



Guidance
Note on
Public Private
Partnerships in
Islamic Development
Bank financed
Procurements

May 2019

This Guidance Note is intended to complement the Guidelines for Procurement of Goods and Works and related services and for the Procurement of Consultant Services under Islamic Development Bank Financing, approved by the Board of Executive Directors (BED) of the Islamic Development Bank, and published September 2018. This document may be used and reproduced for non-commercial purposes. Any commercial use, including without limitation reselling, charging to access, redistribute, or for derivative Works such as unofficial translations based on these documents is not allowed.

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Common Abbreviations and Defined Terms

Common abbreviations and defined terms that are used in these Guidelines. Defined terms are written using capital letters.

Abbreviation / term	Full terminology / definition
BED	Board of Executive Directors
Beneficiary	A Beneficiary is the recipient of IsDB Project Financing. This term includes any entity involved in the implementation of an IsDB financed project on behalf of the Beneficiary.
Bid	An offer, by a Bidder, in response to a Request for Bids, to provide the required Goods, and/or Works and/or related services.
Bidder	A Firm that submits a Bid for the provision of Goods and/or Works and/or related Services
BOO	Build, Own and Operate
BOT	Build, Operate and Transfer
BOOT	Build, Own, Operate and Transfer
Consultant	A Consultant Firm or Individual Consultant that provides Consultant Services. A Consultant is independent of both the Beneficiary and IsDB.
Consultant Service(s)	Consultant Services are those intellectual services delivered by a Consultant Firm or an Individual Consultant. Consultant Services are normally of a professional, expert or advisory nature. Consultant Services are governed by these Guidelines.
EOI	Expression of Interest
Fraud and Corruption	The sanctionable practices of corruption, fraud, collusion, coercion or obstruction defined in IsDB's <i>Guidelines on Combatting Fraud and Corruption</i> and in <i>IsDB Group Anti-Corruption Guidelines on Preventing and Combating Fraud and Corruption in IsDB Group-Financed Projects</i> .
Goods	A category of Procurement that includes, for example: consumables, equipment, machinery, vehicles commodities, raw materials or industrial plant. The term may also include related services, such as: transportation, insurance, installation, commissioning, training or initial maintenance.
IsDB	Islamic Development Bank
JV	Joint Venture
MC	Member Country
MDB	Multi-Lateral Development Bank
Non-Consulting Services	Services which are not Consulting Services. Non-Consulting Services are normally Bid and contracted on the basis of performance of measurable outputs, and for which performance

COMMON ABBREVIATIONS AND DEFINED TERMS

Abbreviation / term	Full terminology / definition
	standards can be clearly identified and consistently applied. Examples include: drilling, aerial photography, satellite imagery, mapping, and similar operations.
PFI	Private Finance Initiative
PPR	Project Procurement
PPP	Public Private Partnerships
PPP Procurement Process	The Procurement process that covers Public Private Partnerships.
Prequalification	The shortlisting process, which can be used prior to inviting Request for Bids in the Procurement of Goods, Works and related services.
Probity Assurance Provider	An independent third party that provides specialist probity services for concurrent monitoring of the Procurement Process.
Procurement	The function of planning for, and sourcing Goods, Works, Non-Consulting Services, and/or Consulting Services to meet required objectives.
Procurement Documents	A generic term used in these Guidelines to cover all Procurement Documents issued by the Beneficiary. It includes: GPN, SPN, EOI, REOI, Prequalification document, Request for Expression of Interest, RFB and RFP, including any addenda.
Project Procurement Guidelines	Covers the Project Procurement Guidelines known as 'Guidelines for the Procurement of Goods, Works and related services under IsDB Project Financing, September 2018' and Guidelines for the Procurement of Consultant Services under IsDB Project Financing, September 2018.
Proposal	An offer, by a Proposer, in response to a Request for Proposal to provide the required Services.
Proposer	A Firm that submits a Proposal for the supply of the required Services.
RFP	Request for Proposal
SBDs	Standard Bidding Documents
Standard Bidding Documents	Standardised Procurement documents issued by IsDB to be used by Beneficiaries for IsDB financed projects. These include IsDB's standard documents for, e.g.: GPN, SPN, Prequalification, LOI, RFB and RFP.
Works	A category of Procurement that refers to construction, repair, rehabilitation, demolition, restoration, maintenance of civil work structures, and related services such as transportation, insurance, installation, commissioning, and training.

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Section 1 - Introduction

1.1 Overview

This Guidance Note relates to Public Private Partnerships (PPPs) and details how and under what circumstances IsDB permits the use of PPPs. The Guidance Note describes the things that should be considered before approaching a PPP Procurement, key considerations and the PPP Procurement Process.

A PPP is a long-term contract between a private party and a government entity to provide a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance.

IsDB may finance the cost of a project or a contract procured under PPP arrangements, Build, Own and Operate (BOO), Build, Operate and Transfer (BOT), Build, Own, Operate and Transfer (BOOT) concessions or similar types of private-sector arrangements, if the selection procedures:

- Are Fit-for-Purpose and reflect VfM through the application of IsDB's core Procurement principles;
- Reflect the application of the IsDB Group Anti-Corruption Guidelines on Preventing and Combating Fraud and Corruption in IsDB Group-Financed Projects; and
- Are consistent, as appropriate, with the requirements set out in these Guidelines.

IsDB's core Procurement principles of economy, efficiency, fairness and effectiveness all apply to PPP Procurement. Although the nature of PPP Procurement is different from the conventional Procurement of Goods, Works, and Services, the process for procuring PPPs should be designed and implemented to comply with these principles.

VfM in PPP projects is achieved through the leveraging of private sector efficiency, effectiveness, and economy, and through the appropriate allocation of risks. Despite PPP projects being different in nature from conventional projects, the PPP Procurement Process is similar, comprising planning, Bidding, Bid evaluation, contract award, and implementation. The methods used in each of these steps vary from conventional Procurement because of the nature of PPP projects, being long-term and output focused.

Extensive literature on PPP Procurement is publicly available from other Multi-Lateral Development Banks (MDB's) such as the World Bank and the Asian Development Bank (ADB).

Section 2 – Public Private Partnerships

2.1 Definition of Public–Private Partnerships

Internationally, PPP Procurement has been used for more than two decades with early Private Finance Initiative (PFI) projects in the United Kingdom generally considered to be the genesis of the PPP model.

While PPP Procurement has been adopted in several jurisdictions (in both developed and developing economies) no clear and consistent definition has emerged as to what constitutes a PPP. This is largely due to the varying policy drivers which influence the design and implementation of PPP Procurement between jurisdictions.

A PPP refers to a long-term contractual arrangement between public (national, state, provincial, or local) and private entities through which the skills, assets, and/or financial resources of each of the public and private sectors are allocated in a complementary manner, thereby sharing the risks and rewards, to seek to provide optimal service delivery and good value to Beneficiaries citizens.

PPPs may be characterized by the following four elements:

- **Duration**
 - Contracts between public and private sector partners are usually medium to long-term, often covering the lifetime of the asset being produced under the PPP contract.
- **Financing, responsibilities, and ownership**
 - Asset financing by the public and/or private sector is often complex and can involve revenues obtained from the operation of the asset over a designated period. Responsibility for constructing, operating, and maintaining the asset can often be included in the responsibilities of the private partner. Ownership of the asset varies by PPP arrangement. In some cases, the private sector operator owns the asset and transfers ownership to the public sector partner after a designated period. In other cases, ownership is shared or may be retained by the public sector partner over the life of the asset.
- **Performance-based returns**
 - PPPs develop assets or projects for delivering ongoing services to the public, rather than the asset being the deliverable of the contract, with payment being contingent on the operator of the asset meeting performance standards. The public sector partner is usually responsible for monitoring performance over the life of the contract.

- **Output and quality specification**
 - The private sector partner participates in stages of the project defined by the public sector partner (e.g., design, construction, operation, maintenance, and financing). The public sector partner defines the outcomes to be achieved in terms of public interest, quality of services provided, and pricing policy.

2.2 PPP vs Conventional Procurement

The key features that distinguish PPP Procurement from more conventional public sector Procurement include:

- Specification of the service outcomes required from an asset rather than prescriptive input specifications that relate to the asset itself;
- Bundling of ‘whole of life’ services, that are otherwise procured independently at different stages of an asset’s lifecycle, under a single long-term contract;
- The transfer of risk to the private sector partner where they are best placed to manage that risk, and
- A periodic (typically quarterly) payment profile which commences only once the asset is operational and is calculated based on the actual performance of the asset and required service outcomes.

2.3 Benefits of PPPs

Whole of Life

PPPs focus on whole of life performance of an asset through full integration of up-front design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs. This is intended to deliver improved efficiency, greater cost optimisation and improved cost certainty over the life of the asset.

Conventional methods fail to incentivise the consideration of the long-term operating and lifecycle costs of new capital assets at the time approval for new capital investment is sought. By establishing an investment period that incorporates a substantial operating period (usually 20-30 years post service commencement), PPP Procurement ensures the whole of life cost of infrastructure is well understood and enough capital and operating appropriations are sought at the outset.

The requirement for more pre-Procurement analysis under PPP Procurement results in better quality information for the procuring entity and more robust, and defensible, decision making. This helps the procuring entity to enjoy a greater level of certainty that the whole of life cost of the project is affordable while the government gains assurance that the future cost of today’s investment is well understood.

Further benefit is gained through the transfer of whole of life risk; that is, the risk that the asset performs as intended for the duration of the operating period (which includes the risk, and cost,

associated with facilities maintenance, lifecycle, fit out and specified equipment). This ensures the private sector partner is highly incentivised to explore innovative opportunities to ensure reliable service while managing the long-term cost of both the asset and service delivery, rather than solely focusing on minimising the up-front capital appropriation.

To date, this has led to design concepts, operating models and approaches to capital investment that had not previously been considered by the respective procuring entity. This increased understanding and optimisation of the whole of life cost of the project is beneficial to the procuring entity's wider asset portfolio as well as the immediate project.

Payment for performance

Globally, fiscal constraints have increased governments' focus on the efficient and prioritised appropriation of taxpayer funds. This has resulted in greater emphasis on agencies to account for the ways in which they apply public funds.

PPP Procurement creates a direct relationship between the performance of an investment and the reimbursement of the associated capital cost associated with the asset over an extended period. Having private sector capital at risk for non-performance provides a strong incentive for the private sector partner to ensure the asset is always available and fit for purpose.

The performance regime ensures that the procuring entity only pays for the asset and service provision where those outcomes are achieved. If the asset does not perform as required and the service outcomes specified by the procuring entity are not met to the required standard, payment is abated in proportion to the level of underperformance. This incentivises the private sector partner to lift its performance to ensure future payments are received.

Abatements for non-performance (or penalties) should be appropriately sized to ensure that the contractor is incentivised to avoid or remedy performance failures.

Project characteristics and suitability of PPP Procurement

PPP Procurement is most likely to be appropriate for projects of large scale and long duration where:

- The nature of the asset required is specific and can only be applied to the purpose intended (such as a prison or hospital)
- The service is durable, and it is unlikely that the service requirements will vary unpredictably over the life of the contract
- Outcomes or outputs can be well-specified, enabling clear specification and monitoring of performance requirements and standards
- The project is sufficiently complex that innovative design and service approaches may be employed, and
- There is enough market appetite and depth to ensure a competitive PPP Procurement Process.
- Objective of selecting one Bidder as the preferred Bidder, and

- The Preferred Bidder stage, during which the procuring entity negotiates the Project Agreement with the preferred Bidder and its debt providers, and resolves any critical issues identified in the proposal.

Section 3 – Key Considerations

3.1 Considerations

PPP Procurement places a greater focus on whole of life performance to optimise decisions and activities that may otherwise occur in isolation, or with other short-term drivers. For example, the trade-off between the choice of construction materials and ongoing maintenance requirements is optimised for the duration of the PPP (including any required hand back period), rather than being unduly influenced by the up-front capital cost.

The integration of service and asset design is equally important to ensure that the asset is fit for purpose and enables efficient and effective delivery of operational services.

The application of private finance is an important component of PPP Procurement as placing significant capital ‘at risk’ ensures that the performance incentives and risk transfer within the model are meaningful.

PPP projects vary from traditional projects in several important ways, which affect the Procurement approach and Procurement methods. These include the following:

- PPP contracts are usually long-term and the environment in which the PPP operates over the life of the partnership can change in unforeseen ways. This may require the selection of criteria used to evaluate proposals that are different from those used in conventional Procurement, in which requirements over the life of the contract are more clearly known.
- PPP contracts generally involve the private sector partner constructing the asset and then operating and maintaining it. The public sector partner usually specifies requirements in terms of outputs, e.g., megawatts of power output of a power plant, rather than the conventional Procurement approach of specifying inputs, such as the specifications of the type and size of plant.
- The private sector operator will generally have an equity stake in the entity (special purpose vehicle or project company) that will procure the asset and will receive or share revenue generated by the asset, rather than the conventional Procurement approach of being paid for provision of goods or services or for the construction of an asset. This changes the balance of risk in the relationship and the nature of the contract management task over the course of the contract.

Despite these significant differences, the process used to procure a PPP arrangement has similar steps with conventional Procurement.

3.2 Outcome Specification

Generally, if the required asset or service can be well specified, then it is likely that it can be measured and delivered by a third party under a contractual relationship. Additionally, where the service can be clearly specified, clear performance specifications can be formulated to ensure higher levels of service outcomes can be delivered and enforced. The PPP project agreement can

include incentives to deliver stronger performance, resulting in greater efficiency and higher quality service outcomes.

Service outcomes which cannot be well specified, however, risk undermining the performance regime and, ultimately, the procuring entity's control over the asset and its performance.

3.3 Durability of Service Specification

The durability of the service specification is also a crucial issue for a public sector practitioner to assess as it will dictate the potential tenure of the contract. If a contract is easily specified and the nature of that service is unlikely to change significantly over time, then it may suit a Procurement model with a long contract term such as PPP Procurement.

A shorter duration may be preferred where the required scope of an outsourced service is unpredictable otherwise the procuring entity may face a risk of costly contract variations or a premium being charged by the service provider due to future uncertainty.

3.4 Complexity

Complexity (both in terms of asset and service provision) is also an important consideration in determining the suitability of PPP Procurement for a specific project. Greater opportunity exists for a private sector partner to introduce an innovative solution where the project has a higher level of complexity. Innovation may include approaches that provide improved service outcomes or reduce the overall cost of the project.

Conversely, care should be taken to ensure that a project's complexity and a private sector partner's response do not undermine the value of the overall project. This might arise through the creation of difficult or costly interface issues with other services provided by the procuring entity or increased contract management and enforcement costs.

3.5 Scale

The size of the project is an important criterion when considering Procurement options and the suitability of PPP Procurement. The larger a project is the greater ability it will likely have to absorb the transaction costs associated with PPP Procurement. A small project or service contract may not be able to sustain those transaction costs associated with the required market development, Procurement and monitoring inherent in PPP Procurement, reducing the VfM proposition.

The scale of the project should also be considered considering the cost to private sector parties in responding to the Procurement. Potential Bidders are unlikely to participate in a PPP Procurement Process where they do not consider that the cost of Bidding is offset by the reward of winning the contract.

3.6 Contract Management Competency

Effective contract management of outsourced service contracts is critical regardless of the form of Procurement. However, due to the level of complexity inherent within the performance regime, PPP Procurement requires a higher level of active contract management than other forms of Procurement. Effective contract management is most likely to occur where service performance can be readily measured, and the procuring entity and Beneficiary has the requisite contract management resource and expertise.

Where the adoption of PPP Procurement for a specific project requires the Beneficiary to establish a contract management function, consideration should be given to the likelihood of further PPP projects or other opportunities to utilise this capability. If such opportunities are not apparent, the additional cost of establishing and maintaining this contract management functionality may diminish the benefits and VfM of procuring the project as a PPP. A Beneficiary considering PPP Procurement should consult with IsDB in developing its contract management plan.

3.7 Competition

The nature of the asset and service outcomes required will determine whether there are enough suppliers in the market to ensure a competitive process to deliver VfM and the Project objectives. Factors both internal and external to the project may have an impact on the level of competition available and the Beneficiary must ensure that the project and potential Procurement methods are robustly tested with interested parties.

The number and nature of interested parties will play an important role in delivering VfM and innovation within the project. Early engagement with the market is required to ensure that interested parties have enough opportunity to consider the opportunity and form consortia or Joint Ventures (JV's). This is particularly important where the project is likely to attract interest from new or international Firms.

3.8 Performance and Payment

PPP Procurement is based on the concept of payment for performance. Together, the performance regime and payment mechanism incentivise enhanced asset performance and service provision throughout the operating period.

The required level of asset performance and service delivery is prescribed in terms of service outcomes by the Beneficiary at the outset of the Procurement phase. These performance standards become part of the contractual arrangement that then ensures that the specified outcomes remain central throughout the life of the project.

The level of analysis required to identify these outcomes and an indicative performance regime is typically more substantial than for conventional Procurement. This analysis should also be completed earlier in the PPP Procurement Process.

The performance regime is both availability and service driven, with payments made by the Beneficiary on a periodic basis commencing only once the asset is operational and calculated based on the actual performance of the asset and the specified required service outcomes.

If the asset (and/or service) does not perform as agreed, payments made by the Beneficiary will be reduced through abatement to the extent that they may not cover the private sector partner's operating cost or, ultimately, the full capital cost of the asset. The application of private finance provides a direct link between asset and service performance and payment for the asset, ensuring that investors have a strong incentive to manage the performance of their service providers.

Section 4 - PPP Procurement Process

4.1 Overview

In a PPP arrangement, the Beneficiary undertakes the following project phases:

- a) project assessment;
- b) project structuring;
- c) selection of the private partner; and
- d) contract management.

The Beneficiary is required to demonstrate that there is adequate institutional capacity to prepare, structure, procure and manage the PPP project.

The PPP Procurement Process contains the following three core stages:

- The Expression of Interest (EOI) stage, during which the Beneficiary conducts an open process to short list a set number of Bidders to participate in the Request for Proposals (RFP) stage;
- The RFP stage, during which the short-listed Bidders develop proposals for delivering the required outcomes by the Beneficiary, through an interactive PPP Procurement Process. The Beneficiary then evaluates the responses with the objective of selecting one Bidder as the preferred Bidder; and
- The Preferred Bidder stage, during which the procuring entity negotiates the Project delivery with the preferred Bidder and resolves any critical issues identified in the Proposal.

4.2 Procuring Entity

A Beneficiary will need to establish a dedicated project team to manage the Procurement led by a suitably qualified Project Director and the setup of governance group. This team should be established as early as possible and, at the latest, soon after Project have been approved by IsDB.

The Beneficiary may need to supplement the project team with specific advisory assistance throughout the planning and implementation of the PPP Procurement Process. This would typically include:

- **Commercial and Financial Management Advisors** – Including the provision of advice in relation to the commercial terms, the performance regime and performing a due diligence review of the financial model and financing proposal.
- **Legal Advisors** – Including the provision of advice in relation to contractual, commercial, property, and resource management matters and performing a due diligence review of the legal and commercial proposal.

- **Technical Advisors** – Including the provision of advice in relation to the design and construction outcomes and requirements and performing a due diligence review of the design and construction programme, and
- **Service Provision Advisors (where included)** – Including the provision of advice in relation to the development of service outcomes, integration of service provision with the asset and performing a due diligence review of the service provision proposal.

The procuring Beneficiary may also require other specialist support such as property, insurance or stakeholder engagement assistance depending on the nature of the project and resourcing of the project team.

While advisors play an important role in PPP Procurement, they do not replace appropriate resourcing by the Beneficiary. The complexity and long-term nature of PPP Procurement means that the PPP Procurement Process cannot be left to advisors exclusively. It is particularly important that the Beneficiary retains, and be seen to retain, overall control of the PPP Procurement Process.

Equally it is important that Beneficiary's engage experienced and skilled advisors to ensure the successful delivery of the project and that knowledge is transferred from the advisors to the Beneficiary.

4.3 Private Sector Partner

Given the breadth of capabilities required to participate in PPP Procurement, the private sector partner will typically require cooperation between multiple entities through the formation of a consortium. This consortium will usually include:

- **Equity Providers** – Who provide capital to the project through a shareholding in the contracting entity (usually a special purpose vehicle).
- **Debt Providers** – Who provide the balance of financing required through loan facilities (which can range from short term facilities to those that match the full duration of the operating period).
- **Design Contractors** – Who develop the design for the required asset.
- **Construction Contractors** – Who provide input to the design and construction planning and carry out the physical construction work.
- **Asset Management and Facilities Maintenance Contractors** - Who provide input to the design and construction planning and carry out the facilities maintenance Works.
- **Service Providers** – Who will provide input to the design and construction planning and carry out provision of core services throughout the operating period.

To participate in a PPP Procurement Process, the private sector partner will also require a full range of specialist advisors including commercial and financial advisors, legal advisors and technical advisors.

The private sector partner will often require a greater number of advisors than the Beneficiary as separate advisors are usually engaged by the consortium or JV and each of the consortium members (for example, each debt and equity provider will likely have their own financial and legal advisor).

4.4 Planning and Strategy

There are many planning and strategic decisions required early in the life of a Project which significantly influence the PPP Procurement Process and outcome of the Project. Many of these matters should be addressed during the development of the Procurement Strategy and Business Case but are also covered below due to their importance to the PPP Procurement Process.

Planning and Strategy decisions include:

- The outcomes required from the Project, and their relative priority, which will guide and influence every aspect of project.
- The combination of services that will be procured from the Firm (this is largely focused on the decision as to whether operation of the facility should be the responsibility of the Firm or the Beneficiary.
- The desired high-level risk allocation between the Beneficiary and the Firm.
- The maximum number of Bidders to be short listed to participate in the RFP stage.
- The length of the service concession period.
- A realistic timetable for PPP Procurement Process milestones, the construction phase and service commencement, ensuring that enough time is available for each.

Prior to the EOI stage, it is also assumed that the Beneficiary has progressed the following elements of the project.

- The assembly of the project team and appointment of a Probity Auditor.
- The preliminary development of Works requirements, the scope of operational and service requirements, and performance regime for the project.
- Land acquisition, site investigation and planning and environmental approvals.

4.5 Timeframes

The PPP Procurement Process, from release of the invitation for EOI to award of the contract can take approximately 14 to 20 months. This timeframe is required to ensure that risks are allocated appropriately, and the private sector Bidders have developed their whole of life solutions to a level at which they can be confident delivering for a fixed price.

Compared to conventional Procurement, a PPP project may appear to take longer. However, this does not necessarily mean that it will take longer for construction to begin or for the required asset to be completed and operational. This is because under PPP Procurement, detailed design development (and other time-consuming activities, such as consenting) occur prior to Financial Close, significantly reducing the time between contract signing and the start of construction.

Furthermore, the incentives under the PPP contract increase the likelihood that construction will be completed on (and in some cases ahead of) time.

It is important that the market is informed of the expected timetable for the project as early as practicable. This allows consortia or JV's to form and establish project teams, commit resources and, if necessary, raise investment funds. However, because of the level of private sector investment required, publicised timeframes must be robust and only subject to change in exceptional circumstances.

The precise time required for each stage of the PPP Procurement Process will depend on the nature of the project, including its complexity and the market's familiarity with the Beneficiary's requirements. If the market is not particularly familiar with a project at the time the invitation for EOI is released, the Beneficiary should allow more time in the EOI stage for market participants to form consortia if required.

In addition to the time required for the Beneficiary and the market to prepare for and engage in each stage, consideration should be given to the timetable of other projects in the market at the same time (particularly if they are also being procured as a PPP) as this can affect likely private sector participation. The timing of necessary Ministerial and IsDB approvals must also be included in the Procurement Plan.

Activities which occur during the Strategy phase can influence the speed and efficacy of later stages in the PPP Procurement Processes. Such activities include developing and clearly articulating the requirements of the project and carrying out market engagement to test various project parameters.

There will often be significant overlap between the market's response to one stage of the process and the Beneficiary's preparations for the next stage of the process. For example, while the market is preparing EOI responses the Beneficiary will be drafting its RFP documentation and schedules to the project agreement.

4.6 Expression of Interest

The EOI stage is the first step in the formal PPP Procurement Process. The invitation for EOI is designed to advertise the project and obtain formal Expressions of Interest from the market. From these EOI's, the Beneficiary evaluates each Bidder's capability to deliver the project and short lists Bidders to proceed to the RFP stage. The short-listed Bidders should be capable of delivering the project outcomes over the contract term.

In developing the invitation for EOI, it is important that the Beneficiary understands the market's appetite for the project and how the market views key commercial and technical factors. Prior to issuing an invitation for EOI, the Beneficiary should undertake a market engagement (usually as part of the development of the Procurement Strategy and Business Case) to confirm the level of market interest in the project and provide an avenue through which private sector parties can comment on the proposed project structure. Further contact with the market prior to releasing

the invitation for EOI is recommended if aspects of the project need further testing or if market appetite changes.

The market enjoyment is a critical indicator of the likelihood of successfully delivering the project on a basis that is acceptable to both the procuring entity and the private sector. The market engagement can also be used to communicate the desired outcomes for the project and draw responses from the market about participants' views on meeting those outcomes. To the extent possible, any innovative or unique elements of the project should be highlighted during the market engagement to ascertain market appetite and feedback.

Interested parties will need time to form consortia or JV's to respond to invitations for EOI. Early market engagement activities allow preliminary discussions between interested parties to occur which can increase the number of potential participants and improve the quality of responses received.

Whilst market engagement is not expected to be an exhaustive process with consultation of every potential participant, it should cover a broad range of likely participants to properly gauge market interest and receive enough feedback. The invitation for EOI must set out the information that Bidders are required to submit for evaluation purposes and the criteria by which this information will be assessed.

The invitation for EOI draws upon much of the work already done in developing the Procurement Strategy and Business Case and during project planning and development. Although the invitation for EOI does not set out the Works and Service requirements for the project in detail, it must contain enough information to enable Bidders to form a view on the capabilities required for delivery of the project and the nature of the risks associated with the project. To inform and provide a basis for short listing Bidders, the invitation for EOI should contain all the information required to allow Bidders to prepare and submit meaningful responses, including the following:

- Project context, including stating that the project will be procured as a PPP.
- Description of the EOI stage, including the purpose of the EOI and the timetable.
- The required form and content of the EOI, including the specific information being sought from Bidders and the deadline for submission.
- Criteria by which the EOI will be evaluated and the maximum number of Bidders that will be short listed to progress to the RFP stage.
- The scope of, and outcomes sought for, the project (i.e., the services requested from Bidders) and the contract term.
- Principles by which the project will be delivered and managed, including commercial principles (e.g., contract terms and risk allocation) and relationship principles between the Beneficiary and the Firm.
- Outline of the basis by which the Firm will be paid for the services in scope (the payment mechanism) and the performance regime.

- Information about the subsequent stages and timetable of the PPP Procurement Process.
- General terms and conditions that Firms must abide by.
- Any other information that may be relevant, such as relevant legislation, regulations or obligations and technical details of the project.

The invitation for EOI should not require Bidders to expend significant resources in preparing a response.

4.7 Request for Proposals

The overall purpose of the RFP stage is to select a preferred Bidder for the project, with which the Beneficiary will enter negotiations. To select the preferred Bidder, the Beneficiary will need to determine which Proposal, above all others, best achieves the project outcomes within the affordability threshold (the specified maximum price the Beneficiary is prepared to pay for the delivery of the project).

The RFP stage involves a Dialogue Procurement Process, designed to facilitate constructive dialogue and clarification between the Beneficiary and each Firm, whilst maintaining high standards of probity and transparency. The Dialogue is an opportunity for Firms to gain a better understanding of the project and response requirements as set out in the RFP. It also helps to test their emerging solutions and ideas by receiving feedback from the Beneficiary which is constructive, without being leading or suggestive.

A significant level of resource is required to develop the RFP and to manage probity and the flow of information between the Beneficiary and Firms. Although the RFP development work can be initiated during the EOI stage, to reduce total Procurement lead times, this will need to be factored into the Beneficiary's resource planning and project management.

Objectives for the RFP

The RFP is a fundamental document to the PPP Procurement Process, as it describes the Beneficiary's requirements in detail, including:

- The background, context and rationale for the project.
- The objectives for the project.
- Design requirements and constraints (with the level of detail and specificity partially dependent on the nature of the project; projects with a high operational component are generally better suited to an outcomes-focused model with minimum constraints).
- The Beneficiary's preferred commercial and legal terms (including the proposed project agreement).
- The required structure and content of Proposals.
- An overview of the RFP evaluation process and timeframes.

It is critical that the RFP contains enough information on all aspects of the project and must therefore be detailed and comprehensive. It is important that potential Bidders can clarify any

questions they may have on the material provided within the RFP. Responses to questions should be timely and, unless there are good reasons for treating a specific question and response as commercial, shared with all Bidders to ensure equal access to information for all parties.

4.8 Dialogue Procurement Process

The PPP Procurement Process is a formal Dialogue process of interaction between the Beneficiary and Bidders and is an important part of the RFP stage. It is designed to ensure that each response reflects the best possible Proposal from each Bidder.

The Dialogue provides Bidders with an opportunity for meaningful interaction with representatives from the Beneficiary to discuss the development of their commercial and operational approach, concepts and designs and to seek clarification and feedback to improve their understanding of the project and required project development objectives. These sessions occur within a framework that ensures the principles of probity are adhered to and the integrity of the PPP Procurement Process is always maintained.

The objective of the Dialogue is to gain the strongest set of Proposals for evaluation, ensuring the highest possible VfM and adherence to IsDB's Procurement. It recognises the significant costs that may be incurred by Bidders and helps in preparing Proposals that are focused and comprehensively address the matters of primary importance to the Beneficiary.

The Dialogue is a forum for Bidders to test ideas and ask questions of the Beneficiary. However, feedback provided by the Beneficiary during the Dialogue must not be leading or direct the development of Bidders Proposals. Only Bidders final Proposals should be evaluated, and evaluators must be careful not to let impressions and opinions formed during the Dialogue unduly affect their evaluation.

The Dialogue helps in reducing the risk of a protracted preferred Bidder stage and facilitates the recommendation of a preferred Bidder with minimal negotiation required.

4.9 Probity Assurance

There are risks associated with any Dialogue process as it can increase the risk of a probity breach. Through a Dialogue process Bidder can misinterpret communications, perceive that they have been treated unequally or that their commercial information, including intellectual property, has been shared with others. These are all real risks which need to be managed through a transparent and comprehensive approach to probity which should include.

- Planning the Dialogue and conducting it in strict confidence to protect the intellectual property of Bidders;
- Communicating to all parties participating in the Dialogue the sensitivity surrounding commercial-in-confidence material and intellectual property;

- Ensuring that all members of the project team participating in the Dialogue fully understand and adhere to their obligations to protect confidentiality and treat Bidders fairly;
- Communicating to Bidders the need for transparent and equitable treatment of all short-listed Bidders and for observing all communication and procedural protocols;
- Ensuring that terms and conditions have been developed specifically for the Dialogue.
- Bidder agreeing to the Dialogue before it commences; and
- The Beneficiary having the right capacity and capability and appropriately skilled personnel to conduct the Dialogues.

The Beneficiary should engage an independent Probity Auditor to be present during the Dialogue with Bidders. The Beneficiary before appointing a Probity Auditor must obtain IsDB's no objection to the selected provider. The Probity Auditor should be present at the Dialogue and their observations should be included in the Probity Auditor's probity report. The probity report should be sent by the Beneficiary to IsDB, and all Bidders.

More information on how to select a Probity Auditor is detailed in Annex I and an example TOR for a Probity Auditor is detailed in Annex II.

4.10 Preparation for Evaluation of Proposals

RFP evaluation is the most resource intensive stage of the PPP Procurement Process. The evaluation approach is like that undertaken at the EOI evaluation stage, except significantly longer and with more personnel undertaking detailed analysis of the Proposals. Given the expected size and complexity of Proposals, the Beneficiary should consider:

- The capabilities of the personnel required to undertake the evaluation;
- The timeframe and sequencing of evaluation activities;
- The structure of the evaluation team, including whether sub-teams are required to evaluate particular subject matter areas; and
- What may be required in terms of specialist support to conduct due diligence, administrative and procedural support and support to ensure compliance with probity requirements.

The evaluation process, methodology and principles are all designed to protect the integrity and fairness of the evaluation process. Above all, personnel involved in the evaluation of Proposals must make sure not to discuss any details of their work or the Proposals with people who are not involved in the evaluation, including non-evaluation personnel within the Beneficiary.

Document storage and security needs to be managed carefully and, in a manner, consistent with IsDB's Procurement Guidelines. The implementation of best-practice document management and confidentiality standards is vital to ensuring the integrity of the PPP Procurement Process is maintained.

4.11 RFP Evaluation Plan

The RFP evaluation plan contains the overall approach, methodology and process that will be followed to evaluate responses to the RFP. It needs to be tightly aligned with the RFP to ensure that all information required for the evaluation is requested from Bidders.

4.12 Evaluation

The evaluation of Proposals results in the recommendation of a preferred Bidder with which to proceed to contract negotiations. It is therefore a critical step in the PPP Procurement Process and the evaluation team must carry out a robust, fair and objective assessment of Proposals to determine which best achieves the project development objectives and delivers VfM.

Proposals must be checked for compliance with the RFP specifications and then undergo separate price and non-price assessment by subject matter experts. An overall evaluation panel should then review, consider and moderate the detailed evaluation results to arrive at a preferred Bidder recommendation in preparation for the negotiation stage. Once a preferred Bidders is recommended this recommendation needs to be approved by IsDB before the Beneficiary moves to the negotiation stage.

Compliance Assessment

On receipt of the Proposals, the Beneficiary must undertake a compliance assessment, with support from legal and probity advisors as required, to determine whether each Proposal complies with the mandatory requirements of the RFP.

Clarification

The PPP Procurement Process does not allow short listed Bidders to re-submit Proposals. However, the Beneficiary may need to clarify some aspects of Proposals for evaluation. Any communication with Bidders during the evaluation must be carefully managed to preserve the integrity of the PPP Procurement Process and ensure that all Bidders are treated fairly.

The sole purpose of any clarification questions submitted to a Bidder must be to clarify aspects of Proposals that may be unclear or incomplete, for evaluation. All clarification questions should be phrased carefully, so as not to provide the Bidder with an opportunity to resubmit or alter its Proposal.

Non-price Evaluation

Following the compliance assessment, the Beneficiary can begin the detailed evaluation of Proposals against the specified criteria. Given the complexity of most projects, responsibility for conducting the initial detailed evaluation should be delegated to subject matter evaluation teams that are specialised in relevant commercial, legal, financial, construction and operational subjects. Evaluation of each criterion should be undertaken by teams of appropriately qualified staff, to ensure that a diversity of opinions is included at each stage of the evaluation. Evaluators should score each Proposal individually and moderate the results as a team.

To ensure that Proposals are evaluated consistently, the evaluation methodology should allow for the systematic assessment of Proposals against the Beneficiary expectations of a quality response. Evaluation can include scored and non-scored; scoring allows for easy comparison across Bidders but is dependent on the Beneficiary being able to specify its expectations of quality (through a scoring scale) in advance. In areas where there is less certainty about what might be acceptable the Beneficiary may undertake non-scored evaluations.

Price assessment

The price assessment is straightforward, as the evaluation primarily focuses on determining that the Proposal has been costed reliably and is within the budget threshold. The evaluation process is sequenced so that the evaluation team considers non-price attributes of Proposals before price. This will ensure evaluators' judgements over the quality of the Proposals are not influenced by price. It may be necessary for some evaluation team members to view price information (e.g., for compliance and due diligence purposes) but access to this information should be segregated where possible and tightly controlled.

The Beneficiary should conduct due diligence on each financial model that is included with the Proposal to ensure that the price is accurate, and that the Proposal is deliverable. Although the Bidders price Proposals do not form part of the qualitative evaluation, they may be considered in the overall evaluation and preferred Bidder recommendation in rare circumstances where the two (or more) leading non-price Proposals are assessed as being equivalent, such that the evaluation team cannot recommend a preferred Bidder on that basis.

Overall evaluation

The overall evaluation is the most critical evaluation stage and incorporates several important activities. The overall evaluation team should be comprised of senior staff from the Beneficiary and key personnel from the subject matter evaluation teams. IsDB may be present in a monitoring capacity.

Overall evaluation includes the following activities:

- Review, consideration and moderation of detailed evaluations conducted by subject matter evaluation teams;
- Selection of the preferred Bidder with which to enter contractual negotiations; and
- Preparation of a negotiation brief outlining key areas for negotiation.

The main role of the overall evaluation team is to ensure that the detailed non-price evaluation has been conducted in a manner consistent with the principles and process set out in the RFP evaluation plan and that Proposals have been treated fairly and consistently. During moderation, the overall evaluation team will be looking for and interrogating any outliers and inconsistencies across Proposals and between subject matter evaluation teams as well as the rationale for specific scoring decisions.

As well as considering the scored assessments of each Proposal, the overall evaluation team should consider the critical issues for negotiation, due diligence, site visits and reference checks. The team should also consider the risks involved in the Proposal and any innovations which have the potential to lift the performance of the Beneficiary other assets.

Following consideration of the subject matter evaluation reports, the overall evaluation team may seek further clarification from Bidders on any identified critical issues. These critical issues are issues that would affect the Beneficiary position and, if not addressed. All critical issues will require specific negotiation and resolution before a Bidder can be appointed as the preferred Bidder. The Beneficiary should address critical issues with all Bidders that could be appointed as the preferred Bidder.

Preferred Bidder Recommendation

The preferred Bidder will be the Bidder whose non-price Proposal offers the highest level of service outcomes for the Beneficiary, provided its price Proposal is within the budget threshold. The project team should provide assurance and evidence that a robust and fair process was followed to reach the outcome.

It is possible that no Proposals will be acceptable to the Beneficiary. For example, if none of the Bidders Proposals are within the budget threshold or the expected performance of each Bidder is below the Beneficiary requirements. If no Proposals are acceptable the PPP Procurement Process may be terminated.

Alternative Proposals

Beneficiary should generally not encourage alternative Proposals. Bidders should submit the Proposal that they believe best meets the Beneficiary's requirements. If Bidders are permitted to include alternative elements within their Proposal, the alternative elements should not be evaluated but may be considered (and potentially adopted) at the preferred Bidder stage.

4.13 Preferred Bidder Stage

Purpose

At the completion of the RFP stage, the Beneficiary selects the Bidder which it intends to contract with to deliver the project. The purpose of the preferred Bidder stage is to work with the preferred Bidder to develop its Proposal into a final project agreement, including resolution of any critical issues identified during the RFP evaluation.

It represents a critical stage in the PPP Procurement Process, with many parties involved including the Beneficiary and the preferred Bidder. Each of these parties is also likely to have separate technical, financial and legal advisers.

Preparation

Entering the preferred Bidder stage can involve a substantial loss of bargaining power to the Beneficiary due to the lack of competitive tension. If the Beneficiary has not sufficiently prepared

for negotiations with the preferred Bidder could result in a worsening of terms for the Beneficiary and erosion of the VfM created through the competitive EOI and RFP stages.

The process for the submission of clarification questions by Bidders and the Dialogue can resolve many issues that would otherwise need to be formalised during the preferred Bidder stage. For this reason, the Beneficiary should identify and resolve as many issues as possible prior to receiving Proposals from Bidders.

Preparation for the preferred Bidder stage is usually conducted concurrently with the later part of evaluation of Proposals. Key preparatory steps include:

- Reviewing the evaluation documentation;
- Completing the internal approvals process for the selection of a preferred Bidder, ensuring all probity issues are addressed;
- Compiling lists of outstanding issues which remain unresolved;
- Drafting the preferred Bidder appointment letter and the debrief strategy for unsuccessful Bidders;
- Developing a detailed plan and timeline for the preferred Bidder stage; and
- Developing the negotiation strategy and the negotiation brief.

Negotiation Strategy

Prior to release of the preferred Bidder letter, the project team should develop a negotiation strategy. The negotiation strategy is designed to reinforce the principles and objectives of the project and the negotiation strategy should.

- Set out the high-level approach that will be taken to negotiating an acceptable final position with the preferred Bidder;
- Identify the parameters within which the Beneficiary, through the approvals process, has delegated the authority to conclude negotiations with the preferred Bidder;
- Detail the negotiation positions which the Beneficiary will accept, including issues which it is willing to compromise; and
- Identify indicative resources and structures required for conducting the negotiations, including identifying the principal negotiators who are ultimately responsible for agreeing and communicating the Beneficiary's negotiating position.

Appointment of Preferred Bidder

The preferred Bidder stage formally begins with notification of the successful Bidder. The preferred Bidder letter will notify the successful Bidder that the Beneficiary intends to appoint that Bidder as preferred Bidder, subject to the resolution of any critical issues relating to their Proposal. To help the preferred Bidder prepare for a streamlined negotiation process, the letter should also clearly set out the Beneficiary expectations for the preferred Bidder stage and the timing of each step.

The preferred Bidder letter must consider the issues identified during the evaluation of the preferred Bidder's Proposal. Any ambiguity in the preferred Bidder letter may lead to critical issues that have been satisfactorily addressed being reopened for negotiation during the preferred Bidder stage.

Negotiating complex and commercially sensitive terms and conditions with a single Bidder can be a long and costly process and lead to poorer outcomes for the Beneficiary. Deferral of substantive issues to the preferred Bidder stage and the risk of re-opening issues for negotiation should be avoided wherever practicable.

The Beneficiary may come under pressure from its own time constraints and from the cost concerns of Bidders to leave significant elements of the project agreement to be negotiated after the appointment of the preferred Bidder. However, this is likely to be counterproductive and should be resisted. All Bidders should be notified of the appointment of the preferred Bidder. The Beneficiary is also encouraged to make a public announcement upon reaching this milestone in the PPP Procurement Process.

4.14 Negotiation of Project Agreement

The Beneficiary can commence negotiations with the preferred Bidder following finalisation of the internal negotiation documents and IsDB's agreement to the appointment of the preferred Bidder.

Negotiation Plan

To assist the Beneficiary in managing both the process and substance the project team should develop a negotiation plan. The plan should primarily be used for internal purposes, though a revised version may be issued to the preferred Bidder and advisors to help establish the terms of negotiation and substantive issues.

The negotiation plan also forms an important part of the audit trail for probity purposes, demonstrating the decisions taken by the Beneficiary between the submission of Proposals and Financial Close and should be included in the Probity Auditors report.

The negotiation plan should cover several different subjects.

- What happens during the preferred Bidder stage, including dates and milestones;
- A list of interested parties, advisors, stakeholders and the individuals involved;
- A list of outstanding issues relating to the Proposal, prioritised and grouped according to whether the issue is commercial, legal, financial or technical in nature; and
- The proposed work streams for the major substantive issues (which should record and cross reference issues to the Proposal and other relevant documentation).

Given the critical nature of the negotiation documentation to the success of the project, the documents will need to be agreed with IsDB prior to finalisation.

Negotiation Process

The negotiation of the project agreement should progress via a series of structured meetings between the Beneficiary and preferred Bidder’s negotiation teams, led by respective Principal Negotiators. Issues to be covered in each Meeting should be agreed and specified in advance and all meetings should take place in the presence of a Probity Auditor.

Negotiation processes are iterative. Each meeting should progress the development of the final project agreement by seeking agreement on contentious issues. To facilitate this, rapid turnaround of draft contractual documentation will be required. Each party should implement efficient review, quality assurance and document version control processes to enable this.

Having the right advisors embedded within teams involved in the negotiation process is critical to an efficient and effective process. At this stage in the PPP Procurement Process, many of the issues are commercial, financial or legal in nature and substantial changes to the Proposal should be avoided. Technical advisors will be required during the negotiation to test the impact of contractual changes on service outcomes.

Bidders are not required to submit fully detailed design drawings as part of the Proposals, as this would impose an unreasonable cost and time burden. It is therefore necessary that the preferred Bidder undertakes further design work during the preferred Bidder stage and after Financial Close, working from the design documentation included in the Proposal. The level of design the preferred Bidder will be required to progress during the preferred Bidder stage will depend on the project.

Approvals

During the preferred Bidder stage, the Beneficiary will need to prepare for any internal approvals, Ministerial approvals and statutory consents or delegations that it requires prior to Financial Close. Once the project agreement has been agreed by the Beneficiary and the preferred Bidder, the parties can, through authorised signatories, execute the project.

Contractual Close

Contractual Close occurs when signatories from respective parties who have delegated authority acknowledge and sign the project agreement.

4.15 Debriefings

Following conclusion of the preferred Bidder stage, all unsuccessful Bidders should be invited to attend individual debriefing sessions. At these sessions, the Beneficiary should present to the Bidder its overall assessment of the Bidder’s Proposal, including identification of the main advantages and disadvantages and the key reasons why that Bidder was unsuccessful.

4.16 Unsolicited Proposals

In the normal course of events, PPP Procurement is initiated by a Beneficiary as a result of identifying a service need and deciding that a long-term contract is appropriate following an

evaluation of different Procurement options. However, there are circumstances in which a private sector party may identify a suitable opportunity for the delivery of a service to a Beneficiary by way of a long-term contract.

IsDB may agree to finance PPP projects initiated from unsolicited Proposals. In all instances of unsolicited proposals, the process to assess and determine the best Fit-for-Purpose and VfM approach to awarding a contract initiated by an unsolicited Proposal shall be clearly defined by the Beneficiary.

When an unsolicited Proposal is subjected to a competitive selection process, the Beneficiary may use one of the following approaches to allow the Firm that submitted the unsolicited proposal to participate in the process:

- a) The Beneficiary grants no advantage to the Firm in the process. The Beneficiary may separately compensate the Firm if permitted under the Beneficiary's applicable regulatory framework; or
- b) The Firm is granted an advantage in the selection process, such as an additional merit in the evaluation or guaranteed access to the second stage of a two-stage process. This advantage shall be disclosed in the RFB Bidding Documents and defined in such a way that it does not prevent effective competition.

Section 5 – Risk Allocation and Management

While conventional forms of Procurement may address Procurement specific risk (such as ‘on time’ or ‘within budget’ delivery) they can fail to address several project related risks (such as lifecycle or operating cost implications). If these risks are not well managed, then an otherwise apparently successful Procurement can be greatly undermined during the operating phase of the project.

A unique aspect of PPP Procurement is the more rigorous up-front identification of risk inherent throughout the life of the project and the cost of that risk to the Beneficiary. Once these risks have been identified and valued, the Beneficiary is able to test which risks a private sector partner may be prepared to bear and whether they can manage these risks more efficiently than the public sector.

The critical principle applied to PPP Procurement is that individually identified risks should be allocated to the party best able to manage and mitigate that risk (in the sense of either reducing the likelihood of it occurring or reducing the cost of rectification or reinstatement). It is only where the private sector partner is better placed to manage a risk that it should be transferred. This principle recognises that value is not achieved through indiscriminate transfer of project risks that the private sector cannot manage better than the public sector.

The structure of the private sector partner ensures that Procurement decisions and risk transfer are thoroughly tested. This is achieved as each member of the Bidders consortium will consider directly the risk that they are taking under the PPP project agreement. Specifically, the financiers’ interests are well aligned with those of the Beneficiary which ensures decisions are rigorously analysed, thereby improving the overall robustness of the final project.

Even where it may not be VfM to transfer a risk to the private sector partner, the risk identification and quantification process has tangible benefits for the Beneficiary through a greater understanding of those risks it will retain and how these should be managed.

Annex I – Probity Auditor Provider

Background

A probity audit is an assurance engagement, in which a Probity Auditor provides independent scrutiny of a PPP Procurement Process and expresses an objective opinion as to whether the prescribed probity requirements have been adhered to. The conclusion expressed should be based on evidence gathered against prescribed criteria.

Independence is essential to a probity audit. A third party to the PPP Procurement Process should be able to rely on the probity audit to obtain confidence that the probity requirements of that Procurement Process have been adhered to.

Key elements of a probity audit are:

- **Criteria**
 - These are the predetermined benchmarks used to measure and evaluate whether the probity requirements within the PPP Procurement Process have been met. The criteria should be clarified and agreed prior to commencement of the audit.
- **Evidence**
 - The Probity Auditor is required to obtain enough, appropriate evidence for all established criteria. The Probity Auditor’s decision must be supported by robust facts and documentary evidence. It is not enough for professional judgement to be used as the justification for decisions that are not otherwise supported by the facts and circumstances of the audit or enough relevant evidence. However, the Probity Auditor will use professional judgement as to whether the evidence is adequate to support the decision based on the determined criteria.

The results and opinion of the Probity Auditor as to whether the probity requirements have been met are documented in a probity audit report, which includes any significant issues that have been identified and that impact upon the opinion that the Probity Auditor provides.

Auditor Independence

Ensuring the independence of the Probity Auditor will help to make sure that they provide an objective and impartial view of probity within the PPP Procurement Process.

The involvement of an independent Probity Auditor provides greater assurance to IsDB and to Bidders wishing to do business with the Beneficiary as to the probity of the PPP Procurement Process.

Determining Independence

A key element of independence is impartiality, which ‘means’ being free from bias and not affected by influences or interests that compromise professional judgment.

Impartiality allows the Probity Auditor to act with integrity and to exercise objectivity in respect of the probity engagement. For a Probity Auditor to be impartial and free from bias, they should not be exposed to situations or relationships that may impair their objectivity with respect to the engagement, or that may be perceived as impairing their objectivity with respect to the engagement.

Probity auditors must not only be independent in action but must also be perceived to be independent. The appearance of independence, as demonstrated by external facts and circumstances, provides an important indicator of actual independence.

There are many potential threats to independence as well as potential safeguards that mitigate these threats. A summary of these is provided below.

Threats to Independence

- **Self-Interest** - This occurs where the Probity Auditor stands to benefit from a financial or significant non-financial interest in a probity client (Beneficiary or Bidder). When evaluating the significance of the self-interest threat, consider the type of interest (direct or indirect) and the materiality of the interest.
- **Self-Review** - This occurs where a Probity Auditor reviews their own advice. For example, a Probity Auditor provides advice regarding probity within a PP Procurement Process and then conducts a probity audit over the Procurement.
- **Advocacy** - This occurs where the Probity Auditor promotes, or may be perceived to promote, a Beneficiary's or Bidder position to the point that objectivity may, or may be perceived to be, compromised. For example, this can arise where a Probity Auditor entity promotes a Procurement approach to market and selection method which has not been reviewed for probity by a third party.
- **Familiarity** - This occurs where a close relationship between the Probity Auditor and a Beneficiary or Bidder causes the Probity Auditor to become biased to the Beneficiary or Bidder.
- **Intimidation** - This occurs where the Probity Auditor is deterred from acting objectively, by threats (actual or perceived) from other parties associated with the Procurement. For example, a Probity Auditor may be threatened with replacement over a disagreement over a probity issue in the Procurement Process, or have their credibility threatened.

Safeguards for Independence

Where there is a potential threat to the independence of the Probity Auditor, the Beneficiary should determine whether there are any safeguards that could eliminate or reduce the threats to independence. Safeguards could include:

- a) A governance structure that provides oversight and support for probity within Procurement.

- b) Training Beneficiary staff so that they are well informed regarding probity requirements in IsDB financed contracts.
- c) Following a structured process in the appointment of the Probity Auditor to ensure independence.

Conflict of Interest

Conflicts of interest represent one of the potential threats to independence. A conflict of interest means having an interest (whether personal, financial or otherwise) which conflicts with, or may reasonably be perceived as conflicting with, the ability of the Probity Auditor to perform their obligations fairly and objectively. Perceived or potential conflicts of interest can be as damaging as actual conflicts of interest.

Recommended Practice

The issue of independence should be specifically considered and addressed prior to engaging a Probity Auditor. At this stage, potential threats to independence should be considered as well as any safeguards that might eliminate or reduce the threats to independence.

In the case of a Probity Audit, independence is essential. A third party to the Procurement should be able to rely on the Probity Audit to obtain greater confidence regarding whether the probity requirements of that Procurement have been adhered to.

Potential Probity Auditor should be required to divulge all potential threats to independence, including conflicts of interest, at the time of offer or as soon as any conflict becomes apparent during the probity service engagement. The Probity Auditor should be required to provide written assurance that they have no conflict of interest in the Procurement, can remain objective and impartial throughout the engagement, and will provide notification of any conflict of interest, or compromise to independence, that arises during the Probity services engagement.

If the Beneficiary is advised of any threat to independence that has arisen during the probity service engagement, its impact on the engagement should be considered including how the threat will be managed.

Annex II – Terms of Reference for Probity Audits

For Beneficiary’s Implementing Agency (Client) to complete

The Implementing Agency (referred to as the client of this Probity Auditor Provider Order) to complete this and send the entire form (including all Parts) to potential Providers.

Today’s Date		Client	
Contact Name		Client Email Address	
Contact Title		Contact Phone	
Procurement Name			
<p>A. Purpose and Project Background</p> <p><i>PIU to complete information on the background of the Procurement</i></p>			
<p>B. Objectives of the Assignment</p> <p>The Probity Auditor will provide probity assurance services in relation to the PPP Procurement Process for (Insert the Name of the Project) to ensure that:</p> <ol style="list-style-type: none"> The PPP Procurement Process is consistent with IsDB’s Procurement Guidelines, the Procurement Documents as issued to the Bidders, IsDB’s Core Procurement Principles and any other applicable procedures; The PPP Procurement Process as conducted is fair, balanced, transparent and conducted with integrity, so that no party is treated unfairly; Risks are identified, and mitigating actions are taken in a timely, effective manner; Probity principles are applied, and probity practices are applied with integrity. 			
<p>C. Scope of Work</p> <p>The Probity Auditor shall:</p> <ol style="list-style-type: none"> Examine and review documentation, information and processes <ol style="list-style-type: none"> Review the RFP document, Procurement Plan, Negotiation Strategy and draft form of contract to familiarize themselves with the requirements of the PPP Procurement Process; Review the Bidders/Proposers submission; Noting that the Beneficiary has already evaluated the Bidders as substantially technically responsive and taking into account the terms and conditions of the Procurement Documents as issued and the draft form of contract as subsequently provided by the Beneficiary to the Bidder on (insert date), identify potential areas of vulnerability in the Negotiation process, such as issues which might give rise to the risk of failure of the PPP contract Negotiations; these might include areas where certain aspects of the Proposal may not be entirely consistent with the technical or commercial requirements of the PPP Procurement Documents. Pay attention to these issues in the observation of the PPP 			

contract Negotiations to ensure that, to the greatest extent possible, they are appropriately handled, negotiated and resolved by the parties during the contract Negotiations.

- d) Act as an independent observer of the PPP Procurement Process, including written and face-to-face communications between the Beneficiary and Bidder and comment on all aspects of the PPP Procurement Process including:
 - i. Briefing meetings and evaluation committee meetings held among Beneficiary officials to discuss the PPP Procurement Process;
 - ii. Negotiation between the Beneficiary and the Bidder;
 - iii. Correspondence and documentation recording the PPP Procurement Process;
 - e) Scrutinize the PPP Procurement Process to determine whether the applicable IsDB Procurement Guidelines and any applicable Beneficiary or policies are followed, and that best practice has been applied.
 - f) Advise that the process has been impartial and fair, with no party being given advantage over another or unfairly discriminated against.
 - g) Report that participants in the process are aware of their responsibilities to disclose any potential or actual conflicts of interest.
 - h) Review and assess all relevant documentation to ensure accountability. For example, check that Beneficiary's decisions have been correctly recorded, that participating officials are duly authorized to make decisions and commit their part(ies) to agreements reached with the Bidder, check that any departures from applicable Guidelines or procedures have been correctly recorded and approved, as necessary. Check that clearances are obtained from IsDB, as and when required.
 - i) Monitor the procedures used by the Beneficiary to protect confidential information.
2. Advise on the management of probity issues that may arise
- a) Conduct a risk assessment and identify possible probity issues that may arise before the PPP Procurement Process commences.
 - b) Provide impartial advice to the Beneficiary, as necessary or as requested, on how emerging issues can be resolved or managed, for example, conflicts of interest. However, it must be emphasized that the Probity Auditor is not part of the decision-making process.
 - c) Assist with improving the level of decision-making, if the circumstances so warrant.
 - d) Observe and document the process followed and document and report on any probity issues that may arise.
3. Document information and report to the organization
- a) Obtain, analyze, interpret and document information to support the outcomes of the probity assurance process.
 - b) Submit reports to management based on predetermined PPP Procurement Process milestones or as requested or, when considered necessary, provide a record of the process confirming that probity has been observed.
 - c) Obtain sufficient and appropriate information to support any conclusions on which reports are based and identify any areas where information has been withheld by either party.
 - d) Prepare a signed, written final report describing the Beneficiary's performance when conducting the process.

The report should present the purpose, scope and results of the probity assurance audit and include an expression of the Probity Auditor's opinion regarding the Objective of Assignment set out in paragraph xx above. Reports

should highlight significant findings and recommendations and inform management of any major deviation from the applicable Procurement Guidelines and the reason for those deviations.

D. List of Reports, Schedule of Deliveries & Period of Performance

PIU to insert.

E. Data, Documents, Local Services, Personnel and Facilities to be Provided by the Beneficiary

PIU to list documents, data and information that the Government will make available to the Probity Auditor Provider, as well as other local services, such as office facilities, internet access, secretarial services, local transportation etc. that the Beneficiary will provide.

F. Institutional and Organizational Arrangements and Reporting Relationship

PIU to describe to whom / which institution the Probity Auditor Provider will be contracted and to whom s/they will report.

G. Timeframes

PIU to add when the Probity Auditor Services are required.

H. Outputs of the Services

On completion of the Projects the Provider is to provide a report outlining:

1. Compliance with the timeline, scope and the cost of the completed services; and
2. A breakdown of the cost for the completed contract; and any recommendations for future contracts.



For any additional information, such as Standard Bidding Documents (SBDs), Guidance, training materials and briefing, please see

www.isdb.org/Procurement

