



**MOSELEY
INFRASTRUCTURE
ADVISORY SERVICES**

PPP Unsolicited Proposals

**Melbourne University
Faculty of Law
LAWS70113: PPP Law
Melbourne, 22 April 2024**

**Mark M. Moseley
Principal, MMM Infra
Mark.Moseley@MMMInfra.com**

Outline of the Presentation



Five main topics

- I. Introduction to PPP Unsolicited Proposals**
- II. The World Bank 2018 USP Guidelines**
- III. The Alberta Canada 2020 USP Guidelines**
- IV. The ACT Australia 2020 USP Guidelines**
- V. Unsolicited Proposals and the Principles of Quality Infrastructure Investment (QII)**

I. Introduction to PPP Unsolicited Proposals

What is an Unsolicited Proposal (USP)?

- **definition of an Unsolicited Proposal (as set out by the World Bank in its 2018 USP Guidelines report)**
*a Public-Private Partnership (PPP) initiative where **a private entity reaches out to a public agency with a proposal for an infrastructure or service project, without having received an explicit request or invitation from the government to do so***
- **this is different than a conventional PPP, where the government invites private sector infrastructure investment through a public planning process**
- **in a USP initiative, the proponent seeks to persuade the government to accept the applicant's proposed project**
- **some governments permit USP applications, while some prohibit them – and a range of recommendations on USPs have been made by the World Bank, UNCITRAL and others**

I. Introduction to PPP Unsolicited Proposals (cont.)

Why do some governments prohibit USP applications?

- **governments in advanced economies may feel that USPs are unnecessary**, since government officials are fully capable of identifying and preparing PPP projects without having to rely on the private sector to undertake these functions
- **governments in developing economies may feel that they lack the capacity to deal with USP applications**, and may also be concerned with being unable to handle a potentially large number of such applications

I. Introduction to PPP Unsolicited Proposals (cont.)

Why do some governments prohibit USP applications (cont.)?

- governments in developing economies may also be concerned with the possibility of **corruption**, either
 - corruption in connection with the initial acceptance of a USP application for processing; and/or
 - corruption during the course of the procurement stage – especially if procurement is done using non-competitive direct negotiations, as noted in the World Bank’s 2018 2018 USP Guidelines Report:

Because USPs often bypass regular procurement procedures, or are directly negotiated (behind closed doors), USPs may favor corrupt or nepotistic practices.

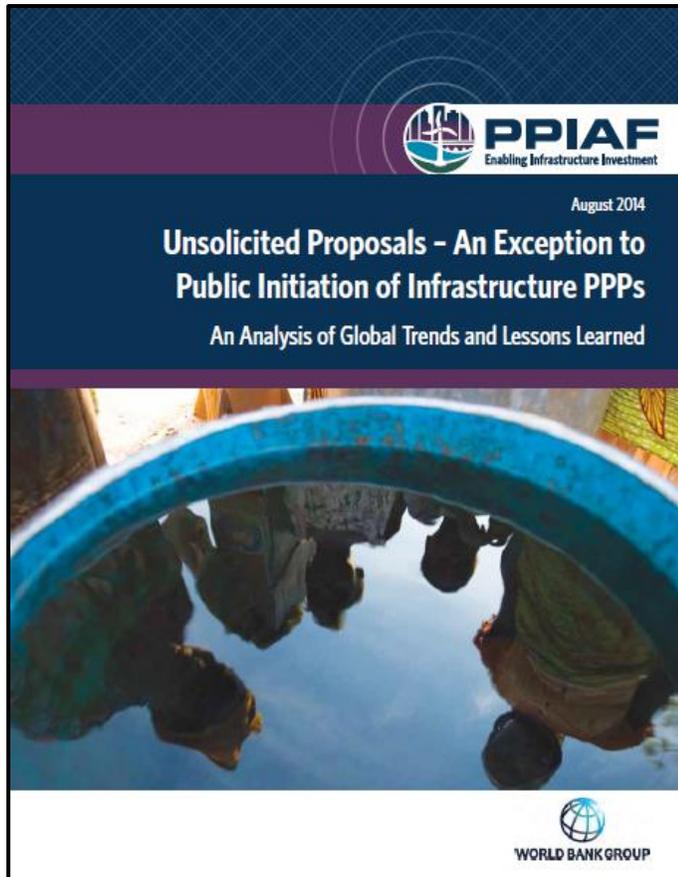
I. Introduction to PPP Unsolicited Proposals (cont.)

USP advantages and disadvantages

- **potential advantages of USPs**
 - **USPs may allow governments to increase the number of viable projects in their PPP project pipeline**
 - **USPs may generate innovative solutions to infrastructure challenges (but innovative projects may create ‘intellectual property’ management issues)**
 - **USPs may help overcome challenges related to project development**

- **potential disadvantages of USPs**
 - **USPs often exacerbate a lack of technical capacity to evaluate, prepare, procure and implement PPPs**
 - **USPs may create difficulties with fiscal planning**
 - **it can be difficult to create competitive procurement arrangements for USPs**
 - **USPs can create adverse perceptions, including perceptions of corruption**

I. Introduction to PPP Unsolicited Proposals (cont.)

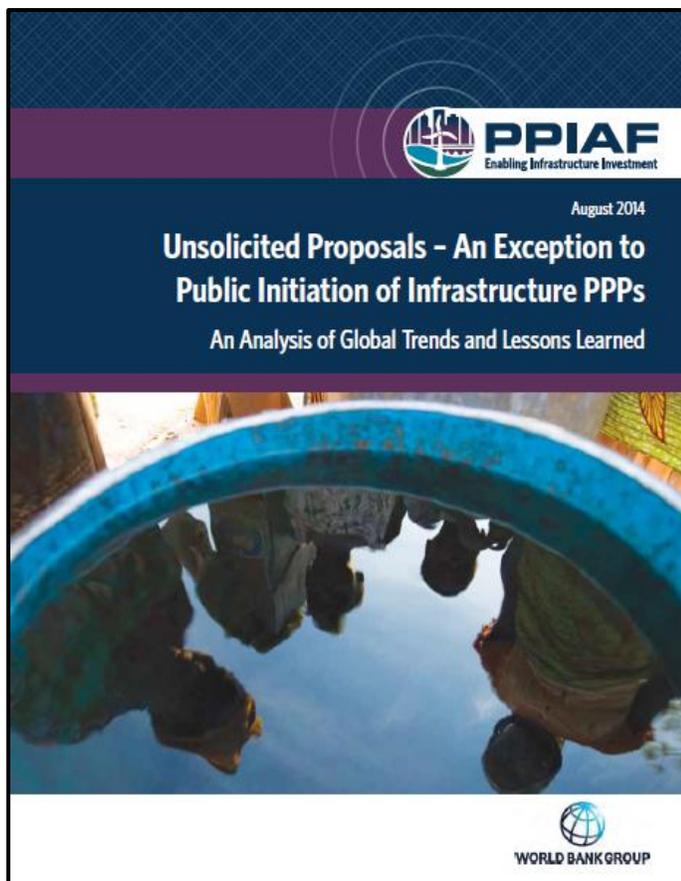


- the WB 2018 USP Guidelines Report builds upon a previous study done the PPIAF in 2014, containing the following key recommendations:

In light of all the issues and concerns outlined in this study with respect to USPs, one might draw the simple conclusion that it is extremely difficult to manage USPs, and therefore, it is preferable not to allow USPs at all. However, USPs are a reality in many countries, and there are no indications that their use will completely fall out of favor anytime soon.

*When determining a position on the merits of USPs, it does not seem realistic to completely ignore or prohibit USPs, but rather accept the reality of their presence and **explore ways to improve the management of USPs by governments in developing countries**. Engaging with key stakeholders in the process is better than deserting them.*

I. Introduction to PPP Unsolicited Proposals (cont.)



- the PPIAF 2014 report continues, as follows:

This study indicates that it is important to develop a framework for USPs and build capacity to successfully use that framework and implement PPP projects. It also shows that frameworks to deal with USPs vary widely in their effectiveness, raising a range of issues that are specific to such frameworks. On the basis of the lessons learned as described in the previous chapter, some practical measures can be suggested to governments in order to improve both their USP frameworks and the implementation of projects that were initiated as USPs.

I. Introduction to PPP Unsolicited Proposals (cont.)

As noted in the 2014 WB/PPIAF report, there is wide variation in the international experience with USPs – **governance of the overall PPP process is a key success factor**



Vietnam

Vietnam's 2018 PPP legislation, Decree 63, explicitly allows for 'Projects Proposed by Investors', but no USP projects have yet become operational



India

USPs are not permitted at the national level, but are allowed in certain states, including Gujarat, Andhra Pradesh, Madhya Pradesh and Rajasthan



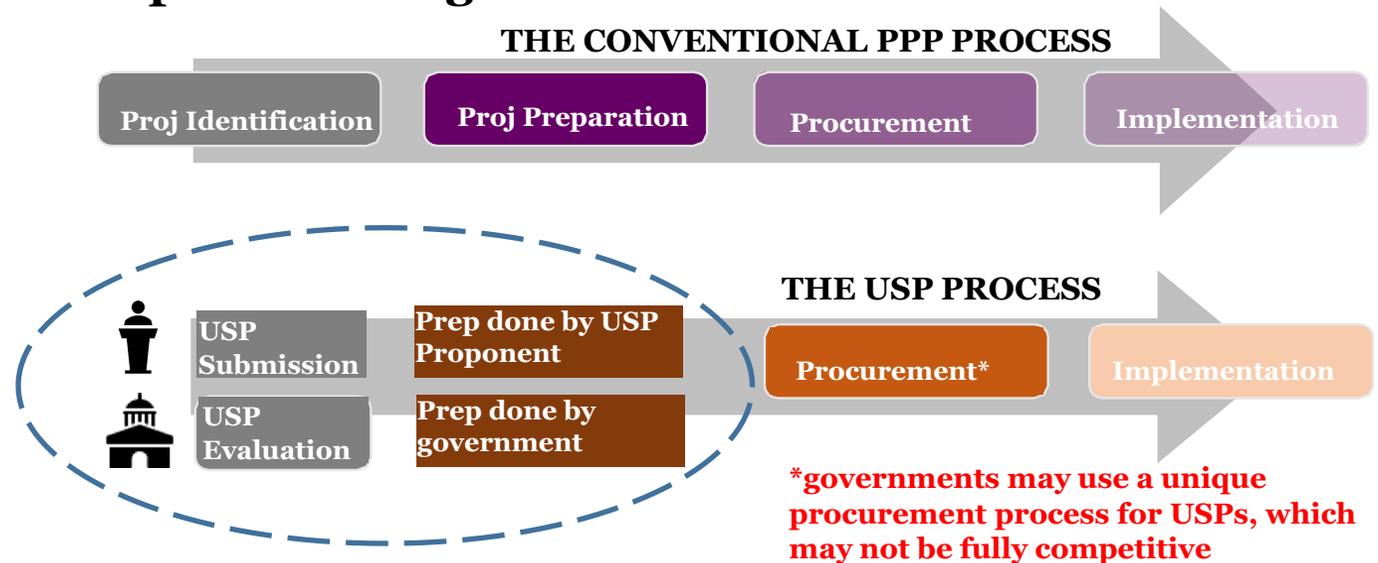
Korea

extensive experience with USP projects since 1999
a 2019 ADB study found that Korea had achieved Value for Money with USPs, by routinely subjecting USPs to a competitive bidding process

I. Introduction to PPP Unsolicited Proposals (cont.)

Comparison of the processes used for USPs and conventional PPPs

- as discussed in the WB 2018 report, USPs **require** a different process to be used during the Project Identification and, potentially, during the Project Preparation stages



- **the main problems with USPs arise during the Project Preparation and Procurement stages, due to a failure by governments to ensure that the process is competitive, that it achieves Value for Money and that it is not corrupt**

I. Introduction to PPP Unsolicited Proposals (cont.)

Recent developments

- **as noted, the challenges of dealing with USP applications have led many countries to prohibit them**
 - **prohibitions were very common in advanced economies, but also in some developing countries**
- **recently, however, a number of sovereign and sub-sovereign states have changed their policies, claiming that USPs can be used to attract greater private investment in infrastructure**
 - **some new policies use the term “Market-Led Proposals”**
- **this includes advanced economies, including most states in Australia and the Canadian province of Alberta, as well as developing countries, such as Myanmar**
- **in addition, a number of countries with pre-existing USP frameworks (e.g., the Philippines and various Australian states) have recently updated them**

II. The World Bank 2018 USP Guidelines



- the WB 2018 USP Guidelines report is a comprehensive three-volume examination of USP arrangements worldwide
 - **Volume I sets out the main findings and main recommendations**
 - **Volume II – the heart of the Report – contains detailed guidelines for the development of a USP legal and policy framework – primarily aimed at countries that have a reasonable level of experience with PPP projects**
 - **Volume III presents a review of international experience with USP projects**
- the WB approach is cautious, focusing on the problematic nature of USP PPPs
- additional data and recommendations are found in the more recent WB Benchmarking Infrastructure Development 2023 report

II. The World Bank 2018 USP Guidelines – Main Recommendations: USP Policies Should Reflect Capacity



- in its main recommendations, the WB Guidelines recognise that a government’s policy regarding USPs can and should be different in different countries
- the key issue is capacity, i.e., the ability of the jurisdiction to implement the necessary **governance** arrangements to make USPs successful
- the capacity spectrum will range from:
 - **low-capacity governments, for whom USPs can present major problems, especially in regard to fiscal management**
 - **higher-capacity governments, with some PPP experience, who may be able to extract benefits from unsolicited proposals, if they are rigorously managed**
 - **advanced economies, who can – with proper procedures in place – attract additional investment through market-led initiatives**

II. The World Bank 2018 USP Guidelines – Main Recommendations: Countries with Limited PPP Experience



- **governments that lack the technical and financial capacity to implement PPP projects often experience challenges with USPs, due to the same lack of capacity**
- **three alternative strategies can help address this:**
 - **governments could decide not to allow USPs (the WB reports notes that this may mean fewer PPP projects in low-capacity jurisdictions);**
 - **governments could allow USPs but hire external advisors to develop and structure projects to achieve equal bidding conditions (but this can be expensive); or**
 - **governments could allow private developers to develop USPs, who structure the transaction and competitively procure the major subcontracts, and the government then takes an equity stake in the project (but this can give rise to conflicts of interest)**

II. The World Bank 2018 USP Guidelines – Main Recommendations: Countries with More PPP Experience



- **governments with more PPP experience have used various mechanisms to receive fewer – but higher-quality – USPs, including**
 - **introducing submission requirements**
 - **instituting USP review fees**
 - **centralizing the USP submission process**
 - **establishing a dedicated time window for USP submissions**
- **governments can help to overcome a lack of competition (from opposing bidders) in USP tenders by (a) playing a more active role in project development; (b) minimizing incentives to the USP proponent that distort competition; and (c) providing opposing bidders with sufficient time to prepare bids**

II. The World Bank 2018 USP Guidelines – Main Recommendations: Countries with More PPP Experience



- PPP projects initiated as USPs but developed by the public agency and competitively tendered appear to perform no better or worse than publicly initiated PPPs
- this suggests that the concern with USPs is not related to the initiation of the project by a private entity, but is instead due to:
 - **the USP proponent developing the project without sufficient public oversight;**
 - **the public agency directly negotiating the USP; and/or**
 - **the public agency failing to ensure transparency and accountability**

II. The World Bank 2018 USP Guidelines – Main Recommendations on Developing a USP Policy



- the primary focus of the WB 2018 USP Guidelines Report is on ensuring that proper processes are in place to ensure good governance of USPs
- governments must ensure that the development of a USP policy is accompanied by appropriate **governance** measures:
 - **an effective PPP regulatory framework that follows international best practices**
 - **an effective institutional organization that governs both publicly and privately initiated PPPs**
 - **the development of institutional and human capacity for the public officials and agencies tasked with PPP development and implementation**

II. The World Bank 2018 USP Guidelines – The Four Stages of the USP Process



➤ Stage I: Submission

- **Define Roles and Responsibilities**
- **Establish Submission Procedures**
- **Due Diligence Criteria and Requests for Qualifications**
- **Establish Intellectual Property and Disclosure Provisions**
- **Establish a Compliance Check**

➤ Stage II: Evaluation

- **Define Roles and Responsibilities**
- **Define Evaluation Procedures**
- **Determine Project Development and Procurement Methods**
- **Outline Approvals and Disclosure Requirements**

II. The World Bank 2018 USP Guidelines – The Four Stages of the USP Process (cont.)



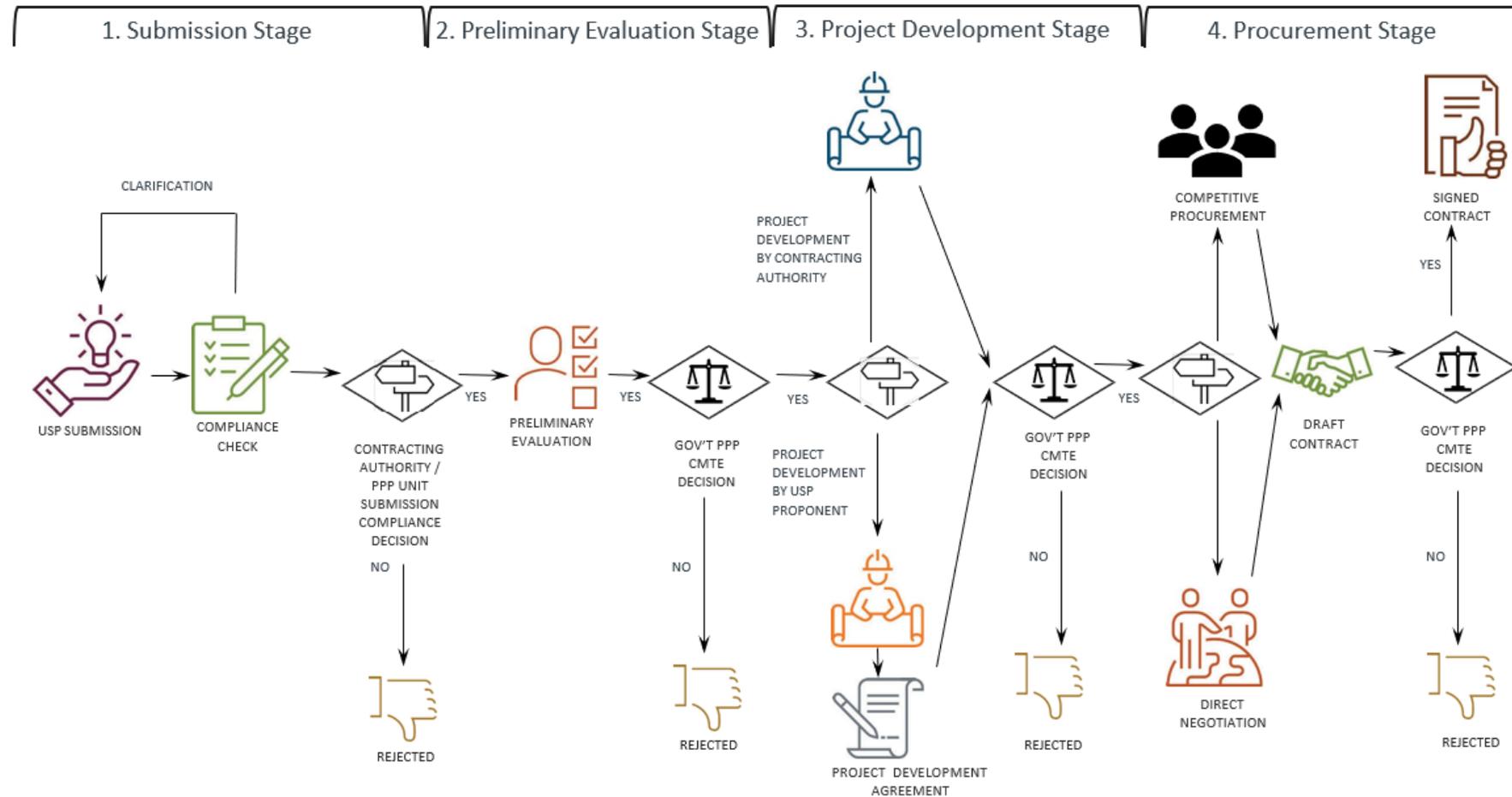
- **Stage III: Project Development**
 - **Establish Submission Procedures**
 - **Define Roles and Responsibilities**
 - **Determine Project-Development Procedures**
 - **Specify Disclosure Requirements and Approvals**

- **Stage IV: Procurement**
 - **Define Roles and Responsibilities**
 - **Define Procurement-Preparation Requirements**
 - **Specify Procurement Procedures**
 - **Specify Disclosure Requirements and Approvals**

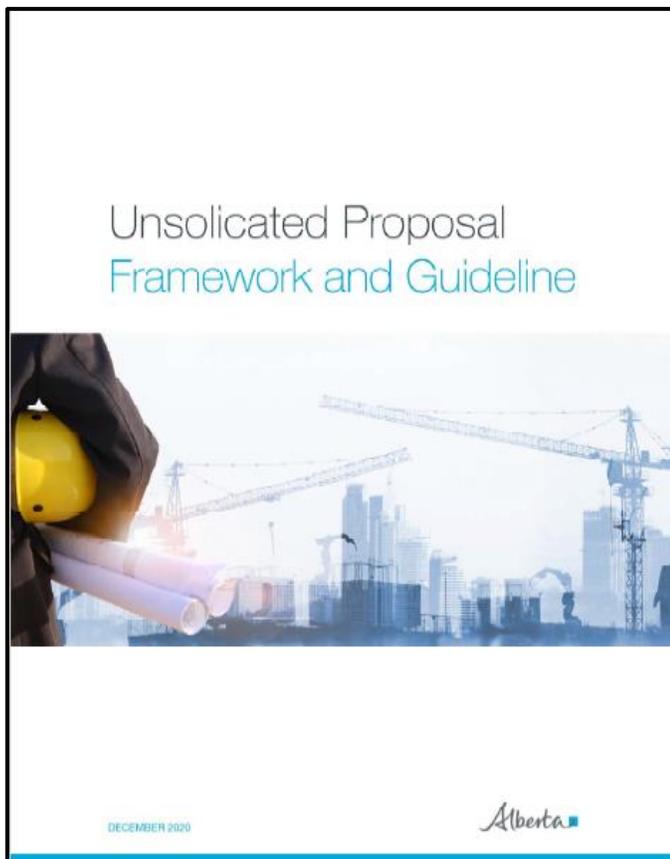
II. The World Bank 2018 USP Guidelines – USP Process Map



WB Guidelines USP Process Flow Map

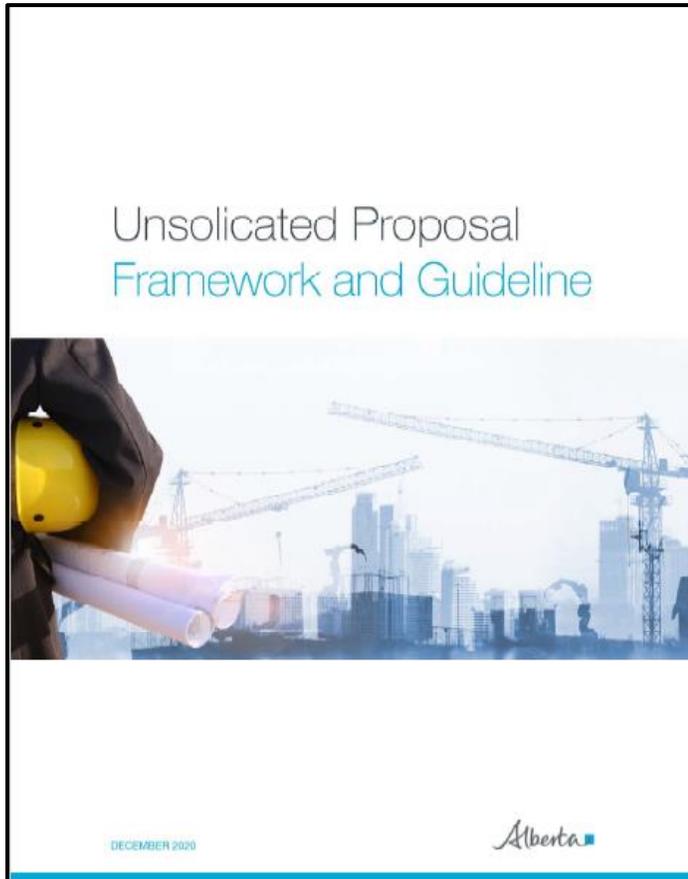


III. The Alberta 2020 USP Guidelines



- **the Alberta 2020 USP guidelines are the most detailed, and most recent, USP procedural arrangements in Canada**
- **they closely follow the recommended ‘best practises’ in the WB 2018 USP Guidelines**
- **however, the Alberta policy is explicitly designed to encourage USPs, if the USP application**
 - **identifies infrastructure needs that the government has not perceived; or**
 - **proposes innovative solutions to Alberta's infrastructure requirements**

III. The Alberta 2020 USP Guidelines – Significant Features

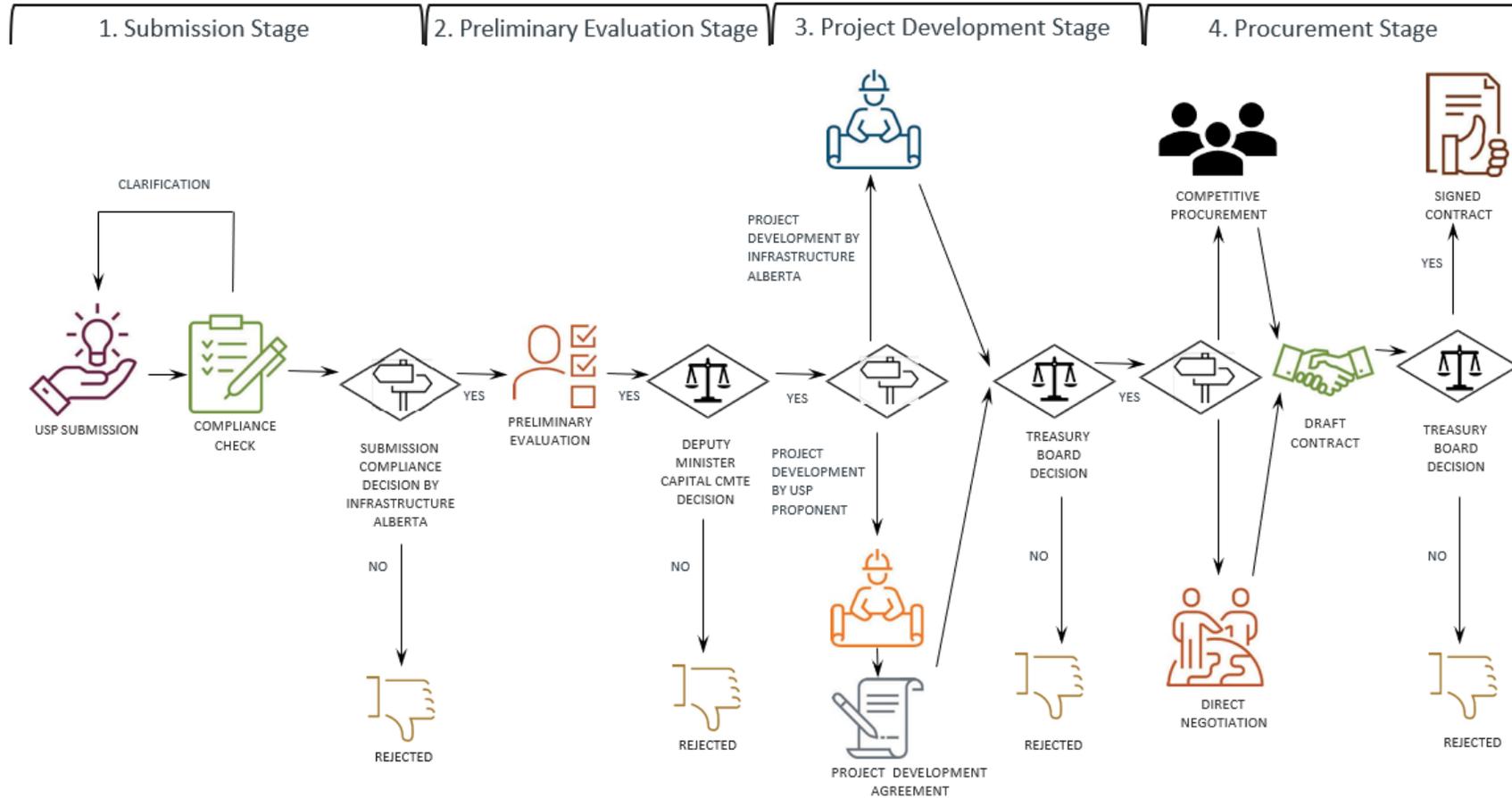


- **the process is administered by Infrastructure Alberta – not by the line ministry Contracting Authority**
- **USP applicants must pay a CDN 20,000 non-refundable fee**
- **no financial compensation to USP proponents for project development fees**
- **USP proponents may receive procurement phase incentives for project development costs**
 - **a 10% uplift in bid scoring**
- **high degree of transparency and public disclosure**

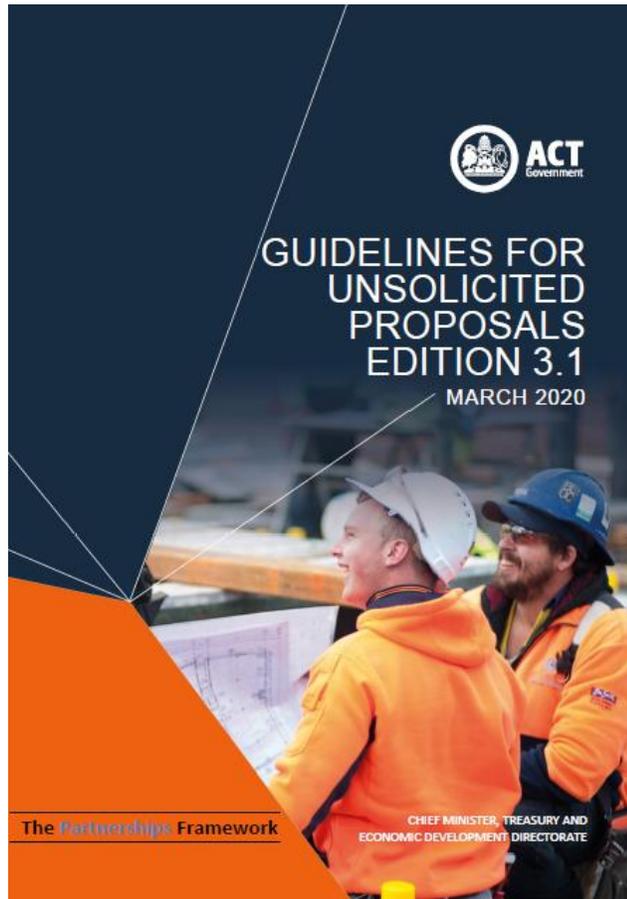
III. The Alberta 2020 USP Guidelines – USP Process Map



Alberta USP Process Flow Map

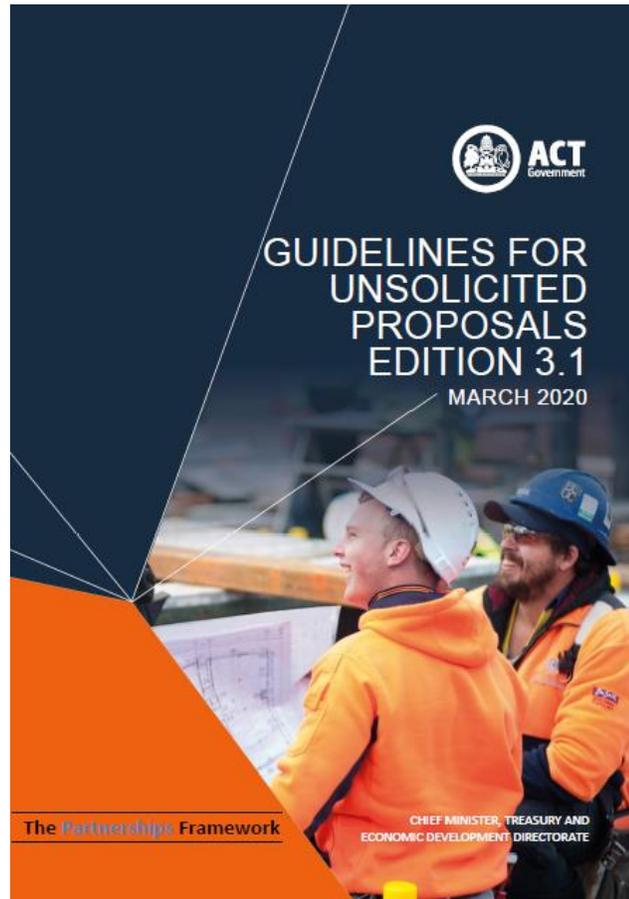


IV. The ACT 2020 USP Guidelines



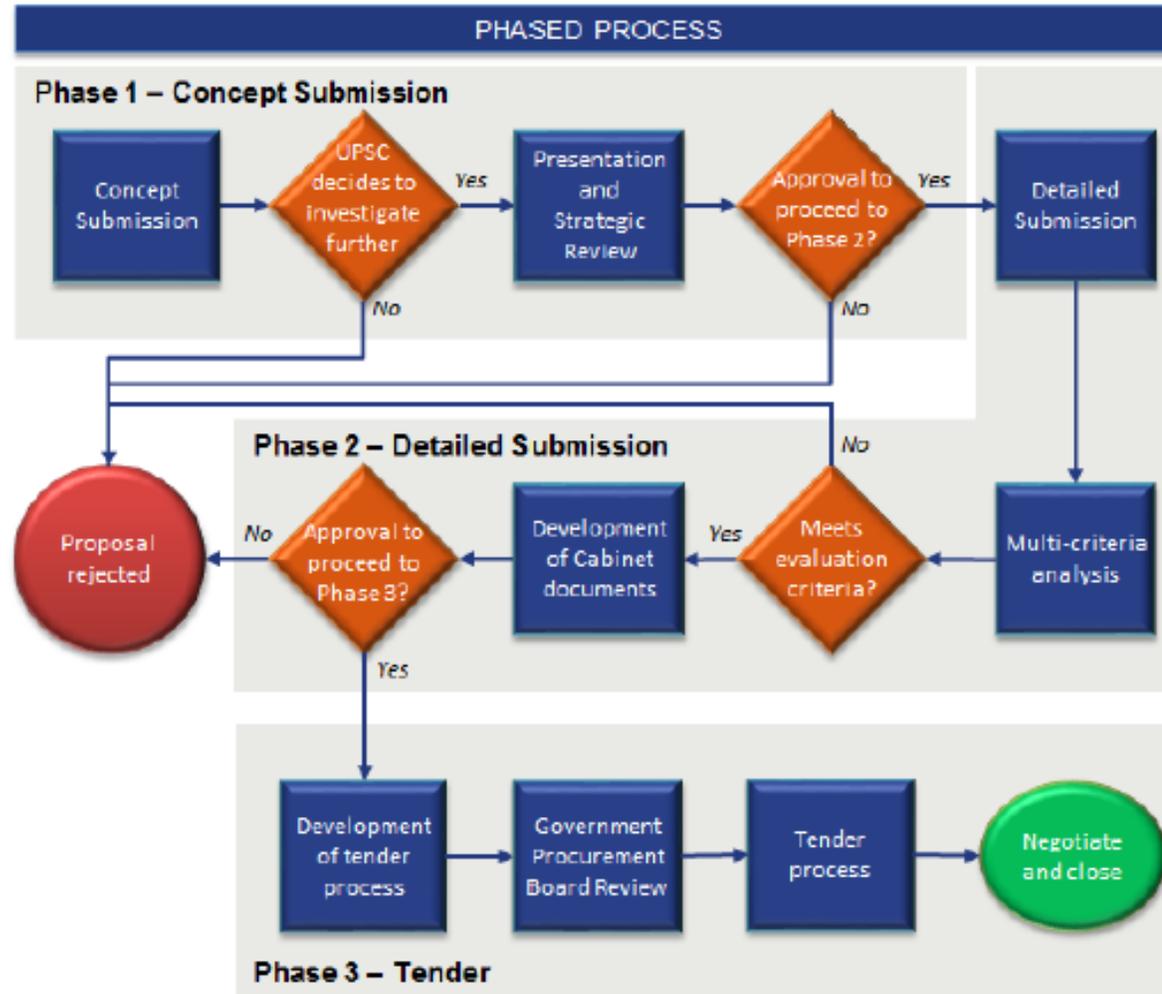
- the ACT 2020 USP guidelines are a refinement of ACT's 2018 USP guidelines, continuing a process which began in 2014
- as is the case in Alberta (and various Australian states), the ACT policy is designed to provide a **“viable framework”** for USP proponents to submit proposals which
 - do not readily fit within the government's normal procurement processes
 - provide value for money
 - align with the government's strategic objectives
- the process is controlled by very senior civil servants, acting as the Unsolicited Proposals Steering Committee (UPSC)

IV. The ACT 2020 USP Guidelines – Significant Features

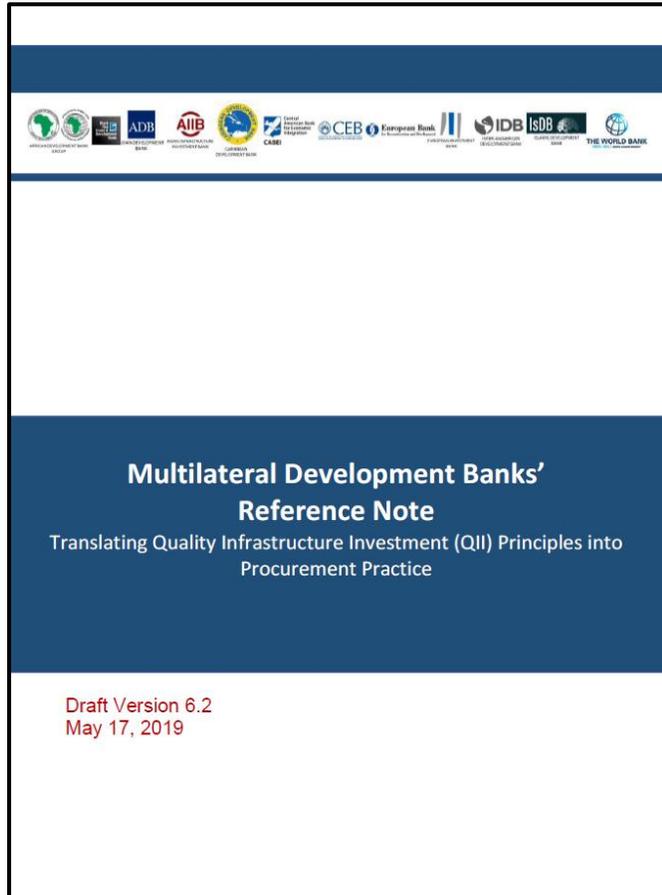


- **all Project Development studies are prepared by the USP proponent**
- **four alternative procurement phase models are permitted, with the default being open competitive bidding**
- **if a proposal is unique, the winning bidder may be required to compensate an unsuccessful USP proponent for project development costs**
- **the 2020 guidelines eliminated the ‘Swiss Challenge’ procurement option, where the USP proponent had the ability to match the proposal submitted by the most competitive bidder (it is noteworthy, however, that Western Australia, which updated its USP guidelines in 2024, has retained this option)**

IV. The ACT 2020 USP Guidelines – USP Process Map

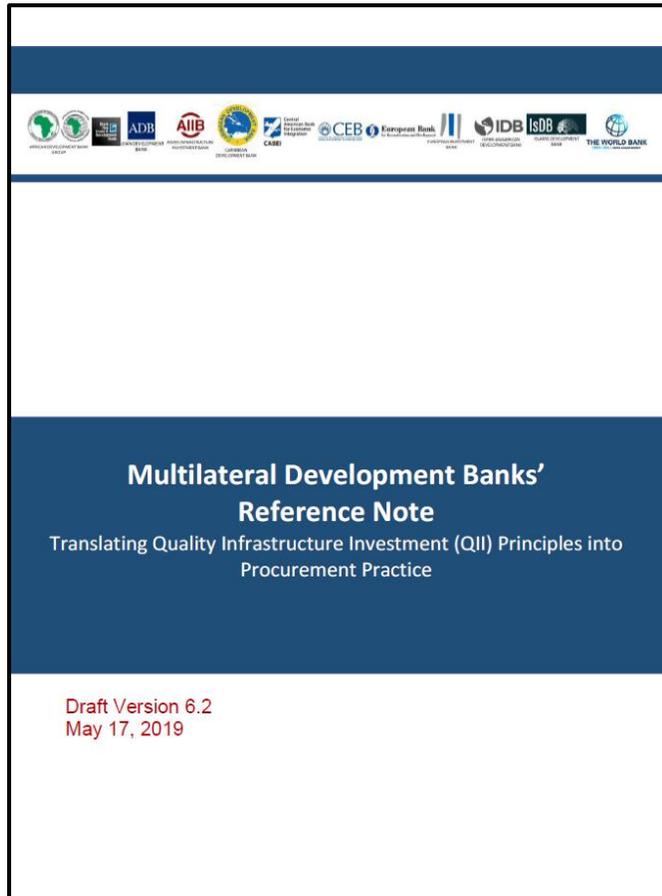


V. Unsolicited Proposals and the Principles of Quality Infrastructure Investment (QII)



- in 2019, the MDBs delivered a joint report to the G20 on the relationship of the G20 Principles of Quality Infrastructure Investment (QII) with procurement
- the six QII Principles, adopted by the G20, are:
 - Principle 1: Maximizing the Impact of Infrastructure to achieve Sustainable Growth And Development
 - Principle 2: Raising Economic Efficiency in view of Life-Cycle Cost
 - Principle 3: Integrating Environmental Considerations in Infrastructure Investments
 - Principle 4: Building Resilience against Natural Disasters and Other Risks
 - Principle 5: Integrating Social Considerations in Infrastructure Investment
 - **Principle 6: Strengthening Infrastructure Governance**

V. Unsolicited Proposals and the Principles of Quality Infrastructure Investment (cont.)



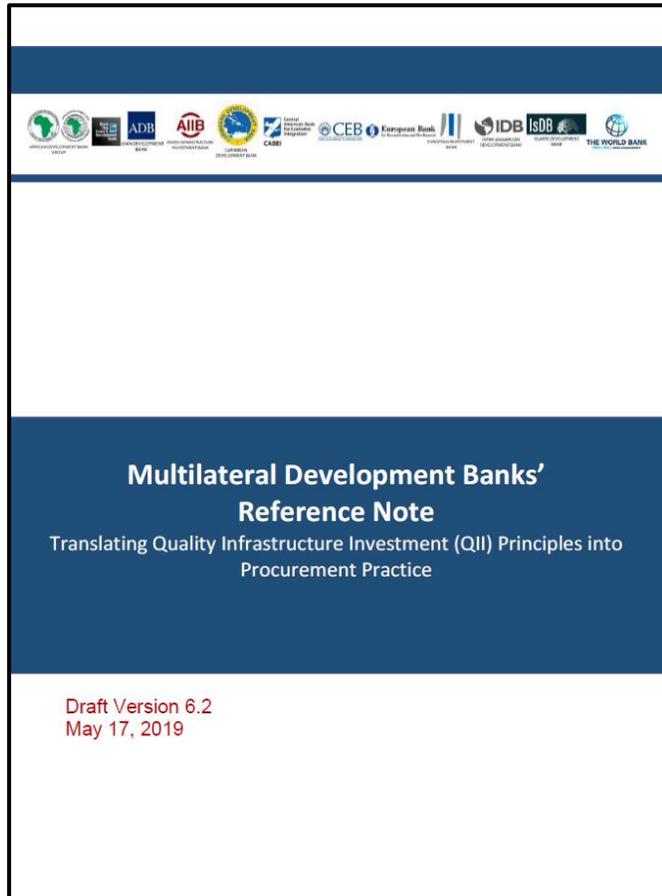
- the MDB report discusses the role that Public-Private Partnerships can play in achieving QII outcomes:

In some instances, Public-Private Partnerships (PPPs) may be the appropriate approach to take to deliver QII. This choice will depend on the results of the market analysis, the choice of commercial model and the readiness of the market.

- the report also discusses USPs:

Unsolicited proposals with solutions offered to potential Borrowers may be considered when they bring new technical and managerial expertise to construction, maintenance and operation of large infrastructure projects. However, this approach presents challenges in striking a balance between benefitting from innovation, and the need for transparency and competition.

VI. Unsolicited Proposals and the Principles of Quality Infrastructure Investment (cont.)



- the report makes the following key point in regard to the relationship between the QII Principles and the need for a clear USP framework:

There is no global unified view on treating unsolicited PPPs, and some countries have established procedures that encourage them, while others do not permit them at all. Generally, enabling factors include clear consistency with investment priorities, a solid business case ... showing good VfM, and desirable innovation which can be scaled up. A clear policy framework handling unsolicited proposals is critical to evaluate them ensuring total transparency, mitigating potential reputational risk, and maintaining overall competitive pressure.



**MOSELEY
INFRASTRUCTURE
ADVISORY SERVICES**

PPP Unsolicited Proposals

**Melbourne University
Faculty of Law
LAWS70113: PPP Law
Melbourne, 22 April 2024**

**Mark M. Moseley
Principal, MMM Infra
Mark.Moseley@MMMInfra.com**