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### Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

#### Draft model legislative provisions 1 to 26

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## Foreword

*The following model legislative provisions (hereinafter referred to as “model provisions”) have been prepared by the United Nations Commission on International Trade Law (UNCITRAL) as an addition to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (hereinafter referred to as “the Legislative Guide”), which was adopted by the Commission in 2000. The model provisions are intended to further assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. The user is advised to read the model provisions together with the legislative recommendations and the notes contained in the Legislative Guide, which offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area.*

*The model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects. While most model provisions relate to specific legislative recommendations contained in the Legislative Guide, they do not cover the entire range of issues dealt with in the legislative recommendations. In particular, no specific model provisions have been formulated on administrative or institutional matters, such as those dealt with in legislative recommendations 1, 5 and 6 to 13.*

*The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources and economic stability.*

*It should be noted that the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the Legislative Guide. Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, rules on government contracts and administrative law, tax law, environmental protection and consumer protection laws.*

*For the user’s ease of reference, the model provisions are preceded by headings and bear titles that follow as closely as possible the headings of relevant sections of the Legislative Guide and the titles of its legislative recommendations. However, with a view to ensuring uniformity of style throughout the model provisions, a few headings and titles have been added and some of the original headings and titles have been modified so as to reflect the content of the model provisions to which they relate.*

[Note to the Working Group: Unless otherwise indicated, all references in the footnotes and in the notes below the headings of the draft model legislative Provisions are to recommendations and chapters of the Legislative Guide.]

## I. General provisions

### Model provision 1. Preamble

[see recommendation 1 and chap. I, paras. 2-14]

#### Variant A

WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a legislative framework to promote and facilitate private investment in infrastructure development,

Be it therefore enacted as follows:

#### Variant B

WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a favourable framework for the implementation of privately financed infrastructure projects by promoting transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

WHEREAS the [Government] [Parliament] of ... considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

[Other objectives that the enacting State might wish to state].

Be it therefore enacted as follows:

### Model provision 2. Definitions

[see introduction, paras. 9-20]

For the purposes of this law:

(a) “*Infrastructure facility*” means physical facilities and systems that directly or indirectly provide services to the general public;

(b) “*Infrastructure project*” means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) “*Contracting authority*” means the public authority that has the power to enter into a concession agreement for the implementation of an infrastructure project [under the provisions of this law];<sup>1</sup>

(d) “*Concessionaire*” means the person that carries out an infrastructure project under a concession agreement entered into with a contracting authority;

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<sup>1</sup> It should be noted that the authority referred to in this definition relates only to the power to enter into concession agreements. Depending on the regulatory regime of the enacting State, a separate body, referred to as “regulatory agency” in subparagraph (h), may have the responsibility for issuing rules and regulations governing the provision of the relevant service.

(e) “*Concession agreement*” means the legally binding contract or contracts between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

(f) “*Bidder*” and “*bidders*” mean persons, including groups thereof, that participate in selection proceedings for the award of infrastructure projects;<sup>2</sup>

(g) “*Unsolicited proposal*” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) “*Regulatory agency*” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

### **Model provision 3. Authority to enter into concession agreements**

[see recommendation 2 and chap. I, paras. 15-18]

The following public authorities have the power to enter into concession agreements<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession agreements by way of an exhaustive or indicative list of public authorities, a list of types of categories of public authorities or a combination thereof*].<sup>5</sup>

<sup>2</sup> The term “bidder” or “bidders” encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings, or persons that have submitted a proposal in response to a contracting authority’s request for proposals.

<sup>3</sup> The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, “General legislative and institutional framework”, paras. 30-53).

<sup>4</sup> It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, “General legislative and institutional framework”, paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to clearly identify which entities have the power to provide such support and what kind of support may be provided (see chap. II, “Project risks and government support”).

<sup>5</sup> Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession agreements, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those agreements, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the States [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

**Model provision 4. Eligible infrastructure sectors**

[see recommendation 4 and chap. I, paras. 19-22]

Concession agreements may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].<sup>6</sup>

## II. Selection of the concessionaire

**Model provision 5. Rules governing the selection proceedings**

[see recommendation 14 and chap. III, paras. 1-33]

The award of infrastructure projects shall be conducted in accordance with [*model provisions 6 to 26*] and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts*].<sup>7</sup>

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<sup>6</sup> It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>7</sup> The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are largely based on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (hereinafter referred to as the "Model Procurement Law"). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The draft model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public, bid security and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, *mutatis mutandis*, supplement the practical elements of the selection procedure described herein.

## 1. Pre-selection of bidders

### Model provision 6. Purpose and procedure of pre-selection

[see recommendation 15 and chap. III, paras. 34-50]

1. The contracting authority [may] [shall] engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the prequalification of suppliers and contractors*].

3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the prequalification of suppliers and contractors*],<sup>8</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility to be built or renovated;

(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire); and

(c) Where already known, a summary of the main required terms of the concession agreement to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications;

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the prequalification of suppliers and contractors*],<sup>9</sup> the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with [*model provision 7*];

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in [*model provision 8*];

<sup>8</sup> A list of elements typically contained in an invitation to participate in prequalification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

<sup>9</sup> A list of elements typically contained in prequalification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

(c) Whether the contracting authority intends to request only a limited number<sup>10</sup> of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with [*model provision 9, paragraph 2*], and, if applicable, the manner in which this selection will be carried out;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*this State*] in accordance with [*model provision 29*].

5. The pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the prequalification of suppliers and contractors*].<sup>11</sup>

#### **Model provision 7. Pre-selection criteria**

[*see recommendation 15 and chap. III, paras. 34-40 and 43-44*]

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria<sup>12</sup> that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

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<sup>10</sup> In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, “Selection of the concessionaire”, paras. 48-49). See also footnote 13.

<sup>11</sup> Procedural steps on prequalification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority’s decision on the bidders’ qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7.

<sup>12</sup> The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the Legislative Guide (see chap. III, “Selection of the concessionaire”, paras. 43-44). The Legislative Guide suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

**Model provision 8. Participation of consortia**

[see recommendation 16 and chap. III, paras. 41-42]

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with [model provision 7] shall relate to the consortium as a whole as well as to its individual participants.
2. Unless otherwise [authorized by \_\_\_ [the enacting State indicates the relevant authority] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium.<sup>13</sup> A violation of this rule shall cause the disqualification of the consortium and of the individual members.
3. When considering the qualifications of bidding consortia, the contracting authority shall consider the individual capabilities of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

**Model provision 9. Decision on pre-selection**

[see recommendations 17 (for para. 2) and 25 (for para. 3) and chap. III, paras. 47-50]

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with [model provisions 10 to 16].
2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number<sup>14</sup> of bidders that best meet the pre-selection criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their

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<sup>13</sup> The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

<sup>14</sup> In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", para. 48). It should be noted that the rating system is solely used for the purpose of the pre-selection of bidders. The ratings of the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on equal standing.

qualifications and draw up [a short] [the final] list of the bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the short list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

3. The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.

## 2. Procedure for requesting proposals

### **Model provision 10. Single-stage and two-stage procedures for requesting proposals**

[see recommendations 18 and 19 and chap. III, paras. 51-58]

1. The contracting authority shall provide a set of the [final] request for proposals and related documents issued in accordance with [model provision 11] to each pre-selected bidder that pays the price, if any, charged for those documents.

2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when [it is not feasible for the contracting authority] [the contracting authority does not deem it to be feasible] to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

3. Where a two-stage procedure is used, the following provisions apply:

(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;<sup>15</sup>

(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;

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<sup>15</sup> In many cases, in particular for new types of projects, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession agreement, in particular the way in which the project risks should be allocated between the parties under the concession agreement. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project (see chap. III, "Selection of the concessionaire", paras. 67-70; see further chap. II, "Project risks and government support", paras. 8-29).

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with [model provisions 11 to 16].

**Model provision 11. Content of the final request for proposals**

[see recommendation 20 and chap. III, paras. 59-70]

To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals],<sup>16</sup> the final request for proposals shall include at least the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;<sup>17</sup>

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;<sup>18</sup>

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

**[Model provision 12. Bid security]**

[see chap. III, para. 62]

1. [The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security.]

2. [A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:<sup>19</sup>

<sup>16</sup> A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

<sup>17</sup> A list of elements that should be provided can be found in chapter III, "Selection of the concessionaire", paras. 61-62, of the Legislative Guide.

<sup>18</sup> See chapter III, "Selection of the concessionaire, paras. 64-66.

- (a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;
- (b) Failure to enter into final negotiations with the contracting authority pursuant to [*model provision 16*];
- (c) Failure to formulate a best and final offer within the time limit prescribed by the contracting authority pursuant to [*model provision 16, paragraph 2*];
- (d) Failure to sign the concession agreement, if required by the contracting authority to do so, after the proposal has been accepted;
- (e) Failure to provide required security for the fulfilment of the concession agreement after the proposal has been accepted or to comply with any other condition prior to signing the project agreement specified in the request for proposals.]

**Model provision 13. Clarifications and modifications**

[*see recommendation 21 and chap. III, paras. 71-72*]

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise the final request for proposals by deleting or modifying any aspect of the project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the final request for proposals, as well as by adding characteristics or criteria to it. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the final request for proposals at a reasonable time prior to the deadline for submission of proposals.

**Model provision 14. Evaluation criteria**

[*see recommendations 22-23 and chap. III, paras. 73-77*]

1. The criteria for the evaluation and comparison of the technical proposals<sup>20</sup> shall include at least the following:
  - (a) Technical and environmental soundness;
  - (b) Operational feasibility;
  - (c) Quality of services and measures to ensure their continuity.
2. The criteria for the evaluation and comparison of the financial and commercial proposals<sup>21</sup> shall include, as appropriate:
  - (a) The present value of the proposed tolls, unit prices and other charges over the concession period;

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<sup>19</sup> General provisions on bid securities can be found in article 32 of the Model Procurement Law.

<sup>20</sup> See chapter III, "Selection of the concessionaire", para. 74.

<sup>21</sup> See chapter III, "Selection of the concessionaire", paras. 75-77.

- (b) The present value of the proposed direct payments by the contracting authority, if any;
- (c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
- (d) The extent of financial support, if any, expected from a public authority of [*this State*];
- (e) Soundness of the proposed financial arrangements;
- (f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;
- (g) The social and economic development potential offered by the proposals.

**Model provision 15. Comparison and evaluation of proposals**

[*see recommendation 24 and chap. III, paras. 78-82*]

1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.
2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.<sup>22</sup>

**Model provision 16. Final negotiations**

[*see recommendations 26-27 and chap. III, paras. 83-84*]

1. The contracting authority shall rank all responsive proposals and invite for final negotiation of the concession agreement the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.
2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession agreement, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the bidder

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<sup>22</sup> This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, "Selection of the concessionaire", paras. 79-82, of the Legislative Guide, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the Legislative Guide are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process.

fails to formulate an offer acceptable to the contracting authority within the prescribed time limit, the contracting authority shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the bidder that has attained the second best rating; if the negotiations with that bidder do not result in a concession agreement, the contracting authority shall thereafter invite for negotiations the other bidders in the order of their ranking until it arrives at a concession agreement or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated pursuant to this paragraph.

### 3. Negotiation of concession agreements without competitive procedures

#### **Model provision 17. Circumstances authorizing award without competitive procedures**

[see recommendation 28 and chap. III, para. 89]

[Subject to approval by \_\_\_ [*the enacting State indicates the relevant authority*]]<sup>23</sup> the contracting authority is authorized to negotiate a concession agreement without using the procedure set forth in [*model provisions 6 to 16*], in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in [*model provisions 6 to 16*] would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of \_\_\_ *the enacting State specifies a monetary ceiling*] [set forth in \_\_\_ *the enacting State indicates the provisions of its laws that specify the monetary threshold below which a privately financed infrastructure project may be awarded without competitive procedures*];<sup>24</sup>

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<sup>23</sup> The rationale for subjecting the award of the concession agreement without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, "Selection of the concessionaire", paras. 85-96). The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

<sup>24</sup> As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

- (c) Where the project involves national defence or national security;
- (d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property right or other exclusive right owned or possessed by a certain person or persons;
- (e) In cases of unsolicited proposals falling under [*model provision 22*];
- (f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria [set forth in the request for proposals], and if, in the judgement of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award, within a required time frame, provided that the terms of any concession agreement so negotiated between the parties must [be consistent with] [not depart from] the project specifications and contractual terms originally transmitted with the request for proposals;
- (g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for [compelling] reasons of public interest [or other cases of the same exceptional nature, as defined in the law].<sup>25</sup>

**Model provision 18. Procedures for negotiation of a concession agreement**  
[see recommendation 29 and chap. III, para. 90]

Where a concession agreement is negotiated without using the procedures set forth in [*model provisions 6 to 16*] the contracting authority shall:<sup>26</sup>

- (a) Except for concession agreements negotiated pursuant to [*model provision 17, paragraph (c)*], cause a notice of its intention to commence negotiations in respect of a concession agreement to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*];
- (b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;
- (c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

<sup>25</sup> Enacting States that deem it desirable to authorize the use of negotiated procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the competitive selection procedures may in turn prefer not to include the subparagraph.

<sup>26</sup> A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, “Selection of the concessionaire”, paras. 90-96, of the Legislative Guide.

#### 4. Unsolicited proposals<sup>27</sup>

##### **Model provision 19. Admissibility of unsolicited proposals**

[see recommendation 30 and chap. III, paras. 97-109]

As an exception to [model provisions 6 to 16], the contracting authority<sup>28</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in [model provisions 20 to 22], provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

##### **Model provision 20. Procedures for determining the admissibility of unsolicited proposals**

[see recommendations 31-32 and chap. III, paras. 110-112]

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be in the public interest.<sup>29</sup>
2. If the project is considered to be in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environment impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

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<sup>27</sup> The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, "Selection of the concessionaire", paras. 98-100, of the Legislative Guide. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 22 to 24.

<sup>28</sup> The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 23 and the references cited therein).

<sup>29</sup> The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. In particular, the contracting authority shall not make use of any information issued or provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. [Except as otherwise agreed by the parties], the contracting authority shall, in the event that the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared [, whether in hard copy or in electronic format,] throughout the procedure.

**Model provision 21. Unsolicited proposals that do not involve proprietary concepts or technology**

[see recommendation 33 and chap. III, paras. 113-114]

1. Except in the circumstances set forth in [model provision 17], the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with [model provisions 6 to 16] if the contracting authority considers that:

(a) The envisaged output of the project can be achieved without the use of an intellectual property right or other exclusive right owned or possessed by the proponent; or

(b) The proposed concept or technology is not truly unique or new.

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit [in a manner described by the contracting authority in the request for proposals] in consideration for the development and submission of the proposal.

**Model provision 22. Unsolicited proposals involving proprietary concepts or technology**

[see recommendations 34-35 and chap. III, paras. 115-117]

1. If the contracting authority determines that the conditions of [model provision 21, paragraph 1, subparagraphs (a) or (b)] are not met, it shall not be required to carry out a selection procedure pursuant to [model provisions 6 to 16]. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4.<sup>30</sup>

<sup>30</sup> The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, mutatis mutandis, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law.

2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].

3. If no proposals in response to an invitation issue pursuant to paragraph 2 are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in [*model provision 18*]. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals pursuant to [*model provisions 10-16*], subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with [*model provision 21, paragraph 2*].

## 5. Miscellaneous provisions

### **Model provision 23. Confidentiality of negotiations**

[*see recommendation 36 and chap. III, para. 118*]

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of any information contained therein to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to [*model provisions 10, paragraph 3, 16, 17, 18 or 22, paragraph 3*] shall be confidential. [Unless required by law or by a court order,] Each party to the negotiations shall not disclose to any other person, apart from its agents, subcontractors, lenders, advisers or consultants, any technical, price or other information that it has received in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

### **Model provision 24. Notice of project award**

[*see recommendation 37 and chap. III, para. 119*]

Except for infrastructure projects awarded pursuant to [*model provision 17, subparagraph (c)*], the contracting authority shall cause a notice of the award of the project to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession agreement.

**Model provision 25. Record of selection and award proceedings**

[see recommendation 38 and chap. III, paras. 120-126]

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*].<sup>31</sup>

**Model provision 26. Review procedures**

[see recommendation 39 and chap. III, paras. 127-131]

A bidder who claims to have suffered, or who may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].<sup>32</sup>

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<sup>31</sup> The contents of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, may need to be set forth in regulations issued by the enacting State to implement the model provision, where no such rules exist under the enacting State's procurement laws. These issues are discussed in chapter III, "Selection of the concessionaire", paras. 120-126, of the Legislative Guide. The content of such a record for the various types of project award contemplated is set out in article 11 of the Model Procurement Law.

<sup>32</sup> Elements for the establishment of an adequate review system are discussed in chapter III, "Selection of the concessionaire", paras. 127-131, of the Legislative Guide. They are also contained in chapter VI of the Model Procurement Law.