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**Expert and consultancy advice in low income countries for  
drafting regulations and developing People first PPP projects  
meeting the Sustainable Development Goals (SDGs):**

**A major issue deserving innovative approaches**

*Note from the secretariat*

The present document is submitted as an informal document for information, prepared by the International Specialist Centre of Excellence on PPP Law, Policy and Institutions in France.



**EXPERT AND CONSULTANCY ADVICE IN LOW INCOME COUNTRIES FOR  
DRAFTING REGULATIONS AND DEVELOPING PEOPLE FIRST PPP PROJECTS  
MEETING THE SDGs:  
A MAJOR ISSUE DESERVING INNOVATIVE APPROACHES**

**MARC FRILET<sup>1</sup>**

A snapshot at the 17 sustainable development goals (SDG's) by experienced practitioners of low income countries (LDC's) is sufficient to understand that **the success of SDG's is linked to massive improvement of public infrastructure and related essential public services.**

Numerous studies have been made around the world on the impact of public infrastructure shortfall on economic development. According to the G20, this costs an average of 2% points of Gross Domestic Product (GDP) in most countries<sup>2</sup>. The United Nations Addis Ababa Action Agenda on Financing for Development has identified an annual sustainable development financing need of USD 3.9 trillion and an annual funding gap of USD 2.5 trillion<sup>3</sup>.

Other studies have evaluated the public infrastructure needs and related investment costs in improved operation, rehabilitation and/or construction of infrastructure projects having the capacity to bridge the public infrastructure gap<sup>4</sup>.

The size of the gap for Africa only is evaluated at 93 billion USD per year. Even if the gap can be reduced by improvement of the use of existing financial resources and better approach

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<sup>1</sup> [www.frilet.com](http://www.frilet.com) / [www.gcila.org](http://www.gcila.org). The redaction of this study has only been possible thanks to the help of academics and in particular Nina Aoudjhane (PhD and teacher in Public Law Nanterre University) and with the input from public and private international PPP experts from CICA, ETIC-PPP, and UNECE together with the invaluable assistance of members of the Global Construction and Infrastructure Legal Alliance (Gcila) and of François Jorand

<sup>2</sup> "Simulations suggest that if all African countries were to catch up with Mauritius in infrastructure, per capita economic growth in the region could increase by 2.2 percentage points. Catching up with Korea's level would bring about economic growth per capita up to 2.6 percent per year."

<sup>3</sup> The Multi Donor Trust Fund supporting the MDB's Global Procurement Partnership (GPP) indicates that "an additional US\$ 1 to US\$1.5 trillion annual investment in low and middle income countries will be required through 2020 to meet the infrastructure demand for water, electricity and transport. **High quality public procurement functions will be essential in ensuring that public funds are spent in an efficient and effective manner with high integrity, and that the value and impact of the purchased public works, goods, and services is maximized**".

<sup>4</sup> "The Priority Action Plan of PIDA, includes energy, transportation, water and information and communications infrastructure programs selected on the basis of their expected overall economic impact, affordability and potential for regional integration. The total cost of delivery of these programs, from 2012 to 2020, is expected to be nearly \$75 billion" (*Africa Strategic Infrastructure Initiative Project Overview: Accelerating Infrastructure Development in Africa, June 2015*)

to planning, investment, project preparation, procurement, it remains that roughly half of the gap cannot be financed by existing budgets and by development aid.

Empirical evidence aggregating local and international experience indicates that **there is a potential to bridge the gap and to attract international financing even in the fragile States but only under precise conditions in the development of a holistic institutional, regulatory and contractual framework including improvement in the investment climate.**

This situation has been addressed in several publications inter alia from the World Bank group. However the expected leapfrog has not taken place in spite of the efforts of the international community and of the States, including the recent developments of the “impact finance” concept.

The number of PPP projects in distress in the low and middle income economies is important and not decreasing. As a result **several institutions and countries wonder if the development of pipelines of PPP meeting the SDG’s is realistic or feasible.** In any event, if the trend is not radically reversed, there will be little chances for the LDC’s to meet the SDG’s.

**The good news which conclude this study** is that the aggregation of experience and tested practices for landmark projects in LDC’s indicate that **is possible within the existing financial capacities to make a real “leapfrog” for developing pipelines of PPP projects if these countries can have access in a well structured and transparency manner to authoritative experts and consultancy services in two distinct areas:**

1. **TOP PRIORITY: Drafting the institutional and legal framework** (including procedures for the planning, prioritization, preparation, procurement and implementation of projects together with various templates) ;
2. **Advising States and public authorities in the preparation and development of Projects.**

So far the need of such high level consultancy services combining cutting edge international and local knowledge free of particular interests is not well identified or considered as not affordable for many LDC’s governments and public authorities<sup>5</sup>.

In our experience this is (together with the more global issues of lack of available financing for developing robust feasibility studies which are a prerequisite before launching the project

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<sup>5</sup> This has been evaluated inter alia for Europe (where the underlying investment climate and legal framework is more secured than in LDC’s) in the EPEC publication: “Role and Use of Advisers in Preparing and Implementing PPP Projects” further discussed below.

in the market)<sup>6</sup> one of the main issues preventing LDC's to develop the pipelines of People First PPP (PfPPP) necessary to reduce substantially the infrastructure gap and to meet the SDG's<sup>7</sup>.

**There is a growing dissatisfaction from LDC's governments on the process of hiring reliable and independent experts and consultants adapted to their real needs**, to monitor them and maximize their use for the design and development of a conducive institutional, regulatory and contractual framework and for the implementation of Concessions/PPP projects meeting the SDG's. This is expressed repeatedly in various forums over the last few years.

**This situation has been one of the main "raison d'être" of the design and development of the CONNEX initiative<sup>8</sup>** originally sponsored by Germany within the G7 framework and further developed under the OECD initiative for complex projects in the area of natural resources based development (and which according to latest developments may soon address complex infrastructure projects including PPP).

The authors of this report have participated to all the steps of the CONNEX then OECD initiative which has already published authoritative papers and guiding principles. They have noticed that several issues, queries, lessons learnt, guidance (including code of conduct for consultants and experts deriving from this initiative) are often valid for the selection of high level experts and consultants by States for designing framework regulations or advising on PfPPP projects.

The authors have also benefited from the unique experience of the French Institute of International Legal Experts (IFEJI) created fifteen years ago for identifying and selecting international legal experts with a proven local experience which is in most cases a prerequisite to meet the requirements of the Authorities in low and middle income countries<sup>9</sup>.

In order to evaluate how to improve the process of hiring consultants and experts for drafting regulations and advising in Concessions/PPP projects and how to reach much more effective results within available State and development aid budget, **it is important at the outset to clarify the particular situation of Concessions/PPP projects in low and middle income countries for which there is generally little experience in the public sector by contrast with the one of more traditional public infrastructure projects.**

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<sup>6</sup> The money available to project preparation in the infrastructure sector for Africa only to bridge the infrastructure gap has been estimated by World Bank expert around 1 billion US dollars per year and the aggregation of several funds dedicated scattered across the continent to this is below 100 millions US dollars .

<sup>7</sup> The reference paper from the World Bank "*Financing PPP Infrastructure in Sub-Saharan Africa*" indicates that: "*Existing project preparation funds (PPFs) from diverse official sources are not adequate to address the range of issues required. These facilities have often narrowly focused on technical feasibility studies and not on the broader set of tasks and expertise and seed assets required to make projects bankable*".

<sup>8</sup> See <http://www.oecd.org/dev/natural-resources.htm>

<sup>9</sup> IFEJI has structured an expert identification process including an expert charter. This exercise has been full of lessons for instance for the identification of the real needs by States and international organizations, for the process of identifying consultants and experts able to meet these needs under a real competitive approach, for the particular procurement process needed and adapted to the situations, etc.

These differences may only be well appraised if a simple and clear definition of PPP valid for most projects is proposed. In this study we focus on PfPPP (i.e. PPP for essential public services meeting the SDGs) as further defined below.

- **The PfPPP delivery form underlying this study**

PPP in general is a global delivery form among the various forms of private participation in public infrastructure.

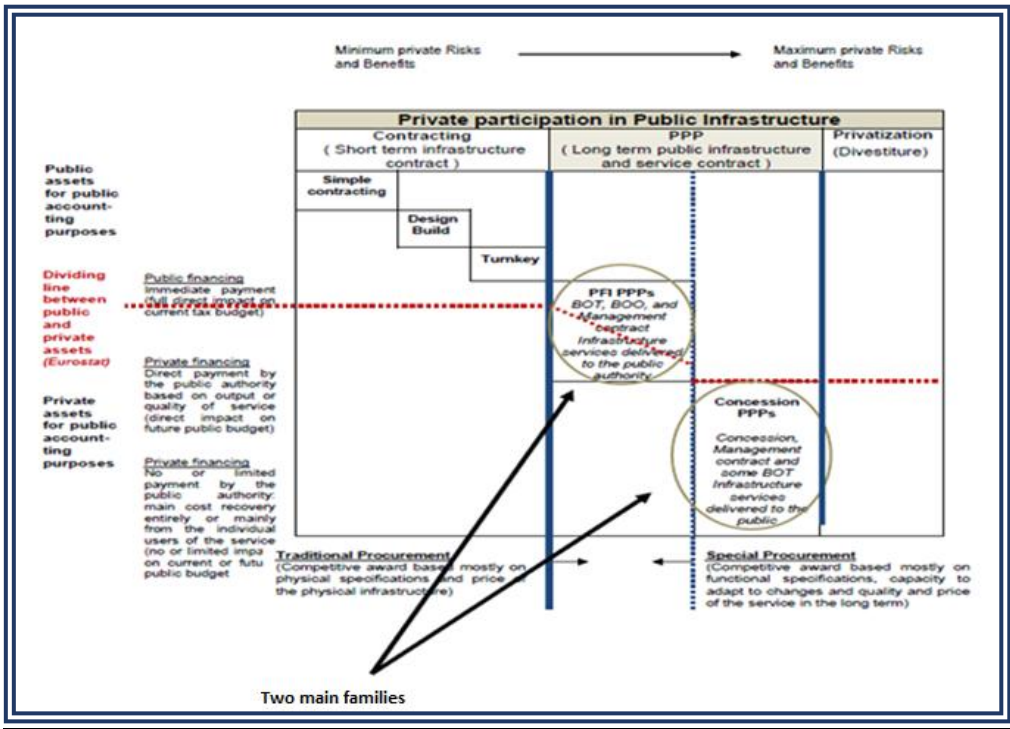
- **This study does not address:**

- **Consultancy and experts needs for traditional procurement of public infrastructure.** For our purpose traditional procurement includes not only remeasurement contracts based on unit prices and estimated quantities but also any type of global contract such as Design & Build, EPC, Turnkey and others (whether totally or partly lump sum) where the price is paid upon satisfactory completion of the works and compliance with performance parameters;
- **Consultancy and experts needs for privatization of infrastructure** when the private party is free to deliver the service at market conditions (sometimes more or less regulated) without direct or indirect public service obligations.

- **The focus of this study:**

This study will mainly focus on the situation of the two families of PPP having the main characteristics summarized in the two following charts.

**Chart I: Place of PPP in private participation of public infrastructure**



## Chart II: Focus on the two PPP families

1. PFI / PPP family	2. Concessions / PPP family
<ul style="list-style-type: none"> <li>✓ Design (based on functional specifications)</li> <li>✓ Build or rehabilitate</li> <li>✓ Finance</li> </ul>	
<ul style="list-style-type: none"> <li>✓ Operate the infrastructure or utility without delivering the public service to the end users</li> </ul>	<ul style="list-style-type: none"> <li>✓ Operate infrastructure of utility and in charge of delivering full public service to the end users</li> </ul>
<ul style="list-style-type: none"> <li>✓ Compensated entirely by the public authority when service is rendered</li> </ul>	<ul style="list-style-type: none"> <li>✓ Compensated entirely or mainly by the end users paying for the service</li> </ul>
<ul style="list-style-type: none"> <li>✓ Contract duration limited to the project cycle (amortization of assets, profit margin and financial recovery)</li> </ul>	

Since these two families trigger different nature of risks and opportunities and since for obvious budgetary reasons in LDC's the PFI/PPP family is not a delivery form sufficient by itself to meet the needs of LDC's for pipelines of PfPPP for essential public services, **an important part of our study will focus on the experts and consultancy needs for setting up the institutional, legal and contractual framework and for advising in the preparation and procurement of PPP projects belonging to the more complex Concessions/PPP family<sup>10</sup>.**

**The definition of PfPPP in the Box below** deriving from the above charts has been tested and discussed during several rounds of exchanges internationally and in LDC's. In our experience **it covers the vast majority of PfPPP feasible in LDC's.**

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<sup>10</sup> Part of EurActiv's European Development Dialogue workshop series Stakeholder Workshop – November 6th 2014: "What form of PPP should be championed to finance the post 2015 Agenda?"

BOX 1: PfPPP definition underlying this study

**“A PHYSICAL INFRASTRUCTURE WHICH IS THE SUPPORT OF A PUBLIC SERVICE IS DESIGNED, FINANCED, BUILT OR REHABILITATED AND OPERATED BY A COMMERCIAL COMPANY SELECTED BY WAY OF COMPETITIVE BIDDING AND OPERATING THE SERVICE IN ACCORDANCE WITH THE PROVISIONS OF A CONTRACT, ENTERED INTO WITH THE PUBLIC AUTHORITY IN CHARGE OF DELIVERING SUCH A SERVICE.**

**THE CONTRACT, BASED ON FUNCTIONAL SPECIFICATIONS AND PERFORMANCE CRITERIA PROVIDES FOR A COMPENSATION OF THE COMPANY BY THE PUBLIC AUTHORITY OR BY THE END USERS (OR A COMBINATION OF BOTH). THE SERVICE IS RENDERED FOR A TIME PERIOD CALCULATED IN SUCH A WAY THAT THE COMPANY MAY AMORTIZE ALL COSTS AND MAKE A REASONABLE PROFIT.**

**AT THE EXPIRY OF THE TERM, THE INFRASTRUCTURE IS TRANSFERRED IN GOOD OPERATING CONDITIONS TO THE PUBLIC AUTHORITY, GENERALLY WITHOUT COMPENSATION UNLESS SUCH COMPENSATION IS PROVIDED FOR THE CONTRACT”.**

In order to be able to permit a much better access by the LDC’s to the expert and consultancy services meeting their real needs for advising on the set up an drafting of the institutional framework, regulations, templates and procedures and advising on projects, it is essential in our experience to have a three steps approach as follows:

I) **To identify and analyze the main issues at stake globally in LDC’s and refined for a particular country or region** preventing the development of pipelines of PfPPP or impairing the development of particular a PfPPP project.

II) **To evaluate the needs of advisory and consultancy services** globally in LDC’s and in a particular country either for developing the underlying framework or for advising on a PfPPP project.

III) **To propose directions for improvement** inter alia by comparison with existing situations and typical cases **leading progressively to the formulation of an inclusive set of “best practice methodology(ies)”** outcome orientated for hiring consultants and experts for PfPPP in LDC’s.

## I. What are the main issues to consider for developing pipelines of PfPPP projects in LDC's?

**There are no detailed studies in the development world and therefore no real consensus on the identification of the core issues** in a purely objective, pragmatic and inclusive manner and how to deal with them for developing pipelines of PfPPP in LDC's.

However by a simple review of their perception by different stakeholders it is generally recognized that so far **several of these issues which for many of them are red flags are not addressed adequately in specialized PPP laws or in PPP contracts.**

- **From a bird's eye these issues are** governance, investment climate, business climate, institutional organization, political situation and various uncertainties triggering risks (but also potential rewards).
- **The additional problem is that perceived issues and risks are often different from the reality** in a particular country or region specially when they are viewed from different angles and different legal culture as it is often the case for PfPPP. This leads to confusion at the outset and non alignment of expectations and objectives, examples:
  - **For a project finance practitioner** the main issues are often how to “divert” in a secured manner part of the income from the operation of the service, for the repayment of loans; also how to structure the project in a satisfactory manner including counter guarantees, government guarantees dealing with various uncertainties common to many countries and projects.
  - **For a public authority in charge of developing an infrastructure service** the focus is more on the risk of not having the infrastructure and service adapted to the needs of the users after some years. Another question is how to be satisfied that the public service will always be delivered in a smooth manner in a situation acceptable to all stakeholders and in compliance with the SDGs.
  - **For a PPP contractor**, one of the concerns is the risk of inappropriate interference of the public authority in the design of the project and during the construction for which he is liable to fitness for purpose and meeting performance obligations. He may also expect to be fully paid by the SPV upon delivery of an infrastructure meeting the performance criteria and exclude all liability during the operation service period.
  - **For a PPP operator** it may only accept to guarantee performance of the service and its adaptation if the infrastructure remains fit for the purpose and easy to adapt to service improvement and if the public authority does not interfere without equitable process in the provision of the service.



- **Last but not least PfPPP for essential public services** are very different from other public infrastructure projects; this situation has a critical impact on risks and rewards and consequently on the appetite to bid for a Project, examples:
  - Up front investments in complex physical infrastructure with high capital costs ;
  - Investments in infrastructure or building only designed for delivering public services and which cannot be sold on the market ;
  - Very long recovery cycle (often 10 to 40 years) ;
  - Public and Private partners having limited capacity at the outset to appraise existing and future risks and opportunities ;
  - Diverging views on content of procedures and contracts for avoiding, limiting, sharing or allocating risks and rewards ;
  - A banking sector having difficulties to adapt lending to the nature of the risks and rewards beyond 10 to 15 years.

This situation specific to PfPPP has given rise to some analysis and surveys focusing on issues or sector during the last ten years. One of the most recent surveys on identification and proposal to address the matter is “Allocating Risks in Public-Private Partnership Contracts” published by the Global Infrastructure Hub (GIH) addressing mostly the financial issues for some sectors<sup>11</sup> (Transport Sector, Energy Sector, Water and Sanitation Sector).

However as indicated above **no inclusive survey based on the LDC’s situation addressing in a pragmatic manner the issues common to most LDC’s for PfPPP has been undertaken by a leading organization**<sup>12</sup>.

The Confederation of International Contractors Association (CICA) and the French Institute of International Legal Experts (IFEJI), representing together probably together the largest international experience for PfPPP in LDC’s, have set up for more than a decade a working group sharing their views on a regular basis with States and the development community. They have participated or organized numerous conferences and workshop around the world and in many LDC’s or emerging economies<sup>13</sup>.

<sup>11</sup> <https://www.gihub.org/allocating-risks-in-ppps>

<sup>12</sup> The authoritative summary of the inter agency task force meeting on PPP (UN New York, December 2016) provides that: “*In elaborating on implications of the PPP principles on policies, it was noted that more work would be useful in a number of areas*”.

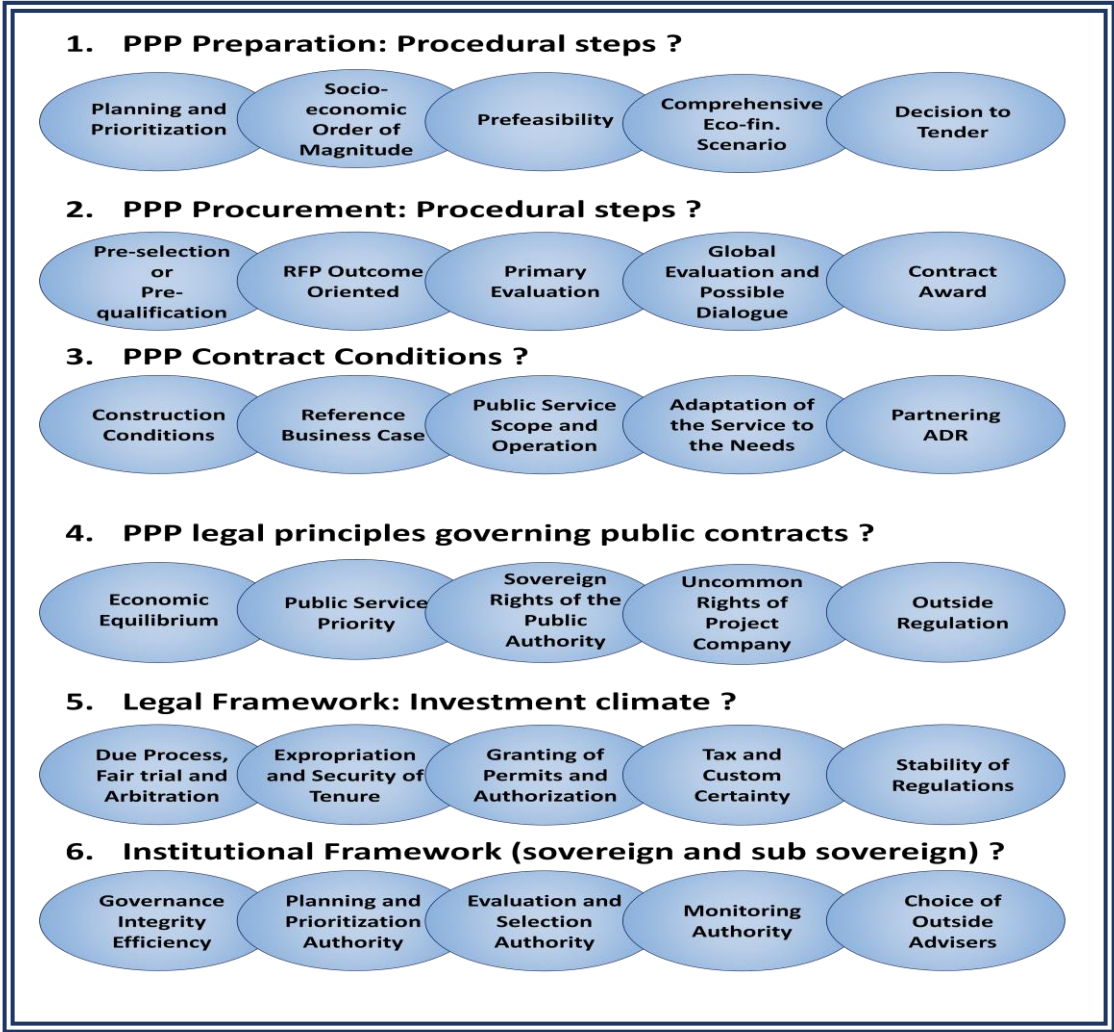
<sup>13</sup> ALGERIA, Alger & Oran – December 2012 and September 2013, AUSTRIA, Vienna – May 2013, March 2014, BELGIUM, Brussels – November 2014, BRAZIL, Brasilia & Sao Paulo – April 2015 and September 2016, BURKINA FASO, Ouagadougou – October 2014, March 2015, October 2016, March 2017, CANADA, Vancouver – May 2014 and Toronto December 2014, CHINA, Beijing & Qingdao – October 2007 and June 2016, CZECH REPUBLIC, Prague – September 2005 (IBA Africa Regional Forum), EGYPT, Cairo – October 2009, ENGLAND, London – June 2015, FRANCE, Paris – May 2011 (Meeting of the Infrastructure Consortium for Africa), May 2013, January 2014, February 2015, May 2015, July 2016, Lyon – April 2014 (OHADA Colloquium), February and March 2015 (Tanzania Business Forum), Annemasse – October 2015, GERMANY, Berlin – March 2015, INDIA, 2008, IVORY COAST, Abidjan – March & October 2012 and May 2017 (Executive Master Class), KUWAIT – September 2015, JORDAN – 2012, MOROCCO, Casablanca & Marrakech – May and October 2011, RUSSIAN FEDERATION, Moscow – October 2013, Saint Petersburg – November 2014, SENEGAL, Dakar – July 2007 & May 2008, SOUTH AFRICA, Cape town – May 2008, June 2013, SPAIN, Barcelona – November 2015, SWITZERLAND, Geneva – February 2012, February 2013, September 2015, March, May & October 2016, March 2017, Lausanne October 2013, SYRIA – 2012, TOGO, Lomé – November 2008, TUNISIA, Tunis – June 2006, June 2008 and May 2009, UKRAINE, Kiev – April 2014, USA, Laguna Beach – February 2016, Washington – November 2010, October 2012, September and December 2016, Amelia Island – March 2017

A first synthesis on the issues at stake and way forward for developing the legal framework in LDC's was presented by CICA/IFEJI working group to the World Bank in 2013<sup>14</sup>.

This concept note and others deriving from it has been evaluated and debated in various workshops and seminars around the world and more particularly in Africa and the related list of issues specific to PfPPP in LDC's has been adapted and refined on a regular basis inter alia as part of the stakeholders engagement and action plan of the UNECE International Centre of Excellence Concessions and PPP policies laws an institution and the ETIC-PPP public private expert team created to support the activity of the Center

This list has been relatively stable during the last two years. It matches with the practical experience of the authors and ETIC-PPP experts in LDC's for PfPPP. The list is currently used as a leading tool to evaluate the needs of a particular country or region for designing its framework regulations, institutional setup and templates or for advising on a particular project. It is summarized in the following chart:

**Chart III: Main issues to address for most PfPPP**



<sup>14</sup> Concept Note on the conditions for development of international concessions and other ppps: *Why so many failures?How to remedy with better appraisal of lessons learned and an innovative institutional and contractual framework of conditions for success?* (December 2013)

## II. Evaluation of the needs of advisory and consultancy services

Evaluation of the real needs of advisory and consultancy services for designing regulations, institutions, standard procedures or for advising on a particular project is a particularly **complex exercise if the objective is develop pipelines of PfPPP for essential public services always meeting the SDGs in LDC's.**

It is necessary to distinguish the needs of advice for drafting of laws, implementing regulations, procurement procedures, bidding documents and templates from the need of advice on the development of a particular project.

**There is no doubt that the current approach must be substantially improved in most cases.** The comparison with the expectations of governments in many LDC's by hiring experts and consultants for advising on drafting regulations or advising on projects and the outcome in terms of efficiency of PPP laws and resilience of projects speaks for itself.

Indeed many countries have developed PPP laws and programs in the last decade, PPP units have been created with the help of experts and consultants. Experts and consultants have also been used on a regular basis for advising on the development of projects but in the meantime (1) the number of projects effectively implemented on this basis remains far below the expectations and (2) **most PfPPP projects in LDC's are in distress after two years and oblige the parties either to enter in a dispute or to renegotiate.**

The following chart IV from the World Bank illustrates the situation for Concessions/PPP<sup>15</sup>:

	<b>Renegotiated Concession Contracts</b>	<b>Average Time to Renegotiation</b>
<b>All Sectors</b>	<b>61%</b>	<b>1.8 years</b>
<b>Electricity</b>	<b>25 %</b>	<b>2.1 years</b>
<b>Transport</b>	<b>73%</b>	<b>2.9 years</b>
<b>Water</b>	<b>87%</b>	<b>1.3 years</b>
<b>Mega and Natural Resources Projects</b>	<b>53%</b>	<b>2.0 years</b>

<sup>15</sup> Dispute Resolution Board Conference Paris 2015, Mark Moseley (Strategic Direction to the PPIRC)

It is often considered that this is due to the fragile situation of many LDC's States and political instability leading to a limited capacity of the administration and asymmetry of information during the contract negotiation.

This is partly true **but in our experience this is mainly due to the fact that the need to address several issues in an inclusive manner (such as the ones deriving from the list above) was not sufficiently understood or was not addressed with sufficient information** permitting to take the considered decision of initiating the process of hiring the suitable experts and consultants.

This is now repeatedly confirmed after the facts, by decision makers in LDC's leading to complaint often heard in international gathering and supported by LDC's practitioners.

It is therefore important to explore further the processes of (1) evaluation of the real needs and (2) drafting the term of reference for hiring experts and consultants.

## **A. How to evaluate the needs in context?**

### ***1) Advisory needs for assistance to the design of institutional, legal, procurement process, and contractual framework***

The need of a comprehensive and at the same time user friendly framework in order to develop pipelines of PfPPP projects has been felt for a long time within the international community after the pioneer work of UNIDO on BOT Guidelines<sup>16</sup>.

Another major effort has been made by UNCITRAL through an extensive program involving all stakeholders leading to the publication of the “*UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*”<sup>17</sup>. Thereafter in 2004, UNCITRAL has issued some legislative provisions<sup>18</sup> on the same matter.

The two UNCITRAL masterpieces are in the process of being revisited and workshops and conferences, to which the authors have participated, have taken place in the last three years. However the decision has not been made by UNCITRAL to set up a full working group to redraft or update the Guide and the legislative provisions.

The workshops have nevertheless identified serious gaps: some important issues were not adequately covered by the guide and others need to be revisited.

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<sup>16</sup> UNIDO guidelines for infrastructure development through BOT Projects (1996)

<sup>17</sup> <https://www.uncitral.org/pdf/english/texts/procurement/pfip/guide/pfip-e.pdf>

<sup>18</sup> [https://www.uncitral.org/pdf/english/texts/procurement/pfip/model/03-90621\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/procurement/pfip/model/03-90621_Ebook.pdf)

Several publications from various organizations are also addressing part of the matter. One of the most comprehensive documents is the WB publication “*Attracting Investors to African Public-Private Partnerships: a project preparation guide*”<sup>19</sup>.

Useful guidance has also been given by EPEC in its publication “*The Guide to Guidance: How to Prepare, Procure and Deliver PPP Projects*”<sup>20</sup>.

Some additional efforts have been made in the particular area of procurement especially in the last edition of UNCITRAL public procurement laws<sup>21</sup>

The global procurement partnership initiative gathering MDBs and international experts (GPP) to which IFEJI has also contributed proposes some innovative procurement directions to improve the situation and advocate an **important shift from “process based procurement” to “outcome based procurement”** (Box 3 below).

BOX 3: Multi Donor Trust Fund for the Global Procurement Partnership program document  
(08.03.2016)

*“In the context of the Finance for Development meeting in Addis Ababa in July 2015 and the formal adoption of the Sustainable Development Goals (SDGs), public procurement reforms is seen as a major instrument to increase efficiency and spur innovation in the global landscape of financing for development in the coming decades.”*

*“The vision is to catalyze a paradigm shift in public procurement that focuses on results, development impact and shared prosperity. It seeks to transform the function, strategy and impact of public procurement by bringing a sharper focus on drivers of improved procurement performance at both the global and country level.”*

Some modern procurement procedures including an element of negotiation strictly structured for instance at the European level have also been developed<sup>22</sup> and refined for instance through the publication of the Competitive Dialogue Charter<sup>23</sup>.

UNECE from its side is finalizing the steps for the publication of standards for “Zero Tolerance in PPP procurement”<sup>24</sup> which is the result of three years of extensive international exchanges within a project team led by these authors.

However **no authoritative publication has addressed yet the process of identification and analysis of the real needs to be**

<sup>19</sup> <https://openknowledge.worldbank.org/handle/10986/2588>

<sup>20</sup> <http://www.eib.org/epec/resources/guide-to-guidance-en>

<sup>21</sup> <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

<sup>22</sup> Practical Guide (PRAG)

[http://ec.europa.eu/europeaid/prag/?header\\_description=DEVCO+Prag+to+financial+and+contractual+procedures+applicable+to+external+actions+financed+from+the+general+budget+of+the+EU+and+from+the+11th+EDF&header\\_keywords=ePrag%2C+europa](http://ec.europa.eu/europeaid/prag/?header_description=DEVCO+Prag+to+financial+and+contractual+procedures+applicable+to+external+actions+financed+from+the+general+budget+of+the+EU+and+from+the+11th+EDF&header_keywords=ePrag%2C+europa)

<sup>23</sup> Developed by French Public Association including MAPPP and published in 2007 under the leadership of Christian Poncelet (President of the French Senate) ([https://www.economie.gouv.fr/files/directions\\_services/ppp/charte\\_dialogue\\_competitif.pdf](https://www.economie.gouv.fr/files/directions_services/ppp/charte_dialogue_competitif.pdf))

<sup>24</sup> <https://wiki.unece.org/display/pppp/Zero+Tolerance+Approach+to+Corruption+in+PPP+Procurement> sometimes referred to as chapeau principles or standards)

**taken into account in most LDC's** in order to draft the institutional, regulatory, procedural and contractual framework permitting to develop pipelines of PfPPP.

It is sometimes heard that this is not really necessary since each PPP project is different and must be developed and negotiated in the context of its particular situation.

Indeed experience indicates that for PfPPP in LDC's these views which are only true beyond a certain level of details are not relevant for numerous common core issues. This is especially the case for countries which intend to develop pipelines of projects where many common features and standards need to govern project planning and prioritization, project preparation, procurement principles including sometimes standard bidding documents, contract conditions, etc.

The existence of those common features have been confirmed in 2011 by the G7 in Cannes where the industry and development world have identified together the so called 'Gold Standards' (which for most of them remain to be formulated in a user friendly manner) essential to structure the development of the PPP process, to limit the transaction costs and to offer strong guarantees of resilience if well formulated and well implemented.

When addressing the need to develop framework regulations and the accompanying procedures, documents and contracts, it is important at the outset to have these factors in mind.

This means that in practice that **before considering hiring experts and consultants for drafting regulations a well structured due diligence exercise should be carried out checking in particular a comprehensive list of issues which can be inspired in the inclusive list of most common issues for PfPPP proposed above.** The end product is a gap identification which deserves to be crosschecked at different level and put in a hierarchical order.

When this exercise is professionally carried out it appears that several issues equally important for the success of pipelines of PfPPP projects falls within the scope of specialized legislation such as investment protection laws, business laws, criminal laws, administrative laws, ADR and arbitration laws, land laws, employment laws, environment laws, community laws, accounting and tax laws, etc. The amendment of these specialized legislations and not found in the bulk of recent PPP laws is rarely considered as an immediate need and consequently not part of advisory services when a country considers developing PPP regulations. **This situation leads to a non inclusive approach to the core issues to address for successful projects and it is in our experience one of the main causes of failure of new PPP laws. This must be well understood at political level and by the development world and avoided.**

Experience indicates that an interministerial committee having a clear mandate and full support of the head of State may have the best chance to discuss refine and endorse in context the core issues to address in an inclusive manner together with some initial views on the process to resolve them.



The above considerations are sufficient to understand that **the evaluation of the needs of advisory and consultancy services** for designing institutional and legal framework together with all ancillaries process and documents **is by itself a complex and time consuming exercise which must be well structured failing which there are little chances to succeed in the equally complex exercise of drafting the Terms of Reference (ToR) for experts and consultancy services meeting the expectations.**

In practice it is often advisable for this purpose to hire one or two lead and authoritative international expert or consultant having a robust experience of the Country or Region for PfPPP or for projects of similar nature in terms of issues and risks profile.

The time and resources for a satisfactory outcome should not be underestimated and six months is generally a reasonable estimate.

## *2) Advisory needs for preparation development and procurement of a particular project*

Prima facie the situation is simpler than for identifying the needs for drafting institutional framework, procedures, etc.

It is often heard that when a project has been identified as a project to be developed under PPP, the best approach is to hire a team of transactional advisors aggregating different skills from sociology, environment, community relationships, engineering and design, legal, contractual, tax, economic and financial modeling and others.

However if this is maybe necessary for a particular project in a particular country it is not always the best approach especially for countries intending to develop pipelines of PfPPP projects. Experience indicates that the costs of a professional transaction advisor team able to address all the issues deriving from a risk matrix designed after a due diligence exercise up to financial close are very high<sup>25</sup>.

In addition if the project is not sufficiently developed up to a certain level before launching the call for tender, several core governance procurement principles such as fair competition, transparency and equality of treatment are at risk affecting the appetite of potential bidders for other projects in the country<sup>26</sup>.

From an economic and engineering standpoint is worth to refer to the cutting edge standards and process in project preparation known under the SIF Source developed by the SIF foundation with the support of the MDBs to which members of ETIC-PPP have participated. SIF Source develops questions on many issues on project preparation which should be addressed before the call for tender reducing uncertainty on economic and technical feasibility with a potential to reduce drastically transaction costs. As a result if the SIF Source

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<sup>25</sup> See inter alia EPEC publication: "Role and Use of Advisors in preparing and implementing PPP projects" and PPIAF toolkit: "A guide for hiring and managing advisors in public private infrastructure": for instance a water concession in Manila USD 3 millions (mix of success and fix fees)

<sup>26</sup> Numerous examples of such situation in LDC's often discussed in international conferences

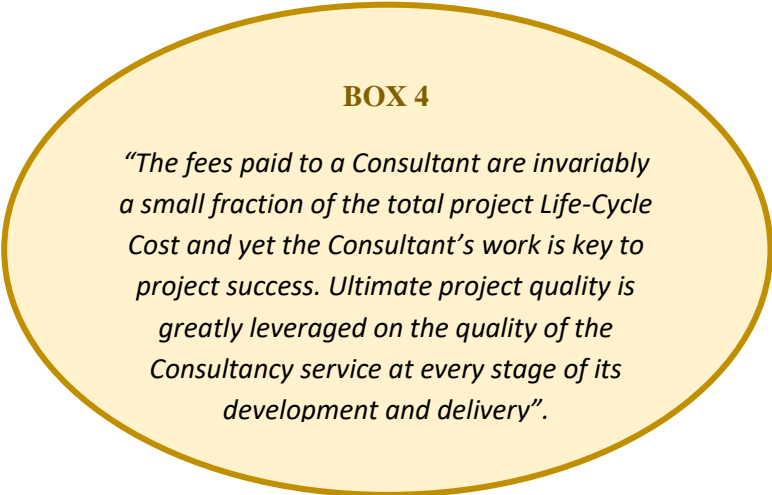
questionnaire is completed with satisfaction for a particular project it will reduce substantially the need of experts and consultancy services and pave the way toward better governance and pipelines of projects<sup>27</sup>.

In addition **lessons learnt from the “well prepared project” concept** developed over the years mostly by the contractor industry<sup>28</sup> indicate that the real needs for experts and advisors on a particular project may be in most cases divided into two:

- Well prepared project advisory services up to the decision to tender( including blue print of tender documents)
- Drafting tender document and tender procurement advisory services including financial services and participation to the procurement process and financial close

**3) Conclusion on evaluation of the real needs of experts and consultancy services in LDC’s for pipelines of PfPPP**

The evaluation of the real needs of consultants and experts is a very complex and sensitive issue both for drafting institutional and regulatory framework, procedure and template contracts and for advising on particular projects. The experience indicates that **if this first link in a chain leading to the choice of consultants and experts is deficient the whole project of hiring consultants and experts is at serious risks.**



**BOX 4**

*“The fees paid to a Consultant are invariably a small fraction of the total project Life-Cycle Cost and yet the Consultant’s work is key to project success. Ultimate project quality is greatly leveraged on the quality of the Consultancy service at every stage of its development and delivery”.*

Taking into account the level of international and local experience needed in an area where there is very little practical experience in most LDC’s and where the international community has not been able so far to formulate a comprehensive set of best practices and standards **an innovative and efficient approach based on a precedents and tested methodology is often necessary for a proper evaluation of the needs.**

Experience indicates that contrary to current practice, it is often advisable at this early, but essential stage of evaluation of the real needs, and before considering drafting ToR, to hire one or two lead international expert with the broadest experience in the country or in the region in drafting regulations and implementing projects. This lead expert(s) must offer real guarantees of neutrality and well aware of the expert and consultancy market<sup>29</sup>.

<sup>27</sup> <https://public.sif-source.org/> see costs EPEC and PPIAF  
<sup>28</sup> CICA website: <http://www.cica.net/> - EIC website: <http://www.eic-federation.eu/>  
<sup>29</sup> As pointed out by the PPIAF “lead advisors will be particularly useful when knowledge of PPI reform within government is limited, when considering large and complex programs of reform and/or when there is little capacity within government to manage the process”



### III. Drafting the Terms of Reference

The process of drafting the ToR for PfPPP regulatory framework or Project in LDC's is an equally complex exercise not only from a technical standpoint but also from a governance standpoint in order to avoid a risk of conflict of interest<sup>30</sup> or corruption.

The drafting necessitate high skills and long practical experience in LDC's since the role of experts and advisers for PfPPP are substantially different from their role in traditional public infrastructure projects where there is a long experience and established expert and consultancy market.

Indeed **there is a considerable experience of traditional procurement of public infrastructure** projects in LDC's. For over 20 years the procurement regulations and institutional framework have been refined under a strong influence of the multilateral agencies (including standards MDB contract conditions). There are various publications and documents of common use for the ToR and their annexures such as template contracts.

The World Bank has produced a full set of documents for consultancy services<sup>31</sup>. The FIDIC from its side has produce useful guidelines for the selection of consultants for project development and project implementation<sup>32</sup> stressing the preeminence of quality in the selection process.

**By contrast there is no experience in most LDC's and very few authoritative publications of the international community in the area of PfPPP** with the exception for the PPIAF Toolkit: *A guide for hiring and managing advisors for private participation in infrastructure* (2001)<sup>33</sup> and for the EPEC guide: *Role and use of advisors in preparing and implementing PPP projects* (2014)<sup>34</sup>. These two documents although incomplete or outdated in some aspects remain a useful reference<sup>35</sup>.

Papers have also been produced from time to time and in particular within the CONNEX initiative for hiring experts and consultants to help LDC's in complex mining project<sup>36</sup> to which these authors have participated notably in revising the OECD CONNEX guiding

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<sup>30</sup> This risk is more important than in traditional procurement due to several factors including the fees to be paid to the expert team. The often controversial issue of success fees for financial close among others. This matter has been addressed from various angles for complex and PPP projects: see two recent publications: "Zero Tolerance to Corruption in PPP" Standards and CONNEX code of conduct for advisors.

<sup>31</sup> World Bank Consulting Services Manual, Guidelines: selection and employment of consultants by World Bank borrowers (<http://documents.worldbank.org/curated/en/796061468126898713/pdf/956640PUB0Box3010Revised0July102014.pdf>)

<sup>32</sup> FIDIC Guidelines for the Selection of Consultants 2nd Edition (2013)

<sup>33</sup> <http://documents.worldbank.org/curated/en/347941468766772652/How-to-select-and-manage-PPI-advisors>

<sup>34</sup> [http://www.eib.org/epec/resources/publications/role\\_and\\_use\\_of\\_advisers\\_en](http://www.eib.org/epec/resources/publications/role_and_use_of_advisers_en)

<sup>35</sup> PPIRC (PPP in Infrastructure Research Center: <https://ppp.worldbank.org/public-private-partnership>) has also produced among its toolkit sample ToR for some sectors for PPP implementation units and implementation of PPP programs. However these useful documents remain templates and sometimes qualified sample ToR do not permit without substantial knowledge, skills and researches to finalize ToR for PfPPP either for drafting regulations and standard contracts or for advising on a particular project.

<sup>36</sup> *Guidance to assemble and manage multidisciplinary teams for extractive contract negotiation*

principles on the engagement with authorities, on the limitation and allocation of risks for heavy investment with long recovery cycle in LDC's and on contract role and content<sup>37</sup>.

The starting point for drafting the ToR is to take into account in a well organized and structured manner (including priority and timing for addressing them) all the needs identified in accordance with the methodology outlined above.

It is important to note that **in practice drafting of ToR and related skills for various categories of experts and consultants is an exercise substantially different for setting up the institutional and regulatory framework (A) and for advising on a particular Project (B).**

### **A. Drafting ToR for experts and consultancy advice for drafting institutional, regulatory, procedural and contractual framework**

**This is currently the area which is the most critical for LDC's which intend to develop pipelines of PfPPP projects meeting the SDGs.**

It is now well established that pipelines of such projects for essential public services have hardly no chances to develop in LDC's without a clear, simple and strong institutional, regulatory, procedural and contractual framework. Learning by doing for PfPPP is not an option<sup>38</sup>.

Although no reliable data are provided, it is clear for experienced practitioners in LDC's that the financial and political savings of having a robust framework for developing a project compared with the transaction cost of the same project without such a robust framework are enormous<sup>39</sup>.

A simple example illustrate this situation based on the EPEC and PPIAF evaluation of the transactions costs for one PPP project only. As indicated below those costs can be evaluated in the region of USD 5 millions in order to have a robust medium size project In LDC's adapted to stakeholders expectations needs and capacity. Examples abound of lengthy and complex organization on the procurement process of inadequate feasibility leading to aborted projects or to contract signature and financial close taking place after years essentially due to the lack of a robust legal, regulatory and procedural framework for project preparation,

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<sup>37</sup> Several conclusions and guiding principles on the use of consultants and experts in this area, based on the lectures from these authors at the French Ecole des Mines of Paris are also valid for hiring consultants and experts for PfPPP in LDC's (*Role of Lawyers and Advisors for the Development of Large Mining Projects: Lessons Learned in Francophone Africa*, Marc Friet (October 2016)

<sup>38</sup> Lessons learnt around the world indicate that for countries which have the largest experience in pipelines of PPP projects for essential public services and which have started without an appropriate institutional and legal framework the learning curve has been painful and taken decades. This is particularly the case for countries such as France and Napoleonic civil law countries. If these countries represent now by far the majority of PPP projects for essential public services without real need for special PPP laws, this is because a full framework of pragmatic and authoritative case law based on equitable legal and economic principles carved for several decades applies together with a good quality of the remaining enabling environment (quality of the investment and business climate, confidence with the judiciary, etc).

<sup>39</sup> OECD principle 5 "Enhancing the enabling institutional environment" in OECD principles for private sector participation in infrastructure 2007

procurement and contracts templates adapted to the reality of the market and of the particular country and valid for most PfPPP projects irrespective of sectors and status of contracting authorities.

When drafting the ToR for PfPPP, strong consideration must be given to the nature and particulars of the market for experts and consultants able to provide proper advice in context. For this purpose it is always useful to have in mind as a starting point various checklists published from time to time for general advisory services such as the PPIAF checklist<sup>40</sup>.

However the practice indicates that this is not sufficient in most cases if the objective is to reduce drastically the transaction costs without compromising on expectations to facilitate the life of the evaluation committee and limit the risks of misprocurement/

The team drafting the ToR should also consider practical issues in context such as the 30 issues deriving from local practice in LDC's for PfPPP proposed above (page 9). This will permit to refine the checklist adapted to the expectations, formulate specific selection criteria per category of experts and consultants at different phases together with weighting ratios and scoring. For this purpose the support of a leading international expert with a strong practice of the country or the region needs to be seriously considered.

**BOX 5: Example: refined criteria for institutional and legal expert qualification:**

The criteria with appropriate weighting ratio for PfPPP should often include:

1. In depth knowledge of the law making process globally (legistic) ;
2. Knowledge of the institutional organization and procedure for formulating and adopting regulations: precedents in a country or region ;
3. Tested practice of the engagement process with LDC's governments at various level ;
4. Clear understanding of the political support to the project and political priorities.

The ToR for PfPPP should develop with a maximum detail the criteria permitting inter alia to select the lead expert or consultant able to organize and participate with the necessary authority to meetings with senior civil servants in their language and in their culture and conducting meetings guaranteeing the outcome. Sub criteria should deal inter alia with the process of drafting concept notes, position papers and other documents in plain language and in a synthetic manner for various layers of participants, etc.

**When drafting the ToR it is also essential to have a clear understanding of the market for different types of experts and consultants really capable to deliver efficiently the outcome** (i.e. simple, clear and holistic regulations, institutional framework, procedure, etc).

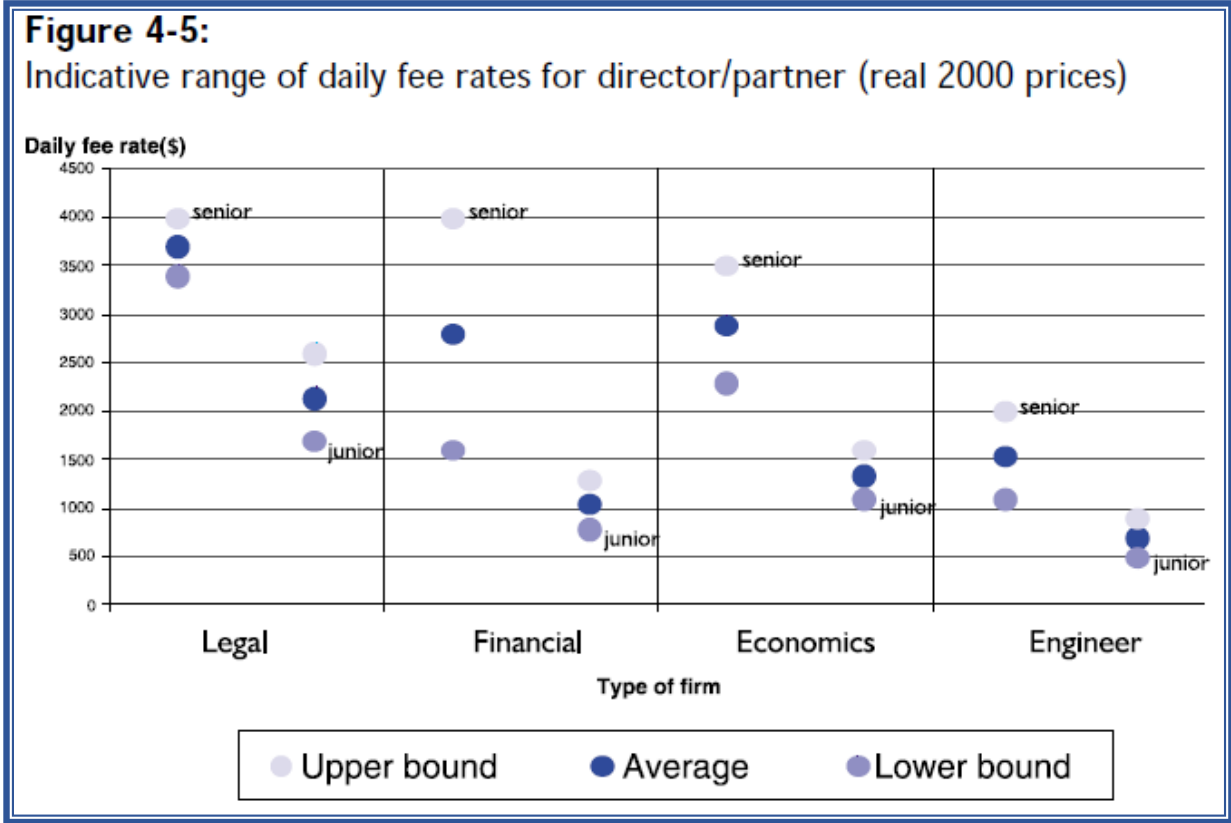
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40 PPP in Infrastructure Resource Center for Contracts, Laws and regulations (PPIRC) ([www.worldbank.org/ppp](http://www.worldbank.org/ppp)), Victoria Rigby Delmon March 2008

Experience indicates that for such a complex exercise where the aggregate skills are far above the threshold necessary for advising on standards projects, **only the first tier of a very small market of highly knowledgeable experts and consultants deserve in most cases to be approached.**

This cannot be achieved without a **good understanding of the fee structure per category of experts or consultants.** This information on the fee requirements often comes as a shock for some categories of experts or advisors for procurement specialists used to draft the ToR for more traditional projects where the market is much wider and the need of top league skills not as critical.

A simple look at the fee structure per categories of advisors (legal, financial economic, engineer) which has been the result of the survey carried out by the PPIAF in 2001 and reproduced in their authoritative Toolkit<sup>41</sup> (reproduced below) raise generally queries from public officials participating often together to the drafting of the ToR.



Those information are sometimes sufficient to explain why many PPP regulations of the last decade in the LDC's have not delivered the expected outcome. Indeed to our knowledge the average of delay fee has been substantially lower than the average rates indicated in the above chart.

<sup>41</sup> A guide for hiring and managing advisors for private participation in infrastructure, PPIAF, p.110

In addition, experience gathered from several significant projects inter alia in Africa indicates that **many ToR have underestimated the needs of different categories of experts, their level of skills and their fee level.** This is sometimes due to a **limited knowledge by the team drafting the ToR of the “legistic” steps to be carried out** in order to achieve the expected outcome or to a pressure to speed up the process of drafting laws, regulations and ancillary documents often coming from the political side.

In the box below a snapshot of the “Legistic Guide” published by the French *Conseil d’Etat* and the General Secretariat of the French government in 2007.

#### BOX 6

**The legistic guide is a masterpiece of approximately a hundred notes gathered mainly under the following headings:**

- **Design of regulations:** this introductory part which include hierarchy of norms and different categories of texts invites the designers to question themselves on use and efficiency on the regulations the intend to develop.
- **Steps for drafting regulations :** This part addresses more the procedure
  - Rules and good practices for drafting regulations including solutions to the most common problems arising during the drafting process.
  - Logical schemes and case studies
  - several schemes are proposed, the objective of summarizing the answer to the main questions: substance, form and procedure that anybody should have in mind at the time of drafting regulations.
  - For some categories of texts, regulations or part of regulations, the guiding principles include legal considerations as well as issues to resolve and to the extent possible template drafts

It is fair to say that the information on “legistic” which is a relatively new science and related methodology (which is efficient when put in good practice) is not well disseminated specially in LDC’s<sup>42</sup>.

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<sup>42</sup> For the legistic approach see <https://www.legifrance.gouv.fr/Droit-francais/Guide-de-legistique>

A useful precedent of a good “legistic” approach in LDC’s is the design and implementation of the OHADA regional regulations for seventeen African countries. Those “OHADA uniform acts” are generally considered of good quality in context and efficient to improve the business climate. This basic framework can serve as one of the key reference for developing a methodology permitting to draft the ToR<sup>43</sup>.

A special focus on PfPPP legistic approach has also been given by the IFEJI CICA Concessions/PPP working groups (to which authors have participated) and presented to the international community and LDC’s in various occasions in the form of a Concept Note see above (p.21).

The annexure to the Concept Note<sup>44</sup> (Box 7) proposes key steps generally found necessary to draft and implement efficient and user friendly good regulations for PfPPP in LDC’s.

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<sup>43</sup> For an excellent analysis of the OHADA legistic approach see “*Encyclopédie du droit OHADA*” (December 2011), p.32 and following. This analysis develops the guiding principles for drafting OHADA uniform regulations followed by a process questioning a criticism on the limited stakeholder participation and the remedy found through national commission organization

<sup>44</sup> See footnote 13

**BOX 7: Condition of design and enactment of efficient and user friendly framework law on concessions and other PPPs and its implementing regulations.**

**(Excerpts from the CICA IFEJI Concept Note presented to the World Bank on March 2013)**

**Set the main objectives: legal framework example**

- That defines the common principles for the range of possible concession and PPPs for public infrastructure services.
- Acceptable by the government, the administration officials and the implementing agencies.
- Law written in a plain and clear language facilitating the planning and development of the projects and their successful implementation in full transparency.
- A framework law based on the methodical approach developed by the legislative drafting science (“*légistique*”).

**Establish an appropriate methodology and engagement process example**

- **First step:**
  - **Evaluation of the existing legislative and regulatory framework and practice**
    - ✓ General framework of public and private investments and infrastructures: analysis of the regulation, of their implementation, procedures, etc.
    - ✓ Analysis of the practical implementation including lessons learnt from the most significant projects.
    - ✓ Review of legislative and regulation development during the last 15 years and the trends for the future
    - ✓ Analysis of international rules and best practices to be complied with for long term investment projects in the public infrastructure and mining sector.
- **Second step**
  - **Identifying key issues, exchanges and roadmap.**
    - ✓ Identification of existing gaps in investment protection, procedures.
    - ✓ Review of the general requirements of private sector investors.
    - ✓ Drafting "concept notes" on each relevant issue (e.g. taxation, public service definition, economic and financial equilibrium, and adaptation) based on an initial exchange resulting from a reliable engagement process with stakeholders in the country or region.
- **Third step**
  - **Establish a process of structured exchanges with experts from key ministries**
    - ✓ Identification of the different levels of experts in the various sectors impacted by the future law.
    - ✓ Organization of an ad hoc drafting committee with strong political and inter-ministerial support.
- **Fourth step**
  - **Initial findings of the drafting committee, roadmap and proceedings**
    - ✓ Development of the roadmap: including a detailed plan of a framework law and guidelines for its drafting.
    - ✓ Organization of exchanges between the drafting committee and the reference PPP expertise and practice (private and public) in the region and selected countries.
    - ✓ Draft of inclusive templates and legal provisions
- **Fifth step**
  - **Drafting of a complete framework law based on the roadmap**
    - ✓ Analysis and evaluation of the draft by the committee.
    - ✓ Amendment of the draft based on the comments and directions of the committee.
    - ✓ Review of the draft by a high level panel of national and international practitioners for concession and PPPs: (legal practitioners, economists, financial and environmental experts).
    - ✓ Final draft in consensus with the committee.

The Annexure to the Concept Note also includes some practical aspects of engaging with governments and institutions at various levels in LDC’s in order to deliver outcome.

Last but not least the annexure to the MoU entered into between UNECE and the International Centre of Excellence Concession/PPP ‘Policies, Laws and Institutions’ in France develops a similar methodology. The main methodological steps which need to be implemented by authoritative expert teams meeting the Excellency and neutrality requirements of the UN are reproduced in Box 8 below :

## BOX 8

### Excerpts from International UNECE International Centre of Excellence MoU (May 2015)

#### 1. Raw materials

- i. Identifying the materials
- ii. Searching or gathering the materials
- iii. Sorting and reviewing the materials
- iv. Analyzing the materials
- v. Blueprint of concept notes or position papers

#### 2. **Drafting of concept notes and studies**

- ❖ For the purpose of packaging and disseminating the information
- ❖ For the purpose of training
- ❖ For the purpose of e-learning

#### 3. **Drafting of documents for universal use**

- ❖ Guidance notes and procedures
- ❖ Standard bidding documents
- ❖ Framework laws and regulations
- ❖ Template contracts

**All these considerations deserve to be taken into account for drafting the ToR of a particular country or region. This will permit to have a reliable evaluation of the budget of expert and consultancy services and of basic timeframe needed** for having the level of assistance required from experts and consultants for drafting any part of the institutional, regulatory, procedural and contractual framework permitting to develop pipelines of PfPPP.

Unfortunately the available budgets in LDC's for implementing such good practices are often below what is required to deliver the expected outcome. This has been well analyzed in the PPIAF guiding principles for setting the budget leading to a PPIAF principle underlined as follows:

*“All too often, budgets for advisors are set during the public expenditure planning rounds or at the start of the financial year, well before there is a clear idea of the range, type and scale of the advisory services required. This approach can lead to problems if the resources allocated to paying for advisory services are insufficient.”*



*“This means that the budget should be defined after the draft terms of reference have been drawn up. In addition, the budget should take into account not just the time required, but also the type of advisors that are needed.”*

It is fair to say that such a good practice is not always easy to implement especially for priority projects in LDC's since it is not usual for a country to look for high level international experts and consultants having in addition practical knowledge of the country for designing the institutional and regulatory framework. This requires also the capacity to engage with authority and pragmatism with senior administration official at various levels and to create the collaborative approach leading to a broad consensus on the blueprint of the provision to be considered (and from there to draft the provisions).

It is even less common to have an initial budget based on a fee estimate commensurate with a very narrow market of authoritative experts and consultants needed for one of the most complex exercise for any senior expert. **Anyone need to remember that the exercise is to contribute to the drafting of very unusual and inclusive regulations for most countries affecting the traditional role of the State in procuring essential public services and leading to new legal and contractual equilibrium often unknown in existing regulations and as such triggering initially “natural resistance”.**

As a result **in many cases the LDC States have difficulties to anticipate issues and to fund the design of authoritative and robust PPP laws and ancillary documents.** Such regulations framework remains nevertheless a prerequisite for the development of pipelines of economically viable PfPPP projects. Consequently most LDC's have to engage with the international development community to get the necessary funding which in practice will be conditioned by the compliance with standard rule of the lender for hiring consultants and advisors.

The situation is not exempt of problems especially when the lending agency does not have itself a long practice of the problems to be resolved in a particular country or region for drafting in a plain language framework regulations and ancillary documents for PfPPP. In such a case, a lending agency is likely to refer to its traditional standards for hiring advisors and experts for traditional infrastructure projects creating a risk of having ToR for drafting complex PfPPP regulations not adapted to the situation either in terms of nature of experts, methodology, fee structure and timing.

To overcome such situations which is often frustrating and costly, it is generally good practice for the State to consider hiring a lead international expert with a broadest practice for the purpose of assisting in the drafting the ToR.

## B. Drafting ToR for experts and consultancy advice for advising for PfPPP projects

If the assessment of the needs have been properly carried out with the time and resources described above for a particular project, it will permit to have a very practical view of the issues which remain to be addressed based on empirical and professional evaluation of the quality of the institutional, regulatory and legal framework, investment climate, business climate, governance situation, etc.

In order to start the exercise of drafting the ToR which shall inter alia end up with an initial estimate of man day and blueprint budget, **it is useful to have a general view of advisory and expert requirements for a standard PPP project.**

In this respect, one of the most recent authoritative publications already mentioned above (**EPEC March 2014**) provides a good initial view of the advisory galaxy for a medium size PPP project addressing (1) the tasks typically devoted to different categories of advisors at different stages of the PPP project cycle. (2) An estimate of the work load of advisory and experts and (3) the aggregate number of men -days.

This number is **above 1.000 men-days for a single medium size PPP project as indicated in the following chart.**

Stages of the project	Roles of advisers (input days)				Total inputs (days)
	Project management	Technical, market/demand	Financial	Legal	
1.1 Project selection and definition	0	150	10	5	165
1.2 Assessment of the PPP option	20	45	85	30	180
2.1 Getting organised	20	3	6	4	33
2.2 Before launching the tender	20	62	38	45	165
3.1 Bidding process	55	83	55	73	266
3.2 PPP contract and financial close	6	5	20	22	53
4.1 Contract management	15	72	47	30	164
4.2 Ex post evaluation	2	20	20	5	47
<b>Total inputs (days)</b>	<b>138</b>	<b>440</b>	<b>281</b>	<b>214</b>	<b>1073</b>

Source: EPEC estimates

By multiplying the total number of men days by the average costs for experts and consultants published by PPIAF in 2001, the outside expert and advisory cost estimated by EPEC for medium size PfPPP projects amount to more than EUR 2 Millions.

Since to our knowledge the EPEC estimate do not take into account the expert and consultancy advice required for several important issues specific to PfPPP in LDC's in order to reach a level of legal certainty and risk profile which may open the appetite of a serious bidder for a PfPPP project in LDC's it is reasonable to consider that the EUR 2 Millions figure should be at least doubled (i.e. **based on EPEC analysis more or less EURO 5 millions of expert and consultant fee for a medium size PfPPP project in LDC's<sup>45</sup>**).

In our experience of LDC's this figure may in practice be substantially reduced in two ways

- Through a very professional appraisal and control of the real skills needed at each stage of the assignment including a due process under the responsibility of a lead advisor ;
- Through the development of an enabling legal, regulatory and contractual framework as a top priority.

In any event those considerations or similar consideration based on other examples or publications deserve to be well appraised at the outset since they may also impact on the political decision to proceed or not for a particular project and for the organization of the team drafting the ToR.

The first task of any drafting team should be to analyze in details the need assessment report prepared during the previous phase and at the same time to explore in details the status of the relevant expert and consultant market.

This exercise is indeed critical because if the objective of the ToR is to address in an inclusive manner all the core issues leading to the project feasibility which **are more or less similar for every project they should not be addressed in a same manner, with the same depth and with the same type of experts and consultants from one project to the other.**

For instance, drafting ToR and related qualification for expert and consultancy services for a PfPPP Port or Power project in Madagascar where the bidder will be entrusted with the full delivery of the services to the end users and recovering entirely or mostly from user's fees (which is a delivery form which is likely to be the most popular for delivering pipelines of PfPPP in LDC's for obvious budgetary reasons<sup>46</sup>.) may be very different from another country.

As a result the qualification for experts and consultants for a same type of project in Madagascar or in East Africa or in South Africa (and consequently the fee estimate) should be sometimes substantially different.

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<sup>45</sup> A reference World Bank report (unavailable online) "*Financing PPP infrastructures in sub-Saharan Africa*" indicates that "*PPP typically require between about 2% and 10% of the total capital cost as upfront expenditure on project preparation to achieve bankability*". In relation to the preparation of large scale infrastructure projects, the paper indicates that "*the cost of preparing such projects "may amount to between 7 and 10% of a project's final investment cost"*".

<sup>46</sup> There is a growing consensus on this in the development world and in LDC's

To keep the example of a PfPPP port in Madagascar it is not common knowledge that this country has one of the most sophisticated PfPPP legal and contractual frameworks for Port and Power in the Concession/PPP family. Part of this framework in contractual matter is not new and most of the regulatory framework has been developed for several years with international assistance from senior World Bank experts.

These regulations together with the background of equitable public contract law principles lead to a rather detailed advanced allocation of risks and benefits for PfPPP contract avoiding lengthy negotiations. See box below

**BOX 9: Concept and provision of Madagascar regulatory and contractual framework governing Port Concessions (Decree n°2004-699 07.13.2004)**

- **Concession contracts are regulated by administrative law:** this means that a long range of equitable legal principles shall apply governing the relationships between public sector and the private sector. They are not written in any code but are authoritative and well known by public contract law practitioners. They are carved by special courts with authoritative precedents in Napoleonic civil law countries with strong reliance on the cases (Conseil d’Etat in France). Some examples :

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- Common definition of public services
- Main characteristics such as continuity, adaptability.
- Reinstatement of the economic equilibrium of the contract above a certain threshold if external causes.
- Duty to adapt compensated by clear indemnification provisions

- **Some particular provisions of the decree:**

Right of keeping the initial general economic equilibrium inter alia in case of unilateral changes imposed by the public authority on the basis of its sovereign rights.

Duration of the concession; linked to the amortization of the asset financed by the Concessionnaire in order to deliver the public service.

Early termination; possible in case of absolute necessity justified by public interest reason and full indemnification of the Concessionnaire in accordance with the provisions of the Concession (minimum equal to the aggregate of the value of asset financed by the Concessionnaire not yet amortized and a part of the loss of profit.

Termination for gross default, Concessionnaire should receive an indemnification equal to, the non-amortized value of the assets which will continue to be used for the public service reduced by the amount of an indemnification for gross default.

Any experienced team drafting ToR for port or power projects in Madagascar should then conclude that the fee estimate for drafting the template contract and related bidding documents should be much lower than the same situation in other LDC's not having such a sophisticated set of regulations and precedents for risks and benefits sharing and allocation.

On the other hand, Madagascar being a fragile State, the need to have high level expert or consultant to advise on the institutional setup dealing with various administrative bodies and committees for evaluating the project, selecting the bidder, engaging in a real partnership, to deliver permits and visas, streamlining the land use, dealing with dispute avoidance and dispute settlement will entail more expert and consultancy time and more man-days than for another LDC country.

**This example illustrates the rigorous, well documented and at the same time flexible methodological approach which should be considered by the team drafting the ToR for assisting the authority for a particular project in order to reach the expected outcome.**

In a nutshell the team drafting the ToR for a particular PfPPP Project should at the same time have a sufficient knowledge of many issues and related good practice common to most PfPPP projects in LDC's irrespective of country or sector and the particular situation of the country and of its practice for each of the core issues.

Otherwise it would be difficult for the drafting team to assess the quality and profile of consultancy or experts needed and the time necessary to deal with each of the core issue identified. In such a situation the chain permitting to develop PfPPP Project meeting the SDG's with limited transaction cost has serious chance to be broken.

## IV. Guiding principles and choice on procurement route for consultants and experts for PfPPP projects

Reference and proper implementation of “guiding principles” including inter alia the choice of modern procurement routes adapted to the needs and to the market is critical for a good selection of high level consultants and experts having together composite qualifications and experience required for the very complex nature of PfPPP projects (and more particularly projects from the Concession family where the investor has to deliver a full public service and recovers fully or mostly from user’s fees).

Guiding principles and considerations on procurement options have been summarized in useful documents published by MDBs.

However as already described, so far no authoritative synthesis has been published on several of the core issues to address and which are critical to the success of pipelines of PfPPP projects in LDC’s more particularly for Concession family projects. This situation impacts on the choice and process of best procurement practice permitting to hire the high level experts and consultants advising on PfPPP regulations or PfPPP projects.

It is a fact that the gap between expectations and outcome both for advising on PfPPP regulations and on projects having a chance to be realistically implemented (inter alia for priority projects for essential public services) tends to increase as reported regularly by LDC’s authorities and governments in surveys and conferences.

### **BOX 10: PPIAF Toolkit a guide for hiring and managing advisors for private participation in infrastructure**

#### **PPP advisory services and project success**

Future private sector participation depends on investors’ confidence in both the country and the government. The role of advisors will have an impact on whether potential investors decide to invest. Appropriate selection and use of advisors builds confidence in the reform process by:

- (1) **Demonstrating the existence of transparent and fair selection processes from an early stage.** Potential future investors will judge the government by its past actions.
- (2) **Attracting advisors with a strong reputation.** Their willingness to see their names attached to a project or piece of advice acts as a signal that they feel it is thorough and correct.
- (3) **Introduction of a well-designed reform program.** Where the new industry and market structures, contracts regulatory regime, and legal framework are comprehensive, potential investors will be re-assured that the government and its advisors understand the process with which they are dealing.

This situation is a deterrent to investor’s confidence to bid for PfPPP at the time where the infrastructure gap needs to be bridged as a top priority for LDC’s which intend to have the best chances to meet the SDGs.

More than fifteen years ago the relationships between the quality of expert and consultancy advice for PfPPP projects and investor’s confidence in a country has been well expressed by the PPIAF (Box 10).

These considerations are fully in line with the recent conclusions of the Global Procurement Partnership (GPP) gathering MDBs and other institutions. After having evaluated inter alia the question of PPP procurement, GPP advocates for a **shift of paradigm in the procurement** inter alia for experts and advisors **changing from “process based procurement” to “outcome based procurement”**.

Indeed lessons learnt in the field indicate that due to the complexity of drafting PfPPP regulations or advising on a PfPPP project (more particularly for the family of PPP for essential public services and recovery from user’s fees), **it is necessary not only to ensure compliance with procurement best practices but in addition to adapt and develop them in several directions in order to have a real chance to reach the expected results.**

It is useful as a starting point to summarize some of the best practices for hiring experts and consultants for projects in LDC’s. To our knowledge the most comprehensive publication often used as a reference remains “the guidelines for selection and employment of consultants” published by the World Bank and updated in July 2014<sup>47</sup>.

Reference to this guideline is topical since it is the result of lessons learnt in numerous projects and it has been refined over the years and widely used in LDC’s. In addition, the focus is the same as ours i.e. expert and consulting services of intellectual and advisory nature.

It is founded on principles and best practices of modern procurement which focus on **achievement of value for money, open, effective and adequate competition, fair and equitable treatment, integrity and transparency, accountability and due process, and non-discrimination.**

These principles underline the four pillars developed by the African Development Bank (AfDB) for a sound public procurement system<sup>48</sup>.

The AfDB also promotes “**broad attributes**” which must be reflected in regulations and acceptable by the Bank when it is requested to contribute to the financing of a project.

Those requirements include:

- **fair, equal and equitable treatment of all bidders;**
- **credible bid protest or complaint handling provisions;**
- **integrity and transparency in the procurement process;**

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<sup>47</sup> *Guidelines selection and employment of consultants under IBR loans and IDA credit & grants (July 2014)*

<sup>48</sup> These pillars are: public procurement legislative and regulatory framework, public procurement institutional framework, efficient procurement operations and practice and integrity of the system (<https://www.afdb.org/en>)

## **A. Procurement methods**

Procurement methods for hiring expert and consultant depart from the recommended procurement method for works, goods and services in several aspects especially when it comes to the procurement route and selection criteria

### ***1) Quality and cost based selection (QCBS)***

There is a broad consensus internationally and in LDC's for complex projects to use the quality and cost based selection method (QCBS) for selecting experts and consultants.

This method is based on competition among qualified short listed experts, consultants or firms in which the selection is based on the quality of the proposals and on the costs of the service to be provided (with weighting ratio) where the quality becomes in most cases the overwhelming criteria.

Based on the particulars of PfPPP described in this study, this approach different from the most popular approach in public procurement (open consultation and lowest price), represents a minimum requirement for hiring high quality experts, consultants, and as appropriate their firms, able to deliver expected outcome.

The World Bank guidelines developing the QCBS procurement method are globally valid for hiring experts and consultants for PfPPP. The guidelines include provisions for pooling of expert and consultancy resources such as joint venture, sub consultancy agreements which altogether could provide better approaches and in some cases lower prices. Most useful information on this matter can be found in the OECD CONNEX publication (*Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations*<sup>49</sup>).

However some provisions will create problems in most cases for the high level of expertise and advice required for PfPPP in LDC's and more particularly for the Concession/PPP family.

- A Problem arises for instance for the provisions relating to the establishment of a short list. The guidelines propose that the list shall comprise six firms with a wide geographic spread with no more than two firms from any one country unless there are no other qualified firms identified to meet the requirements and at least one firm from a developing country unless no qualified firm from developing countries could be identified ;

Taking into account the very few number of PfPPP projects in most LDC's leading to a very limited numbers of qualified experts, consultants or firms, these principles should not be considered as a prerequisite for the hiring of expert consultancy services for PfPPP projects.

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<sup>49</sup> <http://www.oecd.org/fr/publications/guidance-to-assemble-and-manage-multidisciplinary-teams-for-extractives-contract-negotiations-9789264274914-en.htm>



It is fair to say that the guidelines in its § 2.6 recognize in this respect that:

*“Exceptionally, the Bank may agree to short lists comprising a smaller number of firms when there are not enough qualified firms having expressed interest for the specific assignment, when enough qualified firms could not be identified, or when the size of the contract or the nature of the assignment does not justify wider competition.”*

- Another problem relates to the proposed “homogeneity” of the short list.

§2.8 of the guidelines reads as follows:

*“The short list should normally comprise consultants of the same category with similar business objectives, corporate capacity, experience and field of expertise, and that have undertaken assignments of a similar nature and complexity.”*

Indeed as demonstrated in the EPEC estimate (p.24) the particular nature of PfPPP requires experts and consultants of very different categories belonging to very different markets and with a fee structure estimated by PPIAF (p.19 above) much different ranging from one to five.

An illustration of the need to have precise discriminative criteria for short listing an institutional and legal expert for a same project into two different LDC’s jurisdictions is found in the Box below:

**BOX 11: Example of key qualification criteria for shortlisting an institutional and legal expert for a same project into two different LDC’s jurisdictions**

**Proposed Assignment: Drafting PfPPP framework laws and bidding documents**

- 1) **Jurisdiction A - Civil law country based on Napoleonic legal culture:** one of the key eligibility criteria should be an in depth knowledge and practice of the particulars of construction and of global contracts together with all the preempted risks and benefits allocation deriving from the civil code as implemented by authoritative case law and at the same time a long practice of the pragmatic equitable public contract law applicable (through authoritative case law) addressing in advance, sometimes as with the public order status in an equitable manner various situations and risks which should otherwise be addressed and detailed in regulations and complex contractual clauses.
- 2) **Jurisdiction B - Common law country:** One of the key eligibility criteria should be the respective role of legislative texts, regulatory procedure and content of global construction contract in the system where there is no construction contract law as such, where there is no generally standard provision for global contracts development and implementation or for outcome based contract, and where there is no equitable public contract law dealing with various type of risks and opportunities.
- 3) **Consequence on qualification criteria:** it derives from the above that a lead international expert specializing in procurement and legal matters with broad experience in jurisdictions A will have little chance to have the same level of specialization in jurisdiction B and reciprocally. These findings are also valid in many cases for global firms since as pointed out by the PPIAF and EPEC(1) it is always essential to check beyond global references.

(1) **Focus on the skills of individuals** rather than those of the company. To a large extent, the quality of an assignment depends on the quality of the people who are involved in delivering it. Even with a company presenting a sound reputation and track-record of relevant mandates, the Authority should assess the credentials of the individuals proposed and ensure that key individuals are involved as scheduled. (PPIAF Toolkit: a guide for hiring and managing advisors for private participation in infrastructure: <https://ppiaf.org/d/2070/download> )

In summary, QCBS for hiring high level expert and consultancy services as promoted by the multilaterals has a lot of merit and should be considered as the starting point for analyzing procurement options for PfPPP. A really professional drafting of the ToR should permit to identify in detail the qualification of each type of high level experts and consultants needed at the different stages of the project.

If the expert and consultant market has been sufficiently explored, it is then possible to identify early how to best meet the qualification criteria with a “real outcome and oriented” approach as advocated inter alia by the MDB’s.

This should necessitate in practice in most cases the assistance of a lead international expert with the broadest knowledge of the country for finalizing the drafting of the ToR and knowledgeable the relevant market of high level experts and consultants.

## *2) Alternative selection methods*

The alternative procurement methods for high level advisory and consultancy services are exceptional but those options deserve nevertheless to be considered for PfPPP projects especially for the Concession PPP family.

Among these methods, several of them are not relevant in our field such as the selection under a fixed budget (FBS) or least cost selection (LCS).

The World Bank guidelines outline however two methods which deserve to be considered in our view for PfPPP namely the QBS and the single source selection (SSS).

### *i. Quality Based Selection (QBS)*

QBS is appropriate for complex or highly specialized assignment for which it is difficult to define precise ToR and the required inputs from experts or consultants and for which the authority is looking for innovative proposals.

As mentioned by the World Bank QBS should also be valid in situations where there is a high downstream impact in which the objective is to have the best experts and consultants. This includes policy studies of national significance. This method is also possible for assignment than can be carried out in substantially different ways such that the proposals will not be comparable.

In this system, the financial proposal is not as such a prerequisite and the expert and consultant or firm selected in a competitive manner will negotiate the financial proposal with the authority.

ii. Single Source Selection (SSS)

This situation is also acceptable for the World Bank in a context of overall interest of the State or the public authority having in mind the principles of economy and efficiency and equal opportunity to all qualified experts and consultants.

It may only be justified if it presents a clear advantage over the competition and when only one group or firm is qualified or has experience of exceptional worth for the assignment.

In this situation there is no formal competition and the detailed ToR are transmitted to the single source.

iii. Comments on alternative selection methods

Lessons learnt in the last decade fostering the urgent necessity for a better methodology and more professional approach for evaluating the needs, drafting the ToR and inter alia proposing more detailed and relevant selection criteria (leading to better results in terms of outcome) indicate altogether that it is often necessary to hire high level consultants and experts in an innovative manner for LDC's and stakeholders.

At the same time this is often difficult to organize due to the exceptional nature of such an assignment for most LDC's.

As a result and after due analysis of the situation and of the market **several PfPPP projects could qualify as “exceptional” for using either the QBS or the SSS method.**

These methods could permit to tap in a well structured manner best ideas and resources without compromising on best international practice in procurement if the process is developed in accordance with the guidance proposed by the World Bank.

*3) Innovative selection method to consider for PfPPP: the Swiss Challenge*

The Swiss Challenge is not by itself a new method of procurement but to our knowledge it is not described as a concept in an operational manner in any procurement code or in the guidelines of the development world. As such it remains confidential<sup>50</sup>.

Although there are differences it bears some similarities with SSS and with ‘unsolicited proposals’.

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<sup>50</sup> For a snapshot to Swiss Challenge experience see the PPIAF Toolkit, for a more structured approach see PPP Cell, Infrastructure Development Department, Government of Karnataka, May 2010 ([www.idd.kar.nic.in](http://www.idd.kar.nic.in))

**Unsolicited proposals are fueling currently hot debates for PfPPP** and it has little future in our view for developing pipelines for PfPPP projects in LDC's. One of the main reasons for the little relevance of the unsolicited proposal debate in our case is that is that pipelines of PfPPP need to be in the vast majority of cases the result of a long term planning and prioritization process itself based on a long term development vision with a priority for transformational infrastructure ending up with an infrastructure development plan. It is only in very exceptional situation that a new PfPPP project not envisaged by the plan has a chance to be successfully proposed by an investor accepting that its proposal is eventually open to competition.

**However the situation is quite different when it comes to hiring high level experts and consultants** for advising on institutional setup, drafting framework regulations, proposing standard bidding documents, etc.

The various considerations developed in this paper on the need to have a detailed methodology and best guarantee on the capacity of engagement for experts and consultants participating to the above tasks means that it is sometime advisable for a State or a public authority not to embark in a complex process of prequalification and drafting detailed ToR by using one of the procurement method described above.

The States could consider instead of using the **Swiss Challenge method where the State is engaging directly with a team of experts and consultants or firms it knows and trust having prima facie both for the international and local expertise on the basis of well defined objectives.**

These objectives could be for instance "how to organize and draft an institutional and legal procedural and contractual framework which could permit to develop pipelines of PfPPP projects meting the SDG's taking into account the financial constraints and other issues such as the investment and business climate, the ingredients of the private sector appetite to bid for PfPPP projects.

From there the group of experts and consultants should be required to make a complete proposal including a detailed and inclusive methodology together with an estimated budget and time frame, conditions of engagement of stakeholders, guarantee to deliver by stages, criteria for assessing the impact (including guarantee of independence and lack of conflicts of interest, etc.).

The complete proposal shall be delivered within a precise time frame and give rise to a thorough evaluation ending with the decision to proceed or not within a certain delay.

In case of decision to proceed the main terms of the proposed assignment are recorded in a structured term sheet or similar document.

The State may then invite other experts and advisor team or firms to match the offer based on structured clear and transparent criteria known in advance.

If a better offer is proposed, the State should go back to the initial team for improving its offer and give him a chance to revise its offer to be selected.

**Taking into account the difficulty to draft ToR for PfPPP projects a well organized Swiss Challenge system deserves in our view to be considered as an innovative and possibly efficient method to deliver outcome specially for drafting regulatory and contractual framework for PfPPP.**

## **V. The procurement process: lessons learnt and need of better compliance with best practices**

We will not develop here the detailed procurement techniques in term of documents, timing, compliance etc., for hiring consultants and experts which has been described in various documents and in particular by organizations such as EPEC, PPIAF, World Bank and FIDIC.

These documents are themselves based on universally accepted principles which are deriving sometimes from model documents and laws and primarily in the UNCITRAL model law on procurement recently updated<sup>51</sup>.

Lessons learnt in the field indicate that it is nevertheless necessary to streamline or develop core principles, template contracts, best practices and/or to propose innovative solutions and procedures in order to meet the expectation of LDC's for Pipelines of Pf PPP projects.

Since this should not be achieved at the cost of compromising on the core principles of procurement and good governance we will focus essentially on the implementation of those principles and propose some additional best practices.

This is in our experience essential to build trustful and long term relationships between States and public authorities on the one hand and reliable and experienced experts and consultants which are not always free of special interest.

### **A. Integrity and Transparency**

The authors have been leading the Project Team for integrity and transparency in PfPPP procurement set up by UNECE. The process has been to exchange widely with public and private stakeholders from around the world in order to identify and agree a list of priority issues and thereafter to discuss the way forward to deal with the issues. Lastly standards which have been drafted and discussed for over a year and revised by UNECE before the submitting them to public consultation.

Several provisions of the UNECE draft (not final) address directly or indirectly integrity and transparency in the procurement of experts and consultants.

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<sup>51</sup> <https://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf>

## *1) UNECE Standards specific to consultants and experts involved in a PfPPP project*

### **Standards for drafting the Terms of Reference (ToR) for consultants and experts**

The ToR shall include to the extent necessary the skills and experience of independent consultants and experts for each stage of the project from evaluation of the needs up to final award.

Due consideration should be given to the capacity of consultants and experts to work within a team able to deal with the interactions of the studies in different areas which is one of the distinctive feature of PPP.

- Transparency: as much information as possible relative to the project is made available.
- Fairness: the same information should be received at the same time and evaluations are based on the same criteria.
- Cost-effectiveness: costs should be minimized by requesting detail breakdowns easy to compare and providing for remuneration of the service adapted to the particular conditions of deliveries (such as cost plus, lump sum, schedules of rates and estimated quantities...).
- Avoidance of conflict of interest: independence from companies or institutions, financial or other having a potential interest in the Project.

### **Standards for drafting the consultancy and experts contracts**

- Contracts based on standards and contract terms & conditions to be published from time to time by the government or international institutions.
- The contract conditions shall permit the contracting authority to adapt or to limit the scope of the services of the consultant or expert to a particular phase in the preparatory or tendering process.
- The contract terms shall be simple and detailing precisely the expected deliverables and milestones, permitting an objective external assessment of the given service by a professional.
- The contract shall provide remedies for breach of contract, and ground for termination.

### **Standards for monitoring consultants and experts**

- The contracting authority shall appoint a Project Officer with a significant length of experience at a high position in dealing with consultants and experts for monitoring the activities of consultants and experts including their respective organization, human resources, relationship with the public sector and the stakeholders, control of the methodology for implementing the contract, drafting notes and reports and meeting the date or time line for deliverables.

## *2) UNECE standards for avoidance of conflicts of interest and disclosure by whistle blowers*

### **- Avoidance of conflicts of interest**

Conflict of interest arises where a person mixes up or is confused by his/her roles. They may arise in a particular context as the result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest.

Any conflict of interest which may arise for personal reasons, for current or past employment reasons or for institutional organization during the procurement process must be disclosed by the individual or institution as soon as it becomes aware of them.

Public and private sector participants to the procurement process, agents or personnel shall not abuse of their powers for private gain more particularly during exchanges and dialogue which may take place in a process of evaluating or optimizing the bids.

The bidder or any of its sub-contractors, agents or personnel shall not receive or agree to receive from any person or offer or agree to give to any person or procure for any person, gift, gratuity, commission or consideration of any kind as an inducement or reward for performing or refraining from any act relating to the procurement or for showing favor or disfavor to any person in relation to the process.

### **- Disclosure by whistle blowers**

A whistleblower is any person from the public and the private sector witnessing conflict of interest, corruptive maneuvers and other fraudulent practices detrimental to public interest and having decided to report it in accordance with the provisions of a regulatory framework taking into account international best practices.

The regulations shall be user friendly, guarantee the confidentiality of the information and of the identity of the whistleblower.

The whistleblower reporting in good faith shall in all anonymity, together with his protection and his family's protection be protected against personal and professional measures of retaliation and against criminal and civil liability.

When a disclosure does not meet the requirement of good faith, the whistleblower's protective provisions shall not apply and he/she can be liable to criminal penalties.



### 3) *FIDIC and PPIAF considerations for integrity and transparency*

-Excerpts from the PPIAF Toolkit:

*“The process of selecting advisors is not solely one of advisors trying to impress the evaluators but also of the government, or other agency, selling the particular opportunity. In order to attract the best advisors it is important that the:*

- Project is well thought-out and clearly presented;*
- Evaluation process is transparent;*
- Funding is sufficient and the sources clearly indicated; and*
- Shortlist of eligible firms is not longer than 5-6 companies.”*

-Excerpts of FIDIC<sup>52</sup>:

*“It is also recommended that details of the evaluation system, including weightings, be disclosed with the Request for Proposals (RFP), or at least before any proposals are due to be submitted, and that Consultants who have submitted proposals, have the right to an open debriefing following the selection. FIDIC also recommends that the selection panel has the necessary skills and independence to make a fair and proper selection...”*

*“FIDIC recommends that Consultancy Firms should follow an integrity management system such as the FIDIC Integrity Management System FIMS...”*

*“FIDIC recommends that, in the public interest, Consultancy Firms compete with each other in the provision of Consultancy Services on a transparent, “level playing field” basis. Furthermore, whenever publicly funded bodies such as government enterprises, NGO’s, universities or similar, and Not-For-Profit Organizations compete with independent Consultancy Firms, selection should be made exclusively by QBS and fee negotiations should take into consideration the different tax and profit evaluations for such bodies”*

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<sup>52</sup> FIDIC QUALITY BASED CONSULTANT SELECTION guide (2011)  
([http://www.acec.ca/assets/pdf/advocacy\\_pdf/FIDIC\\_QBS\\_Guide\\_2012\\_IAABAA.pdf](http://www.acec.ca/assets/pdf/advocacy_pdf/FIDIC_QBS_Guide_2012_IAABAA.pdf))

#### *4) UNECE Standard for evaluation committees*

Members of the Tender Evaluation Committees shall be appointed after giving due consideration to the particulars of the Project, the procurement method, the nature and timing of the evaluation process, and the skills and resources necessary for permitting the Committee to carry out a fair, independent and professional evaluation. Each member and the Committee shall be bound by the Code of PPP Ethics or to a charter to the same effect.

The aggregation of the respective technical, organizational, operational and financial background of the members shall be such that each Tender Evaluation Committee has the capacity to organize itself in order to be able to discharge its duty efficiently and free of conflicts of interest.

##### *i. Proceedings of the Committee*

The Secretary shall keep a record of the evaluation sheet used at each step of the evaluation process. A summary of the evaluation sheets shall be annexed to the report transmitted to the body in charge of approving the choice of the successful bidder.

The proceedings of the Committee and its recommendation for awarding the bid shall be recorded in a report signed by all its members and kept in safe custody.

##### *ii. Integrity*

Upon acceptance of their appointment, each member shall disclose in writing, any existing or potential conflict of interest. He/she must continually monitor the risk of conflict of interest and if he/she feels that such a conflict crystallizes during its term of appointment, he/she must disclose it to the Chairman at short notice and resign from the Committee.

Each member shall at each step of the evaluation process (i.e. at each committee meetings) reassure that such a conflict hasn't crystallized. A formal procedure allowing clear liability must be organized.

The Committee and each member of the Committee undertake to keep strictly confidential all information submitted by the bidders whether in writing, orally and otherwise. The Committee and each member shall organize itself in such a way that the confidential information is not divulged directly or indirectly to non authorized person.

Upon acceptance of their appointment, each member shall sign a confidentiality agreement.

#### IV) Standards for negotiating with bidders

For the more complex PPP and more particularly for concession PPP, competitive negotiation process such as the UNCITRAL model law request for proposal with dialogue shall be organized.

A dialogue is organized between the contracting authority and one or more selected bidders on all technical and financial requirements.

Due to the elevated risks of corruption and abuse in these procedures, a transparent process based on the following additional standards shall apply:

The scope of the dialogue of the negotiation shall be clearly set out in the tender documents. The dialogue is not permitted for functional specifications, performance parameters, standards or norms which are of the essence of the project and described as intangible in the tender documents.

#### V) Standards for misprocurement and protests

An effective protest mechanism shall be organized along the following lines: The Contracting authority shall 30 days least before the date of signing the PPP contract disclose to all the prospective bidders having contacted the authority and all the bidders, the name of the preferred bidder and the criteria's notation of the winning bid.

When procurement involves competitive dialogue or competitive negotiation the information to be disclosed to the bidders is the special report certified by the fairness auditor.

During that period, any bidder who fails to be selected as well as prospective bidders justifying an interest may protest for misprocurement.

The protest must be filed with an independent authority or a court having the power to make an (interim) decision to suspend the awarding process if prima facie, the protest has sufficient merit.

If this case, the independent authority or competent court may decide the cancellation of the procedure.

Otherwise, the Public Authority may proceed with the signature of the contract without prejudice of the right of any aggrieved bidder to initiate court proceeding for damages with a competent court.

## **B. Experts and consultants requirements: Code of Ethics, Charters, Code of Conduct**

Experience indicates that integrity and transparency and avoidance of conflicts of interest can be better achieved by the way of integrity charter, code of ethics, code of conduct, contract clause etc., binding on stakeholders involved in the expert and consultancy services either from the private sector and public sector.

Various documents having sometimes a different binding effect and applying to some categories of experts and consultants address the matter

This is the case for instance in the in the World Bank document for selection and employment of consultants.

The French Institute of International Legal Experts (IFEJI) has promulgated after an extensive stakeholders consultation the IFEJI Charter (in French) developing inter alia the criteria for claiming an expert status in terms of quality and peers recognition and inviting any interested candidate who meet the qualifications to apply for the IFEJI expert title selected by a high level and independent committee gathering public and private sector personalities.

The Charter further address the expert duties for its professional conduct, independence, ethic, confidentiality, lack of conflict of interest and responsibility.

Although focus mainly on legal experts, several of its principles are valid for other categories of experts<sup>53</sup>.

To our knowledge the most recent document addressing the particular situation of integrity and transparency for consultants and advisors in complex contracts in LDC's is the code of conduct published in under the G7 CONNEX initiative to which these author have contributed<sup>54</sup>.

This code of conduct focus on complex contracts for natural resources which in many aspects have similarities with Pf/PPP. It deserves therefore to be considered as a reference document which could be endorsed by experts and consultants (and may become part of contractual documents.)

The CONNEX code of conduct addresses standards of conduct, independence, client interest, role of advisors, quality of advices, professional standards, bribery and corruption, avoidance of conflicts of interest, disclosure of conflicts of interest, employees and subcontractors, confidentiality, advisor duties, collusion, etc. (some excerpts in Box 12).

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<sup>53</sup> For more information contact : IFEJI Secretary: Jean-Claude Beaujour: [jcbeaujour@smithdoria.com](mailto:jcbeaujour@smithdoria.com)

<sup>54</sup> [https://www.bmz.de/g7/includes/Downloadarchiv/150505\\_CONNEX\\_Code\\_of\\_Conduct\\_final.pdf](https://www.bmz.de/g7/includes/Downloadarchiv/150505_CONNEX_Code_of_Conduct_final.pdf)

## BOX 12: Excerpt of CONNEX Code of Conduct

### Standard of Conduct

- (1) Advisors shall observe the highest standards of ethical conduct in carrying out their duties for a Client and shall act with integrity, honesty and probity in all dealings with Clients, the Support Provider and others with whom the Advisors come into professional contact in the course of activities contemplated herein.
- (2) In conducting their work, Advisors are expected to treat others with courtesy and respect and to act with tolerance, sensitivity and impartiality towards other persons' cultures and backgrounds. An Advisor shall strive to avoid even the appearance of impropriety in his or her conduct and to avoid behavior that would reflect adversely on the Advisor, Client or Support Provider. Independence
- (3) Advisors shall maintain their professional independence and be afforded the protection of such independence in giving Clients unbiased professional advice and representation.
- (4) Payment by the Support Provider must not affect the Advisor's independence and professional judgment in rendering services to the Client. For the avoidance of doubt, the interests of any parties providing financial support to the Client through the Support Provider shall have no bearing on the content of any advice that the Advisors offer to their Clients. Advisors are not, and shall not hold themselves out as, representatives or agents of the Support Provider. [...]

### Professional Standards

- (13) Advisors' work shall be carried out in a competent, professional, and timely manner. Advisors shall not take on work that they do not reasonably believe can be carried out in that manner for reasons of competence, personal conflicts, professional conflicts, workload, physical or mental illness, or other personal or professional reasons. An Advisor shall act only within his or her level of competence and shall clarify any limitations to the Client when asked to act beyond it.
- (14) When an Advisor is a member of a team of advisors, he or she will respect the other members of the team and the views and perspectives brought by them, regardless of the disciplines, specialties or types of organizations from which they come. Recognizing that there may be differences of opinion within any team of advisors, an Advisor will endeavor to work with other team members to provide advice to the Client, drawing on the various skills of the team members. If the team has a designated Team Leader, the Advisor will follow the directions of the Team Leader, subject always to the Advisor's duty to observe the law and to maintain ethical standards. The Team Leader will respect the dignity, professionalism and possibly different viewpoints of each team member.
- (15) To the extent practical, it may be beneficial for a group of Advisors to seek an understanding at the outset of any program of work as to the areas of competence and responsibility of each member of such team to facilitate efficient coordination of advice. Each Advisor shall act in accordance with the spirit of any such understanding that may be reached. Nothing in this paragraph shall be interpreted as requiring that each Advisor subscribe to advice with which he or she strongly disagrees, but differing advice must be presented in a way that respects the positions of other members of a team.
- (16) Advisors will not communicate independently of the Client with a potential investor or its advisors, unless explicitly asked to do so by the Client. For any 6 direct substantive communication with a potential investor, Advisors will copy the Client on correspondence and will report to the Client in detail on any conversations. [...]

### Conflicts of Interest | Avoidance of Conflicts of Interest

- (21) Advisors shall avoid situations and actions that compromise, or could appear to compromise, their ability and complete commitment to carrying out, in a conscientious and personally disinterested way, their responsibility to provide the best professional advice to their Clients.
- (22) Advisors shall not misuse their position to pursue their own private interests, which include both financial or personal interests and those of their family members, relatives, business associates and friends.
- (23) An Advisor shall not assume a position in which a Client's interest conflicts with that of the Advisor or a person or entity affiliated with the Advisor, or another client of the Advisor in a substantially related matter, unless permitted by the Client's written authorization. "Affiliated" shall be defined as having an existing commercial, professional, and/or personal relationship with the 7 Advisor. Should such a situation arise, the Advisor shall disclose this to the Client as soon as he or she becomes aware of it.
- (24) The giving of advice that is or can be construed as intentionally or unintentionally designed to generate financial gain for an Advisor is prohibited. Information that is not available to the public that is acquired in the course of working as an Advisor shall not be used for personal financial gain. [...]

### Employees and Subcontractors

- (31) Where an Advisor is a firm or organization, the personnel of such firm or organization who are assigned to a project shall act in a manner consistent with this Code of Conduct.
- (32) Firms or organizations shall ensure that Advisors so assigned acknowledge and agree to abide by this Code of Conduct.
- (33) Firms shall also ensure that Advisors so assigned shall have the authority to act on their behalf within the scope of the mandate for the project. (34) Advisors shall require any sub-consultants and agents that they engage in service of a Client to agree to this Code of Conduct through contractual provisions to ensure compliance by all parties acting on behalf of the Client. [...]

## **VI. Some takeaways for further considerations**

If the objective of LDC's and of the international community is to develop pipelines of PfPPP projects for essential public services meeting the SDGs, the use of experts and consultants to contribute for this purpose is essential and needs to be optimized.

Taking into account the important transaction costs and the suboptimal results of developing individual PfPPP project in LDC's we may only endorse the growing consensus of the international community for giving top priority to the development of an inclusive institutional, regulatory, procedural and contractual framework which indeed, based on the existence of numerous similar issues, has many common features in different countries, regions and sectors. This can be done by stages with progressive results if based on a clear vision and appropriate "legistic" approach.

Lessons learnt on the law making process in LDC's in the last decade indicate that there are little chances to succeed without a real 'leapfrog' in the methodology for identifying in an inclusive manner the core issues to address and from there drafting the ToR for hiring consultants and experts in a very narrow expert and consultant market for which there is little experience in LDC's and to a lesser extent in the development world.

It is nevertheless possible to proceed efficiently by developing and revisiting (without compromising anything) best practices in procurement.

Due to the complexity of PfPPP which trigger new relationships between the public and the private sector this means that it is necessary to explore in-depth at the same time many different directions inter alia in terms of engagement and law making process starting with a very clear understanding on the type of PPP which could be reasonably developed in LDCs to become PfPPP meeting the SDGs.

It is also necessary to dig much further into the skills required from different nature of experts at different time with a clear view of the different fee structures for each category of expert and consultant market failing which the qualification criteria will not permit to benefit from aggregation of the required level of skills.

The procurement options and process in this top priority area for LDC's should be less 'process orientated' and much more 'outcome orientated' in order to attract the best experts and consultants as required in most cases.

This approach will facilitate the professionalization of procurement which is critical to improve governance.

This study addresses innovative procurement routes such as Swiss Challenge which in our view deserve in this particular situation to be seriously considered.

Our ambition has not been limited to analyze current situation but also to propose tools and directions based on in-depth analysis of regulations and their practice in LDC's, on a selection of landmark cases, as well as tested innovative practices, processes and contracts.

This inclusive approach permits to conclude on an optimistic note on the way forward (Box 13)

**Box 13: Reasons for optimism for developing pipelines of PfPPP meeting the SDG's in LDC's**

**Our view**

1. It is possible, subject to an innovative and inclusive approach to the issues at stake leading to a careful and really competitive choice of experts and consultants, to develop clear and simple framework of laws, regulations and templates adapted to context for a particular region or LDC's country. This will play a major role in guiding the parties for developing a project and permit to clarify their reasonable expectations and requirements as well as the ones of the public to which the PfPPP services are in most time dedicated. The parties will then have much more chances to agree on the terms which must underpin the very particular long term equilibrium between different and evolving interests which characterize PfPPP for essential public services.
2. Based on empirical evidence gathered around the world over the last decade both in LDC's and developed economies, the process of identifying and engaging individual consultants and experts teams able to deliver the expected outcomes, which necessitates in most cases and enhanced level of professionalism, is reasonably well identified in this study.
3. There are chances that an outcome based process for engaging an expert team able to design inclusive framework laws and regulations, templates and procedures for PfPPP in LDC's will be more expensive than the amount spent so far for PPP laws by most countries and regions.
4. However these additional costs for first league experts or teams able to deliver in context in an inclusive manner should permit to save the major part of the downstream costs for hiring consultants and experts for advising on a particular project in an LDC's not having developed modern, inclusive and user friendly laws, regulations and templates.
5. A simple comparison of the money currently spent on transaction costs for one or two PfPPP projects only in LDC's and the costs of hiring first league individual experts and consultants or team for drafting laws, regulations and templates confirm the growing international consensus on the benefit of quality based selection for consultant and expert team for PfPPP. Indeed a leapfrog of professionalism in the process and methodology following the lines developed in this study will likely unlock progressively and at affordable costs pipelines of PfPPP meeting the SDG's in LDC's.
6. We think it is the time to have in depth exchanges between interested parties on those major issues which are probably the easiest one to resolve by countries and development world for fostering essential public services in LDC's triggering much better governance and altogether an improvement of North-South relationships.

We hope that this study will attract attention, criticisms and additions.

**Next step could be to exchange not only on issues and way forward but also on mock cases addressing each step from evaluation of the needs and procurement process up to contract signature of experts and consultancy contracts as well as the monitoring of the contract and impact assessment. We could aggregate for this purpose several of the real cases on hiring consultants and experts either for law making process or for advising on projects in various regions or sectors (and inter alia the ones in which the authors together with IFEJI and ETIC-PPP experts have been involved in LDC's in the last 30 years).**

This should permit to develop a new generation of a 'best practices methodological guide' including examples of bidding documents and template conditions of PfPPP contracts essential in our view to foster new trust in PPP in LDC's. This could play in turn a decisive role for the development of PPP for essential public services (or in other words PfPPP) which have a real potential to bridge the growing infrastructure gap in LDC's.

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