

SECOND INTERNATIONAL CONFERENCE ON
BUILD-OWN-TRANSFER (BOT) PROJECTS

Cairo, 7-9 October 1997

1997
1997

POSSIBLE METHODS AND PROCEDURES
FOR SELECTING SPONSORS
OF INFRASTRUCTURE PROJECTS

presentation by

José Angelo Estrella Faria *
Legal Officer
International Trade Law Branch
Office of Legal Affairs
United Nations

* The views expressed in this presentation are those of the speaker and do not necessarily reflect those of the United Nations.

TYPES OF PRIVATE INVESTMENT IN INFRASTRUCTURE

- **“Privatization”**

Purchase of public utilities enterprises.

Common award method: public auction and award to the highest bidder.

- **“Licensing”**

Provision of public services without development of infrastructure.

Common award methods: Public offer to interested parties who satisfy the qualification requirements and pay the licence fee (if applicable) set forth by the law or established by the licensing authority.

- ***Construction and operation of public infrastructure.***

“Concessions of works and services”

Common award methods similar to those that govern public procurement (e.g. ranging from negotiation to structured competitive methods, such as tendering proceedings).

GENERAL OBJECTIVES OF SELECTION PROCEDURES

Economy

- Selecting project sponsors capable of performing works and delivering services of the desired quality at the most advantageous price and upon the most advantageous contractual terms.
- Best achieved by means of procedures that promote competition among prospective project sponsors.

Efficiency

- Selecting project sponsors within a reasonable amount of time, with minimal administrative burdens and at reasonable costs both to the awarding authority and to participating contractors or suppliers.

Integrity

- Fair treatment of prospective project sponsors.
- Elimination of abuses of the selection process by persons administering it or by companies participating in it.
- Selection decisions taken on a proper basis.

Transparency

- Fully disclosure of the rules and procedures to be followed by the awarding authority and by prospective project sponsors.
- Keeping record of the procedures.

PREPARATIONS FOR SELECTION PROCEDURES

Particular aspects to consider:

- Complexity and scale of infrastructure projects;
- High costs incurred by project sponsors in formulating proposals;
- Relatively higher risk that a selection procedure may not lead to a contract award than in more traditional forms of procurement.

Important preparatory decisions:

- Appointment of the authority to conduct the selection procedures;
- Allocation of adequate administrative and personnel support to conduct the selection procedure;
- Careful consideration of the technical, economical and financial assumptions of the project;
- Clear definition of the proposed role of the private sector.

ALLOCATION OF RESPONSIBILITIES BETWEEN THE PUBLIC AND THE PRIVATE SECTOR

TRADITIONAL PROCUREMENT	OUTPUT-BASED PROCUREMENT
The Government assumes the position of a <i>maître d'ouvrage</i> .	The Government transfers the direct responsibility for managing the project to the project sponsors.
The selected contractor carries out the function of performer of the works.	The project sponsors are responsible for devising the best solution for meeting the Government's need.
The procurement procedures emphasize the inputs to be provided by the contractor, with the awarding authority establishing clearly what is to be built, how and by what means.	Emphasis on the output expected from the project (i.e. the services or goods to be provided) rather than to technical details of the works to be performed or means to be used to provide those services.
The Government is responsible for ensuring that the specifications are adequate to the type of infrastructure to be built and that such infrastructure will be capable of being operated efficiently.	The Government is ultimately accountable to for the quality of the works and services, but the private sector will bear the risks that might result from the inadequacy of the proposed solutions.

CHOICE OF A SELECTION METHOD

Choice of two main types of procedures:

- competitive procedures
- negotiated procedures

Competitive procedures

Formal procedures, objectivity and predictability provide optimal conditions for competition among project sponsors.

Main characteristics are:

- Solicitation of tenders from a range of companies;
- Formulation of proposals on the basis of specifications and contractual terms and conditions specified by the awarding authority in tender documents;
- Examination, evaluation and award in accordance with essentially objective criteria and procedures that are set forth in the procurement laws or in the tender documents.

Intrinsic advantages of competitive methods:

- Widely recognized as generally most effective in promoting competition, economy, efficiency and transparency in procurement;
- Competitive methods are recommended by international organizations, such as the World Bank, UNIDO and UNCITRAL.

Further reasons for preferring competitive methods over negotiations:

- **Negotiations require highly skilled personnel with sufficient experience in negotiating complex projects;**
- **Negotiations require a well structured negotiation team, clear lines of authority and a high level of coordination and cooperation among all the offices involved;**
- **Negotiations do not ensure the level of transparency and objectivity that can be achieved by competitive methods;**
- **Negotiations carry a higher risk of abusive or corrupt practices.**

DEVISING SUITABLE COMPETITIVE PROCEDURES

- Under most national laws tendering procedures were originally devised to suit the Government's procurement needs for goods, constructions or services.
- Traditional competitive procedures (e.g. tendering) for complex projects may be lengthy and cumbersome and in some cases may not allow for the desired flexibility to consider alternative proposals or review the assumptions of the project.
- Special adjustments may be needed so as to adapt the tendering method to the particular needs of privately-financed infrastructure projects.

PRE-SELECTION OF PROJECT SPONSORS

Reasons for requiring pre-selection:

- Reducing candidates to a manageable number;
- Facilitating the evaluation of proposals;
- Fostering the confidence of project sponsors.

Initial invitation

- Advertise in such manner so as to reach an audience wide enough to provide an effective level of competition.
- Provide a set of pre-selection documents to candidates.
- Identify the infrastructure to be built or renovated and contain information on other essential elements of the project.
- Describe the services to be delivered by the project company.
- Set out the proposed financial arrangements (e.g. whether the project will be entirely financed by user fees or tolls or whether public funds may be provided as direct payments, loans or guarantees).
- Where already known, provide a summary of the principal required terms and conditions of the contract to be entered into as a result of the selection proceedings.

Typical pre-selection requirements:

- Professional and technical competence;
- Financial resources, equipment and other physical facilities;
- Managerial capability, reliability, experience, reputation;
- Undesirability of domestic preferences as a pre-selection criterion.

Contribution towards tendering costs

- The awarding authority may be authorized to consider compensating prequalified tenderers if the project cannot proceed for reasons outside their control; or
- For the costs incurred by them, when justified in a particular case by the complexity involved and the prospect of significantly improving the quality of the competition.

Pre-selection procedures

- Requests for clarification of the pre-selection documents (responses to requests expected to be of interest to other project sponsors should be communicated to all project sponsors that received the pre-selection documents).
- Consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.
- Limit the prospective tenders to the lowest possible number sufficient to ensure meaningful competition (e.g. three or four).

Final selection procedures

- The awarding authority solicit proposals relating to the output requirements as well as to the contractual terms and conditions of its supply.
- Proponents are invited to a conference to discuss the output requirements. If output specifications need to be amended, a revised set of solicitation documents is sent to the pre-selected proponents.

Feasibility studies by proponents typically cover the following:

- (a) Commercial viability;**
- (b) Engineering design and operational feasibility;**
- (c) Financial viability;**
- (d) Environmental impact.**

Final solicitation documents typically contain

- (a) Instructions for preparing proposals;
- (b) Information concerning the scope of the project;
- (c) Description of the manner in which alternative tenders are to be evaluated and compared;
- (d) Information concerning the contractual arrangements envisaged by the awarding authority;
- (e) Information regarding the assets and property to be transferred to the Government at the end of the concession and possible alternative, supplementary or ancillary revenue sources;
- (f) Indication of minimum criteria of responsiveness.

- *Submission of proposals*

Technical proposals typically include elements such as:

- (a) Specifications and schedule of works;
- (b) Feasibility and other studies;
- (c) Description of services to be provided and applicable quality standards;
- (d) Description of maintenance services and standards.

Financial proposals typically include elements such as:

- (a) Proposed tariff or price structure;
- (b) Proposed duration of the concession;
- (c) Level of governmental financial support required for the project;
- (d) The extent of risks assumed by the project sponsors during construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees to meet those risks.

Evaluation criteria

In the award of public works contracts the decisive factor is often the global price offered for the construction works.

Privately-financed infrastructure projects involve elements of both construction and services management and require a number of other factors to be considered in addition to the construction and operation cost and the price to be paid by the users.

For infrastructure projects, the evaluation criteria typically combine the following factors:

- (a) The effectiveness of the proposal submitted by the project sponsors in meeting the needs of the awarding authority;
- (b) The proposed tariff structure including the proposed adjustment;
- (c) The soundness of the proposed financial arrangements.

Opening, comparison and evaluation of proposals

- The awarding authority establishes a threshold of minimum requirements for responsiveness.
- The awarding authority rates each technical proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals.
- The awarding authority eliminates the non-responsive proponents.
- The awarding authority compares the financial proposals of the responsive proponents and identifies the “preferred proponent” (“interim award”).
- The awarding authority and the preferred proponent negotiate the particular terms of the contract.
- No changes aimed at making an unresponsive proposal responsive should be sought, offered or permitted during these negotiations.

EXCEPTIONS TO COMPETITIVE METHODS

Circumstances authorizing the use of negotiated methods

- (a) For the award of projects for which it is not possible to obtain competitive proposals or for which competitive proposals would not lead to satisfactory results, due to exceptional circumstances;
- (b) In emergency situations, so as to meet an impending need for ensuring immediate provision of the service, which could not await tendering proceedings;
- (c) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;
- (d) If only one application to prequalify is submitted or only one project sponsor meets the prequalification requirements. In such a case, the awarding authority may require the project sponsor to submit a proposal, which if found to be responsive, may serve as the basis for the negotiations;
- (e) If, after pre-selection of more than one proponent only one submits a tender which is found by the awarding authority to be responsive.

Unsolicited proposals

Two basic approaches:

- Direct negotiations with the proponent;
- Competitive selection upon confirmation of public interest in the proposed project.

* * *