

Unsolicited Proposals for PPPs in Developing Economies

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One of the features of the legal regulation quality in the field of PPP is the interest of business in the implementation of infrastructure projects using this mechanism. At the initial stage of the PPP development, this interest is expressed in the active participation of business in competitions for the implementation of PPP projects and / or in the preparation of unsolicited proposals (USPs). At the next stage, in the number of successful PPP projects. In conditions when the public authorities do not make efforts to structure PPP projects, it is business who takes the initiative by starting the preparation and submission of unsolicited proposals. The attitude to such proposals by the public authorities and the expert community is very different. In a number of countries, including Ukraine, there are many discussions about the expediency of USPs and the approaches that should be used when considering them. This article presents an analysis of various points of view regarding unsolicited proposals; an assessment of the advantages and disadvantages of USPs compared with the proposals prepared on the initiative of public authorities; the author's observations regarding the potential of using this mechanism to achieve the public interest and recommendations on how some of the problems existing in this area could be resolved.

Keywords: Public-Private Partnership (PPP); PPP proposals; Unsolicited Proposals (USP); Infrastructure Projects, Public Interest.

I. Introduction

Until May 24, 2016, when the new version of the Law 'On Public-Private Partnership' has become valid, the implementation of projects using PPP mechanism in Ukraine was of little interest to anyone. During the six years of the validity of the initial version of the Law (since 2010), it was used only twice to structure very small projects in the field of heat supply (installation of boilers in boiler houses), and even that was not efficient. In fact, that time the only purpose for using PPP mechanism was to demonstrate the possibility of applying the current legislation in practice in the framework of the implementation of one of the technical assistance projects.

The public authorities and the private business preferred to use concession legislation, which was also very imperfect, but more understandable in application than the PPP Law. Before the entry into force of the new version of the Law on PPP in Ukraine, about 200 concession agreements have been concluded. Unfortunately, none of the concession contracts concluded that time resulted in constructing new infrastructure facilities. Moreover, no serious reconstruction has been performed. At present, most of the concession contracts are either terminated or simply enable private business to manage State (municipal) property objects. Neither public authority, nor the population was satisfied by such cooperation. In most cases, the private business did not meet its expectations as well. Among the latter, by the way, there was no a single serious foreign company, which indicates about the low attractiveness of the legal regulation that time to ensure the participation of private business in the modernisation of infrastructure.

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The new version of the Law on PPP, of course, is not perfect. At the same time, it has introduced a clear and quite flexible procedure for forming partnerships between business and public authorities for the implementation of long-term infrastructure projects. And this is not a theoretical conclusion. During the two years since the adoption of the by-laws, based on the new redaction of the Law on PPP, it was submitted 5 Unsolicited proposals (USP) related to the State-owned objects (3 of them by the well-known foreign companies) and 2 proposals on port concessions based on the Concession Law that were prepared by the Ministry of Infrastructure with active assistance of EBRD and IFC. The process has started.

What was the reason for such activity in the preparation of USPs?

Firstly, the submission of USPs was legally allowed and the procedure for their consideration was clearly defined: the requirements for the content of the proposal for implementing PPPs, the procedure and deadlines for their consideration, the grounds for rejecting USPs, as well as the grounds for the Ministry of Economic Development & Trade and the Ministry of Finance not to approve it (in cases when such approval is necessary). There is a 3-month period established for consideration of PPP proposal and decision-making (to accept a proposal or not). If a public authority has accepted PPP proposal, it shall be announced a competition to attract a private partner. The initiator of the proposal, participating in such a competition, has no preferences. But if someone else wins the competition, they will be obliged to reimburse the proposal's initiator for the cost of its preparation, which may not exceed 2.5% of the cost of the proposed project.

Secondly, business is interested both in a good reliable infrastructure, and in participation in long-term projects on its development. In Ukraine, the roads are in a very bad condition; rail transportation system, (incl. passenger) is inefficient; there are not enough bridges, and most of the existing ones require serious repair; heat supply, water supply and sanitation systems are extremely aged; there is a lack of infrastructure for waste treatment etc. At the same time, there are no carefully elaborated and interesting for business proposals concerning the modernisation of infrastructure prepared by the public authorities. In such conditions, business has the only opportunity to influence on the current situation —

to independently initiate the implementation of infrastructure projects, using USP mechanism.

Interest to USPs in Ukraine has generated numerous discussions regarding their advantages and disadvantages. As a rule, they were initiated by our foreign colleagues — representatives of international financial institutions (IFI) and their consultants. In the opinion of most of them USPs, as a rule, do not reflect the public interest, can be used to avoid competition, and potentially create an environment for corruption. Therefore, such proposals should be avoided by public authorities or, at least, should be treated very carefully.

Such conclusions were largely based on recommendations of the Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects prepared by the World Bank and PPIAF¹ (Guidelines). This study contains an in-depth analysis of international experience in the application of USPs, and also includes a number of very interesting and important observations, conclusions and suggestions. Most of them are extremely useful for implementation in emerging economies, especially those with a poor USP experience, for example, in such countries as Ukraine. But a number of conclusions presented in this publication, in our opinion, is discussible. The perception of them as 'the only true' could negatively affect the participation of business in the modernisation of infrastructure in developing countries under PPP terms and in some cases, completely 'kill' the desire of business to offer something in this area. Below in this article we consider these issues based, among other things, on the experience of consideration of USPs in Ukraine.

II. USPs: Advantages and Disadvantage

In order for the discussion to be reasoned, we have compared USPs and proposals prepared by the public authorities (solicited proposals) by their influence on a number of parameters important for the society to understand their advantages and disadvantages.

1 Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects (Volume I,II,III) - World Bank Group, PPIAF - <<https://ppp.worldbank.org/public-private-partnership/library/policy-guidelines-managing-unsolicited-proposals-infrastructure-projects>>.

1. Public Interest and Compliance With Strategic Priorities

The presence of public interest is one of the main features indicating the possibility of qualifying a project as a PPP. Protection of public interest should be a basis for taking decisions by public authorities. As a result, by default, it is considered that PPP proposals prepared by public authorities correspond to the public interest and are in compliance with the strategic priorities of the country (territory) development while the USPs do not.

The statement that the USPs don't comply with the public interest and are not aimed at achieving strategic priorities in infrastructure development is a very serious argument against their use. Therefore, we think this issue requires detailed consideration.

Indeed, there are many cases when USPs don't meet the public interest and don't take into account strategic priorities (a lot of such examples could be found in the Guidelines). But for the sake of justice, it shall be said that in developing countries this disadvantage could often be inherent also to PPP proposals prepared by public authorities. One of the reasons for this is the lack of long-term strategic documents of infrastructure development at the State and local levels. In such a situation, not only private business, but also public authorities unwittingly act situationally.

Is it correct to make a complaint to private business that its submitted PPP proposal does not meet the public interest in the absence of clearly defined State priorities in infrastructure development? We think it is not.

At the same time, if long-term strategic documents for infrastructure development are adopted at the State / local levels, the presence of public interest in a PPP proposal and the compliance of the proposed project with them can always be assessed, regardless of whether the proposal is prepared by a private business or a public authority. For this, it is simply necessary to envisage the necessity to conduct such an analysis in the process of evaluating the effectiveness of PPP proposals.

For example, in Ukraine, the analysis of the compliance of PPP proposals with strategic priorities is obligatory in the process of their evaluation (both, for solicited proposals and for USPs). And this is a positive moment. At the same time, there are no plans for infrastructure development at either the State or

local level in Ukraine. As a result, the analysis of PPP proposals is carried out based on the existing socio-economic strategies and programs (State or municipal), many of which do not contain specific requirements regarding infrastructure development and are of a general nature. Such an analysis is superficial. Its results only lead to the conclusion whether the proposed project meets the State policy in a particular area. And nothing else.

As a result, nobody can answer the question, what is more important for a country or a certain territory in the first place — to build a bridge, a road, a waste treatment plant, or to rehabilitate the water supply or heating system, etc. Moreover, in such conditions it is also difficult to assess the demand for the infrastructure facility proposed for construction (modernisation) within the framework of PPP in the medium term and hence the project's payback. And these are the risks for both: private business and the State / municipality.

It is impossible to take right (effective) decision about the implementation of an infrastructure project using budgetary funds or within the framework of PPP in the case of absence of the State / municipal infrastructure plan regardless of whether their implementation is proposed by a public authority or a private business. In this situation decisions are made spontaneously and subjectively. It is not possible to assess the success (relevance) of projects proposed for implementation in the medium term.

For example, in the past few years, all efforts to promote PPP in Ukraine were directed to the preparation of concession projects in seaports (IFIs have supported the development of a new Law on Concessions, primarily to implement port projects; they have financed the preparation of PPP proposals for two ports — Kherson Sea Trade Port and Sea Trade Port Olvia).

Can this solution be considered as optimal in the conditions of extremely poor quality of roads and railway communication systems, the lack of a number of bridges, which are critical for transportation, etc? In our opinion, no.

Will port projects be effective in the conditions of poor quality of other transport infrastructure, undeveloped industrial production and low capacity of the domestic market? In our opinion, no as well.

Is the port sector the highest priority in terms of creating a modern infrastructure in the country, pro-

viding conditions for business development and improving the quality of life of the population? Very doubtful.

It means that, if the country (the municipality) does not have a long-term infrastructure development plan, then no matter who initiated a project (private business or public authority), or what mechanism is planned to be used for its implementation (budget financing, PPP or other). In all cases it is impossible to make a clear conclusion as to whether this project meets the public interest or contributes to the achievement of strategic priorities.

2. Social Attractiveness, Focus on Achieving the Sustainable Development Goals (SDGs)

For some reason, it is believed that PPP proposals prepared by the public authorities are always socially attractive and provide for the implementation of projects that have positive impact on the SDGs. On the contrary, USPs are primarily commercial in nature and are focused exceptionally on the interests of the business offering them for implementation.

We cannot agree with that. In our opinion, business does not deserve such an attitude. Of course, the commercial component of a project is very important for business and it will not undertake non-recoverable projects with high risks. At the same time, business understands that PPP projects that are not perceived by the population or have a negative impact on its life are very risky for implementation. Therefore, the analysis of their social component is a very important part of USPs.

We should also note that today business is becoming increasingly socially responsible and in many countries it is one of the drivers for ensuring sustainable development and the achievement of the SDGs. Moreover, it sometimes takes more active position on this issue than national governments.

For example, the results of an expert analysis conducted by PriceWaterhouseCoopers in 2015 have demonstrated that 71% of 986 companies operating in 10 economic sectors surveyed by them had already planned that they would take part in achieving the SDGs; 13% of them identified the activities that they are going to implement to achieve the SDGs; 41% have announced the implementation of the SDGs in their business strategies for the next 5 years.² More

than 1,300 investors, managing capital of about US\$ 60 trillion, stated that they adhere to the United Nations principle of the Responsible Investment.³ More than 9,500 business companies from more than 135 countries of the world have joined the United Nations Global Compact, the largest voluntary initiative in the field of corporate responsibility. Thus, they declared their intentions to contribute to the achievement of the SDGs. So, in our opinion, it is not correct to state that the majority of USPs have a low social impact and ignore the tasks on achieving the SDGs.

It cannot also be stated that the proposals initiated by public authorities are always socially oriented and aimed at achieving the SDGs. In theory, it should be so, but in practice it does not always happen. The reasons are incompetence and/or personal interests of some civil servants who make decisions in the field of PPP; their desire to select for implementation those infrastructure projects that are easier to prepare and less risky.

All this means that both USPs and proposals prepared by public authorities can be:

- socially oriented or not;
- have a positive impact on the achievement of the SDGs or not;
- meet the public interest or not.

Answers to all these questions don't depend on who initiates a PPP proposal — a private business or a public authority. Such a conclusion can be made only on the basis of an assessment of a submitted PPP proposal. Such an analysis should be envisaged in the process of its evaluating. When conducting such an analysis, it is important to use the recommendations of the Guidelines,⁴ in particular, introduce clear evaluation criteria and procedures and provide that such 'criteria should cover public-interest, project-feasibility, PPP suitability, and affordability considerations'.⁵

2 Запатріна І.В. Керівництво «Посилення ролі бізнесу в досягненні ЦСР в Україні» - публікація в рамках проекту ПРООН/GIZ «Підтримка реалізації Цілей сталого розвитку в Україні» - березень 2018 – 69 с. - <<http://www.ua.undp.org/content/ukraine/uk/home/library/entrepreneurship-support/sdg-business-role-enhancement.html>>.

3 <<https://www.unpri.org>>.

4 World Bank Group, PPIAF (n 1).

5 *ibid*, vol I, p 12.

3. Fiscal Sustainability of Project

The issue of fiscal sustainability is very important for understanding whether a State (municipality) can support an infrastructure project proposed for implementation on a PPP basis. In this context, it is very important to analyse a project impact on public finances, including fiscal liability, and also to assess the ability of a public authority to effectively manage the involved risks. Such an assessment should be presented in PPP proposal both in the case of its preparation by a private business or by a public authority.

In general for a public authority it is easier than for a private business to assess the fiscal implications of a project implementation while preparing it. Although during the preparation of solicited proposals, such an assessment is usually carried out by the relevant line-ministries, and not by the Ministry of Finance (or municipal financial departments). In many cases assessment of fiscal risks for them has the same difficulties as for a private business.

At the same time, fiscal risks could be avoided if legislation has clear criteria that PPP proposal must meet and in case of non-compliance with which it is rejected. Assessment of compliance of PPP proposal to such criteria should be approved by the Ministry of Finance (local financial body) in the process of analysing the effectiveness of PPP proposal. And not only for USPs, but also if a PPP proposal is prepared by a public authority.

It should be noted that in many countries of developing economies who take only the first steps in implementing PPP projects, the essence of evaluating a PPP proposal for its financial sustainability is not always correctly understood even by financial institutions. Often, instead of assessing the long-term impact of the proposed project on the budget revenue and expenditures (including indirect, by creating conditions for the development of another business, increasing labour productivity, reducing morbidity, etc.), financial agencies in the first place evaluate a PPP proposal based on the following criteria:

- short-term project impact on budget revenues, ie just at the time when the object is being modernised (reconstructed). In practice during this period revenues may even decline;
- commercial attractiveness of the project (no need to provide State support, the high amount of concession and other payments to the budget).

The majority of refusals / warnings of financial authorities regarding PPP projects implementation are based on the comments of this kind. At the same time, the demand for the project by the population, its influence on the creation of opportunities for the socio-economic development of the territory and conditions for doing business (living) are ignored or considered as secondary. As a result, private partners are completely unreasonably denied in the implementation of a project proposed in USP that is actually very important for the society.

Such approaches to projects evaluation contradict with the essence of PPP. The goal of attracting private business to the modernisation (creation) of infrastructure is to improve the quality of life of the population, but not the short-term increase in budget revenues (for example, through concession payments). The most important thing that the implementation of such projects should ensure is a sustainable effect for the country (municipality) in the medium and long term perspective. Therefore, when assessing the fiscal sustainability of a project, first of all, it is necessary to analyze the ability of the State (municipality) to respond to the obligations taken within the framework of this project, to avoid fiscal risks for the budget in the future (not to create problems for the budget).

4. Competition

The fact that the initiator of USP has competitive advantages over the rest of the bidders is considered as one of its negative characteristics. This statement, of course, is more relevant to the situation when the project submitted as a USP is awarded as a result of direct negotiations. However, we can agree that for cases when a private partner is selected as a result of an open competition, this is also true. Initiators of USPs are more prepared for the competition than others. Additionally a competition is often held taking into account technical proposals of the USP initiator.

But what is negative in it for public authorities and for the society, if USP initiator turns out to submit the best proposal in the process of an open competition when winner selection criteria are not focused exclusively on USP initiator and reflect the public interest?

In our opinion, nothing is wrong with that. After all, it was a USP initiator who took the initiative and

risks to invest in the preparation of PPP proposal. Therefore, they have a right to certain advantages. The other thing is that these advantages should not have as a consequence that the project proposed in USP will be implemented by him on worse conditions than other participants of the competition can offer.

Another warning from the authors of the Guidelines is that the USPs 'potentially engage in corrupt practices'.⁶ We will not argue with that. But, in our opinion, the potential for corruption risks for USPs in the case when a private partners for PPP projects are selected at an open competition is not higher than for PPP proposals prepared by public authority. At least for the developing countries.

The same applies to warnings that overpricing (non-market prices) could be used in USPs. Competition can always adjust them. If criteria for selecting a winner are determined based on the public interest, the problems with overpricing for works / services in the framework of PPP will not arise.

5. Transaction Costs

One of the problems in launching PPPs regardless of who initiates them, is the high transaction costs of a project preparation and consideration, holding a tender and concluding a contract. Only a PPP proposal preparation is estimated from 2.5 to 5% of the appropriate project cost. Significant costs are incurred by public authorities also when they are considering a PPP proposal, preparing a tender and concluding a contract. And the longer these processes take, the higher these costs are.

It is important for the society to have transaction costs of structuring and consideration of PPP proposal low as far as possible and at the same time it shall not result in a loss of quality.

Solicited proposals are prepared at the expense of public budgets or funds from IFIs. In the first case it is in fact the population and business that pays for the preparation of PPP proposals at the expense of their taxes. So, public authorities have high responsibilities — they have to spend money as efficiently as possible and, consequently, take care of transaction costs decreasing.

In the case of attracting IFI funds the public authorities are not very concerned about the amount of transaction costs. And the cost of PPP proposal prepa-

ration could be very high. The legislation of many countries, in particular Ukraine, stipulates that an obligation of the winner of PPP competition on compensation of the costs of a PPP proposal preparation by a public partner / IFI may be established. As a result the cost of appropriate project for a private partner could increase sufficiently. And finally, additional costs will be covered at the expense of consumers of the services generated by the relevant project.

We have another situation with USPs. International experience demonstrates that the cost of their preparation is significantly lower (sometimes in several times) than the preparation of a proposal at the expense of donors (IFIs).

Firstly, business uses its own knowledge and competence to prepare USP, at least its technical part, and thus reduces the cost of preparing PPP proposal. Secondly, business spends its own money on the preparation of a feasibility study and therefore does everything possible to reduce the cost of its preparation. For example, it doesn't attract for the development of a feasibility study such expensive consultants as IFIs do. In addition, when preparing USP (attracting consultants for their development), there are no corruption risks — a business spends its own funds guided by the principle of 'best price-quality'.

Therefore, if we compare USPs and PPP proposals prepared by public authorities in terms of transaction costs, then for the USPs they are much lower. And from this point of view, they are more attractive to the society.

6. Detailing of the Information Provided in PPP Proposals

When considering USPs, many complaints arise as to the fact that the information used in it is not sufficiently accurate / detailed. In particular, this concerns information about land plots; financial and economic situation in an enterprise operating facilities planned for transfer to a PPP; existing obligations of such an enterprise; technical condition of some objects, etc. That is, the information to which the potential private partner — the USP initiator cannot have access at the stage of preparation of PPP proposal. At the same time, if PPP proposal is prepared

⁶ *ibid*, vol 1, p 3.

by a public partner, then it has the opportunity to get all the information it needs about PPP facilities, the company, and land plots. And all this information, as a rule, is presented in detail in this PPP proposal.

Is this has to be acknowledged as a disadvantage of USPs? In our opinion, no.

In order to decide on the expediency of implementing the considered project as PPP, first of all you need to make sure that the project is in demand by the society; that its implementation will provide an opportunity to solve existing problems; that it could be implemented technically and will not lead to a negative impact on the environment; and that a private partner will be willing to take on the risks that may arise from its implementation. So, at the stage of deciding whether to implement the project or not, the assessment of a *project* is more important than the analysis of the problems of the enterprise operating certain infrastructure facilities and the characteristics of its operation.

As the experience shows, almost always business has better understanding of a *project* that it proposes for implementation and related risks, than a public authority. And, most importantly, by submitting USP, it confirms its readiness to implement the project submitted for consideration, subject to the conditions set out in its PPP proposal.

At the same time, public authorities are more thinking about how to solve the problems existing in the enterprise operating the future PPP facility (object), and how not to reduce revenues from this enterprise to the budget in the next year or two, not to reduce the number of employees etc. Analysis of the proposed for implementation *project* itself, as a rule, is of secondary importance. Moreover, public authorities do not always understand which risks the business will be ready to undertake, and which not. Based on the above, there is a certain probability that solicited proposal can fail. Reasons: very high risks, conditions of a project implementation or a technological solution chosen for the project implementation doesn't suit any potential participant of the tender.

In our opinion the demand to present very detailed information in PPP proposal is not necessary also for solicited proposals. Under 'detailed' we mean the in-

formation that is not so important for making decision regarding PPP implementation, especially the information collection of which is impossible for a private business and very expensive for public authorities. In this context, it is important to take into account the recommendations of the authors of the Guidelines stating that the Government should specify the documentation and information that private entities need to provide as a part of their USP submission. 'Public officials in various jurisdictions confirm that stringent minimum requirements are effective at reducing the number of low-quality USPs'.⁷

Detailed information on the technical conditions for the future PPP project, availability of land plots, etc., can be collected by the public partner when preparing the competition for appropriate project in the case positive decision on its implementation.

7. Transparency and Accountability

The authors of the Guidelines noted that transparency and accountability are extremely important issues that should be addressed in the process of preparing and implementing PPPs. 'Governments should disclose all relevant project information to allay stakeholder concern'.⁸

One cannot disagree with this. But in our opinion, such a recommendation is important in relation to all PPP proposals, regardless of whether they are prepared by public authorities or private business.

There is an opinion that USPs have less transparency and openness than PPP proposals prepared by public authorities. Is it really so? In our opinion, no.

Indeed, PPP proposals prepared by private business often contain confidential information (or are generally not subject to wide dissemination). The lack of opportunity to get acquainted with this proposal in full reduces the competitive advantages of other participants in the future competition. In order to avoid such problems, the law may establish a list of those issues, information on which may be confidential, as well as those issues, the answers to which shall be publicly available. And then this problem related to USPs can be avoided.

In order to ensure transparency in PPPs the State policy on this issue has to take into account the recommendations of the Guidelines regarding the necessity to 'specify how the government will address

7 *ibid*, vol I, p 9.

8 *ibid*, vol I, p 5.

requests to protect proprietary or confidential information’;⁹ disclose parts of the USP submission and evaluation process, in particular

- (1) material elements of the USP submission; (2) the process and findings of the evaluation process; and (3) a description of the proposed project-development and procurement process.¹⁰

For the sake of justice, it should be noted that today there is sometimes an opposite situation. The proposals prepared by the public authorities are confidential and do not disclose sufficient information about PPP proposal.¹¹ For example, the Feasibility Study that have been prepared as a solicit proposal are marked as confidential. In our opinion, such situations should not arise.

Our analysis demonstrates that USPs could not be less, and sometimes could be even more attractive, than proposals prepared by public authorities. But for this, a proper legal and institutional environment shall be created.

III. How to Ensure USPs Efficiency and Effectiveness

In order to ensure the efficiency and effectiveness of USPs, the authors of the Guidelines propose three potential strategies:

1. Governments decide not to allow USPs (some experts believe, however, that this would result in a limited number of projects in low-capacity jurisdictions);
2. Governments allow USPs but hire external advisors to develop and structure projects (hiring advisors brings confidence to the market and contributes to equal bidding conditions); or
3. Governments allow private developers to develop USPs, who structure the transaction, competitively procure the major subcontracts, and take an equity stake in the project.¹²

Are the proposed strategies effective in developing countries, such as Ukraine, in the context of the global community’s movement towards achieving the SDGs? And could the pursuit of one of these strategies influence on the overcoming of inequality between countries (territories within one country), in terms of the standards of living of the population

(conditions for doing business)? Does this approach correspond to the UN idea of attracting private business to the achievement of the CDGs?

We will try to answer these questions below.

Strategy 1. Governments Decide Not to Allow USPs

We completely agree with the conclusion of the Guidelines that ‘USPs do not allow public agencies to overcome technical or financial capacity constraints’,¹³ and with the statement that in order to make a decision on USPs a public agency shall be ‘able to protect the public interest during the evaluation, development and procurement of a USP project’ and ‘ensure transparency and accountability’.¹⁴ But after all, the same demands are no less, and maybe even more important, if public authorities prepare PPP proposals. Even in the case of attracting external consultants. We have to understand that in order to properly set a task for consultants and monitor the results of their work, public authorities shall have knowledge on PPP issues. Moreover, attracting consultants in conditions of a low level of public authority’s qualification creates high risks of corruption — consultants could manipulate public authorities in the interests of some business.

Consequently, public authorities with low institutional and human capacity should not have the right to make decisions in the field of infrastructure development and on PPP issues, in particular to prepare PPP proposals. This could be very expensive for the State and the society. In our opinion, in order to avoid these risks, it is not necessary to prohibit USPs. The most important: to involve qualified specialists or to train existing specialists in public institutions.

The prohibition to submit USPs, which is practiced in a number of countries, is unwise, especially for the developing countries. It will negatively affect the infrastructure development of these countries,

9 *ibid*, vol I, p 10.

10 *ibid*, vol I, p 13.

11 Feasibility Studies in the framework of PPP proposals for Ukrainian Olvia and Kherson sea ports.

12 *ibid*, vol I, pp 19-20.

13 *ibid*, vol I, p 2.

14 *ibid*, vol I, p 5.

worsen their infrastructural problems. As a result the quality of life of the population on the relevant territories will remain low. In the end, this will lead to increased inequality between countries, which will create a fertile ground for migration, the emergence of social and political conflicts.

Based on the above, the following conclusion could be made. *The lack of qualifications in the field of PPP among public authorities should be a reason to think about how to improve the current situation (to attract qualified specialists for work in the relevant public institutions, to introduce measures to improve the institutional capacity of staff, etc), and not a reason to prohibit the USP.*

Also we cannot agree with the recommendations outlined in the Guidelines to governments regarding introducing fee for consideration of USPs. In the opinion of the authors of the Guidelines ‘a fee also ensures the effective use of public resources during evaluation, defraying some of the costs associated with processing USPs’.¹⁵

In our view, consideration of USPs is the obligation of the public authority.

National governments should ensure the society with modern infrastructure and high quality services including by attracting a private business for this purpose. In many cases public authorities cannot cope with their obligation to modernise infrastructure either at the expense of budget funds or borrowings. Private business proposes them to assist in resolving existing infrastructure problems. Why does it has to pay for the consideration of its proposal?

After all, when preparing USPs business actually takes the obligations of public authority. It invests own financial resources in the preparation of PPP proposals, sometimes quite serious amount, and spends the time. At the same time, it is not sure that the project proposed by it will be supported.

In our opinion, the proposal to introduce a fee for considering USPs could be acceptable only for economically developed countries, where public authorities are able to cope with overcoming infrastructure problems and ensure the population with an adequate quality of life and business – with attractive conditions for functioning. But not for the countries

of developing economies where the implementation of infrastructure projects is very risky for private business even without necessity to pay for consideration it’s PPP proposals. So it is at least not reasonable to introduce such ‘anti-stimulation’ (‘deterrence’) of business.

Strategy 2. Allow USPs but Hire External Advisors to Develop and Structure Projects

In fact, this Strategy provides for a PPP proposal preparation by public authorities based on the idea (concept) proposed by a private business. For implementing this Strategy the authors of the Guidelines propose obligations for Governments ‘to determine the extent to which the USP proponent may be involved in project development’,¹⁶ in particular select one of the two options:

- project development by the public agency (with external advisors);
- project development by the public agency and the USP proponent, whereby specific public-interest studies are undertaken by the public agency (and its external advisors), and the public agency and its advisors undertake a detailed review of any studies developed by the USP proponent.¹⁷

We cannot agree with this Strategy, especially with the first option above.

Firstly, we don’t understand how to entrust such complicated work to public authorities, which do not have sufficient qualifications even to consider and evaluate USPs.

Secondly, the implementation of this option in practice will result in high transaction costs.

In addition, if such a Strategy is used, the likelihood of a negative result in PPP competition will considerably increase. Public authority, which does not possess the necessary qualification, can ‘destroy’ a good and useful business idea. The project proposal prepared by it could have no interest for a business that submitted the corresponding idea. Involvement of external consultants could improve the situation. But in this case, transaction costs will significantly increase. And besides, as we noted above, the involvement of consultants by public authorities with low level of qualification in the field of PPP creates favourable conditions for corruption.

15 World Bank Group, PPIAF (n 1).

16 *ibid*, vol I, p 6.

17 *ibid*.

The most acceptable scenario is the third. But it doesn't relieve the public authority from the need to ensure a high level of qualification in the field of PPP for employees who make decisions on project proposals.

IV. Conclusions

1. The policy in relation to USPs and proposals prepared by public authorities as well as the legal regulation in this area should be based on the same principles.

A public-private partnership is possible if a balance of interests is achieved between the parties interested in the implementation of a complex and, as a rule, long-term infrastructure project needed by the country (city) and people. Achieving this balance requires finding a compromise between a public and a private partner, based on the public interest. And the search for this balance should begin at the stage of preparing PPP proposal, regardless of who prepares it.

Public partner shall prepare such PPP proposal that will be interesting to business and provides conditions that are acceptable to a private partner given the existing project risks. Otherwise, the proposed project will not take place. It will not be interesting to private business. As a result, large amounts of money will be spent on PPP proposal preparation and holding a competition, and a 'zero' effect will be obtained.

In order to prepare such a proposal, a public authority shall be highly qualified, even if it plans to involve external consultants to structure PPP. In addition, it must understand the interests and opportunities of business to implement a project on the terms offered in PPP proposal. The latter requires an experience and the ability to conduct a dialogue with business to assess the market attractiveness of a project.

Private partner shall prepare PPP proposal that is in the public interest and does not negatively influence on fiscal stability. Otherwise, it will not be supported by public authority. In this case, the proposal initiator will not return the funds invested in the preparation of PPP proposal and will have losses.

In order to prepare such a proposal, a business shall know criteria by which its proposal will be evaluated by public authorities. A serious argument for

business, who is deciding whether to prepare a USP, is the presence of an infrastructure plan (national or municipal). It is also important to understand that the civil servants responsible for consideration of USPs have the necessary qualifications, are not personally engaged and are ready for a civilised and equal dialogue.

In Ukraine, the requirements for any proposals for the implementation of PPP (USP and submitted by public authority) are the same, namely:

- common requirements for the structure of PPP proposals and the issues that should be covered in them;
- the same criteria for the consideration of PPP proposals and the grounds for their acceptance / rejection;
- mandatory competition for the selection of a private partner;
- possibility of compensation of expenses of the USP initiator (or public entity who have prepared PPP proposal) for proposal preparation at the expense of the winner of the competition;
- the same procedure for consideration of proposals. The only difference in the consideration of solicited and unsolicited proposals — the decision to prepare a feasibility study for a project that is planned to be implemented in the framework of PPP at the initiative of public authority with the involvement of budgetary funds, shall made based on the results of the evaluation of a concept note on the proposed project.

2. The main problems related to consideration of USPs and implementation of projects initiated in their framework in the developing economies are:

- Low qualification of public authority (both central and local);
- Lack of strategies and plans for the development of infrastructure at the State and municipal levels;
- The suspicious attitude of public authorities to private business and, as a result, the lack of dialogue between them in the process of discussing USPs;
- Lack of interest of civil servants in infrastructure development. Firstly, nobody assesses the work of civil servants in terms of the number of successfully implemented projects (neither the senior managers nor the population). Secondly, in order to prepare and implement long-term infrastructure projects as PPPs, you need to learn, work hard, take responsibility, and this is far from being interesting for all;

- USPs are being considered for very long time.¹⁸ As a result, projects become out-of-date, the interest of private business to them decrease. The responsibility of public authorities for exceeding the established by law time limits for consideration of USPs, as a rule, is not specified in national laws;
- In a number of cases, the public authorities apply a subjective approach when making decisions on USPs. Criteria for decision making are not concrete;
- Common practice is to impose excessive demands to level of detailing of an information in PPP proposals. In particular, this concerns the requirement for private business to substantiate in their proposals the issues that are not crucial for making decisions about implementing PPPs, or questions for answering which an information is required that in principle cannot be available to private business, the initiator of PPP proposal;
- When evaluating PPP proposals, the main focus is on the problems of an enterprise operating an infrastructure facility that is planned to be transferred to a private partner in the framework of PPP, as well as to the amount of revenues to the public budget in the first years after concluding a PPP contract. At the same time, the assessment of a *project* itself, its relevance, long-term socio-economic effect and impact on the achievement of the SDGs, as well as ensuring public interest and having the ability to control this by the project's performance indicators, is carried out perfunctory.

rily. Not enough attention is paid to assessing the fiscal sustainability of PPP projects in the long term perspective;

- Quite often, public authorities consider USPs as doubtful because of the terms for the creation (reconstruction) of PPP facilities, as well as the term of contract. They do not agree with the forecasted demands for goods / services provided in the framework of the proposed project, assessment of the long-term price / tariff dynamics by a private business, the size of fee for the risks of private business, etc. The inconsistency of such USPs indicators with the 'optimistic' expectations of public authorities is often the reason for the refusal to implement proposed in the framework USP project that demanded by the society and critical for achieving the SDGs. At the same time, these and similar indicators on which USP is based may well be adjusted during the tender procedure as a result of the competition in the case of well-defined criteria for the selection of a private partner for the project implementation. Those indicators that, in the opinion of public authorities, are overstated / undervalued should be reflected in the selection criteria of tender.

In our opinion in order to increase the efficiency of USPs in the developing economies that critically need to attract private business into infrastructure, it is necessary to focus on solving these problems. And for this purpose public authorities, again, must have the proper qualification.

3. Almost all problems, that USPs could potentially have, could be avoided if a public partner (authority) has the necessary qualification in the field of infrastructure development and PPP, and is responsible to the society for the results of its management decisions.

¹⁸ Many USPs projects took several years to reach operational stage after having been initiated as a USP. In the Philippines it took more than 15 years to become operational and, in Ghana, the Accra-Kumasi Highway USP faced delays for more than 11 years (World Bank Group, PPIAF (n 1), vol 1, p 2). We have the similar examples in Ukraine.