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Chapter 6.

PPP projects implementation guidelines

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Introduction

These guidelines on the preparation and implementation of public-private partnership (PPP) projects have been developed for the officials and specialists of state government authorities (SGAs) and municipal authorities of Commonwealth of Independent States (CIS) member countries to specify the main objectives and activities to be performed by them at different stages of preparing and implementing PPP projects.

The guidelines contain recommendations for SGAs with respect to the following stages of implementing PPP projects:

- (a) PPP project identification
- (b) PPP project preparation
- (c) PPP project viability/feasibility assessment, including the determination of PPP project price/quality ratio (PQR)
- (d) selection of a private partner
- (e) commercial close
- (f) financial close
- (g) monitoring of implementation of the PPP project
- (h) further PPP project assessment.



1. PPP project identification

1.1 At this stage, the SGA shall form the initial concept of the project, determine the needs of the public and specify the project objectives.

1.2 One of the SGA's main objectives at the stage of PPP project identification shall be an assessment of the applicability of PPP mechanisms to the project and an assessment of the need to implement the project.

1.3 It is recommended that CIS member countries develop and approve the applicable methodologies for this stage based on the identification of those projects that may be effectively implemented as PPPs. This is required to avoid incurring unnecessary expenses using budgetary funds for projects that do not fall into this category.

1.4 The SGA shall select the most promising PPP projects in terms of their potential for attracting private investments and their need to develop the relevant industry or sector. Priority shall be given to projects that satisfy the needs of the public and public sector to the greatest extent and provide an optimum PQR.

1.5 Each PPP project shall comply with the strategic plans and objectives for infrastructure development of the relevant CIS member country, as well as with the plans and objectives for development of the relevant industry or sector in which the PPP project is being implemented.

1.6 At the stage of PPP project identification, the SGA shall prepare a preliminary technical feasibility study (TFS) confirming the viability of PPP as a basis for the relevant project, as well as the practicability of implementing the PPP project. The development of a preliminary TFS may be preceded by the development of the original concept for the project. This concept and the TFS shall be submitted to the authority responsible for preparing the PPP in the relevant industry or sector.

1.7 Preparing a preliminary TFS before preparing an extended final TFS can help from the outset to analyse any applicable "stop factors", determine what difficulties and problems the PPP project may face, and take them into account when preparing the final TFS.

1.8 When identifying the PPP project, if it is necessary to ensure the quality of project management, the SGA shall create an interdepartmental project group by engaging specialists from a selection of subordinate organisations, independent experts, design, engineering and other companies, interested and authorised state bodies, representatives of the

chamber of entrepreneurs, business entities and consultants. The interdepartmental project group shall study PPP proposals and initiatives, assess and determine the priority and method of implementation of the PPP project and tender structure, and study the results of relevant research and preliminary calculations.

2. PPP project preparation

2.1 The objective of preparing the PPP project shall include developing such terms and conditions that will attract private investors and provide the best PQR, including, but not limited to, the commercial, financial, technical and legal basis of its implementation.

2.2 CIS member countries shall determine the requirements for the professional qualifications of the officials of the SGA and other parties responsible for PPP project preparation. Significant experience within the SGA in PPP project implementation shall be one of the key factors behind the successful implementation of any PPP project.

2.3 At the stage of PPP project preparation, as a rule, the SGA's tasks shall include performing the following activities, some of which may in certain circumstances be delegated to the private partner, for example, in the course of implementing private initiative arrangements (an unsolicited proposal):

- (a) economic, technical and legal studies for the PPP project
- (b) preparing the TFS or business plan for the project
- (c) preparing a financial model (should its preparation be the responsibility of the public party)
- (d) analysis and assessment of PPP project risks
- (e) PQR assessment
- (f) preparing the PPP project implementation plan
- (g) preparing project documentation
- (h) preparing necessary changes in current legislation (if applicable)
- (i) taking reasonable measures with respect to land plots (for example, formation of the land plots [including assignment and surveying thereof] and the registration of title to the land plots)
- (j) obtaining necessary (preliminary) permits, consents and agreements from the state authorities
- (k) legal structuring of the project
- (l) holding public hearings
- (m) holding meetings, conferences and negotiations with potential investors.

2.4. One of the main tasks of the SGA while setting up the PPP project shall be to prepare the TFS (or a business plan of the project). The public authority responsible for the PPP or the consultants they engage (legal, financial, technical) shall prepare the

TFS. Once it has been prepared, the TFS shall be subject to approval by the relevant ministry or the public partner's other legally authorised authority.

2.5 Member countries should develop the methods of analysis and application of the criteria for the financial, social, economic and budgetary viability of PPP projects, as well as evaluation of their environmental and social impacts.

2.6 Among other requirements, stipulated by normative and regulatory acts of the relevant CIS member country, the TFS shall include:

- (a) justification of the need for and feasibility of implementing the PPP project in terms of the public needs of the member country in the context of the relevant public infrastructure and/or public services
- (b) legal analysis of the PPP project (for instance, the ability to implement the project in accordance with the current laws of the country, what kind of amendments to current legislation may be required to implement the project, if such amendments may be stipulated within a reasonable time)
- (c) technical analysis of the PPP project (whether the project can be implemented with the use of technologies available without any material technical risks)
- (d) assessment of the budgetary consequences of implementing the PPP project, including its tax consequences
- (e) analysis of the investment potential of the PPP project and its compliance with the strategic development plans of the relevant industry or sector and the wider infrastructure development plans of the country
- (f) assessment of the ecological consequences of implementing the PPP project and available steps to minimise any negative impact on the environment
- (g) Justification of the efficacy of using PPP for the project, and the comparative advantage of doing so, compared with other options available to the public partner.

2.7 To take into account the interests of the public, consumers, users of the infrastructure objects and other stakeholders, the SGA shall conduct public hearings once the TFS of the PPP project has been prepared.

2.8 Where necessary, adopt any regulatory acts or amendments to ensure the legal viability of the PPP project. It is advisable to conduct an analysis of the regulatory impact of any such acts or amendments on the wider market and business conditions in the country.

2.9 Upon preparation of the PPP project, the SGA should assess the project's efficacy, based on the TFS and the relevant supporting documentation.

2.10 Banks and other financial institutions and organisations interested in financing a PPP project can participate in the development and discussion of the concept of the PPP project, its tender documentation and the draft PPP contract. This includes making proposals on the financing structure for the project, security for loans, payments in the event of early termination of the PPP agreement and other issues related to the financing of the project.

2.11 To attract potential private partners to discuss the proposed PPP, round tables, meetings, road shows (presentations), industry conferences, fora, exhibitions, investment marketing and other necessary events can be held (including with the participation of consultants).

3. PPP project efficacy assessment

3.1 The SGA shall provide assessments at key points during the lifecycle of a PPP project's implementation (selection, preparation, procurement, construction and operation), updating the results of earlier PPP project efficacy assessments to reflect new information.

3.2 The SGA shall also provide an independent verification (analysis) of the results of the assessment of the PPP project's efficacy (including the TFS) and the assumptions used in the assessment. Member countries shall specify the regulations and rules applicable to such assessments. A team of specialists not previously involved in preparing the project shall carry out the verification exercise. This is required because the team engaged in preparing the project cannot, in most cases, provide an independent and unbiased assessment.

3.3 The initial stage of assessing a PPP project shall include a strategic analysis that includes identifying the project, confirming compliance of the project objectives with the SGA strategy and long-term objectives and priorities of the state, preliminary determination of the project's forms of state support, identifying any stop factors and verifying the sufficiency of the information provided. (The components of the strategic analysis are provided in detail in the Chapter in this volume on the methodology for conducting a PPP project appraisal.) The strategic analysis may be conducted at the project identification or project preparation stages.

3.4. In addition to the strategic analysis, the assessment of a PPP project's efficacy shall include a complex analysis involving the criteria representing

the financial, social, economic and budgetary impacts of the project. (The components of the complex analysis are provided in detail in the methodology for assessing PPP project efficacy.)

3.5 At each stage of the project's implementation, the assessment and its subsequent updates shall be based on the information contained within the PQR, as well as the risk analysis.

3.6 Should the project initiator have already prepared the project efficacy assessment subject to the strategic and complex analyses, as well as the PQR analysis and risk analysis, the SGA shall provide independent verification of the results, assumptions and appropriateness of the assessments.

3.7 In addition to the initial assessment of the PPP project, the SGA shall assess each material change to the PPP agreement, the scope of which shall depend upon the changes proposed. In the case of insignificant changes to the agreement, the assessment may be carried out in short form, involving fewer resources and within a shorter timescale.

3.8 The financial and economic analyses of the PPP project shall also be agreed with the financial authority of the relevant public legal entity (that is, the government agency or organisation with the legal authority to oversee the financial aspects of the PPP project), authorised to perform executive functions in the sphere of economic development of the relevant territory and/or with other bodies authorised by the laws of the relevant member country.

3.9 The PQR shall be one of the key assessment criteria of the PPP project for the SGA. The PQR shall indicate the optimum balance between the total expenses of the project and the quality of the services, to maximise the net value of the project via PPPs compared with other forms of state procurement. The SGA shall use qualitative and quantitative criteria for the PQR assessment.

3.10 It is recommended that member countries adopt a methodology for carrying out their PQR assessments, specifying the applicable criteria, procedures and terms, as well as their allocation of responsibilities for the assessment among the different SGAs and levels (federal, state or municipal), depending on the nature and characteristics of the PPP project. The PQR assessment methodology should comply with the methodology for evaluating the effectiveness of PPP projects and the PQR assessment matrix in CIS member countries.

3.11 If the PPP project complies with the requirements stipulated by the laws of the relevant member

country, as shown by the results of its preparation and assessment, the relevant authority shall decide on its implementation. The content requirements for such a decision shall be established by the laws of the relevant member country.

4. Selection of a private partner

Procedure for selecting a private partner for PPP projects

4.1 The state typically derives the greatest efficiency from PPPs by using a transparent competitive tendering process to select the private partner. Competitive procedures enable the most favourable PQR to be achieved, while the transparency of the process confirms the legitimacy of the state's decisions associated with the implementation of PPP projects.

4.2 The SGA shall implement the procedures for selecting the private partner in accordance with the laws of the relevant member country, including the principles stipulated in the normative and regulatory acts on PPP.

4.3 In some exceptional cases stipulated by applicable law, the SGA may conduct (direct) negotiations for concluding the PPP agreement with a potential private partner without any competitive procedures.

4.4 For the purposes of selecting private partners for PPP projects, the SGA shall establish a tendering commission, which, among other things, shall include specialists in the sphere of PPP project implementation. The laws of the relevant member country shall provide for the functions, powers and operational procedures of the tender commission.

Tender notices

4.5 Upon deciding to implement a PPP project, the SGA shall prepare and publish the relevant tender notice. The tender notice shall be published on the official website of the public partner, as well as on the official website of the tendering procedure (if applicable) stipulated by law and in any official publication (if any) for information about tendering procedures.

4.6 A tender notice shall specify the terms of the tendering procedure, its subject, participant qualification criteria, as well as other terms and conditions stipulated by the laws of the relevant member country. The SGA may amend a tender notice only subject to any necessary extension of

the deadline stipulated for the preparation of bids or tender proposals for bidders/participants.

Pre-qualification

4.7 The SGA shall provide criteria for the pre-qualification stage of tender participants. Such criteria:

(a) shall not entail any (unfair) competition restrictions or unwarranted restriction on the participation of bidders

(b) shall refer to the professional and business qualifications and capabilities of the bidders and include other objective standards enabling the identification of their respective abilities to implement the relevant PPP project.

4.8 In the course of determining the criteria, the SGA shall be guided by the project specifics to select bidders that are best suited to implementing the relevant PPP project.

Invitation to tender

4.9 The tender documentation included in the invitation to tender (the tender documentation) shall contain all the information required by bidders to prepare their tender proposals. The SGA shall specify precise criteria to be used for the evaluation of the bidders, as well as the relative value and weighting of each criterion.

4.10 The tender documentation shall reflect the tendering procedure's compliance with all applicable requirements and the PPP principles stipulated by applicable law. It is also recommended to include in the tender documentation other data and information that may not be specifically required by applicable law but which may be important for participants in the course of drawing up their bids.

The tender documentation should contain the following information:

- (a) contents of a bid, form, location, deadline and period of validity of submission
- (b) form and conditions of bid security
- (c) terms and methods for obtaining clarifications of the contents of the tender documentation
- (d) compliance requirements for potential private partners/bidders
- (e) a description of the criteria for determining the winning bid
- (f) procedures, place, date and time for the opening of bid documents
- (g) estimated types and amounts of state support, as well as sources of income generation for the PPP project

(h) main terms and conditions or a full draft of the PPP agreement (submitted as an annex to the tender documentation)

(i) language requirements

(j) an indication of the right of a bidder to change or withdraw its bid before the deadline for final submission.

4.11 The SGA shall be entitled to amend the tender documentation subject to publication of the relevant amendments and granting any necessary extension of the term for preparation and submission of tenders by bidders.

4.12 Interested bidders have the right to ask the organiser of the tender for clarification of any of its provisions. At the same time, a deadline shall be set for the submission of such requests (for example, no later than 30 calendar days before the deadline for submission of bids). The tender organiser shall send a response to any such request within a reasonable timeframe and, without specifying the source of the request, publish its response on the official website for posting information about the bidding process and/or inform all bidders to whom the tender documentation was provided (if it was provided to selected parties).

Tender stage

4.13 In the course of the tendering procedure, more active participation may be required from the SGA in addition to clarifying the provisions of the tender documentation to the tender participants, which is especially important in the course of implementing more complex and costly PPP projects.

4.14 Competitive dialogue can be organised to optimise decisions on the technical, financial, legal and other necessary parameters of the PPP project, as well as state support measures and the criteria for determining the winning bid.

4.15 The SGA may conduct meetings, consultations or conferences with any pre-qualified bidders (if applicable) for the purposes of negotiating and discussing the provisions of the tender documentation and possible adjustments thereto. The SGA shall refrain from making any unnecessary amendments to the tender documentation, as most significant parameters of the project should have been developed during its identification and preparation.

4.16 In the course of these meetings and conferences, the SGA shall comply to the fullest extent with the principles for selecting a private partner, and provide equal rights and access to the relevant information for all bidders. These meetings

and conferences shall not cause undue delay to the selection process.

4.17 The SGA shall keep records of all communications with the bidders, along with clarifications and justifications for all decisions made by the SGA at this stage. The SGA shall respect the confidentiality of all commercially classified information received when communicating with bidders.

4.18 The SGA has the right to involve PPP consultants at the tender stage.



Assessment of bids and selection of the winner

4.19 It is recommended that CIS member countries develop a methodology for assessing bids that will be mandatory for tender commissions.

4.20 The list of criteria for determining the winning bid may include:

- (a) [terms of] construction, reconstruction, modernisation and/or operation of the facility
- (b) technical and economic aspects of the facility
- (c) amount and terms of the public partner's payments to the PPP project
- (d) amount of private partner funding (both debt and equity) to be invested in the PPP project
- (e) proposed risk allocation
- (f) marginal prices (tariffs) for work performed or services rendered, and any additional surcharges.

4.21 At the bid assessment stage, tender commissions shall keep a detailed record of all stages leading to each bid assessment. The record shall describe the decision-making methodology applied by the members of the commission, as well as the rationale for all its decisions.

4.22 The SGA shall notify bidders about any decisions made by the tender commission and shall publish them on the official website of the public partner and/or the official website for the tendering procedure (if any).

Final negotiation

4.23 Typically, any PPP project requires additional negotiation with the tender winner to decide on the final draft of the PPP agreement. In the course of negotiation with the tender winner, however, the SGA shall not amend those terms and conditions of the PPP agreement that were material to making the decision on participation in the tender (selection of the short-listed/winning bidders) and which formed part of the selection criteria. With respect to certain projects, the legislation of the relevant CIS member country may provide for certain restrictions or an absolute prohibition on further negotiation following determination of the tender winner.

4.24 If the estimated cost of the PPP project increases, including due to a change in legislation or a significant change in the exchange rate of the national currency, the project documentation may be adjusted and new tender documentation approved if such an increase does not entail a change in the project's technical features. In this case, a new competition is not required.

Publication of information about the results of the competition

4.25 Information on the results of the competition for the selection of a private partner, with the exception of information constituting state secrets or other secrets protected by law, shall be posted by the SGA on the official website for publishing information about tenders and/or in the official print media.

Private initiative

4.26 The laws of the relevant member country shall stipulate the rules and procedures for concluding a PPP agreement where private initiative arrangements are used (for example, private unsolicited proposals upon conclusion of the PPP agreement).

4.27 In the context of private initiative arrangements, one of the principle objectives of the SGA is to define the conditions for implementing and financing PPP projects by private initiative investors and to assure sufficient transparency in the selection methods used and the achievement of an optimum PQR.

4.28 In the course of implementing private initiative arrangements, the project proposal shall also undergo the relevant procedure for assessing PPP project efficacy applicable to PPP projects initiated by the public partner, in accordance with the CIS member country's chosen methodology for evaluating the effectiveness of PPP projects.

4.29 The proposal of the investor initiating the PPP project shall be published on the official website of the public partner and/or on the official website of the tendering procedure (if applicable) and/or in the official publication for information about tendering procedures (if any). If any other interested parties ready to implement the project are available, the SGA shall select the private partner on the basis of a competitive tender.

4.30 If a competitive tender is held, the relevant public body should ensure the protection of the rights and legitimate interests of the investor initiating the PPP project. The investor may be granted certain benefits and incentive measures in accordance with the laws of the CIS member country, in particular:

- (a) exemption from the need to provide security for the fulfilment of its obligations at the stage of preliminary selection and/or competition or exemption from certain other obligations at that stage
- (b) the right to change its proposal after the evaluation of the proposals of other bidders if one of the latter was recognised as the highest scoring;
- (c) the right to receive from the bidder who has entered into an agreement with the public partner (if this is not the initiator of the project) reimbursement of the costs incurred by the project initiator in preparing the project in an amount specified in the tender documentation
- (d) other benefits and incentive measures.

5. Commercial close

5.1 Upon determining the winner of the tender or concluding any negotiation specified in paragraph 4.24 above, or if no other interested parties are available in the context of the private initiative arrangement (paragraph 4.30), the public partner and the private partner shall conclude the PPP agreement.

5.2 The PPP agreement shall be concluded within the period established by the legislation of the CIS member country, the tender documentation or within the PPP agreement.

5.3 If it is necessary to conduct final negotiations at the stage of commercial close, the period for concluding a PPP agreement may be extended. In practice, the final negotiations may last for several weeks or even months. However, the SGA should seek to minimise the duration of such negotiations.

5.4 At the stage of commercial close, the draft PPP agreement can be changed only to the extent permitted by the legislation of the CIS member country.

6. Financial close

6.1 Commercial and financial close of a PPP project may take place at different periods of time because, after the commercial closing, the financing institutions may need time to analyse the provisions of the PPP agreement and other project agreements, and a private partner may need time to comply with all the preliminary terms and conditions required for the availability of financing.

6.2 In such a situation, there is a risk that the project will not be implemented due to a failure to achieve financial close, or that the relevant public authority will have to make changes to the PPP agreement, which are in some respects unfavourable for the public partner, to comply with the requirements of the financing institutions, as a new selection process for a private partner would require additional time and expense.

6.3 To minimise this risk, the relevant public authority may specify in the tender documentation the requirement that private partners fulfil their obligations as a prerequisite to financial closing. Other options to mitigate this risk may be mandatory confirmation of availability of the required financing or conclusion of preliminary financing agreements in the tender proposals of bidders. However, the SGA should note that including such provisions will complicate the process of preparing bids and may decrease the project's appeal to potential investors.

6.4 The SGA shall fulfil in a timely way the preliminary conditions of financial close related to the public partner and, upon compliance with all preliminary conditions, including receipt by the public partner of confirmation that the private partner has in place sufficient funding (debt and/or equity) for implementation of the PPP project, shall guarantee the signing and issuance of a report to confirm the parties' achievement of the financial close of the PPP agreement.

6.5 If debt financing is used for the project, a public partner, a private partner and a creditor/lenders can conclude a direct agreement at financial close. This agreement may include the following conditions:

(a) obligations of the private partner to inform the other parties about the occurrence of any material breach of obligations under the PPP agreement, the direct agreement and the financing agreements, including (in particular) those which may lead to the termination of these agreements

(b) a procedure for party interaction in case of a breach by the private partner of the terms of the financing agreements or PPP agreement, including for the purposes of preventing the project from being stopped

(c) an allowance and procedure for transferring the PPP agreement to a lender and/or a third party to replace the private partner in a project, in circumstances specified by the direct agreement, including the inability to implement the project using the existing private partner

(d) consent of the public partner to the creation of various types of security interest in favour of the lenders and to make payments under the PPP agreement to (an) account(s) specified by the lenders

(e) restrictions on making changes to (certain) provisions of the PPP agreement and other project agreements that may affect the rights of the lenders

(f) a clause prioritising the provisions of the direct agreement over the provisions of the PPP agreement and other project contracts

(g) other conditions included in the direct agreement to protect the interests of the lenders.



7. Supervision of performance under the PPP agreement

Control and supervision

7.1 The public partner shall continue to be responsible for the provision of the relevant public services following conclusion of the PPP agreement. After the commercial and financial close are achieved, the public partner shall ensure that performance under the PPP agreement is systematically monitored, both at the stage of creating/reconstructing the facility and at the stage of its operation/maintenance, and that the reporting documents submitted by the private partner are systematically reviewed.

7.2 The public partner shall appoint an authorised body responsible for monitoring and supervising the PPP agreement. The authorised body shall have sufficient experience in implementing PPP projects, knowledge of the relevant industry or sector, and sufficient resources to carry out these tasks.

7.3 Apart from monitoring the fulfilment of its obligations by the private partner, the authorised body shall also provide monitoring and supervision of fulfilment by the public partner of its own obligations. If any breach by the public partner of its obligations under the PPP agreement is detected, the SGA shall take appropriate measures to minimise the consequences and reduce the probability of it recurring.

7.4 For the purposes of monitoring and supervising performance under the PPP agreement, the public partner may engage independent experts and specialists in the relevant industry or sector and conduct a survey among the users of the services provided by the private partner to make possible a proper determination of the quality and availability of such services.

7.5 Applicable laws and the PPP agreement shall strictly regulate the rights and responsibilities of the public partner with regard to monitoring and supervision. In discharging them, the public partner shall not unreasonably interfere with the economic and business activities of the private partner or prevent the latter from fulfilling its obligations under the PPP agreement.

7.6 More detailed requirements for the monitoring and supervision of PPP projects shall be set out in the brief recommendations on monitoring the quality of services provided and the results of PPP projects in CIS member countries.

Transparency and information on PPPs

7.7 The SGA shall maintain a database of PPP agreements, subject to any legally recognised exceptions, including to protect national security and confidentiality. For these purposes, the database may include PPP agreements in redacted form or the main provisions thereof.

7.8 If the PPP agreement is changed, the SGA shall ensure that the relevant information is recorded in the database of PPP agreements.

7.9 The maintenance of such a database shall contribute to the transparency of the applicable tendering procedures and enable the public partner to track the performance of its own obligations.



8. Further PPP project assessments

8.1 The SGA shall procure a further assessment of each PPP project after its completion. A team of specialists independent of the public partner that took part in the preparation and implementation of the PPP project shall carry out such assessments.

8.2 The laws of the relevant CIS member country shall stipulate the criteria and methods for any further assessments of PPP projects, as well as the information required for their conduct. The SGA shall collect the relevant information for the post-project assessment when preparing and implementing the PPP project.

8.3 The SGA shall use the conclusions reached in these further assessments of PPP projects to identify the positive and negative aspects of such projects and to update and refine the processes involved in preparing and implementing them.