

PROCUREMENT & PPP TRANSACTIONS GUIDANCE FOR MDB PUBLIC SECTOR ENGAGEMENTS

February 2012

ABBREVIATIONS

DBFO	–	Design-Build-Finance-Operate
EA	–	Executing Agency
IA	–	Implementing Agency
MDB	–	Multilateral Development Bank
PCG	–	Partial Credit Guarantee
PPP	–	Public Private Partnership
PRG	–	Partial Risk Guarantee
SBD	–	Standard Bidding Document
SOE	–	State Owned Enterprise
SPV	–	Special Purpose Vehicle
TOR	–	Terms of Reference
VGF	–	Viability Gap Funding

MDB Heads of Procurement PPP Working Group

Members:

ADB:	Omar Tiwana
AfDB:	Eric Yoboue
BSTDB:	Vassilis Christakis - chairing
EBRD:	Jan Jackholt
EIB:	José Luis Alfaro, Pierre Poinson
IDB:	Maria Camila Padilla
WB(IBRD/IDA):	Ashish Bhateja - chairing

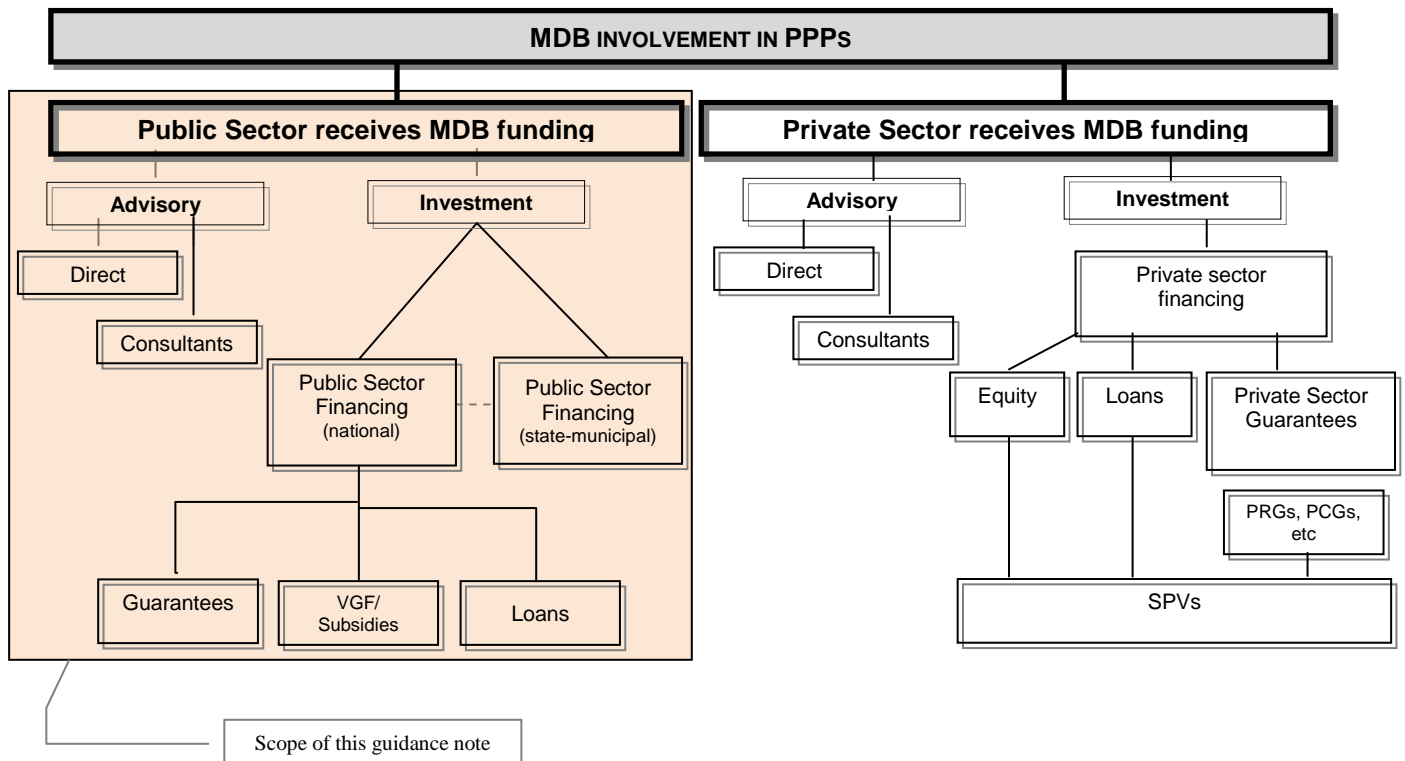
CONTENTS

	Page
I. BACKGROUND	1
II. SCOPE.....	2
III. GENERAL PRINCIPLES	2
IV. SELECTION OF THE PPP SERVICE PROVIDER	3
V. GUARANTEES.....	6
VI. TRANSACTION ADVISORY	7
VII. PROVISIONS RELATED TO FRAUD AND CORRUPTION.....	8
VIII. MONITORING	8
IX. NEXT STEPS AND POSSIBLE FOLLOW UP WORK	9

I. BACKGROUND

1. The Heads of Procurement (HOP) of Multilateral Development Banks (MDBs) set up a Public Private Partnership (PPP) Working Group (WG) to understand and develop guidance on the application of procurement principles for MDB engagements with PPPs.
2. For public sector PPP transactions, the World Bank has prepared Information and Guidance Notes. These notes outline the approach to procurement due diligence for IBRD/IDA projects subject to the World Bank's Procurement Guidelines. The approach set out in the World Bank's Guidance Notes has been endorsed by HOP as preferred practice to be applied by all MDB in circumstances in which public sector financing is provided or guaranteed for PPP transactions to the extent their respective procurement guidelines permit.
3. The guidance in this note is based on similar principles as have been elaborated in the WB (IBRD/IDA) notes for the public sector, and expands to public non-sovereign guaranteed engagements (see Public Sector PPPs in Figure 1 below). For procurement principles and practices applicable to the private sector involvement by MDBs, a separate guidance note is being prepared with the involvement of the private sector arms of the various MDBs.

Figure 1: MDBs & PPPs



II. SCOPE

4. From a procurement perspective, PPP is essentially an exercise by the public sector to obtain execution (or operation) of public services over a prescribed period through a private provider, which undertakes efficient and value-for-money operation of such services through output or performance-based agreements. The public sector retains ultimate responsibility to the public for the service concerned. If there is no material transfer of risk (construction, financing, managerial or operational) to the private sector for longer term public service provision, typically accompanied by majority private sector equity ownership in the relevant SPV, such transactions are not considered as PPP for purposes of this note.

5. The MDBs are involved in transactions involving advisory services, equity investment, lending and guarantees, that cover a wide range of contractual relationships as may exist in a PPP arrangement. MDBs recognize that procurement considerations in PPP operations may vary depending on whether project funds are lent to a public entity, including national, state, local government or enterprises majority-owned by such government or to a private entity, either fully privately owned or with minority representation by a national, state, or local government body (see Figure 1).

6. PPPs most often involve provision of ‘hard’ infrastructure (e.g. power, roads, railways, ports, etc.) through significant risk transfer of both capital and operational expenditure to the private project sponsor with cost recovery and return to the private sector by end user tariffs or availability payments from the government. PPPs are also increasingly considered for “soft” infrastructure (e.g. healthcare, education, social housing, etc.) which has been in the past, usually funded directly by government. Whether for ‘hard’ or ‘soft’ infrastructure, PPP arrangements include Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Build-Own-Transfer (BOT), Design-Build-Finance-Maintain/Operate and other similar types of arrangements. PPP arrangements may also be used for service, management, or lease contracts in line with the provisions above.

III. GENERAL PRINCIPLES

A. Flexibility and performance

7. MDBs recognize the need for flexibility in PPP transactions, while maintaining the requirements of economy, efficiency, transparency and openness. The procurement may require several stages including market consultations, project design, pre-qualification, bidding, contract negotiation and award. Further, for PPPs, MDBs recognize the importance of focusing on outputs, performance measurements and related payment mechanisms as distinct from the ‘inputs’ and ‘specifications’ approach of traditional procurement.

8. In principle, a well-structured, implemented and enforced PPP contract will result in efficient procurement, both “upstream” (selection of the PPP service provider, also referred to as project sponsor, concessionaire, operator or promoter) and “downstream” (purchase of inputs by the PPP service provider), as a result of:

- (i) a transparent, competitive bidding process which should yield the most economically advantageous tariff or PPP payment and that offers incentives for efficient procurement throughout the lifecycle of the project;

- (ii) a formula or regulatory mechanism within the PPP contract for periodic and extraordinary adjustments of the tariff or PPP payment, which (if properly structured) precludes pass-through of inefficient or costly procurement by the PPP service provider;
- (iii) contract monitoring and enforcement by the government (or the regulatory authority) to ensure that the payments are performance-based and in accordance with the contract.

B. Bid Evaluation

9. MDBs emphasize a robust evaluation process and procurement due diligence. The bidding process should require application of bid evaluation criteria that focus on optimal combinations of a range of relevant variables (such as cost and magnitude of financing offered, performance specification of the facility, cost charged to the end-user, other income generated for the service provider of the facility, level and quality of asset creation and income generation, the effect of financing conditions on the term of the contract, the state of the asset at contract termination etc.), and the nature and extent of risk allocation between the public and private sector.

C. Procurement documentation

10. To date, there has been no effort by MDBs to develop a set of standard bidding documents for PPP transactions, whether sector-specific or otherwise since these transactions are too varied and project specific for this to be a meaningful exercise. However, it is clear that well prepared PPP bid documentation by the borrower is essential, given the complexity and typically longer-term duration of PPPs. This will help in reducing the duration of the procurement process and consequently lowering the transaction costs for both the public sector and the private sector. Well developed documents make projects more attractive to international participants.

IV. SELECTION OF THE PPP SERVICE PROVIDER

11. When providing financing to the public sector, MDBs require the application of an open competitive public sector procurement principles for selection of the PPP service provider. These procurement principles promote the policy objectives of economy, efficiency, transparency and openness to provide services based on performance outputs that directly benefit the public and, at the same time, ensure compliance with required fiduciary requirements. Such principles are also important for gaining public confidence in PPP projects.

12. If the selection of the PPP service provider has been determined acceptable by the MDBs (i.e. in accordance with the approach set out in paragraphs 13-15 below), then during the term of the contract, the PPP service provider can apply its own internal corporate practices to procure the goods, works and services required to perform the contract. Where the service provider has not been selected as above, the service provider must follow acceptable competitive procedures as defined in the respective MDB Guidelines for downstream procurement of goods, works, or non-consulting services (see paragraphs 16-17 below).

13. While open competitive tendering is the requirement for the PPP service provider selection, such procedures need not necessarily follow detailed international competitive bidding (ICB) procedures prescribed by the MDB in their respective ICB standard bidding documents. In order to be determined acceptable to the MDB, the procedures must conform to the basic

procurement principles established in the respective MDB Procurement and Consulting Guidelines.

14. Key elements for MDBs to examine, as summarized in Table 1 below, are:

- (i) *Advertising*: advertisement is done in a manner that reaches the widest possible audience, contains sufficient information to stimulate bidder interest; and provide potential bidders with detailed information and sufficient time for preparation of their proposals;
- (ii) *Pre-qualification*: If there is pre-qualification stage, pre-qualification criteria must be clear and well-designed, and related to technical, financial and project-related factors, for potential participants to determine if they are likely to be qualified.
- (iii) *Bidding Documents / Requests for proposals (RFPs)*: issuance of well prepared and clear documents (including precise statements on what is required of participants for submitting the proposals, and on non-discriminatory and non-restrictive evaluation criteria^a);
- (iv) *Clarifications and bidder complaints*: Equal opportunity for bidders to seek and obtain clarifications (e.g. pre-bid meeting) and adequate and fair treatment of bidder complaints using appropriate complaint handling mechanisms;
- (v) *Bid evaluation*: Evaluation of proposals must apply transparent and well-defined criteria as specified in the bidding documents to determine the most economically advantageous bidder;
- (vi) *Contract negotiations and award*: Negotiation of the final contract, if required, to be done, after receiving MDB 'no-objection' only with the most economically advantageous bidder and within the parameters defined in the bidding document, without altering any key elements of the proposal. Termination of contract negotiations and proceeding to the next ranked bidder subject to agreement with the MDB.

Table 1: Procedure for PPP Service Provider Selection

Open Bidding Process	<ul style="list-style-type: none"> • Open competition • LIB • NCB only exceptional cases (without restriction of access to foreign bidders)
Advertisement & Promotion	<ul style="list-style-type: none"> • Disseminate information to potential bidders • Innovative means like road shows, data room
Bidder prequalification	<ul style="list-style-type: none"> • Ensures quality bidders • Indicates market perception of risk • Based on quantifiable and objective criteria to the extent possible
Bidding Documents / Request for Proposals	<ul style="list-style-type: none"> • MDB standard documents are not available • Borrower documents shall be well prepared • Bidding process may include several stages, in addition to pre-qualification, as may be needed based on different levels of evaluation criteria to obtain an optimal outcome
Bid submission and Opening	<ul style="list-style-type: none"> • Allow sufficient time for bid preparation for various stages
Bid Evaluation	<ul style="list-style-type: none"> • Clearly specified criteria in the Bid Documents
Negotiation of Final	<ul style="list-style-type: none"> • Contract awarded to Most Economically

Contract	Advantageous Offer <ul style="list-style-type: none"> • May involve discussions related to the final details, contract terms, and financing plan
Complaints and Appeals	<ul style="list-style-type: none"> • Clear and effective mechanism

15. In addition to open competitive procedures, to proceed with the financing of the selection of the PPP service provider, MDBs are required to ensure that basic considerations relating to bidder ‘eligibility’ apply in all transactions. The extent of application of the ‘eligibility’ restrictions by MDBs is determined by the procurement guidelines of the respective MDB.

16. If the PPP service provider has not been selected under open competitive procedures, MDBs need to ensure the following conditions are met to their satisfaction: First, the borrower must have selected the PPP service provider under their applicable laws and regulations and the procurement process must be compliant with applicable MDB integrity and anti-corruption requirements as referred to in the loan/financing agreement with the MDB. Second, such process must demonstrate sufficient fairness, transparency, and competition. Third, the resulting contract award must be reasonable in terms of price, quality, and risk allocation. Assuming such conditions have been adequately satisfied and, importantly, depending on the ‘added value’ of such proposed PPP project within the relevant MDB’s strategic and operational framework, MDBs may consider financing downstream procurement by the service provider provided that such practices follow competitive bidding procedures acceptable to the MDB or private sector commercial procurement practices, if acceptable under the respective MDB guidelines.

17. In assessing the acceptability of private sector commercial procurement procedures for downstream PPP procurement undertaken by the selected service provider, the MDB will undertake due diligence to ascertain that there will be or has been ‘appropriate use’ of MDB funds (‘for the purposes intended’) and that such procurement practices applied by the private sector promote economy and efficiency.

D. Other Situations

18. Expansions of existing systems: Under certain exceptional conditions, the procurement procedures of a service provider may apply in the case of small scale expansions of existing systems operated by such entity.^b

- (i) This may be accepted when an open competitive method may not be warranted. The entity must meet the eligibility criteria of the MDB and have acceptable procurement capacity. As part of its normal business operations, the practices and procedures that the entity relies upon should not grant any preference or award contracts to their parents or affiliates or controlling shareholders. Finally, the procurement procedures should ensure fair competition, economy, efficiency, quality, and transparency;
- (ii) In such cases, the MDB shall conduct post reviews from time to time during implementation to satisfy itself that the procurement capacity and practices remain acceptable, and that the procurement procedures agreed under the loan were followed.

19. Unsolicited proposals: At this stage, MDBs do not have harmonized provisions to consider unsolicited proposals. Further discussions are needed with regard to 'competitive' validation of the terms and conditions of unsolicited proposals in alternative ways. This is the preferred MDB approach; it is consistent with the application of MDB direct contracting provisions applicable to public sector transactions. Such provisions require the Borrower to submit for the MDB review (and no objection) a sufficiently detailed justification, including the rationale for direct contracting instead of a competitive procurement process, and the basis for recommending a particular firm in all such cases. The extent to which such competitive validation is less than optimal, competitive purchasing by the PPP service provider for all downstream procurement (as mentioned in paragraph 16) will be required.

E. Affiliated or related transactions

20. If procurements by the PPP service provider contemplate transactions between related or affiliated entities, an 'arm's length' commercial transaction is preferred practice and mandated by some MDBs (eg. BSTDB, EIB, EBRD). In situations where the relevant contractor or supplier of goods or services is associated or related to the PPP service provider undertaking such procurement, the paramount objective is to ensure that the financial interest of the client (i.e. SPV or operating) company or entity, as distinct from its promoters or shareholders. Procurement between or among 'related parties' is not prohibited per se, but such procurement must result in a reasonable, fair and competitive pricing relative to the applicable private sector market for such goods, works or services.^c

V. GUARANTEES

21. MDB guarantees may include provision of political risk, credit and other types of guarantees to make a particular PPP project more credit-worthy in order to attract sufficient private sector investment. Such guarantees may be used in cases where a particular public sector commitment for viability gap funding (VGF) to a private sector sponsor is considered too risky from a credit standpoint in the absence of such VGF guarantee.^d A similar type of MDB instrument could be issued to the project sponsor to guarantee commitments for 'service' or 'availability' payments by the PPP contracting authority.

22. The requirements for projects that include guarantee operations are not yet harmonized amongst MDBs. WB (IBRD/IDA) and ADB require that, apart from promoting economy and efficiency, require the goods and/or works procured to have appropriate quality and pricing, and be delivered or completed in timely fashion.^e Other MDBs such as, BSTDB, EBRD and IADB include guarantee operations as part of their regular loan and investment financing operations and, thus, regular public or private sector procurement approaches continue to apply. For EIB, procurement undertaken by a guaranteed borrower must be consistent, in addition to promoting economy and efficiency, with the principles of transparency and fairness, and result in selection of the 'most advantageous offer'.^f

23. Such requirements should be agreed with the borrower during project preparation and documented in the project manual. Normally, this would entail a review of the borrower's proposed procurement arrangements to ensure that such arrangements are consistent with the general principles of each MDBs Procurement Guidelines promoting economy and efficiency. The MDB may require a post review of a sample of procurement transactions under the guaranteed financing, in accordance with the approach set out in section IV.

VI. TRANSACTION ADVISORY

24. For engagement of specialist transaction advisors, the provisions of the respective MDB Consulting Guidelines shall apply.

25. The preferred approach is to determine, at the outset, whether the terms of reference of the transaction advisor will include activities that place such advisor, or any affiliated entity or individual, in a position of unfair competitive advantage or conflict of interest during the actual PPP procurement process.

26. The PPP mode of procurement combines procurement issues associated with design, construction and long term maintenance of assets (and possibly operational services) with issues associated with project financing arrangements. It is therefore necessary to become involved early in the PPP transaction advisory process in order to advise the clients as well as assess what specialist advisors are necessary. It is standard in current PPP transactional advisory work to engage specialist advisors to provide:

- (i) commercial legal advice on the adequacy of the legal framework, the structure and content of the project agreement and tender procedures, and any other legal documents that may be required;
- (ii) technical advice to draft technical output and performance specifications as well as challenge and evaluate technical solutions put forward by bidders;
- (iii) financial advice to prepare a financial model for the PPP, advise the government on different fiscal and tariff scenarios, draft relevant parts of the PQ and RFP documents, analyze bidders' financial models, and assist in final drafting at financial close.

27. In most instances PPPs involve relatively complex procurement involving several stages. Therefore such specialist advisory team should include a PPP transaction expert, who is familiar with the contemplated PPP procurement process in order to provide the expertise necessary to structure the procurement process and frame the procurement documentation to ensure maximum value for money for the contracting party. The transaction advisor is typically an international expert, although in some MDB countries with considerable PPP experience this might be a local appointment. It is possible that this advisor would spend considerable time acting as a mentor or coach to the contracting authority's project director, thus transferring skills when being involved in the procurement process itself.

28. The terms of reference (TOR) for such PPP transaction advisor should include the following factors:

- (i) the enabling environment and the existence of a thorough business case which includes a clear and objective specification of the outputs required from the private sector;
- (ii) project management issues relating to the PPP procurement process;
- (iii) the nature of the proposed PPP procedure, including bid formulation, the bidding process and applicable contract award policy, and whether the applicable regulations and procedures are sufficiently transparent and fair;
- (iv) the underlying sector market conditions, including the type and extent of competition and market access or lack of it (e.g. international, national, local, etc.);

- (v) understanding of MDB procurement requirements (if MDB financing is being contemplated) including advice on procurement strategy, the most appropriate procurement method, procurement planning, suggest mechanisms to maximize competition and bidder response, and design of the prequalification and bidding procedures;
- (vi) with inputs from the transaction advisory team, the proposed PPP project agreement in terms of output specifications, acceptable level of capital and operational expenditure risk transfer, mechanisms for measuring performance and making payment to the private party;
- (vii) the nature and extent of monitoring during the bidding process and post – award during the contract term;
- (viii) with inputs from the transaction advisory team, the likely sources of funding and proposals as to fill any gap as well as the “public sector comparator” review^g, if applicable;
- (ix) potential conflict of interest issues that may arise for such transaction advisor, or its affiliates, should they be interested in competing for downstream related procurement.

29. Taking the above factors into account, the PPP transaction advisor should assist in proposing for government consideration, with inputs from the technical, financial and legal team, appropriate bid qualification and evaluation criteria. Such criteria should be as objective, precise and quantified as reasonably possible to minimize the possibility of undue discretion or subjectivity during bid evaluation. In short, advisory procurement transactional advice should assist in structuring the procurement and contractual arrangements that are most suited to the relevant sector and market conditions and maximizing the probability that only good quality projects reach the market.

VII. PROVISIONS RELATED TO FRAUD AND CORRUPTION

30. MDBs involved in financing PPPs apply their respective anticorruption policies and procedures as part of their internal integrity due diligence and their collective agreement on cross debarment with other International Financial Institutions, including MDBs as may be applicable. For example, procurements funded by WB (IBRD/IDA) are governed by the provisions of World Bank IBRD/IDA Guidelines On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants, October 2006 revised January 2011, Guidelines for Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers, January 2011 and Guidelines for Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers. PPP operations funded by ADB are subject to ADB Anti-corruption and Integrity Policies. For its private sector operations, ADB follows recommendations of the Integrity Due Diligence Guidelines (‘IDD Guidelines’)^h of the Joint International Financial Institutions (IFI) Anti-Corruption Task Force.

VIII. MONITORING

31. MDBs advise PPP monitoring at two levels: a) systematic self-monitoring by the private sector contractor at scheduled intervals through a quantitative and qualitative monitoring system

measuring specified performance targets, and b) monitoring at scheduled intervals and randomly with the government or the MDB which is financing the PPP having the right to increase its reviews when there are failures to meet or maintain targets. In addition the PPP contract often provides for reviews by independent monitors. Successful implementation of a monitoring regime and possible consequential payment deduction mechanism is dependent on the quality of the output specifications drafted in the feasibility stage and reflected in the PPP contract. Output specifications and performance measurement systems should set be out in the relevant concession or contractual documents in objective, quantifiable and measurable terms. It is critical for the relevant concession or contract document is well – balanced and commercially reasonable in terms of allocation of risks.

IX. NEXT STEPS AND POSSIBLE FOLLOW UP WORK

32. MDBs recognize the need to apply public sector procurement principles for those types of PPP transactions covered by this guidance note. However, to the extent to which financing is provided for PPP transactions by the private sector windows of MDBs by way of loans, guarantees or grant funding, there remain differences in requirements, policies and practices that are expected to be covered under a separate guidance note to be prepared by a working group set up for such purpose.¹

33. Supplementary work is envisaged in developing guidance on handling the varied area of unsolicited proposals for PPPs which involve both public and private sector financing, as well as possibly collating a compendium of selected examples of public sector PPP transactions financed by MDBs that illustrate both preferred and less than desirable procurement approaches. In addition, further work may be undertaken in new areas and emerging trends related to PPPs on which MDB practices are evolving. It is recognized that in many type of PPP/Design-Build-Finance-Operate (DBFO) projects, a multiple stage process may be applied after prequalification. For example, the EU model allows a “competitive dialogue” with selected suppliers to identify and define solutions to meet the requirements of the contracting authority.¹ Such approaches may be suitable for specific situations, and for borrowers having capacity to effectively execute such procedures, and need to be separately addressed in meaningful detail.

34. Finally, MDBs will seek to increase capacity building of borrowers and staff, undertake continued efforts on knowledge sharing and share case studies around MDB experiences as well as lessons learnt.

35. Since PPPs seek to be instrumental in efficiently engaging and managing risks around private sector involvement, follow on work will include private sector consultations.

Endnotes:

-
- ^a Equal information should be provided to all bidders to ensure that no single bidder involved in any aspect of a PPP transaction has an actual or potential unfair or undue competitive advantage.
- ^b This is currently permitted only under WB (IBRD/IDA) Procurement Guidelines. This approach may be adopted by other MDBs in due course by updating their respective guidelines. The entity may be an incumbent concessionaire or entrepreneur that is either a privately owned or a government owned company provider or utilities that is either a privately-owned or a government-owned company. See World Bank's Procurement Guidelines (January 2011), para 3.15.
- ^c As per para 4 of Appendix 6 of AfDB's Procurement Rules, contracts awarded by private sector borrowers should be negotiated on an arm's-length basis, taking into account the financial interest of the borrower rather than the interests of its parent firm. When a shareholder of a private sector borrower also acts as contractor to the borrower, it should be demonstrated to the Bank that the costs of the acquisition are approximately equivalent to budget estimates and market prices, and that the conditions of the contract are equitable and reasonable. AfDB will not finance acquisitions that exceed market prices. In the case of EIB, there is an express provision that prohibits a company in which a promoter has a controlling interest from participation in any tender initiated by such promoter. See EIB, Guide to Procurement, S. 3.4.2.
- ^d These circumstances would also apply to guarantees extended to MDB non-sovereign public sector clients.
- ^e Refer to para 1.5 and 3.18 of WB (IBRD/IDA) Procurement Guidelines, Jan 2011, ADB *Procurement Guidelines*, S. 3.16 read with S. 1.5.
- ^f EIB, Guide to Procurement, S. 3.4.3 ('...[the guaranteed procurement] must be purchased following procedures which ensure transparency...fairness...and selection of the most advantageous offer (i.e. competitive price, satisfactory quality and timely delivery). [EIB] may request that competition be opened to an adequate number of suppliers...').
- ^g The Public Sector Comparator is used by governments to determine whether a PPP project proposal offers value for money in comparison with the most effective form of public procurement.
- ^h The IDD Guidelines set out several general principles including: (i) adequate 'know your customer' procedures to ensure identification of beneficial ownership; (ii) close scrutiny of parties that have been convicted of, or are under serious investigation for, serious crimes, investigated or sanctioned by a regulatory body, or appearing on a sanctions list recognized by IFIs; (iii) identification of mitigation and enforcement of covenants that address integrity risks; and (iv) ongoing monitoring of integrity risks through portfolio management.
- ⁱ The HOP have established the Private Sector (PS) Working Group, chaired by EBRD, which is tasked with preparation of such note. The PS Working Group will focus on developing guidance on application of procurement principles for engagements involving private sector windows of the MDBs in PPPs.
- ^j http://www.ogc.gov.uk/documents/guide_competitive_dialogue.pdf