8. GENERAL PROCUREMENT ISSUES OF PPP’S

8.1 Introduction

This chapter takes an overview of key issues to be addressed for selection and award of a PPP agreement to a suitable Developer to implement the chosen long term water PPP agreement. Given the size and complexity of water PPP projects, the chosen procurement method has not only to meet local procurement standards but generally will need to be adapted to satisfy international norms and standards, to ensure effective involvement of financing institutions and developers. The overall aim is to establish an effective method of selection of a long term Developer that is financially, technically and operationally capable of development and long term operation of an effective water system under the PPP agreement. I focus on a competitive bidding approach, but note some key issues of other procurement approaches. The selection criteria and assessment methods are considered to be issues to be established at an early stage in the process. Furthermore, given the nature of development of water PPP schemes, there is a benefit in having continuing stakeholder consultation throughout the procurement process, with the aim of development of the most optimal scheme. In this chapter I show how the procurement process can be managed from initial survey of interest, through to final bidding, negotiation and award of a PPP agreement and achieving financial close. Finally it must be noted that this chapter provides the backdrop and general principles for the recommendations that are made later on in chapters 12 and 13 related to dealing with imperfect data and improving the overall sustainability of long term PPP agreements.

8.2 Principles for Good Procurement and Managing the Bidding Process

“Proper planning prevents poor performance”

The selection process is intended to achieve efficiency and maximize value for money within a dynamic and flexible environment. Conducting a selection process requires a balancing of control, flexibility and efficiency. The major parties involved in the tendering procedures, the Grantor, the bidders and the public will require assurances that the process has been carried out with transparency and that competition amongst bidders has obtained the best price and that the project will deliver value for money and quality service. The winning bidder will likely present the most economically advantageous offer, provide adequate price/service certainty and appropriate risk allocation.

According to brook and Cowen (2002), the key considerations governing the award of public contracts are as follows:

Competition amongst bidders injects efficiency into the process by allowing market forces to mould the procurement approach selected by the Grantor. The aim of a bidding competition
is to reduce the price of the project and to induce firms to offer best technical and financial solutions. Bidders are aware of the other competing firms and each firm or consortia will compete by reducing its price and improving its technical and financial proposals in order to be selected for final negotiations. Price is not the only consideration. The competitive process can spur greater innovation on the part of the bidders and this can only benefit the Grantor by providing it with technical and financial solutions that otherwise may not have been presented in non-competitive tendering.

**Economy and Efficiency:** The competitive bidding allows the selection of the Developer best able to deliver a high quality service (including all investments required) at the most cost effective or most commercially attractive proposal. Promoting competition between bidders is the most effective method to achieving this economy. The competitive approach can also be used to develop most effective technologies and operational methods.

**Integrity and Fairness:** The selection procedure should be clear and transparent and should ensure equal treatment of all bidders. Bidders can spend substantial amounts of time and money on preparing bidding packages and most will do so with confidence in the integrity of the selection procedures. Bidding firms are likely to decline to participate, or will price in the higher risk of participation into their bidding package, where they not sure of the fairness of proceedings. The confidence of participants will be bolstered by an approach that is developed to show fairness, and also has confidentiality mechanisms that protect the information detailed in the bids. Assurances should be made that no information will be disclosed to competing bidders and that all negotiations or discussions will be confidential (UNCITRAL, 2001). Any form of abuse, either by firms participating in the process, or by the parties administering it, should not be tolerated and a clear system of sanctions will demonstrate the integrity of the approach.

The *transparency* of the bidding process, the way that it is administered and the scope, requirements, pricing and technical specifications should be clearly detailed (Dinar and Subramanian, 1997). Not only does this reduce the need for clarifications during the process, but allows the bidding firms to generate a clearer view of the risks, resource commitment and costs involved in participating in the process. By giving every potential bidder the same information on the Grantor's requirements, the costs of bidding and the probability of winning become much more calculable, increasing the number of potential bidders and increasing the competitive environment. The Grantor should ensure that all procedures governing the selection of the Developer are transparent and fully disclosed. Transparency in tendering procedures can improve competition and reduce unexpected costs. It also serves to mitigate potential corruption. A clear record of the selection proceedings will assist transparency and accountability, and help reduce potential disputes. Transparent tendering procedures can also attract the interest of non-traditional investors, increasing the potential sources of finance for bidders.

**Managing the Bidding Process**

A competent and efficient procurement management team, linked to careful planning and co-ordination of the procurement process, will ensure success of the selection proceedings. My research suggest the need for the Grantor to establish a strong bid management structure able to handle the complexities of procuring the project and managing the bidding process. The

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71 Excessively costly and burdensome selection procedures can act to dissuade bidders from participation in the proceedings, as well as being a burden on the Grantor, and therefore selection procedures should be designed to select a Developer within a short period of time, with minimal administrative burdens and at a reasonable cost to both Grantor and the bidders.
Grantor should ensure that suitable administrative and personnel support is provided to undertake the chosen selection procedure. I would strongly recommend that representatives from key public agencies should form a steering committee to oversee the execution of the process. Furthermore, I would recommend:

Appointment of Award Committee: The Grantor should establish an award committee that will be responsible for evaluating the proposals and making recommendations on selection. The committee should ensure a fair, transparent and efficient procurement process, executed in accordance with local and international laws and regulations. The composition of the committee is decided by the Grantor, with members of suitable standing and skills. These will be supported by suitable technical, operational, legal and financial staff. Outside expertise will be critical in providing knowledge and expertise to establish the water PPP scheme. The advice of independent experts or advisers to help determine the evaluation criteria, performance indicators and specifications and preparing the bid documentation may be sought. The responsibilities of the committee include overseeing the bid management team in: drafting bid documents, identifying short listed bidders, and identifying the winning bid. However, it must be noted that a separate team may be required to finalize negotiations with the winning bidder.

Use of Advisers: As mentioned before it will be important that the Grantor has appropriate financial, technical, operational and legal support. Demand analysis is a key area where external technical advisor participation is often crucial. Technical support is required as well in:

- Preparation or review of construction costs and assumptions for the feasibility review.
- Drafting output specifications and risk analysis
- Structuring the technical aspects of the bid documentation
- Evaluation and negotiation of the technical aspects of the bids.
- Design review
- Construction supervision

External legal advisors can assist on specialized legal aspects of the project and particularly in drafting the PPP agreement and all bid documentation, and, together with the Grantor, ensuring that the bidding procedure fits with relevant procurement legislation (Basañes, et al, 1999).

Market Sounding is the process of assessing the reaction of all potential bidders to a proposed project and procurement approach before formally initiating a procurement process. Market sounding helps to establish the existence of a market for the proposed project, level of investor interest and project feasibility. It helps to obtain feedback on basic fundamentals of a project and its key constraints (Yescombe, 2002). If the project’s financial model is shared...

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72 My research reveals that time and money should be invested into proper procurement preparation. When badly conceived, tendering processes can lead to delays and wasted capital. An example of this is the failed bidding procedure for a lease type PPP agreement in Dar es Salaam, Tanzania which was re-bid twice before Bidders felt confident the procedure was well enough designed and had a reasonable risk allocation for them to spend money and resources in bidding the project. The Grantor should ensure that, prior to beginning the process, it has conducted a thorough review of the project in detail, of the potential risks, the design requirements and that the project will deliver value for money. Thorough project preparation will reduce the bidding costs for potential Developers, increasing the number of parties able to participate, the level of competition and so reducing the cost of the project to the Grantor.

73 Other advisers and consultants may be hired to assist the Grantor in the evaluation of proposals and drafting and negotiation of the project agreement. Financial, technical and legal advisors should generally be selected on a competitive basis, and should demonstrate that they have the skills relevant to the scope of the work.
with the potential pool of bidders, insight on commercial viability can be sought. However, the focus of market sounding should be to obtain information on: the following key areas: Feasibility — whether the proposed project is feasible, experience from other similar projects; Capability & Capacity — whether potential bidders are able to execute the project; Maturity — whether there is an established market for the requirement and whether a competitive procurement could be held.

It is recommended that the market sounding process be open and that all participants are treated with equality and fairness. Giving any potential bidder an inside advantage must be avoided to preserve a level playing field. Market soundings can range from a request for comments, to a full market-testing questionnaire, through to ‘road shows’ or meetings with potential bidders to address key issues that may help optimize project design and implementation.

8.3 Selection Criteria & Bid Evaluation

Contracting authorities seek bidders with proven experience and capability in the service being tendered. As discussed above, my research suggests that the award of public contracts is best achieved through methods that promote competition among a range of bidders within structured, formal procedures. Competitive selection procedures generally provide optimum conditions for competition, transparency and efficiency.

Competitive selection is generally carried out in two stages:

a) Prequalification of suitable bidders
b) Formal bidding, and selection of the winning bid

Contracting authorities should decide the methods, principles and scoring process and weightings before starting the selection process. Contracting authorities need to indicate the broad evaluation framework to the bidders in order to maintain transparency and to increase bidder’s confidence. It may also be necessary to train staff in reviewing bids in order to maintain consistency in the evaluation process.

In this chapter we consider evaluation at both pre-qualification and bidding stages.

Selecting Criteria for Competitive Bidding

The complexity of many infrastructure projects requires contracting authorities to design evaluation systems to compare proposals from different bidders. Bidding packages which have passed the threshold of quality and technical aspects can be judged solely on the single factor, such as a global price offered for the construction works and long term operation, or some basket of financial measures. However, price alone should not be the sole determinant. Privately financed infrastructure projects are expected to be financial self-sustainable, maximizing recovery of the development and operational costs from the project’s own revenue, and optimizing amounts of subsidies needed. The Grantor will therefore need to analyze the suitability of the technical elements and the commercial and financial feasibility of the project, the soundness of the financial models and of the bidding proposals (Vives, 1997). The manner in which the winning bid will be selected must be determined prior to the tendering process. The most common system uses the following evaluation procedures:

74 One approach is for the Grantor to calculate the comparable cost for the public sector itself to construct and run the project in order to ascertain a ‘public sector comparator.’ This comparator can be useful as a measurement standard for assessing bids and provides another method of ascertaining value for money.
• **Prequalification** – Firms interested in the project are required to establish technical competence and financial viability. The purpose is to limit the field of applicants to those that meet the minimum requirements to participate in a competitive award process. The Grantor reviews the information and selects a short list of firms invited to participate in the next stage.

• **Evaluation of technical proposals** – Technical proposals are submitted on how the Developers would execute the project and further technical and financial capacity information is submitted. Grantors establish technical evaluation criteria by which to assess the proposals. Bidders have to achieve a minimum score according to the criteria to be chosen to participate in the next stage.

• **Evaluation of financial proposals** – financial evaluation criteria are then used to assess the bidders’ financial proposals. The bidder with the best financial proposal is then awarded the PPP agreement.

The technical evaluation criteria determine the fitness of a bidder to undertake the project if selected. The criteria are used during the prequalification and the technical evaluation stages. As a pre-qualifying test, a bidder’s operating capacity may be evaluated by investigating the bidder’s previous experience with similar projects, its human resources and technical capability. Financial capacity can be established by analyzing the bidder’s financial statements and whether other financial institutions are supporting its bid. The financial capacity of the bidder evaluated at the initial stage only to see whether he has the resources to carry out work of the size and complexity of the proposed water PPP scheme (Klein, 1998b).

Common quality criteria include:

- Technical skills
- Personnel skills
- Management team
- Supply chain management
- Methodology
- Environmental criteria
- Relevant experience
- Past performance

At the final bid stage more specific technical evaluation criteria are required, specifically related to the detailed water scheme and the type of PPP agreement. Depending on the type of PPP agreement being bid, so will the emphasis of the technical evaluation differ – for a PPP agreement the Grantor will be more concerned with the construction, and operations and maintenance and extension plans included in the bids; while for a management contract, the evaluation will focus more on the quality and expertise of the management personnel, management style and systems. Operational and capital works investment issues are the main focus of the technical proposal. Financial information on the bidder’s working capital and investment plans may also be included to ensure sufficient resources will be available. Technical evaluation of proposed business plans involves a great deal of discretion and judgment, and care needs to be taken to ensure continuing transparency of procedures. The Grantor can liaise with bidders on the technical and service requirements before finalizing a technical package to be bid on75.

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75 Many contracting authorities have opted for a process in which all the bidders bid on the same technical specifications or service requirements and the evaluation is solely based on the financial proposal.
The Developer's financial proposal will need to assure the Grantor that sufficient financial resources will be made available to ensure that the technical proposal can be carried out. This will be evaluated on the strength and deliverability of the financing plans, equity and debt providers’ levels of commitment, and the risk allocation terms. Criteria required for financial evaluation can include:

- Customer/Developer tariff required/Subsidies payable
- Upfront fee, periodic lease payments, or concession payments to the Grantor.
- Price for shares or assets to be sold
- Capital investment committed by the Developer
- Service Quality targets
- Service or management fees payable to the Developer
- Subsidy payable to the Developer
- Subsidy payable by the Grantor.

### 8.4 Prequalification

With the size and complexity of privately financed infrastructure projects, the Grantor may decide to limit the number of bidders from whom more detailed proposals will be requested, to only those which satisfy pre-qualification criteria. Pre-qualification is selection of suitable bidding firms from among all interested parties, involving evaluation of bidders’ qualifications and resources, as well as technical and financial capacity for handling the project (Klein, 1998b). Those bidders who qualify can be selected to take part in the tendering phase.

The prequalification process is also beneficial in helping to simplify the final bid selection process, since assessment of ability and capacity to perform will not be required again. The prequalification process has the benefit of helping the Grantor focus on development of the project details on a clear and effective way, and the process can be used to get industry input in doing this. My research suggests that key documents issued to potential bidders at the pre-qualification stage can include:

- Background information memorandum on the proposed project
- Bidding process instructions and bidding selection criteria
- Prequalification questionnaire for all potential bidders

**Prequalification Questionnaire:** A key purpose of the pre-qualification questionnaire (PQQ) is not only to ensure the potential bidders’ capacity, but also to be used as an evaluation tool used to reduce the number of bidders invited to tender down to a manageable amount. The Grantor will evaluate the completed questionnaires and exclude the bidders who do not meet the minimum requirements of suitability (Office of Government Commerce 2005). The pre-qualification questionnaire explores:

- Business Activities – the bidders’ previous experience and expertise in the field
- Financial Information – the bidder’s financial health and whether there are any risks to satisfactory contract completion. Information on the bidders’ capacity to raise finance and the type of debt to be raised will also be critical.
- Legal Information - The legal status of bidding firm.
- Resources – Quality of the personnel involved in the project.
Road Shows: Before launching a pre-qualification process, Governments (aided by their advisors) generally undertake a ‘road show’ to promote the potential transaction and review the level of investor interest. By meeting potential bidders, contracting authorities can set the criteria to ensure that there will be a sufficient number of bidders based on their knowledge of investor interest and the technical and financial characteristics of potential bidders.

Public Notification and Prequalification: In the interests of transparency and competition, the invitation to the pre-selection proceedings should be handled in a manner which attracts the broadest possible interest to ensure a competitive selection process. The invitations should be published domestically and internationally in order to foster interest at home and abroad. The procurement process generally begins with a public notification in electronic and traditional media outlets stating the details of the tender opportunity. The details of the notification will adhere to the requirements of the country’s procurement laws and will contain information on the project with a request for qualified companies, groups, or consortia to participate in the tender process. Companies expressing interest in the invitation are then sent prequalification documents.

The pre-selection documents should contain clear and concise information detailing the precise infrastructure to be built and the specific requirements expected of the selected Developer, the financial structure and a summary of the terms of agreement envisaged by the Grantor.

Pre-selection Criteria: Bidders should be required to demonstrate that they possess:

- The technical and professional qualifications
- Financial and human resources
- Managerial capability
- Reliability and experience
- The specific criteria required for large scale infrastructure projects such as an water scheme include:
  - Experience managing financial aspects and experience operating infrastructure services under public regulatory oversight (proven through quality indicators of their past performance in previous projects);
  - The experience of the key team members to be involved in the project;
  - Organizational ability (experience in construction, operation and maintenance); and
  - Financial sustainability (demonstrated by the amount of equity the bidder is willing to provide and the support of financial institutions defending the financial standing of the bidder).

The challenge is to identify the right parameters by which to judge quality. Performance criteria may also be utilized which allow bidders to demonstrate a minimum level of efficiency in their relevant operations elsewhere.

76 In discussions with Mr David Siggers, an experienced transaction adviser in the water and wastewater sector (February 2009), he strongly recommends that the Grantor only prequalifies firms with a track record and reputation at stake. Firms with experience will have observable PPP agreement behavioural patterns and therefore evidence of ‘low-balling’ in their past can be factored into the bid evaluation.
Dealing with bidding Consortia: The prequalification process should be designed in such a way to ensure the participation of the broadest range of local and international companies with relevant experience in the field. The number of firms experience in building and operating water and wastewater services is relatively small and in most cases contracting authorities will be faced with consortiums of real estate developers, rolling stock providers and construction companies. Developer consortiums seek to offer the full range of expertise and experience. Grantors should be careful to evaluate the full financial capacity of the consortium and whether there is a track record of the component firms working together in the past. There is a need to assess the forms of any joint ventures that have been established to make the bid and the likely effectiveness of their varying types of equity or sub contract structures.

One firm should be designated as the spokesman for the entire consortia for the purpose of efficiency. It is recommended that the Grantor oblige the members of the consortia to sign an agreement committing them to remain in the consortia in the event of their selection. The Grantor may also stipulate that the members of the winning consortia create a special purpose vehicle to carry out the entity.

Evaluation of Pre-Qualification Responses: The Grantor should create a framework to evaluate the responses to the questionnaire using a pre-determined scoring matrix that determines the scale by which each component of the questionnaire will be graded and the level of importance to the Grantor (the weighting) that is to be applied.

Generating a Shortlist for Bid Selection: Potential bidders will prefer smaller short lists due to the increased probability of winning the competition. Some past experience evaluated as part of this research shows that some bidders may withdraw from the process if too many other firms are prequalified (more than 5 prequalified firms is the general threshold before firms evaluate their decision to proceed with a bid). At the same time, contracting authorities will seek to ensure greater competition between bidders by prequalifying more bidders. Past experience suggests that at least 3 bidders are necessary to ensure competition with 4 chosen as an insurance option should one firm drop out. Quantitative pre-selection criteria are more easily applied and transparent than qualitative criteria.

- Prequalification Threshold – the Grantor determines a quality threshold and all the bidders that pass the threshold are placed on a shortlist. The disadvantage is that too many or too few bidder will be shortlisted.

- Set a Number of Short Listed Bidders – the Grantor decides upon a maximum number of bidders that will be shortlisted. The top-ranking bids evaluated are then selected until the ‘quota’ is reached. The disadvantage is the probability of including low-quality bids and excluding high quality bids.

- Hybrid – interlace the above two approaches by creating a maximum quota of 5 firms that pass the threshold to be put on a shortlist but at the same time the Grantor can ring-fence the right to choose the top two or three ranked firms if less than 5 bids meet the threshold.

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77 Discussion with three international business development managers for Severn Trent Water International (Simon Langton), Thames Water International (Iain Menzies), Suez Lyonnaise des Eaux (Charles Chaumin), Bechtel International Water (Dr Geoff Thorpe) confirmed this statement. This was also evidenced by the retraction of Azurix from the bidding process of Tallinn, Estonia where five firms were pre-qualified.
8.5 Choosing the Bidding Process

Contracting authorities have at their disposal a broad range of options for the bidding and award procedures. The three main approaches are:

- competitive bidding
- competitive negotiations and
- direct negotiations.

In practice, most award processes contain an interface between competition and negotiation. In this section we look at the competitive bidding and negotiation approach, as being the most common, and generally considered the most appropriate for water PPP schemes.

After the pre-qualification stage, it is recommended that the Grantor review its original feasibility study and project/performance specifications in the light of information and comments gleaned from the pre-qualification process. The design of the bidding and award process can have a significant impact on the economic efficiency, transparency and quality of the outcome. At this stage of proceedings, the Grantor should then decide whether a single or a two-stage procedure or two-envelope bidding system will be used to request proposals.

**Single-Stage Bidding**

If the Grantor is confident that the final project specifications and performance indicators meet the required standards and designs, the selection process may be structured as a single-stage process. After pre-qualifying bidders, the Grantor would then proceed to issuing a final request for proposals.

**Figure 14: Single Stage Bidding Process**

- The authority prepares and issue bid documents
- Bidders offer responses containing their final technical and financial proposals
- The authority evaluates the combined proposals (technical and financial)

**Two Stage Bidding**

For complex projects, such as a water PPP scheme, the two stage bidding process is generally the most effective. The process includes a stage for dialogue between the Grantor and the eligible bidders that ensures that bids are more likely to meet acceptable standards. The purpose of this initial stage is to determine what the market considers feasible and bankable, and allows the Grantor to refine the bid requirements to take advantage of this information. No negotiations on the terms of contracts take place at this stage.

The process contains the following steps:

- Grantor issues request for proposals which contains technical specifications and bidding documents. The request for proposals should also include details on the risk allocation envisaged by the Grantor.
- Bidders submit a first round bid containing only preliminary technical proposals based on the information contained in the request for proposals for comment and discussion.
Figure 15: Stage One of a Two Stage Bidding Process

- The authority prepares a first stage bidding document with functional performance specifications (not all detailed specifications).

- Bidders offer unpriced technical proposals (without financial proposals).

- The authority evaluates bidders' qualifications along with technical proposals and then indicates what bidders must do in order to make their bid technically responsive.

- The bidders’ responses to the proposed risk allocation can assist the Grantor in assessing the feasibility of the project. The Grantor consults with each eligible bidder to discuss the bids and what changes are required to improve the bids. The Grantor must avoid disclosing details of any discussions to competing bidders and must treat all discussions as confidential.

- After these discussions, the Grantor should review and if necessary, revise the initial project specifications. Any changes to the project specifications must be communicated to the bidders in the invitation to submit final proposals. At this stage, bidders not desiring to maintain an interest should be allowed to withdraw from the process.

Figure 16: Stage Two of a Two Stage Bidding Process

- The authority prepares a memoranda of changes for each bidder (along with any addenda to the bid documents) to initiate the second stage.

- Bidders offer amended bids containing their final technical proposal along with their financial proposal.

- The authority evaluates the combined proposals (technical and financial).
Final request for Proposals\textsuperscript{78}

The Grantor’s chief responsibilities at this stage will include: providing detailed information to the bidders along with information on the tender rules and procedures; consulting with the bidders and delineating the precise format and content of the proposals. Each of these responsibilities will ensure the maximum amount of transparency competition within the bidding process.

The Grantor should ensure that it fully discloses all information regarding the potential project and precisely what the expectations are for the winning bidder. This will minimize accusations of unfairness and corruption. In addition, full disclosure will allow bidders to prepare the best possible bids according to the outlined requirements and given the same information, bidders are likely to produce easily comparable bids. Developers who have more relevant information will be more open to taking on the associated risks.

The Grantor should provide information where possible on:

- Description of the project and expected outputs – description of works and services to be performed, technical specifications, plans, drawings, and designs; time schedules for the execution of works and provision of services; technical requirements for the operation and maintenance of the service;
- Minimum applicable design and performance standards, including environmental standards – the desired quantity and quality of service should be detailed;
- Quality of service – general obligations, availability of services, and the relevant standards of quality to be used to assess the system.
- The bidders should provide information where possible in order for the Grantor to evaluate the technical soundness of proposals; the operational feasibility and the responsiveness to standards of quality and technical requirements, including:
  - Preliminary engineering design, along with the proposed schedule of works;
  - Project costs, operating and maintenance cost requirements and the proposed financing plan (debt to equity ratios);
  - Proposed organization, methods and procedures for the operation and maintenance of the project; and
  - Description of quality of services.

The contractual terms of the proposed risk allocation envisaged by the Grantor should also be included as part of the bidding documents. If the Grantor details its preferred risk allocation (provided it is bankable) it can ensure that Developers will bid against a common standard. Other essential elements to be included in the request for proposals include:

\textsuperscript{78} Compensation for Bid Costs: Bidding for water and wastewater PPP agreements is expensive. My research suggests that retaining at least two bidders until final selection is absolutely imperative for maintaining public bargaining power. Public support during final stages of the procurement process can offer good value for money by keeping competing consortiums involved and committed. However, structuring competition for unsuccessful bids can be difficult as actual bid costs are often unknowable. Bidder compensation based on a percentage of proven expenditures is one solution for compensation when parties can agree to qualifying expenses and open information exchange. Detractors of this method include increased complexity and reduced private incentives to control costs. Alternatively, fixed sum ‘honorariums’ may offer a simpler option for compensating unsuccessful bidders. Setting the honorarium amount correctly is the obvious challenge for this latter method and will require expertise from similar procurement processes.
• Information on the duration of the agreement
• Formulas and indices to be used to calculate tariffs;
• Government support and investment incentives;
• Bid bond requirements;
• Regulatory agency requirements;
• Monetary rules and regulations;
• Revenue sharing agreements, if any; and
• Transfer of assets at termination;

Information should be shared through the following channels:
• Bidding documents and information memorandums
• A data room
• Meetings with Grantor

A data room provides a one-stop location for bidders to receive further information about the proposed project. All bidders should have equal time and access to the project data.

Interaction with Bidders: Dialogue between the Grantor and bidders can be beneficial to both parties. Consultation with potential bidders prior to formally beginning the procurement process can increase investor interest as the contracts and can be tailored to increase the attractiveness of the project. The main approaches for bidder interaction are bidder conferences and arm’s length consultation. Bidder conferences are arranged by the Grantor to meet all the prospective bidders, explain the bid process and consult them on their ideas for the project. The Grantor may provide the conference attendees with draft documentation before the conference and bidders are given the opportunity to raise questions or request clarifications of specification. Based on my research I would recommend that these questions and clarifications are distributed to all potential bidders prior to the conference. The aim is to ensure fairness and transparency of information. However, it must be noted that there are disadvantages to this approach:

• Bidders may not wish to share innovative plans with their competitors.
• Bidders may not honestly answer questions during the conference.
• Bidders may seek to manipulate the transaction terms through their comments on the draft documentation.
• Bidders may seek to collude and persuade the Grantor to take on more project risks than necessary.

An alternative to this is the use of ‘Arm’s length’ discussions, where bidders submit written and independent comments on the draft bidding documents and the proposed PPP agreement. The Grantor reviews the comments and can receive a greater understanding of the key issues and concerns held by potential bidders. Whilst this written process does not suffer from the competitive issues of bidders conferences, it does not offer the advantages of the potential dialogue from a bidders’ conference.
The Technical Proposal

The Grantor must clearly specify in the request for proposals (RFP) the precise information and format required in bidders’ technical proposals. The format and content should be directly related to the evaluation system being employed by the Grantor as this will facilitate easier comparison and scoring of bids. Mott Macdonald (2008) recommend that each bid package will contain a technical package which contains details as to the Bidder’s proposals to design, construct, commission, operate, maintain and handover (if contract stipulated) the project to the Grantor. Bidders must respond to the performance specification and construction specification as detailed in the invitation to bid. The marking scheme and weighting allowances that the Grantor will use to evaluate the bids should not be revealed to the bidders before bid closure.

In the bidding procedures evaluated as part of this research it can be observed that technical proposal formats differ but their general purpose is to demonstrate the bidder’s ability to execute the proposed project according to the standards specified in the request for proposals. Bidders should provide sufficient details to enable the Grantor to obtain a good understanding of the essence of the development work that the bidder would undertake should they be awarded the PPP agreement.

It is therefore my recommendation that in evaluating the proposals, the Grantor should ensure that the bidders’ plans fulfil the terms of the bidding documents and are able to ensure the service levels stipulated in the proposed PPP agreement. In general, the evaluation process will look at:

- The scope, clarity, quality, robustness and deliverability of the proposals;
- The technical effectiveness of the proposals in relation to the reference design and performance specification;
- The superiority of the operations and maintenance proposals;
- The inherent quality, reliability, availability and maintainability of the proposed system;
- The robustness of the program methodology, schedule and delivery plans;
- The technologies to be employed for the supply, construction, billing and commercial systems, operations and maintenance; and
- Compliance with environmental and sustainability requirements.

The Financial Proposal

The financial proposal will demonstrate the Developer’s detailed financial approach to providing the technical solution detailed in his technical proposal. This typically includes details on: Financial Plan (funding as well as operational), Financial Model (provided by the bidder) demonstrating key financial parameters and assumptions, additional proposals made by the bidder and the required levels of State Financing (for example level of subsidy to be

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79 A summary resulting from the evaluation of various tender documents of Ecuador, Tanzania, Estonia, Bulgaria, Chile, Argentina amongst other confirms that typically these includes details on: Design, planning and system management, examples of previous projects of a similar nature to the water and wastewater system being bid on where the procedures proposed have been used by the bidder, Procurement and Subcontracting Strategy, Asset management, Civil Works, Operations and Maintenance, Health, Safety, Quality and Environmental Management, Project Program and Work Structure and a list of other Critical Events and Factors.
paid by the Grantor to supplement connection or tariff charges for poor customers, Grantor contributions to the capital expenditure program etc).

The structure of the financial proposal is critical as it can have important effects on the funding and the operation of the project, and ultimately on consumers. The financial plan within the bid is used to demonstrate the adequacy and feasibility of project financing proposals. The Grantor should follow the following basic principles:

- The structure should be as simple and transparent as possible so that the bid award is automatic (avoiding complex formulas or anything requiring subjective judgment).
- The structure should promote economic efficiency on the part of the Developer and users of the proposed system

The financial proposals will be evaluated by the bid evaluation committees to check whether they are compliant with the requirements of the invitation to bid and whether they correspond to the legal and technical parts of the bid criteria. Generally, evaluation panels will award a coefficient to each financial part, and consider the quality of the financial plan and the model in respect to its maturity and feasibility.

### 8.6 Submission, Opening and Comparison of Bids

Given the complexity of the tendering procedures for large infrastructure PPP projects and the multitude of criteria to be evaluated, it is recommended that contracting authorities opt for a two-step evaluation process. The technical proposal is evaluated separately from, and generally before, the financial proposal evaluation in order to avoid placing greater weight on price considerations to the detriment of non-financial criteria.

The two-envelope system has been used in many water and wastewater tendering competitions. The process occurs as follows:

- Grantor pre-qualifies bidders based on their technical and financial capacity.
- Bidders then submit technical and financial proposals in separate envelopes at the same time.
- The Grantor will then evaluate the technical proposal and financial proposals separately and will not open the financial proposal until the technical evaluation is complete.
- The technical and financial scores are combined using a suitable scoring methods and a winning bid is selected.

This approach eliminates price as an influence during an evaluation of the technical proposals and therefore the more subjective technical evaluation is less vulnerable to manipulation. However, care must be taken to ensure that technical criteria do not exclude solutions that are technically adequate and that might offer more competitive financial advantages. International institutions such as the World Bank do not generally support such procedures due to the difficulty in objectively evaluating proposals under such a system.

An alternative to the two envelope system involves the Grantor receiving both technical and financial proposals in one single proposals but the evaluation is structured in two stages. The Grantor establishes minimum quality and technical score thresholds and rates each proposal according to the degree to which the requirements specified in the requests for proposals have been met. The weighting and scoring mechanisms will be detailed in the request for proposals.
so as to ensure transparency. The Grantor will then proceed to evaluate the financial proposals of all the technical bids that have scored at or above the threshold.

The overall approach to selecting the winning bidder should be decided at the initiation of the tender process. The specific evaluation criteria and their use for determining the winning bidder should be detailed in the Bid Procedure documents.

**Compliance:** The Grantor should review each bid submission to ensure that they comply with the procedures and requirements set out in the Bid procedure documents. Under certain jurisdictions elimination may be mandatory at this stage. Any form of material non-compliance may lead to either the elimination of the bidding firm from the evaluation process or a request for a revised proposal.

The Grantor should review any changes made to the proposed PPP agreement. Any changes to the proposed PPP agreement should be marked clearly so that suitable risk adjustments can be made to ensure that all bids are evaluated using the same risk parameters. Bids should fulfil the requirements following any reference engineering design, and should include the core requirements that include commercial, technical, operational, maintenance and financial details.

**Financial and Technical Evaluation:** As discussed in previous sections, the technical and financial evaluations are performed sequentially but not simultaneously to ensure unbiased analysis and to ensure that cost considerations are not factored into the analysis of technical proposals. Public opening of financial proposals are commonplace and the primary benefit is to avoid allegations of impropriety in the evaluation process. Arrangements are frequently made for opening of major bids in public, with attendance by the media. Financial criteria will depend on several factors:

- The type of arrangement proposed.
- The level of cost recovery achieved by existing tariffs
- Predictability and value of future tariff-based revenues
- Grantor’s objectives
- The rules for setting future tariffs
- The need to prevent bidders from deliberately under-pricing their bids (low-balling)
- Whether the proposed terms by the developer contained in the bid can be taken to financial close

### Bid evaluation methods available

After assessing both the technical and financial viability of bids, the Grantor must then select the best overall bidder based upon the conclusions formed from the assessments. Some technical and financial criteria can firmly be established as crucial, but other elements of bids, such as personnel, are not completely objective criteria, yet can form a key element behind whether a company can successfully execute a project. A common approach is to therefore choose weights for the technical and financial scores and then combine the scores to produce an overall score. Pakkala (2002) suggests that the weighting of these factors should be appropriately defined and measured as objectively as possible in order to be most effective. Each factor will be weighted differently and this will be dependent upon the contracting authorities preferred combination of quality and price. Considerations include:
To reward quality or price aspects, the bid weighting should be distinguished accordingly to reward bids that match this criteria. Therefore, in order to improve innovation and have the best qualified organization provide the maintenance activities, appropriate percentages for the quality aspects should be considered.

Technical proposals are usually evaluated first, scores are communicated to the bidders and then the financial proposals are assessed. The final scores are then calculated using the pre-determined formula and the winning bidder is then chosen.

The weighted average score can be manipulated. The technical score is subjective and is decisive for determining the winning bid. An avenue for corruption is therefore opened as an unwarranted higher technical score can be granted, with little chance of being detected, allowing a favoured bid to win.

Another possible bid evaluation method is to, within the invitation to bid document, the Grantor indicate the percentage of total assessment marks that will be awarded to the different aspects of the bidding packages – the financial, legal and technical sections. The technical assessment and marking will allocate a percentage of the marks to each of the sections of the performance specifications and the code of construction practice and marks are awarded to the Bidder's response to each section of the documents. The marks are recorded on bid marking sheets which are then forwarded to the Grantor by his technical assessors. The completed sheets should be kept securely for a period of years after the completion of the bidding process. The detailed marking scheme and weighting of the marks should not be revealed to bidders or any other parties before Bid Closure. After Bid Closure, bidders may privately request access to examine the bid marking sheets related to their own bid after the bid assessment process has been completed.

Table 8: Weighting Bids - Price vs Quality Features

<table>
<thead>
<tr>
<th>Price Based</th>
<th>Quality Based</th>
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<tbody>
<tr>
<td>- Easily administered</td>
<td>- Quality potential</td>
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<tr>
<td>- Widely used and accepted</td>
<td>- Potential for innovation</td>
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<tr>
<td>- Clear and objective selection process</td>
<td>- Best qualified organization</td>
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<td>- Better people skills</td>
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<td>- Best methodology potential</td>
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<td>- Potential for project success</td>
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<td>- Lack of innovation</td>
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<td></td>
<td>- Tendency for change</td>
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<td></td>
<td>- Orders and cost overruns</td>
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<td>- Tendency for mediocre quality</td>
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<td>- Some criteria is subjective</td>
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<td>- Requires more effort and skill for tender evaluation team</td>
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</tbody>
</table>

Source: Pakkala 2002

Other weighting methods include:

- Technical threshold, highest financial score – this decision method is used for concession contracts. All bidders are evaluated on their technical proposals and a ‘technical threshold’ score is set. All bids that do not meet this score are rejected. The remaining bids are then judged on their financial proposals and the best financial offer wins the PPP agreement.
  - This method is simple and transparent, based on the objective criterion of price, thereby making it harder to manipulate.
However, this method eliminates higher priced bids that would provide higher quality solutions. In many cases the cheapest bid does not necessarily provide the best value over the long term.

- Fixed budget, highest technical score – Grantor sets a budget and informs the prospective bidders. The bidders are then asked to submit their best technical proposal based upon the set budget. For management contracts, the bidders would then compete on the amount of money they would use to pay the management fee. This method encourages creativity towards quality rather than focusing on minimizing cost.

**Final Selection**

After completing the evaluation of the technical and financial proposals, the Grantor may proceed by selecting the proposal that contains the highest combined scores in price and non-price criteria. Alternatively, the level of tariff offered over a given period (typically five years as was the case in Buenos Aires or Tallinn) may be used as the deciding factor. The winning bidder will likely present the most economically advantageous offer, provide adequate price/service certainty and appropriate risk allocation and the award committee is advised to offer written explanations for their selections that go beyond simply accepting the lowest priced bid. Negotiations then commence with the best rated bidder. If more than one bid obtains a high score or there is a minimal difference between bid ratings, more than one bidding firm or consortia can be invited for further negotiations over the transaction documentation and to answer any queries from the bidders’ lenders. If negotiations are unsuccessful it may be necessary to restructure and rebid the whole selection process.

Negotiations may be done in two ways Non Competitive Negotiations where the best rated bidder is invited for a final round of negotiations for the finalization of elements of the project. If final agreement cannot be reached, then generally negotiation is started with the next rated bidder. However, with the consultative selection process suggested, combined with the use of acceptance of contract terms at bid stage, the risks of non-agreement at this stage can be mitigated. Competitive Negotiations involve the Grantor negotiating simultaneously with two or more bidders in order to enhance the competitive nature of the negotiated transaction. Competitive negotiations are suited to complex, non-standard projects. However, the process is less transparent and more subjective.

The negotiated bidding process involves:

- The Grantor details its requirements and requests expressions of interest through a request for proposals (RFP).
- The Grantor reviews the proposals and selects those that are technically responsive to the RFP.
- The Grantor then negotiates the PPP agreement terms with the selected bidders.
- The advantages for selecting competitive negotiations are:
  - Induces bidders to submit innovative and creative project proposals.
  - Reduces ‘optimism bias’ in bids and discourages bidders from deliberately underbidding in order to win PPP agreements.
  - Allows for greater dialogue between contracting authorities and more opportunities for the Grantor to evaluate bidders on criteria beyond bid prices alone.
- The disadvantages are:
  - Non-standard bids make comparisons difficult
• Increased level of closed dialogues between contracting authorities and bidders decreases transparency (increasing the potential for corruption).

• The prolonged bidding process and the costs involved may deter some firms from engaging in the process.

• Bidders may attempt to make changes which fundamentally alter the price or risk allocation originally contained in the proposal, thereby distorting the criteria upon which the bid was originally rated.

At this stage, the Grantor should inform the remaining bidders that they may be contacted for negotiations should negotiations with the highest rated bidder fail to end in agreement. If this scenario occurs, the Grantor will inform the bidder of its decision to terminate negotiations and then advance with negotiations with the next highest bidder on the basis of its ranking. It is recommended that contracting authorities do not re-open negotiations with bidders with whom failed negotiations have been conducted.

**Negotiating with Preferred Bidders**

Contracting authorities have various options available to them after completing the financial and technical evaluations. The Grantor can:

• Choose the firm obtaining the highest score according to the bid procedure criteria at the price stated in the firm’s bid.

• Enter into negotiations with the selected firm.

• Hold another round of bidding due to:
  - Additional issues remaining to be agreed with the preferred bidder.
  - The opportunity for a better offer.

**Negotiation Options:**

• No Negotiation – all previous technical and financial consultations with the bidders has removed any issues over their bids allowing the bidding teams to include signed and unchanged PPP agreement and associated documentation in their submitted bidding packages. The Grantor then accepts the signed PPP agreement after selecting the preferred bidder.

• Negotiation with Preferred Bidder – the Grantor negotiates outstanding issues with the preferred bidder. Contracting authorities should ensure that it maintains the resources to negotiate on level terms with the more experienced bidders to ensure that the modifications requested by the bidders are justifiable or are attempts by the bidder to take advantage of the Grantor’s lack of experience.

• Additional Round of Bidding – all submitted bids are shared amongst the bidding teams and an additional round of bidding is then held.

• Competitive Negotiation 80 – the Grantor negotiates simultaneously with two or more bidders. The bidders compete against each other with the aim of generating a better deal for the Grantor. A major criticism of this approach is that it encourages ‘private’

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80 A new process called ‘Competitive Dialogue’ is an innovative new addition to the procurement options available to contracting authorities. Pioneered by the European Union, the process allows for dialogue between the Grantor and prequalified bidders to allow them to fine tune, specify and clarify their bids.
negotiations between the Grantor and the bidders and the transparency of such negotiations is questionable.

Competitive negotiation may be formalized to include the ‘Best & Final Offer’ or BAFO approach. This is becoming common in some European projects. After bids have been evaluated, the bidders are called back to give a ‘best and final offer’, with the aim of increasing benefits to the Grantor.

Box 7: The down side of BAFO Processes

Best and Final Offer (BAFO) processes can both benefit and harm the public interest. Reduced bid prices or increased design value can clearly benefit the value for money that public authorities derive from PPP structures. However, BAFO processes can add time and complexity to the procurement process while also introducing an overabundance of subjectivity into the selection of preferred bidders. Compromises made during BAFO processes can potentially harm the economic viability of concession companies which may lead to insolvency or renegotiation at a later date. Planners must be aware that sometimes the most accommodating bidder is not the best choice.

The main features of the EU competitive dialogue system are:

- Dialogue is permitted with selected suppliers in order to identify and develop solutions to the Grantor’s project requirements;
- Dialogue occurs in successive stages, at the end of each stage the number of bidders/solutions is reduced;
- The Grantor makes its decisions based on which bid provides the most value for money; and
- No changes are allowed to bids in the post-final tender or post award stage.

The procedure is executed as follows:

- Contracting authorities publish a PPP agreement notice which explains their needs and requirements;
- A prequalification questionnaire is completed by the interested parties and is evaluated by the Grantor’s bid evaluation team. Prospective bidders are then selected.
- Prospective bidders are invited to begin a dialogue to identify and develop the best solution to the infrastructure requirement. The Grantor must clearly describe its needs in order to assist the process and ensure bidders do not use the dialogue to market test ideas;
- The Grantor can reduce the number of prospective bidders it remains in dialogue with as long as sufficient competition is ensured. If there is not a sufficient number of prospective bidders, the authority can continue its dialogue with the remaining bidders;
- Contracting authorities can discuss all aspects of the PPP agreement with the chosen candidates, but care must be taken to ensure that all candidates are treated fairly and evenly;
- The prospective bidders will then specify their proposals in writing and the award criteria contained in the PPP agreement notice will be used to evaluate the proposal. The number of bidders can then be reduced further at this point;
• The Grantor will then decide which of the proposals meets its requirements and the proponents of these proposals are then requested to submit their final offers based on the dialogues with the Grantor; the final tenders should be as complete as possible as there are various limits on post-tender discussion and alterations to bids;

• The bids are then evaluated against the award criteria and then most economically advantageous proposal is selected as the winner;

• Post-tender discussions with candidates who submit final tenders are permitted to allow clarification, fine-tuning and additional information. No changes to the fundamental nature of the bid are permitted;

• Dialogue with the preferred bidder will allow for the further delineation of design, PPP agreement finalization, and financial due diligence.

The dialogue process should be used to identify the best means of satisfying the Grantor’s needs. The intention is that during this dialogue phase, whilst there is still a competitive element in the process, bidders are encouraged to promote more value for money and innovative solutions. While competitive dialogue potentially extends the competitive phase, it ought to also shorten the closure phase after a preferred bidder has been selected and should lead to a shorter procurement timetable. 81

Unsolicited Proposals and Direct Negotiations

Unsolicited proposals usually originate from the private sector and are generally not requested by a Grantor. In unsolicited proposals the Developer uses its own resources to develop a project idea and then approach the relevant governmental or Grantor for the required official approvals. Government openness to receiving unsolicited proposals can incentivize the private sector to come forward with innovative proposals (Hodges and Dellacha 2007). Additionally, in smaller municipalities where it may be too costly or difficult to arrange a competitive bidding process, direct negotiations increase the chance of private sector interest in infrastructure development projects. However, my research confirms that a major disadvantage of unsolicited proposals for Grantors is that they are associated with a lack of competition and transparency, and they do not guarantee the most effective or economical solution. The granting of exclusive rights to private entities without the accountability of a transparent tendering process courts controversy and history suggests that such scenarios lend themselves easily to corruption (Hodges and Dellacha, 2007). Additionally, the competitive dialogue with the wider industry and financial sector that can be used to develop and refine the PPP agreement is lost.

8.7 European Union Position on PPPs

This section describes specifically the approach that the European Union has taken with respect to PPPs, their definition and the issues surrounding their procurement and operation. The relevance of discussing EU in this research and its ‘fit’ to this chapter is that the EU has developed an approach which is flexible enough to incorporate countries with different legal traditions yet have a consistent approach to the manner in which each country uses the private sector to help deliver infrastructure services. Accordingly, despite the basic guidelines or distinctions on PPPs, EU law on public contracts and concessions do not prescribe whether

81 More information on ‘Competitive Dialogue’ is available at www.4ps.gov.uk
or not a PPP arrangement should be used. A European Union Member Country, and thus by implication Accession Countries, are free to provide a public service themselves or to entrust it to a third party. Moreover, EU law allows a pragmatic approach to PPP whereby it recognises that under PPP arrangements, public partners are primarily national, regional or local authorities. There may also be public law bodies which have been created for the specific purpose to fulfil certain specific interests under State control. For the purposes of EU interpretation, the term “contracting body” or “contracting authorities” is used to designate all of these entities. In this way, EU law may be a useful guide for developing countries seeking to create an enabling PPP environment and associated legislation. EU is not prescriptive about the structure of PPP but ensures that in selecting the partner of a PPP, the general principles of the EC Treaty apply, as do the current directives on public contracts. These include that PPP agreements must satisfy the requirements of transparency, equal treatment, proportionality and mutual recognition. Furthermore, all agreements in which a public authority awards a contract are subject to the general principles on freedom of establishment and freedom to provide services in Articles 43 to 49.

In addition, PPP agreements that count as public contracts are subject to the application of the public procurement directives. Some special provisions apply to building concessions, while service concessions are not at present covered by secondary law. On the implementation of PPPs the national laws apply and they must be in agreement with the provisions of the EC Treaty, which take precedence. Additionally, the Commission has introduced some degree of flexibility under procurement law. Notably, it defined, on the basis of the rules and principles derived from the Treaty and applicable secondary legislation, the outlines of the concept of concession in Community law and the obligations incumbent on the public authorities when selecting the economic operators to whom the concessions are to be granted.

In the absence of a uniform legal framework for PPPs at European level and in view of the heterogeneity of national laws the question arises, whether uniform provisions are needed to safeguard transparency and effective competition between market participants. The EU has decided against the creation of a separate legal regime for PPPs, but considers that there is a need for legislative initiatives in the areas of concessions for the provision of services, and institutionalised public-private partnerships (IPPPs). EU also considers that as a matter of principle, the law on public contracts needs to be applied whenever a private partner is to be selected. This is discussed in great detail in Annex 2.

Community secondary legislation establishes that for any contract for the execution of works or services between a contracting body and an operator, these are to be designated as a “public works or public services contracts”. The concept of “concession” is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment.

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82 The term “contracting body” or “contracting authorities” is considered the same and falls within the meaning of Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 2004/18/EC and the contracting entities of the type “public authorities” and “public undertakings” within the meaning of Directives 93/38/EEC and 2004/17/EC.

83 The rules on the internal market, including the rules and principles governing public contracts and concessions, apply to any economic activity, i.e. any activity which consists in providing services, goods, or carrying out works in a market, even if these services, goods or works are intended to provide a 'public service', as defined by a Member State.

84 Interpretative Communication on concessions under Community law, OJ C 121, 29 April 2000.

85 The contract has to be for a pecuniary interest i.e. a contract where a consideration in the form of a fee.
Thus, in relation to all PPP contracts the following should be considered:

- PPP arrangements should emphasise fairness and transparency. Accordingly, transparency must be in evidence whenever public funds are involved, as well as ensuring that the PPP arrangement allows for the right of elected representatives to inspect agreements and documents. Furthermore, the EU takes the view that transparent rules should be applied for the award of public contracts to ensure effective competition and protection from corruption, in the citizen’s interest;
- For those PPP arrangements or contracts which have already taken place, and in order to avoid legal uncertainty, transitional periods should be applied for existing contracts that have been concluded in good faith in accordance with national law;
- PPP arrangements should make adequate provisions to ensure protection of the citizen’s rights to ensure secure safety, efficiency and quality standards;
- Member States are recommended to alleviate the task of the public sector by means of standard contracts and by stepping up the training of the decision-makers who have the task of selecting the private partners for PPPs;

Furthermore the EU has decided not to establish a European agency for PPPs, but welcomes other ways of sharing experience, such as the networking of national and regional PPP authorities.

PPPs are essentially a form of public contracting. Given the significant examples under case-law of the Court of Justice, the EU has decided against developing blanket regulations for PPPs. In any event, the decision has been taken by the Commission that the legislative process should as a matter of principle go carefully, because PPPs are often very complex agreements whose attractiveness can only survive in a climate of flexible regulation.

As stated earlier in this chapter, in legal terms there needs to be a clear statement that, wherever a private partner is being selected, transparent procedures have been used for this selection. Transparency and fair competition between market participants should be used no matter what form of PPP is used.

The EU considers two types of PPP arrangements, Contractual PPPs and Institutional PPPs. In the case of PPPs that are characterised as public contracts the main issue is the question of the award procedure. With PPP structures, the competitive procedure to be used tends to be slightly more complex. In this regard, a new award procedure has appeared on the scene to join the familiar public, restricted and negotiated procedures for procurement above the threshold values. This procedure combines elements of the tender procedure with those of the negotiated procedure and takes precedence over the negotiated procedure. It must be noted that difficulties do arise in defining precisely what is meant by ‘particularly complex’ contracts.

In response to this, the Commission has clarified that a particularly complex project is that in which the public contractor is objectively unable to specify the technical means with which

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86 See for example Case C-324/98. Telaustria Judgment, the Court stated in this respect that “[the] obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”. See also ruling of 30 May 2002, Case C-358/00, Deutsche Bibliothek, ECR. I-4685. These principles are also applicable to other State acts entrusting an economic service to a third party, as for example the contracts excluded from the scope of the Directives owing to the fact that they have a value below the threshold values laid down in the secondary legislation (Order of the Court of 3 December 2001, Case C-59/00, Vestergaard, ECR. I-9505), or so-called non-priority services.
their needs and objectives can be fulfilled, and/or is objectively unable to specify the legal and/or financial conditions of a project.

Although PPP projects by their very nature need not be necessarily be more complex, each case must be assessed on its own merits. In any event, the Commission does allow for the competitive dialogue procedure to take preference for the award of contracts in the PPP sector as a principle because it combines the advantages of the restricted procedure with those of the negotiated procedure. Its flexible nature enables it to obtain optimum solutions under great competitive pressure. Although its disadvantages include its complexity and the extent of effort required from all involved, these are offset by its greater transparency compared with the negotiated procedure. This reduces the risk of anti-competitive behaviour.

The concept of “concession” is defined as a contract of the same type as a public contract except for the fact that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the construction or service, or in this right together with payment. The Commission takes the view that concessions should be of limited duration so that competitors are not excluded from competition for an unnecessarily long time. At the same time it recognises that under these types of PPPs, competitive dialogue is also the appropriate procurement procedure, as its flexibility is as a rule suited to the complexity of concessions, without jeopardising the principles of transparency, equal treatment and proportionality.

Institutionalised PPPs (IPPPs) are joint industrial creations combining private and public partners. The objective of such a PPP structure is to provide or supply a service on behalf of the public, typically in the field of public welfare. IPPPs may be created by the formation of a mixed-economy enterprise or company, but may also arise when a private company assumes control of what was a public concern, i.e. by changing the share ownership.

This raises the question whether the two processes, new formation or a change of ownership, are relevant from the point of view of procurement law. The Commission says that the private partner of such an enterprise must be selected for the tasks involved in a transparent way and without discrimination, and must be selected irrespective of the actual form of the contract under the procurement directives or the EC Treaty. The selection of a private partner in accordance with objective criteria will safeguard fair competition.

Case law under the judgments of the Court of Justice in the Teckal and Stadt Halle cases (C-107/98 and C-26/03) set the principle that the participation of the awarding authority in a mixed-economy company does not justify exemption from the principles of procurement law. What is crucial is to award the contract to a body with independent legal personality. Accordingly an exemption from procurement law is recognised when the awarding authority exercises a control over the mixed-economy enterprise similar to that control which it exercises over its own departments, and when the enterprise essentially acts for the public body. The two criteria must be cumulatively fulfilled to ensure that there is equivalence with internal entities of the contracting authority. The Stadt Halle case-law has further clarified the matter. The Court decided that public contracting authorities may award a contract to an undertaking that belongs to them without adhering to the procurement provisions only when they hold 100% of the undertaking’s capital, in other words when there is not even a small private shareholding in the undertaking. Only then, says the Court, does the contracting authority exercise control as it would over its own departments.

In summary, the Commission considers it necessary, in view of the transparency requirement and the ban on discrimination, for procurement law to be applied when an IPPP is set up, in so far as the act of setting it up is combined with the assignment of a public contract, concession or other public tasks to a private undertaking. Additionally, this same principle would apply when an IPPP is established by the sale of shares in a public undertaking.
8.8 Summary and Conclusions

In this chapter we have examined the key issues to be addressed for selection and award of a PPP agreement. Parting from a recognition that given the size and complexity of water PPP projects, the chosen procurement method has not only to meet local procurement standards but generally will need to be adapted to satisfy international norms and standards, to ensure effective involvement of financing institutions and developers. The overall aim is to establish an effective method of selection of a long term Developer that is financially, technically and operationally capable of development and long term operation of an effective water and wastewater system under the PPP agreement.

Important contractual issues related to the bidding procedure include the use of Bid Bonds which provide insurance that compensates the Grantor should the winning bidder decide to withdraw from the project. The bonds serve to act as a guarantee to the Grantor that the winning bidder will implement the project and has the means to fulfil the terms of the PPP agreement. At the same time it will be importance to ensure that the procedures related to the acceptance of the process are clarified. Brook and Irwin (2003), suggest that the Grantor may require all bidders to sign a legally binding agreement which confirms their satisfaction with all aspects of the bidding process, that they will accept the outcome of the process and that they will not challenge the decision. This aims to limit bidders from seeking to re-open the bid evaluation process on the basis of complaints over procedures, evaluation criteria or lack of information. This is linked with a need for the Grantor to conduct the process with full transparency and treat all parties on an equal basis.

Upon selecting a winning bid, a long negotiation period between the Grantor and the winning bidder begins. During this period, there is a large risk of the selected bidder attempting to change parts of agreement. To mitigate this risk, the Grantor can require the bidders, prior to selection, to provide a signed PPP agreement as part of the bidding package (Diaz, 2003 and Dinar and Subramanian, 1997). In the event that a financial model is provided as part of the bidding documentation the following should be considered: (a) should a single model by specified as part of the bidding material, or should the model be created by the bidder?87 What will be the legal status of the model and how will it be given that status?88; (b) Will the results of the model be binding, or merely provide a guide to the Expert Panel, which could be allowed to take other factors into account also? A binding model provides greater certainty, but runs the risk that it may not capture relationships between variables which in the event turn out to be important.

Other issues that contracting authorities / Grantors may come across include:

Dealing with Variant Bids: Contracting authorities will expect bidders to submit standard bids based on the bidding requirements. Additionally, bidders can usually be allowed to submit variant bids with alternative proposals for technical or financial provisions. The Grantor has to decide whether variant bids will evaluated simultaneously with the standard bid or whether variant bids will only be considered after a preferred bidder has been selected. This system

87 It must be noted that if the model is provided for by the Grantor there is a risk that the cost relations in the model may not match those the bidders/Developer believe to exist in the business. Conversely if the bidder/Developer provides the model there is a risk that they would game the process, predicting where data is likely to change, and creating a model which overcompensates them for such changes. In my opinion, and based on my experience as a transaction adviser, I would recommend that the Grantor develop its own model and as part of the bidding process request bidders to provide detailed commentary on both the inputs to the model but also to its architecture.

88 I would recommend that care be taken to ensure that the model cannot be altered after the contract is signed, while still allowing it to be used.
encourages innovation and can lead to the Grantor getting better value for money. Bidders must indicate the precise differences between their standard bids and variant bids and with explanations of the effects on costs and risk allocation. Variant bids also allow the Grantor to test the costs of different risk profiles between the authority and the potential Developer. Contracting authorities can hold meetings with the bidders to clarify or negotiate any issues emerging from the bids. All bidding teams must be dealt with in a fair and equitable manner.

Dealing with Unsustainable Bids: With complex and competitive negotiations, a mistake or deliberate misrepresentation of information is likely. Contracting authorities should develop clear and sustainable guidelines on how to deal with such scenarios. Deliberate ‘under-bidding’ or even a genuine mistake by bidders may assist the bidder’s financial proposal and increase the attractiveness of their bid to the Grantor. However, acceptance of the bid based on an unsustainable project means that in the long term the PPP agreement will have to be renegotiated or dissolved and re-bid, both expensive in time and money for the Grantor.

Experience shows that certain risk evaluation and mitigation techniques should be followed to ensure the sustainability of the bids and to avoid performance or financial issues. Such techniques include for example so-called use of ‘shadow models’ created by the Grantor projecting what a standard and financially viable bid might look like. Real bids are compared to this shadow model allowing the authority greater information to query bids. I would also recommend that the Grantor should create bidding procedures that allow for discussions and clarifications, with the option to withdraw from discussions. Requesting higher performance bonds can also protect the Grantor against the risk of Developer failures.

Every procurement process runs the risk of being challenged on the grounds of unfair competition, partisanship or questions over procedures. My research strongly points at the need to establish guidelines on methods to deal with such eventualities. These procedures need to unequivocally determine how complaints and appeals will be heard and on what grounds and how they are to be evaluated. The bid details should clearly establish the process to deal with the situation when the long term PPP agreement ends, and should ensure that the Grantor has the flexibility to be able to extend the PPP agreement or to re-tender the whole agreement. This matter should be dealt with in the contractual agreements.

Furthermore, in this chapter I examine briefly the implications of PPPs in the European context. In the absence of a uniform legal framework for PPPs at European level and in view of the heterogeneity of national laws the EU has decided against the creation of a separate legal regime for PPPs. There are valuable lessons to be learnt from the European experience that may be applicable to developing countries, not only to ensure fair and transparent procurement and implementation processes but also to ensure their long-term sustainability. This can for example be achieved through active and continued stakeholder consultation throughout the procurement process, with the aim of developing the most optimal PPP scheme. Finally, I draw attention to how best to manage the procurement process and recommend the use of early consultation with the market to assess suitability and ‘market appetite’. I recommend the use of a consultative process to contract development at the bidding stage, so long as the right framework is established to directly engage with bidders and that any inclusions that are made are done in a fair and transparent way. I end with a review of

89 This approach was used successfully in Tallinn, Estonia where bidders were allowed to comment on the bidding documentation. In my opinion and as far as I am aware and my research suggests this was the first time such consultative approach was widely used in a long term water and wastewater PPP agreement. I was involved as the lead transaction adviser for such project.

90 A good example of this was the recently flawed PPP process on the island of St Lucia where a bidder has been selected (March 2009) and the losing bidder has launched a legal contest on this decision.
the possible ways in which negotiations can be done and recommend that whatever process is chosen the grantor retain the elements of competitive tension as a means of achieving best value for money.