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Public-Private Partnerships Conference

PPP contract as key for  
safeguarding interests from  
multiple perspectives:  
Recommendations contained in the  
UNCITRAL Legislative Guide on  
PPPs

HARNESSING  
OPPORTUNITIES  
and  
OVERCOMING  
CHALLENGES

Legislative guide is not a contractual guide but covers the following aspects of the PPP contract

- Conclusion
- Execution
- Termination or extension

# Core terms of the PPP contract

- Project description
- Financial arrangements, including refinancing
- Organization of the private partner
- Transferability of the project
- Project site and easements
- Construction works
- Operation of infrastructure
- Security interests
- General contractual arrangements
- Termination and compensation
- Transfer obligations

# Balancing the interests of Public and Private sector

- Limitation to party autonomy in the form of
  - Implied or mandatory contractual terms
  - Implied powers of public authorities
- That result in a substantial inequality between the parties

# Conclusion of the contract

- Conclusion of the PPP contract depends on the quality of the planning and preparation steps taken at inception phase and at bidding stage
- Establishment of a timetable for approval or procedures required to conclude the contract
- PPP Unit assistance to contracting authority helps to keep the negotiation process on track
- Use of standard clauses or template contracts (FIDIC, World Bank) may reduce the risk of delay



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# Corporate structure of the private partner

- Domestic legislation may set forth various requirements regarding the establishment of the private partner
- PPP contract would elaborate further on the rules applicable to the private partner (« special purpose vehicle », SPV)
- Registration of the investment and the SPV could be merged to gain time



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# Financial arrangements

- Payment to private partner may differ depending on the type of PPP project (Concession PPP or non-concession PPP)
- PPP contract should contains detailed provisions dealing with payments or financial transfer between the contracting authority and the private partner / other parties



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# Variations orders at construction stage

- Contract shall set forth the circumstances under which the contracting authority may order variations
- Contract shall clarify the financial consequences of such variations (which party shall bear the costs)
- PPP contract should contain incentives for variations proposed by the private partner that lead to cost decrease in the project



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# Operation phase

- Risk of failure to complete the project ceases to exist: PPP contract may allow for construction companies to leave the project company



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# General contractual arrangements : the issue of subcontracting

- Subcontracting: transparency standards are very important
- Disclosure of information from the contracting authority at bidding stage, and
- Disclosure of information from the private partner, at all stages, to prevent the risks associated with subcontracting :
  - Non respect of laws,
  - Non adherence of subcontractors to code of conduct,
  - Potential conflict of interest between subcontractors and private partner



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# Dealing with changed circumstances: the case of unexpected changes in economic conditions

- Unexpected changes in economic conditions
  - Adjustment to the contract may be necessary :
    - Circumstances leading to an adjustment to the contract should be clearly stated in the contract or in the law
    - PPP contract should set forth the procedure for triggering the adjustment process
    - The range of the admitted contract modifications should be strictly defined (no more than a percentage of the contract value as agreed in the bidding submission for instance). New PPP contract award is necessary otherwise



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# Extension of the PPP contract

- Extension can be used as a compensation mean by the contracting authority :
  - for unexpected downside revenue flows, including those due to regulatory price and tariff control measures exceeding the margin contemplated in the contract
  - for construction delay or cost overruns due to unanticipated adverse conditions on the construction site (e.g. geological or meteorological)
- Transparency commends the inclusion in the PPP contract or in the law of the circumstances allowing for an extension of the PPP contract



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# Termination of the PPP contract

- Termination is a last resort measure
- New ground in the Legislative Guide: serious violations of the country's criminal laws by the private partner and its agents, or a conviction under the private partner's national law or a third country's law.



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# Where to get more information

- <http://www.uncitral.un.org>
  - One-stop-shop for legal texts in the 6 official UN-languages
- [uncitral@un.org](mailto:uncitral@un.org)
  - Email us when you have specific queries
- THANK YOU !



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