

## Ukraine

### Unsolicited Proposals: New Realities in COVID Times

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This report continues the discussion on advantages and disadvantages of unsolicited proposals that was started in EPPPL 2/2019 and analyses the new tendencies in evaluation of their potential for infrastructure development in post-COVID times. The main obstacles for private businesses' decision to invest in Public-Private Partnership (PPP) proposals preparations are considered. Recommendations on how some of the existing problems in this area could be resolved are provided.

#### I. Introduction

Until this year the attitude towards unsolicited proposals (USPs) was rather negative than positive. Previously, most experts and representatives of international financial organisations believed that in general USPs do not reflect the public interest, provoke non-competitive behaviour, and create a favourable environment for corruption. Therefore, such proposals must be avoided by public authorities or, at least, be treated very carefully. Based on this opinion, PPP policy in many countries was characterised by a highly suspicious attitude to USPs. Many PPP proposals submitted by private businesses have been ignored by public authorities without a deep consideration or analysis; the proposals were handled too slowly and without any enthusiasm.

Trying to change the situation regarding USPs in Ukraine, in 2019 we started a discussion on this issue in EPPPL.<sup>1</sup> The analysis was based on the conclusions and recommendations of the 'Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects' prepared by the World Bank and the Public Private Infrastructure Advisory Facility (PPIAF)<sup>2</sup>, some of which, in our opinion, were disputable. We considered the advantages and disadvantages of USPs by comparing them to traditional PPP projects preparation process (solicited proposals or SPs) in particular, by their impact on the indicators that are important for the society: public interest and compliance with strategic priorities; social attractiveness, focus on achieving the Sustainable Development Goals (SDGs); fiscal sustainability; competitiveness, corruption risks; overpricing (non-market prices); transaction costs; transparency and accountability.

Based on the performed analysis the main conclusions of the previous article were the following:

- it is impossible to compare unsolicited and solicited proposals based on a 'black and white' approach. Both USPs and SPs could be socially oriented or not, have a positive impact on the achievement of the SDGs or not, could meet the public interest or not, be transparent and competitive or not, sustainable or not;
- the policy in relation to USPs and SPs as well as the legal regulation in this area should be based on the same principles;
- the answer to the question 'which type of proposal (USPs or SPs) is better' depends on many factors, including national legal and institutional environment, and capacities of public authorities;
- in some cases, USPs can demonstrate even better results than solicited proposals, especially if they provide for innovations including institutional ones. It could be explained by the innovative nature of Public-Private Partnership itself. Utilisation of this mechanism demonstrates the best results when serious problems must be eliminated and

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1 Iryna Zapatrina, 'Unsolicited Proposals for PPPs in Developing Economies' (2019) 15(2) EPPPL 118-128.

2 World Bank Group and PPIAF, 'Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects' <<https://ppp.worldbank.org/public-private-partnership/library/policy-guidelines-managing-unsolicited-proposals-infrastructure-projects>> accessed 3 September 2020.

different players with different interests should participate in the project. To apply the PPP mechanism accordingly, innovative institutional models such as the United Nations People First PPP should be designed. Such institutional innovations are proposed by public authorities not so often, especially in countries with low capacities on PPP. The private sector is much more creative and flexible when preparing PPP proposals.

## II. Unsolicited Proposals in the post-COVID-19 Economic Crisis

The COVID-19 pandemic has changed the attitude towards USPs. For the first time, strong support of unsolicited proposals has been demonstrated by professional PPP experts and representatives of international organisations in two publications appeared in July 2020.

The first one – ‘A Call for Infrastructure Development through Unsolicited Proposals: Tapping into private-sector innovation to improve infrastructure delivery’<sup>3</sup> has been prepared by the Global Future Council on Infrastructure’s Unsolicited Proposals Working Group (UPWG) and Global Future Council on Infrastructure in the framework of the World Economic Forum COVID Action Platform. In this community paper the UPWG presented a revision of their previous recommendations providing ‘a fresh perspective to an old idea’.

The second one – ‘Want to build back better? Let innovators come to you’<sup>4</sup> has been prepared by Anita Marangoly George, Pierre Guislain, Rashad-Rudolf Kaldany, Usha Rao-Monari, Richard Threlfall, Joseph Losavio, Alain Ebobisse, Jean Innes, Jean-Patrick Marquet, Paul Newfield and Clemente del Valle. The authors of this publication supported the previous one in advocating USPs and mentioned that they ‘can and should play a role in infrastructure development schemes’.

The main message of both publications is that USPs could be an effective instrument for developing ‘more, better-quality projects with less time, money and efforts’<sup>5</sup> which is extremely important now when all governments are looking at infrastructure development to boost their economics. USPs have been recognised as

[...] powerful tool that allows the private sector to lead on initiating and developing a project and,

when used alongside other procurement methods, can rapidly mobilize investment, build stronger project pipelines, improve efficiency and increase innovation.<sup>6</sup>

Moreover, the authors of these publications acknowledged that USPs could be more effective than solicited proposals which are

often expensive to administer, time consuming and require significant amounts of preparatory resources (e.g. pre- and full-feasibility studies) that require a high level of sophistication from policymakers, regulators and administrators to implement. Additionally, they tend to limit innovation.<sup>7</sup>

Recognizing that USPs are ‘not a panacea for all infrastructure development needs’, they nonetheless believe that USPs ‘can and should be included among the tools that governments consider in awarding infrastructure contracts when developed under certain conditions’<sup>8</sup>. Among such conditions are the existence of proper capacity in public authorities, their transparency for trust, competitive bidding with some preferences for initiators of USPs to have real market price for the project, and others.

Instead of the previous strategy ‘not to allow USPs’ or introduce fees for initiators of PPP proposals to ‘ensure the effective use of public resources during evaluation, defraying some of the costs associated with processing USPs’<sup>9</sup>, today, on the contrary, it is recommended for governments to provide a high degree of clarity and a clear framework to the private sector to support their intention to invest in PPP proposal preparation.

We believe that the new approach could help national governments in their goal to provide the public with modern infrastructure and high-quality ser-

3 World Economic Forum, ‘A Call for Infrastructure Development through Unsolicited Proposals: Tapping into private-sector innovation to improve infrastructure delivery’ <[http://www3.weforum.org/docs/WEF\\_UPs\\_Note\\_2020.pdf](http://www3.weforum.org/docs/WEF_UPs_Note_2020.pdf)> accessed 3 September 2020.

4 World Economic Forum, ‘Want to build back better? Let innovators come to you’ <<https://www.weforum.org/agenda/2020/07/want-sustainable-infrastructure-fast-let-the-private-sector-come-to-you/>> accessed 3 September 2020.

5 World Economic Forum, ‘A Call for Infrastructure Development through Unsolicited Proposals’ (n 3).

6 *ibid.*

7 *ibid.*

8 *ibid.*

9 World Bank Group and PPIAF (n 2).

vices to eliminate existing problems by involving private businesses in creating (at times even highly innovative) critical infrastructure.

### III. Is It Enough to Change Attitude to Unsolicited Proposals to Facilitate Private Investments in Infrastructure?

In our opinion, no. To attract the private sector to infrastructure development, including through USPs, it is important to analyse other factors that 'kill' the interest of businesses to initiate infrastructure projects in those countries where unsolicited proposals are possible and the legislation provides for comfortable conditions for their initiators, as it is the case in Ukraine.

#### Box 1. USPs Regulation in Ukraine

In accordance with Ukrainian legislation, the requirements to PPP proposals in case of USPs are the same as for SPs: the same are the requirements for the structure of PPP proposals and issues that should be covered in them; the procedure for consideration of proposals is also the same, as well as the criteria for their acceptance/rejection. Both types of proposals (USPs and SPs) should be considered by the responsible authorities for three months, including taking a decision whether to implement a PPP for the proposed project.

The only difference is in the preparation process of solicited and unsolicited proposals. A decision to prepare a feasibility study as part of a PPP proposal at the initiative of public entities with the involvement of budgetary funds shall be made based on the results of the evaluation of a concept note of implementation of the proposed project as PPP. For unsolicited proposals that is not necessary.

A competitive tender procedure is obligatory for USPs as well as for SPs. At the same time, the Swiss challenge mechanism is applied – the initiator of a PPP proposal has the exclusive right to conclude a PPP agreement on the terms of the best bid. And, if it is not acceptable to the initiating company, the winner of the tender must compensate the expenses of the PPP proposal initiator for its preparation. This compensation should not exceed 2.5% of the cost of the proposed project.

What are the main obstacles that result in private businesses losing their interest to invest in infrastructure projects, including to prepare USPs?

*Firstly, it is the absence of strategies and plans for the development of infrastructure at the State and municipal levels.* Without such strategic documents a private business does not understand where its participation could be supported by governments (central or local) and consequently is not ready to spend own money and time for PPP proposal preparation.

*Secondly, it is the low qualification of public authorities (both central and local).* They cannot understand and rigorously evaluate USPs, and are not ready to shoulder the responsibility for taking decisions on this issue. As a result, USPs are being considered for exceptionally long time<sup>10</sup>; projects become out-of-date, the interest of the private business in them decreases. Money and time spent on the project proposal preparation are lost. Nobody wants to repeat such attempts to build a long-term partnership with public authorities.

*The third and especially important issue is the lack of interest of civil servants in infrastructure development, including within the framework of USPs.* The reason is that in many countries the work of civil servants is not assessed by governments and by society in terms of their input in preparation and/or facilitation of successful infrastructure projects. In practice, they are ready to support such projects mostly if they are financed with budget money (if available). Everything is clear, simple and in many cases beneficial for them when public procurement procedure is applied. On the other hand, to evaluate and push long-term infrastructure projects as PPPs, they need to learn a lot, work hard and take responsibility. This is far from being interesting for all, especially when there is a lack of responsibility of public authorities for exceeding the deadlines for consideration of USPs established by law.

And finally, it is the different vision of public authorities and businesses on approaches to preparation of an infrastructure project and the process of its implementation. Public authorities do not understand a private business, its risks, fears, and the difficulties it may face when implementing long-term and risky infrastructure projects. When structuring PPP projects, they have over-expectations towards the business. On the other hand, a private business, when preparing PPP proposals, does not pay sufficient attention to the issues of ensuring public inter-

10 Many USPs projects took several years to reach operational stage after having been initiated as a USP. The Philippines took more than 15 years to become operational and, in Ghana, the Accra-Kumasi Highway USP faced delays for more than 11 years (VI, p.2). We have the similar examples in Ukraine.

est, projects impact on voluntary groups of people, and other socially sensitive issues. Business considers projects as purely commercial and puts all its 'wishes' in unsolicited proposals. In addition, in many cases private business does not understand the limitations in decision-making by the public authorities, including the need to comply with certain procedures.

It is very important to understand that PPP proposals in the first place must be considered from the point of view of the *project* itself: which problems will be eliminated as a result of its implementation; 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 of society to control the results of the project implementation by performance indicators. Then, the fiscal sustainability in the long-term perspective should be assessed. In practice, the situation is quite different, especially in developing economies. When businesses prepare USPs they are more concentrated on the project itself and its profitability. On the contrary, public authorities more often are interested in inputs, then in outputs of the proposed project. In the first turn they assess what revenues the project will bring to the public budget in the short-term perspective and do not care about long-term effect of the project implementation (direct and indirect). In many cases they are more focused on eliminating the problems of a utility operating an infrastructure facility planned to be transferred to a private partner in the framework of PPP, and only after that - on the project itself and its importance for people. Additionally, public authorities prefer to consider more optimistic scenarios of forecasted demands for goods/services provided in the framework of the proposed project, the long-term price/tariff dynamics then the private business is ready to adopt. Such 'optimistic' expectations of public authorities often became the reason for the refusal of business to participate in PPPs.

If all these problems are not eliminated, any political support of unsolicited proposals on the international arena and/or in national PPP policy will not change the situation. Ukrainian experience confirms this. We have perfect PPP regulation that corresponds to the best international standards, it is clear, transparent, and comfortable for the private business. In conditions, when public authorities were not able to prepare PPP projects that could be interesting (or acceptable) for investing, private companies did sever-

al attempts of preparing and submitting USPs. Unfortunately, all of them are still under consideration, and most of them are on the initial stage of evaluation. Such experience 'kills' the interest of private business to invest in infrastructure, especially in the framework of long-term projects. It is very risky.

#### *Box 2. USPs Practice in Ukraine*

In accordance with the information of the Ministry of Development of Economy, Trade and Agriculture of Ukraine, 5 USPs and 2 SPs have been submitted to line-ministries of Ukraine during 2017 – 2018<sup>a</sup>.

Not a single project in relation to State property objects was initiated in 2019-2020 as USPs and SPs.

<sup>a</sup> Ministry for Development of Economy, Trade and Agriculture of Ukraine, 'Висновки за результатами аналізу ефективності здійснення ДПП' <<https://bit.ly/3mEBKmy>> accessed 22 September 2020

The global COVID-19 pandemic crisis has led to an increase in the demand for PPPs as a tool to restore economic growth. Crises have always been treated with investments in life support infrastructure. This government spending has made it possible to significantly reduce unemployment, strengthen the domestic market, and create attractive conditions for small and medium-sized businesses. It is no coincidence that today government officials, experts and practitioners are having active discussions regarding the selection of the most effective mechanisms to stimulate investments in infrastructure, and, above all, private investments.

If we talk about PPPs, then, first of all, we mean an adequate distribution of risks between partners, the creation of mechanisms to guarantee risks arising from the fault of a public partner, as well as clear regulation of rights and obligations of the parties in the event of force majeure. These issues have acquired high urgency all over the world today. In conditions of competition for a long-term financial resource, those countries that fail to create favourable conditions for attracting the private sector to infrastructure projects will be left without investment and thereby prolong the crisis for many years.

The most important tasks to be completed by the public authorities in this area are: prioritisation of infrastructure projects, for the implementation of which private business is invited, based on the assessment of their social and economic effect and impact on the quality of human life; increasing requirements for the qualifications of the public sector in

the field of infrastructure development, in particular on the basis of PPPs, and strengthening control over the performance of civil servants responsible for this area.

Today it has become clear that it will be extremely difficult, and in some countries even impossible, to get out of the crisis without the participation of private business. At the same time, most countries with a huge investment gap cannot propose to pri-

vate business well prepared and acceptable infrastructure projects. Therefore, if the private sector has expressed its readiness to take part in the modernisation of the infrastructure demanded by society and invested in PPP proposals preparation, then the proposal should be considered with due attention. In this context, it is important to ensure that USPs are considered timely and objectively if they meet the country's strategic priorities.