GUIDANCE

Financing of Concessions

1 October 2023

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Section I: Purpose

This document provides guidance on the interpretation of the Bank's approach on the financing of Concessions as set out in Section III, Article 3 (in respect of financing a public party to a Concession), as well as Section III, Article 4 of the PPR (in respect of financing a private party to a Concession).

Section II: Definitions

Terms used in this Guidance have the following meanings:

Bank — means the European Bank for Reconstruction and Development.

Concession — means an undertaking involving a cooperative relationship between public and private parties that shall be:

(a) long-term in nature and implemented pursuant to a Concession Agreement; and

(b) related to the provision of public services or services of general interest, whereby the public party furnishes special or exclusive rights to the private party or other undertakings (such as a recognised monopoly) and the private party undertakes the design, development, construction, reconstruction, rehabilitation or the maintenance of new or existing public infrastructure with the aim of private operation.

Concessionaire — means the private party in a Concession Agreement.

Concession Agreement — means an agreement, between a public authority and a private partner selected by that public authority, outlining the terms of a Concession.

Core Criteria — has the meaning given to it in paragraph 3 of this Guidance.

OCCO — means the Bank's Office of Chief Compliance Officer.

OGC — means the Bank's Office of General Counsel.

PPAD — means the Bank's Procurement Policy and Advisory Department.

PPR — means the Bank's Procurement Policies and Rules (POL/2022/8) as amended from time to time.

Terms not defined in this Guidance have the same meaning as set out in the PPR.

Section III: Scope

1. Introduction

The Bank seeks to encourage private sector involvement in the provision of public services or similar services of general interest through a variety of means. One example is a concession arrangement, whereby a public party entrusts a private party with a long-term undertaking that normally would involve large-scale and complex design, construction, and operation of new or existing public infrastructure by the private party who, in turn, would be furnished with special or exclusive rights in relation to such infrastructure.

What falls under a concession differs across jurisdictions. In relation to Bank-financed projects, the Bank's definition of a concession (as set out in the PPR) prevails, regardless whether the operating (commercial) risk would be transferred to a private party under a concession arrangement.

Concessions for the use of land or exploitation of natural resources do not fall under the scope of the Bank's definition of Concession. Projects involving privatisation or part privatisations, where a private party becomes a shareholder through an equity investment, are not classified as Concessions either. However, should the privatisation involve concession-like arrangements, it would be considered a Concession (e.g. long term lease coupled with investment obligations).

The Bank recognises that Concessions may raise several issues of interest to the public given that especially the operation of public infrastructure affects the quality of people's lives and impacts economic progress in a country. As a result, Concessions can be politically sensitive and vulnerable to re-negotiation and abrogation, in particular when the public perceives the contracting process as being opaque, unfair and non-transparent. Therefore, the Bank is particularly vigilant in relation to the transition, reputation and credit risks arising from Concessions.

When financing Concessions, the Bank aims at achieving a balance between its desire to encourage contributions by private parties to economic progress and the various public interests in the Bank's countries or economies of operation.

Should there be any questions on Concessions, teams should seek further advice from PPAD and / or OGC as appropriate.

2. Bank's involvement with Concessions

The Bank is normally involved with Concessions in the circumstances described below, whereby the Bank will always aim to address concerns that can arise in respect of Concessions.

(1) *Advising a public party about the appropriate procurement and contractual arrangements to be applied in respect of projects involving Concessions*

The Bank advises public parties to award Concessions in accordance with a fair, transparent and competitive process, allowing for prequalification of the potential participants, followed by a comprehensive competitive dialogue. Annex 1 describes the procurement procedures deemed by the Bank to be 'best practice' for awarding Concessions.

(2) *Financing a public party to support their funding of Concessions*

When the Bank is financing a public party to a Concession, the Bank Operation financing such Concession is classified as a Public Sector Operation. In such case, the procurement undertaken by the public party must follow the appropriate procedures set out in Section III, Article 3 PPR.

(3) Financing a private party to a Concession

When the Bank is financing the private party to a Concession (i.e. Concessionaire), the Bank Operation financing such Concession is classified as a Private Sector Operation. In accordance with Section III, Article 4 PPR, the Bank allows the Concessionaire to follow its established procurement arrangements. In such case, in line with Section III, Articles 4.2 and 4.3 PPR, the Bank will satisfy itself that the Concessionaire employs "appropriate procurement arrangements which ensure a sound selection of Goods, Works or Services at fair market prices and achieve value for money". Furthermore, contracts awarded by the Concessionaire should be negotiated on an arm's length basis and should be in the best financial interest of the private party.

Moreover, the Bank carries out a comprehensive due diligence on the Concessionaire selection process and the resulting Concession Agreement, as described below.

Notwithstanding the aforementioned arrangements, the Bank may engage in different ways in the transaction related to Concessions. In such instances, the team should consult with PPAD as early as possible.

<u>Bank Due Diligence</u>

The Bank's classification of the Bank Operation financing the Concession (i.e. private or public sector) will determine the due diligence process to be applied by the Bank. In any event, standard due diligence shall be undertaken in relation to both public and private sector operations.

Furthermore, in relation to private sector operations, additional due diligence must establish whether the Concession meets the Core Criteria. The Stakeholder Questionnaire in Annex 2 is provided to facilitate the due diligence process. In first instance, the information should be requested from the Concessionaire (where possible). If the project team cannot obtain the necessary information from the Concessionaire (e.g. the Concessionaire may not be in possession of the required information or the Concession has not yet been awarded), the team shall use reasonable efforts to obtain the missing information from the public party to the Concession. After reviewing the provided information, the project team shall prepare the Core Criteria assessment as set out in Annex 3.

The results of the due diligence as set out in the Core Criteria assessment, including the completed questionnaire and any relevant documentation, shall be provided to OGC and PPAD to enable a verification of the outcome of the due diligence.

3. Core Criteria for assessing Concessions under Private Sector Operation

When considering financing a Concessionaire, the Bank generally expects that Concessions are awarded following a procurement process that has been in line with 'best practices' as set out in Annex 1. Nonetheless, the Bank acknowledges that national concession laws may deviate from some best practices. Therefore, the Bank has established Core Criteria that may justify the Bank's involvement with financing a Concessionaire, which are set out in Section III, Articles 4.4 and 4.5 PPR.

As set out in the aforementioned articles of the PPR, the Bank may provide financing to a Concessionaire if, based on the information analysed during the due diligence process, it has determined that the following Core Criteria have been met:

(a) the process for selecting the Concessionaire:

(i) has demonstrated sufficient fairness, transparency and competition; and

(ii) was in compliance with all applicable laws and regulations;

(b) the terms of the Concession Agreement reflect market practice and are fair and reasonable in terms of price, quality and risk allocation; and

(c) no Prohibited Practices were identified in relation to the Concessionaire selection process or the implementation of the Concession Agreement.

In making a determination with regard to the above Core Criteria, the Bank will take into account the following considerations:

Process is sufficiently fair, transparent and competitive

The process for awarding a Concession must be open and transparent in terms of public scrutiny and adherence to appropriate public administrative procedures. It shall be established whether the project (from the structuring phase to awarding the Concession as well as the final terms of the Concession Agreement) was appropriately reviewed by the relevant authorities and was subject to public consultations.

The public party must have defined the opportunity and made it known broadly enough to attract the attention of potentially interested and qualified companies. Furthermore, it must not have discriminated or limited the number of potential participants on the basis of irrelevant and non-market criteria. Evaluation of the received offers must have been conducted on the basis of fair and reasonable criteria.

The Bank may consider the process unacceptable if due diligence reveals evidence of discrimination by the public party against a potential participant or favouring a particular participant or a company that made an unsolicited offer. Systematic efforts by the public party to limit competition would constitute sufficient grounds for the Bank to decline to finance the Concession. A public party may limit potential Concessionaires to those who can demonstrate sufficient capability and resources to successfully perform their contractual obligations in respect of financing, construction and operation throughout all phases of their undertaking.

In case of a Concession Agreement with a value below the thresholds as set out in the PPR, the Bank recognises that applicable national laws may allow such Concession to be awarded without a competitive procurement process being followed. In the context of such type of Concessions, the Bank may consider any deviations from a competitive procurement procedure acceptable if (a) the project has the potential to achieve a positive transition impact and (b) the Bank's due diligence has not identified any issues that could be detrimental to the reputation of the Bank.

The considerations in respect of the assessment of the transition impact of the Bank's Operations involving Concessions are further detailed in Annex 4.

In carrying out its due diligence, the Bank may also review press reports and seek out the views of civil society. It is assumed that the application of a competitive procurement process that allows structured negotiations between the parties will lead to a Concession Agreement that reflects appropriate market practice and provides for balanced conditions and value for money. The effectiveness of the procurement process depends on the maturity of the market and on the level of competition amongst qualified market players (including the presence of international actors amongst them). Nonetheless, following a competitive process does not guarantee a fair and reasonable outcome. Therefore, the Bank also considers the final terms and conditions of the Concession Agreement as an important element (see for more information below at "*Terms of Concession Agreement reflect market practice and are fair and reasonable in terms of price, quality and risk allocation")*.

As international practice is rapidly evolving in this area, the Bank will consult with other international institutions dealing with the financing of Concessions to ensure that its financing decisions are generally consistent with what is emerging as best practice.

For projects co-financed with another international financial institution, the concession policy of such institution may apply instead if the Bank considers their concessions policy to be broadly in line with the principles of the PPR.

Limits to due diligence

During due diligence the Bank must assess that the process for selecting the Concessionaire has demonstrated sufficient fairness, transparency and competition (Section III, Article 4.4(a)(i) PPR). This requirement, however, does not apply in two circumstances set out in Section III, Article 4.5 PPR: (a) when a Concession Agreement was signed more than 10 years prior to the request for Bank financing or (b) where the value of the Concession is below €5.35 million (excluding VAT).

Due diligence may not be feasible when information and documents are not available due to passage of time. The Bank has thus set a statute of limitation related to due diligence in respect of the Concession award process to ten years. Also, in case of Concession Agreements of low value, the Bank recognises that applicable national laws may allow such Concessions to be awarded without a competitive procurement process being followed. The Bank has therefore set a threshold for this in the PPR.

Process complies with applicable laws and regulations

During the due diligence process, the Bank must establish that applicable laws and regulations have been followed. The information provided by stakeholders in this respect must be verified. To this end, when necessary, legal opinions shall be solicited.

Terms of Concession Agreement reflect market practice and are fair and reasonable in terms of price, quality and risk allocation

The Bank will need to be satisfied that the terms of the Concession Agreement reflect market practice and are fair and reasonable in terms of price, quality and risk allocation. Internationally recognised model forms of contract used as a basis of the Concession Agreement will usually be considered by the Bank as reflecting market practice.

To assess if the Concession Agreement is fair and reasonable in terms of price, quality and risk allocation, the following aspects shall be reviewed:

(i) Is the risk allocation efficient and generally consistent with good international practice?

(ii) Is the risk-reward profile of the contract fair?

(iii) Is the equity contribution by the Concessionaire proportionate to the risk undertaken by them under the Concession Agreement?

(iv) Are the terms of the Concession Agreement balanced and do they protect the interest of all stakeholders?

(v) Are there appropriate dispute resolution and termination clauses?

(vi) Does the price represent value for money from a public interest perspective?

(vii) Is there a transparent and objective price setting and adjustment mechanism (either within the contract or by regulation)?

(viii) Is the price in line with independently estimated costs and consistent with international benchmarks (where available)?

(ix) Is the price fixed or based on cost pass-through? If the latter, does the Concessionaire have appropriate incentives to efficiency?

(x) Are there appropriate incentives made to ensure efficient and optimal investment, whilst minimising the risk of capital expenditures exceeding the level necessary to achieve the goals of the Concession?

(xi) Where there is a risk of transfer pricing or excessive investment (if regulation relies on a rate-of-return type of approach), have appropriate arrangements been made to ensure the procurement of goods, works, services has been conducted on an arm’s length basis and their costs are in line with current market prices?

No Prohibited Practices were identified in relation to the Concessionaire selection process or the implementation of the Concession Agreement

During the due diligence stage, the Bank's standard integrity checks will be conducted. The Concessionaire's qualifications, track record, reputation and business integrity shall also be reviewed.

Given the reputational risks and the Bank's zero-tolerance approach to fraud and corruption, the Bank will not provide financing for a Concession Agreement if the conducted due diligence has identified that Prohibited Practices have occurred in relation to the selection process of the Concessionaire or during the implementation of the Concession Agreement. Any indications of potential Prohibited Practices shall be reported by the project team to OCCO.

Derogation

In the event of non-compliance with at least one of the core criteria, in order to proceed with the project, the project team must seek a Board derogation from the PPR. Before approaching the Board, the project team shall consult with PPAD Policy. PPAD may consult with other departments, such as OGC and OCCO (if appropriate).

Annex 1 – Best Practices Competitive Procurement Procedures for Concessions

In accordance with the PPR, the Bank pursues the following objectives when financing Concessions:

(a) Economy and efficiency in relation to the selection of the Concessionaire.

Economy refers to the selection of a Concessionaire that leads to achieving value for money for the given Concession. Efficiency refers to the selection of a Concessionaire within a reasonable time frame and at a minimal cost for the public party and the participating companies.

(b) Integrity, transparency and accountability in the procurement process conducted by the public party.

The Bank expects all parties involved with the Concession to observe the highest standard of ethical conduct, transparency and integrity. The Bank has zero tolerance for fraud and corruption and generally takes measures to mitigate the risk of its funds being misused. To this end, during the due diligence phase, the Bank assesses if Prohibited Practices were identified in relation to the Concessionaire selection process or the implementation of the Concession Agreement, because this may also pose reputational risk.

Any indications of potential Prohibited Practices in relation to the Bank Operation involving the Concession or the implementation of the Concession Agreement shall be reported by the project team to OCCO.

Best practices procurement process

The Bank believes that a Concession Agreement should be procured following a procedure similar to the Bank's standard multistage open tendering procedure (preceded by a pre-qualification) as set out in Section III, Article 3 PPR. Therefore, the following elements are considered best practice for the procurement process for Concession Agreements:

(i) Appointment by the public party of experienced advisers covering the technical, legal, and financial issues arising during the preparation and the conducting of the procurement process to ensure these are handled to the highest professional standards.

(ii) An invitation to a selection process is made public in such manner that it reaches as many potential participants as possible. The invitation should contain sufficient information to stimulate potential participants' interest and to allow them to judge whether they are likely to be qualified to compete and perform the Concession Agreement.

(iii) Given the high costs of participation in a procurement process for a Concession, pre-qualification is recommended to ensure strong competition amongst a limited number of qualified participants.

(iv) Issuance by the public party of comprehensive and well-structured procurement documents describing the selection process, evaluation methodology, qualification criteria, performance requirements, draft contract terms and conditions.

(v) A structured approach to the evaluation of proposals, iterative discussions with participants, and subsequent negotiations with the selected participant to finalise the Concession Agreement.

(vi) Public disclosure of the outcome of the selection process and the key terms of the Concession Agreement that has been negotiated and of any other important elements of the proposal (subject to reasonable confidentiality).

Beyond the aforementioned fundamental elements, further details would typically be included in a competitive selection process that the Bank would consider as best practices in terms of communication with potential participants, evaluation of proposals, handling of negotiations, and publicity in relation to the process and the outcome. A useful compendium of these elements is contained in the consolidated legislative recommendations in the draft legislative guide on privately financed infrastructure projects produced by the United Nations Commission on International Trade Law (UNCITRAL) as well as in the publications of the United Nations Economic Commission for Europe (UNECE) in respect of People-first Public-Private Partnerships (PPP).

As a critical element of transparency in the process, the final request for proposals shall include the criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals.

The issues involved here concern:

(i) The number of rounds of preliminary, subsequent, and final proposals from participants and what is required at each stage;

(ii) The content of clarification of proposals in discussion with participants between rounds;

(iii) The definition of what is negotiable vs. non-negotiable at different rounds;

(iv) The stage at which a preferred participant is declared with whom it is intended to undertake final negotiations, reverting to other participants only if there is an unexpected impasse in those negotiations; and

(v) The way in which the different evaluation criteria are combined in making a final decision (whether formal weighting or another approach).

These issues are best determined on a case-by-case basis with the benefit of advice from experienced advisers who can adapt experience from elsewhere to the circumstances of the particular public party, project, and participants.

The Bank avoids rigid prescriptions in this area because there are cases in which it may not be feasible for the public party to formulate its requirements in sufficiently detailed and precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. In such cases, the public party may wish to divide the selection proceedings in two or more stages and allow a certain degree of flexibility for discussions with participants. This process allows the participants to offer their own innovative solutions for meeting the particular infrastructure need of the public party in accordance with defined standards of service. Following examination of the proposals received, the public party may revise the initial proposals specifications and contractual terms prior to issuing a final request for proposals.

One implication of the above discussion is that there is nearly always some element of negotiation before a competitive tender can result in a legal, valid and binding contract between the public party and the Concessionaire. However, changes in essential elements of the proposal should not be permitted, as they may distort the assumptions, on the basis of which the proposals where submitted and rated. Accordingly, an important element in the competitive procurement procedures considered acceptable to the Bank is that final negotiations are limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected participant's lenders. Final negotiations should not concern those terms of the Concession Agreement that were stated as non-negotiable in the final request for proposals. In addition, the mere existence of a competitive tender alone is no assurance of full transparency, openness or lack of corruption. Procurement documents that are faulty or too detailed in terms of technical specifications may well lead to a bad result. The use of qualified and experienced advisers is therefore an important element, whether the public party awards a contract by competitive tender or not.

Annex 2 – Stakeholder Due Diligence Questionnaire

Please provide your response for each question and enclose relevant supporting documentation. Alternatively, the necessary information can be solicited from the public party (either directly or through the Concessionaire). *If you do not have access to the requested information, please indicate alternative sources where such information can be obtained. Where possible, documents should be provided in English or with an English translation. The EBRD can request further information / documents to substantiate the provided information.*	
Questions	**Input Stakeholders**
Concessionaire's Statement	*Concessionaire to prepare a statement explaining the selection procedure and providing information on the selection and award process.* *This questionnaire once completed may form part of that statement.*
General Information	
Contracting authority:	
Name of concession:	
Law(s) under which the concession was awarded:	
Advisors *Information about technical, legal, and financial advisers who supported the contracting authority with the concession.*	
Name and contact details advisers:	
Role of advisers:	
Prequalification / pre-selection process	
Was prequalification conducted?	
Date and source of publication invitation for prequalification:	
Duration of prequalification:	
List the applied criteria:	
Result of prequalification exercise: - List all applications (name and country) - List prequalified applications (name and country)	

Selection process	
- Number and duration of stages of the procurement process:	
- List all participants who submitted proposals (name and country): - List participants invited for the final stage (name and country) (if applicable): - List the winning participant (name and country): - Provide information on complaints or legal proceedings initiated by applicants and the status and outcome thereof:	
- List criteria used for the evaluation of proposals and qualification assessment (in case no prequalification occurred):	
Publication results	
- Date and source of publication of results: - Summary of disclosed information	
Procurement-related complaints	
- Provide information on complaints or legal proceedings initiated by applicants/participants and the status and outcome thereof.	
Contract conditions	
- At which stage of the procurement process were the draft contract conditions disclosed to participants?	
- List key material changes between the draft contract and the negotiated contract (if applicable): *Please attach copy of final Concession Agreement*	
Fraud and corruption	
- Are there any allegations of fraud and corruption in relation to the procurement process? *If so, please provide any available information*.	

Annex 3 – Assessment of Core Criteria Compliance

Core Criteria *For further details on the separate core criteria, please refer to paragraph 3 of the Concession Guidance*	**Assessment Compliance** *Please elaborate and substantiate whether there is compliance with the core criteria.*
Process is sufficiently fair, transparent and competitive	
Process complies with applicable laws and regulations	
Terms of Concession Agreement reflect market practice and are fair and reasonable in terms of price, quality and risk allocation	
No Prohibited Practices were identified in relation to the Concessionaire selection process or the implementation of the Concession Agreement	

Annex 4 – Transition Impact

Three main channels of transition impact may be derived from the Bank financing a Concessionaire as further described below. In assessing the transition impact, the Bank is mindful to balance its commercial interest as financier with its public duty to ensure a fair sharing of efficiency gains between the private and public parties.

(i) *Impact of private sector involvement*

The Concession is a way to engage the private sector and demonstrate the economic benefits of its involvement through the introduction of commercial and market-related practices in relation to the design, development, construction, reconstruction, rehabilitation, operation, maintenance and financing of new or existing public infrastructure. This would also foster institution building in the sector in support of the economic development in the country. It is therefore expected that Concessions will have a positive demonstration effect leading to commercialisation and/or private sector involvement in other cases. Should a Concession fail to achieve the intended outcome, the transition impact could be negative.

(ii) *Demonstration effect of competitive procurement process*

A second channel of transition impact derives from the demonstration effect of the selection process leading to the contract award. If an appropriate competitive procurement procedure (as described in Annex 1) is followed, this will facilitate broad (international) competition, achieve value for money, and result in having balanced contractual terms that would serve as a good foundation for a stable and long-term engagement by the parties to the Concession. Positive outcomes will encourage public parties to follow best practices for their engagement with the private sector, in particular concerning public infrastructure, leading to transition impact. Furthermore, to facilitate the application of best practices in relation to a Concession, relevant authorities may be encouraged to enhance their respective legal frameworks.

(iii) *Fair and balanced contract conditions*

Finally, transition impact may be derived from using contract conditions that are fair and reasonable in terms of price and quality and balanced regarding risk allocation. Such conditions facilitate a long-term partnership between the public and private party by providing a transparent and predictable contractual framework that regulates the interaction between the parties, which would reduce the risk of disputes. Positive outcomes will encourage public parties to follow best practices in relation to contractual terms for Concessions.

Section III: Disclosure

This Guidance will be disclosed on the Bank's external website.

Section IV: Effective Date

This Guidance is effective from 1 October 2023.

Section V: Decision Making Framework

Director, PPAD is accountable for this Guidance.

Associate Director, Policy, PPAD, as designated by the Director PPAD, is responsible for this Guidance.

Section VI: Related Documents

Procurement Policies and Rules (POL/2022/8).