procedures permitted by the Regulatory Guide are:

- Restricted competitive procurement procedures – Restricted competitive procurement is described in the Regulatory Guide, Articles 13 and 60, and differs from an open competitive procurement procedure only in that pre-selection is restricted to invited applicants.
- Two-stage procedure – For complex projects where it is not possible to describe in sufficient detail in bidding documents the characteristics of the project (technical specification, financial arrangements, contractual terms), the contracting authority may engage the market through a two-stage procedure as described in Section 9.0 and as specified in the Regulatory Guide, Articles 14 and 61.
- Negotiated procedure – The negotiated procedure is stipulated in the Regulatory Guide, Articles 15, 62 and 63, and involves the direct negotiation of a concession with a developer that has met pre-selection standards. The negotiation process involves the progressive negotiation of MOU, PDA and concession agreement as the developer undertakes increasingly detailed studies of the project as further described in Section 9.4.

(iii) Unsolicited Proposals

The contracting authority is authorized pursuant to Article 61 of the Regulatory Guide to consider unsolicited proposals if it considers the proposal to be in the public interest. The procurement procedures for unsolicited proposals are described in Section 10.0 and set forth in Articles 15 and 64

6.6 Pre-selection of Developer

The next step in the project development process is the selection of a developer. All procurement procedures permitted under the Regulatory Guide, save the unsolicited proposals procedure, a pre-selection process is involved.

Pre-selection requirements for each method of procurement are specified in the Regulatory Guide and discussed further Section 7.0.

6.7 Project Preparation

Reputable investors will be attracted by the promise of a well-defined project and an orderly, transparent award procedure. The objective of project preparation is to provide bidders with the information they need to: (i) estimate costs and revenues; and (ii) to assess risks. Better prepared projects encourage tighter bidding contests, smaller contingencies and a shorter procurement period.

Preparations may include some or all of the following:

- Site selection according to national power plans and off-taker requirements;
- Investigations and studies to determine site characteristics, including:
 - Hydrology – long term mean monthly flow and flood frequency estimates;
 - Topography – head, reservoir storage characteristics and other inputs;
 - Geology – project layout and preparation of project cost estimates;
 - Social and environmental effects – impact studies and management plans and costs;
- Preparation of bid documentation and particular conditions for model agreements;
- Off-take terms and conditions (determined in consultation with export and domestic off-takers);
- GOL and IFI support (e.g. exemptions, incentives, guarantees);
- Site preparation (e.g. permits and approvals, resettlement, UXO) and infrastructure (e.g. coordinated development of transmission).
- Eligibility for carbon credits;

GOL may not have the resources to progress project preparations to an advanced stage and the Contracting Authority may therefore not be in a position to define in the bidding documents the characteristics of the project in a manner sufficiently detailed and precise to permit final bids to be formulated. The Contracting Authority may also be unable to assess what the market can offer in the form of technical or financial solutions. To accommodate this situation, the Regulatory Guide defines the following procedures:

(i) **Within a competitive bidding procedure** (Article 25):

The Contracting Authority in the pre-selection documents may ask Bidders to submit an outline proposal indicating the Bidders' technical and financial solutions to meeting specified objectives or functional requirements of the project. The Contracting authority may then discuss the outline solutions with each pre-selected Bidder to clarify those best suited for the

project. The Contracting Authority can then draw on these solutions to prepare the final terms of the bidding documents and invite pre-selected bidders to submit a formal bid. During the dialogue the Contracting authority may not disclose to other Bidders the outlined solution proposed or any other confidential information given by Bidders. The Contracting Authority shall prepare minutes of any such discussions and submit them to the Monitoring Authority as part of the formal record of procurement proceedings.

(ii) Within a non-competitive procedure (Article 62):

Under a negotiated procedure, a sole mandate in the form of an MOU may be given to a developer without the need to define the project characteristics to the same level of detail. There are, however, disadvantages in this approach:

- GOL is reliant on studies financed, managed and executed by the developer for its understanding of the project;
- The front-end development time and cost may deter reputable developers;
- GOL becomes committed to a developer and to a project before it knows much about either.

The Regulatory Guidelines includes provisions to promote transparency in a negotiated procedure, among them:

- Article 8: To provide transparency and accountability, the Contracting Authority maintains records of the procurement proceedings;
- Article 11: The Monitoring Authority must approve the use of negotiated procedures and oversee compliance with the Regulatory Guide;
- Article 18: Pre-selection proceedings are advertised publicly;
- Article 62(1)(h): A notice of the initialing of the concession agreement is published, together with a summary of its essential content.
- Article 63: Where a concession is awarded by a negotiated procedure, contracts for the project's civil construction and plant and equipment shall be procured through competitive procedures unless otherwise approved by the Monitoring Authority;
- Articles 71 – 76: Review procedures are defined.

6.8 Solicitation, Negotiation and Award of Concession

The process of soliciting and obtaining proposals, evaluating them, negotiating deviations and awarding the concession contract follows the procedures set forth in the Regulatory Guide for the adopted procurement model:

- For an open, competitive bidding procedure, the process is described Section 8.0;
- For a restricted, competitive bidding procedure, two-stage procedure and negotiated procedure, the process is described Section 9.0;
- For an unsolicited proposal procedure, the process is described Section 10.0.

Irrespective of the procurement model used, negotiation plays a role in bridging differences between parties' expectations. The negotiations involving GOL agencies primarily involve the following agreements:

- Concession Agreement (and in the case of negotiated procurement procedures, its precursor, the Project Development Agreement);
- PPA with the project's export off-taker – GOL agencies are involved in government-to-government negotiations on the wholesale tariff to be paid by the foreign off-taker for output delivered by the Company;
- PPA with EdL for domestic off-take – Concurrent with the Company's negotiations with the foreign off-taker, EdL and the Company must negotiate an off-take agreement for domestic sales. A Model EdL PPA is provided as Annex 7.

6.9 Post-award Activities

A special feature of competitive bidding for PPP / PFI projects is the number of activities that must take place after the award of the concession to the successful bidder and prior to the final execution of the Concession Agreement (or the unconditional validity of that contract).

Under Article 9 of the Electricity Law, the award and execution of the Concession Agreement for projects with an installed capacity exceeding 50 MW will require approval by the National Assembly. Other post-award activities may include:

- Establishment and registration of the project company (which shall be a signatory party to the Concession Agreement);
- Arrangement of equity contributions or equity commitments;
- Achievement of approvals and permits required by the law of the country;
- Requisition of project land;
- Finalization of a number of project agreements; and
- Achievement of financial closing.

The Regulatory Guide, Articles 52 – 60, stipulates that post-award activities are performed within a certain period following the award and prior to the final execution of the Concession Agreement as a condition for the sustained validity of the award and the release of the bid security.

7.0 Pre-selection of Developers

7.1 Mandatory Pre-selection

Preparation of bids for concession contracts for hydropower projects is costly and time consuming and this discourages competent developers from participating in the bidding proceedings unless the proceedings are based upon a shortlist of prequalified bidders, comprising three applicants at most.

There is a consistent need for pre-selection in IPP projects to eliminate unsuitable applicants early in the procurement proceedings. Competent developers may be reluctant to participate in expensive procurement proceedings for IPP projects if they risk competing with unrealistic proposals submitted by unqualified bidders.

Accordingly, the Regulatory Guide stipulates pre-selection of eligible developers for IPP projects in Lao PDR:

(i) Competitive Procurement

Procedures for pre-selecting bidders for open competitive bidding are set forth in the Regulatory Guide, Articles 16 – 25. A competitive bidding procedure will be preceded by a general invitation to parties to express interest in submitting an application for pre-selection.

(ii) Alternative Methods of Procurement

Pre-selection (or the achievement of pre-selection standards) is required pursuant to the Regulatory Guide for procurement by:

- Restricted competitive procedure Reg. Guidelines, Article 60(2)
- Two-stage procedure Reg. Guidelines, Article 61(1)
- Negotiated procedure Reg. Guidelines, Article 62(1)(b)

(iii) Unsolicited Proposal

If the contracting authority decides to implement a project proposed through an unsolicited proposal, a developer selection procedure shall be conducted in accordance with Chapters III and IV of the Regulatory Guide, including pre-selection pursuant to Articles 16 – 25.

7.2 Invitation to apply for Pre-selection

An invitation to apply for pre-selection is advertised in accordance with the requirements of the Regulatory Guide, Article 18, and is issued by GOL in the form provided in the Model Pre-selection Document (*Invitation for Pre-selection*), the minimum content of which being stipulated in the Regulatory Guide, Article 17.

Parties responding to the invitation to submit applications for pre-selection will be provided with a pre-selection document based on the Model Pre-Selection Document. The Model Pre-Selection Document is provided as Annex 2.

Applicants may seek clarification of the pre-selection documents pursuant to the Regulatory Guide, Article 20.

7.3 Participation of Consortia

Bidders are allowed to participate in procurement proceedings through consortia established especially for the project (Regulatory Guide, Article 21). A consortium is better able to meet particular challenges of larger IPP projects because it can better accommodate:

- The heavy financing requirements of large infrastructure projects;
- The need for broad expertise in financing, developing and operating projects;
- Project risks by diversifying them among consortia members.

Some essential issues regarding participation of consortia in procurement proceedings for PPP projects are addressed in the Regulatory Guide, Article 21.

The Model Pre-selection Document contains detailed provisions on the prequalification of consortia, changes of the composition of bidding consortia during the proceedings etc.

7.4 Pre-Selection Criteria

Applications for pre-selection will be evaluated according to the criteria stated in the pre-selection document. Article 15 of the Electricity Law stipulates that parties eligible for IPP concessions shall have access to finance and technical expertise in power projects and shall be of good repute and have a sound commercial background. The requirements of the Electricity Law are reflected in the minimum criteria to be met by applicants as set forth in the Regulatory Guide, Article 22:

- a. Adequate professional and technical qualifications and experience, human resources, equipment and other physical facilities as necessary to carry out all the phases of the power generation project, including design, construction, operation and maintenance;
- b. Sufficient ability and experience to manage the financial aspects of the power generation project and capability to sustain its financing requirements;
- c. Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar power generation projects.

The Model Pre-selection Document defines these minimum pre-selection criteria in an objective manner to facilitate objective assessments and comparisons of applications.

7.5 Decision on Pre-selection

Pursuant to the Regulatory Guide, Article 23, the contracting authority evaluates pre-selection applications and makes a decision about the qualifications of each applicant based solely on the stated pre-selection criteria.

The contracting authority may, provided it has made the appropriate statement in the pre-selection document, reserve the right to request bids only from a limited number of bidders that best meet the pre-selection criteria.

7.6 Post-qualifications

During such long procurement proceedings the qualifications of pre-selected bidders may change. Therefore, most PPP-related ITBs provide the Contracting Authority with a right to require at any stage of the procurement proceedings that the bidders again demonstrate their qualifications in accordance with the same pre-selection criteria applied to the earlier pre-selection.

The right for the Contracting Authority to request such post-qualification is set forth in the Regulatory Guide, Article 48.

8.0 Open, Competitive Procedure

8.1 Competitive Bidding Process

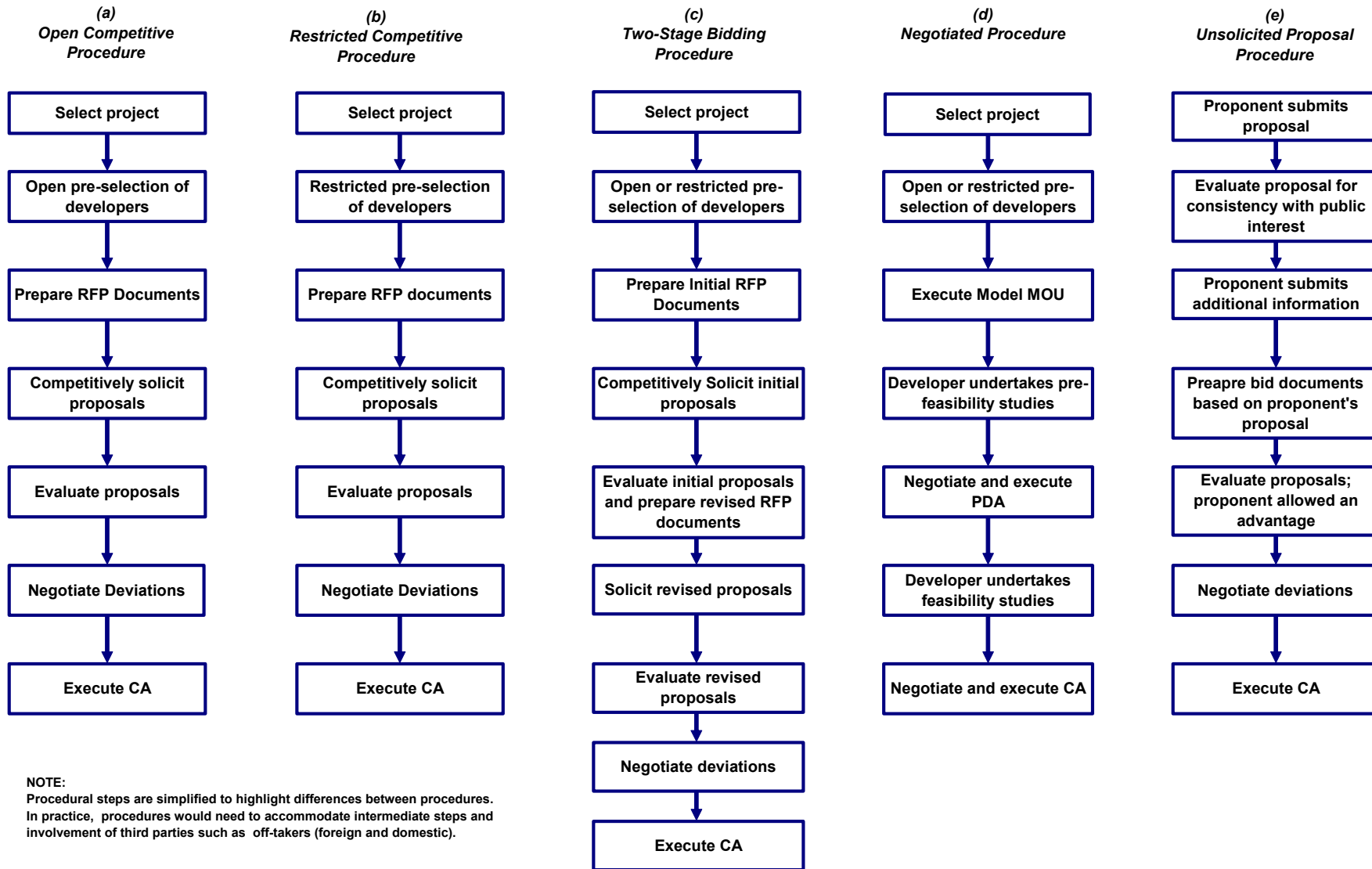
Open competitive procedure is the applicable procurement option unless approval of the monitoring authority is obtained to use an alternative procedure. The steps of the open, competitive procedure are specified in the Regulatory Guide, Chapter IV and illustrated in simplified form in Figure 4(a):

- Pre-selection of bidders (refer Regulatory Guide, Articles 16 – 24);
- In case of complex generation projects (larger IPP projects) the Contracting Authority may - under specified conditions - conduct a technical dialogue with the pre-selected bidders to clarify the means and solutions best suited to meet the project needs and requirements (Regulatory Guide, Articles 25);
- Prepare and issue bidding documents (refer Regulatory Guide, Articles 26 – 30);
- Clarifications and modifications to the bidding documents (refer Regulatory Guide, Article 31);
- Bidders option to undertake further site investigations (refer Regulatory Guide, Article 32);
- Preparation of proposals by bidders (refer Regulatory Guide, Articles 33 – 37);
- Submission of proposals (refer Regulatory Guide, Articles 38 – 40);
- Opening, examining, evaluating and ranking proposals by the contracting authority (refer Regulatory Guide, Articles 41 – 49);
- Bid award and notification of award (refer Regulatory Guide, Articles 50 - 51);
- Proceedings after the bid award (refer Regulatory Guide, Articles 52 – 59).

Open competitive tendering is effective in obtaining the best offer on price and risk for the project but will succeed in this only if project is adequately defined and bidders compete equally under the bidding rules. In addition to the steps specified in the Regulatory Guide, other matters to be considered by the contracting authority in conducting the solicitation are:

- Completion of project preparation activities (refer Section 6.7) and preparation of a comprehensive package of bidding documents (refer Section 8.3).
- Decision by GOL on its intended shareholding in the project, its proposed terms and conditions under the shareholders' agreement, and proposed sources of capital to fund its equity.
- Decision by GOL on state support, including, if appropriate, the support of an agency offering political risk cover.
- Consultations with the export power purchaser to: (i) reach agreement on tariff and PPA, (ii) obtain approval of pre-selected bidders, and (iii) other matters of mutual interest.

Figure 4 – Procurement Procedures (Regulatory Guide)



8.2 Off-taker involvement in Bidding Procedure

For export projects, the foreign off-taker is interested in all matters, technical and commercial, related to the delivery of the foreign off-take portion of the project's output. The involvement of a foreign power purchaser introduces a third party into the project preparation, bid evaluation and negotiation processes.

Pre-agreement on a draft PPA (including tariff) in advance of solicitation would minimize three-way discussions during bid negotiations. The draft PPA would be included in the RFP package and the export tariff would in this way be fixed for the purposes of the bid. Evaluation of price attributes of bidder's proposals would therefore be based on the discounted value of tendered royalty payments.

In the event that bidders indicate deviations to the draft PPA in their proposals, the foreign off-taker would be involved in their negotiation and resolution.

For EDL off-take, a Model EDL PPA (and tariff) would be included in the RFP to alert bidders to the price and terms applying to the EDL portion of the project's off-take. A copy of the Model EDL PPA is provided as Annex 7.

8.3 Request for Proposals

The bidding documents for procurement of IPP hydropower projects in Lao PDR are prepared and assembled according to the characteristics of individual projects. The bidding documents would typically comprise the following:

- Bid document (Instructions to Bidders),
- Model Concession Agreement
- Draft PPA for export off-take
- Model PPA for EDL off-take
- Minimum Technical Requirements of the Facility (functional specification)
- Grid codes for the systems of the foreign power purchaser and EDL
- Project Information, including feasibility studies, interconnection studies, environmental and social impact / management studies, etc.

The Bid document provides bidders with information about the project, instructs them on the content of their technical and financial proposals and specifies the format in which their proposals are to be presented (refer Regulatory Guide, Article 28). A Model Bid Document is provided as Annex 3. The contents include:

- Invitation to Bidders
- Project Description and General Information
- Instructions to Bidders
- Proposal Requirements
- Evaluation Procedure
- Minimum Technical Specification, Schedule and Performance Requirements
- Proposal Forms, including proposal letters, clarification forms, form of bid security, technical proposal forms and financial template.

Technical specifications for the projects are formulated either in terms of performance or in functional requirements, leaving the technical details of how and by what means these requirements shall be achieved to the experience and innovative skills of the bidders.

8.4 Evaluation of Bids and Ranking of Bids

All responsive bids are evaluated. Evaluation of bids is conducted according to the evaluation process described in the bidding documents.

Criteria for the evaluation and comparison of bids are set forth in the Regulatory Guide, Article 46. The relative weight of individual criteria, and weighting of price and non-price criteria, is specified in the bidding documents. The contracting authority may establish thresholds for acceptance of quality, technical, financial and commercial aspects.

The contracting authority ranks responsive bids according to the scores achieved and invites the highest ranked bidder to negotiate the concession contract.

8.5 Negotiation and Award

Before an award can be made, any deviation in the bid, which does not result in rejection of the bid, must be resolved by negotiations. The complexity and phase by phase development of IPP projects makes negotiations between the Contracting Authority and the preferred bidder a practical necessity and some scope for negotiations before the award of concession contracts is therefore acceptable.³ The scope for negotiations under the Regulatory Guide is defined in Article 49.

Any deviations to contractual terms listed in the bidding documents as non-negotiable shall be regarded as material and grounds for rejection of the bid.

If it becomes apparent that negotiations with the invited bidder will not result in a successful outcome, the contracting authority can terminate negotiations, allowing the bidder to formulate its best and final offer. If such offer is unacceptable, the contracting authority shall invite for negotiations other bidders in the order of their ranking until it arrives at an award or a rejection of all bids.

When an acceptable proposal is negotiated, the agreed concession contract is initiated with the successful bidder and will be binding on the parties subject to the approval of the National Assembly. The contracting authority will notify the unsuccessful bidders of the award.

8.6 Post-Award Proceedings

In the period between initialing the concession contract and final execution, the successful bidder shall (refer Regulatory Guide, Article 52):

- Provide the Contracting authority with all requisite applications, requests and documentation for obtaining the approvals, licenses and permits listed in the bidding documents to allow the project company to be established and commence construction;

³ Refer UNCITRAL Guide, Article 17

- Establish and incorporate the project company;
- Ensure that the project company has binding commitments with respect to equity contributions from all shareholders;
- Provide a performance bond from an eligible bank in the required amount and form;
- Achieve Financial Closing, except with regard to those conditions which can only be satisfied on or after the execution of the Concession contract, provided that each such outstanding condition is capable of being satisfied within seven (7) days after the execution of the Concession contract;

9.0 Alternative Methods of Procurement

9.1 Authority to use Alternative Methods of Procurement

The contracting authority may use procurement methods other than an open, competitive procedure as approved by the monitoring authority, and subject to the requirement that it takes all necessary steps to ensure compliance with the principles of transparency, fairness and equality of treatment.

Alternative methods of procurement permitted pursuant to Chapters III and V of the Regulatory Guide are:

- Restricted competitive procedures
- Two-stage procedure
- Negotiated procedure

9.2 Restricted Competitive Procedure

Subject to approval of the monitoring authority, the contracting authority may procure concession contracts through a restricted, competitive procedure in accordance with the provisions of the Regulatory Guide, Article 60. A restricted competitive procedure will be approved if, by reason of the project's scope or complex nature, it can only be developed by a limited number of developers (Regulatory Guide, Article 13).

The restricted, competitive procedure is illustrated in simplified form in Figure 4(b). The procedure is the same as for the open, competitive bidding in all respects, save that pre-selection is open only to bidders selected and invited by the contracting authority. The contracting authority is obliged to invite a sufficient number of bidders to ensure effective competition.

9.3 Two-Stage Bidding Procedure

It is a key condition for transparent and competitive procedures that the characteristics of the project are defined in a manner sufficiently detailed and precise to permit the bidders to formulate final bids and the Contracting Authority to compare the bids in an objective manner. With complex projects, however, the Contracting Authority may be unable to assess in advance the most economically advantageous solution for the country. In such cases it may be appropriate to permit the contracting authority to employ a two-stage bidding procedure.

Subject to approval of the monitoring authority, the contracting authority may procure concession contracts through a two-stage procedure in accordance with the Regulatory Guide, Article 61. A two-stage procedure will be approved where it is not feasible to describe in the bidding documents the characteristics of the project and terms of the concession in sufficient detail and precision to permit final and binding bids to be formulated (Regulatory Guide, Article 14).

The two-stage procedure is illustrated in simplified form Figure 4(c). The procedure involves the following steps:

1. First-stage call for proposals from pre-selected bidders based on an initial RFP describing the owner's requirements, performance indicators, financing requirements and principal contractual terms;
2. Meetings with bidders convened by the contracting authority to clarify matters concerning the initial RFP or the proposals submitted in response to it;
3. Review and revision of the initial RFP by the contracting authority in the light of the concepts presented by bidders in their initial proposals;
4. A second-stage call for final proposals based on the revised RFP;
5. Evaluation of the final proposals and ranking of bidders accordingly.

In other respects, the requirements for open competitive bidding also apply to a two-stage procedure.

9.4 Negotiated Award Procedure

9.4.1 Conditions for use of Negotiated Procedure

Flexibility is needed in the procurement of IPP projects. Where a project is complex, information about it is limited, and time and budget constrain public sector preparatory work, the only practical avenue open to GOL may involve a negotiated award of the project concession.

The Contracting Authority may use a negotiated procedure for awarding concession contracts if the approval of the monitoring authority is obtained and one or more of the following conditions is satisfied (refer Regulatory Guide, Article 15):

- The need to complete the project is urgent (provided that the circumstances giving rise to the urgency were neither foreseeable nor caused by the Contracting Authority's slow response);
- A pre-selection process was conducted but the response was poor and time does not permit a new invitation;
- The offered concession follows naturally on from an earlier concession and it is cost-effective to seek continuity in the concessionaire;
- Extensive preparatory work is needed to define the project sufficiently for firm bids to be prepared for which budget and time is not available;
- When a negotiated approach otherwise serves the public interest.

9.4.2 Procedural Steps in a Negotiated Award

A negotiated IPP procurement procedure involves negotiating successive mandate agreements of increasing commitment and detail as the parties' understanding of the project grows. As pre-feasibility and feasibility studies are completed, and as tariff MOUs and PPAs are negotiated, a firmer foundation is created for upgrading mandates from MOU to PDA and from PDA to Concession Agreement.

The negotiated procedure is set forth in the Regulatory Guide, Article 62, and illustrated in simplified form in Figure 4(d). The steps to be taken by the contracting authority are outlined

below. They are adapted from those specified in the Regulatory Guide to include off-take negotiations in addition to concession negotiations:

1. Confirm that the project is consistent with optimal development of the power system (refer Regulatory Guide, Article 62 (1)(a));
2. Confirm the developer's eligibility according to the prevailing pre-selection criteria (refer Regulatory Guide, Articles 16 – 25);
3. Execute an MOU (and provide an MOU-bond) granting a mandate for a defined period to undertake stipulated studies;
4. Reach agreement with the foreign off-taker on tariff and principal sale and purchase terms and conditions, and execute a formal tariff agreement;
5. Upon satisfactory completion of obligations under the MOU, execute a PDA that extends the mandate and sets out activities to be undertaken to advance the project's readiness for financing;
6. Submit to the developer the model concession contract with non-negotiable and particular conditions demarcated;
7. Establish transparent evaluation criteria in accordance with the Regulatory Guide, Article 46, by which the adequacy of the developer's proposal is assessed;
8. Negotiate and initial the concession agreement and publish a notice of its essential terms in accordance with the Regulatory Guide, Article 51;
9. Finalize and execute the PPA (and provide a PDA-bond) for foreign off-take and the PPA for EdL off-take;
10. Establish and incorporate the Company under Lao law;
11. Arrange permits, consents and approvals as listed in the Concession Agreement;
12. Finalize debt and equity financing for the project and close loans;

9.4.3 Transparency in Negotiated Procedures

To improve transparency, competition and quality in the procedures for negotiating IPP concessions, the Regulatory Guide sets forth nine specific proposals based on Lao legal requirements and international procurement principles, viz:

- MOUs only issued for projects identified and scoped to meet the objectives of optimal national planning (cf. Article 62 (1) (a));
- MOUs only issued to developers achieve minimum pre-selection standards (Regulatory Guide, Articles 16 – 25).
- Developers to demonstrate their seriousness (and protect Lao authorities against economic loss in the event of their breach of contract) by providing MOU and PDA securities (refer Article 62 (1)(c));
- Issuance of MOUs and award of concession contracts to be publicly advertised (refer Article 62 (1) (e));

- Transparent and competitive evaluation criteria to be established, as thresholds for evaluating negotiated terms and conditions. Such criteria to be disclosed to the developer (refer Article 62 (1) (f));
- The contracting authority to take the lead in negotiating the concession contract by submitting to the developer a model concession contract with non-negotiable and particular conditions demarcated. (refer Article 62 (1) (g));
- Major contracts for engineering, procurement and construction of the project facilities to be awarded by transparent and competitive procedures based on international competitive bidding principles (refer Article 63);
- Project development under the PDA shall follow the structured and transparent process set forth in the Regulatory Guide, chapter IV, sec. 7 (refer Article 62 (2)); and
- The Contracting Authority shall keep an appropriate record of the negotiated procurement proceedings in accordance with the Regulatory Guide, Article 8, to promote transparency and public accountability (refer Article 63 (3)).

10.0 Unsolicited Proposals

10.1.1 Admissibility of Unsolicited Proposals

Where a developer submits a proposal to GOL for the development of an IPP project in respect of which no public procurement process has been opened, the contracting authority is permitted under the Regulatory Guide, Article 64, to consider the unsolicited proposal provided that it is in the public interest.

10.1.2 Procurement Procedure for Unsolicited Proposals

The procurement procedure to be followed by the contracting authority for unsolicited proposals is set forth in the Regulatory Guide, Articles 65 – 67 and illustrated in simplified form in Figure 4(e). The steps involved in an unsolicited proposal procedure are outlined below, with additional steps included to account for off-take negotiations:

1. A project proponent submits a proposal which does not relate to a current selection procedure initiated by GOL. The unsolicited proposal is received by, or referred to, the contracting authority.
2. The contracting authority assesses the proposal for consistency with public interest, as determined by its alignment with GOL's power development plans and the potential benefits it would yield to Lao PDR (Article 65(1)).
3. If the project is considered to be in the public interest, the contracting authority invites the proponent to submit as much information on the project as is feasible at that stage. This will include a concept design, an economic feasibility study and an EIA (Article 65(2)).
4. The contracting authority evaluates the project's technical and economic attributes and the proponent's qualifications to determine whether implementation of the proponent's proposal is likely to be successful (Article 65(2)).
5. If the contracting authority decides to implement the project, it arranges through the appropriate GOL agency to open up formal negotiations with the foreign power purchaser and to conclude agreement on tariff and draft PPA. Parallel discussions with EDL determines price and conditions applying to domestic off-take.
6. The contracting authority initiates a selection procedure in accordance with the Regulatory Guide, Chapters III and IV, i.e. an open competitive procedure. It prepares bidding documents based on the proponent's proposal and studies, and on the outcomes of the power purchase negotiations. The scope of the bidding documents is as discussed in Section 8.3.
7. The proponent is invited to participate in the selection procedure and may be given an incentive or benefit in recognition of the proponent's role in developing the proposal. Any such incentive or benefit is declared in the bidding documents.
8. Proposals are evaluated in accordance with the evaluation procedure set forth in the bidding documents and bidders are ranked according to their evaluation score. The proponent's ranking will reflect any incentive or benefit it receives.

9. The top-ranked bidder is invited to negotiate to resolve any deviations from the bidding documents included in the invited bidder's proposal. If it becomes apparent during the course of these negotiations that the negotiations are unlikely to be successful, the negotiations are terminated and the next bidder in the rankings is invited to negotiate.
10. Upon successful conclusion of negotiations, a concession agreement is initialed. Progress to financing and formal award of the concession agreement is as for other procurement procedures.

11.0 Small Privately Financed Hydropower Projects

NOTE: A framework for the procurement of small privately financed hydropower projects is to be prepared in 2006. This Section 11.0 of the Manual is therefore provisional and will need to be re-drafted and expanded on completion of the SPP framework study.

11.1 Procurement Philosophy for Small Hydropower Projects

The procurement processes set forth in the Regulatory Guide do not apply to small hydropower projects. Small projects differ in a number of significant respects and the procurement procedures and model documentation drafted for larger projects may not be appropriate:

- The use of simpler and more streamlined financing is possible but the capacity to bear high transaction costs is less;
- Projects tend to be less complex and therefore easier to define. Ground conditions problems are not as prominent, social and environmental impacts smaller, and power system issues less common;
- Power purchase arrangements are simpler due to the small size of power purchases and the absence of foreign off-takers;
- GOL and EDL cannot afford to devote significant administrative effort to each small project and instead must develop systems for minimizing input without reducing the quality of the procurement process.

A different procurement philosophy for small projects is therefore applied. Small projects are developed under a Small Power Producer (SPP) program that uses standardized procurement systems designed to reduce transaction costs and simplify administration. Procurement processes are simple, uniform and repetitious, allowing each new small project to be managed with little additional effort. Features of this SPP philosophy include:

- Standardized procurement using non-negotiable standard agreements and transparent, formulaic tariff fixing principles;
- “Must run” operational philosophy obliging EDL to take and pay for output according to metered energy and a simple pricing schedule.

11.2 Procurement Procedures for SPP Projects

11.2.1 Alternative SPP procurement models:

To minimize transaction costs and administrative effort, SPP procurement is highly standardized. The Contracting Authority must adopt alternatives in deciding for each project a suitable procurement model and appropriate standard documentation. The alternatives are outlined below:

- a. Open offer to the market: GOL invites offers from the market based on a non-negotiable standardized PPA and a published tariff. GOL's invitation is capped to limit subscription to a specified aggregate MW or GWh pa level.

It is incumbent on developers to find projects that meet profit expectations and technical off-take requirements.

This approach allows developers a great deal of flexibility in the way they respond; they decide the site, technology, installed capacity and project configuration. The published tariff provides incentives to encourage responses that are sympathetic to the needs of the power system (capacity / energy; wet season / dry season, etc.).

- b. Competitive bid for specific projects: GOL/EdL selects and evaluates projects, and packages them individually or in groups for the market. Competitive tendering of SPP concessions involves an orderly, transparent procedure, typically comprising the following sequential actions:
- Prepare project - identify project, conduct technical, economic and environmental studies, obtain permits, consents and land usage rights, and resolve interconnection issues;
 - Draft RFP using Model PPA for Small Projects and Model Bid Document;
 - Advertise for expressions of interest and pre-select bidders;
 - Issue RFP and administer bid period activities (arrange bid meeting and site visit, issue clarifications and addenda, etc.);
 - Evaluate bids on price (tariff) and non-price factors, nominate preferred bidder, negotiate non-material deviations and award SPP concession.

A competitive bid allows more control over the location and sizing of the SPP facility to better serve system needs and could also be expected to yield lower electricity prices. Alternatively, a well subscribed open invitation to SPPs would facilitate the procurement of multiple projects with minimum effort. An open subscription may be favored if market interest is high and EDL's need for SPP off-take is significant and dispersed. Otherwise, a competitive bid is advised, particularly during the establishment phase for the SPP program.

11.2.2 Status of Project under the Electricity Law

Small hydropower projects of 10 MW or less are distinguished under the Electricity Law (1997) as follows:

- a. Projects with an installed capacity greater than 2,000 kW:
- Approval required by the Government (Article 9);
 - Concession application required (Article 11)
 - Form of investment to be BOT (Articles 10 and 16);
- b. Projects with an installed capacity less than 2,000 kW (but greater than 100 kW):
- Approval required by the provincial, prefectural or special zone authorities (Article 9);
 - Exemption from the need to obtain a concession (Article 20);
 - Form of investment to be "in some other form" (Article 10).

11.2.3 Procurement Documentation for Small Projects

Alternative procurement packages apply according to the size of project and way in which the Contracting Authority approaches the market (refer Section 11.2.1) as follows:

- a. Documentation for SPP procurement by competitive bid:
 - Invitation letter
 - Standard PPA for Projects < 10 MW
 - Model RFP / Invitation to Bidders
 - Published tariff
 - *also for projects > 2000 kW*: Standard SPP Concession Agreement

- b. Documentation for SPP procurement by open subscription:
 - Model PPA for Projects < 10 MW (refer Annex 8)
 - Model Pre-selection Document for Projects < 10 MW
 - Model RFP / Bid Document for Projects < 10 MW (refer Annex 9)
 - *also for projects > 2000 kW*: Model SPP Concession Agreement

ANNEXES

ANNEXES

- Annex 1: Regulatory Guide on Procurement of Concession Contracts for Privately Financed Power Generation Projects**
- Annex 2: Model Pre-selection Document**
- Annex 3: Model Instructions to Bidders**
- Annex 4: Model Memorandum of Understanding**
- Annex 5: Model Project Development Agreement**
- Annex 6: Model Concession Agreement**
- Annex 7: Model Power Purchase Agreement for EdL Off-take**
- Annex 8: Model Power Purchase Agreement for Projects < 10 MW**
- Annex 9: Model Bid Document for Projects < 10 MW**
- Annex 10: Other Competitive Procurement Models**

1. Regulatory Guide

**[Insert current version of the “Regulatory Guide
on the Procurement of Concession Contracts for
Privately Financed Power Generation Projects”]**

2. Model Pre-selection Document

[Insert current version of the Model Pre-Selection Document]

3. Standard Instructions to Bidders

[Insert current version of the Standard Instructions to Bidders]

4. Model Memorandum of Understanding

[Insert current version of the Model Memorandum of Understanding]

5. Model Project Development Agreement

[Insert current version of the Model Project Development Agreement]

6. Model Concession Agreement

[Insert current version of the Model Concession Agreement]

7. Model Power Purchase Agreement for EdL Off-take

[Insert current version of the Model PPA for EdL Off-Take]

8. Model Power Purchase Agreement for Projects < 10 MW

[Insert current version of the Model PPA for Projects < 10 MW]

9. Model Bid Document for Projects < 10 MW

[Insert current version of the Model Bid Document for Projects < 10 MW]

10. Other Competitive Procurement Models

Other Competitive Procurement Models

The problems associated with competitively bidding private hydropower concessions are explored in some detail in the World Bank paper, *Financing of Private Hydropower Projects* (Head C, 1999), in which three competitive bidding models were proposed. The first model is a single stage bidding process, differing from the model described in Section 8.1 above only in the steps introduced to accommodate a foreign off-taker. The other models are untested and their use is not entertained under the Regulatory Guide but they represent future procurement options and are briefly described below.

The **Two-Stage Model**, not to be confused with the two-stage bidding procedure described in Section 9.3 and in the Regulatory Guide, Article 61, is designed to reduce front-end preparations by the public sector and avoid the problem faced by bidders in a one-stage contest of determining the project cost during preparation of their bids. The two stage process is described below:

- **Stage 1:** The project is studied in the public sector with technical, environmental and social studies completed only to feasibility level. Public consultations are undertaken in Stage 1. Models of the concession agreement and PPA are prepared. GOL negotiates a tariff with the foreign power purchaser. Competitive bids are then solicited to find the bidder offering the highest royalty payments. Bidders are to base their offers on the feasibility information provided in the RFP (project costs, energy outputs, etc) and the agreed value of the tariff.
- **Stage 2:** The concession is awarded and the developer then further studies, optimizes and develops the project, preparing detailed designs and drafting tender documents for the competitive bidding of the EPC contract. Binding EPC prices are obtained and the contract is awarded. The value of the royalty payments tendered by the developer in its Stage 1 bid is adjusted for the difference between the Stage 1 estimate of capital costs and the EPC contract price. The adjustment is performed transparently using a project financial model provided with the RFP and a sharing of any gains from the Stage 2 optimization is reflected in the royalty adjustment. Any changes between Stage 1 and Stage 2 in the agreed tariff can also be factored into the royalty stream using the financial model.

For the developer, the addition of a second stage overcomes the problem of obtaining binding EPC bids within the limited timeframe of a single stage bid. It also encourages creative input through a sharing of gains from the Stage 2 optimizations and designs.

For GOL, the two-stage approach has the advantage of reducing the amount of work it has to do to develop the project to a point where it can be offered to the market. There are disadvantages, though. The concession must be awarded before there is any certainty on the GOL benefit stream. Also, with the concession agreement already signed, GOL's negotiating position in this second round of negotiations would be weaker.

The Hybrid Model is designed to adapt to a public/private sharing of physical assets and risks in the development of multipurpose projects. The essential features of the Hybrid Model, as adapted to accommodate an international power purchaser, are described below:

- The project is divided physically with some elements, typically the ones with higher construction risks such as dams and tunnels, being allocated to the public partner and others, typically the power station and ancillary works, to the private partner.
- The public partner prepares detailed studies, seeks finance for the public components, negotiates a tariff with the power purchaser and prepares the RFP package for bidding the private elements.
- The private sector partner is chosen in a one-stage bidding process, again bidding on royalties. Upon award, the successful bidder would obtain financing for the private sector elements.
- The PPA would be finalized with the power purchaser and any adjustments to the royalty stream calculated according to pre-agreed mechanisms using a project financial model.
- The project would be constructed either as a unified project under a single EPC contract or as two contiguous projects under independent contract packages administered separately but in coordination. Award of construction and procurement contracts is through competitive bidding to ensure transparency.

The objective of the Hybrid Model is to protect the private sector from exposure to some of the more difficult risks that are best allocated to the public sector partner under the umbrella of a multilateral guarantee or similar protection.