

## DISCUSSION PAPER

# Unsolicited Proposals in Infrastructure Procurement: A growing reality for governments, requiring robust management frameworks

Laura Turley  
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## 1. Background

In February 2015 the Public-Private Infrastructure Advisory Facility (PPIAF) published *Unsolicited Proposals (USPs) – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned*.<sup>1</sup> The report outlines the global trends in the use of unsolicited proposals (USPs), both in terms of the number of countries formally and informally accepting USPs into their infrastructure planning and the quality of processes and frameworks employed for governing them. The report also presents some of the “key factors” governments must consider to make informed decisions about the use of USPs in infrastructure procurement.<sup>2</sup>

The main message of the report is that we need to accept that USPs exist and that their presence is only on the rise. Government officials regularly deal with USPs and can expect to continue to have to manage them in the future. The best approach might, thus, be to develop robust frameworks for managing them, and to have a differentiated approach based on the maturity of the private-public procurement (PPP) market in a particular country.

<sup>1</sup> The full report was prepared by Rebel ([www.rebelgroup.com](http://www.rebelgroup.com)) for the Public Private Infrastructure Advisory Facility

<sup>2</sup> The full citation for the report under discussion is: Public Private Infrastructure Advisory Facility (2014). *Unsolicited Proposals: An Exception to the Public Initiation of Infrastructure Procurement*. Washington D.C.; The World Bank Group.

This short commentary provides a synopsis of the salient features of the PPIAF report, and concludes with a discussion on the relevance of USPs to sustainable public procurement—that is, public procurement that optimizes value for the money across *the life cycle* of the asset and not just at the point-of-purchase.

## 2. What Are USPs?

Private sector participation in infrastructure is most often structured in the form of solicited procurement and contracting processes. These processes adhere to market competition and are regulated by public financial management or procurement-specific laws. Typically, the government identifies its infrastructure priorities in consideration of the budget and then issues a request for proposals (RFP), a request for expression of interest (EOI) or simply a public tender to the market. Subsequently, an open and competitive tendering process takes place, whereby the private sector entities submit technical and financial bids. A final evaluation is made based on delivering value-for-money for taxpayers and (ideally) for society as a whole.

In the case of an unsolicited proposal (USP), a private sector entity reaches out to the government with a proposal to develop an infrastructure project. In such cases, it is the private sector entity (“USP proponent”) that initiates the process, as opposed



to the public sector entity (“authority”). Often, a USP will propose a project that is not within the government budget or policies. A USP may contain fully developed plans for an infrastructure project or be nothing more than a mere idea or concept when it is presented to the government.

*“USPs are often limited to brochures, letters of intent, high-level plans, memoranda of understanding, etc. Too often and too easily, governments go along with the salesmanship of private firms proposing an idea rather than a fully developed project on which the government can do its due diligence.” —PPIAF, p. 26*

### 3. What Are the Motivations for Using USPs?

For the private sector, the market appetite for USPs is directly dependent on the ability to make sufficient return on project investment. Securing large public infrastructure projects is a clear motivation in itself. Their motivations will be different depending on whether or not the government has a USP framework in place and how clear its legal provisions are. For example, it is shown that where well-developed USP frameworks exist, the private sector is discouraged from undertaking opportunistic business and tends to be more genuinely interested in long-term, value-for-money projects.

From the public sector perspective, USPs can seem desirable insofar as they address the lack of financial and human capacity in the public sector to identify, prioritize and procure infrastructure projects. It is also appealing for them to consider side-stepping the lengthy competitive processes in order to start infrastructure projects more quickly—all while bringing in the private sector’s innovation and knowledge for project-specific solutions. It is also (wrongly) believed that USPs can deliver public infrastructure without any cost to the government or public at large (a common misconception in many PPPs, in fact).

Furthermore, USPs often pop up when governments are experiencing particular stresses—such as the immediate need for the exploitation of new-found natural resources, following a natural disaster, or for upcoming domestic or global

events. Naturally, under such circumstances public sector officials facing such resource and time constraints can believe that USPs are a shortcut for implementing PPPs and a “quick win” of sorts, and have subsequently encouraged their governments to formalize processes for dealing with USPs.

#### **Box 1:** Case Study: Port Privatization in Djibouti Using a USP

The privatization of Djibouti’s main port, Port Autonome International de Djibouti (PAID), resulted from a direct negotiation with Dubai Ports International (DPI). With a quest to become a key player in the international arena, DPI approached Djibouti’s government with the opportunity to take advantage of Dubai’s economic power through a partnership. While many international aid providers and financial sponsors recommended issuing an open tender process, Djibouti’s government instead opted to negotiate a 20-year management contract with DPI.

Overall, however, there is no one “type” of government that engages in USPs more than others. A wide variety of countries accept and engage with USPs, just as their particular motivations will depend on circumstance. Countries vary widely across geographies (the PPIAF report focused on Africa, Asia, Latin America and the Caribbean), across income levels (low-, middle- and high-income countries have all accepted USPs) and also in terms of their PPP legal and institutional capacities and the maturity of their PPP markets.

### 4. Cause for Concern?

In both solicited and unsolicited approaches to project development and implementation, the interest of the government should be to develop good projects that achieve value-for-money across the life cycle of the asset for the taxpayers. There are reasons to be concerned that USPs may threaten this prerogative. Of particular concern are:

- Lack of transparency in selection and implementation of projects
- Avoidance of competition
- Avoidance of due diligence processes
- Opportunities for corruption and political patronage



- Acceptance of poor quality projects (design and/or execution) that do not even meet minimum requirements of any sort, in the name of expediency

These significant issues enforce the perception that USPs often do not serve the taxpayer’s interest. Furthermore, the very governments that lack the capacity to identify, organize and plan infrastructure will be afflicted by those same capacity gaps in managing and processing USPs. And while one might think that USPs deliver, at least, cutting edge innovations, it has been shown that USPs are not often particularly innovative—particularly in less developed infrastructure/PPP environments. Indeed, the World Bank prohibits USPs entirely in the projects they fund.

However, as the PPIAF report reminds us, USPs are a reality in most countries. The concerns highlighted above only demonstrate the need for countries to adopt formal USP frameworks that explicitly impose minimum requirements for processing USPs. The PPIAF report makes important contributions to this discussion on this front.

*On the need for a formal USP framework:*

*“Such a framework acts as a check against inappropriate proposals submitted by vested interests, and empowers officials to reject such proposals on the basis of a technocratic and rule-based approach. Preferably, the framework defines a centralized entry point for USPs, because decentralized models complicate the consistent enforcement of the framework, and make the system less transparent and more prone to corruption.” —PPIAF, p. 21*

The PPIAF report is one of the first to document how governments are actually managing USPs in practice. The conclusions reflect the experiences of 21 different countries (informed by questionnaires, desk top research or both) across Latin America and the Caribbean, Asia and Africa. The sample of countries used in the report represent a mix

of experiences with USPs across parts of the developing world. Something the countries all have in common is the existence of significant gaps in the availability of public infrastructure, hampering economic growth.

**Box 2: PPIAF Report Findings in Numbers**

Since 2007 there has been an increase in the number of countries with formal mechanisms to regulate USPs and overcome challenges associated with them.

**85 per cent of the countries reviewed in the study have chosen to allow USPs.**

This could be through policies, guidelines, directives, circulars, legislative changes to existing public procurement and/or PPP laws, or new laws and regulations. In fact,

**70 per cent of the study countries have developed legal frameworks for managing USPs.**

So, while the trend is toward increasing management frameworks and process, it is still the case that

**1/3 of the countries apply regulatory frameworks that are not specific to USPs.**

This could imply that USPs are not explicitly banned by the relevant procurement or PPP law, or that general procurement regulations apply to USPs, some of which even allow direct bidding (e.g., sole source). In countries with low transparency and sophistication in managing PPPs, this raises concern about value-for-money.

What is clear from figures presented in Box 2 is that more and more countries have formal mechanisms and frameworks for managing USPs. Indeed, this is part of a larger trend towards the strengthening of PPP frameworks (legal, regulatory, institutional) in the sample countries and globally—which has indeed served to boost the noted increase in national USP frameworks.

In terms of the types of frameworks in place and commonalities between different country approaches, some of the qualitative trends are presented in the table below.





**Table 1:** Global Trends in USP Frameworks

FEATURE OF USP FRAMEWORK	GENERAL TREND
Definition of USP	Countries usually require USPs that are: (1) consistent with long-term national infrastructure plans and (2) not part of the existing priorities of the government.
Requirements for Submitting a USP	<p>Most USP frameworks contain requirements for submissions of USPs to include, for example:</p> <ul style="list-style-type: none"> <li>✓ Feasibility studies</li> <li>✓ Financial models</li> <li>✓ Cost-benefit analyses</li> <li>✓ Risk allocations</li> <li>✓ Business plans</li> </ul> <p>These and other requirements help to ensure that proposals are of a certain quality and to deter proposals that are not serious.</p>
Procedure for Managing USPs	<p>Most USP frameworks define a step-by-step procedure for managing USPs. Such pre-determined procedures help officials deal with USPs as objectively as possible.</p> <p>The procedure generally includes a way to introduce competition once a USP proposal has been accepted by the government. The most common mechanisms are:</p> <p><b>Swiss challenge:</b> An open tender process is conducted, in which the USP proponent has the right to match the winning bid in order to win the contract.</p> <p><b>Bonus system:</b> An open tender process is conducted. In the evaluation of the bids, the USP proponent receives bonus points (generally 5–10 per cent of the points), giving him an advantage over other bidders.</p> <p><b>Automatic short-listing:</b> This option applies to a multistage tender procedure. The USP proponent does not have to pass the preliminary stages of the procedure, but is automatically invited to the last stage, in which the remaining bidders submit their best and final offer.</p> <p><b>Regular procurement:</b> An open tender process is conducted in which the USP proponent competes on equal terms with the other bidders.</p>
Protection of Intellectual Property Rights & Reimbursement of Project Development Costs	<p>In only half of the countries surveyed, intellectual property rights for the proposed infrastructure are protected.</p> <p>In some countries, project proponents are reimbursed for their development costs if they do not win the bid; in other countries, there is no reimbursement.</p>

## 6. Recommendations

The PPIAF report identifies challenges and concerns with the USP approach, as highlighted in Section 4 above. At the same time, it is clear that USP incidence is on the increase and, indeed, the respondents to the report surveys claimed they were overwhelmed by the sheer volumes of USPs their offices receive. Therefore, it is suggested to “accept USPs as an exception” and to explore ways to improve the management of USPs by governments in developing countries.

*“The nature of the private sector is to be proactive in the face of challenges and opportunities, which is demonstrated by the multitude of USPs submitted to governments worldwide.” —PPIAF, p. 37*

The following summarizes the recommendations made by PPIAF: specific practical suggestions to achieve key factors.

- i. **Attract the right kind of private sector interest** (i.e., long-term, genuine) by having a robust and well-operating USP framework in place. Items to consider are: predetermined policies on intellectual property and



reimbursement, clear processing procedures and timelines from government, and removal of any legal ambiguity.

- ii. **Dissuade low-quality, opportunistic USPs** by putting in place sophisticated minimum requirements for submissions. Items to consider are: prequalify bidders based on technical capacity and a proven track record, request the project proponent shoulder the initial transaction costs (to be reimbursed should they win the contract) and ensure international companies are obliged to build local capacity.
- iii. **Build public sector capacity** to manage and implement infrastructure projects through the solicited approach first and foremost, as this requires high levels of skill in project development. Subsequently, capacity on PPPs and USPs can be honed. Items to consider are: subject USPs to competitive processes as a way to compensate public sector capacity and use transaction advisors to build capacity “on the job.”
- iv. **Ensure public sector coordination** of USPs. Items to consider: process all USPs through a central cell/unit that has experiences with PPPs, get government appraisal of fiscal impacts of the project before further consideration.
- v. **Maximize the clarity of procedures** surrounding USPs by subjecting them to the criteria of any other solicited project, as much as possible. Items to consider: prequalification criteria, evaluation and award procedures etc., consistent use and enforcement of competitive procedures for USPs and avail services of probity advisors for accuracy in execution of tasks.
- vi. **Always implement a competitive procedure** following a USP proposition in order to arrive at a fair market price. Items to consider: provide sufficient time and relevant information to all competitors to develop bids; ideally, avoid reward mechanisms in the process (like bonus points or Swiss competition) to avoid distorting competition—instead, opt to allow the proponent to participate in the final round of

bidding; reimburse project development costs where possible; and, as part of due diligence, predetermine realistic deal terms, financing, reasonable rates of return or comparable pricing parameters as a benchmark to ensure a competitively priced bid follows from USP processes.

**Box 3: Case Study: A Legally Robust USP Framework Encourages Private Sector Interest in the Philippines**

The notion that a well-regulated USP framework encourages private sector interest and confidence is demonstrated by the example of the NLEX-SLEX connector road in the Philippines. In this case, the USP proponent had several options to pursue a concession of the connector road, including a contractual option to extend the existing alignment. However, the USP proponent preferred a well-regulated unsolicited approach to the contractual option, because it provided a sound legal basis for awarding a concession, even though it would involve eventual exposure to competition in the form of a Swiss challenge.

- vii. **Demand sustainability, quality and innovation.** Items to consider: conduct independent feasibility studies or audit that of the proponent’s, hire external advisors, use best practice in PPP and model contracts.
- viii. **Cover the project proponent’s transaction costs.** Items to consider: get project proponents to pay a fee for submission of proposal to cover costs of evaluation and minimize opportunistic submissions; have the winning bidder reimburse the project proponent for some portion of the value they have provided.
- ix. **Allocate risk effectively** through feasibility studies, clear regulations and strong procedures. Items to consider: establish clear rules on whether government contribution is allowed or not, always follow competitive procedure if government support (grant, subsidy, loan or other) is required and source external expertise when such expertise is required.
- x. **Create transparent processes** with clear descriptions of procedures to manage USPs. Items to consider: enforce minimum requirements, communicate the framework



to all interested parties and the public, incorporate “blind reviews” of proposals or have two independent teams review proposals, use probity officers to ensure fair treatment throughout process.

## 7. A Differentiated Approach

Although the above recommendations are valid in all country contexts, the PPIAF takes the discussion a step further by suggesting priorities for countries at different levels of public capacity and, specifically, PPP maturity. In the full report, sample countries are scored using “key factors.” Below is a summary of the main conclusions.

For countries with low public capacity in the PPP project cycle →

- Introduce and enforce a simple and clear set of rules and procedures for the USP process.
- Obtain capacity to manage USPs (either internally or externally).

For countries with some limited capacity in the PPP project cycle →

- Establish a USP framework with strict minimum requirements and a clear and competitive procedure—and enforce both.
- Establish an empowered PPP unit to lead the USP process. This unit must have, or build, capacity to manage long-term PPP contracts.

For countries with well-developed capacity in all areas of the PPP cycle →

- Focus on highly innovative USP projects.
- Limit the USP procedure to “unique and innovative concepts or services not otherwise available to the government, and not resembling the substance of a recent, current, or pending competitive tender.”
- Develop other methods for the procurement of innovation, such as the use of performance-based specifications in tender documents and the use of competitive dialogues in pre-procurement.

## 8. USPs and Sustainable Public Procurement

More and more governments are seeing the value in procuring goods, services and infrastructure in a way that promotes value-for-money for society, not just at the point of commissioning but throughout the entire life cycle of the asset or service. This means taking into account (internalizing) the true costs of production, operation, repair and, eventually, decommissioning. The idea is that what seems to be a good deal in the short term is not likely to be the least expensive in the medium and long terms—and this is especially true of infrastructure. A “cheap” road might cost many times the construction cost in repairs and maintenance, not to mention the environmental externalities that go unaccounted for on the balance sheet. This type of longer-term thinking in public procurement is referred to as sustainable public procurement (SPP) and is becoming a priority for governments around the world.

The existence and increase of USPs raises several concerns from the point of view of SPP uptake and implementation. The following section presents some of these concerns and suggests ways forward for managing them.

### 9.1 Governments Are Best Suited to Define their Infrastructure Needs

The first step in the public procurement process consists of governments identifying and articulating exactly what it is that they, or the general public, require to function optimally. This is referred to as the needs analysis or needs assessment, and culminates in an infrastructure plan or project pipeline over a given period. The needs analysis would typically answer the questions: Do we need to buy something? Is it a priority given limited public budgets? And, what exactly do we need to buy?

As USPs do not originate as part of a government’s planning process, there is a legitimate concern that they do not reflect priority infrastructure needs. As the PPIAF paper informs us, most countries define USPs as those that are “not part of the existing priorities of the government.” While they need to be consistent with long-term infrastructure plans, they are by their very nature supplementary



to governments' priority infrastructure pipeline/ lists. Some countries allow USPs to be projects on their already-identified priority lists, but it is not the norm.

This raises the important question of whether the service proposed through a USP is sufficiently integrated with other sector plans for demand and benefits to be robust to changing circumstances and priorities. Moreover, unsolicited proposals may divert government attention (and financial resources) from a planned approach to infrastructure as a whole.

With regard to SPP in particular, the needs analysis step in the procurement cycle provides a crucial opportunity for encouraging the private sector to propose sustainable, innovative solutions. For instance, when procuring authorities are able to articulate their needs in terms of performance levels—or outputs—instead of prescriptive, technical inputs and processes, the private sector is given the space to draw on their expertise in products and services, and to innovate and collaborate to find the most suitable solution.

In SPP, the needs analysis step provides opportunities to define requirements based on outputs or performance, thus encouraging private sector innovation. For example:

*Instead of a government identifying the “need” for an oil furnace to heat a particular building, best practice is to express the “need” for a thermoregulation solution to keep the building at an ambient 24° Celsius.*

Public sector officials should focus first and foremost on the important work of infrastructure planning and project preparation. SPP practice involves a shift in the traditional procurement “mindset,” challenging governments to think of their needs in terms of outputs or performance, and to reflect on meeting their infrastructure needs for the long term. From the SPP perspective, governments already have their work cut out for them in improving the ways they articulate and ask the market for sustainable infrastructure that will deliver long-term value-for-money. In this light, USPs only serve to distract government officials from their important

public function and pose a threat to the realization of value-for-money across the life cycle.

## 9.2 USPs Strain the Public Sector Capacity to Practice SPP

The procurement of public infrastructure is a complex process, requiring skilled professionals. Typically, most countries lack the public sector capacity to prepare good infrastructure deals. It is increasingly clear that the major challenge in addressing the global infrastructure gap is not, in fact, a lack of available finance but, indeed, the lack of well-prepared, bankable projects. Particular challenging are the skills required to structure PPPs, conduct feasibility assessments, benchmark and set performance targets and, subsequently, monitor contract performance over the lifetime of the project.

With these and other skills already in short supply, USPs appear to be an expedient and easy way to build and operate infrastructure—which arrives seemingly “ready to go.” In other words, poor project preparation capacity serves to increase the attractiveness of USPs, and that is reason for concern.

Furthermore, in order to implement SPP, governments need to focus on bringing in criteria into the procurement cycle that: enhance the durability of infrastructure; reduce energy and material use; meet acceptable environmental and social standards; and source energy, materials, water, labour and other inputs responsibly. There are opportunities to practice SPP by bringing these and other considerations into the procurement cycle, in: the needs analysis, pre-qualification of bidders, technical specifications, award criteria or contract management. Although some governments have begun implementing SPP, there is still need for greater global appreciation of the benefits and a deeper understanding of value-for-money across the life cycle of the asset. This requires the professionalization of the procurement workforce.

Moving forward, public authorities undertaking infrastructure procurement functions must improve their capacity to design, select and monitor high-quality projects. In order to do so, user-friendly tools and resources for project preparation are becoming increasingly available. Examples include:





- Online platforms that propose templates and tools for early-stage project development, such as the International Infrastructure Support System (IISS), a cloud-based platform to support a standardized, template-based approach to project preparation.
- Standardization of approaches to ensure that projects are developed consistently, comprehensively and with due regard to environmental and social requirements, such as the sector-specific PPP Standards for Sustainable Development Goals being developed by the United Nations Economic Commission for Europe (UNECE) at the time of writing.

Using these and other tools will bolster the traditional procurement and PPP processes, ensure the USPs do not take up undue time and resources for public officials and help ensure that USPs are assessed in the context of already-established procurement priorities and methods. The application of these and other practical resources can improve skills in infrastructure project preparation and, ultimately, support sustainable infrastructure delivery.

## 10. USPs and Value-for-Money Across the Life Cycle

A clear concern with USPs is that they do not allow for price discovery, which is the primary reason the public sector issues public tenders—to allow the market to bid, complete and reach the most competitive price. If not subject to competition, USPs distort the market, as governments do not know if they are paying the most competitive price and realizing value-for-money.

As introduced above, SPP is concerned with value-for-money across the life cycle of the asset. Just as traditional procurement tends to assess bids based on the lowest price at the time of purchase, SPP practices seek to internalize the longer-term costs into the procurement cycle and to assess bids based on price only when quality and environmental, social and economic sustainability are already accounted for.

SPP is not, therefore, something that can be realized through one-off projects, but through the

consistent application of principles throughout the entire procurement cycle. So, even if a USP proposes a particularly sustainable project, it cannot ultimately have the same effect as the government re-evaluating these aspects of the procurement cycle in light of sustainable development: the needs analysis, prequalification criteria, evaluation methods and awarding procedure, and the application of rigorous environmental and social sustainability standards throughout the procurement cycle and across the whole project pipeline.

It is possible that part of the “uniqueness” of a USP will be related to impressively low environmental impacts (e.g., an energy- and resource-efficient building) or positive social benefits (e.g., a community centre). A USP might propose a solution to a local water crisis or reduce traffic jams or cut industrial emissions, but, in all of these cases, it is still essential that competitive processes be introduced. The government may not be aware that there are other ways to implement these ideas available on the market with other technologies and processes. It is worthwhile to subject all proposals to competitive bidding in order to ensure value-for-money and to be as transparent as possible in the public eye.

It is one thing for a project to deliver sustainability on a project-to-project basis (e.g., an eco-friendly stadium), but it is another thing for a government to apply the sustainability “lens” across the procurement cycle and practice value-for-money across the life cycle in a consistent manner (e.g., is a stadium even a priority at this point and time?). As discussed above, a large focus in SPP is the needs analysis, or making sure a government is able to articulate what its needs are in terms of results/outcomes instead of technical inputs/processes. A public need that is identified by the private sector may indeed be legitimate, but it deserves to be treated with caution.

What remains important, as explained in the PPIAF report, is for governments to uphold frameworks and processes that objectively assess whether proposed infrastructure will deliver this long-term value. Furthermore, getting long-term infrastructure priorities through the pipeline from conception to actualization should also be maintained above and beyond one-off infrastructure projects to ensure consistent and sustainable infrastructure planning.



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### Head Office

111 Lombard Avenue, Suite 325  
Winnipeg, Manitoba  
Canada R3B 0T4

**Tel:** +1 (204) 958-7700  
**Fax:** +1 (204) 958-7710  
**Website:** [www.iisd.org](http://www.iisd.org)  
**Twitter:** @IISD\_news

### Geneva Office

International Environment House 2  
9 chemin de Balexert, 1219 Châtelaine  
Geneva, Switzerland

**Tel:** +41 22 917-8683  
**Fax:** +41 22 917-8054  
**Website:** [www.iisd.org](http://www.iisd.org)  
**Twitter:** @IISD\_news



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