

## PPP Skills and Competency Development

### ONLINE TRAINING PROGRAMME

#### Module IV: The Procurement Process

#### Module Overview and Learning Objectives

This module will provide participants with an understanding of the various processes that can be used to procure a PPP arrangement. It introduces the procurement processes for a PPP and explains how they differ from traditional government procurement. The session also explains the different phases of PPP procurement and how they should be managed. Finally, this Module outlines common matters that must be completed prior to the execution of a PPP contract.

By the end of the session, participants should be able to:

- Understand the procurement process for a PPP;
- Realise the differences between the procurement of a PPP and a traditional government procurement;
- Receive an overview of the procurement processes in a PPP;
- Demonstrate insights into the various adjudication mechanisms used during the procurement process; and
- Understand the processes that must be completed prior to execution of the PPP contract.

#### Introduction

The term procurement refers to the process of acquiring goods, works or services. The public procurement process begins when a government identifies a need for goods or services, solicits for outside firms to meet that need, and continues through to the award and signing of a contract. As discussed in Module I, PPPs differ from traditional public procurements, in that they are for the delivery of services over of a period of time (instead of the 1-time delivery of an asset or commodities). For a government, the objective of a PPP procurement process is to ensure that government is able to contract for the desired services in a manner that is affordable and that provides better value for the public's money through the appropriate transfer of specific risks to the private sector.

#### Best Practice Procurement Principles:

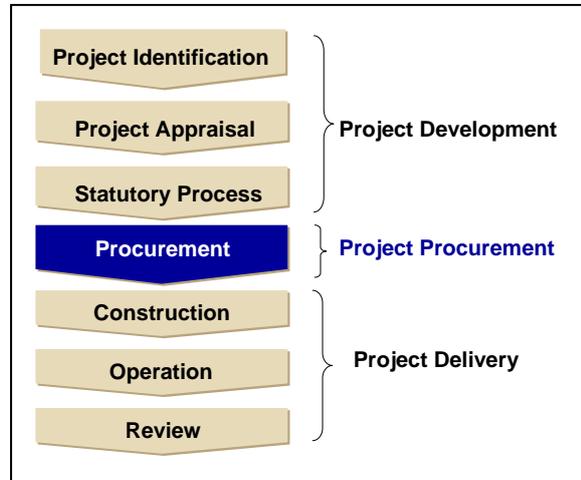
- Competitiveness
- Transparency
- Fairness
- Objective selection criteria

PPP projects tend to be high-profile, with detailed risk-allocation structures. It is therefore important that the overall process for their procurement exhibit the key characteristics of competitiveness, transparency, fairness, and objective selection criteria. International experience has shown that when PPP procurement processes miss any one of these key characteristics, they are often subject to significant delays, bid protests, public mistrust in projects, and even procurement cancellations.

Procurement of a PPP differs significantly from a conventional government procurement process (see Figure 4.1, below). Conventional government procurement typically involves the government providing detailed specifications of the materials, equipment, and assets to be procured. An example is the design and construction of new government buildings. The conventional procurement of this type would typically entail government drawing up detailed specifications of the building, including all elements to be included in it – from the depth of the foundation to the materials to be used for the walls, floors, heating and ventilation, and so forth.

These are deemed *input specifications*. They prescribe how the private sector builder must do the job, leaving the contractor with little to no discretion in carrying out the work. Also typically, government provides funding for construction of the building, and payments are issued to the constructor for milestones completed once the final construction approval is given. Obviously, in such a case, government has retained all of the design risk for such a project (because government itself has determined the design), and must operate and maintain the building itself once construction is complete.

Figure 4.1: Stages in a Traditional Project



A PPP, on the other hand, normally involves the procurement of a service or a solution that is based on *output specifications* rather than inputs. In the government building example provided above, PPP procurement would involve a competitive tender for office accommodation services suitable for a specified set of activities, such as a new courthouse. In this case, government would specify in the procurement documents that the building must be designed for use as a courthouse, and would provide such details as the number of courtrooms, number of judges’ chambers, the capacity of each courtroom and chamber, and the key specification that these facilities must be available for use by the client agency (in this case the Judiciary). The private sector would be asked to provide a design, construction, and ongoing maintenance that would result in a building suitable for Judiciary’s purposes. This procurement format provides the private sector with the discretion to design the facility in the best way it sees fit, so long as the results satisfy government’s requirements. Because the project is subject to competitive tendering, the private sector has an incentive to develop its design, construction, and maintenance using the least-cost and best-value approach.

Commonly with PPP procurements, the private sector is called upon to provide all of the financing for the project – including covering the design, construction, maintenance and periodic renewals and replacement investments needed over the entire life of the project (such as 20 years for a courthouse building). PPP Payments are typically “levelized” meaning that the private partner receives a stable “availability payment” for each month or quarter that the facility is available for the public client agency’s use. This differs from the “front-end loaded” structure of payments for traditional public procurement, where the private contractor “gets all of its money out” of the project as soon as construction is completed.

**Output Specifications: Solid Waste Collection**

Typical output specifications for PPP for solid waste collection project might include:

- Number of times per week for residential and commercial collection
- Types of containers that must be utilized
- Cleanliness levels in and around collection points

For PPPs, this means that the private sector is absorbing not only the design and construction risk, but also the important ongoing maintenance and renewal risks of the facility over the entire life of the facility. Hence, one of the most important steps in the feasibility study and the subsequent

procurement are the exact output specifications which define what the private partner must deliver in order to satisfy the service delivery requirements of the client and to be paid as planned.

### Global Best Practices

In recent years, a number of multilateral development banks and international financial institutions have collaborated on the development of a set of harmonised procurement guidelines and documents. The institutions that have participated in this process include African Development Bank (AfDB), the Asian Development Bank (ADB), the Black Sea Trade and Development Bank (BSTDB), the Caribbean Development Bank (CDB), the Commission of the European Communities (CEC), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the Inter-American Development Bank (IDB), the International Bank for Reconstruction and Development (IBRD), the Nordic Development Fund (NDF), the North American Development Bank (NADB), and the United Nations Development Programme (UNDP).

The “Master Procurement Documents” developed by these organisations represent their majority view and are intended to be used as models by the individual organisations in creating project-specific procurement documents for projects involving the procurement of goods, works, or services. They are also used for the procurement of PPPs supported by these institutions. The Master Procurement Documents are available for review on the Internet (see the link provided in the box below) and are excellent reference material for any public procurement procedure.

### Forms of Procurement

Once a government has decided to structure a particular project as a PPP, it must determine how it plans to procure the resulting PPP contract. This decision is a critical one, as it will have a significant impact on the nature of due diligence that must be undertaken, the complexity of the project preparation process, the risk-allocation structure of the resulting deal, the ability of a PPP to deliver better value for the public’s money (or not), and the selection of private partner.

#### Three Primary Forms of PPP Procurement

- Sole sourcing
- Competitive negotiations
- Competitive bidding

There are three primary forms of procurement that can be used for PPP arrangements. These include<sup>1</sup>:

1. Sole sourcing (or “direct selection”);
2. Competitive negotiations; and
3. Competitive bidding.

The choice of procurement method will depend in part on the laws and regulations in force, the size of the project, and the scope of work and technologies required, but it will also be influenced by the nature of the current marketplace (i.e. the number and nature of qualified potential private bidders in the local, regional, national and international market). Each of the options listed above is described in more detail in the sections that follow.

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<sup>1</sup> Please note that these are not presented in order of their preference or attractiveness

### Sole Sourcing

Sole sourcing (or direct selection) occurs when government enters into negotiations with one particular private party and then awards the PPP contract to that party. Sole sourcing is often used in the following circumstances:

- When a private company has submitted an **unsolicited proposal** to government, and government decides to enter into negotiations with that company. In general, this should only occur if there is a clear government law or regulation allowing the submission of unsolicited proposals for PPP as well as clear capacity within the Government (ie the PPP Unit) to systematically review and evaluate unsolicited PPP proposals.;
- When the services required by government are so specialised that there is only one qualified offerer with that **unique specialisation**. These are more common in technology-intensive sectors, where only one firm may have the technology or intellectual property rights to deliver a new service; and/or
- When the **contract value is so small** that the time and cost of competitively tendering it would exceed any potential savings (typically this money value threshold is explicitly set in the government's procurement regulations).

One of the most important advantages of sole sourcing is that it can be a quicker way to procure a contract, and the transaction costs can be lower. It is also a very valuable tool for encouraging private companies to submit innovative ideas or solutions for better public services. From a qualitative perspective, this essentially “breaks the public monopoly” on ideas for new and better public services. Even if few unsolicited proposals are accepted and turned into signed contracts, the fact that such ideas are allowed can open up the minds of line ministries, national planning commissions, private firms, and consumers to considering new ideas for the structuring and delivering essential public services.

Despite the above, there are also important potential disadvantages to sole sourcing. Because the process does not involve open competition, and therefore there is no basis for comparing different offers, it can be difficult to assess whether the government is actually getting the best value for its money available. Because of the difficulty in proving that the deal is offering good value, and because the process of sole sourcing entails confidential negotiations between the parties (and therefore lacks transparency), sole sourcing often generates negative public opinion and criticism.

### Competitive Negotiations

Competitive negotiations seek to improve upon sole sourcing by adding an element of competition to the process, thereby putting some pressure on participating private parties to offer their best combination of quality and price. In a competitive negotiations process, government invites one or more qualified parties to enter into negotiations for the PPP contract. The parties involved in a competitive negotiations process are usually selected by government on the basis of their reputation and perceived experience in the field of expertise required for the PPP. These parties, once identified, are then invited by government to participate in the process.

A key feature of competitive negotiations is that all parties *are made aware* that they are not the only offeror and that government is conducting simultaneous negotiations with others. Ultimately, government awards the contract to the party that makes the best offer.

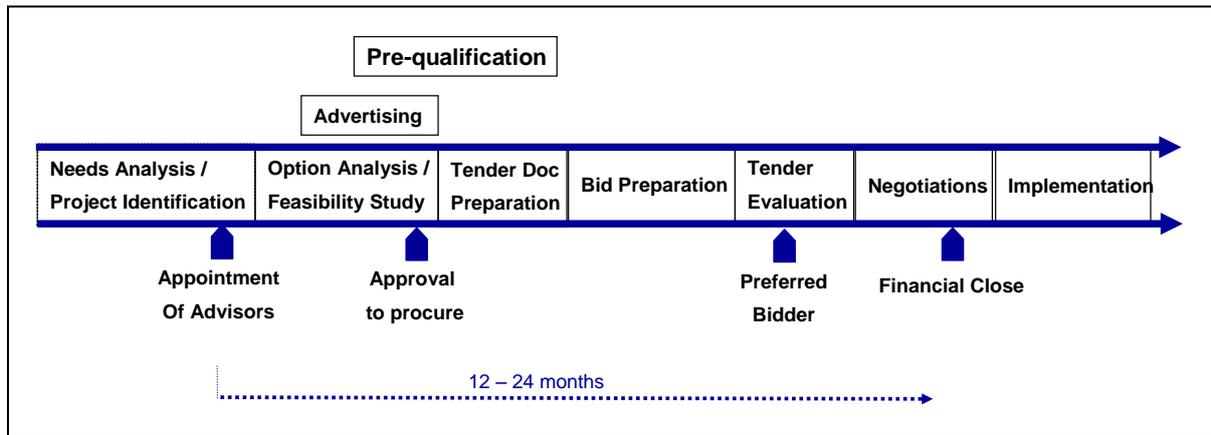
Like sole sourcing, competitive negotiations can be a less expensive and quicker way to procure a PPP. However, also like sole sourcing, competitive negotiation processes lack full transparency and therefore can be viewed negatively by the public.

### Competitive Bidding

Competitive bidding, while typically more expensive and time consuming than either sole sourcing or competitive negotiations, can produce effective results when used appropriately and under the right circumstances. Structured properly, a competitive bidding procedure ensures transparency while also putting competitive pressure on bidders to make their very best offers. Because competitive bidding procedures base the selection of the preferred bidder on objective criteria (price, for example, and meeting specific, written performance standards), and because a properly structured competitive bidding process is more transparent and fair, this method tends to attract qualified private bidders.

Despite these advantages, competitive bidding can be costly and time consuming (see Figure 4.2, below) with periods ranging from 12 – 24 months from the time the feasibility study is started to actual project negotiation. Therefore certain projects are not suitable for this method. An example would be projects that are very small in value. If the cost of preparing the project for a competitive bidding process exceeds the value that can be expected to come from competition, the project should be procured using a simpler method. Alternatively, in situations where time is of the essence and government needs the private party to begin work right away, a competitive bidding procedure might cause unnecessary or unacceptable delays<sup>2</sup>.

**Figure 4.2: Indicative Timetable for a Competitive Bidding Procedure**



Competitive bidding procedures for PPP are commonly organised as either single or double stage processes, as follows:

- In a **single stage process**, bidders’ technical and financial bids are submitted simultaneously, almost always in separate envelopes. The single stage process is typically used when complete technical specifications for a project can be prepared in advance of the procurement phase and included in the Request for Proposals (RFP) document. Where this is possible, bidders can prepare a technical approach that is directly responsive to the technical specifications, resulting in a pool of technical bids that are by and large uniform (ie all them meet the minimum performance technical requirements), making price comparison a relatively simple exercise.
- Where fully detailed technical specifications cannot be prepared in advance (because of the complexity or the project or new technologies required, etc.), or where bidders are asked to prepare a technical approach in response to pre-defined performance indicators or output-based criteria, a **double stage process** may be more appropriate. Using this approach, a first-stage technical bid is submitted without any price information and is evaluated by government, which

<sup>2</sup> For example, in countries like the Philippines and Pakistan, which faced seriously power shortages in the early 1990’s, most their Power Purchase Agreements (PPAs) and Independent Power Projects (IPPs) were procured through direct awards, rather than open competitive bidding, to save time and avoid further electricity black-outs.

then issues clarification requests to all bidders in the form of an amended bid package (RFP). In preparing clarifications, government must take care to fully respect the confidentiality of bidders' first stage technical bids, including any intellectual property rights. After receipt of the amended bid package, bidders prepare a second-stage technical bid and a corresponding financial bid, and these are submitted simultaneously to government (this stage then resembles the single stage process described above).

Both single and double stage bid procedures are commonly used when procuring PPPs. While the timelines for each process differ, they both include the elements of a typical competitive bidding procedure, described in the section that follows.

### Typical Competitive Bidding Procedure

The benefits of competitive bidding can only be realised through a well-designed process that is fair and transparent. The following section describes the elements of a typical, well-designed competitive bidding procedure for the award of a PPP contract.

#### Differentiated Procurement Processes for “Small Cap” and “Large Cap” South African Tourism PPPs

The South African National Treasury's PPP Unit has issued a “PPP Toolkit for Tourism”, aimed to guide, expedite and standardise PPPs in the tourism sector. In this Toolkit, a distinction is drawn between “small cap” and “large cap” tourism PPPs, with different procurement processes applicable to each, for example: there is no Request for Qualifications (RFQ) stage in small cap procurement, and the required regulatory approvals can be given “in-house” by the institution itself, whereas the procurement process relating to large cap tourism PPPs envisages Expression of Interest, RFQ and RFP stages.

### Pre-selection of Bidders

The bidder pre-selection process is referred to by different names in different countries – a Prequalification, a Request for Pre-Qualifications (RFQ), an Expression of Interest (EOI) or a Request for Information (RFI), amongst others. By whatever named called, this stage of the procurement process has a common objective: to determine a short-list of firms or consortia that have demonstrated that they have the necessary technical expertise and resources – including financial resources, in many cases – to undertake the PPP. Only those firms that are short-listed during this stage will be allowed to submit a proposal in response to a Request for Proposals (RFP). The number of short-listed firms usually varies from three to five. This is the number of bidders that have proven to result in the optimal competitive bidding environment. For consistency purposes, we refer to the bidder pre-selection process in this text as an “RFQ.”

A properly-drawn and conducted RFQ process should result in a strong field of qualified firms that will participate in a robust competitive bidding procedure. By ensuring that pre-selected firms have the required technical expertise and resources, government can then focus on the major matter to be resolved in the subsequent tender process - the price. The PPP sponsor is, at this stage, indifferent as to the ultimate “winner” of the tender, in terms of technical expertise and resources.

### Request for Qualifications (RFQ)

The methodology for conducting an RFQ should involve the following steps:

#### Preparing the RFQ Document

The content of an RFQ should be based upon the information obtained and the project's output performance specifications resulting from the feasibility study. Thus, there should be a brief, but complete description of the project containing, as each project dictates, the following:

- An identification of the project;
- The expected performance requirements;
- A statement of any legal requirements, including those pertaining to the formation of consortia;
- A statement of the level of technical expertise required, and the means by which such technical expertise is to be demonstrated by each bidder;
- Identification of the anticipated financing requirements, and the means by which each bidder is to demonstrate its ability to meet such requirements;
- A statement of the proposed payment mechanism to be employed;
- A statement of any requirement to use local labour and materials, and the means whereby each bidder may commit to do so;
- A statement of any security mechanisms to be employed, and the means whereby each bidder may indicate an intention to comply;
- The schedule for procuring and implementing the project, including details as to when any submission to the RFQ must be filed;
- The evaluation criteria, indicating how the short-list will be determined; and
- Any standard forms relating to the foregoing that must be completed by a bidder.

Typically, the evaluation criteria for an RFQ would include specific and measurable criteria used to determine the bidders' general experience (ex. Years in the business or number of similar contracts), particular experience (ex. For a water PPP, this might include experience serving a similar number of connections or a water plant or distribution network of a similar size), and financial resources (ex. Average annual turnover).

A typical "rule of thumb" used when developing evaluation criteria is that bidders should be able to demonstrate experience equating to 80% of what they will be required to do under the proposed contract. So for example, if a PPP contract for municipal bus services would require a private operator to service 400,000 passengers per year, then bidders could be required to demonstrate that they have performed similar contracts in which they have served not less than 80% (or 320,000) of that number of passengers per year. If this criteria is not used, then there is an increased risk to Government and even to the private partner that the new PPP project is too big for them to undertake, and they end up delaying or even withdrawing from the project (after surrendering their performance bond to the Government).

### **Making a Public Announcement for the new PPP Project:**

The RFQ must be advertised in the public domain. Depending upon the size and complexity of the project, such an advertisement should be placed in newspapers of general circulation generally in the country where the project will be undertaken, and if appropriate, in international publications such as the *Financial Times*, the *Economist*, or the *Wall Street Journal*. Most public procurement laws have clear standards for how such bidding opportunities should be advertised. The public announcement should contain the following:

- A brief description of the intention of the government to undertake the project;
- A general description of the project;
- An indication of the qualifications and experience that bidders should demonstrate in their submissions;
- Identification of the specific location where interested parties may obtain a copy of the RFQ, the dates and times during which the RFQ will be available, including any costs for obtaining a copy;
- A declaration reciting the date, time and place where the RFQ submissions must be filed with the government sponsor<sup>3</sup>; and
- A statement of where and how the submissions will be evaluated and a timeframe after which those making submissions will be notified as to the results of the evaluation.

### **Evaluation of the RFQ Submissions**

Evaluation of the RFQ submissions must be undertaken in strict accordance with the evaluation criteria described in the RFQ document. A common practise, at the initiation of the procurement process, is for government to assemble a project management team (PMT) composed of persons with expertise in the technical, financial, human resources, legal and other disciplines needed for the project. For PPPs, the PMT usually has additional, outside expertise, in the form of PPP transaction advisors to assist in the coordination, management, and analysis required for PPP procurements. Often the PMT is divided up into work streams, such as technical, financial, human resources and legal. Each work stream examines the relevant portions of the submissions, and provides a report back to the PMT on its findings.

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<sup>3</sup> It is important to permit sufficient time to respond, without unduly delaying the procurement processes.

## Module IV: The Procurement Process

It is considered good practice to have each member of the PMT and any work stream sign a Code of Conduct (see the box below) that specifies how they are to conduct themselves during the evaluation, and forbidding certain activities such as discussing the evaluation with any of the bidders.

### Sample Code of Conduct

I, [insert name of member of bid evaluation panel], acting in my capacity as member of the [insert name of institution] evaluation panel for the adjudication and evaluation of bids for transaction advisors/private parties (delete which is not applicable) under [insert tender number] hereby undertake:

1. To act at all times with fidelity, honesty, integrity and in the best interests of the state and the general public it serves
2. To diligently perform the duties of a member efficiently, effectively and strictly in accordance with the rules of bidding and bid evaluation, as set out in the bid documentation and according to all relevant instructions given by the institution
3. To properly prepare for and attend each meeting of the bid evaluation panel, and failing this to withdraw as a member
4. To act at all times in accordance with the relevant legislation and regulations, including the public service regulations, the PFMA, National Treasury regulations, and directives given by the institution
5. Specifically, to comply with the *Code of Conduct for the Public Service*, in Chapter 2 of the public service regulations
6. To recognise the public's right to access to information in the interests of administrative justice
7. To take the utmost care in ensuring that there is reasonable protection of the records of the institution and all bid documentation
8. Not to misuse the position or privileges of a member, or privileged or confidential information obtained as a member
9. To carry out duties with the skill and care expected from a person of knowledge and experience, and to exercise due judgement
10. Not to unfairly discriminate against any bidder on the grounds of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, political persuasion, conscience, belief, culture or language
11. Not to abuse any position in the public services to promote or prejudice the interest of any political party or interest group
12. To give the Auditor-General all the information and explanations it requires to carry out its functions
13. To report to the appropriate authorities any case of fraud, corruption, nepotism, mal-administration and any other acts which constitute an offence or which are prejudicial to the public interest, arising during the bid evaluation panel proceedings
14. To declare, diligently, accurately and honestly, in the declaration of interest, all personal and/or business interests that I or a family member may have in any business of any bidder, and to willingly abide by any decision of the chairperson of the bid evaluation panel or the accounting officer/authority to withdraw as a member of the panel because of this
15. To be open and honest about all decisions and actions taken regarding the bid evaluation, and to give clear reasons for these, which can be accurately recorded
16. Not to make any dishonest allegations about any bidder
17. Not to make any false or misleading entries into the records of the bid evaluation panel
18. To make no contractual commitments related to the bid, to any bidding party, on behalf of the institution
19. To proactively protect privileged or confidential information of the bid evaluation panel from theft, unauthorised disclosure or inappropriate use, and specifically:
  - 19.1 not respond to any queries relating to the bid evaluation on behalf of the institution, unless expressly authorised in writing by the accounting officer/authority to do so
  - 19.2 not to speak to or correspond carelessly with any person (fellow member, colleague, friend, family member or otherwise) on any matter related to the bid evaluation
20. Not to request, solicit or accept any reward, gift or favour in return for voting or not voting in a particular way on any matter, or for disclosing privileged or confidential information
21. Not to accept or agree to later accept, any 'kickbacks' in the form of money, favours, inappropriate gifts or anything else of value from a member of the public, government, a political or social movement, or any stakeholder or potential stakeholder which is or may be viewed as aimed at influencing or directing the evaluation of the bids.
22. To disclose immediately to the chairperson or the accounting officer/authority any attempted inducement or offers of perks that may be construed as aimed at influencing or directing the evaluation of the bids
23. To report to the chairperson of the panel any invitations to any kind of entertainment by any party that may be construed as being associated in any way with the outcome of the bid evaluation
24. To not vote at, attend or participate in any other way in any meeting or hearing in relation to any matter before the bid evaluation panel, if any interest prevents me from carrying out my member functions in a fair, unbiased and proper way in accordance with this code of conduct.

**Source:** South Africa National Treasury PPP Unit, "PPP Manual: Module 3"

Communications between government and the bidders during the bidding process are one of the key elements that must be carefully managed and controlled in order to ensure a fair and transparent bid procedure. One way to improve government's control and minimize the potential for problems is to designate a person on the PMT to be the only person who can have contact with the bidders, and to advise all bidders of that person's contact details. Other practices that help to ensure fairness include:

- Discouraging electronic communications of any kind during the evaluation process;
- Naming one person as the keeper of all memoranda and score sheets, and not permitting other PMT or work stream members to keep copies;
- Keeping accurate, confidential minutes of all PMT and work stream meetings during the evaluation; and
- Ensuring that a consensus is reached by the PMT after the work stream reports have been received, based upon a full understanding of those reports.

The evaluation process often involves developing scoring matrices, based upon the criteria set forth in the RFQ document, with appropriate scoring and weighting for the various requirements. A matrix may look like the one presented in Table 4.1, below.

**Table 4.1: Sample Technical Evaluation Matrix**

Category	Points	Company A	Company B	Company C
Technical	30	27	26	29
Financial	25	21	23	19
Experience	25	23	21	24
Local labour	10	10	8	8
Security	10	10	10	10

The matrices and the allocation of points will vary from project to project, and legally required preferences may affect this process.

### **Notify all Bidders**

All firms submitting their qualifications in response to the RFQ should be notified of the results of the evaluation. Notification should be in writing on government letterhead, signed by the government's representative on the project. Notification to the short-listed firms should, in addition to informing them that they have been short-listed, inform them when they may expect to receive the Request for Proposal (RFP) package. Notification to the firms that were not short-listed should contain a statement thanking them for their interest in the project, and informing them that they were not short-listed. No reason should be given, unless a reason is legally required (such as in the local public procurement law or regulations). All copies of the evaluation matrices should be kept in a secure location by the chair of the PMT in order to respond to any legal or procedural challenge.

### **Preparation and Issuance of the RFP**

It is common practice to prepare the Request for Proposal (RFP) package in parallel with the preparation of the RFQ. In that way, the procurement schedule, which was set forth in the RFQ, may be adhered to.

The RFP is typically sent to the short-listed firms under cover of a letter inviting the firm to tender, signed by the government's project representative. This letter provides information on the details of the locations, dates, times and places of key events or milestones in the procurement process. Such proceedings usually include a pre-bid conference, a contracts workshop, the location and hours of a data room<sup>4</sup> where all of the government's detailed background information relevant to the project is made available, and the precise location, date and time when the firm's proposal is to be filed. The letter should also inform short-listed firms of the contact details of the government's representative to whom all communications, without exception, should be addressed. A written confirmation of receipt of the letter, with an indication of an understanding and agreement with the terms and conditions described, should also be required.

### Contents of the RFP

The contents of the RFP can vary from project to project, but they typically include<sup>5</sup>:

- A **letter of invitation** that is individually addressed to the pre-selected bidder and that indicates the names of the other pre-selected firms or consortia;
- **Background information** on the project, elaborating on the description contained in the RFQ, and the including government's objectives for the project;
- **Instructions to bidders** containing basic information about the procurement process, including the rules that bidders must adhere to, the general format in which bids should be submitted, the process governing communications between government and the bidders, and definitions of the terms used in the RFP documents;
- A **bid data sheet** that provides project-specific information including:
  - A project description, as determined in the feasibility study, including the project service area, the elements sought to be performed by the private sector (finance, design, construct, maintain and operate) and existing facilities to be made available;
  - The legal framework, human resources/labour relations requirements, and stakeholder identification and communication responsibilities;
  - Government requirements in terms of the formation of a Special Purpose Vehicle (SPV) or the composition of the consortium to undertake the project;
  - A Scope of Work, in output terms, taken from the feasibility study;
  - The risk allocation principles to be observed, reflecting the specified outputs;
  - A detailed description of the private operator's payment mechanism, and any penalty mechanisms;
  - Any preferential procurement requirements of government, such as the use of local labour and materials;
  - A statement of all insurance and security requirements;

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<sup>4</sup> Recently, it is common to have a "virtual data room" of detailed sector and project information made available through electronic media.

<sup>5</sup> The RFP contents described in this section correspond to those found in the Harmonised Bid Documents that have been developed by the multilateral development banks.

- The timetable for all of the processes to be followed in the tender, often repeating the language contained in the letter of invitation, in terms of:
  - The existence of a data room, whereby all bidders are to undertake such due diligence as will inform their bids;
  - The time, date and location of a site visit;
  - The time, date and location of a pre-bid conference;
  - The time, date and location of a contracts workshop; and
  - The time, date and location for the filing of the bid.
- A clear description of the bid adjudication processes;
- Signatory requirements, including any special requirements if the short-listed firm is a consortium.
- **Standard forms** that bidders are required to use in preparing their technical and financial bids including:
  - Statement of the fee to be charged by the bidder, expressed as a unitary charge, for undertaking the Scope of Work;
  - Insurance certificates;
  - Performance bonds, including any bid bond requirement; and
  - Any other assurances as may be required by law.
- **A full draft of the PPP contract** that the preferred bidder is expected to sign.

### Due diligence

In major, complex PPP projects, it is important that all relevant information regarding the proposed PPP be provided to the bidders so that they can prepare comprehensive and responsive bids based on information that is as accurate and up to date as possible. One of the functions of the feasibility study is to ascertain and verify this information, because it is the basis for the transfer of specific risks to the private sector. While government and its advisors should attempt to make all relevant information available to bidders, bidders themselves are still responsible for verifying this information and undertaking their own due diligence.

There are a number of methods by which bidders may conduct their due diligence. These include examining documents and other information made available in a data room, conducting site visits, attending pre-bid meetings, and participating in contract workshops. Each of these is discussed in more detail below.

- **Data room:** In order to make relevant information available to all bidders, best practices dictate the

#### When Data is Lacking or Unreliable

In many instances, however, not all relevant data is available. It is important to bring this fact to the attention of the short-listed firms, and to suggest that they undertake their own due diligence to determine and acquire such information as may be necessary in order for them to file an informed bid.

To ensure that bidders are able to conduct due diligence, sufficient time for proposal preparation should be allocated in the timetables provided in the RFP. Typically, bidders for a PPP are allowed between one and 6 months for proposal preparation, depending on the nature of the PPP, the scope of work and the level of risk to be assumed by the private party.

gathering of all such information together into one place – the data room – where it can be made available to all short-listed firms. The creation of a data room helps to establish a level playing field for bidders because it provides *all* bidders with the *same information* at the *same time*. The RFP should suggest to all short-listed firms that they undertake due diligence by availing themselves of this information, and that all bids received will be assumed to have been informed by this information. Data rooms typically contained detailed sector and background information that is not practical to include in an RFP package. For greenfield projects data rooms are often simpler to design and manage. However, for PPPs involving the leasing or concessioning of existing assets and utility networks, they can be more complex, including years worth of technical data, financial records, equipment data, and even maintenance records.

- **Site visit:** In most instances it is desirable to organise a site visit for the short-listed firms, particularly where the condition and configuration of the site or sites upon which the proposed services are to be rendered is important. Sometimes site visits are compulsory and other times they are not. In any case, the bidders should be advised that their bids will be adjudicated based in part upon an assumption that they are completely familiar with all existing site conditions. Government should organise the site visit, and provide transport from a specified location to the site. Knowledgeable government officials should be present at the site and conduct the tour. A registration sheet should be maintained, and any questions or comments of significance that are raised during the site visit recorded and transmitted to all of the short-listed firms.
- **Pre-bid conference:** After a suitable period of time within which the short-listed firms have had the opportunity to visit the data room, conduct their due diligence, and visit the site or sites where the services are to be performed, it is best practice to hold a pre-bid conference. During this conference, the bidders are provided an opportunity to seek clarification as to any matter arising during their pre-bid activities up to that time, including clarification of any RFP provisions they may find ambiguous. The conference should be convened by the government's project representative, and minutes taken. The minutes should thereafter be distributed to all of the short-listed firms. Should significant matters arise during the conference that necessitate amendment of any portion of the RFP, such amendments should be made and an amended RFP transmitted to the short-listed firms with a requirement that its receipt be acknowledged. It is critical to stress the importance of raising questions concerning any perceived ambiguity in the RFP at the pre-bid conference, as government will assume that all such ambiguities were resolved at that time. In many cases, bidders are reluctant to discuss such ambiguities in front of their competition, and it is necessary to impress upon them the necessity of doing so. As a matter of course, in all of the procurement processes, if a question is raised by one bidder that requires a written response, all of the bidders should be informed, in writing, of both the question and the response provided.
- **PPP Contract Workshop:** A short time after the pre-bid conference, and as specified in the schedule of procurement events, a contract workshop should be held. The purpose of this workshop is for all short-listed firms to raise questions and requests for clarification as to any provision in the full draft of the PPP contract that was included to the RFP. Experience indicates that holding a contract workshop greatly reduces the amount of time required to conclude negotiations with the preferred bidder. It also protects the government's ability to preserve the important Value for Money benefits that it is expecting from the PPP project. Otherwise, a winning bidder might effectively re-transfer risks back to the Government during the post-award PPP contract negotiations. As with the pre-bid conference, private bidders can be reluctant to discuss specific contract matters in front of their competitors, in order to maintain a competitive advantage. It is important, nevertheless, to require all short-listed firms to identify those provisions in the draft contract that they wish to replace or for which they want to provide alternative language. Such language must be provided by "black-lining" the draft contract when the proposal is filed with government. It is not unusual for government to indicate, at a contract workshop, which provisions of the draft contract are not susceptible to amendment; that is, the bidders must take the language as provided, or their bid will be disqualified. In cases where

innovation and creativity are being encouraged, such “take it or leave it” provisions should be minimised.

**Standardised PPP Contract Provisions Simplify Contract Negotiations in South Africa**

The South Africa, National Treasury PPP Unit’s *Standardised PPP Provisions* aim to reduce procurement time, contract negotiation time, bid costs to the private sector and transaction costs to the public sector. It seeks to achieve these objectives by creating certainty in the PPP market as to contract terms and optimal risk allocation, and prescribes “standard clauses” which must be included in PPP contracts. Deviations from the *Standardised PPP Provisions* are permitted only if they can be justified, and with the National Treasury’s approval. The *Standardised PPP Provisions* have been issued as a Practice Note in terms of the Public Finance Management Act, and are available on [www.ppp.gov.za](http://www.ppp.gov.za).

Below is the standard organization of the sections that make up PPP contracts in South Africa:

<b>South Africa "Standardised PPP Provisions"</b>	
A	Preliminary (Definitions)
B	Project Documents & Project Deliverables
C	General Obligations (Responsibilities of Parties)
D	Project Site
E	Duration & Service Commencement
F	Services (Definition of "Availability")
G	Project Assets
H	Payment & Financial Matters
I	Insurance
J	Relief Events, Compensation Events & Force Majeure
K	Unforeseen Discriminatory Govt. Conduct & Variations
L	Employment
M	Black Economic Empowerment
N	Termination (Causes, Effective, Compensation, Procedures)
O	Step-In (by Govt. Client, by Lenders, Direct Agreements)
P	Information & Audit Access
Q	Refinancing
R	Intellectual Property
S	Miscellaneous

**Receipt of proposals**

An important item in the timetable previously mentioned is the location, date and time for receipt of proposals. These requirements must be strictly followed. Any late proposal must not be accepted, in order to ensure fairness to those who have submitted their proposals in a timely fashion. A typical process for receipt of proposals will call for depositing them in a tender box at a specified address, and on a specified date, before a stated time. Often, firms submitting proposals will be present at that address, on the specified date and prior to the specified time, to submit their proposals and observe the closing of the proposal submission process.

At one minute after the specified time, the government project representative should publicly announce that the time for receipt of proposals has passed, and no further proposals will be received. The names of the firms submitting a timely proposal will be read out, and recorded. Thereafter the government representative should announce that the proposals will be evaluated within the time period stated in the RFP and that firms submitting proposals will be informed of the results thereafter. The public portion of the receipt of proposals is then ended.

In many instances, the staff of the governmental entity conducting the procurement will then take each submitted proposal and initial each page to ensure that the proposals that are later evaluated are

the proposals that were in fact submitted. All received, initialled proposals are then kept in a secure location by the government project representative.

### Evaluation of the proposals

As with the evaluation of the RFQ, evaluation of proposals must be undertaken in strict accordance with the evaluation criteria described in the RFP document. Best practice suggests that the same PMT that evaluated the RFQ submissions (using the same work streams) conduct the proposal evaluation, with the same outside PPP transaction advisors that were used for the RFQ evaluation. Each work stream should examine the relevant portions of the proposals, and provide a report back to the PMT on its findings. PMT and work stream members should be reminded that the previously signed Code of Conduct still applies. Similarly, only the previously-designated PMT contact member may be contacted by, or have contact with, the bidders.

As with the RFQ evaluation, these practices should be continued:

- Discouraging outside (“*ex parte*”) communications of any kind during the proposal evaluation process;
- Naming one person as the keeper of all memoranda and score sheets, and not permitting other PMT or work stream members to keep copies;
- Keeping accurate, confidential minutes of all PMT and work stream meetings during the proposal evaluation; and
- Ensuring that a consensus is reached by the PMT after the work stream reports have been received, based upon a full understanding of those reports.

When procuring a PPP, the evaluation of a proposal is based a specific combination of price, technical approach, and acceptance of risk, as evidenced by the black-lined draft contract that was submitted. This approach is used to assess whether the affordability, value for money, and transfer of significant risk that was assumed in the feasibility study and reflected in the RFP documents, is shown in that particular proposal.

The evaluation process should involve scoring matrices, based upon the criteria set forth in the RFP document, with appropriate scoring and weighting for the various requirements. In some cases, the personnel, technology and/or financing required are as important as the price. This might be common in a management contract or lease type arrangement, where government is concerned that the individuals included in the bidders’ team are of sufficient professional calibre *and* that the price is competitive. In other cases, assuming appropriate risk allocation, price is paramount. This might be the case when procuring a concession or BOT-type arrangement wherein the bidder will take on the full responsibility for operating and maintaining a facility or system, and at the same time, assume all financing and commercial risks.

Table 4.2, below, depicts an indicative proposal evaluation matrix, where price is as important as the personnel, technical skills and financing ability of the bidder:

**Table 4.2: Sample Proposal Evaluation Matrix**

<b>RFP Category</b>	<b>Points</b>	<b>Company A</b>	<b>Company B</b>	<b>Company C</b>
Financial Commitments	15	13	12	14
Design/Construct	5	5	3	4
Operations & Maintenance	5	4	3	5
Personnel	10	6	9	8
Acceptance of risk	15	13	14	11
Price, as Unitary Charge	50	38	42	40
<b>Totals</b>	<b>100</b>	<b>81</b>	<b>83</b>	<b>82</b>

In addition to criteria such as personnel, technical approach, and price, there are a number of other measures that governments can use to select the preferred bidder. Depending upon government's objectives for the specific project, and the environment in which the bidding is being conducted, additional evaluation criteria may include:

- Local participation:
  - Use of local (versus expatriate) individuals amongst the contractor's staff;
  - Inclusion of local companies in the bidding consortium; and/or
  - Proposed percentage of shares in the project company to be sold in local capital markets.
- Human resources arrangements:
  - Benefits to be offered to redundant workers;
  - Training and capacity building programmes; and/or
  - Proposals for performance-related pay and benefits.
- Strategy for improving service to poor customers
- Proposals for local participation and economic empowerment

These are just a few examples of additional criteria that can be used to evaluate bids for PPP arrangements. In the end, governments must ensure that the criteria selected actually reflect the broader objectives for PPP, as the proposals received from bidders will be directly responsive to the evaluation criteria.

This is why it is so important for Governments to begin by developing specific, clear, and written objectives for entering into a PPP. Is it to expand public access to a key service, or to improve service reliability and quality, or to attract private financing because public financing is not available, or to provide defined value for money benefits? Note that if governments objectives for entering into a PPP are unclear, it makes it very challenging to then evaluate PPP bids during the procurement phase.

### “Best and Final Offer” (BAFO)

Another methodology that is followed, particularly in a pioneering or hotly contested procurement, is to conduct an additional bidding process between the top two proposals, called a “Best and Final Offer” (BAFO). This should not be a common practice, however, as the market will come to expect a BAFO with every procurement and the initial bids will suffer accordingly. Further, the BAFO entails additional costs to both government and the private sector, and delays project implementation.

In a BAFO process, the original bids remain valid as to all aspects except those matters addressed in the BAFO process. These matters may involve the acceptance of greater risk, or the clarification of specific pricing elements making up the financial bid.

### Preferred bidder selection and announcement

When the bid evaluation process has been completed, and a consensus reached among the PMT members, but before the preferred bidder has been notified and an announcement made, the PMT must analyse the total bid in terms of the affordability, value for money and significant transfer of risk assumptions that were made in the feasibility study. While it is unlikely that this analysis will produce

#### **South African Revenue Service Cancels Scanner Tender After BAFO Stage**

In 2006, the South African Revenue Service (SARS) announced its decision to cancel the tender for its proposed Container Cargo Scanning Initiative, which had already reached the BAFO stage of procurement. According to SARS, based on submissions made by bidders at the BAFO stage, “the value for money calculated.... has been revised and.....SARS can no longer show that the cost-efficiency and effectiveness of outsourcing the operation of the scanners would be better value for money. Furthermore, the bidders were inflexible regarding...termination compensation during the BAFO stage of the procurement process”. The question of reimbursement of the bidders’ costs remains a debatable issue.

*Source: Sunday Times newspaper, July 30 2006 Business Times, Page 11*

results that mirror those in the feasibility study exactly, the analysis should indicate that, within a narrow range, if the bid was incorporated into a PPP agreement, it would evidence affordability and demonstrate value for money and a significant risk transfer to the preferred bidder. Once that analysis has taken place, and assuming that these requirements are met, then the firm submitting the preferred bid should be notified, and a public announcement – often a joint announcement – made.

### Case Study: Gautrain Rapid Rail Link – Procurement Process

The Gautrain project entails the construction and operation of a modern rapid rail system, operating at speeds of up to 180km/hr, linking Tshwane, Johannesburg and Johannesburg International Airport. The network is 80km long, has ten stations and is the largest single transport infrastructure project in Southern Africa.

Its procurement as a PPP has allowed for significant investment and assumption of risk by the private sector. It has also led to a number of important developments in the PPP market, including amendments to tax and provincial transport legislation.

Two consortia pre-qualified in 2002 and submitted their initial bids in early 2004. The BAFO was necessary because neither initial bid met the Gauteng province's stringent requirements for affordability and value for money. The Environmental Impact Assessment Record of Decision from the Gauteng Department of Agriculture, Conservation and Environment was given in favour of the project in 2004, clearing the way for the BAFO documents to be prepared and issued to the bidders.

Gautrain Rapid Rail reached a significant milestone on 26 January 2005 when BAFOs were received from the Gauliwe and Bombela Consortia.

The preferred bidder was announced on 2 July 2005, and on 15 February 2006, the Gauteng Provincial Government reached agreement with Bombela International Consortium on all substantive issues within the affordability limit set by National Treasury. To ensure speedy implementation, the Province also signed an Early Works Contract with Bombela to commence with the relocation of utilities such as water and electricity.

The respective legal teams are now tasked with the finalisation of the Concession Agreement, which will be submitted to the Minister of Finance for final treasury approval.

Source: Gautrain website: [www.gautrain.co.za](http://www.gautrain.co.za)  
PPP Quarterly publication South African National Treasury's PPP Unit

### Final PPP Contract Negotiations

Negotiations take place after the preferred bidder has been selected and notified. A negotiation schedule should be drawn up and agreed to between the preferred bidder and the PMT. It is recommended to maintain the same work streams and external advisors during this period of time, because of their knowledge of the project and of the matters that may still require clarification.

The Contracts Workshop, the RFP bidding processes in general, and the amount of “black lining” undertaken by the preferred bidder should have reduced the matters that require negotiation to an acceptable level. In pioneering PPPs – that is, where there is little or no international best practice for such a PPP - such negotiations may, notwithstanding the processes that have taken place previously, be protracted.

There are a variety of steps that can be taken to streamline complex negotiations procedures, including:

- The establishment of counterpart work streams by the preferred bidder, with a designated negotiations manager appointed by both government and the preferred bidder;
- Drawing up a negotiations schedule, with weekly work stream and negotiation manager meetings;

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- Establishment of “rules of engagement” to ensure that the negotiations move along quickly, one of which rules is to “park” matters that are not easily agreed for later resolution;
- Quickly determining, from government’s side, those matters that are not negotiable, and relaying this determination to the other side;
- Prioritising issues for negotiation, usually starting with matters that appear to be less controversial, and then working towards those that may be of serious concern; and
- Developing a positive relationship with the preferred bidder and a common goal of achieving consensus on a PPP agreement.

At the conclusion of negotiations, but before the PPP agreement is executed, government should perform a further analysis, similar to that undertaken at the conclusion of the proposal evaluation. The purpose of this final analysis is to reconfirm that the amended contract will provide the services desired in an affordable manner, provide value for money, and entail sufficient transfer of risk to the private sector.

### PPP Contract Management & Performance Monitoring Plan

In addition to adhering to international best practices regarding procurement and contract negotiation, the Government should have developed, prior to execution of the PPP agreement, of a PPP Contract Management Plan. The purpose of this Plan is to demonstrate that government has sufficient resources (technical, financial and human) to undertake the implementation of the contract for its anticipated duration. This approach has proven a highly effective way of ensuring that government is prepared to fulfil its obligations under a PPP and therefore a similar requirement is recommended here. PPP Contract management will be discussed further in Module VI.

### Contract execution and public announcement

Upon the completion of all pre-requisites to execution of the PPP agreement, a suitable public ceremony may be conducted at which time the contract is executed, and all parties to the negotiations invited to make comments to the public media.

### Procurement Ethics

As stated in the introduction, the process of procurement begins when government identifies a need and determines it will fill that need from outside the public sector, and concludes after a contract has been awarded. Procurement ethics apply throughout this entire process. Ethics are the principles and values that guide the actions and decisions of individuals involved in the procurement process. Procurement ethics are based on the principles of honesty, integrity, probity, diligence, fairness, trust, respect and consistency.

#### Procurement Ethics: Core Principles

- Honesty
- Integrity
- Probity
- Diligence
- Fairness
- Trust
- Respect
- Consistency

Procurement ethics are particularly important in the context of PPP arrangements, because these generally involve some combination of public service, public goods, and/or public funds. The ethical procurement of a PPP can be bolstered by openness and accountability, the avoidance of conflicts of interest, and avoidance of abuse of power.

There are a variety of ways in which a procurement process can be designed to promote ethical behaviour. These include, but are not limited to:

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- **Separation of Functions:** Those individuals responsible for setting budgets and approving spending should not be involved in proposal evaluation;
- **Record Keeping:** Clear and complete records should be kept detailing all decisions made by a procurement evaluation committee as well as the rationale for those decisions, and these records should be open to public scrutiny<sup>6</sup>. Such records not only provide evaluators with an incentive to maintain their objectivity and fairness, but they demonstrate to the public that government is committed to an open and transparent process;
- **Communication:** Good communication practices lie at the heart of procurement ethics. An ethical procurement is one in which all bidders are provided with the *same* information at the *same* time. This can be accomplished through the establishment of a data room (discussed earlier), and by setting clear procedures for communications with bidders during the bid process (these procedures often prohibit verbal communication, and require that all written correspondence sent by government be distributed to all bidders). Communication will be discussed further in Module V;
- **Objective Evaluation Criteria:** By setting clear and measurable criteria by which bids will be evaluated, and by publishing the formula that will be used to compute bidders' scores, government can help bidders to prepare more responsive bids and reduce the amount of discretion required of proposal evaluators. Once proposals have been evaluated, the procurement process can be further strengthened by providing all bidders with the results of evaluations, and offering to provide a debriefing to any bidder that requests it;
- **Security and Confidentiality:** All records relating to procurement should be kept in a secure location with access tightly controlled. This is particularly critical in the case of bidders' submissions, which must be protected not only to prevent tampering with the information contained therein, but to respect bidders' confidentiality and intellectual property rights;
- **Avoidance of Conflicts of Interest:** All persons involved in a tender process, including all government officials, evaluation committee members, consultants, and bidders, should be made to sign written declarations describing any actual or perceived conflicts of interest that they may have with respect to the particular procurement. Such conflicts may include other employment, or past employment, investments or financial interests, and personal, familial, or professional relationships with companies or individuals affiliated with the procurement;
- **Gifts and Gratuities:** Individuals and organisations involved in or with influence over the procurement process should be prohibited from accepting any gifts or gratuities from individuals or organisations that are involved with bidders;
- **Well Defined Process:** Procurement should be undertaken in accordance with a clear and well-defined process set out by government. Procurement procedures should include clear timetables for bid preparation and submission, rules for communicating with bidders and government, guidelines for publishing procurement decisions and their rationale, and instructions for managing interactions with bidders (such as pre-bid meetings, site visits, and bid openings), amongst others.

Well designed PPPs that are procured in an ethical manner not only protect the interest of stakeholders, they also enhance Value for Money (for more on Value for Money, see Module II) by providing a transparent and competitive playing field that provides bidders with the maximum incentive to provide the best combination of quality and price in their offer to government.

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<sup>6</sup> Any confidential information relating to bidders' financial standing or intellectual property should not be included in these records or released publicly.

### Conclusions

Procurement is an important part of the overall process of designing and implementing a PPP. When undertaken properly, a well-designed procurement process can attract more qualified bidders, result in better offers (in terms of both quality and price), enhance transparency, and improve the public's confidence in the PPP itself.

### Module 4: Content Assignments

In order to successfully complete your work on the Content component of this Module, you must complete the following:

- Read the required background reading materials:
  - Republic of South Africa National Treasury PPP Unit, “PPP Manual: Module 5 (Procurement)” <http://www.ppp.gov.za/Documents/Manual/Module 05.pdf>
  - Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency, by John T. Hodges and Georgina Dellacha, The World Bank and PPIAF, Working Paper No. 1, 2007. <http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/publication/WP1-Unsolicited%20Infra%20Proposals%20-%20JHodges%20GDellacha.pdf>
- Read this Module IV Content piece
- Answer the following question (with the answer posted to the Discussion Board in Module IV: Content Piece) relating to the Content piece:
  - Please provide:
    - One example of a PPP that you believe would be best procured using sole sourcing,
    - One example of a PPP that you believe would be best procured using competitive negotiations,
    - One example of a PPP that you believe would be best procured using competitive bidding.
    - Explain your rationale for each.
- Read other participants' postings to the Discussion Board and provide substantive comments (in the Discussion Board) on two other participants' answers to the Content question.

In addition, participants may elect to read the following *optional* background reading materials for this module:

- PPP Procurement: Review of Barriers to Competition and Efficiency in the Procurement of PPP Projects, Infrastructure Australia, by KPMG, May 2010. <http://www.kpmg.com/NZ/en/IssuesAndInsights/ArticlesPublications/SmarterProcurement/Documents/Review-of-barriers-to-competition.pdf>

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- Model Request for Qualifications for PPP Projects, Government of India, 2009. [http://www.pppinindia.com/pdf/model\\_rfq\\_may2009.pdf](http://www.pppinindia.com/pdf/model_rfq_may2009.pdf)
- Model Request for Proposals for PPP Projects, Government of India, 2007. [http://www.pppinindia.com/pdf/modelRfp\\_pppProjects\\_30nov2007.pdf](http://www.pppinindia.com/pdf/modelRfp_pppProjects_30nov2007.pdf)
- Panel of Transaction Advisors for PPP Projects: A Guide for Use of the Panel, by Government of India, 2008. <http://www.pppinindia.com/pdf/panel-of-transaction-advisers-guide.pdf>