

# Review of Experiences with Unsolicited Proposals in Infrastructure Projects

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# Executive Summary

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## 1. Introduction and Approach

- 1.1. Private-sector participation in infrastructure is typically structured through a public-planning process in which the government initiates, develops and procures the project. An alternative is a privately initiated process referred to as an unsolicited proposal (USP). In the case of a USP, a private-sector entity (USP proponent) reaches out to the government with a proposal to develop an infrastructure project, without an explicit request from the government to do so.
- 1.2. As a follow-up to the 2014 Study on lessons learned from the use of USPs globally,<sup>1</sup> the Public-Private Infrastructure Advisory Facility (PPIAF) initiated an effort to develop guidelines for the development of a policy for managing USPs. The first phase of this involved an in-depth review of international experience with USP policy frameworks (the Experience Review). The findings are presented in this report.
- 1.3. The Experience Review was based on: (1) desk research on USP and PPP policy frameworks and USP projects; (2) a literature review of existing sources covering USPs (Literature Review); (3) qualitative interviews with public officials in 15 countries and private entities engaged in USPs; and (4) quantitative evidence based on questionnaires administered to public officials. The list of countries—all of which had USP frameworks—studied as part of the Experience Review is shown in Table 1.

Table 1: Countries Studied as Part of the Experience Review Report

Continent	Country
Asia	India, Philippines, South Korea
Africa	Ghana, Kenya, Senegal, South Africa, Tanzania
Latin America & Caribbean	Chile, Colombia, Jamaica, Peru
Developed Countries	Italy, New South Wales (Australia), Virginia (United States)

- 1.4. Although the Experience Review identified numerous best practices with USP policy frameworks, it has several limitations. Just like in the 2014 Study, data availability was a key challenge in most countries.

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<sup>1</sup> "Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned," PPIAF, August 2014, Accessible at: [http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals\\_PPIAF.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals_PPIAF.pdf)

## 2. Approaches to Managing Unsolicited Proposals

- 2.1. Governments use a range of approaches to manage USPs. The variety is likely a result of different motivations for accepting USPs, and different levels of public-sector capacity to manage and implement both publicly and privately initiated PPPs.
- 2.2. Three main variables define the different approaches to managing USPs.
  - **The extent to which the public sector conceptualizes the project:** Public-sector involvement in developing the project concept ranges from: (1) the public agency defines the project concept and allows private entities to submit proposals to implement the same project; (2) the public agency defines a broad infrastructure need for which the USP proponent proposes a project concept; or (3) the public agency accepts a USP that responds to neither a defined project concept nor an infrastructure plan.
  - **The extent to which the public sector develops the studies for the project:**<sup>2</sup> Governments differ in the extent to which they allow the USP proponent to prepare the feasibility studies and procurement documentation for the project. Some governments prepare the project themselves, in the same manner as for publicly initiated PPP projects. Other governments allow the USP proponent to develop the feasibility studies and procurement documentation.
  - **The extent to which the public sector introduces competition during procurement:** Governments differ in the extent to which they introduce competition during procurement, ranging from directly negotiating the contract (no competition) to organizing a competitive tender with no explicit advantage for the USP proponent (full competition with equal bidding conditions). An intermediate mechanism is to provide the USP proponent with an incentive (a bonus, the right to match,<sup>3</sup> or automatic shortlisting) to reward it for its initiative.

## 3. Motivations for Allowing Unsolicited Proposals

- 3.1. Governments typically use PPP delivery models to: (1) implement projects that lead to benefits for society, and (2) implement projects effectively and efficiently, such that they generate greater Value for Money than a conventional delivery model.
- 3.2. Government motivations for allowing USPs are typically based on the perception that USPs will allow them to solve certain structural concerns in the public delivery of

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<sup>2</sup> The Experience Review uses the expression “project development” or “project preparation” to refer to the appraisal and structuring phases of the project cycle (combined). The appraisal stage includes ensuring that the project is economically and financially feasible, commercially viable and fiscally responsible, and that it delivers Value for Money (VfM). The structuring phase refers to drafting the procurement documentation, including the PPP contract. PPIAF, *Public Private Partnerships Reference Guide 2.0*, World Bank, the Asian Development Bank (ADB) and the Inter-American Development Bank, 2014, Available at: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/09/08/00042464\\_20140908133431/Rendered/PDF/903840PPPoRefe0Box385311B000PUBLICo.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/09/08/00042464_20140908133431/Rendered/PDF/903840PPPoRefe0Box385311B000PUBLICo.pdf)

<sup>3</sup> The right to match, or right of first refusal, is also known in some jurisdictions as “Swiss Challenge.”

projects, or to address identified gaps. The Experience Review found two main motivations, and assessed their intentions against the evidence:

- **Motivation One: Lack of public-sector technical or financial capacity to develop projects.** Many governments believe that USPs will allow them to implement projects more rapidly and will provide access to finance that would otherwise not be available. Public agencies that lack the funds to hire advisors tend to rely on the USP proponent to develop the project.
  - **Assessment of the Motivation:** The Experience Review found that 1) USPs do not necessarily expedite project implementation; 2) USPs do not provide access to finance that would not have been available under a well-structured publicly initiated process; and 3) generating Value for Money from a project that initiated as a USP requires as much (if not more) public capacity than from a publicly initiated PPP project. Relying on the USP proponent to develop and structure the project weakens the public agency's knowledge of the project and therefore its negotiating position. This creates challenges in organizing a competitive tender and may result in lower-quality or higher-cost projects. Multilateral agencies and other technical and financial partners can play an important role in ensuring that project-development facilities are in place to assist the public sector with developing and structuring projects to overcome this first motivation for accepting USPs.
- **Motivation Two: Encouraging private-sector innovation.** Many governments believe that accepting USPs encourages private entities to submit innovative solutions to infrastructure challenges.
  - **Assessment of the Motivation:** The Experience Review found that most USP projects were not innovations. What was considered innovative was usually a project concept that was not part of the government pipeline. Governments often fail to consider alternative mechanisms to encourage innovation. These include organizing "idea competitions" with stakeholders and the private sector at the project-concept stage; using output specifications in PPP delivery models; and organizing multi-stage procurement processes. Additional details regarding these alternative ways to generate innovation are provided in the Guidelines.

3.3. **The Experience Review found strong indications that some public officials use USPs to avoid competition and potentially engage in corrupt practices.** The Experience Review distinguishes between proven corruption and corruption allegations. Several of the USP projects studied, particularly those that were directly negotiated, involved corruption allegations. This suggests that the perception of



corruption by stakeholders is high, regardless of whether accusations have been confirmed.

#### **4. Country Experience with USP Submission and Evaluation**

- 4.1. Introducing minimum submission requirements—as well as USP review fees—in the USP policy may reduce the number of low-quality and non-serious USPs received by public agencies.** Minimum submission requirements may thereby prevent public officials from being distracted from stated priorities, and ensure a better use of limited financial and technical resources. Jurisdictions with significant PPP experience tend to either not allow USPs or introduce high submission requirements in order to receive fewer USPs.
- 4.2. Uniformity in the application of the USP framework, in particular with regard to delivery models, helps avoid regulatory arbitrage.** The analysis of USP projects shows that introducing a USP framework that is applicable to both PPP delivery models and non-PPP delivery models helps avoid regulatory arbitrage (a USP proponent strategically altering the delivery model to avoid complying with elements of the USP framework).
- 4.3. Countries with highly decentralized USP submission processes experience the greatest challenges in the management of USPs.** Governments differ in the extent to which they centralize USP management in a single agency or department. The Experience Review found that allowing USPs to be submitted across multiple departments and levels of government creates coordination difficulties, which drain the public sector’s technical and financial resources and create a lack of clarity for private entities, who may be unsure as to which department to submit their USP. Centralizing the USP submission process helps to (1) simplify the coordination processes; (2) ensure that the approved USPs are in line with national plans; (3) promote consistency, transparency and accountability; and (4) prevent the need to build technical capacity in multiple locations.
- 4.4. Introducing a dedicated time window for USP submission (for example, quarterly or semi-annually) can help the government plan for additional resources needed to review USPs.** It can also create certainty for USP proponents, who may receive some assurance that their USPs will be reviewed in a timely manner.
- 4.5. Introducing clear evaluation criteria and procedures helps the public agency efficiently process USPs and ensure that those accepted are in line with public objectives.** The Experience Review found that a lack of clear evaluation criteria and procedures results in (1) public agencies accepting projects that are not in the public interest; (2) USPs stagnating for many years (neither being accepted or rejected), draining public-sector resources; and (3) USP proponents submitting proposals that may not meet the government’s requirements.

## 5. Country Experiences with USP Project Development

- 5.1. **Allowing the USP proponent to develop the project creates significant challenges in ensuring competition and generating Value for Money.** Some governments allow the USP proponent to lead project development after the USP was accepted by the public agency. The Experience Review confirmed that allowing the USP proponent to develop the project creates challenges with regards to (1) guaranteeing equal bidding conditions during the competitive tender; (2) ensuring that the project meets the public-interest criteria; and (3) developing public-sector capacity in project development. The Experience Review found strong indications that having the USP proponent lead the project development typically resulted in a tender process with limited or no competition, which was, in turn, likely to lead to lower Value for Money. Having the public agency in charge of project development and organizing a competitive tender was most likely to generate competition and Value for Money.

## 6. Country Experiences with USP Project Procurement

- 6.1. **Allowing the USP proponent to be involved in project development and structuring is likely to reduce competition during the competitive tender.** Competing bidders were found to be unlikely to bid for a project if they knew the USP proponent had likely structured the project to its advantage. Limiting the involvement of the USP proponent in project development has several advantages—it allows the public agency to (1) define the project scope to meet its objectives and strengthen its negotiating position; (2) create equal bidding conditions during competitive tender; and (3) build the public-sector capacity required to develop publicly initiated PPPs.
- 6.2. **When the public agency involves the USP proponent in project development, reimbursing costs incurred by the USP proponent enhances transparency and accountability.** Most governments with significant USP experience reimburse the USP proponent for costs incurred during project development. Private-sector experts indicate that they expect compensation for the costs incurred in developing feasibility studies. A failure to reimburse the USP proponent may create implicit expectations for reimbursement through other, less transparent means.
- 6.3. **When governments provide limited time for competing bidders to submit bids, competing bidders are unlikely to express interest.** Due to high bid-preparation costs, and the real or perceived disadvantage that competing bidders face compared to the USP proponent, private entities were unlikely to bid if they were not given sufficient time to prepare a bid. Private entities noted that they require three to six months (depending on the complexity of the project) to develop a competing bid.<sup>4</sup>

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<sup>4</sup> Interviews with private-sector firms, October to November, 2015.

- 6.4. **Directly negotiating a USP frequently leads to controversies or poorly structured deals.** The Experience Review found that USP projects procured through a direct negotiation between the public agency and the USP proponent were often subject to controversies, primarily over transparency and accountability concerns. Failure to introduce competition during procurement was found to increase the likelihood of poorly structured PPP deals, likely resulting in lower Value for Money.
- 6.5. **Organizing a truly competitive process is very challenging if the USP proponent is provided with the right to match; providing the USP proponent with a bonus may not necessarily distort competition.** The bonus mechanism does not necessarily distort competition if bonuses constitute small percentages. The Experience Review found that several countries did not provide any incentive mechanisms to the USP proponent during the competitive tender. These countries noted that incentive mechanisms encourage USPs for the “wrong reasons,” and that quality USPs could still be encouraged with the reimbursement of costs incurred during project development.
- 6.6. **It is particularly challenging to create equal bidding conditions when the USP proponent possesses a strong strategic advantage over its competitors.** The strategic advantage may be the result of the USP proponent owning land used for the USP; proposing the use of its proprietary technology; or having existing contracts on adjacent infrastructure projects and therefore benefiting from economies of scale or an in-depth knowledge of demand conditions. In those exceptional circumstances, a direct negotiation may be justified. However, a direct negotiation still requires significant involvement from the public sector and external advisors to assess cost reasonableness and ensure a PPP contract that is in the public interest.

## **7. Conclusions**

- 7.1. **PPP projects that initiated as USPs but were developed by the public agency and competitively tendered appear to perform no better or worse than publicly initiated PPPs.** The concern with USPs is not due to a private entity identifying and proposing a project concept; most of the challenges associated with USPs result from: (1) the USP proponent developing the project without close oversight from the public agency; (2) the public agency failing to introduce competition in the procurement process; and (3) the public agency failing to ensure transparency and accountability throughout the USP process.
- 7.2. **Projects in which the USP proponent was heavily involved in project development may lead to more implementation delays, renegotiations, or early terminations.** Implementation delays in many of the observed USP projects were primarily caused by concerns about transparency resulting from directly negotiated contracts. In some USP projects, the contract terms were unbalanced, prompting the need to renegotiate or even terminate the PPP contract during the operations phase.

- 7.3. Governments typically face a common set of challenges in managing and implementing USPs:
- **Creating equal bidding conditions in a competitive tender is challenging, particularly when the USP proponent was heavily involved in project development.** Providing the USP proponent with the right to match or a significant bonus also deters competition. Some governments have successfully used mechanisms that help foster competition. These include: (1) avoiding directly negotiating with the USP proponent; (2) not providing significant incentives to the USP proponent during a competitive tender; and (3) providing competing bidders with sufficient time to prepare a bid.
  - **Some public agencies receive many low-quality USPs that do not further the public interest.** Such USPs distract public officials from their stated priorities and divert limited financial and technical resources. Mechanisms that have allowed governments to overcome these challenges include: (1) Introducing targeted minimum-submission requirements; (2) requiring that the USP proponent pay a review fee at submission; (3) centralizing the USP submission process in a single agency; and (4) establishing a dedicated time window for USP submissions.
- 7.4. **Governments that lack the technical and financial capacity to identify, develop, procure and implement infrastructure projects often experience challenges in managing USPs due to the same lack of capacity.** The Experience Review did not identify one singular policy solution to address these challenges. The following three strategies, however, may allow governments to overcome these challenges:
- Some governments decide not to accept USPs, which allows them to avoid the challenges resulting from USPs. Some experts believe that this approach would lead to a limited number of projects in low-capacity jurisdictions.
  - Some governments allow USPs and seek the help of external advisors in developing and structuring projects, thereby contributing to equal bidding conditions during the competitive tender.
  - Other governments allow private developers to submit and develop USPs. These private developers take the lead in structuring the project and the PPP transaction, ultimately taking an equity stake in the project entity.
- 7.5. **The Experience Review confirmed that governments with significant PPP experience and technical capacity still sought mechanisms to encourage private-sector innovation.** The Experience Review found that these jurisdictions follow one of the following strategies:
- Some governments—including the UK, India, and most western European countries—strongly discourage USPs or do not allow them. These governments

seek other ways to generate private-sector innovation, ranging from “idea competitions” at an early stage, to output specifications and multi-stage procurement processes.

- Some governments—including Chile and Virginia and other U.S. states—allow USPs and either publicly develop the project or allow the USP proponent to develop specific studies while the public agency maintains a strong supervisory role.
- Some governments—including South Africa and Australia—approve only innovative USPs that show unique public benefits and the exceptional ability of the USP proponent to deliver the project.

7.6. **The Experience Review did not identify a perfect one-size-fits-all USP policy, but rather a range of potential strategies, varying according to governments’ motivations for accepting USPs and their level of technical capacity to implement projects.** These strategies act as the foundation for the Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects (the Guidelines).

# Experience Review

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In 2015, PPIAF launched an effort to develop policy guidelines for governments for the management of unsolicited proposals (USPs). The initiative consists of two key publications:

- **Review of Experiences with Unsolicited Proposals in Infrastructure Projects (the Experience Review):** The Experience Review examined best practices and international experience in implementing USP policy frameworks and USP projects. This report presents the findings.
- **The Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects (the Guidelines):** Based on the Experience Review, the Guidelines provide recommendations and considerations to assist governments in developing and operationalizing a USP Policy.

Governments are advised to read the Guidelines in parallel with the Experience Review.

## **Purpose of the Experience Review**

The Experience Review has the following objectives: (1) build on existing knowledge about USPs by reviewing previous initiatives undertaken by PPIAF and the World Bank Group; (2) examine experiences with USP projects and policies in both developed and developing countries; and (3) identify best practices for managing USPs and developing USP policies to inform the development of policy recommendations in the Guidelines.

# 1 Introduction

Private-sector participation in infrastructure is most often structured through a public-planning process in which the government initiates a project idea, develops the required studies, and launches a competitive-tender process to identify the most appropriate bidder. An alternative to this is a privately initiated process referred to as an unsolicited proposal (USP). In the case of a USP, a private-sector entity (USP proponent) reaches out to the government with a proposal to develop an infrastructure project, with an explicit request from the government to do so.

International approaches to managing USPs vary widely. In developing countries, USPs have raised questions about transparency, governance, and lack of competition.<sup>5</sup> Governments and multilaterals have sought best practices for: (1) ensuring Value for Money<sup>6</sup> from a USP project; (2) appropriately evaluating and integrating USPs into infrastructure plans; and (2) improving the policy environment for USPs, particularly with regard to transparency and fairness.

This chapter describes previous initiatives that were undertaken on this topic. It subsequently describes the methodology and approach used for the Experience Review, its limitations, its conceptual framework, and its structure.

## 1.1 Previous USP Initiatives

In 2007, PPIAF at the World Bank Group (WBG) commissioned a study (the 2007 Study) about the USP policies of several countries, including South Korea and Chile. The 2007 Study emphasized the importance of clear policy decisions for the treatment of USPs.<sup>7</sup>

In 2014, PPIAF commissioned a study about global trends in infrastructure policies relating to USPs. This culminated in the publication of *Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned* in August 2014 (the 2014 Study).<sup>8</sup> The most important findings of the 2014 Study included:

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<sup>5</sup> PPIAF, *Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned*, The World Bank Group (WBG), 2014, available at [http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals\\_PPIAF.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals_PPIAF.pdf) [last visited: January 2, 2016].

<sup>6</sup> “Value for Money (VFM) is the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user’s requirements,” World Bank Institute (WBI) and PPIAF, *Value-for-Money Analysis—Practices and Challenges: How Governments Choose When to Use PPP to Deliver Public Infrastructure and Services*, The World Bank Group (WBG), 2013, available at <http://www.ppiaf.org/sites/ppiaf.org/files/publication/VFM.pdf> [last visited: January 2, 2016].

<sup>7</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016].

<sup>8</sup> PPIAF, *Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned*, The World Bank Group (WBG), 2014, available at [http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals\\_PPIAF.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals_PPIAF.pdf) [last visited: January 2, 2016].

- The number of countries that formally allow USPs has increased since the publication of the 2007 Study;
- A lack of technical capacity to identify and prepare projects is a key driver for allowing USPs;
- USP frameworks face challenges, including lack of competition and transparency; perceptions of corruption and fraud; and low quality of infrastructure assets and/or services;
- Governments need formal policy frameworks in addition to practical measures and recommendations to improve their USP frameworks; and
- The strategy to manage USPs should be consistent with the legal, regulatory, procurement, and institutional capacity and maturity of the PPP market.

One of the key outcomes of the 2014 Study was to highlight the lack of guidance for governments developing USP frameworks. To overcome these challenges, the 2014 Study included the following recommendations:

- Develop guidelines to assist governments in developing USP policies based on international best practices;
- Improve institutional and technical capacity to implement USP projects; and
- Build stakeholder consensus and enforce USP processes as preconditions to implementing USP frameworks.

These findings and recommendations are the basis for both the Experience Review and the Guidelines.

## **1.2 Approach and Methodology for the Experience Review**

The Experience Review used an approach that was based on: (1) desk research on USP and PPP frameworks, and USP projects; (2) a literature review to identify existing knowledge about USPs; (3) qualitative interviews with public officials, private entities engaged in USPs, and experts in multilateral institutions; and (4) quantitative evidence based on questionnaires administered to public officials. The following section details the methodology.

### **1.2.1 SELECTION OF COUNTRIES**

The Experience Review selected 15 countries, based on factors such as geographical and income-level diversity; experience with USP frameworks and projects; availability of data; and willingness of respondents to participate in interviews (see Annex 1 for a detailed overview of the country selection methodology and the selection of countries).



### **1.2.2 LITERATURE REVIEW**

The Literature Review examined prior studies developed by PPIAF and the WBG. It also documented USP projects and countries' USP frameworks. Publicly available sources regarding USP implementation were used wherever possible to complement the findings. The studies examined in the Literature Review are documented in Part D of the Guidelines.

### **1.2.3 DESK RESEARCH ABOUT USP FRAMEWORKS AND ANALYSIS OF USP PROJECTS**

The Experience Review included extensive desk research on countries' USP frameworks and their experiences with implementing USP projects. Although documentation on USP policies was publicly available in most countries, information about USP projects was limited.

The Experience Review established criteria (at both the project and system levels) to determine whether USP projects had successful outcomes. These criteria included: (1) reasonableness of project costs and on-budget delivery; (2) on-time delivery of the project; (3) quality of service; and (4) impact of the USP project on the government's planning process, including efficiency during procurement (transaction costs and time).

Quantitative data for the above criteria was typically not available. The Experience Review therefore relied on indicators correlated to successful outcome criteria. The following indicators were used to guide the analysis of USP projects:

- **Speed of Implementation:** The Experience Review focused on time elapsed between USP submission, project procurement, and project implementation and operation. Speed of implementation was used as an indicator of public-sector efficiency and effectiveness, as well as project performance.
- **Competition:** The Experience Review used competition as a proxy indicator for reasonableness of project cost. It focused on: (1) whether a competitive tender was organized; (2) the extent to which competition was achieved (measured by the number of competing bidders); and (3) the frequency with which competing bidders won the contract (which indicated the government's ability to guarantee equal bidding conditions during the competitive tender).
- **Renegotiations:** For jurisdictions with a portfolio of operational projects, the Experience Review assessed the percentage of contracts that were renegotiated and compared the percentage of renegotiated contracts for publicly initiated projects and for USPs. The number (and overall percentage of) renegotiations was used as a potential indicator for effectiveness of the procurement process; bidding behavior by the USP proponent; and the public agency's negotiating position and ability to protect the public interest.

- **Transparency:** The Experience Review used corruption allegations or other public objections (legal or political challenges) as an indicator of lack of transparency and failure to appropriately disclose project information.

#### **1.2.4 EXPERT DISCUSSIONS AND INTERVIEWS**

Approximately 50 interviews with public-sector officials and private-sector experts were conducted. Experts from partner institutions such as the World Bank, International Finance Corporation, Southern African Development Community, and the Private Infrastructure Development Group were also interviewed. Numerous interviews were conducted with field-office experts with direct experience with USP project implementation.

#### **1.2.5 QUESTIONNAIRE SURVEYS AND FOLLOW-UP INTERVIEWS**

Two questionnaires were developed—one for public officials about the jurisdiction’s USP policy framework and its application in practice, and another one for public officials and private-sector professionals, in order to obtain detailed information about specific USP projects.

The questionnaires relied, as much as possible, on publicly available information. To complete them, the respondents were either sent the questionnaires or approached for an interview. Approximately 50 interviews (with both public-sector officials and private-sector experts) were conducted, and 19 questionnaires were completed and collected.

### **1.3 Limitations of the Experience Review**

Despite the in-depth review of country experiences, the Experience Review has several limitations. Data availability remained a key challenge in most countries, for the following reasons:

- **Political sensitivity:** Many jurisdictions experienced political and legal challenges—including allegations of corruption or government mismanagement—in the implementation of USP projects. Because of the sensitive nature of these projects, public officials were often unwilling or unable to participate in interviews.
- **Lack of Systematic Data Collection for USPs:** Most jurisdictions do not possess a comprehensive database or systematic manner for collecting project information for USPs. Most of the project data was derived from the experiences of public officials involved in the implementation of a project. Institutional memory was typically limited in cases where the public officials involved in a project had left their positions. Where information about USP projects was available, it was often inconsistent.

- **Lack of Systematic Data Collection for PPPs:** The Experience Review was not able to identify differences in Value for Money generated from publicly initiated and USP projects, because in most jurisdictions, structured data related to these projects' Value for Money was not available.
- **Time Constraints:** Many public officials and private-sector experts were not available for interviews. The public officials and private experts who were available typically had limited availability. Additional, lengthier interviews would have likely yielded additional information.

The lack of systematic data about both publicly and privately initiated PPPs resulted in challenges in creating objective comparisons and correlations between publicly initiated projects and USPs. The Experience Review was not able to determine the extent to which Value for Money (or the lack thereof) could be attributed to a project having been initiated (and developed and procured) as a USP. For example, was a suboptimal risk allocation that resulted in a renegotiation of a PPP contract the result of the fact that a project was initiated as a USP, or was it due to the public agency's general lack of capacity?

As a result of the challenges associated with quantitative data collection, the Experience Review focused on identifying policy decisions that: (1) helped mitigate or overcome some of the common challenges associated with USPs, and (2) helped ensure transparency, accountability, public interest, and Value for Money from a project.

## **1.4 Conceptual Framework**

In the publicly initiated PPP process, most public agencies conceptualize a project, undertake the required studies, and subsequently procure the project through a competitive tender. This approach has been widely recognized as the most likely to generate Value for Money and ensure the public interest. The main difference between publicly and privately initiated projects is that the latter allows a private entity to initiate and develop the project concept—typically a public-sector role.

Historically, some governments used sole-sourcing provisions to procure USPs due to either USP proponents claiming exclusive proprietary rights (for instance, for a technology or financing solution) or the lack of guidelines for managing USPs. In many instances, directly negotiated deals enabled corrupt and nepotistic practices. Typically, where USP projects were sole sourced or direct negotiated, the government had a limited role in preparing the project. Over time, many governments have realized that sole sourcing or directly negotiating need not be the default option for procuring USPs.

While the association of USPs with sole sourcing and/or direct negotiation has weakened, there remains no single approach for managing USPs. The variety of approaches derives from

governments' diverse motivations for pursuing USPs, as well as their differing levels of capacity with PPPs and USPs. Three main variables define the different approaches:

- **The extent to which the public sector conceptualizes and solicits the project:** Public-sector involvement ranges from: (1) defining the project concept and allowing private entities to submit proposals for the implementation of the project; (2) broadly defining an infrastructure need for which the USP proponent proposes a project concept; or (3) accepting a privately initiated proposal that responds to neither a previously defined project concept nor an infrastructure plan.
- **The extent to which the public sector develops the project:** Governments differ in the extent to which they allow (or require) the USP proponent to prepare the feasibility studies and procurement documentation for the project. Some governments develop the project themselves, in the same manner as in the case of publicly initiated projects, whereas others permit (or require) the USP proponent to develop all of the necessary studies and procurement documentation.
- **The extent to which the public sector introduces competition during procurement:** Governments differ in the extent to which they introduce competition during procurement. Introducing competition ranges from directly negotiating the USP contract (no competition) to organizing a competitive process without any explicit advantages for the USP proponent relative to competing bidders (full competition). Other mechanisms provide the USP proponent with a bonus and/or the "right to match" in order to reward the proponent for its initiative.

USPs that result from bilateral investment treaties signed by two governments represent a separate category of USPs. A USP submitted under a bilateral treaty is presented by a foreign company whose government has established a special relationship with a host country government. Such USPs could follow any of the approaches described above, but they typically differ in one crucial aspect—they often enjoy differential treatment, including exemption from general procurement laws and/or the USP policy framework. One of the case studies examined as part of the Experience Review and featured in the analysis of USP projects (the Standard Gauge Railway (SGR) between Nairobi and Mombasa, Kenya) was the result of a bilateral agreement between the Kenyan and Chinese governments. USPs submitted under bilateral agreements were not the focus of the Experience Review, because of the fact that they often bypass regular procurement regulations or the USP framework.

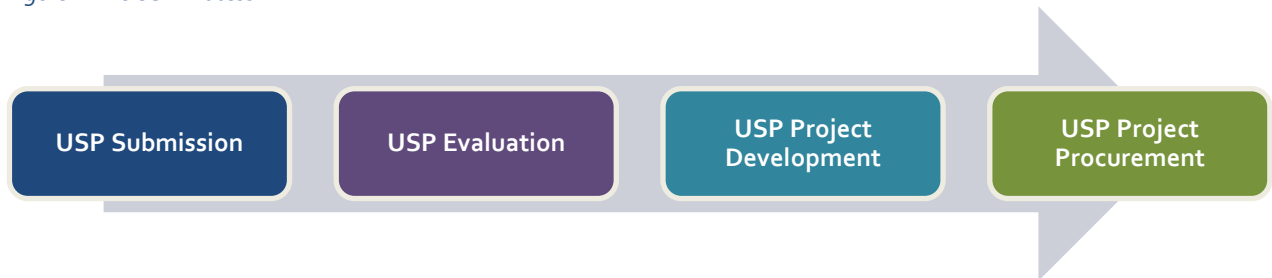
## **1.5 Structure of the Experience Review**

USP policy frameworks typically follow a five-stage project cycle: (1) submission of the proposal by the private entity; (2) evaluation of the USP by the public agency; (3) development of the

studies for the USP project; (4) procurement of the USP project; and (5) implementation of the project (the construction and operations phases).

The Experience Review found that none of the examined USP policy frameworks included clauses specific to USP project implementation (after contract signing). Indeed, most public agencies expect privately initiated projects to be monitored and supervised in the same way as publicly initiated PPP projects. While the results of the USP process are typically most easily observed in the project's construction and operations phases, they originate in the prior phases (project development and procurement). Because most USP frameworks do not include USP-specific provisions for the project-implementation phase, this Experience Review follows the first four phases of the USP process, as shown in Figure 1.

*Figure 1: The USP Process*



The Experience Review is structured as follows:

- **Chapter 2** introduces governments' motivations for allowing USPs. It also describes the extent to which USPs allow governments to address the underlying concerns that motivate them to accept USPs.
- **Chapters 3 to 6** analyze the challenges that governments face during each of the phases of USP management, as well as best practices for overcoming these challenges.
- **Chapter 7** is an overview of the key trends observed, including the major challenges with managing USPs, and potential best practices. This chapter ties together the key findings presented in chapters two through six, and the lessons for developing the Guidelines.

## 2 Motivations for USPs

This chapter discusses the motivations for using USPs, ramifications of the motivations, and key findings from country experiences.

### 2.1 Key Findings

- **Finding 1:** Experience shows that lack of technical and financial capacity to identify, develop and implement projects is a strong motivation to consider USPs.
- **Finding 2:** Experience shows that USPs are not necessarily easier or more convenient to implement than publicly initiated projects. Bypassing regular procurement regulations to implement USP projects risks causing public controversies that can delay the project and/or result in renegotiations several years later.
- **Finding 3:** Experience shows that some governments believe USPs provide them with access to finance. There are, however, no indications that USPs provide access to finance that would not have been available under a well-structured publicly initiated project.
- **Finding 4:** Experience shows that most USPs do not represent real innovations, but are simply projects that were not in the government's pipeline.
- **Finding 5:** There are indications that some public officials misuse the USP instrument to engage in corrupt and nepotistic practices, especially through avoiding competition. Many USPs are subject to corruption allegations that, although often unproven, show that USPs are highly sensitive to public-perception issues and vulnerable to being challenged in the future.

### 2.2 Overview

Governments' motivations for allowing or encouraging USPs are typically based on perceptions that USPs will allow them to solve certain structural concerns—such as the slow implementation of publicly initiated projects—or address identified gaps in publicly initiated and developed projects—such as lack of innovation. These are institutional motivations that may be formalized in USP frameworks or acknowledged by governments. The personal motivations of public officials and political-office holders also invariably impact the approach toward USPs. It essentially caters to vested interests, but is often camouflaged as one of the above two motivations.

The motivations described hereunder are derived from discussions with public officials and industry experts; formal proclamations and elements in USP policies and frameworks; and observable features of USPs accepted by governments.

It is important to understand USP motivations, because they influence how governments manage USPs. Additionally, USPs do not address all the motivations equally effectively. The following discussion provides evidence regarding the extent to which USPs are effective in meeting the underlying motivations.

Key motivations for governments to consider USPs include:

- i. **Overcoming lack of public-sector capacity:** Some governments lack technical capacity and financial resources to identify, develop, procure and implement infrastructure projects. These governments believe that USPs can help overcome public-sector capacity constraints.<sup>9</sup> Lack of capacity manifests in two common challenges—delays in implementing infrastructure projects, and an inability to develop bankable projects that can secure financing. However, as explained below, these reasons are merely symptoms of a deeper malaise, which is a lack of public-sector capacity.
- ii. **Harnessing private-sector innovation and creativity:** Many governments seek to harness private-sector innovation and creativity to solve infrastructure needs. This results from an understanding that the private sector can provide creative solutions to infrastructure problems that the public sector cannot develop itself.
- iii. **Enabling corruption and nepotism by avoiding competition:** A recurring theme in discussions with infrastructure professionals is the use of USPs to enable corruption or nepotism, especially when direct negotiation or sole sourcing is involved. Allegations of corruption are common in USP projects, and despite their unproven nature, indicate a strong perception of corruption and nepotism.

In exploring the evidence for the motivations, it was obvious that alternative (non-USP) solutions exist to address the underlying motivations. Although the Experience Review does not explicitly define these alternatives, they are acknowledged and briefly highlighted in the following discussion. The Guidelines, which provide recommendations regarding the development of a USP policy, address alternative options to USPs.

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<sup>9</sup> In the interviews as part of the Experience Review, many public officials expressed concern over the lack of public-sector capacity. Even a recent study funded by the United Kingdom's Department for International Development noted that countries adopt USPs in the belief that they help speed up projects. Cambridge Economic Policy Associates Limited (CEPA), *Mobilizing Finance for Infrastructure, A Study for the Department for International Development (DFID)*, 2015, page 52, available at [https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+\(DFID\)%2C+2015%2C](https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+(DFID)%2C+2015%2C) [last visited: January 4, 2016].

## 2.3 Country Experience

### 2.3.1 OVERCOMING LACK OF PUBLIC-SECTOR CAPACITY

Many governments lack the technical expertise and experience to develop projects successfully from beginning to end, or they lack the financial resources to hire external advisors to support them in developing and procuring projects. Countries with limited public-sector capacity—including **Kenya**, **Tanzania** and **Senegal**—typically rely on USP proponents to develop the projects, in return for which the USP proponents typically expect the projects to be awarded to them.

For some governments—including **India**, the **Philippines** and **Colombia**—public capacity constraints are characterized by limited expertise rather than its complete absence. For such governments, limited public-sector capacity is often reflected in long delays in implementing infrastructure projects. Alternatively, other governments may possess the required levels of public-sector capacity, but lack the resources to develop and implement the number of infrastructure projects required. These governments—which included **Chile** during the early years of its USP program—may use USPs to expand the number of projects that can be implemented during a short timeframe.

**Discussions with public officials reveal that many believe that the implementation of a USP will be more convenient, easier or faster than the implementation of a publicly initiated PPP project.**

These public officials see the publicly initiated approach—consisting of project development and competitive tender by the public agency—as too cumbersome. In **Colombia**, for example, the government has used USPs to speed up the implementation of priority highway projects (including those requiring contract extensions) under its fourth generation of concessions (4G program).<sup>10</sup> Indeed, Colombia's 2012 PPP law (Law 1508) allows USPs that are privately financed to take advantage of an abbreviated procurement process, suggesting that the government has intentionally structured its USP framework such that these USP projects can be implemented more rapidly.

However, evidence suggests that USPs are not necessarily a good solution for overcoming capacity constraints. Governments often overlook the fact that negotiating and implementing a project with the USP proponent can be equally challenging—if not more challenging—than publicly developing the project and organizing a competitive tender.<sup>11</sup> For instance, allowing

<sup>10</sup> Because Colombia's USPs have only recently reached financial close, it is too soon to tell whether they will run into any implementation difficulties for having been implemented "faster" than publicly initiated projects.

<sup>11</sup> Authors of the recent DFID study also make the observation that USPs can be "extremely complex and governments often do not have the requisite quality of in-house resource to negotiate successfully." Cambridge Economic Policy Associates Limited (CEPA), *Mobilizing Finance for Infrastructure, A Study for the Department for International Development (DFID)*, 2015, page 52, available at



the USP proponent to develop the project results in information asymmetries between the public agency and the USP proponent regarding project details (scope, design, construction and operation), making it more challenging for the public agency to actively structure a contract that delivers Value for Money. Successfully implementing a USP project also requires sophistication and expertise—potentially even more so than for publicly initiated projects, because the public agency will need to “catch up” with the USP proponent that has spent a significant amount of time developing the USP.

Furthermore, USPs are not necessarily easy and convenient for governments, nor do they consistently result in the faster implementation of projects. As shown in Annex 3, many USP projects took several years to reach operational stage after having been initiated as a USP. Two case studies from the Philippines have taken more than 15 years to become operational, with one of them yet to reach financial close. When USPs bypass procurement regulations, they risk causing public controversies that may further delay the projects. In **Kenya**, the government bypassed regular public-procurement regulations when it accepted a USP from the Chinese government for the Standard Gauge Railway (SGR) between Nairobi and Mombasa. Doing so resulted in several years of public controversy, delaying implementation of the project. Similarly, in **Ghana**, the Accra-Kumasi Highway USP has been delayed by more than 11 years, in part due to controversy over failing to competitively procure the USP.

Other studies have also concluded that USPs, especially those that are directly negotiated, are not implemented more rapidly.<sup>12</sup> A case study analysis conducted in 2014, sponsored by several African governments and multilateral institutions, found that USPs were not necessarily faster to implement. In fact, a comparison of the three case studies revealed that USPs took longer to implement.<sup>13</sup> The evidence from the Experience Review confirms PPIAF’s earlier finding that USPs may in the “early stages go faster but ... are ‘difficult’ and take longer overall.”<sup>14</sup>

Private-sector experts also dispel the notion that project implementation can be accelerated via a USP, especially through sole sourcing or direct negotiation. Some private entities acknowledge that it is in their best interest to follow transparent regulations and a competitive procedure. The latter not only creates opportunities for private entities to competitively bid for projects they may not have initiated, but also helps avoid delays and public backlash for projects for which they are USP proponents. This view is supported by a survey of U.S.

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[https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+\(DFID\)%2C+2015%2C](https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+(DFID)%2C+2015%2C) [last visited: January 4, 2016].

<sup>12</sup> John Hodges, *Unsolicited Proposals: The Issues for Private Infrastructure Projects*, The World Bank Group, 2003, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11305/263990PAPERoVPono10257.pdf?sequence=1> [last visited: January 2, 2016]; Peter BrockleBank, *Private Sector Involvement in Road Financing*, 2014, Africa Transport Policy Program Working Paper No. 1, page 84, available at <http://www.ssatp.org/sites/ssatp/files/publications/SSATPWP102-PPP.pdf> [last visited: January 2, 2016].

<sup>13</sup> Peter BrockleBank, *Private Sector Involvement in Road Financing*, 2014, Africa Transport Policy Program Working Paper No. 1, page 84, available at <http://www.ssatp.org/sites/ssatp/files/publications/SSATPWP102-PPP.pdf> [last visited: January 2, 2016].

<sup>14</sup> PPIAF, *Toolkit for PPPs in Roads & Highways*, 2009, The World Bank Group (WBG) page 81, available at [http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/toolkit\\_files/index.html](http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/toolkit_files/index.html) [last visited: January 2, 2016].

companies, where 70 percent of responding private entities favored competitive tender to direct negotiation of a USP.<sup>15</sup>

### **Some governments believe that they do not have access to finance for their publicly initiated projects.**

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Many times, governments' beliefs about access to finance are based on actual rejections from financiers. This makes them receptive to USPs that include a financing solution. For example, a perceived lack of access to financing was a key motivation for **Kenya's** government to accept a USP from the Chinese government for the construction and financing of the SGR project between Nairobi and Mombasa.

Some successfully financed USP projects appear not to have been financeable under non-USP implementation. Upon further review, it is evident that the USP proponent restructured the project to be financeable, including using a different scope and assumptions regarding government support. In fact, governments often fail to understand that challenges in securing financing are usually due to poor project structuring, in terms of design, revenue sourcing, government assurances, and credit support.

This is obvious from **Jamaica's** experience with North-South Link of Highway 2000, which had to be restructured to include a commercial real-estate component in order to make the project financially viable for the USP proponent. Evidence therefore does not suggest that USPs themselves solve financing challenges, but rather that better project preparation (feasibility studies and structuring) enhances a project's bankability. Developing bankable projects requires expert knowledge of technical and financial issues. Although USPs may possess these elements, the real solution is for governments to improve their project-development capacities.

During the Experience Review, many experts reiterated the importance of improving public-sector capacity to develop and procure infrastructure projects. While the absence of such capacity is a problem frequently identified in several previous studies,<sup>16</sup> it should not automatically legitimize an over-reliance on USPs. Most of the experts interviewed believe that multilateral agencies and other technical and financial partners are critical to helping governments overcome these technical and financial constraints, by creating project-development facilities or making the required funds available to hire advisors.

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<sup>15</sup> Ahmed Abdel Aziz and Human Nabavi, *Unsolicited Proposals for PPP Projects: Private Sector Perceptions in the USA*, Construction Research Congress, 2014, pp. 1349-1358.

<sup>16</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016]; Cambridge Economic Policy Associates Limited (CEPA), *Mobilizing Finance for Infrastructure, A Study for the Department for International Development (DFID)*, 2015, page 52, available at [https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+\(DFID\)%2C+2015%2C](https://www.google.com/#q=Cambridge+Economic+Policy+Associates+Limited%2C+Mobilizing+Finance+for+Infrastructure%2C+A+Study+for+the+Department+for+International+Development+(DFID)%2C+2015%2C) [last visited: January 4, 2016].

### 2.3.2 HARNESSING PRIVATE-SECTOR INNOVATION AND CREATIVITY

**Many governments believe that USPs will enable them to take advantage of private-sector innovation and creativity, resulting in efficiencies in delivering infrastructure projects.**

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Although innovation can also be pursued through publicly initiated PPP projects, innovation and creativity is a common motivation for pursuing USPs. In **Senegal**, for example, the government introduced a new USP framework in 2014 which favors “innovative” projects. Similarly, **Jamaica** seeks to benefit from private-sector “innovation” with USPs. Despite the focus on innovation, there is a general lack of clarity regarding the types of projects that would be considered innovative. Some governments distinguish between originality—the fact that the project does not appear in the government’s planned projects—and innovation in terms of technologies or processes.

Evidence suggests that many governments are satisfied with a broad definition of innovation that makes projects that have not yet been identified by public agencies eligible for consideration as USPs. More than half (approximately 56 percent) of governments require that USPs be original—in other words, not already part of the government’s list of planned projects—without necessarily requiring innovation. Others governments—including **South Africa**, the **Philippines**, and **Australia**—only classify projects as “innovative” if they introduce unique products, processes or technologies, typically requiring the protection of intellectual-property rights.

A common challenge faced by governments is that most USP proponents claim innovation or proprietary intellectual-property rights in their USPs, even though it is often demonstrable that similar solutions could have been procured by the public agency from other entities. Claims of innovation by the USP proponent without adequate justification is not a new phenomenon, having been highlighted previously in other PPIAF studies of USPs.<sup>17</sup> Currently, evidence regarding USPs incorporating innovative solutions is hard to find. Public officials were largely unable to identify USP projects that contained new technologies or unique concepts that were otherwise not available to the government.

In the analysis of USP projects, the Jafrabad Liquefied Natural Gas (LNG) Terminal and Floating Storage and Regasification Unit (FSRU) in **India** (see Box 1) can be described as a truly innovative USP in that country, meeting the narrower definition of innovation. No other innovative USP projects were encountered during the Experience Review. Most USPs involve

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<sup>17</sup> John Hodges, *Unsolicited Proposals: The Issues for Private Infrastructure Projects*, The World Bank Group, 2003, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11305/263990PAPERoVPono10257.pdf?sequence=1> [last visited: January 2, 2016]; John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016].

non-innovative projects such as highways or railways that had simply not been identified by the government.

*Box 1: State of Gujarat (India) Receives Innovative USP for LNG Terminal*

### **State of Gujarat (India) Receives Innovative USP for LNG Terminal**

In 2012, SWAN Energy Limited (SEL) approached the Gujarat Maritime Board (GMB) to develop a liquefied natural gas (LNG) terminal with a floating storage and re-gasification unit (FSRU) in Jafrabad. FSRUs are floating systems that receive LNG delivered in bulk by LNG carriers, and subsequently store, pressurize and re-gasify the LNG before supplying it to on-shore gas grids.

Compared to traditional on-shore LNG terminals, FSRUs offer cost, time and environmental benefits. FSRUs are cheaper to develop. The gestation period is also shorter, because FSRUs are prefabricated in distant shipyards, allowing various approvals and permitting procedures to take place simultaneously with their fabrication. FSRUs also have limited environmental impact on shorelines, because they are remotely located.<sup>18</sup> FSRUs were not used in India until SEL's proposal to GMB. (They also represented a new technology on a global level, with the first FSRU having being deployed in 2005 in the Gulf of Mexico,<sup>19</sup> and only 10 FSRUs estimated to have been use in 2012.<sup>20</sup>)

Lacking prior experience with the technology, the Gujarat Maritime Board (GMB) faced challenges in determining the technical feasibility of the USP project. GMB therefore restricted itself to the safety- and security-related aspects of the proposal.

In analyzing the evidence regarding the harnessing of private-sector innovation and creativity, it became clear that encouraging USPs is not the only way to tap into private-sector innovation. Innovation can also be achieved in regular dialogue with the industry, or in a more sophisticated "idea competition."<sup>21</sup> Additionally, a well-structured publicly initiated PPP procurement with

<sup>18</sup> CRISIL Independent Equity Research, Swan Energy Limited, Available at [http://www.moneycontrol.com/news\\_html\\_files/news\\_attachment/2014/SwanEnergy\\_CRISIL\\_280714.pdf](http://www.moneycontrol.com/news_html_files/news_attachment/2014/SwanEnergy_CRISIL_280714.pdf); According to the U.S. Energy Information Administration, an FSRU is a flexible, cost-effective way to receive and process shipments of LNG, that can be developed faster than an onshore re-gasification facility. FSRUs are increasingly being used to meet natural-gas demand in smaller markets, or as a temporary solution until onshore re-gasification facilities are built. As of April, there were only 16 FSRUs functioning globally. Victoria Zaretskaya, *Floating LNG Regasification Is Used to Meet Rising Natural Gas Demand in Smaller Markets*, 2015, available at <https://www.eia.gov/todayinenergy/detail.cfm?id=20972> [last visited: January 3, 2016]

<sup>19</sup> Victoria Zaretskaya, *Floating LNG Regasification Is Used to Meet Rising Natural Gas Demand in Smaller Markets*, 2015, available at <https://www.eia.gov/todayinenergy/detail.cfm?id=20972> [last visited: January 3, 2016].

<sup>20</sup> Keith Schaefer, *FSRUs: The Leading Edge of the LNG Market*, 2012, available at <http://oilandgas-investments.com/2012/natural-gas/fsru-lng-market/> [last visited on January 3, 2016].

<sup>21</sup> Idea competitions can be defined as processes organized by public agencies to stimulate the private sector to develop innovative solutions for complex challenges at a very early stage of the project cycle. An example of an idea competition is "Rebuild by Design," a design competition that was launched by the U.S. Department of Housing and Urban Development in response to

output specifications can also encourage bidders to propose unique products, processes or technological innovations. The emphasis on output specifications as an alternative to achieve innovative solutions is not new; knowledge products produced by several multilateral institutions have consistently highlighted this approach.<sup>22</sup>

### 2.3.3 AVOIDANCE OF COMPETITION FOR CORRUPTION AND NEPOTISM

Because USPs often bypass regular procurement procedures, or are directly negotiated (behind closed doors), USPs may favor corrupt or nepotistic practices. Several studies have noted that direct negotiation or sole sourcing make it easier to conceal corruption and nepotism, which makes USP projects vulnerable to such allegations.<sup>23</sup> In **Mexico**, a study found that 44 percent of private entities submitting USPs admitted to giving a “piece of the pie” to public authorities.<sup>24</sup> Concern over corrupt practices is also prevalent in developed countries. The U.K. government, for instance, does not consider USPs, because it believes that they lend themselves more easily to corrupt practices.<sup>25</sup>

Public officials in **Italy** indicate that USPs at lower levels of government are especially susceptible to corruption—Mestre’s Angel Hospital, for example, is facing corruption allegations due to discrepancies in the Veneto region’s finances, which has raised public scrutiny over how USPs are monitored.<sup>26</sup> The Office of the Contractor General in **Jamaica** raised concerns over procurement practices with respect to USPs in the country in 2011, owing

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Hurricane Sandy’s devastation in the Northeast United States. It led to 10 pre-qualified teams submitting innovative, implementable solutions the address the Sandy-struck region’s most complex needs.

<sup>22</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016]; World Bank Institute & PPIAF, *Public-Private Partnerships Reference Guide*, 2012, page 165, available at <https://openknowledge.worldbank.org/handle/10986/20118> [last visited on January 4, 2016].

<sup>23</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016]; and PPIAF, *Toolkit for PPPs in Roads & Highways*, 2009, The World Bank Group (WBG) page 81, available at [http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/toolkit\\_files/index.html](http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/toolkit_files/index.html) [last visited: January 2, 2016].

<sup>24</sup> *Necesario Combatir la Corrupción en Iniciativa Privada*, Capital Queretaro, 2015, available at: <http://www.capitalqueretaro.com.mx/queretaro/necesario-combatir-la-corrupcion-en-iniciativa-privada> [last visited: January 2, 2016].

<sup>25</sup> James Ballingall, *Infrastructure U.K., PPPs: Fiscal Space and Investment*, 2014, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38831864> [last visited on January 4, 2016].

<sup>26</sup> *Project Finance in Ambito Sanitario Rischi e Criticità*, available at <http://www.beppegrillo.it/listeciviche/liste/pesaro/2014/06/30/alllegato%20%20-%20Denuncia%20sugli%20effetti%20del%20Project%20Finance.pdf> [last visited: January 2, 2016].

to lack of transparency and competitive tendering; it described USPs as “corruption enabling” devices.<sup>27</sup>

*Box 2: Poor Public Disclosure Results in Controversies and Delays*

#### **Office of Contractor General Questions North-South Link of Highway 2000 in Jamaica**

In November 2011, the Office of Contractor General (OCG) of Jamaica raised concerns about the direct negotiation of a USP submitted by China Harbor Engineering Company (CHEC) for the completion of the stalled North-South Link of Highway 2000. The absence of proper disclosure of information, combined with direct negotiations between the Government of Jamaica (GoJ) and CHEC, created a concern in OCG about the potential for the abuse of contracting powers by public officials. Consequently, the OCG asked the GoJ to cease all direct negotiations with CHEC or conduct a competitive tender.

Although the incumbent administration ceased negotiations with CHEC in November 2011, after the general election the following month, the new administration resumed negotiations. As a result, in May 2012, OCG expressed “grave and serious concerns” regarding the use of USPs by GoJ. The OCG described USPs as “corruption enabling” devices that could be used by influential and corrupt public officials to award public contracts to undeserving parties. OCG questioned why GoJ was not subjecting the procurement of the project to a competitive tender. In a further twist to the turn of events, CHEC informed GoJ that it would not participate in a competitive tender. Given these issues surrounding CHEC’s USP, OCG labeled it a “suspicious” and “highly irregular” investment, which would be exposed if subjected to a competitive tender.<sup>28</sup>

**Several case studies involved corruption allegations; even though allegations remain unproven, USPs are highly susceptible to public perception of corruption.**

Aside from the absence of competitive tender, the perception of corruption is often compounded by poor transparency and public disclosure, an issue highlighted in several previous studies of USPs,<sup>29</sup> and in the case studies of the Experience Review.

<sup>27</sup> Open Statement by the OCG Regarding the Proposed Highway 2000 North South Link and the Container Transshipment Hub Projects, Office of the Contractor General of Jamaica, 2012, available at [http://www.ocg.gov.jm/website\\_files/media\\_releases\\_issued/media253.pdf](http://www.ocg.gov.jm/website_files/media_releases_issued/media253.pdf) [last visited: January 2, 2016].

<sup>28</sup> Open Statement by the OCG Regarding the Proposed Highway 2000 North-South Link and the Container Transshipment Hub Projects, Office of the Contractor General of Jamaica, 2012, available at [http://www.ocg.gov.jm/website\\_files/media\\_releases\\_issued/media253.pdf](http://www.ocg.gov.jm/website_files/media_releases_issued/media253.pdf) [last visited: January 2, 2016].

<sup>29</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016]

Local businesspeople involved in the USP for the Doraleh Container Terminal project in **Djibouti** are being investigated for corruption in U.K. courts (see Box 3). In **Senegal**, the 2007 concession agreement with DP World for the management of the Dakar Port is embroiled in corruption allegations.<sup>30</sup> In **Kenya**, a USP by the Chinese government for the SGR between Nairobi and Mombasa was investigated by various public agencies—including two parliamentary committees<sup>31</sup> and the Ethics and Anti-Corruption Commission (EACC)<sup>32</sup>—for mismanagement and corruption, which significantly delayed implementation.

*Box 3: Corruption Allegations for Djibouti Port projects*

#### **Corruption Allegations in Djibouti: The Case of the Port Autonome International de Djibouti (PAID) and Doraleh Port**

The privatization of PAID was first suggested by multilateral agencies in the early 1990s as a solution to Djibouti's economic crisis.<sup>33</sup> The political will to privatize the PAID, however, did not materialize until 1998, when the reemergence of the Ethiopia-Eritrea conflict resulted in Ethiopian traders diverting their cargo from the Eritrean ports of Massawa and Assab. In December 1999, Abdourahman Boreh—a well-known Djibouti businessperson and a close partner of Djibouti President Guelleh—traveled to Dubai to meet with representatives of Dubai Ports International (DPI), proposing that DPI (later DP World) privately manage the PAID. In May 2000, President Guelleh and the United Arab Emirates State Head, HH Sheikh Zayed bin Sultan, signed a memorandum to develop “maritime and aviation assets.”

On 2 June 2000, DPI signed a 20-year contract with the Government of Djibouti (GoD) to manage the PAID; the terms were not made public. The contract was the result of a (challenging) direct negotiation, in which both sides were “thinking far beyond PAID.”<sup>34</sup> Indeed, managing the PAID had never been the real motive of DPI, which had its eye on the construction of a new (and much more profitable) deep-water port in Doraleh, several

<sup>30</sup> *Corruption: Dubai Ports World en ligne de mire au Sénégal et à Djibouti*, Africa Diligence, 2015, available at <http://www.africadiligence.com/corruption-dubai-ports-world-en-ligne-de-mire-au-senegal-et-a-djibouti/> [last visited: January 2, 2016].

<sup>31</sup> *Chinese Firms Lock Horns in Kenyan Big-Money Projects*, Business Daily, 2014, available at <http://www.businessdailyafrica.com/Chinese-firms-lock-horns-in-Kenyan-big-money-projects/-/539546/2158000/-/vq21ko/-/index.html> [last visited: January 2, 2016]; *State Defends Award of Sh1.2trn Rail Deal to Chinese Firm*, Business Daily, 2013, available at <http://www.businessdailyafrica.com/State-defends-award-of-Sh1.2trn-rail-deal-to-Chinese-firm/-/539546/2083628/-/mcjha/-/index.html> [last visited: January 2, 2016]; *MPs Probe Chinese Firm over Sh1.2tr Railway Deal*, Business Daily, 2013, available at <http://www.africanewshub.com/news/768421-mps-probe-chinese-firm-over-sh12tr-railway-deal> [last visited: January 2, 2016]; *Shadowy figures pushing rail deal, says Keter*, Daily Nation, 2014, available at <http://www.nation.co.ke/news/Shadowy-figures-pushing-rail-deal-says-Keter/-/1056/2156652/-/3nq2nq/-/> [last visited: January 2, 2016].

<sup>32</sup> *Graft Team Opens Probe on Rail Deal*, The Daily Nation, 2014, available at <http://www.nation.co.ke/news/Graft-team-opens-probe-on-rail-deal/-/1056/2138214/-/e9dbsez/-/index.html> [last visited: January 2, 2016].

<sup>33</sup> Arthur Foch, *Djibouti, une nouvelle porte de l’Afrique ? L’essor du secteur portuaire djiboutien*, Afrique contemporaine 2010/2 (n° 234), 2010, available at <http://www.cairn.info/revue-afrique-contemporaine-2010-2-page-73.htm> [last visited: January 2, 2016].

<sup>34</sup> Ethan Chorin, Dubai School of Government, *Articulating a “Dubai Model” of Development: The Case of Djibouti*, 2010, available at <http://ethanchorin.com/wp-content/themes/ethan-chorin/docs/djibouti-paper-101001.pdf> [last visited: January 2, 2016].

kilometers from the capital,<sup>35</sup> which would include an economic free-trade zone, a container port, and an oil terminal.

During subsequent years, the PAID management contract showed financial success, as revenues increased from \$38 million in 2000 to \$139 million in 2008. Traffic grew from 3.8 million tons (MT) in 1999 to 8 MT in 2007.<sup>36</sup> The financial success of PAID allowed DP World to sign a build, operate and transfer (BOT) concession with the GoD for the Doraleh Container Terminal in 2006. The three components of the Doraleh Port—the economic free zone, the oil terminal, and the container port—were successfully completed by 2004, 2006 and 2012, respectively. For several years, the Doraleh Port was considered an economic success story for Djibouti and was showcased as the most modern port in East Africa.

In July 2014, the GoD rescinded DP World's concession at the Doraleh Container Terminal, arguing that it had found evidence that DP World had "paid bribes" and given "other financial incentives" to Boreh during the negotiations.<sup>37</sup> The GoD submitted a case against DP World to the London Court of International Arbitration.<sup>38</sup> Boreh—a political opposition candidate in Djibouti who opposed constitutional amendments allowing Guelleh to run for a third term in 2011—blamed the revoked license and the court cases on a "personal vendetta" against him.<sup>39</sup> As of late 2015, the court case in the U.K. is ongoing.

Although it remains unclear whether the PAID/Doraleh port deals involved corrupt practices, the lack of transparency that accompanies direct negotiations makes projects vulnerable to corruption accusations and abuses of process. Disclosure of all relevant information relating to USPs allows public scrutiny and ensures legitimacy of process.

<sup>35</sup> David Styan, *Djibouti: Changing Influence in the Horn's Strategic Hub*, Chatham House Briefing Paper, 2013, available at [https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0413bp\\_djibouti.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0413bp_djibouti.pdf) [last visited: January 2, 2016].

<sup>36</sup> Arthur Foch, *Djibouti, une nouvelle porte de l'Afrique ? L'essor du secteur portuaire djiboutien*, *Afrique contemporaine* 2010/2 (n° 234), 2010, available at <http://www.cairn.info/revue-afrique-contemporaine-2010-2-page-73.htm> [last visited: January 2, 2016].

<sup>37</sup> *Djibouti Opposition Blames Politics for DP World Concession Row*, Bloomberg Business, 2014, available at <http://www.bloomberg.com/news/articles/2014-07-11/djibouti-opposition-blames-politics-for-dp-world-concession-row> [last visited: January 2, 2016].

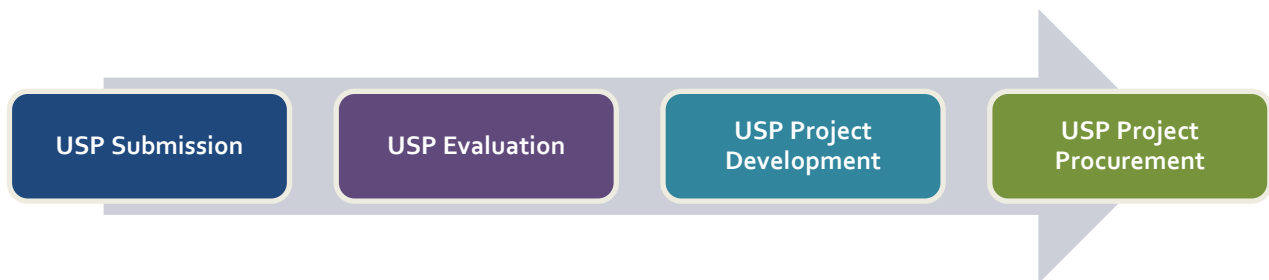
<sup>38</sup> *Djibouti Files Arbitration Against DP World Over Alleged Corruption in Port Deal*, Wall Street Journal, 2014, available at <http://www.wsj.com/articles/djibouti-files-arbitration-against-dp-world-over-alleged-corruption-in-port-deal-1404895724> [last visited: January 2, 2016].

<sup>39</sup> *Ismail Omar Guelleh : En 2016, je m'en irai. Cette fois, je peux vous le jurer*, *Jeune Afrique*, 2011, available at <http://www.jeuneafrique.com/189137/politique/ismael-omar-guelleh-en-2016-je-m-en-irai-cette-fois-je-peux-vous-le-jurer/> [last visited: January 2, 2016]; and *Djibouti Opposition Blames Politics for DP World Concession Row*, Bloomberg Business, 2014, available at <http://www.bloomberg.com/news/articles/2014-07-11/djibouti-opposition-blames-politics-for-dp-world-concession-row> [last visited: January 2, 2016].



## 3 Stage One: Submission

This chapter discusses the experiences with USP submission processes and procedures, and related key findings from country experiences.



### 3.1 Key Findings

- **Finding 6:** Centralizing the USP submission process in a single agency helps to (1) simplify coordination processes; (2) promote consistency, transparency and accountability; and (3) prevent the need to build capacity in multiple locations.
- **Finding 7:** Introducing a predictable time window for USP submissions allows the public sector to dedicate resources and creates certainty for USP proponents.
- **Finding 8:** Introducing minimum submission requirements—as well as USP review fees—may reduce the number of low-quality and non-serious USPs.

### 3.2 Overview

Most governments provide guidance regarding the submission process for USPs in USP frameworks. This typically includes the following types of details:

- **Submission Location:** The extent to which governments centralize the USP submission process largely depends on the countries' political systems (centralized or decentralized). Many governments appoint an agency or institution as the single point of contact for all USP submissions (usually a PPP Unit or equivalent). Other governments fully decentralize the USP submission process, allowing any level of government—national, regional, and sub-regional, or the equivalent—or any government department to accept USPs.
- **Submission Timeframe:** Some governments allow USP submissions only once or twice a year, within a specific time window, both to reduce the number of USPs and to avoid

having USPs distract public officials from pursuing publicly initiated priority projects. Most governments have no time restrictions on submitting USPs.

- **Minimum Submission Requirements:** Governments typically require that USPs comply with several minimum requirements. These may include, for example, requirements to submit details about the USP proponent, including technical and financial capabilities, pre-feasibility studies, financial models, business plans, or financial deposits. These requirements are used to filter out proposals that are incomplete, of poor quality, or non-serious, and ensure that limited public-sector resources are spent only on high-quality USPs.

### 3.3 Country Experience

**Most governments examined in the Experience Review have centralized their USP submission process, either (1) requiring a central agency (typically a PPP Unit or its equivalent) to accept and process USPs, or (2) allowing government departments to accept USPs but requiring the central unit to process and evaluate them.**

In **Chile, Peru, and Jamaica**, a central unit located at the national level (the PPP Unit or its equivalent) is responsible for both accepting and processing USPs. In **Chile**, the central unit is the Ministry of Public Works (Ministerio de Obras Publicas, or MOP); in **Peru**, it is the Private Investment Promotion Agency (Agencia de Promocion de la Inversion Privada, or PROINVERSION); and in **Jamaica**, it is the Privatisation and PPP Unit. Similarly, in New South Wales (**Australia**), the Department of Premier and Cabinet (DPC) acts as the first point of contact for USPs, assessing initial submissions, together with relevant agencies, and rejecting or approving them for the next stage.

Jurisdictions such as **Ghana, Tanzania, Gujarat (India), and Virginia (United States)** allow USPs to be submitted to any government department, but require them to be processed by the central PPP Unit. In **Ghana**, USPs may be submitted to government agencies but must be processed through the Public Investment Division of the Ministry of Finance and Economic Planning, which acts as the main gatekeeper for PPP and USP projects. In **Tanzania**, the PPP Policy requires that all USP proposals submitted to government agencies be processed and approved through the PPP Unit in the Prime Minister's Office. In **Gujarat (India)**, administrative departments may receive USPs, but they are supported by the Gujarat Industrial Development Board (GIDB) during evaluation and procurement. **Virginia (United States)** allows USPs to be submitted to relevant agencies, with a copy submitted to the central unit (the Virginia Office of Public-Private Partnerships (VAP3)) for evaluation within 90 days.<sup>40</sup>

<sup>40</sup> The Commonwealth of Virginia, Virginia Public Private Partnerships, *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 21, available at <http://www.p3virginia.org/wp->

The benefit of only allowing a single agency to accept and process USPs is that it only requires developing public-sector capacity in one location.

**Governments with decentralized USP submission processes appear to have experienced the greatest challenges, including managing and coordinating the flow of USPs, and developing the required USP public-sector capacity across government departments.**

Countries such as **Colombia**, the **Philippines**, and **Italy** have decentralized USP submission processes, allowing USPs to be submitted to different departments and levels of government. Public officials in these countries indicate that they experience challenges, including (1) a large flow of USPs, especially at lower government levels; (2) coordination difficulties during the USP evaluation and implementation process, which drain the public sector's technical and financial resources; and (3) lack of public capacity to evaluate and develop USPs, particularly at lower government levels.

In **Colombia**, which allows USPs to be submitted to any public entity,<sup>41</sup> public officials indicate that USPs are frequently submitted to the wrong departments or duplicated across departments, draining public-sector resources (see Box 4).<sup>42</sup> Lack of capacity to effectively review and evaluate USPs was cited as a concern by public officials in **Colombia** and **Italy**, particularly at municipal levels.<sup>43</sup> The Italian government is reportedly considering establishing Regional PPP Taskforces in order to overcome public-sector capacity constraints at lower levels of government.<sup>44</sup> Finally, private entities indicated that decentralized USP submission processes often create lack of clarity regarding the department or level of government to which a USP must be submitted, sometimes resulting in the submission of the same USP to multiple departments.

*Box 4: Colombia Struggles to Manage USPs After Adopting New USP Framework*

#### **Colombian Public Officials Struggle to Manage USPs under the New (2012) PPP Law**

In 2012, Colombia passed a new PPP Law (Law 1508), which introduced a USP framework for the first time. Under the framework, USPs may be submitted to any level of government, public agency or government department. In the three years following the implementation of the law, approximately 360 USPs were received.<sup>45</sup> Public officials indicate that the lack of a single point

[content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf](#) [last visited: January 2, 2016].

<sup>41</sup> Article 15, PPP Law 1508 of 2012, Government of Colombia, 2012, available at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/Ley150810012012.pdf> [last visited: January 2, 2016].

<sup>42</sup> Interviews with Colombian lawyers, August 2015.

<sup>43</sup> Interviews with Italian former public officials, September to November 2015.

<sup>44</sup> Interviews with Italian public-sector officials, September to November 2015.

<sup>45</sup> *Informe Trimestral del Registro Único de Asociaciones Público-Privadas (RUAPP)*, Departamento Nacional de Planeación, Government of Colombia, 2015, available at <https://colaboracion.dnp.gov.co/CDT/Participacion%20privada%20en%20proyectos%20de%20infraestructura/RUAPP%203%20TRIMESTRE%202015.pdf> [last visited: January 2, 2016].

of entry for USP submissions resulted in USPs being submitted to the wrong departments, or duplicated across departments, creating significant confusion as well as lags in the evaluation process and/or duplicated review processes, draining public-sector resources.<sup>46</sup> Only the national infrastructure agency (*Agencia Nacional de Infraestructura, ANI*), which has significant experience developing highway concessions, has approved any USPs to date. Public officials also indicate that the large number of USPs has distracted government employees from prioritizing publicly initiated priority projects.<sup>47</sup>

**Establishing a dedicated time window for USP submissions prevents public officials from being distracted from their priorities and creates certainty for USP proponents.**

In some countries, especially those with limited capacity, large numbers of USPs can distract public officials from stated priorities and divert limited financial and technical resources. This issue has been highlighted previously by PPIAF.<sup>48</sup> Establishing a dedicated time window allows the public agency to plan for additional resources without distracting staff from priority projects. Governments that restrict the timeframe for USP submissions currently include **Peru** and **Pennsylvania (United States)**.

To maintain private-sector interest, governments need to create certainty about how often and when the dedicated USP submission window will open. In **Peru**, the USP submission window is the first 45 calendar days of the year.<sup>49</sup> Similarly, **Pennsylvania (United States)** guarantees that there will be at least two periods of at least 30 days every year during which private entities can submit proposals (see Box 5).

*Box 5: Pennsylvania's P3 Office Restricts USP Submission Timeframe*

#### **Pennsylvania's P3 Office Restricts USP Submission Timeframe**

In its Implementation Manual & Guidelines, Pennsylvania's DOT specifies that:

*"The P3 Office will establish and publish in the Pennsylvania Bulletin and on the P3 Office website dates when it and the P3 Transportation Board will accept and consider unsolicited proposals for projects on facilities owned by the Commonwealth. There will be at least two periods during the calendar year for private entities to submit unsolicited project proposals to the P3 Office and/or the*

<sup>46</sup> Interviews with Colombian lawyers, August 2015.

<sup>47</sup> Interviews with Colombian lawyers, August 2015.

<sup>48</sup> PPIAF's PPP Toolkit for Roads and Highways notes that USPs "often divert public sector financial and technical resources from priority projects." <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/glossary.pdf>

<sup>49</sup> *Legislative Decree N. 1224 and Supreme Decree N. 410-2015-EF*, PROINVERSION, Government of Peru, available at [http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/ML\\_APP\\_DL\\_1224/DL%201224.pdf](http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/ML_APP_DL_1224/DL%201224.pdf) [last visited: February, 1, 2016].

*P3 Transportation Board. Each such period will begin no later than six months following the beginning of the immediately prior period and will last at least 30 days.”<sup>50</sup>*

**Minimum submission requirements, which enhance the quality of proposals, are observed in almost all USP frameworks, and in all developed countries.**

Minimum submission requirements for USPs were observed in almost 80 percent of the USP frameworks studied as part of the Experience Review (Annex 4 presents an overview of submission requirements used by different governments). All developed countries—including **South Africa**,<sup>51</sup> **Virginia (United States)**, **New South Wales (Australia)**,<sup>52</sup> and **Italy**—have minimum submission requirements. Public officials in various jurisdictions confirm that stringent minimum requirements are effective at reducing the number of low-quality USPs.

A number of the countries studied—including **Colombia**,<sup>53</sup> **Chile** and **Ghana**<sup>54</sup>—require that USPs pass through two stages, with more stringent submission requirements at the second stage. This approach has advantages for both the public and private sectors: (1) the public sector avoids investing significant time and effort in evaluating low-quality proposals, which it eliminates at an early stage; and (2) USP proponents only decide to invest in drafting full proposals if the government has signaled an interest in the project. In **Chile**, for example, the

<sup>50</sup> *Providing for Public Private Transportation Partnerships Implementation Manual & Guidelines Act 88 of 2012 (As Amended)*, The Commonwealth of Pennsylvania, 2014, available at <http://www.dot.state.pa.us/public/Bureaus/press/P3/P3ImplementationManual&Guidelines.pdf> [last visited: January 2, 2016].

<sup>51</sup> In South Africa’s National Treasury framework, minimum submission requirements include information about the USP proponent; confidential or proprietary data not to be made public; other public agencies that have received the USP; scope and approach of the project; innovation promoted by the project as well as supporting evidence; anticipated benefits and proposed cost/price; alignment with the government’s strategic growth and development plan; and duration of the validity of the proposal. National Treasury Practice Note No 11 of 2008/2009, paragraph 2, available at [http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008\\_9.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008_9.pdf) [last visited: January 2, 2016].

<sup>52</sup> In New South Wales, Australia, the first stage of the USP submission process is the submission of the project concept and initial proposal to the Department of Premier and Cabinet. Upon approval of the initial proposal, the USP proponent is required to submit a detailed proposal, including feasibility studies covering both technical and financial aspects, the financial model, and the economic benefit from the project. Unsolicited Proposals: Guide for Submission and Assessment, 2014, available at <https://www.nsw.gov.au/sites/default/files/miscellaneous/Updated-Unsolicited-Proposals-Guide-February-2014.pdf> [last visited January 3, 2016].

<sup>53</sup> During the first stage (pre-feasibility), USPs must include a project description; an initial design and scope of the project; demand studies; project specifications and expected costs; and expected financing options. During the second stage (feasibility), the proposal must contain a detailed financial model and evidence of the value of the project; a detailed description of the project phases and duration; a justification of the contract term; an analysis of associated risks; environmental, economic and social impact studies; and technical, economic, environmental, land, financial and legal feasibility. Article 14, PPP Law 1508 of 2012, Government of Colombia, 2012, available at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/Ley150810012012.pdf> [last visited: January 2, 2016].

<sup>54</sup> Ghana also has a two-step system whereby the USP proponent is required to submit an Initial Business Case—providing a broad overview of the proposal, a timeframe for the project, and an initial cost assessment. If the public agency considers the project worthy of consideration, the USP proponent is required to provide a full feasibility report, including a needs and options analysis; due diligence on legal, technical, environmental and social aspects; a viability assessment, including the financial model; an economic assessment; and a Value-for-Money assessment for the proposal. National Policy on PPP, Ministry of Finance and Economic Planning, Government of Ghana, 2011, available at [http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp\\_policy.pdf](http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp_policy.pdf) [last visited: January 2, 2016]; and Ghana Public Private Partnership Bill, Ministry of Finance and Economic Planning, Government of Ghana, 2013, 2013, available at [http://www.mofep.gov.gh/sites/default/files/docs/pid/PPP\\_Law\\_Draft%20.pdf](http://www.mofep.gov.gh/sites/default/files/docs/pid/PPP_Law_Draft%20.pdf) [last visited: January 2, 2016].

Ministry of Public Works approves the “public interest” of the project concept during an initial “Presentation Stage,”<sup>55</sup> before reviewing the full proposal at the “Proposal Stage.”<sup>56</sup>

**Although not widespread, the institution of a USP review fee may deter opportunistic or low-quality USPs, and encourage USP proponents to meet submission requirements.**

This is primarily observed in the United States, where **Virginia (United States)** has instituted a USP review fee of \$50,000. Other states, such as **Arizona (United States)**, also require the submission of a USP review fee, the size of which depends on the project’s investment cost (see Box 6).<sup>57</sup> The USP review fee can cover a public agency’s cost to review and evaluate a USP, ensuring that USPs do not drain limited public-sector resources.

*Box 6: Arizona (United States) Requires Review Fee for USPs*

#### **Arizona Department of Transportation Requires USP Evaluation Fee**

In Arizona, the Office of P3 Initiatives, which is housed in the Arizona Department of Transportation (ADOT), may accept and procure projects that initiated as USPs. However, its guidelines state that the private party is required to bear all the costs of preparing and submitting a USP. USP proponents are required to submit two certified checks—the first (for \$15,000) allows ADOT to cover the initial evaluation costs and will only be deposited once ADOT has determined whether the USP passes the pass/fail test; the second allows ADOT to cover the detailed evaluation of the USP. If a USP fails the initial (pass/fail) test, both checks are returned to the USP proponent. The amount of the second check depends on the level of investment of the project, as shown in the table below.

<b>Estimated Capital Costs</b>	<b>Estimated Detailed Review Fee</b>
Less than \$50 Million	\$20,000
\$50 Million to \$100 Million	\$35,000
\$100 Million to \$250 Million	\$60,000
\$250 Million to \$500 Million	\$85,000
\$500 Million to \$1 Billion	\$110,000
More than \$1 Billion	\$135,000

<sup>55</sup> The minimum submission requirements during Chile’s Presentation Stage include the name and type of project; project location; estimation of demand and annual expected growth; land expropriation requirements; description of the works and services; expected investment and operational costs; financial analysis; expected risks with respect to existing projects; certain contract conditions (concession length, level of subsidy, etc.); and a declaration of the need to conduct environmental impact studies. Concession Law, Ministry of Public Works, Government of Chile, 1996, available at <http://www.leychile.cl/Navegar?idNorma=16121&idVersion=2010-01-20&idParte> [last visited: January 2, 2016].

<sup>56</sup> Concession Law, Ministry of Public Works, Government of Chile, 1996, available at <http://www.leychile.cl/Navegar?idNorma=16121&idVersion=2010-01-20&idParte> [last visited: January 2, 2016].

<sup>57</sup> Pennsylvania has instituted a refundable deposit of \$50,000 for USP projects with costs greater than \$10 million. If the USP passes the initial screening, the deposit amount can be offset against the costs of further evaluating and reviewing the USP. *Providing for Public Private Transportation Partnerships Implementation Manual & Guidelines Act 88 of 2012 (As Amended)*, The Commonwealth of Pennsylvania, 2014, available at <http://www.dot.state.pa.us/public/Bureaus/press/P3/P3ImplementationManual&Guidelines.pdf> [last visited: January 2, 2016].

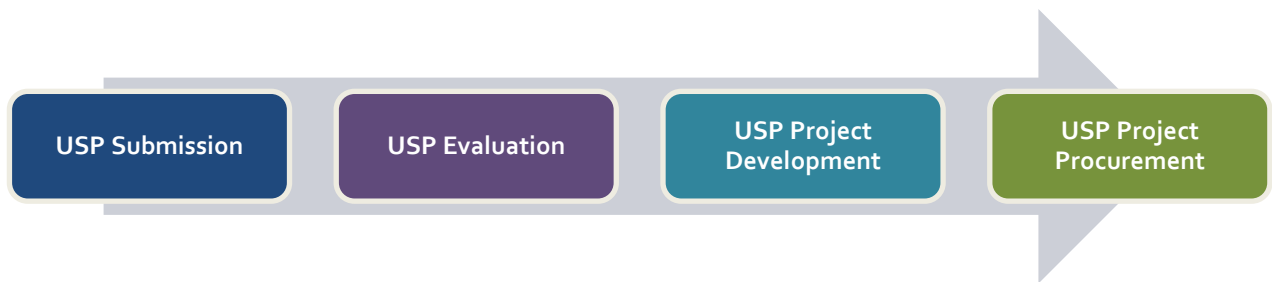
ADOT may also waive the USP evaluation fee at its discretion.<sup>58</sup>

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<sup>58</sup> *P3 Program Guidelines*, Arizona Department of Transportation, Office of P3 Initiatives, *ADOT*, 2011, available at <http://www.azdot.gov/docs/default-source/business/p3-program-guidelines.pdf> [last visited: January 2, 2016].

## 4 Stage Two: Evaluation

This chapter discusses the experiences with USP evaluation criteria, processes and procedures, and the key findings from country experiences.



### 4.1 Key Findings

- **Finding 9:** Clear evaluation procedures, with specific timelines and allocations of evaluation responsibilities, allow public officials to efficiently approve USPs, and are highly appreciated by the private sector.
- **Finding 10:** Evaluation criteria play an important role in ensuring that USPs promote the public interest and meet governmental objectives. Additionally, they prevent the private sector from expending resources on developing USPs that do not align with the government's objectives.

### 4.2 Overview

USP frameworks typically contain provisions regarding how public agencies should determine if a USP merits further consideration and development. Typically, the evaluation process consists of stages of evaluation and corresponding timelines, as well as a clear allocation of responsibilities amongst government departments:

- **Procedure and Timelines for Evaluation:** Generally, USP frameworks define the procedure and corresponding timelines for the evaluation process. This ensures that the USP evaluation process is swift and efficient. It also gives USP proponents clarity regarding specific steps and durations following the submission of USPs.
- **Evaluation Criteria:** Evaluation criteria are used to determine whether a USP should be accepted for further consideration by the government. Typically, USP evaluation criteria are used for an initial screening of the appropriateness of the USP, given the



government's requirements. In evaluating USPs, some governments include a criterion to determine if the USP project should be pursued as a PPP.

- **Allocation of Responsibilities:** The responsibility for evaluating a USP is often given to one governmental agency, with inputs from other agencies. The responsible agency may draw on the expertise of other entities, such as the Ministry of Finance or relevant sectoral departments.

### 4.3 Country Experience

**Most governments use a two-stage procedure to evaluate USP projects. This may offer advantages in terms of limiting the use of public and private resources to only those USPs that have been shown to provide value to the public agency.**

Eleven of the 19 governments studied, including those of **Virginia (United States)**<sup>59</sup> and **New South Wales (Australia)**,<sup>60</sup> used a two-stage evaluation procedure consisting of a preliminary (high-level) evaluation, followed by a detailed evaluation. A two-stage evaluation procedure is also used in **Chile, Peru** and **Colombia**, where the governments first approve the “public interest” of the project or the pre-feasibility studies, before requesting detailed studies. The remainder of the governments studied conducted evaluation in one stage (see Table 2). For instance, **Andhra Pradesh (India)**<sup>61</sup> conducts a one-step evaluation that is more detailed than the preliminary evaluation conducted in **Virginia (United States)** and **New South Wales (Australia)**.

<sup>59</sup> In Virginia (United States), there is an initial policy review, followed by a detail-level screening; these are detailed in the 2015 PPTA Implementation Manual and Guidelines (2015 PPTA Implementation Manual). The policy review is conducted by VAP3 based on the policy-review criteria; it needs to be completed within 90 days of submission of the USP. Within 10 days of completing the policy review, a policy review report is to be submitted to the relevant public agency responsible for the transportation facility in question. The head of the relevant public agency will make the final determination regarding whether the USP should proceed to the second step of evaluation, the detail-level screening, also to be conducted by VAP3. There is no specific timeline provided for the conclusion of the detail-level screening in the 2015 PPTA Implementation Manual. However, the 2010 and 2012 versions of the PPTA implementation manual and guidelines contained specific timelines for the initiation and conclusion of the detail-level screening.

<sup>60</sup> In New South Wales (Australia), the first stage of the USP process is evaluation of the USP, which is undertaken by the Department of Premier and Cabinet (DPC). The first stage is further split into the preliminary and strategic assessment stages. During the first stage, the DPC, in conjunction with relevant agencies, determines if the submission constitutes a USP and whether there are sufficient grounds to justify direct negotiation. A proposal accepted on these grounds moves into the second stage, which consists of a comprehensive assessment to identify the potential benefit to the government of further consideration and development. The outcome is a determination about whether to proceed to the next stage or not, made by the NSW government's cabinet. Unsolicited Proposals: Guide for Submission and Assessment, 2014, paragraph 5.3, page 13 available at <https://www.nsw.gov.au/sites/default/files/miscellaneous/Updated-Unsolicited-Proposals-Guide-February-2014.pdf> [last visited January 3, 2016].

<sup>61</sup> Andhra Pradesh (India) follows a one-step evaluation process for USPs, in which the USP proponent is required to provide: 1) details of technical, managerial and financial capacity of the proponent; 2) all relevant technical, commercial and financial details of the USP; and 3) principles of the concession agreement for the project. The proposal is submitted to the relevant state departments / public agencies, which carry out an initial evaluation and forward the USP to the Infrastructure Corporation of Andhra Pradesh Ltd. (INCAP). No specific timeline has been prescribed for this process. INCAP may request modifications or determine that the proposal has merit. Section 19, Andhra Pradesh Infrastructure Development Enabling Act, 2001, available at <https://ppp.cgg.gov.in/Documents/IDEAct.pdf> [last visited: January 2, 2016].

A two-stage evaluation procedure seems to have advantages in terms of the efficient use of public and private resources. It allows public agencies to only spend valuable resources on projects that pass the preliminary analysis. Additionally, it prevents private entities from spending time developing detailed proposals that the public agency may not find attractive for further consideration.

Table 2: Evaluation Procedure and Timelines of the Studied Countries

Country / Jurisdiction	One-Stage Evaluation	Two-Stage Evaluation	Duration of Stage 1	Duration of Stage 2
India				
• Andhra Pradesh	✓		N.A.	
• Gujarat		✓	N.A.	N.A.
• Madhya Pradesh		✓	2 months	6 months
• Rajasthan		✓	1 month	4.5 months
Philippines	✓		120 calendar days	N.A.
South Korea	✓		60 days <sup>62</sup>	N.A.
Ghana		✓	N.A.	N.A.
Kenya		✓	N.A.	N.A.
Senegal	✓		N.A.	
South Africa <sup>63</sup>				
• National Treasury	✓		N.A.	N.A.
• SANRAL	✓		N.A.	N.A.
Tanzania		✓	21 days	NA
Jamaica	✓		N.A.	N.A.
Chile		✓	N.A.	N.A.
Colombia		✓	3 months	6 months
Peru		✓	90 days	N.A.
Australia (NSW)		✓	90 business days	N.A. <sup>64</sup>
Italy	✓		N.A.	N.A.
United States (Virginia)		✓	3 months	N.A.

N.A. = Not Available

Box 7 below examines **Virginia (United States)'s** two-step evaluation process, as followed in the case of a USP submitted for the concession of the Port of Virginia. The two-stage evaluation process is a prelude to moving a USP on to the project-development stage.

<sup>62</sup> Up to 180 days if total project cost exceeds KRW200 billion. Based on discussions with public officials.

<sup>63</sup> In South Africa, the National Treasury has developed a framework for managing USPs. However, state-owned entities (SOEs) are not required to go through a National Treasury PPP and USP, and can develop their separate processes. The South African National Roads Agency Limited (SANRAL) has created its own PPP and USP frameworks. USP frameworks of the National Treasury and SANRAL do not contain detailed description of the evaluation process.

<sup>64</sup> Determined on a case-by-case basis, subject to the complexity of the USP. Based on discussions with public officials.

*Box 7: Evaluation of a USP Submitted to Virginia (United States)*

### **Evaluation Process for the Port of Virginia USP in Virginia (United States).**

**Submission of USP and Initial Evaluation:** In April 2012, the Secretary received a USP from APM Terminals Virginia, Inc. (APM), which proposed entering into a concession agreement to operate the Port of Virginia (the Port), owned by the Virginia Port Authority (VPA). The Office of Transportation Public-Private Partnerships (OTP<sub>3</sub>, the predecessor of VAP<sub>3</sub>) determined that the USP satisfied the minimum requirements under PPTA and its implementing manual.

**Request for Alternative Conceptual Proposals:** In May 2012, VPA accepted the USP and called for alternative proposals to be considered alongside APM's USP. On August 13, 2012, VPA received alternative proposals from Carlyle Infrastructure Partners, L.P. (Carlyle) and RREEF America L.L.C. (RREEF). Additionally, on August 13, 2012, Virginia International Terminals, Inc. (VIT), the existing operator of the Port, submitted its alternative business plan. VIT was specifically asked to submit this business plan addressing its plans for growth.<sup>65</sup>

**Request for Detailed Proposals:** In August 2012, OTP<sub>3</sub> made a presentation comparing the APM's USP, the alternative proposals, and VIT's business plan.<sup>66</sup> On August 22, 2012, VPA accepted the alternative proposals for further review and evaluation, along with APM's USP. However, on October 5, 2012, Carlyle withdrew its proposal.

Pursuant to VPA's decision to further review and evaluate the proposals, in November 2012, OTP<sub>3</sub> issued instructions to shortlist the remaining proposers (APM and RREEF) to submit detailed proposals.<sup>67</sup> Both APM and RREEF (now called Virginia Port Partners (VPP), a consortium of JP Morgan IIF Acquisitions LLC and Maher Terminals LLC) submitted detailed proposals.<sup>68</sup>

**Final Decision Regarding the USP, Based on Detailed Evaluation:** On March 26, 2013, after assessing APM and VPP's detailed proposals against VIT's business plan, VPA's Board of

<sup>65</sup> *PPTA Proposals Relating to the Virginia Port Authority*, The Commonwealth of Virginia, Office of Transportation Public-Private Partnerships, 2014, available at [http://www.p3virginia.org/wp-content/uploads/2015/01/P3-Office-Presentation\\_Legislative-Review-Panel\\_20120824.pdf](http://www.p3virginia.org/wp-content/uploads/2015/01/P3-Office-Presentation_Legislative-Review-Panel_20120824.pdf) [last visited: January 2, 2016].

<sup>66</sup> *PPTA Proposals Relating to the Virginia Port Authority*, The Commonwealth of Virginia, Office of Transportation Public-Private Partnerships, 2014, available at [http://www.p3virginia.org/wp-content/uploads/2015/01/P3-Office-Presentation\\_Legislative-Review-Panel\\_20120824.pdf](http://www.p3virginia.org/wp-content/uploads/2015/01/P3-Office-Presentation_Legislative-Review-Panel_20120824.pdf) [last visited: January 2, 2016].

<sup>67</sup> *Instructions to Proposers Relating to a Concession of the Port of Virginia*, The Commonwealth of Virginia, Office of the Secretary of Transportation, 2012, page 1, available at <http://www.p3virginia.org/wp-content/uploads/2015/01/InstructionsToProposers.pdf> [last visited: January 2, 2016].

<sup>68</sup> *Letter of the Board of Commissioners*, Virginia Port Authority, 2013, available at [http://www.p3virginia.org/wp-content/uploads/2015/01/Ltr-from-Chairman-to-Governor\\_03-26-2013.pdf](http://www.p3virginia.org/wp-content/uploads/2015/01/Ltr-from-Chairman-to-Governor_03-26-2013.pdf) [last visited: January 2, 2016].

Commissioners decided not to proceed with the USP and to instead undertake restructuring of the existing arrangement between VPA and VIT.<sup>69</sup>

Along with the evaluation steps, specifying clear timelines for completing the steps helps address the private sector's concerns regarding slow or no progress following the submission of USPs. The need for clear timelines, along with evaluation steps, was underscored even in the 2007 Study.<sup>70</sup> Clear timelines also provide an impetus for timely processing of the USPs by public-sector officials, especially in cases where there are constraints on public-sector capacity.

**Evaluation criteria form the bedrock of the USP evaluation process. Absence of clear evaluation criteria results in pitfalls, including: (1) public agencies accepting projects that are not in the public interest; (2) USPs laying stagnant in the public system for years (not being accepted or rejected); and (3) USP proponents submitting USPs that may ultimately not meet the government's requirements, draining public-sector resources.**

In **Colombia**, for example, public officials are hesitant to reject or accept USPs due to both the lack of clear procedures and the lack of empowerment of public-sector officials, resulting in USPs laying stagnant for many years until they are automatically rejected because the evaluation time has lapsed.<sup>71</sup> **Chile** has attempted to address this issue by creating a committee within the Ministry of Public Works, tasked to verify the public interest of USP projects during the first evaluation stage. Since 2010, when the committee was established, of the 31 USP projects presented, only seven were accepted at the public-interest stage and are currently at the feasibility stage. This system has allowed the Ministry of Public Works to efficiently reject or approve projects at the first stage, avoiding the drain on public resources associated with a lack of clear procedures or decision-making responsibilities.<sup>72</sup>

**Certain elements are common in the evaluation requirements across USP frameworks. Most governments require that USP projects align with the public sector's overall objectives, priorities and plans.**

For instance, in **Virginia (United States)**, the initial analysis/screening of the USP is known as a "Policy Review" and the evaluation criteria are termed the "Policy Review Criteria" and comprise a list of eight elements. The Policy Review Criteria can be classified into five broad

<sup>69</sup> Resolution 13-6, 2013, Virginia Port Authority, available at <http://www.p3virginia.org/wp-content/uploads/2015/01/Res13-6-VPA-Resolution-Regarding-VIT-and-VPA-Reorganizational-Measures-F....pdf> [last visited: January 2, 2016].

<sup>70</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, page 5, available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300-UnsolicitedPPIAF0101PUBLIC1.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300-UnsolicitedPPIAF0101PUBLIC1.pdf) [last visited: January 2, 2016].

<sup>71</sup> Interviews with Colombian lawyers, August 2015.

<sup>72</sup> Interviews with former Chilean public officials, September through December 2015.

categories,<sup>73</sup> including the requirement that a USP meet transportation goals, plans, and public needs.<sup>74</sup>

Although 56 percent of governments do not allow USPs for projects included in the government's pipeline, a higher percentage (74 percent) require USP projects to be consistent with the government's plans. This is an important element for two main reasons: (1) it ensures that the USP will meet the public sector's specific needs and objectives, and (2) it prevents the private sector from spending time and money developing proposals that do not meet the public interest. Mature PPP markets such as **Italy, Australia, South Africa,<sup>75</sup> Chile and Peru**, which accept USPs outside of the government's pipeline of projects, also require that USPs be consistent with the government's plans.

**The extent to which USP projects must be original (not on the government's priority-project lists) largely depends on the government's motivations for allowing USPs.**

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Governments motivated to use USPs to obtain project concepts that the public agency was not able to define typically do not allow USPs to refer to projects that are in the government's project pipeline. Governments motivated to accelerate the implementation of projects typically allow (and even encourage) USPs to refer to projects in the government's pipeline of priority projects.

More than half<sup>76</sup> of the governments require that USPs be original—in other words, not already part of the government's list of planned projects. Most of these countries are emerging markets with recent PPP laws; they include **Ghana, Kenya, Tanzania, Niger, Nigeria, Zambia, Senegal, and Uganda**. In several of these countries, however, there is a gap between the USP framework requirement that USPs be original, and the practice of accepting USPs. For example, in **Kenya**, where the USP framework requires that USP projects be original, bilateral agreements have

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<sup>73</sup> The five categories in Virginia (United States) include: (1) meet transportation goals, plans, and public need; (2) enhance efficiency—the USP should make the project available to the public in a more efficient and/or less costly fashion compared to the traditional procurement method; (3) consistent with federal requirements—the USP should be consistent with U.S. federal government funding and/or approval requirements for PPP projects; (4) quality of USP—the USP should be sufficiently developed to conduct a procurement process, including an element of price competition; and (5) no conflict with solicited projects—the USP should not currently be on the list of proposed solicited projects. *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, The Commonwealth of Virginia, Virginia Public Private Partnerships, 2015, pages 21-22, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].

<sup>74</sup> Specifically, a USP must (1) conform with the transportation goals and the policy objectives of the Commonwealth of Virginia, (2) satisfy a public need for timely development and/or operation of a transportation facility, (3) address a demonstrated need identified in state, regional and/or local transportation plans, and (4) interface with existing and planned transportation systems. Furthermore, the USP must be consistent with U.S. federal government funding and/or approval for PPP projects. *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, The Commonwealth of Virginia, Virginia Public Private Partnerships, 2015, pages 21-22, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].

<sup>75</sup> Based on discussions with SANRAL's officials, it is understood that SANRAL does not accept USPs for projects that are outside of its macro-planning framework.

<sup>76</sup> The countries that require that USPs be original (and not on the government's list of planned projects) include the Philippines, Ghana, Kenya, Tanzania, Niger, Nigeria, Zambia, Senegal, Uganda, Jamaica and Uruguay.

been signed for USP projects that were on the government’s priority list, such as the Mombasa-Nairobi SGR. In **Ghana**, the government accepted and directly negotiated a USP for the Accra-Kumasi Highway, even though it had initiated the project and it had failed during procurement. The reason for this gap between policy and practice appears to be lack of public-sector capacity to initiate, develop and procure large infrastructure projects, which motivates governments to consider USPs to deliver critical infrastructure projects.

Governments with greater PPP maturity—such as **Italy, Australia, South Africa, Chile, Peru** and **Brazil**—tend to accept unoriginal USPs, (please refer to Annex 5 to review the evaluation criteria used by different governments).

**Several USP frameworks distinguish between originality of project idea (not in the government’s project pipeline) and innovation. While some jurisdictions do not allow USPs for projects that are already in the pipeline, some allow USPs to refer to pipeline projects if some innovation is involved.**

**South Africa’s** National Treasury USP framework accepts USPs for projects featured on the government’s list of priority projects, but makes innovation a core element of its evaluation criteria. For a USP to be considered, it must involve innovative design, project development and management, or a new and cost-effective method of service delivery.<sup>77</sup> Similarly, in **New South Wales (Australia)**, USPs pertaining to projects on the government’s priority project lists are accepted, but only if a USP demonstrates unique benefits and the USP proponent possess a unique ability deliver the project that cannot be matched by other competitors.<sup>78</sup> On the other hand, the **Philippines** excludes USPs for projects already on the government’s priority lists but makes an exception if the project involves a new concept or technology.<sup>79</sup> All three governments emphasize innovation in USPs but take different approaches with respect to USPs for projects appearing on the government’s priority list.

Most Latin American countries accept USPs in order to accelerate the implementation of public infrastructure projects. These countries—including **Peru** and **Colombia**—do not place an emphasis on innovation and uniqueness when evaluating USPs. In **Peru**, the USP framework requires that PROINVERSION take three factors into consideration in evaluating USPs that do not require government support: (1) the financial and technical capacity of the USP proponent to develop the project; (2) whether the project is economically and socially profitable; and (3) whether the project will have any negative impact on the environment, on a protected area of

<sup>77</sup> National Treasury Practice Note No 11 of 2008/2009, paragraph 2.

<sup>78</sup> PPIAF, *Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs: An Analysis of Global Trends and Lessons Learned*, The World Bank Group (WBG), 2014, paragraph 3.3 page 5, available at [http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals\\_PPIAF.pdf](http://www.ppiaf.org/sites/ppiaf.org/files/publication/UnsolicitedProposals_PPIAF.pdf) [last visited: January 2, 2016].

<sup>79</sup> Section 10.3, Rule 10, Revised BOT Law Implementing Rules & Regulations, Revised Implementing Rules and Regulations of R.A. NO. 6957, 2012, available at <http://www.neda.gov.ph/wp-content/uploads/2013/12/BOT-Law-IRR-Amendments-2012.pdf> [last visited: January 2, 2016].

land, or on the nation's cultural heritage.<sup>80</sup> Based on these criteria, PROINVERSION makes a decision regarding whether or not to consider the USP as being in the "public interest," after which it can move on to the next stage.<sup>81</sup> In **Colombia**, the USP framework specifies that a USP must be aligned with sectoral priorities and policies and must be feasible, but it makes no mention of uniqueness or innovation. In **Chile**, the Ministry of Public Works is planning to place a greater focus on innovation in future reforms of the USP framework, suggesting that the greater the experience the country has with accepting USPs, the more it will seek innovative and unique USPs.

**Value for Money is a key evaluation criterion in mature PPP markets such as Australia and the United States. Where specific Value-for-Money analysis is not conducted, some governments may still require a strong economic rationale for implementing USPs.**

Governments that have greater PPP experience may require that USPs clearly demonstrate Value for Money. In **Virginia (United States)** and **New South Wales (Australia)**, USP projects must demonstrate Value for Money. Although not specifically listed as an evaluation criterion, VAP<sub>3</sub> in **Virginia (United States)** emphasizes Value for Money even during the evaluation stage (see Box 8). Two of the four USPs submitted in the last decade were rejected for PPP delivery and considered for traditional delivery due to better value offered by the latter (see Table 3).

*Box 8: Rejection of USP Based on Value-for-Money Analysis*

#### **USP Submitted for Concession of the Port of Virginia Rejected Due to Superior Public-Sector Comparator**

In 2013, the Virginia Port Authority (VPA) rejected a USP based on the Value-for-Money analysis. The original USP was submitted by APM Terminals Virginia, Inc. (APM), and an alternative proposal was submitted by VPP. Additionally, Virginia International Terminals, Inc. (VIT), the existing operator of the Port of Virginia, submitted a business plan to address APM's USP.

Upon reviewing VIT's business plan and the detailed proposals submitted by APM and VPP, it was determined that the value generated under the concession approach proposed by APM and VPP was lower than the public-sector comparator (PSC). The PSC was developed using VIT's business plan, which assumed the elimination of operational inefficiencies and reduction

<sup>80</sup> Article 21, *Aprueban Reglamento del Decreto Legislativo N° 1012 que aprueba la Ley Marco de Asociaciones Público Privadas para la generación del empleo productivo y dicta normas*, Supreme Decree N° 127-2014-EF, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2014, available at [http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127\\_2014\\_APP/DS127\\_2014EF.pdf](http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127_2014_APP/DS127_2014EF.pdf) [last visited: January 3, 2016].

<sup>81</sup> Article 27, *Aprueban Reglamento del Decreto Legislativo N° 1012 que aprueba la Ley Marco de Asociaciones Público Privadas para la generación del empleo productivo y dicta normas*, Supreme Decree N° 127-2014-EF, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2014, available at [http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127\\_2014\\_APP/DS127\\_2014EF.pdf](http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127_2014_APP/DS127_2014EF.pdf) [last visited: January 3, 2016].

in costs, as well as increases in cargo volumes and revenues. Achieving operational efficiencies required a corporate restructuring of the existing arrangement between VPA and VIT. The recommendation of the VPA's Board of Commissioners was accepted by the Governor of the Commonwealth of Virginia on April 2, 2013.<sup>82</sup>

*Table 3: Summary of USPs Since 2006 in the Commonwealth of Virginia*

USP	Year of Submission	Competing Conceptual Proposals	Decision	Current Status Summary
Odd Fellows Road Interchange and Extension	2013	0	Reject USP, but procure as a design-build contract	Public agency determined that design-build procurement offered better value. Project awarded under design-build contract in January 2015, and currently under construction.
Port of Virginia	2012	3*	Reject USP	USP process was terminated because the Value-for-Money analysis indicated better value from continuing with current operator, with corporate restructuring.
Hampton Roads Bridge-Tunnel	2010	2	Cancel further evaluation of USP	Procurement canceled. The public agency decided not to advance the USP for further evaluation but continued with further funding studies and environmental review for better project definition and scoping.
Jefferson Avenue Widening and Improvements	2006	0	N.A.	USP returned because project advertised for procurement as a solicited design-bid-build contract. Current status of project is not known.

\* Based on data provided by public officials. Written data provided by public officials indicated no competing conceptual proposal, but desk research by authors provided information about three competing conceptual proposals.  
N.A. = Not available

In cases for which a Value-for-Money analysis is not relevant, such as non-PPP USPs, governments require strong economic rationales for accepting USPs. For instance, in 2015, the Government of Andhra Pradesh rejected a USP because its terms did not provide sufficient economic justification. Box 9 explains the context and reasons.

*Box 9: Use of USP Not Economically Justified*

#### **Government of Andhra Pradesh Rejects USP Due to Lack of Economic Justification**

<sup>82</sup> Virginia Port Authority, *Letter of the Board of Commissioners*, 2013, available at [http://www.p3virginia.org/wp-content/uploads/2015/01/Ltr-from-Chairman-to-Governor\\_03-26-2013.pdf](http://www.p3virginia.org/wp-content/uploads/2015/01/Ltr-from-Chairman-to-Governor_03-26-2013.pdf) [last visited: January 3, 2016].



In 2005, the Government of Andhra Pradesh (GoAP) entered into a concession agreement with GMR International Limited (GMR) to develop the new international airport near Hyderabad<sup>83</sup> as a PPP. The concession agreement obligated the GoAP to develop an elevated expressway, about 11.5 kilometers long, connecting Hyderabad to the new international airport. Given the importance of the expressway, GMR proposed to the Hyderabad Urban Development Authority (HUDA), an entity of GoAP, that it would develop the expressway on its own at a cost of about Indian Rupees 550 crores (about \$125 million<sup>84</sup>). This was presented as a USP under the Andhra Pradesh Infrastructure Development Enabling Act, 2001, which allowed implementation of USPs using the Swiss-challenge mechanism.

GMR proposed to finance, design and construct the elevated expressway, in return for which it asked HUDA to provide about 500 acres of land along the expressway corridor. The value of the land was estimated to be at least equivalent to, if not more than, the cost of the elevated expressway. Initially, GoAP was considering accepting the USP and granting the requested land due to the prospect of faster implementation. However, GoAP did not see clear economic justification for the USP, given the potentially high valuation of the land and the implications for public resources. Aside from the poor economic rationale, there was no strong justification to use a USP to implement the elevated expressway. GoAP had the capacity to implement the elevated expressway, and HUDA had successfully completed several flyovers under GoAP's "Mega City Scheme."

GoAP rejected GMR's USP. Instead, it implemented the elevated expressway under a conventional engineering-procurement-construction (EPC) mechanism, at a cost of Indian Rupees 439 crores (\$93 million<sup>85</sup>). The project was completed and commissioned in October, 2009.

**Few governments have restrictions on government support for USPs, but most governments offer both financial and non-financial support.**

Only about 25 percent of governments in the Experience Review—including the **Philippines, Tanzania, Nigeria, Zambia** and **Trinidad**—prohibit government support for USPs. **Colombia** and **Peru**, however, treat USPs that do not require government support differently. In **Colombia**, whether or not a USP requires government support affects the incentive mechanism during procurement, with the USP proponent earning a bonus of three to 10 percent if the project requires government support, and the right to match if the project does not require government support. Additionally, government support may never exceed 20 percent of the

<sup>83</sup> Hyderabad is the erstwhile capital of the state of Andhra Pradesh.

<sup>84</sup> Exchange rate of \$1 = 44 Indian Rupees, based on the average prevailing exchange rate in 2005, available at <http://www.oanda.com/currency/historical-rates/>.

<sup>85</sup> Exchange rate of \$1 = 47 Indian Rupees, based on the average prevailing exchange rate in 2009, available at <http://www.oanda.com/currency/historical-rates/>.

total investment costs of the project.<sup>86</sup> In **Peru**, whether or not a USP requires government support similarly affects all the USP procedures, from evaluation criteria to project development and procurement.

This issue is particularly relevant in the **Philippines'** NAIA-3 concession agreement, which was invalidated by the court because of the government's decision to provide a guarantee to the winning bidder (in this case, the winning bidder was a competing bidder, despite the right-to-match process used in tendering). The BOT Law in the **Philippines** allows USPs to be accepted only if they do not require any direct government guarantee, subsidy or equity. One of the main motivations for the enactment of the BOT Law was the lack of government funds to implement public projects. Therefore leveraging private-sector financing was one of the motivations behind accepting USPs.

**In addition to evaluation steps and timelines, there is a need for clear assignment of evaluation responsibilities.**

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A range of expertise is required to evaluate USPs. Such expertise may not be housed in a single public agency, and will require coordination with other relevant agencies.

Evaluation is usually conducted by the public agency that accepts the USP submission. Such public agencies could be central PPP units or various line ministries or departments. In both cases, there is a need for coordination with relevant public agencies about technical, environmental, fiscal, legal and other aspects. The extent of coordination and consultation depends on the breadth and depth of expertise available in the central PPP unit or the relevant line ministry.

In **Jamaica**, the PPP Unit evaluates USPs in consultation with the Ministry of Finance and Planning's PPP Node, which is responsible for evaluating the fiscal implications of USPs. The overseeing entity is the Cabinet, which makes the ultimate decision regarding whether to accept the USP for further negotiation.<sup>87</sup> In **Virginia (United States)**, although VAP<sub>3</sub> conducts the USP Policy Review, the public agency responsible for the infrastructure project—such as the Virginia Department of Transportation, the Virginia Port Authority, or the Virginia Department of Aviation—makes the final determination about whether or not to move a USP to the next stage of Detail-Level Screening. Additionally, VAP<sub>3</sub> coordinates with affected localities (county, city or town), which will need to provide comments on the proposed USP project to VAP<sub>3</sub>.<sup>88</sup>

<sup>86</sup> Article 17, PPP Law 1508 of 2012, Government of Colombia, 2012, available at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/Ley150810012012.pdf> [last visited: January 3, 2016].

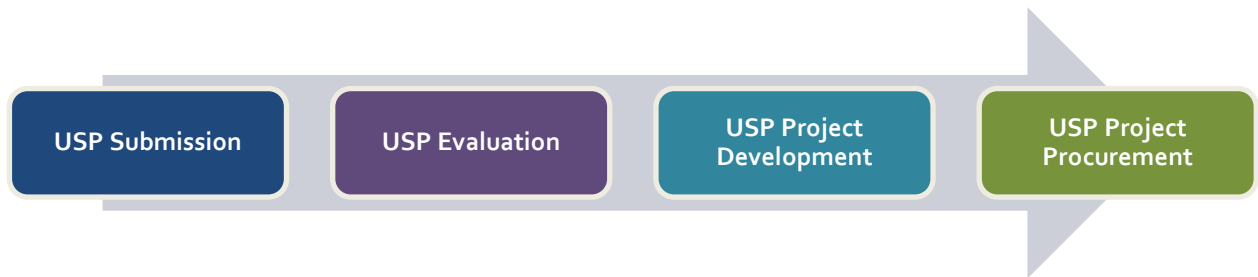
<sup>87</sup> Section 9, Policy and Institutional Framework for the Implementation of a Public-Private Partnership Programme for the Government of Jamaica: The PPP Policy, 2012, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 3, 2016].

<sup>88</sup> The Commonwealth of Virginia, Virginia Public Private Partnerships, *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 22, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].



## 5 Stage Three: Project Development

This chapter discusses the experiences with USP project-development practices, including the allocation of responsibilities between the public agency and the USP proponent, and the key findings from country experiences.



### 5.1 Key Findings

- **Finding 11:** Limiting the role of the USP proponent in project development allows the public agency to (1) create equal bidding conditions during procurement; (2) ensure that the project meets public objectives, strengthening its negotiating position; and (3) develop long-term project-development capacity.
- **Finding 12:** Allowing the USP proponent to contribute to or lead project development, and reimbursing the USP proponent for the associated costs, can be seen as an intermediate solution while the public agency develops the long-term capacity to develop projects.

### 5.2 Overview

Once a public agency has determined that a USP is in the public interest, it prepares the project, conducting the relevant feasibility studies and drafting procurement documentation. As with publicly initiated projects, the project-development phase ensures that only projects that are technically, financially and economically feasible are tendered. The project-development phase is crucial, because it is strongly linked to the level of competition during procurement. USP frameworks typically include provisions to delineate this process.

- **Allocation of Project-Development Responsibilities:** Most USP frameworks define the extent to which project-development responsibilities are shared between the public agency and the USP proponent. Governments typically use one of three approaches: (1) development of the project by the USP proponent; (2) development of the project by

the public agency; or (3) a hybrid approach whereby the USP proponent develops specific studies with close oversight from the public agency.

- **Timeline for Project Development:** Defining a clear timeline for project development ensures that the USP project moves efficiently through the project-development process. It allows the public agency to reject the project if it is not in the public interest, and efficiently process it if it decides to go ahead with the project. Defining a timeline also ensures predictability for USP proponents.
- **Reimbursement of Project-Development Costs:** When governments rely on the USP proponent to develop the project, they typically reimburse the USP proponent for the costs incurred. USP frameworks often: (1) set a threshold for the total costs that can be reimbursed (usually expressed as a percentage of the total investment cost); and (2) determine by *whom* and *when* the project-development costs will be reimbursed. A distinction can be made between reimbursing the USP proponent for a project concept versus reimbursing the USP proponent for conducting all the relevant feasibility studies.

This section will examine challenges and best practices related to project-development responsibilities, timelines, and reimbursement of costs.

### 5.3 Country Experience

**Governments with limited technical capacity typically require that the USP proponent develop the project, whereas governments with greater technical capacity take a more active role in project development.**

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Governments typically use one of three approaches to project development: (1) development of the project by the USP proponent; (2) development of the project by the public agency; or (3) a hybrid approach whereby the USP proponent develops the project, with close oversight from the public agency.

In the majority of the countries that rely on the USP proponent to develop the project—including **India, the Philippines, Kenya, Tanzania** and **Senegal**—public officials cited a lack of public-sector capacity (both technical and financial) as the main constraint to developing projects.<sup>89</sup> Some public officials also believed that studies would be conducted faster and at a higher level of quality if the USP proponent developed them.<sup>90</sup> Some of these countries require

<sup>89</sup> Interviews with public sector officials, August through November 2015.

<sup>90</sup> Interviews with public sector officials, August through November 2015.

the USP proponent to develop not only the relevant feasibility studies, but also the procurement documentation (including the draft PPP contract).<sup>91</sup>

The Experience Review found that governments with greater PPP maturity either conduct project development themselves or allow the USP proponent to develop specific studies while the public agency oversees the process. In **Virginia (United States)**<sup>92</sup> and **South Africa**,<sup>93</sup> the public agency is responsible for project development, but it can engage with the USP proponent. Italy requires the USP proponent to develop the project, but public agencies must conduct their own feasibility study.<sup>94</sup> In **Chile** (see Box 10), the Ministry of Public Works actively oversees and guides the USP proponent while the latter develops the required studies. The Experience Review did not find any instances in which the public agency fully developed USP projects, with limited to no involvement from the USP proponent. Annex 8 provides an overview of project-development responsibilities across jurisdictions.

*Box 10: Chile's Ministry of Public Works' Active Role in USP Project Development*

#### **Chile's Ministry of Public Works' Active Role in USP Project Development**

A distinctive feature of the Chilean USP framework is the active role played by the Ministry of Public Works in the development of USP projects, which helps ensure transparency of process and equal treatment of bidders, fostering equal bidding conditions between the USP proponent and competing bidders during the procurement stage.

Although the USP proponent develops the necessary studies, the MOP actively determines and defines their scope. To ensure that the USP proponent complies with the deadlines and terms of reference specified by the MOP, the former must submit a "bid security," its value determined by the project's investment cost. Although the bid security is minor, it is a clear signal of the seriousness of both the MOP and the USP proponent to develop the project.

Subsequently, the MOP designates a public official, or "Tax Inspector" (*Inspector Fiscal*), who is responsible for overseeing the development of studies, and who acts as the direct counterpart

<sup>91</sup> In jurisdictions such as Gujarat (India) and Senegal, the USP proponent is required to submit a draft contract as part of its proposal.

<sup>92</sup> In Virginia (United States), project development is undertaken by the public agency (the VAP3). For each project, the VAP3 Director appoints a project manager to get the project ready for procurement, with assistance from relevant public-agency and external advisors (as necessary). In Virginia, the public agency may elect to enter into an interim agreement (prior to the final concession agreement) with one or more private entities, to pre-develop certain aspects of a particular project. In practice, the interim agreement allows for sharing of project development responsibilities between the public agency and private entities. Source: Code of Virginia, § 33.2-1809 (2014), *Highways and Other Surface Transportation Systems*, 2014, available at <http://law.justia.com/codes/virginia/2014/title-33.2/section-33.2-1809> [last visited: January 3, 2016].

<sup>93</sup> In the South African National Treasury's framework, the public agency and the USP proponent enter into a USP agreement to determine the procedure for project development, including the preparation of bid documents. Development of these documents must always be under the supervision of the public agency.

<sup>94</sup> In Italy, public agencies have been required to conduct a feasibility study since the 2008 legislative changes. Legislative Decree n.152, *Codice dei Contratti Pubblici Relativi a Lavori, Servizi e Forniture*, available at [http://www.bossettigatti.eu/info/norme/statali/2008\\_0152.htm](http://www.bossettigatti.eu/info/norme/statali/2008_0152.htm) [last visited: January 3, 2016].

of the USP proponent. Each stage of project development—as well as the study as a whole—must be approved by the public official. Such approvals are complex and difficult, with studies being subjected to demanding criteria. One of the reasons for delays in processing USPs is the ongoing iterations between the USP proponent and the approval officer, which frequently results in disputes about the scope of the studies. Private proponents claim that the public agency’s requirements in terms of project development are far superior for USPs compared to publicly initiated projects.

The MOP’s active role in defining the manner, scope and timeline for the studies guarantees that they will be completed in a timely and quality manner. All of the information and all of the studies are made available to the competing bidders during the competitive tender, avoiding any asymmetry in information delivery.<sup>95</sup>

**There are indications that USP projects in which the USP proponent developed the feasibility studies and the PPP contract documentation lead to more renegotiations.**

In **Indonesia**, the government identified several shortcomings in the direct negotiation of USPs with potential independent power producers (IPPs), leading to unbalanced contract terms that eventually required renegotiations (see Box 11)<sup>96</sup>.

*Box 11: Unbalanced PPP Contracts for USPs in Indonesia*

#### **Unbalanced PPP Contracts for USPs in Indonesia**

In 2001/2002, the Government of Indonesia (GoI) prepared a project to improve regional power transmission and develop a competitive electricity market in Java and Bali. As part of this initiative, the GoI evaluated private-sector participation in power projects and identified several shortcomings in the direct negotiations of USPs with potential IPPs, leading to many failed or unbalanced projects.

The review identified the following main reasons: (1) lack of competition and transparency in awarding power-purchase agreements (PPAs); (2) lack of government control of the PPA negotiating process; (3) lack of experience within the GoI’s negotiating teams; (4) lack of standardization in documentation, which resulted in the USP proponents controlling the PPA drafting process; and (5) no benchmarking procedures to establish a clear upper tariff threshold of acceptability.

<sup>95</sup> Interviews with former Chilean public officials, August through November 2015.

<sup>96</sup> Technical assistance completion report, 3807-INO: Preparing the Regional Power Transmission and Competitive Market Development Project (Part B) - Developing a New Framework for Private Sector Participation in Power Generation Projects outside Java-Bali, available at <http://www.adb.org/sites/default/files/project-document/69226/tacr-ino-3807.pdf>

After concluding that the government had accepted unbalanced terms in 27 PPAs, it renegotiated all the PPAs in order to complete the rationalization process for power-sector reform. This renegotiation took five years.

The Experience Review did not find structural data about the early termination of PPP contracts that began as USPs, nor a point of comparison with the potential for early termination in publicly initiated PPPs. It is likely, however, that the same unbalanced contract terms in PPPs arising from USPs that lead to renegotiations in those cases can also lead to early termination of PPP contracts. In **South Africa**, the government terminated a PPP contract for an information-technology system that initiated as a USP and was directly negotiated (see Box 12).

*Box 12: Negative Experiences with USPs in South Africa*

#### **Negative Experiences with USPs in South Africa**

In 1998, the government of the Johannesburg metro area was being centralized. A decision was made to tender for a centralized information-technology (IT) system that could be used by all constituent city precincts. During the preparation of the tender, it was discovered that the City of Johannesburg had an existing IT system that had previously been procured through an unsolicited bid, in the absence of a competitive tender process. The existing IT contract had no contract term (i.e., it went on forever), and the IT equipment could only be replaced by obtaining equipment that was more expensive (i.e., there could be no downsizing). When the City of Johannesburg attempted to terminate the contract, the firm threatened to sue. The firm ultimately reconsidered and agreed to a termination on the condition that it would be allowed to bid for the new, larger contract. The tender went out and, after a bid evaluation consistent with the City of Johannesburg's then-current supply-chain management policy, a new and different IT service provider was selected. Under the new agreement, the annual cost of the Johannesburg metro area's new, expanded system ended up being less than the previous annual cost of the City of Johannesburg's IT system. This experience led many officials to believe that USP contracts do not offer Value for Money, and are often detrimental to government.

**Limiting the involvement of the USP proponent in project development allows the public agency to (1) define the project according to its objectives and strengthen its negotiating position; (2) create equal-bidding conditions during the competitive tender; and (3) build the long-term capacity required to develop high-quality projects.**

The Experience Review found that when the public agency develops the feasibility studies and contract documentation, it enhances its understanding of the USP project, strengthening its negotiating position. In contrast, allowing the USP proponent to develop the feasibility studies and, in particular, the contract documentation, may result in overly aggressive terms that may



not be in the public's interest or may increase the likelihood for renegotiations.<sup>97</sup> Public officials in **Virginia (United States)**, for example, found that allowing the USP proponent to develop the project scope put them in a weak negotiating position for the I-495 HOT Lanes project (see Box 13).

The extent to which the USP proponent develops the project is also correlated to the level of competition during the tender. When the public agency scopes and defines the project, it limits the strategic advantage of the USP proponent relative to competing bidders, increasing the likelihood of attracting a larger number of bidders. Private-sector experts also indicate that a project with well-developed technical and financial studies and publicly available procurement documentation enhances the confidence of other bidders and increases market interest.<sup>98</sup>

Governments with limited capacity may rely on project-development facilities<sup>99</sup> or other multilateral assistance to develop USP projects. Project-development facilities typically seek to develop bankable projects and organize a competitive tender process in return for a fee. Because they typically do not bid for the design, construction and operation of the project, they do not have a conflict of interest in developing the project (unlike the USP proponent, who will typically also be bidding for the project).

*Box 13: Evolution of the Project Development Approach in Virginia (United States)*

#### **Virginia's Experience with Project Development in the Case of the I-495 HOT Lanes USP**

In the early 2000's, the Virginia Department of Transportation (VDOT) began advancing plans for a traditional highway expansion to address growing congestion on I-495 in Virginia. VDOT's plan entailed the acquisition of more than 350 homes and businesses, which led to opposition from the local community.<sup>100</sup> In June 2002, while the environmental-clearance process was underway, Fluor submitted an unsolicited conceptual proposal to VDOT. As an alternative to VDOT's plans to construct several new lanes, Fluor proposed the concept of tolling I-495 by adding two high-occupancy toll (HOT) lanes in each direction. The HOT lanes would not only

<sup>97</sup> When the USP proponent develops the PPP contract as the starting point of its negotiations with the public agency, it is unlikely that this will lead to a balanced agreement regarding the allocation of roles and risks, because the public agency will be in a weaker negotiating position from day one. This may result in a contract that does not meet all of the public agency's objectives, or in overly aggressive terms that could result in renegotiations later on.

<sup>98</sup> Interviews with private-sector experts, October to December 2015.

<sup>99</sup> Project-development facilities include firms such as InfraCo Africa or InfraCoAsia, funded by the Private Infrastructure Development Group (PIDG). PIDG mobilizes private-sector investment to assist developing countries in developing infrastructure. PIDG has founded a range of specialized financing and project-development subsidiaries including DevCo, GreenAfrica Power, InfraCo Asia, InfraCo Africa, and the Infrastructure Crisis Facility Debt Pool (ICF-DP). For more information about PIDG, refer to [www.pidg.org](http://www.pidg.org) [last visited: January 3, 2016].

<sup>100</sup> Express Lanes, Project Background, available at <https://www.expresslanes.com/project-background> [last visited: January 3, 2016].

address congestion issues but also avoid the acquisition of hundreds of properties and result in faster implementation of the project.<sup>101</sup>

Upon receipt of the conceptual proposal in June 2002, VDOT published a notice inviting competing conceptual proposals, to be submitted within the next 120 days. No competing proposals were received in response to the notice, and Fluor's proposal was approved for further development.<sup>102</sup> The USP proponent's conceptual proposal, however, did not address VDOT's project-scope requirements and was not subjected to the NEPA Process.<sup>103</sup> As a result, several iterations of the project's scope were required, which added complexity to the securing of environmental clearances.<sup>104</sup> Additionally, because VDOT had not developed the scope of the project, it found itself struggling to "catch up" with Fluor on most of the technical issues. Although it is hard to point out the specific impact of this issue, it is understood that it gave Fluor a superior position in driving the process, leaving VDOT somewhat disadvantaged.<sup>105</sup>

Advanced technologies or new sectors, however, may require greater involvement from the USP proponent. The government in **Gujarat (India)**, for example, lacked prior knowledge of the technology proposed for the Jafrabad liquefied natural gas (LNG) terminal and floating storage and re-gasification unit (FSRU). As a result, project development was primarily undertaken by the USP proponent (see Box 1).

Public officials in **Peru's** PROINVERSION also cited lack of sectoral experience as the reason for allowing the USP proponent to develop the studies for the Waste Water Treatment Plant of Taboada (see Box 14). In these cases, it may be preferable for the public agency to hire advisors or work with project-development facilities to develop the project so that it builds capacity in that particular sector or technology. In certain cases, it may be justified to allow the USP proponent to develop elements of the project, if the public agency takes an active role in overseeing and scoping them.

<sup>101</sup> Porter Wheeler, *Public-Private Partnership Lessons Learned and Best Practices*, 2013, page 8, available at <http://p3policy.gmu.edu/wp-content/uploads/2013/12/LESSONS-LEARNED-06-25-2013.pdf> [last visited: January 3, 2016]; Discussion with Commonwealth of Virginia's Office of Public-Private Partnerships (VAP3). Fluor posited that its proposal would provide the needed new capacity, encourage greater car-pooling than would result from traditional high-occupancy vehicle (HOV) lanes, and facilitate more bus ridership by allowing reliable express bus use of the HOT lanes / HOV network. Fluor Daniel, *Capital Beltway HOT Lanes: Conceptual Proposal*, 2002, page 2-4, available at [http://www.vameqaprojects.com/tasks/sites/default/assets/File/pdf/HOTLANECapitalBeltwayProposalPART\\_2.pdf](http://www.vameqaprojects.com/tasks/sites/default/assets/File/pdf/HOTLANECapitalBeltwayProposalPART_2.pdf) [last visited: January 3, 2016]; and Discussions with VAP3 and Fluor.

<sup>102</sup> Roger Boothe Jr., Virginia Department of Transportation, *SEP 14: Initial Report*, 2008, available at <http://www.fhwa.dot.gov/programadmin/contracts/sep14.va2008.cfm> [last visited: January 3, 2016].

<sup>103</sup> The NEPA Process is a statutory process to assess the environmental impacts of alternative options carried out in accordance with the requirements of the National Environmental Policy Act of 1969. For more information, refer to the website of the United States Environmental Protection Agency (EPA): <http://www.epa.gov/nepa/what-national-environmental-policy-act>

<sup>104</sup> Discussion with VAP3.

<sup>105</sup> Discussion with VAP3.

Although it is common—particularly in mature PPP markets—to reimburse the USP proponent for the costs incurred in developing the project, this may be an intermediate solution while the public agency develops the capacity to prepare projects.

Half of the USP frameworks examined in the Experience Review allowed the USP proponent to be reimbursed for project-development costs. The feature is more common in mature PPP markets, including **Chile**,<sup>106</sup> **Peru**,<sup>107</sup> **Colombia**,<sup>108</sup> **Virginia (United States)**,<sup>109</sup> **South Africa**,<sup>110</sup> and **Italy**. In most countries, the USP proponent is only reimbursed if the project is accepted and tendered,<sup>111</sup> to discourage non-serious proposals. The costs could be reimbursed either by the public agency, if the USP project is not tendered, or by the winning bidder, if the project is won by a competitor.<sup>112</sup> Some countries, including **Peru**<sup>113</sup> and **Italy**,<sup>114</sup> provide a reimbursement threshold, often expressed as a percentage of overall investment costs.

If the USP proponent is asked to prepare and develop the project, it will expect to be compensated for the costs that it incurred.<sup>115</sup> However, if the public agency possesses the funds to reimburse the USP proponent, it may be preferable to use those funds to develop the project itself (if necessary, by hiring advisors or working with project-development facilities). Allowing the USP proponent to develop the project remains a less-than-ideal approach to project development, because it increases the strategic advantage of the USP proponent relative to

<sup>106</sup> In Chile, the project-development costs are reimbursed by either the MOP or a third-party bidder, depending on whether or not the project is awarded. The reimbursement costs are borne by the Ministry of Public Works in cases where the project fails to go to tender or fails to be awarded, or is tendered in a system other than a concession. The reimbursement costs are borne by a competing bidder in cases in which the project is awarded to a bidder other than the USP proponent.

<sup>107</sup> In Peru, the winning bidder is required to reimburse not only the project-development costs incurred by the USP proponent (not applicable in cases where the USP proponent wins the tender) but also the costs incurred by PROINVERSION in processing the USP. The USP proponent is not reimbursed for the costs incurred, however, if the USP project is rejected, or if the USP proponent fails to participate in the tender or submit a valid financial bid.

<sup>108</sup> Similarly, in Colombia, project-development costs are reimbursed by the public agency in cases where the project is rejected or fails to go to tender, and by a competing bidder in cases in which the project is awarded to a bidder other than the USP proponent. Article 20: "Si el originador no resulta seleccionado para la ejecución del contrato, deberá recibir del adjudicatario el valor que la entidad estatal competente haya aceptado," PPP Law 1508 of 2012, Government of Colombia, 2012, available at <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/Ley150810012012.pdf> [last visited: January 2, 2016].

<sup>109</sup> Virginia only reimburses project-development costs if it entered into a project-development agreement with the USP proponent.

<sup>110</sup> In South Africa, reimbursement of project-development costs is made only if the project is awarded to a party other than the USP proponent. The reimbursement is borne by the successful bidder, who has to make allowance for such agreed-upon costs in its proposal. Usually, a USP agreement is negotiated according to the methodology for determining costs to be reimbursed to the USP proponent.

<sup>111</sup> In Peru, the USP proponent does not receive reimbursement for project-development costs unless the project is accepted by PROINVERSION and goes to tender. Similarly, in Andhra Pradesh, Madhya Pradesh, and Rajasthan (India), the reimbursement is only made after the project is approved and taken through a Swiss-challenge bid process.

<sup>112</sup> This is the case in Chile and Colombia.

<sup>113</sup> In Peru, for example, the total amount of costs that can be reimbursed depends on whether a project is self-sufficient or requires government support—in the former case, the total reimbursement amount cannot exceed one percent of the total investment cost; in the latter case, the total amount cannot exceed two percent. Supreme Decree N° 127-2014-EF, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2014, available at [http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127\\_2014\\_APP/DS127\\_2014EF.pdf](http://www.proinversion.gob.pe/RepositorioAPS/o/o/arc/DS127_2014_APP/DS127_2014EF.pdf) [last visited: January 3, 2016].

<sup>114</sup> In Italy, the USP proponent may receive a reimbursement of project-development costs (up to 2.5 percent of investment costs) from a competing bidder in cases in which the USP proponent does not win the contract in a competitive tender. Italy's USP framework also possesses a unique feature, requiring the USP proponent to reimburse the project-development costs of the second-best competing bid if the USP proponent wins the contract.

<sup>115</sup> Interviews with private-sector experts, October and November 2015.

competing bidders. When public agencies build the long-term capacity to develop USP projects themselves, they eliminate the need to reimburse the USP proponent for developing the studies.<sup>116</sup>

*Box 14: Reimbursement of Project-Development Costs in Peru*

#### Reimbursement of Costs in Peru: The Case of the Waste-Water Treatment Plant of Taboada

In early 2006, the Minister of Housing, Construction, and Health (*Ministro de Vivienda, Construcción y Saneamiento*) declared the Waste-Water Treatment Plant of Taboada a priority project, asking PROINVERSION to include it in its investment-promotion portfolio.<sup>117</sup> In October 2006, the Taboada Consortium—comprised of the Brazilian-led Constructora Noberto Odebrecht S.A. and Odebrecht Inestimentos em-Infra-Estructura Ltda, the USP proponent—submitted a USP for the project. In order to verify the costs incurred by the USP proponent in the development of the proposal, PROINVERSION hired technical firm CESEL Ingenieros S.A., which confirmed that the costs were \$911,403.00.<sup>118</sup>

By December 2007, PROINVERSION had declared the project of “public interest,” publishing it on its website, as well as in the newspapers “El Peruano” and “Gestión.” Seven companies expressed interest in the project and were declared competing bidders. In April 2008, PROINVERSION published the procurement documentation, specifying that the winning bidder would be required to: 1) reimburse PROINVERSION for the costs incurred in evaluating the USP and organizing the procurement; 2) provide a contribution to the Investment Promotion Fund (*Fondo de Promoción de la Inversión Privada en las Obras Públicas de Infraestructura y Servicios Públicos*, FOCEPRI)<sup>119</sup>; and 3) reimburse the USP proponent for the costs incurred in developing the USP.<sup>120</sup>

On 26 February 2009, PROINVERSION awarded the concession to a competing bidder, the Spanish firm ACS Servicios, Comunicaciones y Energía de España, which offered to charge a

<sup>116</sup> Although the public agency may no longer need to reimburse the USP proponent for the costs incurred in developing the project (if it develops and prepares the studies and procurement documentation itself), it may still want to reimburse the USP proponent for the initial project concept.

<sup>117</sup> *Concurso de Proyectos Integrales para la concesión del Diseño, Financiamiento, Construcción, Operación y Mantenimiento del Proyecto: Planta de Tratamiento de Aguas Residuales Taboada – PTAR Taboada*, White Paper, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2006 – 2009.

<sup>118</sup> *Concurso de Proyectos Integrales para la concesión del Diseño, Financiamiento, Construcción, Operación y Mantenimiento del Proyecto: Planta de Tratamiento de Aguas Residuales Taboada – PTAR Taboada*, White Paper, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2006 – 2009.

<sup>119</sup> Article 10 of Legislative Decree N° 839 *Precisan Mecanismo General para la Determinación del Monto Considerado como Ingresos del Foncepri*, Supreme Decree N° 021-98-PCM, 1998, available at [http://www.proinversion.gob.pe/RepositorioAPS/fo/arc/ML\\_APPS\\_DS\\_021\\_98\\_PCM/07-D\\_S\\_21-98-PCM.pdf](http://www.proinversion.gob.pe/RepositorioAPS/fo/arc/ML_APPS_DS_021_98_PCM/07-D_S_21-98-PCM.pdf) [last visited: January 3, 2016].

<sup>120</sup> *Concurso de Proyectos Integrales para la concesión del Diseño, Financiamiento, Construcción, Operación y Mantenimiento del Proyecto: Planta de Tratamiento de Aguas Residuales Taboada – PTAR Taboada*, White Paper, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2006 – 2009.

tariff of 0.2277 percent per cubic meter of treated water, less than 33 percent of what was established in the procurement documentation. On 8 May 2009, ACS submitted the three payments: 1) a payment to PROINVERSION for the costs incurred by the USP process, which totaled \$545,723.42; 2) a payment to FONCEPRI, which totaled S/. 4,365,639 (approximately \$1.3 million); and 3) a payment to the USP proponent which totaled S/. 3,423,987 (approximately \$1 million).<sup>123</sup>

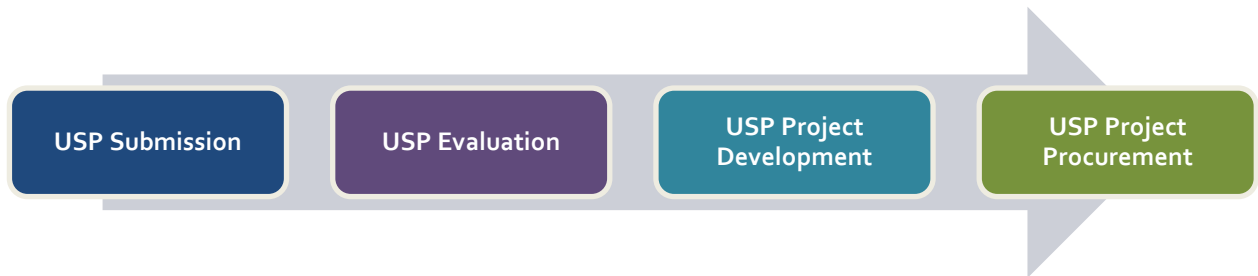
The case of Peru is unique, in that it requires the winning bidder to reimburse not only the project-development costs incurred by the USP proponent, but also the administrative costs of PROINVERSION. Asking the winning bidder to reimburse the administrative costs of the public agency in evaluating, developing and procuring the USP is similar to the public agency requesting that the USP proponent provide a review fee upon USP submission, as the latter is typically also intended to cover the public agency's administrative costs. The distinction, however, is that the initial evaluation fee is paid by every USP proponent (and therefore covers the evaluation costs of all the USPs submitted), whereas the winning bidder reimbursing administrative costs only applies to the USP projects that were successfully procured.

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<sup>123</sup> *Concurso de Proyectos Integrales para la concesión del Diseño, Financiamiento, Construcción, Operación y Mantenimiento del Proyecto: Planta de Tratamiento de Aguas Residuales Taboada – PTAR Taboada*, White Paper, Private Investment Promotion Agency of Peru (PROINVERSION), Government of Peru, 2006 – 2009.

## 6 Stage Four: Procurement

This chapter discusses experiences with USP project-procurement practices, including challenges regarding the creation of competition, and solutions to overcome those challenges.



### 6.1 Key Findings

- **Finding 13:** Failing to introduce competition in the USP procurement process—in other words, directly negotiating a deal—can lead to implementation delays, poorly structured PPP transactions, and low Value for Money.
- **Finding 14:** Organizing a competitive process is challenging if the USP proponent is provided with the right to match. A bonus mechanism may not necessarily distort competition, if bonuses constitute small percentages of bid-evaluation criteria.
- **Finding 15:** Providing a short period for competing bidders to submit bids (usually less than six months) limits competition. USPs that provide a significant strategic advantage for the USP proponent typically fail to create competition.

### 6.2 Overview

Governments have adopted different approaches to procuring projects that originated as USPs. One distinction exists between governments that procure USPs through direct negotiation and those that organize a competitive tender process. Another can be found in the extent to which governments provide advantages to USP proponents during the tendering process. This section addresses challenges and best practices in procuring USP projects.

- **Extent of Competition in Procurement:** Governments vary in the extent to which they introduce competition in the USP-procurement process. Some governments allow the public agency to negotiate the USP contract directly with the USP proponent. Most governments, however, introduce a competitive tender process to ensure that the contract provides the best value to society.

- **Incentive Mechanisms:** Many governments provide incentive mechanisms to the USP proponent during the tendering process. Many public officials believe that private entities would not be sufficiently incentivized to submit USPs if they did not possess these advantages, which improve their chances of winning the contract. The most commonly used incentive mechanisms include (1) providing a bonus (usually expressed as several percentage points) to the USP proponent in the evaluation of the bids, and (2) allowing the USP proponent to match a competing bid to win the contract (known as “right to match”). A less commonly used mechanism involves allowing the USP proponent to be automatically shortlisted to the final bidding round (often referred to as “automatic shortlisting” or “best and final offer”).
- **Preparation Time for Competing Bidders:** When governments introduce formal competition, the USP framework typically indicates how much time the public agency should provide to competing bidders to develop their bids. The preparation time provided to competing bidders has a strong impact on the level of competition. If competing bidders believe they do not have sufficient time to prepare a serious and competitive bid, they will choose not to participate in the tender process.

### 6.3 Country Experience

**Most governments examined in the Experience Review competitively tender USP projects. Directly negotiated USPs often struggle with controversies, primarily over transparency and accountability, which results in delays in implementation.**

More than 65 percent of the governments studied in the Experience Review use formal competition in the procurement of USPs. Only a few governments use direct negotiation as the default option for USPs. Nevertheless, many governments allow direct negotiation with the USP proponent in specific scenarios, including lack of market interest.

In **Peru** and **Chile**, the public agency may negotiate directly with the USP proponent if no competing bidders express interest.<sup>122</sup> Similarly, in **South Africa**, a “market test” determines whether other firms are interested in the project, after which the public agency can negotiate directly with the USP proponent (if there is no response from competing bidders). In **Senegal**, the public agency may negotiate a contract directly with the USP proponent if the USP meets a number of minimum requirements. Although less common, governments such as **Kenya**<sup>123</sup> and

<sup>122</sup> In Peru, the public agency may negotiate directly with the USP proponent if no competing bidder has expressed an interest in the project during the specified period of 150 days.

<sup>123</sup> Section 61 of Kenya’s PPP Act, 2013 stipulates that USPs may not be subject to a competitive tender. As in the case of general procurement laws that allow sole sourcing under certain conditions, USPs can be considered in cases where: (a) there is an urgent need for continuity in developing, operating or providing a service; (b) the cost of intellectual property is substantial; (c) there is only a single party with requisite capacity; or (d) the existence of any other circumstance that is prescribed by the Cabinet Secretary of Kenya.

**Australia**<sup>124</sup> use direct negotiation as the default procurement option for USPs. In the case of **Australia**, however, the threshold for directly negotiating a USP is very high, and remains an “exceptional” procedure to procure projects.

The Experience Review found that directly negotiated USPs are often subject to legal and political challenges, primarily over transparency concerns. Even where no corruption exists, the lack of transparency makes the projects vulnerable to accusations of corruption.<sup>125</sup> These legal and political challenges often result in project timelines being significantly delayed. Although USP proponents may argue that direct negotiations may be more cost efficient or faster,<sup>126</sup> experience suggests that directly negotiated deals are more likely to be subject to delays than competitively tendered deals. This highlights the importance of organizing a competitive tender process. Even if only the USP proponent submits a bid, organizing a competitive process shows the government’s commitment to transparency and removes any speculation around market interest in the project.<sup>127</sup>

A number of directly negotiated deals were significantly delayed due to legal and political challenges. The Accra-Kumasi Highway in **Ghana** has been delayed for more than 11 years, primarily due to concerns over the fact that it was not competitively tendered (see Box 16). In **Jamaica**, the government directly negotiated with the USP proponent for the North-South Link of Highway 2000. The decision to negotiate directly with the Chinese engineering company resulted in public controversy, including concerns raised by Jamaica’s OCG (see Box 2: Poor Public Disclosure Results in Controversies and Delays), as a result of which the project procurement was delayed by several months. **Kenya**’s SGR between Nairobi and Mombasa experienced major controversies, in large part because the project was not competitively tendered, resulting in at least a two-year delay (see Box 15). The **Djibouti** government revoked the license of, and launched a case in the U.K. courts against, the operator (and USP proponent) for the Doraleh Container Terminal project, because of corruption allegations (see Box 3).

*Box 15: Direct Negotiations Lead to Perceptions of Corruption in Kenya*

<sup>124</sup> Guide for Submission and Assessment, 2014, paragraph 5.5, page 16 available at <https://www.nsw.gov.au/sites/default/files/miscellaneous/Updated-Unsolicited-Proposals-Guide-February-2014.pdf> [last visited January 3, 2016].

<sup>125</sup>This finding is consistent with that of previous studies regarding USPs, including that of John Hodges (2003). John Hodges, *Unsolicited Proposals: The Issues for Private Infrastructure Projects*, The World Bank Group, 2003, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11305/263990PAPERoVPono10257.pdf?sequence=1> [last visited: January 2, 2016].

<sup>126</sup>“Some private proponents claim that it’s necessary to sole-source some project proposals in circumstances such as the following: (1) A project developer possesses intellectual property rights to key approaches or technologies; (2) there is a lack of private-sector interest due to the small scale, remote location, or political risk of the project; (3) organizing a public tender may not be cost efficient for governments, bidders, or both; (4) project development would happen more quickly through negotiations, especially during emergencies or widespread shortages.” John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo101PUBLIC1.pdf) [last visited: January 2, 2016].

<sup>127</sup> John Hodges, *Unsolicited Proposals: The Issues for Private Infrastructure Projects*, The World Bank Group, 2003, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11305/263990PAPERoVPono10257.pdf?sequence=1> [last visited: January 2, 2016].



### Lack of Competition Results in Controversies and Delays in Kenya's SGR

The renovation of rail infrastructure between the Indian Ocean Port of Mombasa and the Kenyan capital of Nairobi is a flagship project in Kenya's Vision 2030 development plans. The Kenya Railway Corporation (KRC)'s initial timetable indicated that the studies would be completed by March 2011, with construction beginning in November 2011 and being completed by 2013.<sup>128</sup> Over the next two years, however, the KRC struggled to hire consultants to conduct the initial studies for the Project.<sup>129</sup> The \$10 million transaction tender, which had attracted 16 bids,<sup>130</sup> was reportedly halted twice.<sup>131</sup>

In March 2011, the Ministry of Transport (MoT) ordered the KRC to halt the hiring of consultants during the procurement process, because a memorandum of understanding (MoU) had been signed between Transport Minister Chirau Ali Mwakwere and the Government of China (GoC), committing the latter to conducting a feasibility study "free of cost" on the condition that China Roads and Bridge Corporation (CRBC) undertake the construction of the railway. The bilateral agreement included provisions for the Export-Import Bank of China (ExIm Bank) to finance the majority of the \$5.2 billion<sup>132</sup> project costs.

The CRBC contract raised claims of corruption and mismanagement and was reportedly under investigation by various public agencies, including two parliamentary committees,<sup>133</sup> as well as the Ethics and Anti-Corruption Commission (EACC).<sup>134</sup> Opponents of the contract advocated cancelling it and launching a competitive tender.<sup>135</sup> Two petitions (Petition No. 58 of 2014 and

<sup>128</sup> *Firms submit offers for services in new railway project*, Business Daily, available at <http://www.businessdailyafrica.com/539444/803078/-/view/printVersion/-/sv8xwaz/-/index.html> [last visited: January 3, 2016].

<sup>129</sup> *Kenya Railways seeks advisor for new line*, Daily Nation, 2009, available at <http://www.nation.co.ke/business/news/1006/681338/-/ieoqj2z/-/index.html> [last visited: January 3, 2016].

<sup>130</sup> *Bidders show interest in rail-track modernization*, Standard Daily, 2009, available at <http://www.standardmedia.co.ke/business/insidePage.php?id=1144028791&cid=14&> [last visited: January 3, 2016]; and *Kenya to construct a modern railway*, Standard Digital, 2010, available at <http://www.standardmedia.co.ke/?id=2000002577&cid=14&j=&m=&d=&articleID=2000002577> [last visited: January 3, 2016].

<sup>131</sup> *Kenya Tender Annulled*, Railways Africa, 2010, available at <http://www.railwaysafrica.com/news/kenya-tender-annulled> [last visited: January 3, 2016]; and *Study on new rail line to go on, says court*, Daily Nation, 2012, available at <http://www.nation.co.ke/lifestyle/smartcompany/Study-on-new-rail-line-to-go-on/-/1226/1640004/-/view/printVersion/-/suauoy/-/index.html> [last visited: January 3, 2016].

<sup>132</sup> *Kenyan Puts Cost of Key Infrastructure Project at \$5.2 Billion*, Bloomberg Business, 2014, available at <http://www.bloomberg.com/news/2014-01-21/kenyan-puts-cost-of-key-infrastructure-project-at-5-2-billion.html> [last visited: January 3, 2016].

<sup>133</sup> *Chinese firms lock horns in Kenyan big-money projects*, Business Daily, 2014, available at <http://www.businessdailyafrica.com/Chinese-firms-lock-horns-in-Kenyan-big-money-projects/-/539546/2158000/-/vq21ko/-/index.html> [last visited: January 3, 2016]; *State defends award of Sh1.2trn rail deal to Chinese firm*, Business Daily, 2013, available at <http://www.businessdailyafrica.com/State-defends-award-of-Sh1-2trn-rail-deal-to-Chinese-firm/-/539546/2083628/-/mcjha/-/index.html> [last visited: January 3, 2016]; *MPs probe Chinese firm over Sh1.2tr railway deal*, Business Daily, 2013, available at <http://www.businessdailyafrica.com/MPs-probe-Chinese-firm-over-Sh1-2tr-railway-deal/-/539546/2073664/-/1y04qz/-/index.html> [last visited: January 3, 2016]; and *Shadowy figures pushing rail deal, says Keter*, Daily Nation, 2014, available at <http://www.nation.co.ke/news/Shadowy-figures-pushing-rail-deal-says-Keter/-/1056/2156652/-/3nqzng/-/> [last visited: January 3, 2016].

<sup>134</sup> *Graft team opens probe on rail deal*, Daily Nation, 2014, available at <http://www.nation.co.ke/news/Graft-team-opens-probe-on-rail-deal/-/1056/2138214/-/eqdbsez/-/index.html> [last visited: January 3, 2016].

<sup>135</sup> *New standard gauge railway 'is a do-or-die project for Kenya*, Daily Nation, 2013, available at <http://mobile.nation.co.ke/lifestyle/New-standard-gauge-railway/-/1950774/2087578/-/format/xhtml/-/142t29uz/-/index.html> [last visited: January 3, 2016].

Petition No. 209 of 2014)<sup>136</sup> were submitted. They voiced various concerns related to the procurement and implementation of the contract, especially the fact that the contract was not subject to a competitive tender.<sup>137</sup>

Although the Project was officially launched in November 2013,<sup>138</sup> no significant progress was made until early 2015, due to the controversies surrounding the lack of a competitive tendering.<sup>139</sup> As of late 2015, the Project is reportedly on schedule, with 50 percent of the civil works expected to be completed by the end of 2015,<sup>140</sup> and the entire stretch from Mombasa to Nairobi to be completed by June 2017,<sup>141</sup> several years behind the original schedule.

*Box 16: Lack of Competitive Tendering Resulting in Project Delays in Ghana*

#### **Lack of Competitive Process Delays the Accra-Kumasi Highway Project in Ghana**

The Accra-Kumasi Highway forms part of an international trunk road connecting Ghana, Burkina Faso, Guinea, Chad, Libya, and Senegal. In 2004, Arterial Toll Roads Company Limited (ATRCL), a joint venture formed by Wellington Trust (Canada), Savarino (United States) and DSC International (Egypt), submitted a USP for the dualization (adding two lanes in each direction) of all unimproved sections of the highway, through a 30-year design-finance-build-operate (DBFO) concession. The Government of Ghana (GoG) awarded ATRCL the concession through direct negotiation in November 2005. This is considered the first highway PPP project in Ghana. However, the project is yet to be implemented a decade after the awarding of the concession.

<sup>136</sup> Petition No. 58 of 2014, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Republic of Kenya, available at <http://kenyalaw.org/caselaw/cases/view/103808/> [last visited: January 3, 2016].

<sup>137</sup> *CS Michael Kamau says Chinese set out terms of SGR tender*, Standard Digital, 2014, available at [http://www.standardmedia.co.ke/?articleID=2000102843&story\\_title=chinese-set-out-terms-of-tender-says-cs](http://www.standardmedia.co.ke/?articleID=2000102843&story_title=chinese-set-out-terms-of-tender-says-cs) [last visited: January 3, 2016]; *Making of a mega scandal? Why railway figures do not add up*, Daily Nation, 2014, available at <http://www.nation.co.ke/news/g-of-a-mega-scandal/-/1056/2160724/-/gdm5hbz/-/> [last visited: January 3, 2016]; *New railway petitioners asked to notify parties to the suit*, Daily Nation, 2015, available at <http://www.nation.co.ke/business/Standard-Gauge-Railway-Case-Court-of-Appeal/-/996/2786262/-/kjd7tbz/-/index.html> [last visited: January 3, 2016]; Petition No. 58 of 2014, High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Republic of Kenya, available at <http://kenyalaw.org/caselaw/cases/view/103808/> [last visited: January 3, 2016]; World Bank Press Release, *World Bank Applies 2009 Debarment to China Communications Construction Company Limited for Fraud in Philippines Roads Project*, 2011, available at <http://www.worldbank.org/en/news/press-release/2011/07/29/world-bank-applies-2009-debarment-to-china-communications-construction-company-limited-for-fraud-in-philippines-roads-project> [last visited: January 3, 2016]; and *Chinese Construction Giants barred by World Bank*, China.org.CN, 2009, available at [http://www.china.org.cn/business/news/2009-01/15/content\\_17110950.htm](http://www.china.org.cn/business/news/2009-01/15/content_17110950.htm) [last visited: January 3, 2016].

<sup>138</sup> *Uhuru asked to halt railway project*, Daily Nation, 2014, available at <http://www.nation.co.ke/counties/Uhuru-asked-to-halt-railway-project/-/1107872/2138076/-/cimeky/-/index.html> [last visited: January 3, 2016].

<sup>139</sup> *Construction of Standard Gauge Railway gathers steam*, Kenyan Government Website (MyGov), 2015, available at: <http://www.mygov.go.ke/?p=2121> [last visited: January 3, 2016].

<sup>140</sup> *President Kenyatta on inspection tour of Standard Gauge Railway*, Kenyan Government Website (MyGov), 2015, available at <http://www.mygov.go.ke/?p=2659> [last visited: January 3, 2016]; *Rail Contractor to Clear Half of the Civil Work this year*, Kenyan Government Website (MyGov), 2015, available at <http://www.mygov.go.ke/?p=389> [last visited: January 3, 2016]; and *Kenya: Standard Gauge Railway construction ahead of schedule*, Standard Digital, 2015, available at <http://www.standardmedia.co.ke/article/2000174167/kenya-standard-gauge-railway-construction-ahead-of-schedule> [last visited: January 3, 2016].

<sup>141</sup> *SGR project key to China's foray in Africa*, Kenyan Government Website (MyGov), 2015, available at <http://www.mygov.go.ke/?p=481> [last visited: January 3, 2016]; and *public debt attributed to borrowing to fund major projects*, Kenyan Government Website (MyGov), *High* 2015, available at <http://www.mygov.go.ke/?p=3504> [last visited: January 3, 2016].

Although several factors have contributed to the delays in the finalization of the concession agreement and in the project implementation, the absence of a competitive tender process has been a significant factor. Concerns were raised by Ghana's Parliament, primarily relating to the absence of a competitive-tender process. To address the concerns, an Inter-Ministerial Team was constituted to review the project. The Inter-Ministerial Team highlighted the lack of competitive tender, along with the inadequacy of the business case. Due to a lack of public-sector expertise and experience, GoG did not undertake preparatory work for the project, and instead relied on the business case developed by ATRCL, the USP proponent. Additionally, the validity of the business case could not be established through competitive tender because GoG negotiated directly with ATRCL. In light of this, GoG has appointed independent advisors to develop viability studies for the project, and to competitively procure the project if it is found to be viable.<sup>142</sup>

### **Competitively tendering USPs can help to strengthen the negotiating position of the public agency and ensure Value for Money.**

Many PPP experts confirm that, even in the case of limited public-sector capacity, it is easier for the public agency to negotiate a contract in a competitive setting than in a setting with only one bidder. A competitive tender allows the public agency to compare financial bids and risk-allocation preferences. Typically, the public agency is at a disadvantage when it negotiates with a preferred or unsolicited bidder, which often hires professional negotiators to finalize the terms of the concession agreement.<sup>143</sup>

A competitive tender is typically seen as a prerequisite for achieving a fair market price, an efficient allocation of resources, and Value for Money.<sup>144</sup> The World Bank Procurement Guidelines note that open competition is the basis for an effective public procurement.<sup>145</sup> If a competitive process attracts more than one bidder, it is highly likely to drive down the price requested by the private sector,<sup>146</sup> resulting in a better deal for the public agency.

<sup>142</sup> Peter BrockleBank, *Private Sector Involvement in Road Financing*, 2014, Africa Transport Policy Program Working Paper No. 1, page 84, available at <http://www.ssatp.org/sites/ssatp/files/publications/SSATPWP102-PPP.pdf> [last visited: January 2, 2016]

<sup>143</sup> Peter BrockleBank, *Private Sector Involvement in Road Financing*, Africa Transport Policy Program Working Paper No. 1, 2014, available at <http://www.ssatp.org/sites/ssatp/files/publications/SSATPWP102-PPP.pdf> [last visited: January 2, 2016].

<sup>144</sup> Cesar Queiroz, *Launching Public Private Partnerships for Highways in Transition Economies*, Transport Papers 9, Transport Sector Board, The World Bank Group (WBG), 2005, available at: [http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1227561426235/trp-9-PPPs\\_Highways.pdf](http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1227561426235/trp-9-PPPs_Highways.pdf) [last visited: January 3, 2016].

<sup>145</sup> *Guidelines: Procurement under IBRD Loans and IDA Credits*, The International Bank for Reconstruction and Development, 2004, available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf> [last visited: January 3, 2016].

<sup>146</sup> John Hodges, *Unsolicited Proposals: The Issues for Private Infrastructure Projects*, The World Bank Group, 2003, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11305/263990PAPERoVPono10257.pdf?sequence=1> [last visited: January 2, 2016].

Private entities may also prefer a competitive tender to direct negotiation. Indeed, a 2011 study in the United States found that 70 percent of private entities preferred participating in a competitive tender versus directly negotiating a USP.<sup>147</sup>

**Most competitive tenders that provide the USP proponent with the right to match attract few or no competing bidders. A bonus mechanism may not necessarily distort competition, if bonuses represent small percentages of bid-evaluation criteria.**

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Most USP frameworks feature an incentive mechanism for the USP proponent during the competitive-tender process (see Annex 9). The right to match is the most common incentive mechanism, used in **India** (Andhra Pradesh, Madhya Pradesh, and Rajasthan), the **Philippines**, **Peru**, **Colombia**, **Jamaica** and **Italy**. The bonus mechanism is used in **Chile**, **Colombia** and **South Korea**.<sup>148</sup> A less common mechanism is the automatic admission of the USP proponent to the final bidding round (also known as best and final offer (BAFO) stage), featured in **South Africa** (SANRAL) and the **Philippines**.<sup>149</sup>

Some governments, including **South Africa** (National Treasury) and **Virginia** (United States),<sup>150</sup> do not offer the USP proponent any incentive over competing bidders. In the United States, a 2011 study found that none of the 22 states with a USP framework provided incentive mechanisms.<sup>151</sup> These countries have found that incentive mechanisms encourage USPs for opportunistic motivations, and that quality USPs can still be encouraged with the reimbursement of costs incurred in the development of any feasibility studies (if the USP

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<sup>147</sup> Ahmed Abdel Aziz and Human Nabavi, *Unsolicited Proposals for PPP Projects: Private Sector Perceptions in the USA*, Construction Research Congress, 2014, pp. 1349-1358.

<sup>148</sup> South Korea also awards bonus points to USP proponents. If the public agency does not make any changes to the USP proponent's project details, and the USP proponent does not submit a modified proposal, the bonus is within 10 percent of the total evaluation score. When the public agency makes changes to the USP project's details, as proposed by the USP proponent, and the USP proponent submits the amended proposal, the bonus is within five percent of the total evaluation score.

<sup>149</sup> In the Philippines, USPs submitted under the NEDA JV Guidelines allow the USP proponent to submit a revised financial bid on or before the opening of competitive bids. The NEDA JV guidelines mainly relate to projects that are arranged as a joint venture agreement between a government entity (as defined in the NEDA JV Guidelines) and the private sector to reach a common goal and that involve a community or pooling of interest in the performance of an investment activity.

<sup>150</sup> In Virginia (United States), if VAP<sub>3</sub> develops the USP project along the lines of a solicited project (i.e., without support from the USP proponent), then project procurement is based on a two-stage process consisting of a request for qualifications (RFQ) and a request for proposals (RFP). VAP<sub>3</sub> is the primary point of contact for project procurements, in consultation with the public agencies responsible for the infrastructure facility. However, VAP<sub>3</sub> is allowed to enter sign an interim agreement with the USP proponent for pre-development support prior to project procurement. In that case, procurement of the interim agreement is conducted through competitive sealed bidding or competitive negotiation, as per the Virginia Public Procurement Act of 1982. The public notice period for an invitation to bid or a request for proposals (as the case may be) is 10 days.

<sup>151</sup> In terms of a preferred incentive mechanism, 30 percent preferred BAFO, 20 percent preferred a bonus system, 10 percent preferred Swiss challenge, 10 percent preferred a combination of Swiss challenge and bonus system, and 30 percent favored no incentive. The research methodology utilized an online questionnaire and direct contacts with senior officials of 33 PPP private entities working in the United States. A. M. Abdel Aziz, and H. Nabavi, "Unsolicited Proposals in Public-Private Partnerships Projects – Analysis of State Regulations in the USA," Dept. of Construction Management, the University of Washington, Seattle, USA, June 2011.

proponent was involved in project development). This approach finds support among private entities, most of which oppose incentive mechanisms during procurement.<sup>152</sup>

Countries that allow the right to match—including **Italy**, the **Philippines**, **Colombia**, and **Peru**—have struggled to create competition during procurement. USP projects that allow the right to match have typically failed to attract enough competing bidders. In **Italy**, public officials estimate that the USP proponent is awarded the contract in approximately 85 percent of the cases.<sup>153</sup> In the **Philippines**, only one of the 10 USP projects was awarded to a competing bidder (see Table 4). In **Peru**, the USP proponent has been awarded the contract in all of the USP projects, with the exception of one—the Waste-Water Treatment Plant of Taboada (see Box 14). In **Colombia**, all seven USP projects approved in 2015 were won by the USP proponent (see Table 5).

Numerous government agencies have actively voiced their concern with the right-to-match mechanism. In **Italy**, which has had a USP framework since 1998 and introduced the right to match (known as the *diritto di prelazione*) in 2002, the right-to-match mechanism has been heavily criticized both by Italians and by the European Union for violating the principal of equal treatment of bidders<sup>154</sup> and is likely to be removed for the second time in 2016 (see Box 17).<sup>155</sup> In **India**, the Department of Economic Affairs (DEA) in the Ministry of Finance, which is the nodal agency for central PPP projects, has spoken out against the use of the right-to-match mechanism (see Box 18).

<sup>152</sup> Ahmed Abdel Aziz and Human Nabavi, *Unsolicited Proposals for PPP Projects: Private Sector Perceptions in the USA*, Construction Research Congress, 2014, pp. 1349-1358.

<sup>153</sup> Interviews with Italian public-sector official and Italian PPP consultant on 17 November 2015.

<sup>154</sup> "Commission of the European Communities v Italian Republic," Case C-412/04, OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER, deliver on 8 November 2006, Accessible at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CCo412&from=FR>. Also: Zunarelli, Stefano, "Il diritto del mercato del trasporto," Volume 49 of the Trattato di diritto commerciale e di diritto pubblico dell'economia, CEDAM, Milano, 2008.

<sup>155</sup> Interviews with Italian public-sector officials.

Table 4: Competitive Tension in Infrastructure USP Projects in the Philippines

USP Project	Sector	Year of Submission	Winner (Third Party or USP proponent)	Number of Competing Bids	Status
Caliraya-Botocan-Kalayaan Power Plant	Power	N.A.	USP proponent	N.A.*	Operational
Casecnan Multipurpose Project	Irrigation/Power	1994	USP proponent	N.A.	Operational
San Roque Multipurpose Project	Irrigation/Power	1996	USP proponent	N.A.	Operational
San Pascual Cogeneration Power Plant	Power	1995	USP proponent	N.A.	Operational
Bohol Provincial Electric System	Power	N.A.	N.A.	N.A.	Operational
Port Irene Redevelopment	Transport/Port	N.A.	USP proponent	N.A.	Operational
South Luzon Tollway Extension	Transport/Roads	N.A.	USP proponent	N.A.	Operational
Ninoy Aquino International Airport (NAIA) Terminal 3	Transport/Aviation	1994	Third Party	2*	Terminated (award nullified by Supreme Court) but operational under public agency
Metro Rail Transit (MRT) Line 7	Transport/Multi-modal	2007	USP proponent	0	Awaiting financial close; construction expected to start in 2016
NLEX-SLEX Connector Road	Transport/Roads	N.A.	N.Ap.	N.Ap.	Currently in procurement stage through right to match

N.A. = Not Available.

N.Ap. = Not Applicable

\* According to 2007 PPIAF working paper by John Hodges and Georgina Dellacha, right to match under the Swiss challenge was a factor in the final award of the contract.<sup>356</sup>

<sup>356</sup>Refer to Table B.3: Unsolicited Projects Presented to BOT Center and ICC Secretariat, 1994–2006 (operational and awarded). John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAF0101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAF0101PUBLIC1.pdf) [last visited: January 2, 2016].

Table 5: Competition in Colombian USP Projects

Project	CAPEX (\$ millions) <sup>157</sup>	Contract Value (\$ millions)	Number of Competing Bidders	Award Date	Government Financial Support	Time Given for Competing Bidders to Express Interest <sup>158</sup>	Winning Bidder
Ibagué-Cajamarca	553	776 <sup>159</sup>	0	January 2015	No	2 months	USP proponent
Malla Vial del Meta	356	1,282 <sup>160</sup>	0	April 2015	No	2 months	USP proponent
Chirajará – Fundadores/ Bogotá – Villavicencio	803	2,039 <sup>161</sup>	0	April 2015	No	2 months	USP proponent
Cesar y la Guajira	16	680 <sup>162</sup>	0	May 2015	No	2 months	USP proponent
Cambao Manizales	216	547 <sup>163</sup>	0	May 2015	No	2 months	USP proponent
Neiva – Girardot	260	656 <sup>164</sup>	0	September 2015	No	2 months	USP proponent
Antioquia – Bolívar	395	1,007 <sup>165</sup>	0	September 2015	No	2 months	USP proponent

<sup>157</sup> Calculation of CAPEX in dollars represent own calculations based on FX taken from Colombia's Central Bank website, average monthly rate according to project's approval date. Data available at <http://www.banrep.gov.co/es/trm> [last visited: January 3, 2016]; *Iniciativas Privadas en APP*, Departamento Nacional de Planeación, 2015, available at <https://colaboracion.dnp.gov.co/CDT/Participacion%20privada%20en%20proyectos%20de%20infraestructura/Iniciativas%20Privadas%20Septiembre%202015%20VF.pdf> [last visited: January 3, 2016].

<sup>158</sup> Sistema Electrónico de Contratación Pública, Sistema Electrónico de Contratación Pública, *document name: Invitación Participar*.

<sup>159</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-001-2014, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=14-19-3126186> [last visited: January 3, 2016].

<sup>160</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-001-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-19-3423753> [last visited: January 3, 2016].

<sup>161</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-002-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-19-3481458> [last visited: January 3, 2016].

<sup>162</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-003-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-19-3603607> [last visited: January 3, 2016].

<sup>163</sup> Sistema Electrónico de Contratación Pública. Detalle del Proceso VJ-VE-APP-IPV-004-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-19-3627936> [last visited: January 3, 2016].

<sup>164</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-005-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-20-432> [last visited: January 3, 2016].

<sup>165</sup> Sistema Electrónico de Contratación Pública. Detalle del proceso VJ-VE-APP-IPV-006-2015, available at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=15-19-3481458> [last visited: January 3, 2016].

*Box 17: Controversies Over Italy's Right-to-Match Mechanism***Controversies over Italy's Right-to-Match Mechanism**

The right to match (*diritto di prelazione*) has been a controversial element of Italy's USP framework since the 2002 legislative changes (Law 166/2002 or *Merloni-quarter*). The right to match was criticized not only in Italy, but also by the European Union (EU) for violating the principle of equal treatment of bidders.<sup>166</sup>

An analysis of infrastructure tenders in the Emilia-Romagna region in the period 1999-2003 found that publicly initiated tenders received on average 4.5 interested private parties, whereas USP tenders received on average 1.5 interested private parties. An analysis of projects in the Lombardy region found that publicly initiated tenders received on average 3.1 requests for participation (and 1.8 bids), whereas USP tenders received only 2.7 requests for participation (and only 1.6 bids). Additionally, 75 percent of tenders in Lombardy were awarded directly to the USP proponent, without any competition.<sup>167</sup>

In 2007, the Government eliminated the right to match, in response to significant domestic and EU criticism. The mechanism was reintroduced, however, in 2008, allegedly in response to pressure from private-sector lobbies.<sup>168</sup>

Italian public officials continue to criticize the right-to-match procedure for significantly hampering competition—public officials estimate that the contract is awarded to the USP proponent in 85 percent of cases—as well as fostering corruption, especially because USPs are used more at the regional and local levels than at the national level. However, a strong private-sector lobby has managed to prevent the right to match from being revoked.<sup>169</sup> Nevertheless, public officials indicate that the procedure is likely to be revoked during legislative changes.<sup>170</sup>

*Box 18: Challenges with Swiss Challenge Identified in India***Indian Central Government Discourages Swiss Challenge, but State Governments Have Adopted Swiss Challenge**

India is a large market for PPPs in the infrastructure sector, with about 1,200 PPP projects in various stages of development and operation, representing an estimated investment of Indian

<sup>166</sup> Opinion of Advocate General Ruiz-Jarabo Colomer, Commission of the European Communities v Italian Republic, Case C-412/04, deliver on 8 November 2006, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CC0412&from=FR>; and Stefano Zunarelli, *Il diritto del mercato del trasporto*, volume 49 of the Trattato di diritto commerciale e di diritto pubblico dell'economia, CEDAM, 2008.

<sup>167</sup>Note that these figures refer to overall public tenders (publicly versus privately initiated) and are not restricted to procurements for PPP delivery models. Chiara Bentivogli et al. *Il project finance nei servizi pubblici locali: poca finanza e poco progetto?* Questioni di Economia e Finanza, Banca d'Italia, 2008, available at: [http://www.itaca.org/documenti/finanza/QEF\\_25.pdf](http://www.itaca.org/documenti/finanza/QEF_25.pdf) [last visited: January 4, 2016]. Lungarella, Raffaele. *La finanza di progetto in Emilia-Romagna*, Bologna : CLUEB, 2004, available at: <http://www.torrossa.it/resources/an/2449723> [last visited: January 8, 2016].

<sup>168</sup> Interviews with Italian public-sector official and Italian PPP consultant on 17 November 2015.

<sup>169</sup> Interviews with Italian public-sector official and Italian PPP consultant on 17 November 2015.

<sup>170</sup> Interviews with Italian Public Sector Officials, 17 November 2015.



Rupees 7.2 lakh crores (about \$110 billion) through October 2015.<sup>171</sup> India's federal structure allows for the central government and various state (provincial) governments to develop and administer separate PPP and USP-specific policies and guidelines. States such as Gujarat, Andhra Pradesh, Madhya Pradesh, and Rajasthan have issued formal legislation and guidelines for processing USPs through a right-to-match (Swiss challenge) process. Gujarat (1999) and Andhra Pradesh (2001) were the first states to introduce formal legislation that dealt with USPs through the right to match.

In contrast to some of the state governments, the central government has been very clear that USPs using a right-to-match process are not preferred. This view is supported by the Central Vigilance Commission, the agency responsible for oversight of central-government procurement processes, which advocated for transparent and competitive processes for procuring infrastructure projects. Additionally, a recent report issued by India's Department of Economic Affairs (DEA), Ministry of Finance, which is the nodal agency for central PPP projects, actively discouraged USPs procured through a right to match "*as they bring information asymmetries in the procurement process and result in lack of transparency and in the fair and equal treatment of potential bidders in the procurement process.*"<sup>172</sup>

Governments such as Chile and South Korea have found that the bonus mechanism may still allow for competition. In **South Korea**, the USP proponent can receive a bonus of up to 10 percent if its proposal is not amended by the public agency, and a bonus of up to five percent if the proposal is amended by the public agency. Although South Korea has struggled to create competition during procurement, a 2011 report by the Asian Development Bank (ADB) found no significant difference between the number of bidders in publicly initiated and USP projects, suggesting that the lack of competition cannot necessarily be attributed to the bonus mechanism used for USPs, as shown in Table 6.<sup>173</sup> This is consistent with the 2007 Study that found that "bonus points do not seem to be a main factor to decide a preferred bidder" in South Korea,<sup>174</sup> and with a 2013 study by the Korea Development Institute, which found no significant difference between the number of bidders for publicly initiated and USP projects.<sup>175</sup>

<sup>171</sup> Department of Economic Affairs, Ministry of Finance, *Report of the Committee on Revisiting and Revitalizing PPP Model of Infrastructure*, 2015, paragraph 2.2.2, page 10, available at <http://finmin.nic.in/reports/ReportRevisitingRevitalisingPPPModel.pdf> [last visited on January 3, 2016].

<sup>172</sup> Department of Economic Affairs, Ministry of Finance, *Report of the Committee on Revisiting and Revitalizing PPP Model of Infrastructure*, 2015, paragraph 6.2.7, page 45, available at <http://finmin.nic.in/reports/ReportRevisitingRevitalisingPPPModel.pdf> [last visited on January 3, 2016].

<sup>173</sup> Jay-Hyung Kim et al. *Public-Private Partnership Infrastructure Projects: Case Studies from the Republic of Korea - Volume 1: Institutional Arrangements and Performance*, Asian Development Bank (ADB), 2011, available at <http://www.adb.org/sites/default/files/publication/29032/ppp-kor-v1.pdf> [last visited: January 3, 2016].

<sup>174</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300UnsolicitedPPIAF0101PUBLIC1.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300UnsolicitedPPIAF0101PUBLIC1.pdf) [last visited: January 2, 2016].

<sup>175</sup> Jay-Hyung Kim and Seung-yeon Lee, "Public-Private Partnerships: Lessons from Korea on Institutional Arrangements and Performance," Korea Development Institute and Ministry of Strategy and Finance, Republic of Korea, 2013.

Table 6: Number of Bidders in South Korea by PPP Projects (and Sector)<sup>176</sup>

Type	Sector	Number of Bidders				Subtotal	Total
		1 bidder	2 bidders	3 bidders	4 bidders		
Number of Publicly Initiated Projects	Road	9	1		1	11	42
	Seaport	9	2		2	13	
	Railway	3	4			7	
	Logistics	2	1			3	
	Airport	6		1		7	
	Environment		1			1	
	<b>Subtotal</b>		<b>29</b>	<b>9</b>	<b>1</b>	<b>3</b>	
Number of Unsolicited Projects	Road	8	2	1	1	12	27
	Seaport	3		1		4	
	Railway	2		1		3	
	Logistics	1	1			2	
	Airport						
	Environment	5	1			6	
<b>Subtotal</b>		<b>19</b>	<b>4</b>	<b>3</b>	<b>1</b>		
Total	Tender Processes	48	13	4	4	69	
	% of Total	69.57	18.84	5.80	5.80	100	

In **Chile**, which has used a bonus mechanism since 1992, it appears that bonuses have not significantly distorted competition. Of the 19 USPs that have been implemented since 1995, the majority (12 projects) were awarded to competing bidders in competitive tenders, with 3.4 bidders on average, as shown in Table 7. However, Chile has reduced its bonus to the USP proponent from 20 to 3.8 percent, in order to be able to maintain a desired level of competitive tension.<sup>177</sup> It is important to note that the bonus mechanism is unlikely to be the only factor contributing to equal bidding conditions in **Chile**, because the Ministry of Public Works also plays a particularly active role in project development and allows sufficient time for competing bidders to present bids; both of these reduce the strategic advantage of the USP proponent.

*Box 19: Bonus Mechanism in Chile: The Case of Highway 5*

#### **In Chile, The Bonus Mechanism Does Not Significantly Impact Competition: The Case of Highway 5, from Puerto Montt to Pargua**

On 19 October 2004, Itinere Chile S.A. (the USP proponent)—a company linked to the Spanish firm Sacyr—submitted a USP to the Ministry of Public Works (MOP) for the expansion and rehabilitation of the 55-kilometer highway between Puerto Montt and Pargua. The project aimed to take advantage of a growth in demand in travel between the city of Puerto Montt and Chiloé Island—prompted by the fishing industry and salmon farming in the area—which had caused congestion, road deterioration, and frequent accidents. The MOP declared the project

<sup>176</sup>Jay-Hyung Kim and Seung-yeon Lee, "Public-Private Partnerships: Lessons from Korea on Institutional Arrangements and Performance," Korea Development Institute and Ministry of Strategy and Finance, Republic of Korea, 2013.

<sup>177</sup> Article 10, Concession Law, Ministry of Public Works, Government of Chile, 1996, available at <http://www.leychile.cl/Navegar/?idNorma=16121&idVersion=2010-01-20&idParte> [last visited: January 2, 2016].

to be in the public interest in 2005, and approved studies that it commissioned in December 2007.

In November 2008, the MOP initiated procurement, inviting competing bidders to submit bids by 29 October 2009. Two competing bids were received, from Concesiones Viarias Chile S.A. (comprising Dragados) and Consorcio Vial Chile (comprising the firms Besalco, Belfi and Icafal). Due to the project's investment cost of \$157 million,<sup>178</sup> the MOP granted the USP proponent a bonus of three percent. All three firms presented technically compliant bids, and the cost (largely determined by the state subsidy) became the determining factor. The state subsidy amount presented by the USP proponent (approximately \$65 million) was more than double that presented by the other two firms (\$25 million in the case of Concesiones Viarias and \$30 million in the case of Consorcio Vial Chile), and as a result, the three-percent bonus had no final impact on the procurement results.<sup>179</sup> In February 2010, the MOP awarded the contract to Concesiones Viarias Chile S.A., a competing bidder.<sup>180</sup>

The USP for Highway 5 is one of 12 Chilean projects in which a competing bidder won the contract, highlighting that in Chile, the bonus mechanism does not significantly or necessarily impact the level playing field.

<sup>178</sup> *Puerto Montt-Pargua highway concession attracts three bidders*, BN Americas, 2009, available at [http://www.bnamericas.com/news/infrastructure/Puerto\\_Montt-Pargua\\_highway\\_concession\\_attracts\\_three\\_bidders](http://www.bnamericas.com/news/infrastructure/Puerto_Montt-Pargua_highway_concession_attracts_three_bidders) [last visited: January 3, 2016].

<sup>179</sup> It is worth noting that the USP proponent in this case (Sacyr) was heavily affected by the economic crisis in Spain, and was in the process of divesting from most of its concessions in Chile, which may have affected its uncompetitive economic bid price.

<sup>180</sup> Snapshot of Ruta 5 Mott Pargua, Private Participation in Infrastructure Database, World Bank Group, available at <http://ppi.worldbank.org/snapshots/project/ruta-5-puerto-montt-pargua-5689> [last visited: January 3, 2016].

Table 7: Chilean USP Concessions (1995 – 2015)

Name of Project	Level of Investment (Unidad Fomento / \$ millions)	% Bonus	Awarded to USP Proponent or Third Party	Number of Bidders	Contract Award Date	
Airport El Tepual de Puerto Montt	164,021	7	20%	Third Party	2	June 1995
Airport Diego Aracena de Iquique	128,525	6	20%	USP proponent	3	August 1995
Access Road for the Santiago (AMB) Airport	279,990	9	20%	USP proponent	1	January 1996
Highway 57 Santiago - Colina – Los Andes	3,700,000	138	10%	USP proponent	1	December 1996
Airport El Loa de Calama	70,800	4.5	10%	USP proponent	4	October 1997
Airport Carriel Sur de Concepción	629,300	25	10%	Third Party	7	March 1999
Airport Cerro Moreno de Antofagasta	250,000	7.5	10%	Third Party	5	December 1999
Melipilla Bypass	669,100	21	10%	Third Party	3	August 2001
Américo Vespucio South System	10,350,000	270	10%	Third Party	4	August 2001
Inter-Port Highway Talcahuano – Penco	517,700	25	10%	USP proponent	3	January 2002
Américo Vespucio Nor Poniente System	10,100,000	320	10%	Third Party	4	March 2002
Anillo Intermedio El Salto Kennedy	2,500,000	70	10%	Third Party	2	October 2004
Highway Connection Melipilla Camino de la Fruta	880,000	43	3%	Third Party	3	January 2009
Highway 5, Tramo Puerto Montt - Pargua	4,125,000	99	3%	Third Party	3	May 2010
Centro Metropolitano de Vehículos Retirados de Circulación	482,000	N.A.	6%	Third Party	5	May 2010
Highways of the Antofagasta Region	7,750,000	336	3%	USP proponent	4	April 2010
Iquique Access Highway	5,000,000	220	3%	Third Party	4	September 2011
Highways Concepción Cabrero	8,400,000	370	3%	USP proponent	3	September 2011
Highway Concession Rutas del Loa	6,560,000	300	3%	Third Party	3	April 2014

**To create sufficient market interest, public agencies must offer sufficient time for competing bidders to develop their bids.**

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Governments vary in the time they give to competing bidders to either express interest in developing a competing proposal, or to present a full-fledged competing proposal (see Annex 6). In **Italy**, the USP framework specifies that competing bidders must be given a minimum of 52 days to prepare a project, with a larger window of time given for larger and more complex projects. In **Colombia**, competing bidders have from one to six months to express interest in a project, with two months being the most frequent time period.<sup>181</sup> Guam<sup>182</sup> provides 60 days, and the Philippines provides 60 working days for competing bidders to submit a competing proposal.

Experience shows that a shortage of preparation time strongly deters private entities from submitting competing bids. In the Philippines, public officials noted that allowing only 60 working days for a competing bidder to submit a competitive bid under the right to match (Swiss challenge) mechanism has led to most USPs being won by the USP proponent, as shown in Table 4. Private entities note that they require at least three to six months (depending on the complexity of the project) to develop a serious competing proposal.<sup>183</sup> A 2014 study by A. M. Abdel Aziz and H. Nabavi found that one of the key reasons preventing private entities from submitting competing proposals was a shortage of preparation time (e.g., only 60 days).<sup>184</sup>

**When the USP proponent owns land required for the project, proposes the use of its proprietary technology, or possesses adjacent concessions, its strategic advantage is difficult to overcome. In these cases, the public agency may either restructure the project to reduce the USP proponent's strategic advantage, or conduct benchmarking exercises before directly negotiating with the USP proponent.**

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A strong strategic advantage may originate from an existing concessionaire submitting a USP that proposes to expand the project during the operations phase. In **Colombia**, highway concessionaires have submitted USPs for projects that, in many cases, are simply extensions of ongoing highway concessions. When procured, these projects attracted no competing bidders,

<sup>181</sup>In most of the USPs that the National Infrastructure Agency (ANI) of Colombia approved during 2015, no competing bidders expressed interest. This was the case for the Chirajara-Villavicencio and Malla vial del Meta USPs. *Grupo Odinsa construirá la malla vial del Meta*, Portafolio.co, 6 April 2015, Accessible at: <http://www.portafolio.co/negocios/grupo-odinsa-construira-la-malla-vial-del-meta> [last visited: January 3, 2016].

<sup>182</sup> John Hodges and Georgina Dellacha, *Unsolicited Infrastructure Proposals: How Some Countries Introduce Competition and Transparency*, PPIAF Working Paper No. 1, 2007, available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo1o1PUBLIC1.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsoPPIAFo1o1PUBLIC1.pdf) [last visited: January 2, 2016].

<sup>183</sup> Interviews with private sector firms, October to November, 2015.

<sup>184</sup> Ahmed Abdel Aziz and Human Nabavi, *Unsolicited Proposals for PPP Projects: Private Sector Perceptions in the USA*, Dept. of Construction Management, the University of Washington, Seattle, USA, 2014.

in part because the concessionaires benefited from economies of scale and in-depth knowledge of demand conditions (see Box 20 and Table 5).

Strategic advantage may also be created through land ownership. In the USP for the Metro Rail Transit (MRT) Line 7 in **Philippines**, a complex structure including real-estate development was devised to make the project financially viable and avoid the prohibition on government support in the BOT Law. This structure was more favorable to the USP proponent, because it owned land in strategic locations around the project's right of way. As such, no competing bids were received during procurement, and the USP proponent was declared the preferred bidder.

*Box 20: In Colombia, Strategic Advantage is Difficult to Overcome: The Case of Chirajara-Villavicencio*

#### **In Colombia, Strategic Advantage is Difficult to Overcome: The Case of Chirajara-Villavicencio**

The 85-kilometer highway between the capital of Bogota and Villavicencio is one of Colombia's most important highways, and the only one connecting Bogota with the northwest. In August 1994, the Government of Colombia (GoC) awarded the contract for the management, operation and maintenance of the Bogota-Villavicencio corridor to Corficolombiana (through Concesionaria Vial de los Andes S.A. and later Coviandes). This contract was one of 13 projects awarded by the National Institute of Concessions INCO (now the National Infrastructure Agency: ANI) under the first generation of highway concessions. The contract was renegotiated in April 1996, and construction was completed in September 1999.

In 2009, the GoC declared the Bogotá-Villavicencio corridor of strategic importance under its national Strategic Highway Program (PROESA I), planning its expansion in three stages: (1) from Bogota to El Tablón (Section 1), (2) from El Tablón to Chirajara (Section 2); and (3) from Chirajara to Villavicencio (Section 3). In January 2010, the GoC granted an extension to Coviandes' 1994 contract for the construction, operation and maintenance of additional lanes between El Tablón and Chirajara. This section is currently under construction and will be completed in late 2017. The concession contract, which involves a variable concession length based on real revenues, is estimated to end in 2019-20. The expansion of the El Tablón-Chirajara segment belongs to the country's third generation of highway concessions.

In 2012, after the new PPP law was adopted, Corficolombiana submitted a USP to ANI that included two elements: (1) the construction, operation and maintenance of 24.6 kilometers of additional lanes between Chirajara and Villavicencio (Section 3), and (2) the maintenance of 85.6 kilometers of the highway between Bogota and Villavicencio (essentially a contract extension). The approval process for the USP took three years. On February 17, 2015, the GoC offered a two-month window for competing bidders to submit competing proposals. No competing bidders expressed interest, and the \$1.8-billion contract was directly awarded to Corficolombiana on April 20, 2015, as part of the country's fourth generation of highway concessions. Construction, which was expected to start in the first quarter of 2016, will be

completed by early 2021, with the concession expected to end sometime between 2035 and 2040.

In cases where there is a strong strategic advantage and it is highly likely that no competing bidder will express interest, public agencies may restructure the project to reduce the USP proponent's strategic advantage. Some public agencies, including PROINVERSION in Peru (see Box 21) conduct benchmarking exercises and assess cost reasonableness before engaging in direct negotiation, to ensure that the deal represents a fair market price and value for society.

*Box 21: Benchmarking Prior to Direct Negotiations in Peru*

#### **Benchmarking Prior to Direct Negotiations: The Case of the Shipping Terminal for Mineral Concentrates in El Callao, Peru**<sup>185</sup>

In 2009, the consortium *Transportadora El Callao* (the USP proponent) submitted a USP to the National Port Authority (NPA) for the design, construction, financing, maintenance and operation of a shipping terminal for mineral concentrates in El Callao, Peru. The co-financed initiative had investment costs of approximately \$163 million.<sup>186</sup> In March 2010, PROINVERSION declared the project of public interest, because it provided: (1) the mining sector with a more efficient solution to ship minerals; (2) the local population with environmental benefits, by reducing the reliance on ground transportation; and (3) mineral exporters with competitive transport and shipping rates.<sup>187</sup>

In August 2010, PROINVERSION awarded the concession to the USP proponent through a direct negotiation, after no competing bidders expressed interest within the 90 allotted days.<sup>188</sup> Despite the lack of competition, the public agencies took several measures to ensure that the deal represented a fair market price. The studies included: (1) a technical assessment based on demand projections for minerals in the port of Callao, comparing the USP proponent's proposal with projections provided by Valencia Port;<sup>189</sup> (2) a benchmarking of tariffs; and (3) an estimation of investment costs (based on similar studies and the project's technical information). The resulting price was six percent lower than the price proposed by the USP proponent (the freight rate was reduced from \$7.40 to \$6.97 per metric ton). Additionally,

<sup>185</sup> "Iniciativa Privada Terminal de Embarque Concentrado de Minerales en el Terminal Portuario del Callao," PROINVERSION White Paper, September 2009 to January 2011.

<sup>186</sup> *Transportadora Callao Opens New Mineral Concentrates Shipping Terminal with \$163 million USD Investment*, Impala Terminals, 2014, available at: [http://www.impalaterminals.com/news/latest-news/transportadora-callao-opens-new-mineral-concentrates-shipping-terminal-with-\\$163-million-usd-investment/](http://www.impalaterminals.com/news/latest-news/transportadora-callao-opens-new-mineral-concentrates-shipping-terminal-with-$163-million-usd-investment/) [last visited: January 3, 2016].

<sup>187</sup> *Este mes declararían de interés muelle de minerales en el Callao*, Gestion, 2010, available at <http://gestion.pe/noticia/445544/este-mes-declararian-interes-muelle-minerales-calla> [last visited: January 3, 2016].

<sup>188</sup> *Declaran de interés iniciativa privada para muelle de minerales*, Gestion, 2010, available at <http://gestion.pe/noticia/468968/declaran-interes-iniciativa-privada-muelle-minerales> [last visited: January 3, 2016].

<sup>189</sup> Valenciaport Foundation is a private non-profit organization that emerged to screen the logistics of ports, becoming a core research, training and cooperative expert in the industry. For more information, refer to: <http://www.fundacion.valenciaport.com> [last visited: January 3, 2016].

Peru's supervisory body, OSITRAN,<sup>190</sup> used a price regulation cap known as RPi- X,<sup>191</sup> to be revised after five years and periodically updated.<sup>192</sup>

The contract was signed in 2011, and construction was completed in April 2014, with operations starting in May of the same year.<sup>193</sup> This case study illustrates the importance of conducting benchmarking exercises in a directly negotiated deal, to arrive at a competitive and fair market price for consumers.

<sup>190</sup> OSITRAN is the Supervisory Body Transport Infrastructure investment in Peru. It is a decentralized entity, under the Presidency of the Council of Ministers. For more information, refer to: <http://regulationbodyofknowledge.org/glossary/p/price-cap-regulation/> and <http://fen.uahurtado.cl/wp-content/uploads/2010/07/inv191.pdf> [last visited: January 3, 2016].

<sup>191</sup> RPi-X is a price-cap regulation, first used in the telecom sector in the United Kingdom and now widespread in other countries. Such regulation provides strong incentives to cut costs, and the price control must also address service-quality issues. Such regulation reduces incentives to over-invest in capital during the period of a price control. For more information, refer to <http://fen.uahurtado.cl/wp-content/uploads/2010/07/inv191.pdf> [last visited: January 3, 2016].

<sup>192</sup> Review rate procedure for Shipping Port for Mineral Concentrates in *El Callao*. Clause 8.25 and for more information, refer to <http://www.ositran.gob.pe/joomlatools-files/docman-files/RepositorioAPS/o/o/par/000001-TEMP/CONSULTAS/01%20-%20INICIO%20REVISION%20TARIFARIA%20APM%20-%20INFORME.pdf> [last visited: January 3, 2016].

<sup>193</sup> *Inauguran muelle y faja transportadora de minerales en Callao*, *El Comercio*, 2014, available at <http://elcomercio.pe/economia/negocios/inauguran-muelle-y-faja-transportadora-minerales-callao-noticia-1732794> [last visited: January 3, 2016].



# 7 Conclusions

## 7.1 USP Performance and Management Challenges

The Experience Review did not find any indications that projects initiated by USP proponents but developed and competitively tendered by the public sector performed any better or worse than publicly initiated PPPs.<sup>194</sup> Therefore the concern with USPs is not about having a private firm identifying and proposing a project—private entities may, in fact, be more capable of identifying bankable projects than the public sector. The implementation delays, controversies and cost increases associated with USPs result from the lack of competition in the procurement process. The Experience Review found that concerns were the most prevalent in directly negotiated deals, but that they also occurred in jurisdictions that organized a competitive tender but failed to attract at least a few serious competing bidders (for example, when governments allowed the right to match, or procured USPs in which the USP proponent had a strategic advantage that could not be overcome by competing bidders).

The Experience Review also found that it is crucial for the public sector to have a leading role in project development<sup>195</sup> in order to assure competition during procurement. When the public sector develops the project, it helps overcome the strategic advantage of the USP proponent and builds the knowledge required to negotiate a contract that represents Value for Money. However, governments in both developing and developed countries struggle to build the required capacity to lead project development and, where appropriate, to organize a competitive tender process. This highlights the importance of working with external advisors during the project-development process.

Allowing the USP proponent to develop the project creates difficulties with ensuring equal bidding conditions and results in difficulties during implementation. The Experience Review found indications that when the USP proponent develops the feasibility studies and the procurement documentation (e.g., the draft contract), it can also lead to a lower quality of service, higher project costs, and a greater chance for renegotiations.

Ex-post evaluation information regarding the performance of projects that initiated as USPs is often not available. Few governments conduct structured and quantitative performance

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<sup>194</sup> Chile is an example of a country that procures USPs in a very similar way to publicly initiated projects. As a result, it has seen no significant differences in the performance of privately versus publicly initiated PPPs. The Ministry of Public Works takes an active role in the project-development stage and procures USP projects competitively, awarding a small bonus to the USP proponent (between three and eight percent). Despite the bonus, it has been able to attract a sufficient number of bidders in most tenders. Although Chile has struggled in general with renegotiations after contract close, experts indicate that no difference can be observed in the number of renegotiations in publicly versus privately initiated projects.

<sup>195</sup> The public sector may develop the project with the help of multilaterals or external advisors that do not have an interest in the project implementation. The concern with having the USP proponent develop the project is that it has an interest in winning the contract, not in developing the project to fit the public's needs.

evaluations of publicly initiated projects.<sup>196</sup> As a result, some countries’ policies are heavily influenced by one or a few negative experiences with USPs, or by general concerns with respect to lack of transparency; lack of competition; low Value for Money; a weak government negotiating position; corrupt practices; incompatibility with national infrastructure program; or misdirected public resources.

## 7.2 Policy Interventions to Address USP Management Challenges

Although countries’ experiences with USPs vary, governments typically face a common set of challenges in managing and implementing USPs. The Experience Review identified several policy interventions that governments have successfully used to address these challenges.

### 7.2.1 CHALLENGE 1: DIFFICULTIES IN CREATING EQUAL BIDDING CONDITIONS

Most governments expect that competitively procuring PPP contracts is more likely to result in a fair market price and Value for Money than directly negotiating a contract. However, creating a truly level playing field in a competitive tender is challenging, particularly when a project has involved several years of prior interaction between the public agency and the USP proponent.

Providing the USP proponent with the right to match or with a significant bonus during the evaluation of bids also inhibits interest from other private entities. Experience shows competing bidders will struggle to develop mature, competitive bids (or decide not to submit a bid at all) when they are not given sufficient time to prepare a competing bid, or when the USP proponent has advantages such as the right to match. Although some governments expect the implementation of USPs to be quick and easy, most governments acknowledge that there is value in allowing sufficient time to create equal bidding conditions.

Experience shows that the following policy components can help create competition during the procurement process.

*Table 8: Best Practices in Creating Competition During Procurement*

Best Practice	Description
<b>Public Agency Leading Project Development</b>	When the public agency “takes over” the project soon after USP submission, and leads the development of the project, including the development of feasibility studies and procurement documentation, it reduces the strategic

<sup>196</sup> “Ex post” or “ex durante” evaluations of PPPs are typically performance audits, looking at the processes that were carried out to ensure that the best possible VfM was achieved, not involving quantitative analysis. *Value for Money Assessment, Review of approaches and key concepts*, European PPP Expertise Centre, 2015, available at [http://www.eib.org/eppec/resources/publications/eppec\\_value\\_for\\_money\\_assessment\\_en.pdf](http://www.eib.org/eppec/resources/publications/eppec_value_for_money_assessment_en.pdf) [last visited: January 3, 2016].

	advantage of the USP proponent and helps level the playing field.
<b>No Incentives During Tendering</b>	Avoiding both direct negotiation and significant benefits for the USP proponent (for example, the right to match, or a significant bonus during bid evaluation) will help create equal bidding conditions.
<b>Bid Preparation Time</b>	Competing bidders must be provided with sufficient time to prepare a bid, with a larger window of time for larger and more complex projects.
<b>Strategic Advantage</b>	Public agencies can either reject or restructure USP projects in which the USP proponent possesses a strategic advantage that is difficult for competing bidders to overcome (such as ownership of land, contract extensions, or proprietary technology), or they can conduct benchmarking exercises before directly negotiating with the USP proponent.

### 7.2.2 CHALLENGE 2: LARGE NUMBER OF LOW-QUALITY USPs DRAINING PUBLIC-SECTOR RESOURCES

The Experience Review found that some public agencies receive many USPs, often of low quality. Such USPs distract governments from their stated priorities and divert limited financial and technical resources. The problem is often caused by the absence of (or inadequate) minimum submission requirements that do not set a threshold for the quality of USPs. Moreover, inadequate evaluation criteria result in USPs that may not be aligned with public goals. Additionally, dispersed submissions of USPs and easy gains for USP proponents (through reimbursements or direct negotiation) contribute to the problem.

Experience shows that the following policy components can help reduce the number of low-quality USPs received by public agencies and while also fostering the efficient processing of USPs.

*Table 9: Best Practices in USP Management*

<b>Best Practice</b>	<b>Description</b>
<b>Minimum Submission Requirements</b>	Introducing stringent and targeted minimum requirements for USPs allows the government to filter out poorly developed and opportunistic proposals, and to reduce the number of

	USPs received.
<b>Review Fee</b>	Requiring that the USP proponent pay a review fee may reduce the number of low-quality, non-serious and opportunistic USPs.
<b>Two-Stage Submission Process</b>	The public sector avoids investing significant time and effort in evaluating low-quality proposals, or proposals that do not meet the government's needs and objectives, which it eliminates during the first phase.
<b>Clear Evaluation Criteria and Procedures</b>	Clear evaluation criteria and procedures help public agencies focus on projects that are in the public interest, and also help them to efficiently process USPs.
<b>Competitive Tender</b>	Avoiding direct negotiation and benefits for the USP proponent during a competitive tender will discourage potential USP proponents from submitting proposals just to avoid competition.
<b>Centralized USP Submission</b>	Centralizing the USP submission process in a single agency helps (1) simplify coordination processes; (2) ensure approved USPs are in line with national plans; (3) promote consistency, transparency and accountability; and (4) prevent the need to build capacity in multiple locations.
<b>Submission Window</b>	Establishing a dedicated time window for USP submissions prevents public officials from being distracted from their stated priorities and creates certainty for USP proponents.

### 7.3 USP Management Strategies

In addition to identifying specific policy interventions to help address the main USP challenges, the Experience Review identified USP management strategies. These vary according to governments' motivations to consider USPs, as discussed in Chapter 2. Many governments accept USPs to overcome their lack of capacity to implement projects, whereas governments that have the capacity to implement projects may accept USPs to harness innovation.

### 7.3.1 OVERCOMING LACK OF PUBLIC-SECTOR CAPACITY

The Experience Review confirms that many governments lack the technical and financial capacity to identify, develop, procure and implement infrastructure projects, which motivates them to consider USPs. These governments typically also rely on the USP proponent to develop the feasibility studies and procurement documentation for the project. Although relying on the USP proponent to develop the project may seem convenient, in practice, governments may struggle to ensure Value for Money with this approach. The main challenge for these governments is to adopt a leading role in scoping and structuring both the project and the PPP contract, such that it serves not only the public interest, but also the market interest required for a competitive tender.

Relying on the USP proponent to develop the project is unlikely to lead to the most attractive public-interest project. Additionally, it creates significant challenges with ensuring that bidders compete on an equal footing. When the USP proponent fully develops the project, with limited oversight or guidance from the public agency, it typically results in a directly negotiated contract or a quasi-competitive tender. Failure to generate competition may lead to higher costs, lower quality, or a greater chance for renegotiations after contract close.

Many governments that lack the technical and financial capacity to identify, develop, procure and implement projects experience the challenges described above. Although the Experience Review did not identify one single policy solution to address these issues, three strategies appear to allow these governments to overcome these challenges:

1. Some governments decide not to accept USPs, which allows them to avoid the challenges resulting from USPs. Governments that employ this strategy often work with multilaterals or external advisors to identify, develop, and implement publicly initiated projects. Some experts believe that this approach would lead to a limited number of projects in developing countries.
2. Some governments allow USPs and seek assistance from multilaterals or external advisors to develop the project at an early stage, thereby leveling the playing field for a competitive tender. This is difficult in practice, because countries need a firm commitment regarding extensive external support to implement this strategy.
3. In the case of some projects, especially in the energy sector, USPs are submitted and developed by project developers, who subsequently request an equity stake in the project entity. In this way, the majority of the work can still be competitively tendered, but the project developer takes the lead in structuring the project and PPP transaction, as well as in managing the interfaces among the project components. Potential conflicts of interests can be avoided by having a developer with a clear public interest as a private-sector partner, or by having an experienced transaction advisor support the government throughout the project development and contracting.

### 7.3.2 HARNESSING PRIVATE-SECTOR INNOVATION AND CREATIVITY

The Experience Review confirms that some governments that have the capacity to identify, develop and implement projects may still seek mechanisms to encourage private-sector innovation. The Experience Review found that these countries follow one of three strategies:

1. Some governments—including the U.K., India’s central government, and many western European countries—strongly discourage USPs or do not allow them at all, typically because they have concerns about ensuring a transparent and competitive tender and generating Value for Money. These governments typically seek other ways to generate and utilize private-sector innovation, ranging from the use of output-based specifications in PPP procurements to (at an even earlier stage) requests for information or idea competitions.
2. Some governments—including Chile, Virginia and other U.S. states—allow USPs, and either develop the project at an early stage, or allow the USP proponent to contribute to the development of the project, maintaining a strong guidance or oversight role. This allows these governments to utilize USPs to capture creative ideas, while still ensuring that they are competitively tendered.
3. Some governments—including South Africa and Australia—decide to only approve innovative USPs that show unique public benefits and the exceptional ability of the USP proponent to deliver the project. Because other projects may still be good project ideas, governments may decide to develop them as non-USPs. Only truly innovative or unique proposals will therefore receive exceptional treatment (involving direct negotiation in some cases). With this strategy, the definition of innovation is crucial. The Experience Review did not identify a clear and commonly agreed-upon definition of innovation.

## 7.4 Epilogue

The Experience Review confirmed many of the USP management challenges identified by previous studies. Additionally, the Experience Review provided an overview of challenges and key policy interventions contained within USP frameworks that can help overcome these challenges. The Experience Review has not identified a one-size-fits-all USP policy, but rather a range of potential strategies, varying according to governments’ motivations and PPP maturity levels. These strategies act as the foundation for the recommendations in the Guidelines.

## 8 ANNEX 1: COUNTRY SELECTION CRITERIA AND SELECTION OF COUNTRIES

The list below presents the selection criteria for selecting the countries during the first phase of the research and Experience Review. The objective was to ensure diversity.

- **Continent:** geographical diversity.
- **Ranking in the Global Competitiveness Index (CGI):** diversity in terms of countries' income levels and overall economic competitiveness.
- **USP Framework in Place:** diversity in terms of countries that do have a USP framework and countries that do not have one (but may still have experience with USP projects).
- **Experience with PPPs / PPP Maturity:** diversity in terms of countries' level of experience with PPPs.
- **Experience with USPs / USP Maturity:** diversity in terms of the countries' level of experience with USPs.
- **Sectorial experience with USPs:** diversity in terms of the countries' sectoral experience with USPs (health, energy, transport or water).
- **USP Implementation System:** diversity in terms of the countries' treatment of USPs, including:
  - a. Regular procurement
  - b. Direct shortlisting to final bidding round ("automatic shortlisting")
  - c. Bonus system
  - d. Right to match

e. Direct negotiation

- **Project Experience:** the country has case studies of projects that were implemented as USPs that could be used for the subsequent ex-post evaluation.

Table 10: Country Selection—Ensuring Diversity in Selection

Country / Jurisdiction	Continent	Global Competitiveness Index (CGI) Ranking	USP Framework Experience <sup>197</sup>	PPP Maturity <sup>198</sup>	USP Maturity <sup>199</sup>	Sectorial USP Experience	USP Procurement Mechanism	Case Study <sup>200</sup>
India	Asia	4.2	Medium	Medium	Medium	Roads, Energy	Right to Match (Swiss Challenge), Direct Negotiation	Yes
Philippines	Asia	4.4	High	Medium	Medium	Transit, Roads, Airport, Power	Right to Match (Swiss Challenge), BAFO <sup>201</sup>	Yes
South Korea	Asia	5.0	High	High	High	Roads, Railroads, Transport, Social Infrastructure	Bonus System	No
Ghana	Africa	3.7	Low	Low	Low	Roads	Full Competition	Yes
Kenya	Africa	3.9	Low	Low	Low	Power, Railway	Direct Negotiation	Yes
Senegal	Africa	3.7	Low	Low	Low	Energy, Ports	Full Competition, Bonus System, Direct Negotiation	Yes
South Africa	Africa	4.4	Medium	Medium	High	Roads	BAFO, Direct Negotiation	Yes
Tanzania	Africa	3.6	Low	Low	Low	Ports, Rail, Airports, Power/Energy,	Full Competition	No

<sup>197</sup> USP Framework Experience is measured by the presence of a USP framework, and the country's experience with using the framework to manage and/or implement USPs.

<sup>198</sup> PPP Maturity is measured by the presence of a PPP framework and experience with structuring PPPs.

<sup>199</sup> USP Maturity is measured by the country's experience in managing and implementing USPs.

<sup>200</sup> Indicates whether a case study was examined as part of the Experience Review.

<sup>201</sup> Guaranteed admission to the best and final offer (BAFO) stage.



Country / Jurisdiction	Continent	Global Competitiveness Index (CGI) Ranking	USP Framework Experience <sup>197</sup>	PPP Maturity <sup>198</sup>	USP Maturity <sup>199</sup>	Sectorial USP Experience	USP Procurement Mechanism	Case Study <sup>200</sup>
Jamaica	LAC	4.0	Low	Low	Low	Water Ports, Roads	Right to Match (Swiss Challenge)	Yes
Chile	LAC	4.6	High	High	High	Roads, Airports	Bonus Mechanism	Yes
Colombia	LAC	4.2	Medium	Medium	Medium	Roads	Right to Match (Swiss Challenge), Bonus Mechanism, Direct Negotiation	Yes
Peru	LAC	4.2	High	High	High	Social Infrastructure, Agriculture, Ports, Transport, Prisons, Energy	Right to Match (Swiss Challenge), Direct Negotiation	Yes
Australia (NSW)	Australia	5.1	Medium	High	High	Roads, Social Infrastructure	Full Competition, Direct Negotiation	No
Italy	Europe	4.4	High	High	High	Social Infrastructure, Transport, etc.	Right to Match (Swiss Challenge)	No
United States (Virginia)	North America	5.5	High	Medium	High	Transportation, Education Facilities, Social Infrastructure	Full Competition	Yes

## 9 ANNEX 2: OVERVIEW OF USPS SUBMITTED IN SELECT COUNTRIES

Table 11: Overview of Infrastructure USPs Submitted in Select Countries

Country/ Jurisdiction	Time Period*	No. of USPs	USPs Rejected	USPs Under Review	USPs in Project Development	Reached Commercial Close	Reached Financial Close	In Operation	Explanation
India									
• Andhra Pradesh**	2006 - 2015	At least 4	1	N.A.	2	0	0	1	
• Gujarat**	2006 - 2015	22	1	2-3	0	>2	>2	>2	• Ten transport projects developed through engineering-procurement-construction (EPC) contract are under operation.
• Madhya Pradesh	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	
• Rajasthan	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	
Philippines	N.A.								• Data available on the website of the Philippines PPP Center is outdated. Requests have been made for most up-to-date information.
South Korea	2010-2014	88	13	18	N.A.	40 tendered, but information about commercial	22	16	

Country/ Jurisdiction	Time Period*	No. of USPs	USPs Rejected	USPs Under Review	USPs in Project Development	Reached Commercial Close	Reached Financial Close	In Operation	Explanation
						close is not clear.			
Ghana	2011 - 2015	14	N.A.	12	3	N.A.	3	N.A.	
Kenya	2013 - 2015	>10							<ul style="list-style-type: none"> <li>The USPs are not formally rejected, but not taken forward by the contracting authorities</li> </ul>
Senegal	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	<ul style="list-style-type: none"> <li>Public officials indicated that they receive many USPs, but no numbers were obtained.</li> </ul>
South Africa									
<ul style="list-style-type: none"> <li>National Treasury</li> </ul>	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	
<ul style="list-style-type: none"> <li>SANRAL**</li> </ul>	1999- 2015	Approximately 20	18	N.A.	0	0	N.A.	0	<ul style="list-style-type: none"> <li>Only two USPs accepted for further review, including the N1 N2 Winelands Toll Highway and the N2 Wild Coast Toll Highway.</li> <li>One USP project was abandoned.</li> </ul>
Tanzania	2011 - 2015	>5							<ul style="list-style-type: none"> <li>USPs to be taken forward after operationalizing the 2014 amendments to PPP Act and approval of the draft PPP Regulations, 2015</li> </ul>
Jamaica	N.A.								<ul style="list-style-type: none"> <li>There is no data about USPs compiled by public officials. Efforts are underway to monitor</li> </ul>

Country/ Jurisdiction	Time Period*	No. of USPs	USPs Rejected	USPs Under Review	USPs in Project Development	Reached Commercial Close	Reached Financial Close	In Operation	Explanation
USP-related data.									
Chile	1995 – 2015	423	N.A.	N.A.	N.A.	19	19	19	<ul style="list-style-type: none"> <li>The Ministry of Public Works has received 423 USPs since 1995; only 19 of these have reached operational stage.</li> </ul>
Colombia <sup>202</sup>	2012 – 2015	360	>127	N.A.	2	7 <sup>203</sup>	N.A.	N.A.	<ul style="list-style-type: none"> <li>By late 2015, nine USPs had been approved, all for highway projects, and seven had reached contract close.</li> </ul>
Peru	2012- 2015	292	N.A.	81	N.A.	N.A.	5	5	<ul style="list-style-type: none"> <li>A total of 292 USPs have been received by Proinversion in the last three years.</li> </ul>
Peru (No Government Support) <sup>204</sup>	2012- 2015	55	N.A.	18	N.A.	N.A.	5	5	<ul style="list-style-type: none"> <li>To date, only five USPs that do not require government support have reached contract close and have been implemented.</li> </ul>
Australia (NSW)	2012- 2015	120	112	4	2	3	3	1	<ul style="list-style-type: none"> <li>Since January 2012, three USPs have reached financial close; one of these is operational. The total value of these USP projects is approximately A\$5 billion.</li> </ul>

<sup>202</sup> See *Informe Trimestral del Registro Único de Asociaciones Público-Privadas (APPs)*, Departamento Nacional de Planeación, Government of Colombia, 2015, available at <https://colaboracion.dnp.gov.co/CDT/Participacion%20privada%20en%20proyectos%20de%20infraestructu/RUAPP%203%20TRIMESTRE%202015.pdf> [last visited: January 3, 2016].

<sup>203</sup> USPs that have reached contract close include: (1) Ibagué – Cajamarca; (2) Malla Vial del Meta; (3) Chirajara – Villavicencio; (4) Cesar - La Guajira; (5) Cambao – Manizales; (6) Antioquia – Bolívar and (7) Neiva – Girardot. Two additional projects were approved by the Government but have not yet reached contract close: a six-lane highway between Bogotá and Girardot, and the Vías del Nus (known as Magdalena 1).

<sup>204</sup> *Semana Económica, MEF y ProInversión desbordados por las iniciativas privadas*, 2015, available at <http://semanaeconomica.com/article/economia/macroeconomia/172504-mef-y-proinversion-desbordados-por-las-iniciativas-privadas/> [last visited: January 3, 2016].

Country/ Jurisdiction	Time Period*	No. of USPs	USPs Rejected	USPs Under Review	USPs in Project Development	Reached Commercial Close	Reached Financial Close	In Operation	Explanation
Italy	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	<ul style="list-style-type: none"> <li>Italy has relied very heavily on USPs to execute public works. However, due to its broad definition of a PPP, statistics cannot be disaggregated about DBFOM contracts.</li> </ul>
USA (Virginia)	2006- 2015	4	3	0	0	1	N.Ap.	0	<ul style="list-style-type: none"> <li>4 original USPs received and 5<sup>205</sup> competing conceptual proposals received between 2006-2015, second decade of PPTA. 1 USP procured as a design-build contract and not PPP, which is under construction.<sup>206</sup></li> <li>Between 1995-2005, first decade of PPTA, 31 original USPs received and 15 competing conceptual proposals received. 10 USPs reached commercial close.</li> </ul>

\* Time period selected based on best data available.

\*\* Information is based on discussions with public officials and desk research of authors. Public officials did not provide written confirmation regarding the data provided above.

N.A. = Not Available

N.Ap. = Not Applicable

<sup>205</sup> Written data provided by public officials indicates two competing proposals, but desk research by authors found a total of five competing conceptual proposals, including three for the Port of Virginia USP.

<sup>206</sup> [http://www.virginiadot.org/projects/lynchburg/odd\\_fellows\\_road.asp](http://www.virginiadot.org/projects/lynchburg/odd_fellows_road.asp) [last visited: January 3, 2016].

## 10 ANNEX 3: USP SPEED IN CASE STUDIES

Table 12: Speed of Implementation in Case Studies

Project	Initial Evaluation Duration	Project-Development Duration	Project-Procurement Duration Until Commercial Close	Duration from Commercial Close to Financial Close	Total Time from USP Submission to Commercial Close	Total Time from USP Submission to Project Operation	Years to Commercial Close (Approximate)	Years to Operation (Approximate)
Manila Metro Rail Transit Line 7	1999-2004	2004-2007	2007-2008	2008-TBD	1999-2008	2003-TBD (pending financial close)	9 years	>16 years (still pending)
Terminal 3 of Ninoy Aquino International Airport	1994-1996	Project procurement was undertaken immediately after approval.	1996-1997. Amendments made to the concession agreement in 1998.	N.A.	1994-1998	1994-2014	3 years	20 years
Jafrabad LNG Terminal and FSRU	2011-2013	2011-2012	2012-2013	2013	2012-2013	2012-TBD (Letter of intent was issued in 2013. Signing of concession agreement is pending.)	2 years	6 years (expected)
Chirajara-Villavicencio	2012-2014	N.A.	N.A.	N.A.	2012 to April 2015	Construction was expected to start in early 2016 and end in early 2021.	3 years	8-9 years (expected)
Planta de Tratamiento de Aguas Residuales	2006-2007	2008 – 2009	2008-2009	N.A.	2006-2009	2006-2013. Operation began in February 2013.	3-4 years	7 years

Project	Initial Evaluation Duration	Project-Development Duration	Project-Procurement Duration Until Commercial Close	Duration from Commercial Close to Financial Close	Total Time from USP Submission to Commercial Close	Total Time from USP Submission to Project Operation	Years to Commercial Close (Approximate)	Years to Operation (Approximate)
(PTAR)								
Taboada								
Mombasa-Nairobi Standard Gauge Railway (SGR)	N.A. Project declared strategic in 2008.	CRBR proposed to undertake feasibility study in 2011. Unclear how long project development lasted.	N.A. No procurement process.	N.A. Financing provided by China ExIm Bank.	USP submitted in approx. 2011. Unclear exactly when it was accepted and contract signed.	Approx. 5 years (2011 to 2017). Construction expected to be complete by June 2017.	N.A.	5 years (expected)
Doraleh Container Terminal	Since early 2000.	2000 – 2006	In 2006, DP World signed BOT concession for container terminal.	2006 - 2007	USP Submitted around 2000 and BOT contract signed in 2006.	Construction of Phase I completed in June 2009.	6 years (2000 – 2006)	9 years (2000 – 2009)
North-South Link of Highway 2000	2009-Indeterminate	Negotiations continued from 2009 until commercial close.	2009-2012	Not Available	2009-2012	2009-2012	3 years	7 years - expected
Accra-Kumasi Highway	2004-2005	2004-2005	2004-TBD (Project was awarded in 2005 but the concession agreement	2004-TBD	2004-TBD (Project was awarded in 2005 but the concession agreement has	2004-TBD (Pending signing of concession agreement)	1 year for awarding of the project, but concession agreement is	>11 years (still pending)

Project	Initial Evaluation Duration	Project-Development Duration	Project-Procurement Duration Until Commercial Close	Duration from Commercial Close to Financial Close	Total Time from USP Submission to Commercial Close	Total Time from USP Submission to Project Operation	Years to Commercial Close (Approximate)	Years to Operation (Approximate)
			has not yet been signed)		not yet been signed.)		yet to be signed	
N1 N2 Winelands Toll Highway	1998-2000	2000-2008	2010- TBD (Pending resolution of legal issues)	N.Ap.	1998-TBD (Pending resolution of legal issues)	1998-TBD (Pending resolution of legal issues)	>17 years (still pending)	>17 years (still pending)
I-495 HOT Lanes	2002-2004	2004-2006	2002-2003	2005-2007	2002-2005	2002-2012	3 years	10 years

N.A. = Not Available  
N.Ap. = Not Applicable



# 11 ANNEX 4: USP SUBMISSION REQUIREMENTS

Table 13: Summary of USP Submission Requirements in Select Countries

Country / Jurisdiction	USP Framework specifies a location and/or institution for submission of the USP	USP Framework limits USP submissions to a specific timeframe	USP Framework specifies Submission Requirements or Materials including:	<u>Project Description/Concept and/or Initial Design</u>	<u>Feasibility Studies</u>	<u>Economic Feasibility / Cost-Benefit Analysis</u>	<u>Financial Feasibility</u>	<u>Environmental and/or Social Impact Assessment</u>	Funding and Financing Plan	Expected government contributions	Risk Analysis and/or Proposed Risk Allocation	Projected Timeline and/or contract length	Explanation of how the project aligns with Public-Sector Objectives or priority	Draft Contract	Identification of Confidential/Proprietary Information	USP Review or Evaluation Fee / Deposit
India																
Andhra Pradesh			✓	✓	✓		✓			✓	✓	✓	✓		✓	
Gujarat	✓		✓	✓	✓		✓						✓	✓	✓	
Madhya Pradesh	✓		✓	✓	✓		✓	✓							✓	
Rajasthan	✓		✓	✓	✓		✓			✓			✓		✓	
Philippines																
South Korea	✓		✓	✓	✓	✓	✓	✓	✓	✓		✓				
Ghana	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓		✓		✓	
Kenya	✓		✓	✓	✓		✓						✓			
Senegal			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
South Africa	✓		✓	✓	✓				✓			✓	✓		✓	
Tanzania	✓		✓	✓	✓		✓			✓			✓		✓	

Jamaica <sup>207</sup>	✓	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.
Chile	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Colombia			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓				
Peru	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			
Australia (New South Wales)	✓		✓	✓	✓	✓ <sup>208</sup>	✓	✓	✓ <sup>209</sup>	✓	✓	✓	✓	✓	✓	✓
Italy			✓	✓	✓	✓	✓	✓			✓					
United States (Virginia)	✓		✓	✓	✓				✓							✓

<sup>207</sup> Based on discussions with public officials, USPs should be submitted with all necessary studies/reports. While there is no mention of specific contents that must be in the submission, the government expects a fully prepared/developed USP.

<sup>208</sup> Subject to nature of the proposal. Based on discussions with public officials.

<sup>209</sup> Subject to nature of the proposal. Based on discussions with public officials.

## 12 ANNEX 5: USP EVALUATION CRITERIA

Table 14: Summary of USP Minimum Evaluation Criteria

Country / Jurisdiction	USP is aligned with government's goals and development plans	USP contains an innovative concept	USP is not part of list of government projects	USP involves a faster implementation or cost-effective solution	USP is feasible	<u>Financial feasibility</u>	<u>Technical feasibility</u>	<u>Economic feasibility (benefit-cost assessment)</u>	<u>Legal feasibility</u>	<u>Environmental feasibility</u>	<u>Socially sustainable</u>	No government support is needed for the USP	USP demonstrates value-for-money or positive economic benefits	USP is largely or entirely financed by the private proponent	USP involves local content or technology transfer <sup>210</sup>
India															
• Andhra Pradesh			✓		✓	✓	✓		✓						
• Gujarat		✓			✓	✓	✓		✓			✓		✓	
• Madhya Pradesh		✓	✓		✓	✓	✓			✓					
• Rajasthan		✓	✓		✓	✓	✓		✓	✓	✓				
Philippines		✓	✓	✓								✓			
South Korea	✓	✓	✓	✓	✓	✓	✓	✓	✓				✓		
Ghana	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓		✓		✓
Kenya		✓	✓	✓	✓										
Senegal	✓	✓			✓	✓	✓						✓	✓	✓

<sup>210</sup> Local content is an evaluation criterion in countries in which international firms are likely to submit most USP projects. In Senegal, USPs are evaluated based their capacity to utilize local content, create jobs, and transfer technology to national firms.<sup>210</sup> In Ghana, the PPP Policy specifies that local industries should be promoted.

South Africa												
• National Treasury	✓			✓	✓	✓	✓	✓				
• SANRAL	✓			✓	✓	✓	✓	✓			✓	✓
Tanzania	✓		✓		✓	✓	✓				✓	✓
Jamaica	✓	✓	✓			✓		✓	✓	✓	✓	✓
Chile	✓				✓	✓	✓	✓	✓	✓	✓	✓
Colombia	✓				✓	✓	✓	✓	✓	✓	✓	✓
Peru	✓	✓			✓	✓	✓	✓		✓	✓	✓
Australia (NSW)		✓		✓	✓	✓	✓	✓		✓		✓
Italy	✓	✓	✓		✓	✓		✓		✓		
United States (Virginia)	✓	✓	✓		✓	✓	✓	✓	✓	✓		✓

## 13 ANNEX 6: USP MANAGEMENT TIMELINE

Table 15: USP Management Timeline in Select Countries

Country / Jurisdiction	Evaluation of USPs	Time for Approval after Evaluation	Project Development	Submission of Bids (Full Competition or Other Mechanism)	Submission of Matching Bid or BAFO (In case of Swiss Challenge or BAFO Method)	Signing Letter of Intent
India						
• Andhra Pradesh	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
• Gujarat	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
• Madhya Pradesh	1 month	1 month	6 months	2 months	1 month	1 month
• Rajasthan	1 month	Not specified	4.5 months	<ul style="list-style-type: none"> <li>• International bidding: 2 months and 20 days</li> <li>• National bidding: maximum of 2 months and 5 days</li> </ul>	0.5 months	3 days for award letter and 15 days for contract execution
Philippines	120 calendar days	1.5 months (30 working days)	Approximately 18 months <sup>211</sup>	3 months (60 working days)	1.5 months (30 working days)	Not specified
South Korea	60 days <sup>212</sup>	Not specified	Not specified	Minimum 30 days	Not specified	Not specified
Ghana	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
Kenya	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
Senegal	Not specified	3 months <sup>213</sup>	Not specified	Not specified	Not specified	Not specified
South Africa						

<sup>211</sup> There is no duration specified for project development. However, an approval granted for the USP is valid only for a period of 18 months, unless an invitation for comparative proposals has been issued. This indicates an expectation that project development would be completed and procurement started within 18 months.

<sup>212</sup> Up to 180 days if total project cost exceeds KRW 200 billion. The relevant public authority has two months to notify the USP proponent of the decision about the USP.

<sup>213</sup> 2014 Partnerships Law, Government of Senegal, Accessible at: <http://droit-afrique.com/upload/doc/senegal/Senegal-Loi-2014-09-PPP.pdf>

Country / Jurisdiction	Evaluation of USPs	Time for Approval after Evaluation	Project Development	Submission of Bids (Full Competition or Other Mechanism)	Submission of Matching Bid or BAFO (In case of Swiss Challenge or BAFO Method)	Signing Letter of Intent
• National Treasury	6 months <sup>214</sup>	Not specified	Not specified	Not specified	Not specified	Not specified
• SANRAL	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
Tanzania	Not specified	Not specified	Not specified	Not specified	Not specified	Not specified
Jamaica	Not specified	Not specified	Not specified	3 months	1 month	Not specified
Chile	1.5 months to declare public interest	6 months for development of studies	Not specified	Not specified	Not specified	Not specified
Colombia <sup>215</sup>	3 months (pre-feasibility stage)	6 months (feasibility stage)	Not specified	1-6 months for competing bidders to express interest	Not specified	Not specified
Peru	2 months to confirm relevance of proposal; 6 months to approve declaration of interest	Not specified	Not specified	3 months for competing bidders to express interest	Not specified	Not specified
Australia (NSW)	Step 1: 90 business days	Not specified	Not specified	Not specified	Not specified	Not specified
Italy	3 months	Not specified	Not specified	52 days (or more) for submission of competing proposals	15 days	Not specified
United States (Virginia)	3 months for policy review. Timeline for detail-level screening is not mentioned. <sup>216</sup>	10 days at the policy-review stage	Not specified	4 months for submission of competing conceptual proposals. During procurement process, the time is based on general standards applied by the public agency	Not specified	Not specified

<sup>214</sup> Neither of the South African frameworks contain timelines. However, the National Treasury's USP framework requires that the USP be valid for six months. This could be used as a proxy for approximating the maximum amount of time that public agencies can take to evaluate USPs.

<sup>215</sup> 2012 PPP Law 1508, Government of Colombia, Accessible at: <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/Ley150810012012.pdf>

<sup>216</sup> Timeline for the detail-level screening is not mentioned in the 2015 PPTA Implementation Manual and Guidelines.

## 14 ANNEX 7: USP EVALUATION PROCEDURE

Table 16: Evaluation Procedure in Select Countries

Country / Jurisdiction	One-Step Evaluation	Two-Step Evaluation	Duration for Step 1	Duration for Step 2
India				
• Andhra Pradesh	✓		N.A.	
• Gujarat		✓	N.A.	N.A.
• Madhya Pradesh		✓	2 months	6 months
• Rajasthan		✓	1 month	4-5 months
Philippines	✓		120 calendar days	N.A.
South Korea	✓		60 days <sup>217</sup>	N.A.
Ghana		✓	N.A.	N.A.
Kenya		✓	N.A.	N.A.
Senegal	✓		N.A.	
South Africa <sup>218</sup>				
• National Treasury	✓		N.A.	N.A.
• SANRAL	✓		N.A.	N.A.
Tanzania		✓	21 days	NA
Jamaica	✓		N.A.	N.A.
Chile		✓	N.A.	N.A.
Colombia		✓	3 months	6 months
Peru		✓	180 days	N.A.
Australia (NSW)		✓	N.A.	N.A.

<sup>217</sup> Up to 180 days if total project cost exceeds KRW 200 billion. Based on discussions with public officials.

<sup>218</sup> The evaluation process is not described in detail in the USP frameworks of the National Treasury and SANRAL.

Country / Jurisdiction	One-Step Evaluation	Two-Step Evaluation	Duration for Step 1	Duration for Step 2
Italy			N.A.	N.A.
United States (Virginia)		✓	3 months	N.A.



## 15 ANNEX 8: USP PROJECT DEVELOPMENT

Table 17: Allocation of Project Development Responsibilities in USP Frameworks

Country / Jurisdiction	Allocation of Project-Development Responsibilities			Additional Comments
	Public Agency (only)	USP proponent (only)	Collaborative Approach	
India				
• Andhra Pradesh		✓		
• Gujarat		✓		
• Madhya Pradesh		✓		
• Rajasthan		✓		
Philippines		✓		
South Korea	✓			
Ghana	✓			The public agency appoints transaction advisors to carry out the feasibility studies.
Kenya		✓		
Senegal		✓		
South Africa				
• National Treasury			✓	
• SANRAL			✓	
Tanzania		✓		
Jamaica	✓			The responsibilities are not clearly specified in the USP framework, but it is the responsibility of the public agency to confirm that the USP project's business case has been made.
Chile			✓	The Ministry of Public Works takes an active role in defining the scope of studies to be undertaken by the USP proponent.

Country / Jurisdiction	Allocation of Project Development Responsibilities			Additional Comments
	Public Agency (only)	USP proponent (only)	Collaborative Approach	
Colombia		✓		Although the public agency undertakes a public-private comparator, the large majority of the technical and financial studies are undertaken by the USP proponent.
Peru		✓		
Australia (NSW)			✓	The government and the USP proponent are required to work together during the preparation of the detailed proposal, after the proponent's initial submission is approved by the government.
Italy			✓	The public agency is required to conduct the feasibility study.
United States (Virginia)	✓			If necessary, the public agency is authorized to sign an interim agreement with the USP proponent or other private entities for assistance with development activities.

## 16 ANNEX 9: USP PROCUREMENT MECHANISM

Table 18: Overview of Procurement Mechanisms Used by Governments

Country / Jurisdiction	Full Competition	Swiss Challenge	Bonus System	Admission to Best and Final Offer (BAFO) Stage	Direct Negotiation	Additional Comments
India						
• Andhra Pradesh		✓			✓	Direct negotiation may be done in specific cases related to proprietary technology; failure of earlier competitive-bid process; social infrastructure projects developed by non-profit organizations; or projects linked to mega-infrastructure projects as defined in the governing legislation.
• Gujarat	✓					
• Madhya Pradesh		✓				
• Rajasthan		✓				Rajasthan introduced an amendment in 2015. The original proponent is only allowed to match the best bid received during the Swiss Challenge if the bid submitted by the original proponent is within 15 percent of the best bid received.
Philippines		✓		✓		
South Korea			✓			
Ghana	✓					Draft PPP Bill mentions that in the case of a bid that is more competitive than that of the proponent, the original proponent will be entitled to make a best and final offer. However, pending the passage of the PPP Bill, this is not currently applicable.
Kenya					✓	USP or privately initiated investment proposal, as defined in the governing legislation, needs to meet strong criteria, as prescribed. These conditions are more akin to emergency or exclusive scenarios, for which a typical USP would rarely qualify.

Country / Jurisdiction	Full Competition	Swiss Challenge	Bonus System	Admission to Best and Final Offer (BAFO) Stage	Direct Negotiation	Additional Comments
South Africa						
• National Treasury	✓				✓	
• SANRAL	✓			✓		In the competitive tender process, the two most advantageous bids are selected by SANRAL, and best-and-final offers are invited.
Tanzania	✓					
Senegal	✓		✓		✓	Senegal allows for direct negotiation if the USP meets minimum requirements. If the USP is not innovative, it is subjected to competitive tender.
Chile			✓			Chile uses a bonus mechanism of three to eight percent. It also allows for direct negotiation in the case of a single bidder (no competition).
Peru		✓			✓	Peru uses a right-to-match mechanism. It also allows for direct negotiation in the case of a single bidder (no competition).
Colombia		✓	✓			Colombia uses a bonus mechanism if the USP project requires government support, and right to match if the USP project does not require government support.
Jamaica		✓				
Australia (NSW)	✓				✓	In cases where a proposal is assessed as not meeting the USP criteria, the government may procure the project from the market through full competitive tender. In such cases, the USP proponent may participate in the procurement process but will have no additional rights beyond those afforded to other market participants. Proposals that meet the USP criteria are procured through direct negotiation.
Italy		✓				Italy has used a right-to-match mechanism since 2002.
United States	✓					

Country / Jurisdiction	Full Competition	Swiss Challenge	Bonus System	Admission to Best and Final Offer (BAFO) Stage	Direct Negotiation	Additional Comments
(Virginia)						

## 17 ANNEX 10: TRANSPARENCY AND PROPRIETARY INFORMATION

This section discusses how governments address the issue of transparency and protecting the proprietary rights of USP proponents. The discussion is primarily based on clauses incorporated in USP frameworks.

### Key Findings

- **Finding 16: Protection of confidential proprietary information is relevant, but few USP frameworks address the issue in significant detail.**

### Overview

Ensuring transparency in the management of USPs, and protection of the USP proponent's proprietary information, are critical in the management of USPs. Most governments address these concerns in their USP frameworks.

- **Transparency:** As discussed in Chapter 3, there is a perception that USPs enable corruption and nepotism by public officials, especially when USPs are sole-sourced or directly negotiated. In light of this, ensuring transparency is an important aspect of USP management. Despite its importance, governments are not consistent in the extent to which they include specific provisions related to transparency in their USP frameworks.
- **Proprietary Information:** Private entities submitting USPs are concerned about the protection of proprietary information, including intellectual property rights related to unique technologies and concepts, and confidential business information. Given that encouraging innovative project concepts is one of the primary motivations for governments to accept USPs, protecting proprietary information is an important element of USP frameworks. In addition to ensuring confidentiality of proprietary information, the protection of the USP proponent's intellectual-property rights also needs to be addressed. Usually, intellectual-property rights are protected by way of offering fair compensation for their use.

On the surface, ensuring transparency seems to conflict with the need to protect USP proponents' proprietary information. However, it is possible to harmonize the interests of the public sector—including ensuring transparency in the management of USPs—with those of the USP proponents—to protect genuine proprietary information, including intellectual-property rights.

## Country Experience

**Some governments include specific provisions to enhance transparency and accountability in the management of USPs. However, the use of transparency provisions is not universal. Only one third of the countries in the Experience Review incorporate even the most essential transparency features.**

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Ensuring transparency in the management of USPs requires disclosing information that can enable stakeholders to hold public agencies accountable. The most basic transparency measures include publishing the list of submitted USPs, as well as information about USPs; their status; decisions taken; and project contracts. Transparency regarding the performance of USP projects is even rarer, with only 16 percent of governments making performance and audit reports available to the public.

After several controversies related to USPs, **Jamaica** developed its national PPP Policy in October 2012. Jamaica is committed to enhancing transparency in its PPP program, which also applies to PPPs resulting from USPs. Specifically, Jamaica's government will publish: (1) A summary of PPP projects before the start of the procurement process (prior to issuing a request for qualifications or request for expressions of interest); (2) RFPs, if issued to potential bidders; (3) PPP contracts once they become effective; and (4) project-performance data, according to an agreed-upon schedule and format.<sup>219</sup>

*Box 22: Disclosure of Information in Colombia's USP Framework*

### **Disclosure of Information in Colombia's USP Framework**

Colombia's PPP Law (Law 1508 of 2012), which includes a framework for the management of USPs, also contains several provisions related to disclosure of information.

USP proponents are guaranteed confidentiality during the first evaluation stage (the pre-feasibility stage), in which the government evaluates the project concepts based on public-interest criteria. For USPs that progress to the formal feasibility stage, a public hearing is required. This hearing is intended to benefit competing bidders and must be undertaken within one month of the feasibility studies being delivered.<sup>220</sup>

Transparency provisions during procurement depend on whether a project requires public funding. Projects that require public funding are competitively tendered via the standard

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<sup>219</sup> Section 10, Government of Jamaica Policy and Institutional Framework for the Implementation of Public Private Partnerships, page 36, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 4, 2016].

<sup>220</sup> The requirement to conduct a public hearing or "audiencia publica" is contained within Decree 1553 of 15 August 2014, available at: <http://wsp.presidencia.gov.co/Normativa/Decretos/2014/Documents/AGOSTO/15/DECRETO%201553%20DEL%2015%20DE%20AGOSTO%20DE%202014.pdf> [last visited: February, 1, 2016].

procurement process, which requires the publication of the same data as would be required for a public procurement. Projects that are privately funded proceed through an abbreviated procurement process. This process also uses the Sistema Electronico de Contratacion Publica (SECOP), which places relevant information to facilitate other bidders' participation in the public domain.<sup>221</sup>

Relatively advanced transparency norms for USPs are found in **Virginia (United States)**, where promoting transparency and accountability is a key objective and goal of Virginia's Office of Public-Private Partnerships (VAP3) under PPTA. PPTA has several disclosure requirements; the ones specifically applicable to USPs are listed below.

*Table 19: Disclosure Requirements Under Virginia's PPTA*

<b>Disclosure</b>	<b>Description and Notice Period</b>
<b>Call for Competing Conceptual Proposals</b>	Upon acceptance of the USP, provide 120 days' notice period to allow for the submission of competing proposals. <sup>222</sup>
<b>Findings and Recommendations of Detail-Level Screening</b>	The findings and recommendations of the detail-level screening are publicly posted for at least 30 days on VAP3's website prior to their consideration by the transportation PPP advisory committee set up under PPTA. <sup>223</sup>
<b>Interim Agreement</b>	Prior to signing an interim agreement, provide 30 days' notice to give opportunity for public comment on the proposals. This is done by posting the proposed interim agreement on the project website and/or the VAP3 website.
<b>Audit of Final Terms of Concession Award</b>	PPTA requires VAP3 to appoint an independent consultant to audit the final terms of the concession award prior to awarding it to the winning bidder. VAP3 is required to disclose information from the audit within 30 days of its completion by posting it on its

<sup>221</sup> The World Bank Group (WBG), *A Framework for Disclosure in Public Private Partnerships: Technical Guidance for Systematic, Proactive Pre- & Post- Procurement Disclosure of Information in PPP Programs*, 2015, available at <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/11/773541448296707678/Disclosure-in-PPPs-Framework.pdf> [last visited: February 2, 2016].

<sup>222</sup> Code of Virginia, § 33.2-1820 (2014), *Highways and Other Surface Transportation Systems*, 2014, available at <http://law.justia.com/codes/virginia/2014/title-33.2/section-33.2-1820/> [last visited: January 3, 2016].

<sup>223</sup> The Commonwealth of Virginia, *Virginia Public Private Partnerships, PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 23, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].



website.<sup>224</sup>

#### **Draft Concession Agreement**

Prior to the issuance of a final request for proposals (RFP), the relevant public agency should provide 30 days for public comment on the draft concession agreement.<sup>225</sup>

Simultaneously, VAP<sub>3</sub> is required to allow public comment on the project and proposals on a continuous basis, by making use of the VAP<sub>3</sub> and/or project website. The RFP, including the concession documents, will be posted to the VAP<sub>3</sub> and/or project website(s).<sup>226</sup>

All proposals, including USPs submitted by private entities under the PPTA, become the property of the Commonwealth and are subject to disclosure pursuant to the Virginia Freedom of Information Act (VFOIA).<sup>227</sup> Under the terms of VFOIA, public agencies and VAP<sub>3</sub> will publish all information relating to projects, including proposals, procurement documents, concession agreements, etc. Information about the government's mega-projects is published on a dedicated website.<sup>228</sup> Specific project websites are also created for the purposes of accessing historical and current information about projects under PPTA and PPEA.<sup>229</sup>

**In the absence of specific provisions in the USP framework, general laws regarding transparency and accountability apply.**

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In **South Africa**, SANRAL is required to make public its decision to appoint the USP proponent as the scheme developer. Besides this requirement, SANRAL's USP framework includes no other public-disclosure provisions. However, this does not limit the applicability of the general

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<sup>224</sup> The Commonwealth of Virginia, Virginia Public Private Partnerships, *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 34, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].

<sup>225</sup> Code of Virginia, § 33.2-1820.B.2 (2014), *Highways and Other Surface Transportation Systems*, 2014, available at <http://law.justia.com/codes/virginia/2014/title-33.2/section-33.2-1820/> [last visited: January 3, 2016].

<sup>226</sup> The Commonwealth of Virginia, Virginia Public Private Partnerships, *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 33, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].

<sup>227</sup> Code of Virginia, § 33.2-1809 (2014), *Highways and Other Surface Transportation Systems*, 2014, available at <http://law.justia.com/codes/virginia/2010/title-2-2/chapter-37/2-2-3700/> [last visited: January 3, 2016].

<sup>228</sup> Virginia Mega Projects, The Commonwealth of Virginia, available at <http://www.vamegaprojects.com> [last visited: January 4, 2016].

<sup>229</sup> Examples include website of (i) I-495 HOT Lanes and I-95 Express Lanes projects, available at <https://www.expresslanes.com> [last visited: January 4, 2016] and (ii) Elizabeth River Tunnels project, available at <https://www.driveert.com> [last visited: January 4, 2016].

transparency and disclosure regulations that exist in the general supply-chain management legislation.<sup>230</sup>

Similarly, **Jamaica** does not prescribe specific transparency norms for USPs, but its PPP Policy contains general provisions about probity management and transparency procedures, which are also applicable to USPs. Specifically, the Access to Information Act, 2002, and Access to Information Regulation, 2003, are both applicable to projects under Jamaica's PPP Policy.<sup>231</sup>

**Although many USP frameworks seek to protect proprietary information, including intellectual-property rights, they often fail to include details about the nature of the protection and the specific mechanisms.**

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More than 60 percent of the USP frameworks assessed in the Experience Review contain provisions for protecting proprietary information. However, many of these frameworks do not specify in detail the nature of this protection, or specific mechanisms.

In **Jamaica**, although specific protections of intellectual-property rights are not mentioned in the national PPP Policy, there is a principle-level affirmation to treat the intellectual-property rights of USP proponents and other bidders fairly and equitably. If legal issues arise on this matter, they are referred to the Attorney General of Jamaica for an opinion.<sup>232</sup> Similarly, even in the case of **Virginia (United States)**, the Public-Private Transportation Act (PPTA) of 1995 and the 2015 PPTA Manual and Guidelines provide only general instructions on the protection of proprietary information. Additionally, treatment of intellectual-property rights is not specified in the PPTA.

In the **Philippines**, the government emphasizes the submission of a complete USP, which includes all documents necessary to evaluate it. Such documents, even if they contain proprietary information, need to be submitted for the USP to be considered complete. Although the importance of submitting even proprietary information is underscored in the BOT Law and its implementing rules and regulations, there is limited detail regarding how the government will protect the proprietary information, aside from the implementing rules and regulations noting that public agencies are to treat proprietary information with the utmost confidentiality, and not include it in tender documentation.<sup>233</sup>

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<sup>230</sup> Discussions with SANRAL officials from September to December, 2015.

<sup>231</sup> Section 10, Government of Jamaica Policy and Institutional Framework for the Implementation of Public Private Partnerships, page 36, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 4, 2016].

<sup>232</sup> Section 9, Government of Jamaica Policy and Institutional Framework for the Implementation of Public Private Partnerships, pages 34-35, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 4, 2016].

<sup>233</sup> Section 10.3, Rule 10, Revised BOT Law Implementing Rules & Regulations, Revised Implementing Rules and Regulations of R.A. NO. 6957, 2012, page 49, available at <http://www.neda.gov.ph/wp-content/uploads/2013/12/BOT-Law-IRR-Amendments-2012.pdf> [last visited: January 2, 2016].

**Governments put the onus on the USP proponent to claim the protection of proprietary information. The treatment of intellectual-property rights is mostly left to discussions between the public agency and the USP proponent.**

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Most governments require USP proponents to clearly identify information that is confidential or proprietary as part of the minimum submission requirements. Based on this, public agencies determine the protection accorded to such information. In **Virginia (United States)**, private entities submitting USPs or competing conceptual proposals are required to take steps to protect confidential or proprietary documents from disclosure, by bringing such information and materials to the notice of the public agencies and VAP<sup>3</sup>. The government then determines the extent to which these materials are exempt from disclosure and, if appropriate, the scope of such protection. Although the government can reject the private entity's request and disclose such materials after providing the private entity with notice of its intent to disclose, the overarching principle is that information and materials may remain confidential if the financial interests of a private entity would be adversely affected.<sup>234</sup>

**South Africa (National Treasury)** bars public agencies from using a USP proponent's intellectual property or proprietary data if the USP is rejected. If the public agency proceeds to the procurement stage, it is required not to use any data, concept, idea or other part of the USP as the basis, or as part of the basis, for a procurement and negotiation with bidders, unless the USP proponent authorizes the intended use. In cases where a competing bidder wins the competitive-bidding process, the public agency can implement the USP project without the involvement of the USP proponent, if it purchases required intellectual-property rights. The terms of the purchase of intellectual-property rights are documented in the USP agreement signed by the public agency and USP proponent.<sup>235</sup>

In **New South Wales (Australia)**, the USP framework requires the public agency to respect intellectual-property rights owned by USP proponents. The methods for the identification, recognition and protection of intellectual-property rights are supposed to be addressed and agreed upon between the USP proponent and the public agency during the first stage of the evaluation process. Specifically, the steering committee set up to evaluate the USP is responsible for confirming the unique elements of the proposal and agreeing with the USP proponent about the approach to be used to manage intellectual property.

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<sup>234</sup> The Commonwealth of Virginia, Virginia Public Private Partnerships, *PPTA Implementation Manual and Guidelines for the Public-Private Transportation Act of 1995 (As Amended)*, 2015, page 65, available at <http://www.p3virginia.org/wp-content/uploads/2015/12/2015-PPTA-Implementation-Manual-06-02-15-HB-1886-CHANGES-CHANGES-ACCEPTED-JDK-DLH-EDITS-reposted-to-website-12-30-15.pdf> [last visited: January 2, 2016].

<sup>235</sup> National Treasury Practice Note No 11 of 2008/2009, paragraphs 3.2, 4.2.4 and 7, available at [http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008\\_9.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008_9.pdf) [last visited: January 4, 2016].

## 18 ANNEX 11: APPLICABILITY OF THE USP FRAMEWORK

Governments sometimes limit the application of USP frameworks to specific delivery models, sectors and governmental levels. This discussion is primarily based on USP framework features and the experience of governments in implementing the USP frameworks.

### Key Findings

- **Finding 17: USP Frameworks that only apply to a limited range of delivery models may encourage USP proponents to engage in regulatory arbitrage.**

### Overview

Governments have taken different approaches to determining the applicability of the USP framework—in other words, to which delivery models, sectors or levels of governments the USP framework applies. Three main distinctions are as follows:

- **Delivery Models:** Governments differ in the extent to which the USP framework applies to the full spectrum of delivery models for private participation in infrastructure. Some USP frameworks may be in the general procurement regulations that apply to all project delivery options, whereas others are limited to PPPs and their variants. The definition of PPPs can vary, however, across jurisdictions, with some jurisdictions including a wider variety of delivery models within this classification. As such, a delivery option that is considered a traditional/conventional (non-PPP) option in one jurisdiction may be defined as a PPP in another.
- **Sectors:** The applicability of a USP framework may also be sector specific—in other words, only applicable to projects in specific sectors, procured by relevant sectoral departments. The sector-specific nature and application of a USP framework may be structural—in other words, a result of a decentralized political system—or purely incidental.
- **Levels of Government:** A USP framework may also be only applicable to a specific level of government—central, state or local.

### Country Experience

**Many developing countries introduced USP frameworks as part of new PPP policies or laws. However, only some governments changed their public-procurement laws to reflect the**

## **new USP frameworks, resulting in inconsistencies in the treatment of USPs between delivery models.**

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A number of less-mature PPP markets—including **Tanzania, Kenya, Senegal, Ghana** and **Jamaica**—recently adopted PPP policies and laws to encourage the private sector to participate more actively in the development of public infrastructure. This included taking advantage of the private sector’s skills in raising finance, introducing innovative technologies, and developing and implementing projects. Although governments could have taken advantage of private-sector efficiency and skills through publicly initiated PPP projects, many of them believed it was necessary to encourage USPs to attract private-sector interest.<sup>236</sup> As a result, they introduced USP frameworks in their new PPP laws and/or policies.

However, many of these governments did not harmonize their public-procurement laws with the USP framework. This was the case in **Jamaica**, which introduced a USP framework as part of its 2012 national PPP policy.<sup>237</sup> Jamaica’s national PPP policy provides specific procedures for the treatment and consideration of USPs. However, the USP framework in the PPP policy is confined to the PPP program. Other forms of private-sector participation in infrastructure are governed by the general public-procurement regulations, whose procedures for USPs are not consistent with those of the national PPP policy. For example, the national PPP policy mandates a competitive bidding process using the right to match (Swiss challenge), whereas the general procurement regulations do not provide for this mechanism.<sup>238</sup> A USP received for trans-shipment port development in the Goat Islands was precluded from being managed under a formal process, because it was not submitted as a PPP structure.<sup>239</sup>

In contrast, **Senegal** reformed its public-procurement code after it introduced a new PPP law (or partnerships code) with a USP framework in 2014. Instead of harmonizing the two USP frameworks, however, it adopted two separate USP frameworks for the delivery models (see Box 23).

*Box 23: USP Framework Differs by Delivery Model*

### **USP Framework Differs by Delivery Model in Senegal**

In Senegal, the USP Framework that applies to the project depends on the delivery model. In 2014, the government of Senegal enacted both a new PPP law (loi relative aux contrats de

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<sup>236</sup> In Senegal, for example, government officials believed that loosening the restrictions on USPs would attract greater private-sector interest. Interviews with Senegalese public sector officials.

<sup>237</sup> Government of Jamaica Policy and Institutional Framework for the Implementation of Public Private Partnerships, page 36, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 4, 2016].

<sup>238</sup> Government of Jamaica Policy and Institutional Framework for the Implementation of Public Private Partnerships, page 36, available at [http://dbankjm.com/files/public-private-partnership/ppp\\_policy.pdf](http://dbankjm.com/files/public-private-partnership/ppp_policy.pdf) [last visited: January 4, 2016].

<sup>239</sup> Interviews with Jamaican public officials.

partenariat, Law n°2014-09 of 20 February 2014) and a new public-procurement code (Decree n°2014-1212 of 22 September 2014). The former legislation governs availability-based PPP contracts, whereby project revenues derive primarily from government payments, while the latter governs other forms of PPP contracts, such as leases, concessions and public-service delegations (DSP), whereby project revenues derive primarily from user charges.

The two USP frameworks are similar in that they both only allow USPs if they meet a threshold investment of \$85 million, and allow direct negotiations in cases where specific conditions are met. However, the two frameworks are distinct in terms of their minimum submission requirements; the extent to which the projects must be privately financed; and the extent of local content required. In the case of the partnerships law, at least two of three conditions must be met: 70 percent private financing; technological innovation; or competitive pricing. In the public procurement code, however, the project must be 100-percent privately financed. The USP framework in the public-procurement code is more lenient regarding minimum submission requirements (in other words, the extent of studies that must be conducted by the USP proponent) compared to the partnerships law. Additionally, the public-procurement code is more specific about the local content required (at least 10 percent) than the partnerships law. Finally, the partnerships law also has significantly more approval stages involving various government entities.

Although it is too soon to tell whether Senegal's experience of having two USP frameworks (based on delivery model) will be effective, there is certainly a risk that it could result in regulatory arbitrage by USP proponents.

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**Approximately half of the governments studied as part of the Experience Review developed a USP framework as a legal instrument that applies to both PPPs and non-PPPs.**

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The **South African** National Treasury's USP framework applies to both PPP and non-PPP delivery models. South Africa's National Treasury first developed regulations for PPPs in 2004 but did not adopt regulations for USPs (applicable to both PPPs and non-PPPs) until 2008/2009. The procedural elements of the USP framework are common to both PPPs and non-PPPs, and only substantive elements relating to the determination of the feasibility of projects differ between PPPs and non-PPPs. The feasibility of PPPs is determined based on regulations specific to PPPs, which are included in National Treasury Regulation 16 and Practice Notes.<sup>240</sup>

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<sup>240</sup> National Treasury Practice Note No 11 of 2008/2009, paragraph 4, available at [http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008\\_9.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/Practice%20note%20SCM%2011%20of%202008_9.pdf) [last visited: January 4, 2016].

In jurisdictions that adopt a very broad definition of PPPs, the classification of USP frameworks based on their applicability to PPPs and non-PPPs tends to be blurred. For example, **Virginia (United States)**'s PPTA authorizes the government to engage private entities to develop and/or operate infrastructure facilities. However, the government has implemented projects using traditional delivery approaches—including design-build (DB) and design-bid-build (DBB), which are typically not classified as PPP models—under the PPTA. Indeed, the initial USPs that were submitted to VAP<sub>3</sub> were not for PPP projects. The first PPP—the I-495 HOT Lanes project that used a design-build-finance-maintain-operate (DBFMO) delivery model—was implemented through a USP in 2005.

**Most governments (approximately 74 percent) do not have sectoral restrictions on the applicability of the USP Framework. Where sectoral constraints exist—in South Africa, Virginia (United States), and Andhra Pradesh (India)—they are largely informed by developmental priorities.**

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In 2001, **Andhra Pradesh (India)** enacted legislation to enable infrastructure development with PPPs for specific physical and social infrastructure sectors. These include roads, public buildings, sport and recreational infrastructure, health, and water and sewerage, among others. These sectors are specified in Schedule 3 of the legislation, and the government has the authority to extend the application of the legislation to other projects and sectors.<sup>241</sup> **Virginia (United States)**'s PPTA was enacted in 1995, with a specific focus on transportation, because the government had recognized the significant need for developing transportation facilities. In 2002, Virginia enacted the PPEA, expansive legislation covering education, technology, and other public-infrastructure and government facilities. Both of these laws, and their regulations, contain provisions to manage USPs.

In **South Africa**, the sector-specific USP framework has structural causes. Although the National Treasury's USP framework applies to all sectors, the national roads agency (SANRAL) is authorized to develop its own procurement regulations. As a result, SANRAL has created a separate USP framework applicable to projects relating to the national roads network.

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<sup>241</sup> Andhra Pradesh Infrastructure Development Enabling Act, 2001, available at <https://ppp.cgg.gov.in/Documents/IDEact.pdf> [last visited: January 4, 2016]