

# Institutional Investor Public Partnerships Model Law



An initiative of



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# The Model Law on Institutional Investor-Public Partnerships (The “ML-IIPP Initiative”)

## Foreword

### **A legal framework to mobilise private capital at scale and be deployed at speed for the delivery of the projects necessary to realise the Nationally Determined Contributions of African nations**

Africa needs to mobilise \$3trn for its Nationally Determined Contribution (NDC) projects by 2030. The world only mobilised \$2.8trn for renewable energy investments in the last twenty years; Africa received 2% of that global sum. Therefore, Africa has to mobilise more climate finance and investment in the next eight years, than the world mobilised in the last twenty years.

At COP26, Africa’s (and, generally, emerging markets’) current legal and regulatory frameworks were stated as a key investment barrier by global and domestic institutional investors representing over \$150trn.

The International Energy Agency (IEA) also highlighted that fostering the financial conditions for a rapid deployment of clean energy in Africa, is one of the defining challenges of our times and that the creation of new legal and regulatory frameworks will help tackle many cross-cutting issues to enable the mobilisation and deployment of private capital at scale and at speed.

### **A collaborative approach**

In response to this challenge, the ML-IIPP Initiative, a collaboration led by the African Green Infrastructure Investment Bank (AfGIIB), Africa investor (Ai), the CFA Asset Owners Council (AoC), and global law firm DLA Piper was announced, to introduce and enable the use of a newly designed infrastructure investment procurement regulatory framework, to support governments and global institutional investors to work together to deliver ‘green’ infrastructure investment programmes and ‘green’ infrastructure projects to deliver NDC commitments.

The Model Law’s overarching goal is to design and deliver the fast tracking, de-risking and scaling of private capital participation in ‘green’ infrastructure investment programmes and ‘green’ infrastructure projects through the formation of Institutional Investor-Public Partnerships (IIPPs).

### **The work starts now**

We look forward to engaging you and the COP27 Presidency, on the application of the Model Law, in support of delivering the goals of the Paris Agreement, the SDGs, Agenda 2063 and The African Union’s 5% Institutional Infrastructure Investment Agenda’s, private climate capital mobilisation goals.



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# Introduction

## Objectives of the Model Law

The objectives of the Model Law are to create a legislative framework that:

1. *Incentivises collaboration between institutional investors and the public sector in respect of the development and implementation of climate-focused infrastructure investment programmes and projects to deliver NDC commitments (**Climate Projects**)*

The collaboration of institutional investors and the public sector, “**Early Investor Involvement**”, has been embedded into the Model Law via various mechanisms including preliminary market engagement with institutional investors and the award of an IIPP Collaboration Agreement to a Qualified Investor to identify priority Climate Projects (pre-procurement) by reference to criteria such as:

- strategic importance to the delivery of a country’s NDCs and its Net Zero planning;
- the level of economic, environmental and social benefit which a particular Climate Project would deliver to a country;
- prospects of successful delivery (including feasibility from a technical, financial and/or legal perspective, and the management and mitigation of risk);
- the ability for a Climate Project to be scaled up; and
- whether delivery of a Climate Project has the opportunity to unlock further potential funding.

The IIPP Collaboration Agreement includes provisions on collaborative working to (i) encourage the Climate Procurement Authority and the Qualified Investor to work in mutual co-operation to fulfil their agreed roles and responsibilities under the IIPP Collaboration Agreement, (ii) to minimise and give early warning to one another of any proposed matter which is likely to or will have a material impact on the Climate Project, and (iii) to ensure the success of the Climate Project.

2. *Facilitates private sector investment into Climate Projects in accordance with best international practice*

In order to incentivise investment in Climate Projects, countries will need to provide a transparent, stable and predictable investment climate, which allows for transparent and efficient contracting processes, contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allows the private sector, both domestic and international, to operate efficiently and profitably and with maximum development impact.

Therefore, promoting and protecting investments requires special emphasis on the part of governments to ensure that appropriate regulatory and policy frameworks are in place which encourage public and private sector initiatives to foster effective resource mobilisation. Environmental, Social and Governance factors also play an important role in a country’s investment readiness.

Governments will need to consider if, in addition, to the implementation of the Model Law, introduction of additional new laws or amendment of any further existing laws (included as part of the implementation of the Model Law) are required in order to facilitate a country’s investment readiness.

3. *Utilises fast-track procurement processes to award Climate Projects in an efficient and streamlined manner, avoiding high procurement costs and delays to project implementation*

Procurement Laws are generally structured towards the procurement of works, services and supplies – not the procurement of Climate Projects. Even PPP Laws are often not drafted in a manner which would facilitate the efficient and streamlined procurement of Climate Projects.

The Model Law features a range of procurement procedures which include:

- the establishment of an **Investor Qualification System**. Once established, the need to advertise each Climate Project and have a prequalification process is removed (thus saving time and costs), and contracts for IIPP Collaboration Agreements and Climate Contracts can be awarded to Qualified Investors pursuant to fast-track mini-procurement competitions amongst Qualified Investors, on a direct award basis by the Climate Procurement Authority to Qualified Investors or in response to an unsolicited proposal received by the Climate Procurement Authority from a Qualified Investor;
- the establishment of **Framework Agreements** in respect of, for example, legal services, financial services, technical services, modelling, surveys and enabling works which will enable the speedy appointment of consultants which will be very useful in terms of accelerating the procurement of Climate Projects; and
- for the purpose of seeking Bids in respect of a proposed Climate Project or a proposed Climate Contract (in addition to, or an alternative to the award of Climate Contracts pursuant to the Investor Qualification System), the Climate Procurement Authority may use one of the following procurement methods:
  - **competitive dialogue;**
  - **negotiated procedure;**
  - **direct procurement;** or
  - **restricted procedure.**

The Model Law ensures fairness and transparency in the procurement processes by setting out rules on each of the procurement procedures as well as provisions dealing with prequalification selection criteria, confidentiality, conflict of interest, fraud and corruption, and transparency requirements.

4. *Delivers demonstrated value for money for governments through the participation of Qualified Investors, in the implementation and delivery of the Climate Projects, on the basis of internationally recognised and bankable risk allocation*

As part of the process of standardising documents and processes in respect of the procurement of Climate Projects, a suite of Model Climate Contracts should be prepared in order to assist the Climate Procurement Authority with their Climate Procurement Procedures. This will also provide the market with clarity in respect of the standard provisions in Climate Contracts which will be applied by the Climate Procurement Authority (including in respect of risk allocation), ensure key Government policy drivers are appropriately to the fore and save time and costs to the Climate Procurement Authority in the development of the Climate Contracts for each Climate Project.

Some examples of Climate Contracts which should become Model Climate Contracts have been included in Chapter Ten of the Model Law. However, in practice, many more types of Model Climate Contract will need to be developed on country-specific and sector-specific bases to match the requirements for the types of Climate Project which a country will need to procure in order to fulfil its NDCs. For example, a standard power purchase agreement in the context of renewable energy projects.

As an alternative to many different types of Model Climate Contract being described in the Law, the types and detailed content for any Model Climate Contracts (including those Model Climate Contracts already mentioned in Chapter Ten and/or any additional contracts) could be included in secondary legislation (which should be more flexible than primary legislation) or the Climate Procurement Authority could choose to go straight to drafting the required Model Climate Contracts based on its requirements.

Qualified Investors should be consulted in respect of the draft form of the Model Climate Contracts to ensure the Model Climate Contracts reflect internationally recognised and bankable risk allocation

5. *Provides for an effective and efficient contract management framework, with easy access to international dispute resolution, if required*

The Model Law includes provisions to ensure that each Climate Contract is properly administered and enforced in accordance with its terms and conditions, and this includes fair and effective mechanisms and transparent procedures for matters such as governance, performance and managing stakeholder engagement.

## Methodology for Development of the Model Law

The methodology for the development of the Model Law has included:

- use of extensive stakeholder engagement to understand the particular challenges and objectives which needed to be addressed in the Model Law together with the lessons learned from previous projects. Stakeholders, including representatives from the public sector, the development finance community, domestic and global investors, and consultancies advising these entities, were consulted;
- identification and consideration of key issues associated with the development of a Model Law, including what the potential 'blockers' were to the implementation of the Model Law and investment in Climate Projects by institutional investors; and
- a comparative legislative review from a range of jurisdictions to review international best practice and lessons learned in the context of public procurement, PPP and strategic investment laws.

## Structure of the Model Law

This document has been structured as follows:

- **Introduction** (description of the objectives of the Model Law, the methodology for development of the Model Law, the structure of the Model Law, the implementation of the Model Law and next steps);
- **Assessment of a country's readiness for investment: identification of risks** (discussion of the common types of issue or risk which will be considered by investors as part of their country due diligence prior to investing in Climate Projects);

- **Legislative, regulatory and institutional sector reform to achieve the implementation of Climate Projects** (a discussion of the types of sectoral reform which will be necessary to achieve the implementation of Climate Projects); and
- the **Model Law** (split into twelve chapters comprising Articles and notes reflecting guidance, international best practice and examples of the model documents and guidelines which will need to be developed to support the operation of the provisions of the Model Law in practice).

The Model Law includes the following chapters:

1. Scope and General Principles
2. Institutional Framework and Powers
3. Permitting and Property Rights
4. Procurement Principles and Methods
5. Early Investor Involvement
6. Framework Agreements
7. Climate Procurement Procedures
8. General Procurement Rules and Climate Procurement Documents
9. Evaluation
10. Climate Contracts
11. Standstill Notices, Contract Award Notices, Information, Documentation and Reporting Requirements and Remedies
12. Miscellaneous Provisions

Annexes have been included which set out flow diagrams showing the operation of a selection of the Climate Procurement Procedures described in the Model Law.

### Implementation of the Model Law

Depending on national requirements, a government may elect to implement some or all of the Model Law, or implement the Model Law as a 'bolt on' to a country's procurement or PPP law.

It is suggested that the required process for legislative reform and implementation of the Model Law should be undertaken as follows:

- the Government's policy objectives for the legislative reform and the realisation of its NDCs need to be considered together in order to scope out the requirements for the reform and implementation of the Model Law, as the reform may require a number of new laws in addition to the amendment of existing laws;
- consideration of key issues associated with the legislative reform and implementation of the Model Law, including:
  - is a new law required to implement the Model Law or is amendment of an existing law or laws required?
  - what other new laws or amendments to existing laws are required in order to support the realisation of Climate Projects from a general (e.g. fraud and corruption laws) or sector-specific basis? See the sections below which discuss 'Assessment of a country's readiness for investment: identification of risks' and 'Legislative, regulatory and institutional sector reform to achieve the implementation of Climate Projects'

- what secondary legislation (regulations) and supporting documents (procedures, guidelines and Model Climate Contracts and Model Climate Procurement Documents) are required?
- what is the timescale for the legislative reform and implementation of the Model Law?
- what are the potential 'blockers' to the legislative reform and implementation of the Model Law?
- what are the steps in the legislative process which need to be followed?
- use of stakeholder engagement (within Government entities – wider, if required) to understand the particular challenges in the jurisdiction which need to be addressed in the legislative reform and implementation of the Model Law;
- review of relevant existing legislation to identify potential conflicts and gaps;
- where appropriate and available, understanding lessons learned from the experience of other jurisdictions by analysing legislation related to the legislative reform and implementation of the Model Law from those other jurisdictions;
- considering what would work from a practical perspective in the specific jurisdiction, as well as compliance with the underlying principles of local legal system (e.g. compliance with the principles needed in the context of a civil law jurisdiction); and
- presenting the drafts of the legislation to the relevant Government Ministries and institutions, civil society and institutional investors for comment and input.

## Next Steps

### 1. Use of Pathfinder Climate Projects in the implementation of the Model Law

We believe that the procurement of 'pathfinder' Climate Projects which implement the Model Law is essential and will have the following benefits:

- confirms that key issues which could be faced by procuring authorities and institutional investors in the award of Climate Projects have been identified and are dealt with in the Model Law;
- ensures that the Model Law is workable in practice by addressing the lessons learned from the pathfinder projects;
- 'stress tests' the Investor Qualification System and procurement processes (including timescales) which have been included in the Model Law;
- identifies the common legislative 'blockers' which will need to be addressed by the Model Law (including implementation);
- tests risk allocation and ensures that the risks in the Model Climate Contracts are bankable;
- assists in the knowledge sharing of Model Climate Contracts and Model Climate Procurement Documents which can be used alongside the Model Law;
- identifies where capacity building is required in order to support the successful procurement of Climate Projects; and
- facilitates development of a process which enables governments to prioritise and audit legal reform readiness and assess the associated costs and timeframes to implement the Model Law.

'Pathfinder' Climate Projects should be capable of being used to test key characteristics of the Model Law:

- collaborative working (including project identification and prioritization where there is no defined project pipeline to deliver NDCs;)
- mobilisation of private capital at scale;

- fast-track procurement;
- dealing with unsolicited proposals and direct awards;
- setting up the Investor Qualification System;
- setting up and operating Framework Agreements;
- awarding Climate Contracts;
- risk allocation; and
- governance.

## 2. **Development of Model Climate Procurement Documents and Model Climate Contracts**

A suite of Model Climate Procurement Documents and Model Climate Contracts should be prepared in order to assist the Climate Procurement Authority with their Climate Procurement Procedures. These Models should, where appropriate, be shared with other jurisdictions so that the Models become internationally recognised and avoid the need for reinvention and repetition in different jurisdictions.

## 3. **Capacity Building**

The strengthening of institutional capacity is at the core of the success of the implementation of the Model Law as well as the successful procurement and delivery of Climate Projects. The approach to capacity building should not only to address the theoretical or conceptual aspects associated with the implementation of the Model Law as well as the procurement and delivery of Climate Projects, but, even more importantly, should provide practical advice and user-friendly and efficient tools in addition to the Model Climate Procurement Documents and Model Climate Contracts which could be confidently and easily used in the future in the context of Climate Procurement Procedures.

Detailed training sessions should be set up to ensure that the members of the Climate Procurement Authority can apply the Model Law (once implemented) and successfully procure and deliver Climate Projects.

# Assessment of a country's readiness for investment: identification of risks

## Introduction

In order to incentivise investment in Climate Projects, countries will need to provide a transparent, stable and predictable investment climate, which allows for transparent and efficient contracting processes, contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow the private sector, both domestic and international, to operate efficiently and profitably and with maximum development impact.

Therefore, promoting and protecting investments requires special emphasis on the part of governments to ensure that appropriate regulatory and policy frameworks are in place which encourage public and private sector initiatives to foster effective resource mobilisation. Environmental, Social and Governance factors also play an important role in a country's investment readiness.

Potential investors will assess the domestic legal and regulatory environment in the relevant country before deciding to invest in, or otherwise participate in, any Climate Project. Each country will have their own legal and regulatory considerations and risks which will naturally impact the nature and extent of any investment that may be provided for a specific Climate Project. Any such assessment will be carried out by potential investors on a case-by-case basis, and each investor will have their own specific requirements which will need to be satisfied before any investment is contemplated.

A list of the common types of issue or risk which will be considered by investors as part of their country due diligence prior to investing in Climate Projects is set out below. Specific considerations in respect of sector regulation are discussed in the next section. Governments will need to consider if, in addition to the implementation of the Model Law, introduction of additional new laws or amendment of any further existing laws (included as part of the implementation of the Model Law) are required in order to facilitate a country's investment readiness.

## Rule of law

The rule of law is a fundamental pillar and indicator of a country's readiness for investment. Linking to a variety of risk categories, including a country's legal and regulatory environment, control of crime and corruption, and disputes, the rule of law underpins the legal certainty in and of a jurisdiction. By extension, the rule of law ties to the confidence and trust in the very systems and jurisdictions that Climate Projects must engage with and navigate to ensure stakeholder rights and obligations are preserved. A strong rule of law can be a reflection and feature of a country's governance, political stability and institutional maturity, all of which have a role to play in implementing and governing legal and regulatory frameworks, sanctions, and more.

In turn, the rule of law presents Climate Projects with greater means for the prevention or resolution of issues encountered within their lifecycle, triggered by risks such as crime and corruption, and navigating disputes to obtain suitable redress. In assessing a country's rule of law, therefore, Climate Project stakeholders can begin to identify and assess a variety of other risk factors, as further detailed in the subsections below, as part of an overall assessment of a country's readiness for investment. In turn, this assessment informs the legal developments that may be required of a country and prompted by the Model Law.

## The legal and regulatory environment allowing investments

**Contract Enforcement** is an important consideration for investors. Investors will want to consider if the legal and regulatory environment in a particular country promotes and protects property rights. The amount of time it takes to enforce a contract varies from country to country and it is observed that countries attract the most investment where the legal systems allow for enforcement of contractual rights in a timely and efficient manner. See below for our comments below on disputes and enforcement, and the importance of whether the host country recognises and enforces foreign judgments and arbitration awards and is a party to Hague and NY Conventions.

**Promotion and protection of intellectual property rights** is an important consideration for investors as they consider their plans for further investment in a particular country. The level of protection afforded to intellectual property rights and the enforcement mechanisms available to holders of such rights are important considerations. Businesses have the incentive to invest in research and development only when they have the confidence that their rights over their intellectual property would be respected and protected under law.

**Foreign Direct Investment Limits** can sometimes inhibit or fetter the ability of a country to attract valuable and useful investment from the investment community into a particular sector. Equity investors generally prefer to have to certainty on their investments into a particular sector and therefore should there be legal or regulatory restrictions on the ability of foreign investors to participate in a sector in a manner which is on a similar scale and level as other local investor in a country, it may affect the ability of that particular sector to evolve or grow to its full potential. Capital controls which are not onerous and the existence of effective channels within which profits can be repatriated are also considerations for investors as they consider a particular jurisdiction to invest into.

**Bankruptcy and insolvency laws** are critical to economic activity, innovation and growth. Legal and regulatory frameworks which are well designed with respect to insolvency and creditor and debtor rights allow the extension of credit and enable private sector development. By providing for the restructuring and preservation of distressed yet viable businesses, and providing, alternatively, for the orderly resolution of distressed, non-viable businesses, insolvency laws offer predictability and enhance investor confidence.

**Investment stability and assurance laws** which provide a level of comfort to investors that their asset will not be expropriated or compulsorily acquired under domestic law without fair compensation will be an important consideration for investors. Carve-outs for Climate Projects or entry into bilateral or multilateral investment treaties would address this issue. A related concern will be the extent to which significantly higher rates of taxation or customs and excise imposts can be imposed on an investor's revenue stream once relevant Climate Projects start generating revenues. This can be addressed through fiscal stability commitments for Climate Projects entered into on a case by case basis.

## Control of Crime and Corruption

Corruption erodes trust, weakens democracy and can hamper any Climate Project. The control of corruption requires the identification and assessment of the following risks which span across corruption, bribery and money laundering issues:

**Legal frameworks and enforcement mechanisms** must be in place to not only deter crime and corruption but also provide for civil and criminal consequences. Developing the importance of the rule of law, legal frameworks and enforcement mechanisms must sufficiently address crime and corruption to manage this risk category. This requires a suitably mature body of laws, legal system and institutions to appropriately govern, implement and enforce the criminal and corruption-related laws, including areas such as bribery and money laundering.

**Transparency** helps reduce crime and corruption which may otherwise materialise through the use of illicit structures and anonymity being used to underpin corrupt and criminal financial transactions. Transparency will also drive investor confidence by improving certainty and clarity in investment activity, such as by providing visibility of investor information and origin of funding, through mechanisms and requirements such as beneficial ownership transparency. A transparent jurisdiction can therefore be seen as a jurisdiction with a lower susceptibility to criminality and corruption.

**Process and procedures** assist with the prevention and mitigation of crime and corruption. Adequate processes and procedures should be assessed in a range of contexts, including the procurement of Climate Projects and supplier management to more granular day-to-day activities of Climate Projects, such as invoicing and contract variations, all of which can assist in providing structure, accountability and transparency at various levels of a Climate Project, thereby reducing the risk of crime and corruption. Processes can also further mitigate this risk where those processes are digitised and technology-enabled, further enhancing the effectiveness of such processes to be more resilient and less susceptible to crime and corruption.

**Social norms** should be considered as an important risk factor for Climate Projects and how such Climate Projects are scoped, implemented and monitored whilst needing to navigate local customs, practice and implications such as and how Climate Projects address native title or rights and/or displacement issues. Every jurisdiction will have its own cultural and social considerations which will interplay with how and what investment activity could be undertaken in an impactful and effective manner. Climate Project stakeholders will need to assess social norms and associated risks as part of their assessment of a country's readiness for investment, as well as specific Climate Projects.

**International cooperation** is a key consideration in tackling increasingly cross-border and globalised issues of crime and corruption. This risk category interacts with the other crime and corruption risk factors identified, including legal frameworks, transparency and process, alongside wider risk categories such as legal and regulatory environment given the nature of Climate Projects and what stakeholders may be involved and the geographical scope of such activity.

## Sanctions

Sanctions are restrictive measures that are implemented against certain individuals, entities or governments to fulfil a range of purposes including maintaining international peace and security, preventing terrorism, protecting human rights and/or promoting non-proliferation. Climate Project stakeholders will need to assess the applicability of sanctions when considering their involvement in any Climate Projects to ensure they comply with the applicable international and domestic sanctions regimes. Such an assessment will include a consideration of:

**United Nations Security Council (UNSC) Sanctions.** The UNSC adopts sanctions measures pursuant to the United Nations Act 1946. The UNSC maintains a Consolidated Sanctions List which includes all individuals and entities subject to UNSC sanctions measures. All UN Member State are bound by the UNSC's decisions but are responsible for implementing sanctions domestically. UN Member States are therefore required to adopt national implementation measures and make sure that the individuals and entities concerned comply with them. Climate Project stakeholders will need to ensure such UNSC sanctions measures are implemented domestically to better protect their involvement in the Climate Projects, specifically in ensuring they do not invest into, or participate in such projects with, or for the benefit of, UNSC sanctioned persons. To the extent UNSC sanctions are not implemented by the relevant UN Member State in which the IIPP Project is planned, Climate Project stakeholders may consider including an explicit provision within the Model Law under the Article concerning "*Grounds for Disqualification*".

**Domestic Sanctions Regimes and Lists.** A developed domestic framework within a country will support Climate Project stakeholders in understanding their sanctions obligations with respect to an IIPP Project in the relevant country. Such a framework may also help to reduce the risk of a sanctions breach occurring and act as a deterrent against non-compliance in the relevant jurisdiction.

**A domestic licensing or authorisation system.** The existence of suitable processes and procedures with respect to dealing with certain individuals and entities can assist in providing structure, accountability and transparency at various levels of a Climate Project, thereby reducing the risk of breaching sanctions in a relevant jurisdiction

**Penalties for breaches of sanctions.** Having an established set of penalties for breaches of sanctions is an important deterrent against non-compliance whilst also providing for civil and criminal consequences which is important for the rule of law in a jurisdiction. This may help mitigate and manage the risks associated with sanctions compliance in a relevant jurisdiction

**Competent Authorities/Regulators.** Climate Project stakeholders may wish to consider whether there is a competent authority or regulator which is principally responsible for the adoption, implementation and enforcement of sanctions in the relevant country where the IIPP Project is planned. Such accountability and governance within a country may support in reducing the risk of a sanctions breach occurring and act as a deterrent against non-compliance in the relevant jurisdiction.

**International Sanctions Regimes.** Many countries and country blocs have adopted their autonomous [sanctions and maintain their own sanctions lists](#) related to specific regional threats or other national security considerations, for example the sanctions adopted and implemented by the United Kingdom, the United States of America or the European Union, respectively. Climate Project stakeholders will need to ensure compliance with their own applicable sanctions obligations which may therefore extend beyond sanctions adopted by the UNSC and include wider sanctions regimes.

## Disputes

### The availability of international arbitration as dispute resolution mechanism

The majority of contracts between an investor and a state (or a state entity) contain mechanisms for the settlement of disputes through international arbitration. Disputes are typically adjudicated before private tribunals situated outside the state in question, and the resulting awards are enforced in domestic courts. The prevalence of international arbitration as a dispute resolution mechanism in the investor-state context suggests that an important factor in facilitating foreign direct investment is the ability of investors to refer disputes with the state/state entity to international arbitration.

There are a range of reasons for investors' preference for arbitration. First, investors may have concerns about the impartiality or quality of domestic courts. They may (justifiably or otherwise) worry that domestic judges are subject to political or other pressure which mean that they are compelled to resolve disputes in favour of the state, or that domestic judges are susceptible to bribes from government officials (particularly in jurisdictions which do not have robust anti-corruption and anti-bribery regimes). There may also be a perception on the part of investors that domestic judges lack the necessary commercial expertise to properly determine a dispute (at least to relative to arbitrators with specialist commercial knowledge).

Secondly, an important benefit of arbitration is that the proceedings and the awards are kept confidential, allowing the parties to avoid the reputational costs of public hearings and the possible release of sensitive commercial information.

Thirdly, the use of arbitration may facilitate the parties' choice of law for their contract. Investors may also be more familiar with the rules and procedures of particular arbitral institutions compared to those of domestic courts. Arbitration therefore provides greater predictability as to the outcomes of disputes.

Finally, arbitration may be preferred due to the ease of enforcing arbitral awards in different jurisdictions. 169 states are signatories to the New York Convention 1958, which requires contracting states recognise and enforce arbitration awards made in other contracting states. There is no treaty comparable to the New York Convention for decisions made by national courts.

### **Recognition and enforcement of foreign judgments/awards**

Another factor which investors will consider when assessing a state's investment climate is how amenable its domestic laws and courts are to the recognition and enforcement of foreign judgments. The bulk of a state's assets are located within its own jurisdiction. The benefit afforded to an investor in being able to refer disputes to foreign tribunals or courts is significantly undermined if judgments against a state cannot be easily enforced in that jurisdiction.

Accordingly, domestic laws which prevent or raise barriers to the enforcement of foreign judgments, or domestic courts which have historically been hostile toward foreign judgments, are likely to be seen by investors as significant risk factors. Countries which have entered into the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 and 2019 will provide additional comfort to investors that they can enforce the terms of their contractual arrangement including through judgments obtained in competent foreign courts.

### **Sovereign immunity**

Sovereign immunity operates in two ways: (i) it protects states from legal proceedings brought in the courts of a foreign jurisdiction (immunity from suit); and (ii) it prevents the recognition / enforcement of a foreign judgment against state-owned assets (immunity from execution).

It is not uncommon for states to waive their sovereign immunity when entering into a commercial contract. However, a party seeking to enforce a foreign judgment against assets within the state's jurisdiction may be impeded by national laws which do not recognise such a contractual waiver, or domestic courts which take a restrictive approach to determining whether the waiver is valid.

Consequently, related to a broader consideration of the ease of enforcing foreign judgments, investors are likely to take into account the extent to which a state is able to rely on immunity from execution when deciding to enter into a project or a transaction with the state in question.

In light of the above, states seeking to boost foreign direct investment may wish to consider implementing measures which facilitate the following:

1. A well- trained, independent legal profession and judiciary which supports and understands international arbitration;
2. The effective and efficient recognition by domestic courts of arbitration agreements, as well as foreign judgments and arbitral awards;
3. The ratification and implementation the New York Convention to enable automatic enforcement of arbitration awards; and
4. The recognition by domestic courts of waivers of sovereign immunity in line with international best practice.

### **ESG Considerations**

Responsible investment involves taking into consideration the environmental, social and governance (ESG) factors in a particular country. Investors are increasingly taking into consideration the ESG aspects and the impact created as a result of their investment into a particular country.

A country's ranking on the Notre Dame Global Adaptation Initiative Index (ND-GAIN) which is a summary of a country's vulnerability to climate change impacts and its adaptive capacity, is also indicative of the immediacy with which government and regulators should work to facilitate Climate Projects in order that investors are convinced about the protections afforded to their investments from climate change and its impact on their investments.

Also, investors will be interested in the availability of 'green' incentives, tax breaks, subsidies and other similar measures in the context of the support available in a country for Climate Projects.

### **Practical Considerations**

There are other practical considerations which are relevant in the context of a country's investment readiness. Practical matters such as minimum local content rules and the requirement for a local sponsor for foreign investors and if so, the availability of such a local sponsor within the country. The availability of raw materials and the availability of an appropriately skilled labour force are also factors which determine a country's investment readiness.

The existence of suitable physical infrastructure such as transportation networks, accessibility to markets, power sources, telecommunication and internet facilities and the ongoing investment in such infrastructure by a particular country is also critical for investors as they assess their business needs in the context of the investment they would be proposing to make in that country.

# Legislative, regulatory and institutional sector reform to achieve the implementation of Climate Projects

## Introduction

On a sector basis (e.g. energy sector), legislative, regulatory and institutional reform will be critical to how national governments translate high-level pledges on climate change into credible policy programmes and, ultimately, progress. This will begin by developing or updating NDC implementation plans and assessing whether existing laws and regulations in respect of a sector which is the subject of NDCs will support the achievement of those plans. This will involve conducting a gap analysis of what is required for the delivery of the NDCs against the existing policy, legislative and institutional landscape for that sector, developing specific proposals to meet those gaps, attracting support for their implementation from stakeholders and establishing governance structures and capacity to deliver progress.

The sector reforms required to achieve NDC implementation and wider progress against COP26 and COP27 commitments will differ from country to country, but may include developing new legislation and/or strengthening existing climate, environmental and/or conservation legislation, including drafting secondary legislation (regulations), procedures and guidelines. Such sector reforms could relate to a broad range of areas including:

- Energy production, including accelerating the phase-out of coal and deployment of clean power generation;
- Implementation of energy efficiency measures;
- The regulation of energy-intensive industries;
- Enabling green financing, including facilitating investment from third parties and permitting innovative financing arrangements;
- Enabling the switch to electric vehicles; and
- Curtailing deforestation and introducing adaptation measures to protect communities and natural habitats.

Sectoral reform may also be required to facilitate investment in particular types of project (e.g. developing a water regulatory framework to facilitate investment in water projects).

General principles relating to the development of an appropriate regulatory environment and a case study showing how legislation can support the development of renewable energy projects are set out below.

## Development of an appropriate regulatory environment: Principles

Designing an appropriate regulatory environment in a particular sector will differ from jurisdiction to jurisdiction, for example depending on the extent of government ownership and delivery of the relevant service, whether a 'principles-based' or 'rules-based' approach to regulation is taken in that jurisdiction and whether a system of 'self-regulation' or 'external regulation' is predominant.

Despite these differences, there are a set of broad principles which will support the design, implementation and on-going monitoring of effective regulatory frameworks.

**Problem and objective definition:** To design a regulatory framework, there must be a defined overall purpose and a clear sense of the ‘challenge’ or issue(s) that the regulation is intended to address. This clarity as to the overarching aim of the regulation (and regulators) will ensure a shared understanding of the regulatory purpose and intended outcomes. The overall aim of the regulation should be translated into specific objectives. Consideration should be given to any trade-offs against potentially competing objectives.

**Considering alternatives to regulation:** Regulatory interventions should be proportionate and cost-effective. Therefore, when responding to a clear challenge or objective, governments should consider alternatives to regulation and various models for regulation,

**Ensuring accountability:** Early consideration should be given to the respective roles and responsibilities of government, regulators, the private sector and other stakeholders in the wider regulatory system and the means by which they will be held accountable for their effectiveness. The extent of regulatory independence from government should also be considered.

**Considering regulatory delivery:** The powers provided to regulators in legislation, regulations and guidance should be proportionate and provide them with the appropriate tools to perform their intended role. Their powers should be matched to the objectives, capacity and resources required. Consideration should also be given to the funding model for the effective regulation of the sector – for example fees on regulated entities or general taxation.

**Balancing predictability and flexibility:** Regulatory frameworks should provide a stable and objective environment for stakeholders, ensuring that those affected can make decisions with confidence. However, the framework also needs to have the capacity to evolve and respond to changing circumstances, in order that it can continue to be relevant and effective over time.

**Consultation on proposed regulation:** Stakeholder consultation leads to the design of more effective regulation. That consultation should take place at a stage where there is scope to influence the design of the framework. Depending upon the subject matter and jurisdiction, this consultation may be formal or informal, public or private, written or provided in meetings, workshops or other fora.

**Conducting a regulatory impact assessment:** when designing a regulatory framework consideration should always be given to its likely effects. Therefore, a systematic review of the positive and negative effects of the regulatory proposal and identified alternatives should be conducted against the problem identified and objective of the framework.<sup>1</sup>

**Performance evaluation:** When developing a regulatory framework, consideration should be given to the method of post-implementation impact assessment and performance evaluation. This evaluation should be designed to assess whether or not the regulatory framework meets the intended objectives cost-effectively and levels of compliance across relevant affected sectors.<sup>2</sup>

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<sup>1</sup> <https://www.oecd.org/regreform/regulatory-policy/ria.htm>

<sup>2</sup> <https://www.oecd.org/daf/competition/37318586.pdf>

## Case Study

### How legislation can support the development of renewable energy projects

Renewable energy public private partnerships models can be structured and implemented in a number of ways. A common form is a public body led tender for new generation capacity where the public body provides a lease for a site it owns. In addition, the public body may offer or facilitate a long term offtake agreement in form of a power purchase agreement or a contract for difference with a designated off-taker for price certainty and bankability.

Legislation can play an important role in facilitating the development of public private partnerships by facilitating authorisation and permitting processes, increasing measurability and predictability on key risk items in project development and operation such as grid access, curtailment, imbalance cost attribution, and improving competitive procurement of additional renewable energy capacity.

The following provides recommendations for addressing key risks and processes to facilitate renewable energy public private partnership in legislation.

#### 1. Grid Access

Issues regarding connection and access to transmission or distribution networks is a common cause for delay in renewable energy projects.

Works that need to be performed for the realisation of grid connection for new projects often comprises one or more of the following:

- reinforcement works to the existing grid;
- extensions of the existing network to the new generation facility, including new substations and converters;
- works to connect the new generation facility to the network including any works within the boundary of the new generation facility.

Depending on the type of work required, these may be procured by the grid operator or by the private partner developer of the new generation facility.

Tariff and permissible cost regulation of grid operators by energy regulators or by other public bodies can lead to delay where the process to include the additional reinforcement or extension works in the regulated cost base of the grid operator is unclear or take time to get approved.

Often, there are several options to allocate and share costs between the grid operator and the private partner developer and the approach that will be taken by the grid operator is sufficiently clear to the private partner developer.

Common cost sharing approaches include:

- 'shallow' – the developer pays for costs of extensions and immediate connection assets, while the grid operator bears reinforcements costs, charging them on to all grid users through grid charges;
- 'deep' – the developer pays for both extensions, immediate connection assets and reinforcements and charges them to all grid users through grid charges; or

- 'hybrid' – the costs of reinforcements and extensions are shared between developer and grid users, and the remainder is born by the developer.

Most attractive to private partner developers would be a super shallow approach which draws the charging boundary at the immediate connection assets with the grid operation and ultimately grid users paying for all the reinforcements, system extension, and sometimes part of the immediate connection assets. However this is usually difficult to achieve

Imposing both grid connection, extension, and reinforcement costs on new producers' risks (under the deep approach) to reduce incentives to locate production where the RE resource is optimal, unfairly imposes the costs of creating a socially optimal infrastructure on the marginal producer.

It is recommended to take into consideration shallow network connection regimes (enabling system-wide optimization and cost-sharing). In some countries, the obligation of the system operator to reinforce the grid is based on a statutory basis, in others on a contractual basis. The TSO/DSO is usually responsible for setting the design criteria on grid connection, the required studies for grid connection and the provision of access to the grids. The grid connection works (internal MV line and substation) are carried out by the investor, while other works are carried out by the system operator.

Specific deadlines and penalties on system operators for delays in carrying out works, need to be determined to ensure predictability and certainty for investors.

## **2. Access to Bilateral or Exchange Markets**

Another key risk and bankability consideration for private partner developers are cases in which the public partner or designated offtaker is not in a position to purchase or take delivery of the agreed quantity. This can, for example, be because of lower than agreed demand, force majeure or change in law situations. Whilst some of these risks can be addressed through insurance or take-or-pay mechanisms, bankability of a new development is improved by the existence of bilateral markets for the sale of the power or even access to local commodity exchanges which have a day-ahead market for power generation.

In countries with developed markets, private partner developers are often allowed to freely elect a route to market, either bilaterally or through an organised trading platform or power exchange. However, some regions or countries with developed power markets such as the Nordics or Romania, Bulgaria, Spain, Ireland or Greece, generators are required to continuously or for certain periods trade over a specific platform or exchange to be eligible under certain support schemes for the development of new generation. The mandatory route to market is often imposed as a measure to enhance liquidity on the organised commodity market.

To mitigate the risk of unavailability of a route to market, some developing power markets provided an off-taker of last resort (OLR). The OLR provides a route-to-market at a discounted price compared to the reference market price used for the calculation of the premium. This is a measure that attracts project finance whilst at the same time maintaining incentives for participation in the market.

Encouraging new generation projects through public private partnerships require invariably a clear and secure route-to-market for the private development partner and lenders, as financing typically relies on non-recourse project finance to part-fund the investment. Long-term limited recourse financing of projects based on the analysis of the cash-flows of the specific project, rather than the strength of the balance sheet of the company sponsoring the project. In contrast to an ordinary borrowing situation, with project finance, the

financier usually has little or no recourse to the non-project assets of the borrower or the sponsors of the project.

Legislation should address route to market and as far as possible allow private partner developers to select a route to market, either bilaterally through an organized market/power exchange or provide for an offtaker of last resort where bilateral or organised markets are not sufficiently developed or liquid to aid the bankability of the public private partnership.

### **3. Imbalance Costs**

Renewable energy projects are inherently intermittent, that means the availability of renewable energy sources such as wind or radiation is less predictable compared to conventional generation. As a consequence allocating risks for imbalance between agreed and nominated delivery quantities and actual generation is an important consideration for any private development partner, which can be de-risked through legislation.

A task of grid operation is to balance load and generation by allocating the corresponding resources in sufficient quantity and efficiently to avoid black-outs. To help the grid operator with this a regulatory requirement is usually introduced which all generators to undertake balancing responsibilities and participate in the balancing markets.

The existence of a liquid intra-day market for power, usually through a platform or an organised market, is an important factor to facilitate private development partners to assume balancing responsibility for their intermittent renewable generation.

Moreover, as not all generators have the capability to access intra-day markets or participate in capacity and ancillary services market or to trade out imbalances efficiently, the ability to allocate the balancing responsibility or the trading out of imbalances to third parties like professional balancing services provider are further important risks mitigations.

The basis for dealing with imbalances efficiently is that a model or structure exist that clearly allocates that responsibility to one designated market participant - the balancing responsible party. Each balancing responsible party is then financially responsible for its imbalances between nominated and actually produced quantities. Derogations from balancing responsibility are in some countries provided for small RES facilities. Balancing responsible parties can also take over forecasting of generation to ensure that imbalances and related costs are reduced.

Legislation can facilitate development of new generation by private partners by creating concepts of balancing responsibility and balancing groups, by allowing these to be delegated to third parties and by creating access to intra-day markets to allow developers or their balancing service providers to trade out imbalances and reduce costs risks for the project.

### **4. Curtailment**

In the context of electricity generation, curtailment means the reduction for a specified period by the manager of an electric grid of the electricity that one or more generating stations (also known as power plants) operating within the grid are scheduled to produce or deliver because either (a) there is a lack of transmission capacity during that period or (b) the amount of energy produced by the generating stations within the electric grid's area is greater than the demand for electricity during that period and the excess energy cannot be exported to other balancing areas due to transmission constraints.

Curtailement are key risks and thus bankability considerations for private development partners. A number of concepts have been developed to mitigate curtailment risks through proxy generation, production guarantees, availability guarantees, seasonal guarantees and fixed quantity settlements.

All of these concepts and methods seek to optimise curtailment scenarios and provide compensation for curtailments. Legislation can facilitate the development of generation PPPs by providing clear methodologies and principles for curtailment and related compensation by the grid operator or a designated third party.

## **5. Environmental Attribute Certificates**

Countries' NDCs and a general drive to decarbonisation in power generation leads to renewable energy projects being implemented to either provide renewable sources electricity because the designated offtaker requires the electricity to be from renewable sources, or because the electricity is to be used for production of new products be it other energy products such as renewable hydrogen or ammonia, or low or no carbon products such as green cement or steel and the associated environmental attributes associated with the public private partnership need to be fully transferred to this offtaker for that purpose.

The difficulty of allocating environmental attributes between parties where all conventional and renewable generation and consumption is connected to same grid is that any consumption which technically speaking always be a grid mix of the emissions from conventional energy and the avoided emissions from renewable operating at the time of consumption. However, because this does not sufficiently incentivise renewable energy generation or fairly attributes the environmental benefits to those public partners or offtakers that pay for them, a legal fiction is commonly used in form of transferable environmental attribute certificates that the offtaker claims that all renewable energy it has consumed was legally to be considered renewable even if technically it was not.

One of the longest-standing environmental attribute schemes is the Guarantee of Origin (GoO) scheme in the EU. It requires all European member states to recognise electricity as renewable sources if a national GoO or a GoO from another member states has been transferred and cancelled for that consumption. Other national, regional or international scheme of a similar nature exist, for example Green-E or IRECS. One major benefit of these certificates is that they can only be issued and only be cancelled once and as such limit duplication of claims through multiple assignment or rights for example.

In their most common form, environmental attributes are issued electronically for a metered and confirmed quantity of electricity generation (1 GO per MWh), transferred and cancelled by suppliers as evidence to their customers of the quality of the delivered electricity with a temporal congruence over a year. That means that irrespective of whether consumption exceeded or fell short of generation, these differences can be averaged out over a year and the buyer claim full renewable energy consumption if the total generation and consumption match. However, these requirements are developing and already there are efforts to narrow temporal congruence requirements to get ever closer to a technical match between consumption and generation.

Environmental attribute certificates have also been a major driver for zero subsidy, corporate PPAs in which counterparties pay a premium for electricity delivered with environmental attribute certificates because they will be able to count these towards goals such as net-zero or carbon neutral and count them as renewable under the Greenhouse Gas Protocol Scope 2 emissions accounting.

Providing for the issuance and the transferability of environmental attribute certificates in legislation can facilitate the pricing of renewable energy benefits and the transfer of attributes between the private and the public development partners.

## **6. Production site documentation, authorizations or permits required**

It is good best practice to require production site documentation and permits as auction participation requirements where the creation of new renewable energy capacity is tendered by public partners.

These often include standardized evidence of project progress and may include proof of access to the project site, proof of RE resource measurements, grid connection check, an environmental and social impact assessment, or an approved zoning/development plan.

Technical requirements aim to ensure a high probability for awarded projects to be realized, given that they have already overcome some of the risks related to project planning, including securing a location and essential permits.

However, some conditions can entail higher costs for bidders, potentially creating barriers to participation and decreasing competition levels. These effects must be balanced when selecting and implementing conditions for auction participation.

Where new generation capacity is to be tendered, legislation could facilitate the process by further setting out the documentation and processes to be provided to private development partners.

## **7. Tender Process**

Experience with renewable energy tenders have shown that both static and dynamic auction processes can work well. Static auctions can be implemented either as a paper-based or an electronic procedure. In a paper-based auction procedure, bidders submit their technical and financial bids on paper. In an electronic auction procedure, there is a special interface dedicated to the auction, i.e., a data room for the upload of documents and submission of financial bids. Bids in both cases are “manually” evaluated by the auctioneer. Dynamic auctions work in the form of sequential bidding phases with increasing prices. Selection takes place on a “first come, first served” basis to foster procurement through low-cost technologies/projects

Equally, both one- or two-stage auctions can work well, and the choice often depends on local regulatory requirements. A two-stage process reduces the administrative burden for the authorities, allowing more time to prepare high-quality tender documentation and avoiding the need to assess the proposals of non-qualified bidders. This can be particular relevant for countries introducing auctions and limited institutional capacities.

Moreover, auctions can be structured as price-only auctions or multi-criteria auctions. Price only auctions are the most common method of bid evaluation. Multi-criteria auctions will for instance also take into account other environmental or development impacts. In general, a purely price-only selection process is associated with lower support and transaction costs, while the inclusion of other criteria imposes restrictions that might lead to higher costs and decreased transparency. However, multi-criteria auctions can also help promote social acceptability and local economic development.

Other common design elements of renewable energy tenders include considerations for a post-award negotiation stage. Not having a post-award negotiation stage can be faster to implement and impose a lower administrative effort on the competent authority than other tender procedures. Auctions also improve transparency for market participants. Also, measures to ensure a minimum level of competition, i.e.

imposing constraints on maximum awarded capacity to prevent a single player from becoming dominant in the auction are a common design feature.

Clear marginal bids and clearing mechanisms will also facilitate the effectiveness of bids. As bids are awarded based on the price ranking, there will likely be a “marginal project” which, if awarded, would cause the auction volume to be exceeded. There is a choice of various clearing mechanisms to resolve this and clarity will optimise bidding.

Lastly most bids also consider a price clearing through a pay-as-bid uniform (pay-as-cleared) pricing rule by which all bids receive the price or a discount of the last bid accepted when supply equals demand.

These auction design principles when facilitated through legislation will greatly enhance clarity for private development partners and thus lead to more optimal bidding and price formation for the benefit of the public partner.

# Model Law Provisions

## ***Disclaimer***

*Use of this Model Law is not a substitute for specialist legal advice and Governments must take appropriate legal, financial and technical advice when implementing and using this Model Law.*

*This Model Law does not represent an exhaustive list of matters that will need to be considered by each Government and its advisers when preparing for the procurement of Climate Projects.*

**It is important to note that this Model Law is a 'living' document. This Model Law will be reviewed and updated from time to time by DLA Piper with (i) any 'lessons learned, which are experienced by Governments who are conducting Climate Procurement Procedures using this Model Law, and (ii) best practice which is generated.**

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## CHAPTER ONE

### SCOPE AND GENERAL PRINCIPLES

#### Introduction

The Climate Projects, which are the subject of this Model Law, are high value, large-scale complex procurements. Careful preparation and management pre, during and post each procurement competition for a Climate Project will be required in order to ensure successful delivery of that Climate Project and the NDC objectives of a Government.

This Model Law has been drafted to support Governments in the procurement of their Climate Projects, and specific rules for structuring the procurement of Climate Projects are set out in this Model Law. However, the provisions of this Model Law do not foresee every eventuality which might ensue during the course of a Climate Procurement Procedure. The Climate Procurement Authority will, therefore, need to exercise discretion in certain circumstances and in doing so, must act in accordance with the general principles of transparency, equal treatment of Bidders and taking steps which are proportionate to the outcome to be achieved.

These principles are codified in Article 16 of the Model Law, which states:

- “(1) The Climate Procurement Authority shall treat all Bidders equally and without discrimination and, at all times, the Climate Procurement Authority shall act in a transparent and proportionate manner.*
- (2) Each Climate Procurement Procedure shall be designed as a fair and transparent procurement procedure.*
- (3) The design of a Climate Procurement Procedure shall not be made with the intention of artificially narrowing competition, and for that purpose, a Climate Procurement Procedure shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain Bidders.*
- (4) The Climate Procurement Authority shall ensure that the conditions for participation in a Climate Procurement Procedure shall be the same for all Bidders and there shall be no discrimination in respect of any Bidder in any such Climate Procurement Procedure.”*

It is important for the Climate Procurement Authority to have these principles in mind during all stages of a Climate Procurement Procedure.

The benefits of implementing this Model Law, and conducting an efficient and effective Climate Procurement Procedure, are as follows:

- allows procurement at speed and at scale of Climate Projects;
- enables Governments to drive quality and value for money via robust Climate Procurement Procedures. For example, by
  - having meaningful discussion/negotiation with Bidders; and
  - maintaining competitive tension throughout Climate Procurement Procedures;
- ensures delivery of Climate Projects on time as the Private Partner and its proposals (including issues such as solvency risk, previous experience and deliverability) have been rigorously evaluated;
- minimises the risk of disputes and problems with the Bidders (including the Private Partner)

because:

- Bids have been thoroughly evaluated and tested during the Climate Procurement Procedure, and
- the Climate Procurement Procedure has permitted detailed review of the Climate Contracts thus enabling clear, unambiguous drafting to be included in the Climate Contracts;
- delivers local community benefits through clear requirements and incentives in the Climate Contracts which are evaluated during the Climate Procurement Procedure;
- attracts Bidders by giving the market confidence that:
  - the Climate Procurement Procedure will be run on a transparent and fair basis;
  - the requirements on Bidders will be proportionate and appropriate to what is being procured; and
  - the procurement timetable will be adhered to, giving increased certainty on resource requirements and bid costs;
- increases the likelihood of unsuccessful Bidders bidding for other opportunities advertised by the Climate Procurement Authority; and
- helps control public and private sector procurement/bidding costs.

## Article 1 Basis

### Comments

The statutory basis on which this Law is made should be described in this Article (e.g. the relevant provision of the Constitution). This Model Law has been drafted as primary legislation. However, it may be that, in certain jurisdictions, the Model Law needs to be implemented as secondary legislation.

(1) This Law has been enacted pursuant to [\*\*\*].

## Article 2 Objectives

- (1) The objectives of this Law are to:
- (a) incentivise collaboration between Qualified Investors and the Climate Procurement Authority in respect of the development and implementation of Climate Projects;
  - (b) facilitate private sector investment into Climate Projects in accordance with best international practice;
  - (c) utilise fast-track procurement processes to award Climate Projects in an efficient and streamlined manner, avoiding high procurement costs and delays to the implementation of Climate Projects;
  - (d) deliver demonstrated value for money for the State through the participation of Qualified Investors, both in respect of implementation and delivery of the Climate Projects, on the basis of internationally recognised and bankable risk allocation;
  - (e) provide for an effective and efficient contract management framework, with easy access to international dispute resolution, if required; and

- (f) address related matters.

### Article 3 Definitions and Interpretation

(1) In this Law, the definitions below have the following meanings unless the context indicates otherwise:

**Bid** means any bid to perform the obligations of the Private Partner pursuant to a Climate Agreement to be submitted or which has been submitted by a Bidder to the Climate Procurement Authority pursuant to a Request for Proposals.

**Bidder** means, as the context requires, a Person:

- (a) expressing an interest to a Climate Contract Notice;
- (b) submitting or who has submitted a Bid;
- (c) selected by the Climate Procurement Authority to take part in a Procurement Procedure; or
- (d) who is a potential participant in a Procurement Procedure.

**Climate Contract** means a contract awarded by the Climate Procurement Authority to a Private Partner pursuant to this Law, and shall, as the context requires, include an IIPP Collaboration Agreement, a Framework Agreement, a Climate Project Agreement and a Shareholders' Agreement.

**Climate Contract Award Notice** means a contract award notice which has been prepared by the Climate Procurement Authority in accordance with Article 57.

**Climate Contract Notice** means a contract notice which has been prepared by the Climate Procurement Authority in accordance with Article 35.

**Climate Prior Information Notice** means a prior information notice which has been prepared by the Climate Procurement Authority in accordance with Article 19.

**Climate Procurement Authority** means the authority established pursuant to Article 5(1).

**Climate Procurement Documents** means, as the context requires, the Climate Prior Investment Notice, Investor Qualification System Notice, Investor Qualification System Document, Climate Contract Notice, Prequalification Document, Request for Proposals, Climate Contract Award Notice [and any document prepared for the purposes of a Climate Procurement Procedure.]

**Climate Procurement Procedure** means any procurement procedure for the award of a Climate Contract carried out by or on behalf of the Climate Procurement Authority pursuant to this Law, and [shall exclude the procurement of an Investor Qualification System.]

**Climate Project** means a project or programme of projects which is required to assist with the achievement of the State's NDCs [and the achievement of the State's Net Zero plan]. [define to reflect plans which have been prepared by the State].

**Climate Project Agreement** means the agreement which is prepared by the Climate Procurement Authority in accordance with Article 49.

**Collusive Practice** means a scheme or arrangement between two or more Bidders, Investors or Qualified Investors, with or without the knowledge of the Climate Procurement Authority, designed to establish commercial proposals at artificial, non-competitive levels including influencing improperly the actions of another party.

**Concept** means a potential Climate Project.

**Corrupt Practice** means the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the action of a Public Official in a Climate Procurement Procedure, in an Investor Qualification System, in a Framework Agreement or execution of a Climate Contract.

**Entity** means [Ministry, independent head department, State owned enterprise, municipality, State owned company] [define to reflect the State entities in a jurisdiction] and the equivalent body in another country.

**Framework Agreement** means an agreement between the Climate Procurement Authority and one or more Bidders which is prepared by the Climate Procurement Authority in accordance with Article 51.

**Fraudulent Practice** means a misrepresentation or omission of facts in order to influence (or attempt to influence) a Climate Procurement Procedure, an Investor Qualification System, a Framework Agreement or the execution of a Climate Contract.

**IIPP Collaboration Agreement** means the agreement which is prepared by the Climate Procurement Authority in accordance with Article 48.

**Impairing Practice** means impairing, harming or threatening to impair, harm, directly or indirectly, Persons or their property to influence their participation in a Climate Procurement Procedure, Investor Qualification System, or Framework Agreement or affect the execution of a Climate Contract.

**Investor** means, as the context requires, a Person:

- (a) expressing an interest to an Investor Qualification System Notice;
- (b) submitting or who has submitted an Investor Qualification System Response;
- (c) who is a potential participant in an Investor Qualification System

**Investor Qualification System** means a system of qualification of Investors for the award of IIPP Collaboration Agreements and Climate Contracts which is established in accordance with this Law.

**Investor Qualification System Notice** means a notice by which the Climate Procurement Authority invites interested Investors to qualify in respect of an Investor Qualification System.

**Investor Qualification System Document** means any document issued by the Climate Procurement Authority on the basis of which Bidders prepare and submit Investor Qualification System Responses.

**Investor Qualification System Responses** means a response from a Bidder to the Climate Procurement Authority pursuant to an Investor Qualification System Document.

**Law** means this Law

**Model Climate Contract** means a model contract which is prepared by the Climate Procurement Authority pursuant to Article 47.

**Model Climate Procurement Document** means a model procurement document which is prepared by the Climate Procurement Authority pursuant to Article 34.

**NDC** means Nationally Determined Contributions.

**Obstructive Practice** means:

- (a) attempting to or actually deliberately or recklessly destroying, falsifying, altering or concealing of evidence to the investigation or making false statements to investigators to impede an investigation by the State into allegations of a Corrupt Practice, Fraudulent Practice, Impairing Practice or Collusive Practice;

- (b) attempting to or actually threatening, harassing or intimidating any party, including but not limited to a State or an official of the Climate Procurement Authority, to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation; or
- (c) attempting to or actually engaging in acts intended to materially impede the exercise of the State's and the Climate Procurement Authority's inspection and audit rights.

**Person or Persons** shall mean, as the context requires, natural persons, individuals, firms, bodies corporate, unincorporated associations, partnerships, joint ventures, trusts and/or other entities or organisations of any kind.

**Preferred Bidder** means a Bidder who has been awarded a Climate Contract.

**Prequalification Document** means the prequalification document which has been prepared by the Climate Procurement Authority in accordance with Article 36.

**Prequalification Responses** means a response from a Bidder to the Climate Procurement Authority pursuant to a Prequalification Document.

**Private Partner** means, a Person who enters into a Climate Agreement with the Climate Procurement Authority.

**Public Contract** means any contract which is not a Climate Agreement.

**Public Official** means a Person employed by the Climate Procurement Authority or a member of any other public service, of [country].

**Qualified Investor** means an Investor who is participating in the Investment Qualification System.

**Request for Proposals** means the request for proposals which has been prepared by the Climate Procurement Authority in accordance with Article 37.

**Shareholders' Agreement** means the agreement which is prepared by the Climate Procurement Authority in accordance with Article 50.

**State** means the Government of [country].

- (2) A reference in this Law to "include", "includes", "including" or "such as" is to be construed without limitation.
- (3) A reference in this Law to a law or regulation pertaining to a particular subject matter is a reference to that law or regulation as amended from time and includes any consolidations, amendments and replacements of that law or regulation.
- (4) A reference in this Law to "written" or "in writing" means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and it may include information transmitted and stored by electronic means.
- (5) In this Law, unless the context otherwise requires, any reference to a numbered Article is a reference to the Article bearing that number in this Law.

## **Article 4**    **Scope**

### *Scope of Application of this Law*

- (1) This Law shall apply to every procurement of a Climate Contract by the Climate Procurement Authority, and every Climate Procurement Procedure shall comply with this Law and any applicable laws of [country].

- (2) The Climate Procurement Authority shall comply with this Law and any applicable laws of [country].
- (3) This Law does not apply to the procurement of a Public Contract by an Entity.

*No Retrospective Effect and Interpretation*

- (4) This Law shall apply to all Climate Procurement Procedures which are commenced by the Climate Procurement Authority after the date on which this Law enters into force.
- (5) For the purposes of Article 4(4), a Climate Procurement Procedure may be commenced when a Climate Contract Notice is published in accordance with this Law.

## CHAPTER TWO

### INSTITUTIONAL FRAMEWORK AND POWERS

#### Introduction

To address the impact of COVID-19, many countries set up COVID-19 taskforces to procure and roll out vaccination programmes, as well as procure a range of contracts on an emergency basis. Some of these taskforces were very successful; others were not. Successful taskforces were generally single entities featuring cross-Ministry collaboration and they were empowered at the highest level of Government to do what was necessary to fulfil their objectives.

To address climate change, it is suggested that an entity called the 'Climate Procurement Authority' is established to operate within the Office of the President or the Office of the Prime Minister. The Climate Procurement Authority could be staffed with procurement professionals from the PPP unit and the national procurement body, as well as new personnel. However, it is suggested that the PPP unit and the national procurement body are not the administering bodies on this Law on the basis that they already have their day to day roles to fulfil in terms of the Public Contracts and PPP Contracts, and the Climate Procurement Authority will need to be entirely focused on the delivery of Climate Projects given the urgent requirement for the delivery of NDCs.

The role of Sovereign Wealth Funds and Public Pension Funds will be critical to securing investment from Investors, and it is anticipated that these Funds will invest in the Climate Projects in their jurisdiction. It is suggested that these Funds work closely with, or form part of the team, in the Climate Procurement Authority.

It is possible under the Model Law for the Climate Procurement Authority to work with an Entity or Entities in other countries in the context of the procurement of Climate Projects, where, for example, there are economies of scale in 'batching' a number of smaller projects in different countries and thereby making the batched procurement a more attractive investment. There are also certain types of Climate Project (e.g. water projects which cross national borders) where collaboration with other countries will be essential to the delivery of this type of Climate Project.

#### Model Documents required for this Chapter

The following model documents will need to be drafted:

- Template pre-feasibility report;
- Template feasibility report; and
- Project selection criteria.

#### Guidelines relevant to this Chapter

Guidelines could be developed in respect of the following topics:

- The administration of this Law by the Climate Procurement Authority;
- Working with other countries to implement cross-border Climate Projects; and
- The Development of Financial Support, Economic Support and Sovereign Guarantees and Undertakings: key issues to consider.
- Affordability;
- Value for Money;
- Viability gap financing and use of Government Guarantees;

- Prioritisation of Climate Projects and development of NDC implementation plans;
- The requirements for Pre-Feasibility and Feasibility Studies;
- Identification and mitigation of risks in Climate Projects;
- Batching of Climate Projects; and
- Environmental, Social and Governance.

#### **Article 5 Climate Procurement Authority**

- (1) The Climate Procurement Authority shall be established by the [State] and it shall function within the [Office of the President] for the purpose of administering the provisions of this Law.
- (2) All Ministries of the Government and public corporations and public authorities of the State shall fully support the Climate Procurement Authority in order to enable it to achieve:
  - (a) the implementation of this Law; and
  - (b) the delivery of the objectives of the Climate Procurement Authority as described in Article 2.
- (3) The Climate Procurement Authority shall discharge the functions which are ascribed to it pursuant to this Law
- (4) The Climate Procurement Authority shall:
  - (a) liaise with UNFCCC National Focal Points in the context of the implementation of this Law and Climate Projects;
  - (b) liaise with the African Union Commission (in collaboration with regional economic communities) in the context of the implementation of this Law and Climate Projects;
  - (c) share Model Climate Contracts, Model Climate Procurement Documents, best practice and lessons learned in the context of this Law with Entities in [country] and Entities from other countries, the UNFCCC and the African Union Commission;
  - (d) explore opportunities for collaboration in respect of Climate Projects with Entities from other countries, the UNFCCC and the African Union Commission;
  - (a) formulate State policy, support and incentives so that Climate Projects can be made attractive to Investors and Bidders; and
  - (b) implement measures aimed at developing human resources and professional skills to support the activities described in this Law. Such measures may include recruitment and training programs, and providing certification of professional credentials for personnel appointed to the Climate Procurement Authority.
- (5) The Climate Procurement Authority shall have the power to enter into a Climate Contract for the implementation of a Climate Project.

#### **Article 6 Procurement involving Entities from other countries**

- (1) The Climate Procurement Authority may act jointly with an Entity or Entities from another country or countries in the award of a Climate Contract by using one of the means provided for in this Article 6.

- (2) The Climate Procurement Authority and the Entity or Entities from another country or countries shall not use the means provided for in this Article 6 for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject.

*Joint procurement*

- (3) In the circumstances set out in Article 6(4), the Climate Procurement Authority may:
- (a) award a contract for a Climate Project jointly with an Entity or Entities from another country or other countries; and
  - (b) award contracts pursuant to a Framework Agreement.
- (4) The circumstances are that:
- (a) there is an agreement that determines:
    - (i) the responsibilities of the parties and the applicable national provisions, and
    - (ii) the internal organisation of the procurement procedure, including the management of the procurement procedure, the distribution of the works, supplies or services to be procured, and the means of execution of the relevant contract or contracts; and
  - (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents for that Climate Project.
- (5) For the purposes of Article 6(4)(a):
- (a) the agreement may be:
    - (i) an agreement made between the Climate Procurement Authority and the participating Entity or Entities from another country or other countries, or
    - (ii) an international agreement concluded between the countries concerned; and
  - (b) the agreement may have allocated specific responsibilities among the Climate Procurement Authority and the participating Entity or Entities from another country or other countries, and determined the applicable provisions of the national laws of any of their respective countries.
- (6) In procurements under Article 6(4), the other provisions of this Law apply only where such provisions are the applicable national provisions determined by an agreement referred to in Article 6(4)(a).

*Joint entities*

- (7) The Climate Procurement Authority may, with an Entity or Entities from another country or other countries, set up joint entities for the purposes of Article 6(1), subject to compliance with Article 6(8).
- (8) This Article 6(8) is complied with if, before undertaking any procurement procedure for a Climate Project, the Climate Procurement Authority and the participating Entity or Entities from another country or other countries, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement provisions of one of the following countries:
- (a) the country where the joint entity has its registered office;
  - (b) the country where the joint entity is carrying out its activities.
- (9) The agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of Climate Contracts or to one or more individual contract awards.

- (10) The other provisions of this Law apply to procurement by the joint entity only where such provisions are the national provisions applicable in accordance with Article 6(8) and Article 6(9).

## Article 7 Financial Support, Economic Support and Sovereign Guarantees and Undertakings

### Comments

A wide range of powers relating to Financial Support, Economic Support and Sovereign Guarantees and Undertakings has been set out in this Article. The existing laws, policies, rules and regulations of the jurisdiction and any existing laws, policies, rules and regulations to which the State, Office of the President, Ministry of Finance, Sovereign Fund and Climate Procurement Authority may be subject will need to be reviewed in order to assess what amendments may be required to existing legislation to offer these types of Financial Support, Economic Support and Sovereign Guarantees and Undertakings.

Careful consideration and consultation will be required before these powers are exercised, as well as which entity can exercise the power and how the governance for that exercise is managed.

Finally consideration should be given to the forms of funding and financing (e.g. blended finance) which could be entirely innovative to assess whether any additional forms of support may be required, or existing laws amended.

- (1) The State, the Climate Procurement Authority in consultation with the [Office of the President and Ministry of Finance]; the [Ministry of Finance] and/or the [Sovereign Fund], may, where it is considered necessary to support a Climate Project, provide in respect of such Climate Project one or more forms of support or contribution described in this Article 7, and other forms of support or contribution which are approved by the State from time to time.
- (2) The State, the [Ministry of Finance], the [Climate Procurement Authority], or the [Sovereign Fund] may provide or assist in the provision of financial support for a Climate Project using the funds of the State, the [Climate Procurement Authority], the [Sovereign Fund] and/or using special funds (as defined in [insert references to relevant public finance and budget laws]).
- (3) The State, the [Ministry of Finance] or the [Sovereign Fund] may provide or assist in the provision of financial support for a Climate Project as follows:
- (a) provision of loan(s) to the Private Partner on preferential terms;
  - (b) provision of loan guarantee(s) for the repayment of loan(s) taken by the Private Partner ;
  - (c) provision of any direct subsidy including any tariff subsidy to supplement the Private Partner's revenue from the Climate Project without receiving payment or value from the Private Partner therefor;
  - (d) provision of incentives or grants for Climate Projects;
  - (e) provision of viability gap funding or direct or indirect subscription in equity or other security convertible to equity in the Private Partner;
  - (f) grant of and/or facilitation of tax exemption(s) and/or tax benefit(s) and/or tax postponement(s); and/or
  - (g) grant of and/or facilitation of customs duty exemption(s) and/or preference(s) and/or postponement(s).

- (4) The [Climate Procurement Authority], the State, the [Ministry of Finance] or the [Sovereign Fund] may provide or assist in the provision of economic support for a Climate Project as follows:
- (a) provision of rights or grant of preferential terms in respect of rights to movable or immovable property owned by the [Climate Procurement Authority], the State or the [Sovereign Fund] to the Private Partner, including but not limited to, the acquisition of land or rights over land necessary for the Climate Project;
  - (b) assistance in obtaining licence(s), permit(s), approval(s) or clearance(s) for the purposes of the Climate Project;
  - (c) grant of exclusive rights to engage in an activity or provide a service within the scope of the Climate Contract; and/or
  - (d) grant of the right to collect tariff(s) and/or to generate revenue from other types of activities not directly associated with the implementation of the Climate Project, on the terms specified by the [Climate Procurement Authority], the State, the [Ministry of Finance] and/or the [Sovereign Fund].
- (5) The [Ministry of Finance] may provide or assist in the provision of sovereign guarantees and/or undertakings for a Climate Project as follows:
- (a) an undertaking of the State, a Ministry, an authority or State agency assuming responsibility for the performance of the Climate Procurement Authority's obligations under a Climate Contract including the payment of monetary obligations in the event of the Climate Procurement Authority's default;
  - (b) an undertaking to pay for goods, works and/or services supplied by the Private Partner in connection with the Climate Project;
  - (c) an undertaking in respect of the consequences of nationalization, expropriation or any other measure of similar effect affecting the Climate Project;
  - (d) an undertaking in respect of any rights of ownership, use, transfer and disposal of the investments made by the Private Partner in connection with the Climate Project in accordance with the Climate Contract;
  - (e) an undertaking in respect of convertibility of the national currency of the State into any other foreign currency and free export or repatriation of the currency received in connection with the Climate Project after applicable taxes have been cleared and the central bank has been notified pursuant to [insert reference to relevant investment law];
  - (f) an undertaking in respect of the Private Partner's right to recover losses incurred as a result of unlawful action or unlawful inaction of the State and/or the Climate Procurement Authority, which caused such losses to the Private Partner; and/or
  - (g) an undertaking in respect of any political risk under the State's control such as changes in law, changes in policy in respect of Climate Projects or early termination of the Climate Contract where there has been no fault of the Private Partner.

## Article 8 Climate Project Identification

- (1) The steps which shall be followed in respect of the identification of Climate Projects are:
- (a) **Step one:** the Climate Procurement Authority identifies a potential Climate Project. The Climate Procurement Authority shall identify and prioritise potential Climate Projects based on the plans for the delivery of the State's NDCs and Net Zero plans, and objective criteria which shall include (but not be limited to):

- (i) the required urgency of the delivery of the potential Climate Project;
- (ii) the potential Climate Project relates to public services which are of poor quality or there are changing public services requirements meaning that a different type of service is needed to meet changing demand or deal with obsolescence;
- (iii) the potential Climate Project relates to public infrastructure which are of poor condition, have maintenance problems, have safety issues or cannot meet current or expected demand
- (iv) the potential Climate Project contributes towards the Climate Procurement Authority's State's NDCs and Net Zero plans;
- (v) the potential Climate Project will deliver social, economic or environmental benefits; and
- (vi) [...]

[On an annual basis][Every six months], the Climate Procurement Authority shall submit its list of potential Climate Projects to the [Office of the President] on [date - the commencement of each financial year] and shall update such list on a regular basis.

- (b) **Step two:** the Climate Procurement Authority shall prepare a Concept in respect of a potential Climate Project which has been identified pursuant to step one. Such Concept shall include a pre-feasibility study of the potential Climate Project and such pre-feasibility study shall be a preliminary evaluation of the key elements which will be required for a Feasibility study (if the Concept is approved). Such pre-feasibility study shall include the following preliminary analyses:
  - (i) needs and options analysis;
  - (ii) technical and operational feasibility assessment;
  - (iii) environmental and social safeguards analysis;
  - (iv) preliminary financial and economic viability (including expectations of any required Government financial support);
  - (v) the suitability of the Concept for development as a Climate Project (screening for Climate suitability);
  - (vi) legal assessment;
  - (vii) institutional capability analysis (which shall describe the capability and capacity of the staff whom the Climate Procurement Authority proposes will be engaged in respect of the preparation, procurement and management of the Climate Project);
  - (viii) in respect of batching, consideration of whether the Climate Project could be batched with other Climate Projects or, if already batched, is the proposed batching suitable to attract interest from investors; and
  - (ix) identification of next steps required in respect of the further development of the potential Climate Project.
- (c) **Step three:** the Climate Procurement Authority shall submit the Concept (including the pre-feasibility study of the potential Climate Project, together with any required additional documents) to the [Office of the President/other suitable entity] for checking and evaluation.
- (d) **Step four:** within 21 days of the receipt of a Concept, the [Office of the President/other suitable entity] shall evaluate the Concept (including the pre-feasibility study) in accordance with the criteria and process issued by the [Office of the President/other suitable entity].

- (e) **Step five:** within 7 days of the completion of its evaluation of a Concept, the [Office of the President/other suitable entity] shall prepare a report on the Concept which shall include a recommendation in respect of whether such Concept (including any financial and economic supports, guarantees or commitments of the State which have been described as required in the Concept) should be approved, returned to the Climate Procurement Authority for amendment or rejected. The [Office of the President/other suitable entity] shall either (i) return the Concept to the Climate Procurement Authority for amendment or notify the Climate Procurement Authority that the Concept has been rejected.
- (f) **Step six:** as soon as reasonably practicable after a decision by the [Office of the President/other suitable entity] in respect of the Concept, the [Office of the President/other suitable entity] shall (i) notify the Climate Procurement Authority if the Concept has been approved, or (ii) return the Concept to the Climate Procurement Authority for amendment or (iii) notify the Climate Procurement Authority that the Concept has been rejected by the [Office of the President/other suitable entity]. If the Concept has been returned by the [Office of the President/other suitable entity] to the Climate Procurement Authority for amendment or rejected by the [Office of the President/other suitable entity], the [Office of the President/other suitable entity] shall notify the Climate Procurement Authority of the reasons for such rejection or return, which may include:
  - (i) why the Concept was not considered suitable for development as a Climate Project;
  - (ii) there was low or no likelihood of the Climate Project providing Value for Money; or
  - (iii) there were risks or other aspects (as described in Step two in paragraph (d) of Article 8(1) of the Concept that caused concern.
- (2) The Climate Procurement Authority may resubmit to the [Office of the President/other suitable entity] a Concept which has been returned to the Climate Procurement Authority for amendment or rejected by the [Office of the President/other suitable entity], provided that the resubmitted Concept must be amended by the Climate Procurement Authority so as to address the amendments or reasons for rejection which have been notified to the Climate Procurement Authority by the [Office of the President/other suitable entity]. In such case, steps two to six described above in this Article 8 shall apply.

## Article 9 Climate Project Preparation

- (1) The steps which shall be followed in respect of the preparation of Climate Projects are:
  - (a) **Step one:** when a Concept is approved by the [Office of the President/other suitable entity], a feasibility study in respect of the proposed Climate Project described in such Concept shall be prepared by or on behalf of the Climate Procurement Authority (using, where required, services called off from a relevant Framework Agreement). Such feasibility study shall be prepared in consultation with the [Office of the President/other suitable entity] in accordance with the requirements of the [Office of the President/other suitable entity].
  - (b) **Step two:** the Climate Procurement Authority shall submit the feasibility study for the proposed Climate Project to the Climate Procurement Authority for checking and evaluation.
  - (c) **Step three:** within 21 days of the receipt of a feasibility study, the [Office of the President/other suitable entity] shall evaluate such feasibility study to assess if the feasibility study demonstrates the project selection criteria issued by the [Office of the President/other suitable entity].
  - (d) **Step four:** within 7 days of the completion of its evaluation of a feasibility study, the [Office of the President/other suitable entity] shall prepare a report on such feasibility study which shall include a recommendation in respect of whether such feasibility study should be approved (including any financial and economic supports, guarantees or commitments of the State which

have been described as required in the feasibility study), returned for amendment by the Climate Procurement Authority or rejected.

- (e) **Step five:** as soon as reasonably practicable after a decision in respect of a feasibility study by the [Office of the President/other suitable entity], the [Office of the President/other suitable entity] shall (i) notify the Climate Procurement Authority if the feasibility study has been approved or (ii) return the feasibility study to the Climate Procurement Authority for amendment or (iii) notify the Climate Procurement Authority that the feasibility study has been rejected by the [Office of the President/other suitable entity] . If the feasibility study has been returned by the Climate Procurement Authority for amendment or rejected by the [Office of the President/other suitable entity], the Climate Procurement Authority shall notify the Climate Procurement Authority of the reasons for such rejection or return, which may include:
    - (i) which project selection criteria have not been met; or
    - (ii) why the project described in the feasibility study is not in the public interest.
  - (f) **Step six:** when a feasibility study is approved by the [Office of the President/other suitable entity], draft Climate Procurement Documents in respect of the Climate Project described in such feasibility study shall be prepared by or on behalf of the Climate Procurement Authority (using, where required, services called off from a relevant Framework Agreement).
- (2) The Climate Procurement Authority may resubmit a revised feasibility study to the [Office of the President/other suitable entity], provided that the resubmitted feasibility study must be amended so as to address the amendments or reasons for rejection which have been notified to the Climate Procurement Authority by the [Office of the President/other suitable entity]. In such case, steps one to seven described above in this Article 9 shall apply.

## CHAPTER THREE

### PERMITTING AND PROPERTY RIGHTS

#### Introduction

#### Environmental and Social Objectives

Delivery of Climate Projects, in practice, requires a balance between the objectives of achieving Climate Projects in the global public interest and impacts on particular persons, which is to say local and site-specific concerns. Climate Projects may be extensive in nature, land-hungry or result in deleterious environmental impacts. They may affect the natural and human environments in ways that should be considered before being allowed to proceed, that require mitigation to be secured or compensatory provision to be made.

The public interest in such a balance can only be determined with sufficient information being available. However, the assembly of such data may be complex and time-consuming. Similarly, the determination of a regulatory approval in the environmental sphere may ordinarily be protracted. Such an approach is important in terms of civil society and natural justice. It is essential that stakeholders, including civil society, be provided with information and be consulted, in order to ensure the success of projects and to limit objections to them. This will assist in determining whether Climate Projects are in the public interest, as will strategic environmental assessment.

Whether a specific Climate Project or types of Climate Project have been included in national strategic documents such as national energy strategies or development plans may assist in determining whether they are in the public interest and might contribute to meeting strategic environmental assessment requirements for a Climate Project. Similarly, regional or local strategies of programmes may assist in addressing the coordination of multiple Climate Projects, aiding siting or routeing. Public consultation, and with key stakeholders such as NGOs, having been undertaken on these strategies can also contribute to meeting stakeholder engagement requirements. Early stakeholder engagement helps to identify issues early and builds a baseline of dialogue with stakeholders that might be built upon by individual projects.

Maintain a national database of the location of major environmental and socially sensitive receptors, such as protected environmental areas and cultural sites, along with the reason for their protection.

In order to reduce complexity, increase efficiency and transparency, and help enhance cooperation of Climate Projects, there should be a competent authority or authorities integrating or coordinating all permit granting processes. It is envisaged that a single national or federal authority should oversee permitting for Climate Projects, which may be administered by the Climate Procurement Authority or may be administered by a separate, one stop shop authority, capable of resolving all permit granting processes. Pre-consultation for environmental assessment and permitting processes should be focussed so that a single procedure should apply, avoiding duplication. This can be a bespoke Climate Project process or a process based upon pre-existing environmental assessment or consenting processes. Consideration can be given to parallel strategic environmental assessment and assessment of individual Climate Project. It will also be valuable to maintain registers of permits, plans and programmes and of sensitive environmental receptors. Laws can provide for such registers in order to facilitate longer term programmes and assessments.

The planning and implementation of Climate Projects should be coordinated to generate synergies where it is feasible from an overall economic, technical, environmental, heritage, climate or spatial planning point of view and with due regard to the relevant safety aspects. Thus, during the planning of the various Climate Projects, it should be possible to give preference to integrating programmes and projects in order to ensure that as little land as possible is taken up. Wherever possible, a common vision or programme is necessary whilst ensuring, where possible, that existing or disused sites or routes are reused, in order to reduce to a minimum any negative social, economic, environmental,

climate and financial impact.

Climate Projects should be given priority status at the national level to ensure rapid administrative treatment and urgent treatment in consenting and in all judicial and dispute resolution procedures relating to them. They should be considered by competent authorities as being in the public interest. For reasons of overriding public interest, Climate Projects which have an adverse impact on the environment should be authorised where necessary assessment of environmental impacts and be addressed at the point of permitting or, because mitigation or compensatory measures can be secured thereafter, prior to implementation of the Climate Project in question. In the latter case, strong regulatory oversight is required.

It is important to streamline and improve the permit granting process for Climate Projects, while respecting, to the extent possible existing national competences and procedures for the construction of new infrastructure. Given the urgency of developing Climate Projects, the simplification of the permit granting process should set a clear time limit for the decision of the relevant authorities regarding the construction of the Climate Project. That time limit should stimulate a more efficient definition and handling of procedures, and should under no circumstances compromise the high standards for the protection of the environment in line with environmental legislation and public participation. This Model Law may establish maximum time limits. However, shorter time limits may well be feasible and, in particular, as regards projects reliant on modest infrastructure interventions, which may not require as complex a permitting process. Competent authorities should be responsible for ensuring compliance with the time limits.

Because of the land-hungry nature of certain Climate Projects, where land for their delivery may be acquired by expropriation if in the public interest, it should be the objective to include powers of land access and expropriation in comprehensive decisions on Climate Projects. This should take account of negotiations with individual landowners to grant access to, ownership of, or a right to occupy, property. In the context of the permit granting process,

Climate Projects should be able to include related infrastructure to the extent that it is essential for the construction or functioning of the Climate Project.

### **Models for coordinating the granting of development consent for the construction and operation of Climate Projects**

There are three legislative schemes available for a simplified consenting procedure for Climate Projects. These are derived from the model contained in European Union regulations for promoting energy projects of common interest. The models are referred to in points (a), (b) and (c) below, and jurisdictions will need to determine which is most effective for them in light of national specificities in their planning and permit granting processes. However, the integrated scheme is the most streamlined and forms the basis for the drafting that follows.

#### **(a) integrated scheme**

The development consent is issued by the competent authority and is the sole legally binding decision arising from the statutory permit granting procedure. Where other authorities are concerned by the Climate Project, they may, in accordance with national law, give their opinion as input to the procedure, which shall be taken into account by the competent authority.

#### **(b) coordinated scheme**

The decision to grant development consent comprises multiple individual legally binding decisions issued by several authorities concerned, which shall be coordinated by the competent authority. The competent authority may establish a working group where all concerned authorities are represented in order to draw up a detailed schedule for the permit granting process and to monitor and coordinate its implementation. The competent authority, after consulting the other authorities concerned, where applicable in accordance with national law, and without prejudice to the relevant time limits specified in this Chapter, establishes on a case-by-case basis a reasonable time limit within which the individual decisions are to be

issued.

The competent authority may take an individual decision on behalf of another authority concerned, where the decision by that authority is not delivered within the time limit and where the delay cannot be adequately justified; or, where provided under national law, the competent authority may consider that another authority concerned has either given its approval or refusal for the project where the decision by that authority is not delivered within the time limit. Where provided under national law, the competent authority may disregard an individual decision of another authority concerned if it considers that the decision is not sufficiently substantiated with regard to the underlying evidence presented by the authority concerned; in doing so, the competent authority shall ensure that the relevant requirements under Union and international law are respected and shall provide reasons for its decision.

(c) **collaborative scheme**

The decision to grant development consent is coordinated by the competent authority. The competent authority shall, after consulting the other authorities concerned, where applicable in accordance with national law, and without prejudice to the relevant time limits specified in this Chapter establish on a case-by-case basis a reasonable time limit within which the individual decisions shall be issued. It shall monitor compliance with the time limits by the authorities concerned.

The competence of the other authorities concerned can either be incorporated into the competence of the designated competent authority or the authorities concerned can maintain, to a certain extent, their independent competence in line with the respective permitting scheme chosen in order to facilitate the issuing of the comprehensive decision on an application for development consent and cooperate with the national competent authority accordingly.

## Article 10 Permitting for Climate Projects

### Comments

This drafting does not contain drafting to address national spatial or other policy with regard to Climate Projects, but can be adapted so as to provide for such policy and to favour Climate Projects that are aligned with such policy.

- (1) Consent under this Law ("**development consent**") is required for development to the extent that the development is or forms part of a Climate Project.
- (2) Development consent may authorise:
  - (a) any Climate Project; and
  - (b) any development, works or activity associated with a Climate Project.
- (3) The [competent authority] may by [regulations/guidance] include or exclude development from the provisions of this sub-article.
- (4) To the extent that development consent is required for development, works, operation or other activity, none of the following is required to be obtained for the development or given in relation to it:
  - (a) [list permits, permissions, authorisations, etc.]

- (5) This part of the Law shall apply to [land including land covered by water][onshore and offshore areas and territories][other].

#### **Article 11 Organisation of the permit granting process**

- (1) The [identify single authority] (“**competent authority**”) shall be responsible for facilitating and coordinating the permit granting process for Climate Project and has the function of deciding an application for development consent.
- (2) The grant of development consent shall be a comprehensive decision for the purposes of the permits contained in Article 10(4)(a) and shall contain all such conditions, requirements and restrictions which might otherwise be imposed on such permits.
- (3) The responsibilities of the competent authority referred to in Article 11(1) or the tasks related to it may be delegated to, or carried out by, another authority or a panel of [inspectors/assessors] provided that:
- (a) the competent authority retains oversight of and be accountable for that delegation;
  - (b) where another authority or panel is appointed on behalf of the competent authority this shall take place within [ ] weeks of any application for development consent;
  - (c) only one authority is responsible for each Climate Project, and shall be the sole point of contact for the project promoter in the process leading to the comprehensive decision for that Climate Project and shall coordinate the submission acceptance and consideration of all relevant documents and information.
- (4) The competent authority shall retain the responsibility to establish time limits, without prejudice to the time limits set in Article [list specific time limits].
- (5) Where an authority concerned does not expect to deliver an individual decision or procedure within the set time limit, that authority shall immediately inform the competent authority, providing reasons for the delay. Subsequently, the competent authority shall set another time limit within which that individual decision shall be issued, in compliance with the overall time limits set in Article 13(1) and Article 13(2).
- (6) Without prejudice to [list specific elements of national law], the competent authority shall facilitate the issuing of the development consent. The development consent shall be issued within the time limits set in Article 13(1) and Article 13(2).
- (7) Where an Climate Project requires decisions to be taken in another state or states, the competent authorities shall take all necessary steps for efficient and effective cooperation and communication with competent or other authorities in other states. So far as possible, the competent authority shall endeavour to provide joint procedures, particularly with regard to the assessment of environmental impacts.

#### **Article 12 Transparency and public participation**

- (1) Prior to making an application for development consent to the competent authority, the Private Partner shall serve upon the competent authority notification of its intention to make such an application in written form and shall include a reasonably detailed outline of the Climate Project. The date upon which such notification is served upon the competent authority shall be the “start date”.
- (2) The competent authority shall publish an updated manual of procedures for the granting process applicable to development consent for Climate Project to include at least:
- (a) specifications of the relevant pieces of legislation upon which decisions and opinions are based for the various Climate Project, including environmental law;
  - (b) the list of relevant decisions and opinions to be obtained;

- (c) the names and contact details of the competent authority, other authorities concerned and major stakeholders concerned;
- (d) the work flow, outlining each stage in the process, including an indicative timeline and a concise overview of the decision-making process for the various types of relevant projects of common interest;
- (e) information about the scope, structure and level of detail of documents to be submitted with the application for decisions, including a checklist;
- (f) the stages and means for the general public to participate in the process; and
- (g) the manner in which the competent authority, other authorities concerned and the project promoter shall demonstrate that the opinions expressed in the public consultation were taken into account, for example by showing what amendments were done in the location and design of the Climate Project or by providing reasons why such opinions have not been taken into account.

The manual shall not be legally binding, but it shall refer to or quote relevant legal provisions including this Law.

- (3) The Private Partner shall, within a period of three months following the start date, draw up and submit a concept for public participation to the competent authority, following the process outlined in the manual referred to in Article 12(1). The competent authority may require modifications or approve the concept for public participation within one month of receipt of the concept for public participation, taking into consideration any form of public participation and consultation that took place before the start date, to the extent that such public participation and consultation has fulfilled the requirements of this Article.
- (4) Where the Private Partner intends to make significant changes to an approved concept for public participation, it shall inform the competent authority thereof prior to implementing that concept for public participation. In that case the national competent authority may require modifications.

#### Comments

The reference in paragraph 5 to minimum requirements for consultation can be to a schedule to the Law as enacted or to a general, national standard

- (5) The Private Partner shall carry out at least one public consultation, before the project promoter submits the final and complete application to the competent authority pursuant to Article 13Article 13(7). The public consultation shall inform stakeholders about the Climate Project and shall describe why the Climate Project to be the subject of an application for development consent comprises the most suitable location, trajectory or technology, including, where relevant, in view of adequate climate adaptation considerations for the Climate Project, all impacts relevant under national law, and the relevant issues to be addressed in the application file. The public consultation shall comply with the minimum requirements set out in [annex or schedule or other policy/instrument]. The project promoter shall publish on the website referred to in Article 12(7) a report explaining how the opinions expressed in the public consultations were taken into account by showing the amendments made in the location, trajectory and design of the project, or by providing reasons why such opinions have not been taken into account.
- (6) The Private Partner shall prepare a report summarising the results of activities related to the participation of the public prior to the submission of the application file, including those activities that took place before the start of the permit granting process.

- (7) The Private Partner shall submit the reports referred to in the first and second subparagraphs together with the application for development consent to the national competent authority. The decision as to whether to grant development consent shall take due account of the results recorded in these reports.
- (8) For Climate Projects likely to have a significant transboundary impact in one or more neighbouring states, the relevant information shall be made available to the national competent authorities of the neighbouring countries concerned. The national competent authorities and other persons within the neighbouring countries concerned may participate in the relevant public consultation procedures.
- (9) The Private Partner shall establish and regularly update a dedicated project website with relevant information about the Climate Project, which shall be linked to the competent authority's website.

**Article 13 Duration and implementation of the permit granting process**

Comments
<p>The duration of the process is envisaged to be 6 months in the pre-application process and a maximum of 6 months following application. If shorter periods are desired, it is particularly important to provide for engagement in policy making and setting for the public and stakeholders and it will be necessary to ensure judicial oversight so as to balance public interest with the interest in promoting the Climate Project in question.</p>

- (1) The permit granting process for a Climate Project shall consist of two procedures:
  - (a) the pre-application procedure, covering the period between the start date and the acceptance of the submitted application by the competent authority, which shall take place within an indicative period of [6] months; and
  - (b) the statutory permit granting procedure, covering the period from the date of acceptance of the submitted application until the taking of the comprehensive decision on whether to grant development consent, which shall not exceed [6] months.
- (2) The competent authority shall ensure the combined duration of the two procedures referred to in Article 13(1) does not exceed a period of [12] months.

Comments
<p>The extension power below can be reserved to the executive.</p>

- (3) However, where the competent authority considers that one or both of the procedures will not be completed within the time limits set in Article 13(1), it may extend one or both of those time limits before their expiry and on a case-by-case basis. The competent authority shall not extend the combined duration of the two procedures for more than [nine] months other than in exceptional circumstances [and [with the consent of/after notifying][the [legislature][executive]].
- (4) Where the competent authority extends the time limits, it shall inform the Private Partner and stakeholders concerned and present it with the measures taken, or to be taken, for the conclusion of the permit granting process, with the least possible delay.
- (5) Within [three] months of receipt of the notification, the competent authority shall acknowledge or, if it considers the Climate Project not to be mature enough to enter the permit granting process for development consent, reject the notification, in writing, including on behalf of other authorities

concerned. In the event of a rejection, the competent authority shall provide reasons for its decision, including on behalf of other authorities concerned. The date of signature of the acknowledgement of the notification by the competent authority shall mark the start of the permit granting process.

- (6) The competent authority shall take into consideration in deciding whether to grant development consent
  - (a) any valid studies conducted and permits or authorisations issued for a Climate Project before the project entered the permit granting process in accordance with this Article, and shall not require duplicate studies and permits or authorisations.
  - (b) any [*environmental assessments*] and other documents submitted with the application for development consent
  - (c) any [*spatial or other policy or programme*]
  - (d) [*other*]
- (7) Where the determination of an application for development consent route or location undertaken solely for the specific purpose of any Climate Project including the planning of specific corridors for electricity or other grid infrastructures, cannot be included in the process leading to the comprehensive decision, the corresponding decision shall be taken within a separate period of [six] months, starting on the date of submission of the final and complete application documents for the other infrastructure by the promoter.
- (8) In the circumstances described in Article 13(7), the extension referred to in Article 13(3), shall be reduced to [six] months, other than in exceptional circumstances, including for the procedure referred to in Article 13(7).
- (9) The pre-application procedure shall comprise the following steps:
  - (a) as soon as possible and no later than 6 months of the start date, the competent authority shall determine, on the basis of the checklist referred to in Article 12(2)(e), and in close cooperation with the other authorities concerned, and where appropriate on the basis of a proposal by the Private Partner, the scope of the reports and documents and the level of detail of information to be submitted by the Private Partner, as part of the application for development consent, to apply for the comprehensive decision;
  - (b) the competent authority shall draw up, in close cooperation with the Private Partner and other authorities concerned and taking into account the results of the activities carried out under Article 13(9)(a), a detailed schedule for the development consent granting process in line with the guidelines set out in Article 12(2);
  - (c) upon receipt of the application for development consent, the competent authority shall, where necessary, on its own behalf or on behalf of other authorities concerned, request the project promoter to submit missing information relating to the requested elements referred to in Article 13(9)(a).
- (10) The pre-application procedure shall include the preparation of any environmental reports by the Private Partner, as necessary, including the climate adaptation documentation.
- (11) Within three months of submission of the missing information referred to in Article 13(9)(c), the competent authority shall accept for examination the application in written form or on digital platforms, starting the statutory permit granting procedure referred to in Article 13(9)(b). Requests for additional information may be made, but only where they are justified by new circumstances.
- (12) The Climate Project promoter shall ensure that the application file is complete and sufficient and seek the competent authority's opinion on that matter as early as possible during the permit granting process. The Climate Project promoter shall cooperate fully with the competent authority in order to comply with the time limits set in this Article.

#### **Article 14 Expropriation**

- (1) [...]

#### **Article 15 Use of property owned by the State or other Entity**

- (1) If a Private Partner is authorized, entitled or required to utilize all or a portion of property owned by the State to fulfil its obligations under a Climate Contract, the Private Partner shall enter into a licence, lease or other suitable agreement regulating the terms and conditions of such utilisation with the State, as appropriate.

**CHAPTER FOUR**  
**PROCUREMENT PRINCIPLES AND METHODS**

**Article 16 Equality and Transparency**

- (1) The Climate Procurement Authority shall treat all Bidders equally and without discrimination and, at all times, the Climate Procurement Authority shall act in a transparent and proportionate manner.
- (2) Each Climate Procurement Procedure shall be designed as a fair and transparent procurement procedure.
- (3) The design of a Climate Procurement Procedure shall not be made with the intention of artificially narrowing competition, and for that purpose, a Climate Procurement Procedure shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain Bidders.
- (4) The Climate Procurement Authority shall ensure that the conditions for participation in a Climate Procurement Procedure shall be the same for all Bidders and there shall be no discrimination in respect of any Bidder in any such Climate Procurement Procedure.

**Article 17 Public Interest and Confidentiality**

- (1) In preparation for and throughout a Climate Procurement Procedure, the Climate Procurement Authority shall always safeguard, to the maximum extent possible, the public interest for which it is responsible and has been entrusted by this Law.
- (2) The Climate Procurement Authority, its employees and agents shall not disclose information forwarded to them by a Bidder which the Bidder has reasonably designated as confidential and the Climate Procurement Authority, its employees and agents shall keep confidential Investor Qualification Responses, Bids, Prequalification Responses and any other documents and information submitted by Bidders except:
  - (a) as required by the laws of [country];
  - (b) for the purpose of investigations by State authorities having relevant jurisdiction;
  - (c) to external consultants and advisers of the Climate Procurement Authority engaged to assist with the Climate Procurement Procedure; or
  - (d) to other State departments or agencies in connection with the subject matter of the Climate Procurement Procedure or the Climate Project.
- (3) The Climate Procurement Authority may impose on Bidders requirements aimed at protecting the confidential nature of information which the Climate Procurement Authority makes available throughout a Climate Procurement Procedure.

**Article 18 Permitted Procurement Methods**

Comments
<p>The Model Law features a range of procurement procedures which include:</p> <ul style="list-style-type: none"><li>■ the establishment of an <b>Investor Qualification System</b>. Once established, the need to advertise each Climate Project and have a prequalification process is removed (thus saving time and costs), and contracts for IIPP Collaboration Agreements and Climate Contracts can be awarded</li></ul>

to Qualified Investors pursuant to fast-track mini-procurement competitions amongst Qualified Investors, on a direct award basis by the Climate Procurement Authority to Qualified Investors or in response to an unsolicited proposal received by the Climate Procurement Authority from a Qualified Investor;

- the establishment of **Framework Agreements** in respect of, for example, legal services, financial services, technical services, modelling, surveys and enabling works which will enable the speedy appointment of consultants which will be very useful in terms of accelerating the procurement of Climate Projects; and
- for the purpose of seeking Bids in respect of a proposed Climate Project or a proposed Climate Contract (in addition to, or an alternative to the award of Climate Contracts pursuant to the Investor Qualification System), the Climate Procurement Authority may use one of the following procurement methods:
  - competitive dialogue;
  - negotiated procedure;
  - direct procurement; or
  - restricted procedure.

- (1) The Climate Procurement Authority shall establish and operate an Investor Qualification System as described in Chapter Five of this Law.
- (2) The Climate Procurement Authority may conclude Framework Agreements as described in Chapter Six of this Law.
- (3) Subject to Article 18(5), for the purpose of seeking Bids in respect of a proposed Climate Project or a proposed Climate Contract, the Climate Procurement Authority may use one of the following procurement methods:
  - (a) competitive dialogue as described in Article 26;
  - (b) negotiated procedure as described in Article 27;
  - (c) subject to Article 18(4), direct procurement as described in Article 28;
  - (d) restricted procedure as described in Article 29; and
  - (e) such other method of procurement as may be approved by the [Office of the President] from time to time and published in a Regulation.
- (4) The Climate Procurement Authority may use the direct procurement procedure in the following circumstances:
  - (a) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the Climate Procurement Authority, the time limits in a Climate Procurement Procedure (excluding the direct procurement procedure) cannot be complied with; and
  - (b) where the Climate Contract can only be performed by a particular Bidder for any of the following reasons:
    - (i) competition is absent for technical reasons; or
    - (ii) the protection of exclusive rights, including intellectual property rights,

but only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

- (5) The procurement method used by the Climate Procurement Authority shall be selected by the Climate Procurement Authority having regard to its appropriateness for the type of Climate Contract and/or Climate Project involved.
- (6) A Climate Contract with a Preferred Bidder may only be entered into following the conduct of a Climate Procurement Procedure in accordance with this Law.
- (7) The Climate Procurement Authority shall develop the requirements for a Climate Procurement Procedure for each Climate Contract and such Climate Procurement Procedure shall comply with the provisions of this Law.

## Article 19 Climate Prior Information Notices and Preliminary Market Engagement

### Comments

#### Should a Climate Prior Information Notice be published for a Climate Project?

Given the importance and urgency of the implementation of Climate Projects, prior to the issue of a Climate Contract Notice, it is recommended that the Climate Procurement Authority should carry out one or more of the following activities:

- give the market early warning of the proposed Climate Procurement Procedure;
- advertise any preliminary market engagement which is to be carried out in advance of progressing the Climate Procurement Procedure; and/or
- advertise a Bidders' conference in respect of the Climate Project, which is being held by the Climate Procurement Authority.

Where possible, it is recommended that the Climate Procurement Authority should publish a Climate Prior Information Notice at least one or two months in advance of the anticipated publication of the Climate Contract Notice for the Climate Project for the purpose of making known its intention to procure the particular Climate Project.

Publication of a Climate Prior Information Notice in respect of any preliminary market engagement has the advantage of advertising the intention to carry out market engagement to a wider audience. However, in terms of the Model Law, a Climate Prior Information Notice does not need to be used for such engagement but the Climate Procurement Authority must comply with Article 19 in carrying out any market engagement. The Climate Procurement Authority must also be aware of, and comply with, the requirements of this Article in terms of how the Climate Procurement Authority must deal with the prior involvement of Bidders, so as to avoid distortion of any Climate Procurement Procedure.

#### What is the purpose of preliminary market engagement?

The overriding purpose of preliminary market engagement is to ensure that Bidders are fully aware of the particular Climate Project in advance of publication of the publication of the Climate Contract Notice for that Climate Project. This will allow interested organisations to respond robustly to the subsequent prequalification process.

Preliminary market engagement should be stimulating and encourage interest from the market, should demonstrate that the Climate Procurement Procedure will be transparent, proportionate, efficient and unbiased, that no Bidder has an inherent advantage at the outset and that the Climate Procurement Authority is an organisation that Bidders can do business with. Preliminary market engagement should also reassure the market that the Climate Procurement Authority has the

competencies, resources and capability to see the Climate Project through to completion, and that the Climate Procurement Authority is committed to the Climate Project.

The topics which could be covered in preliminary market engagement could include:

- the Climate Procurement Authority's progress on the realisation of its NDCs and its Net Zero planning;
- discussion of the terms of the proposed Climate Contract;
- background technical information about the Climate Project, for example, in relation to the site, ground conditions, enabling works, management of risk etc.
- the prequalification process (to ensure that Bidders can prepare);
- discussion about scope and commercial issues to ensure that the Climate Project is attractive to Bidders; and
- proposed deliverables and evaluation criteria.

The aim should be to assist Bidders to be well prepared prior to the entering the Climate Procurement Procedure allowing the overall procurement programme to be reduced.

### **Should the Climate Procurement Authority hold a Bidders' conference?**

A Bidders' conference is a useful means of reinforcing a Climate Project's profile in the market and creating an informal forum for the market to engage with the Climate Procurement Authority. A Bidders' conference is also an opportunity for smaller suppliers to meet with larger ones, and can operate as an effective forum for creating supply chain linkages.

If a Bidders' conference has not been undertaken as part of any preliminary market engagement, it is recommended that the Climate Procurement Authority should hold a Bidders' conference for the Climate Project not less than two weeks following publication of the Climate Contract Notice (date of the Bidders' conference should be included in the Climate Contract Notice) This will enable discussion with Bidders in respect of how the Climate Procurement Procedure as a whole will be structured. It will also allow Bidders to seek clarification on any issue.

The Bidders' conference should also be used as a forum for convincing Bidders that the Climate Procurement Authority is prepared and has senior level backing for the Climate Project: consequently, senior management and government sponsors should ideally present at the Bidders' conference in order to confirm the need for the Climate Project and the Climate Procurement Authority's desire to engage with Bidders to realise the Climate Project. It is helpful if the Bidders' Day includes a visit to the proposed site(s) of the Climate Project.

### **What if no Bidders come forward?**

Where there are serious concerns about the level of Bidder interest in a Climate Project, the Climate Procurement Authority should consider delaying the start of the formal Climate Procurement Procedure. It may need to change the parameters of the Climate Project to make it more attractive, to reduce perceived barriers to entry or involvement, or to undertake other market creation or stimulating activities.

### *Climate Prior Information Notices*

- (1) Prior to the publication of a Climate Contract Notice, the Climate Procurement Authority may make known their intentions of a planned procurement or procurements for Climate Projects through the publication of a Climate Prior Information Notice.
- (2) Any Climate Prior Information Notices shall, as a minimum, contain the following information:

- (a) name, address, telephone, email and internet address of the Climate Procurement Authority;
  - (b) information about the Climate Contract (including location, brief description of the scope and nature and extent of works, services and/or supplies (as appropriate)) and the Climate Project;
  - (c) estimated date for publication of the associated Climate Contract Notice;
  - (d) date of dispatch of the Climate Prior Information Notice; and
  - (e) any other relevant information (including any plans for preliminary market engagement).
- (3) The publication of a Climate Prior Information Notice by the Climate Procurement Authority is subject to the following rules:
- (a) the Climate Prior Information Notice shall be published in [local language] on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority;] and
  - (b) the Climate Prior Information Notice shall be published in English on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority].

*Preliminary market engagement*

- (4) Before commencing a Climate Procurement Procedure, the Climate Procurement Authority may conduct market engagement with a view to preparing the Climate Procurement Documents, the Climate Contracts, any other documents or information for the purpose of a Climate Project and/or a Climate Procurement Procedure, and/or informing Bidders of their procurement plans and requirements.
- (5) For this purpose, the Climate Procurement Authority may, for example, seek or accept advice from independent experts or authorities or from market participants including Qualified Investors.
- (6) Such advice may be used in the preparation of the Climate Procurement Documents, the Climate Contracts, any other documents or information for the purpose of a Climate Project and/or a Climate Procurement Procedure, and/or the planning and conduct of a Climate Procurement Procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency as described in Article 16.

*Prior involvement of Bidders*

- (7) Where a Bidder or an undertaking related to a Bidder or Qualified Investor:
  - (a) has advised the Climate Procurement Authority, whether in the context of Article 19(4), Article 19(5), Article 19(6), or otherwise, or
  - (b) has otherwise been involved in the preparation of a Climate Procurement Procedure,
 the Climate Procurement Authority shall take appropriate measures to ensure that such Climate Procurement Procedure is not distorted by the participation of that Bidder or Qualified Investor in such Climate Procurement Procedure.
- (8) Such measures shall include:
  - (a) the communication to the other Bidders of relevant information exchanged in the context of or resulting from the involvement of the Bidder in the preparation of the Climate Procurement Procedure; and
  - (b) the fixing of adequate time limits for the receipt of Bids.

- (9) The Bidder concerned shall only be excluded from the Climate Procurement Procedure where there are no other means to ensure compliance by the Climate Procurement Authority with its duty to treat Bidders equally and without discrimination in accordance with Article 16.
- (10) Prior to any such exclusion, Bidders shall be given the opportunity to prove that their involvement in preparing the Climate Procurement Procedure is not capable of distorting competition.

## CHAPTER FIVE

### FORMATION OF INSTITUTIONAL INVESTOR PUBLIC PARTNERSHIPS

#### Introduction

The key principles in respect of 'Early Investor Involvement' are:

- Market engagement;
- Set up Investor Qualification System – open system where investors are pre-qualified prior to detailed discussions on projects and programmes;
- Investor(s) selected to work with the Government – alternative methods for selection (fast track competition, direct award or unsolicited investor proposal);
- IIPP Collaboration Agreement setting out the scope of the early investor involvement and key parameters;
- Selected investor(s) work with Government to develop the procurement strategy and project pipeline including the commissioning of early design, surveys and feasibility studies;
- Selected investor(s) work with the Government in the selection of contractor(s) for the relevant project or pipeline. Alternative procurement methods have been included (including use of qualification systems, frameworks and fast track procurement procedures for single projects).

#### Model Documents required for this Chapter

The following model documents will need to be drafted:

- Model IIPP Collaboration Agreement;
- Model Investor Qualification System Notice; and
- Model Investor Qualification Document;

#### Guidelines relevant to this Chapter

Guidelines could be developed in respect of the following topics:

- Operation of the Investor Qualification System
- Content of IIPP Collaboration Agreements

#### Article 20 Establishment of an Investor Qualification System

- (1) The Climate Procurement Authority shall establish and operate a system of qualification of Investors for Climate Projects in accordance with this Law.
- (2) The Climate Procurement Authority shall commence the establishment of an Investor Qualification System by the publication of an Investor Qualification System Notice, which shall invite interested Investors to submit Investor Qualification System Responses to the Climate Procurement Authority.
- (3) If an Investor wishes to participate in the Investor Qualification System published in an Investor Qualification System Notice, then such Investor shall contact the Climate Procurement Authority.
- (4) The Climate Procurement Authority shall issue an Investor Qualification System Document to all Investors who contact the Climate Procurement Authority, so as to provide such Investors with the information required to prepare and submit an Investor Qualification System Response.

- (5) The Climate Procurement Authority shall ensure that Investors are at all times able to request qualification.
- (6) A written record of qualified Investors in respect of the Investor Qualification System shall be kept and the Investor Qualification System may be divided into categories according to the type of Climate Project (which may include geographical area or size of Climate Project) for which the qualification is valid.
- (7) Any charges that are billed by the Climate Procurement Authority in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the Investor Qualification System shall be proportionate to the generated costs to the Climate Procurement Authority.

**Article 21 Requirements for the Investor Qualification System Notice and the Investor Qualification System Document**

- (1) The Investor Qualification System Notice and the Investor Qualification System Document shall neither solicit nor accept any information from Investors containing the following information:
  - (a) commercial proposals; or
  - (b) technical proposals.
- (2) The publication of the Qualification System Notice by the Climate Procurement Authority is subject to the following rules:
  - (c) the Investor Qualification System Notice shall be published in [local language] on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority;] and
  - (d) the Investor Qualification System Notice shall be published in English on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority].
- (3) The Investor Qualification System Notice shall include, as a minimum, a description of the scope of the Investor Qualification System and how to obtain the Investor Qualification System Document.
- (4) The Climate Procurement Authority shall establish objective rules and criteria in the Investor Qualification System Document for:
  - (a) the exclusion and selection of Investors requesting qualification;
  - (b) the operation of the Investor Qualification System, covering matters such as:
    - (i) registration in the Investor Qualification System;
    - (ii) periodic updating of the qualifications for the Investor Qualification System;
    - (iii) notification by Investors of any change in their Investor Qualification System Responses before and after the Investor Qualification System is established;
    - (iv) the duration of the Investor Qualification System;
    - (v) removal from the Investor Qualification System; and
    - (vi) the formation of institutional investor public partnerships.
- (5) The rules and criteria referred to in Article 21(4) may be updated as required and if so updated, shall be communicated to all Qualified Investors, and Investors who contact the Climate Procurement Authority.

- (6) The Climate Procurement Authority may bring the qualification of an Investor to an end only for reasons expressed in this Law or in the rules and criteria established pursuant to Article 21(4).
- (7) Any intention to bring the qualification of an Investor to an end shall be notified in writing to the Investor at least 15 days before the date on which the qualification is due to end, together with the reason or reasons justifying the proposed action.
- (8) An Investor shall have the right to request from the Climate Procurement Authority in writing, necessary information and clarifications in connection with the Investor Qualification System Document. As soon as reasonably possible, the Climate Procurement Authority shall share such information or clarification (together with the request) with all Investors provided that doing so will not disclose any confidential information or proprietary intellectual property of the Investor making such request.
- (9) The rules and criteria established pursuant to Article 21(5)(a) relating to the exclusion and selection of Investors requesting qualification shall be limited to such requirements that are appropriate to ensure that an Investor (a) has the economic and financial standing and the professional ability, to participate in the Investor Qualification System, and perform the obligations of the Investor pursuant to an IIPP Collaboration Agreement, (b) is not disqualified on the grounds described in Article 22, and (c) has instituted and complies with appropriate environmental, social and governance policies. All rules and criteria shall be related and proportionate to the subject-matter of the Investor Qualification System.

## Article 22 Grounds for Disqualification

Comments
To be customised on a jurisdiction-specific basis.

- (1) If any of the following circumstances apply to an Investor, such Investor shall be disqualified from the procurement of the Investor Qualification System, the Investor Qualification System itself and/or any Climate Procurement Procedure:
  - (a) the Investor is insolvent or has become bankrupt;
  - (b) the Investor has undergone or completed guardianship, bankruptcy proceedings or has been placed under liquidation by court order;
  - (c) the business of the Investor is being run by a court or by a judicial agent or an administrator whether voluntarily or by court decision;
  - (d) the Investor's business activities have been suspended by a court decision;
  - (e) the Investor has tax debts or is in debt of any nature to [country];
  - (f) the Investor does not have the legal capacity to enter into the IIPP Collaboration Agreement or other Climate Contract where they are a contracting party.
  - (g) the Investor has, or directors or officers of the Investor with powers of representation, decision or control have, been convicted in any jurisdiction, by a final court order in the preceding two years for criminal offences in relation to their business or professional behaviour or in relation to the making of false statements or giving of incorrect or misleading information on their qualifications with a view to entering into a contract with any public institution;
  - (h) the Investor has been disqualified or sanctioned in the preceding [five] years as a result of administrative suspensions or licensing procedures in [country] or elsewhere, and such

disqualification or sanction is relevant to the Investor Qualification System and/or any Climate Project;

- (i) the Investor is disqualified on any of the grounds specified in this Law, the Investor Qualification System Document, the Request for Proposals or any other document issued in respect of a Climate Procurement Procedure;
  - (j) the Investor has, or directors or officers of the Investor with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for any Impairing Practice, Collusive Practice, Corrupt Practice or Fraudulent Practice or Obstructive Practice; or
  - (k) the Investor has, or directors or officers of the Investor with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for money laundering, an offence in connection with the proceeds of drug trafficking, a terrorism offence or offence linked to terrorism offences, terrorist financing, or child labour or other forms of trafficking in human beings.
- (2) The Climate Procurement Authority may apply to the relevant competent authority to obtain further information regarding the Investor and, in particular, details of any court orders or decisions, or details of convictions for the offences listed in Article 22(1) if the Climate Procurement Authority considers it needs such information to decide on any disqualification pursuant to Article 22(1).
  - (3) The Climate Procurement Authority shall disqualify any Investor who has at any time submitted false information or submitted falsified or erroneous certificates containing material errors or omissions to any Government department or agency in [country].
  - (4) The Climate Procurement Authority may require an Investor to provide such information as the Climate Procurement Authority considers it needs to consider disqualification.

### **Article 23 Submission and Evaluation of Investor Qualification System Responses**

- (1) Investor Qualification System Responses shall be submitted by Investors in accordance with the requirements stated in the Investor Qualification System Document.
- (2) Investor Qualification System Responses shall be evaluated by the Climate Procurement Authority in accordance with the rules and criteria identified in the Investor Qualification System Document.
- (3) Where information or documentation submitted by Investors is or appears to be incomplete or erroneous, or where specific documents are missing, the Climate Procurement Authority may request the Investors concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of Article 16.
- (4) The outcome of each evaluation including the individual results for an Investor together with reasons why such results were achieved, shall be contained in reports prepared by the Climate Procurement Authority, and shall be sent by the Climate Procurement Authority to [Office of the President] and [identify suitable Government department with audit function].
- (5) Following the completion of the evaluation each Investor Qualification System Response by the Climate Procurement Authority, only those Investors selected by the Climate Procurement Authority from time to time in accordance with the rules and criteria identified in the Investor Qualification System Document may be admitted to the Investor Qualification System.
- (6) The Climate Procurement Authority shall publish on its website the identity of the Investors who have been admitted to the Investor Qualification System. Investors who have not been admitted to the Investor Qualification System shall be notified by the Climate Procurement Authority.

## Article 24 Formation of Institutional Investor Public Partnerships

### *Methods*

- (1) A Qualified Investor and the Climate Procurement Authority may form an institutional investor public partnership by using one of the following methods:
  - (a) the Climate Procurement Authority shall invite each Qualified Investor to participate in an IIPP Climate Procurement Procedure on the basis of the rules and criteria in the Investor Qualification System Document, and award an IIPP Collaboration Agreement and/or Climate Contract to a Qualified Investor on the basis of the outcome of that IIPP Climate Procurement Procedure;
  - (b) the Climate Procurement Authority shall invite a limited number of Qualified Investors to participate in an IIPP Climate Procurement Procedure on the basis of the rules and criteria in the Investor Qualification System Document and such criteria and rules shall set out how the Climate Procurement Authority intends to apply such limitation. The Climate Procurement Authority shall award an IIPP Collaboration Agreement and/or Climate Contract to a Qualified Investor on the basis of the outcome of that IIPP Climate Procurement Procedure;
  - (c) direct award of an IIPP Collaboration Agreement and/or Climate Contract by the Climate Procurement Authority to a Qualified Investor selected by the Climate Procurement Authority on the basis of the rules and criteria in the Investor Qualification System Document; or
  - (d) subject to Article 24(6), the Climate Procurement Authority accepts an unsolicited proposal from a Qualified Investor on the basis of the rules and criteria in the Investor Qualification System Document and awards an IIPP Collaboration Agreement and/or Climate Contract to that Qualified Investor.
- (2) Information about the award of Climate Contracts to Qualified Investors shall be published by the Climate Procurement Authority on its website and on the website of [e.g. the national procurement authority].
- (3) In respect of a Framework Agreement, a Qualified Investor awarded a Climate Contract pursuant to Article 24(1) may:
  - (a) become a joint employer with the Climate Procurement Authority and enter into a Climate Contract based on a Framework Agreement with a Private Partner;
  - (b) may receive the benefit of any works, services or supplies which are performed by a Private Partner under a Climate Contract based on a Framework Agreement.
- (4) A Qualified Investor awarded a Climate Contract pursuant to Article 24(1) may collaborate with the Climate Procurement Authority for the purpose of seeking Bids in respect of a proposed Climate Project or a proposed Climate Contract, where the Climate Procurement Authority is using one of the procurement methods described in Article 18(3). The Climate Procurement Authority shall take appropriate measures to ensure that such Climate Procurement Procedure is not distorted by the involvement of that Qualified Investor in such Climate Procurement Procedure.

### *Purposes of an institutional investor public partnership*

- (5) The purposes of an institutional investor public partnership are to enable the collaboration of Qualified Investors and the Climate Procurement Authority to:
  - (a) identify priority Climate Projects (pre-procurement) by reference to criteria such as:
    - (i) strategic importance to the delivery of the State's [NDCs and its Net Zero planning];
    - (ii) the level of economic, environmental and social benefit which a particular Climate Project would deliver to [country];

- (iii) prospects of successful delivery (including feasibility from a technical, financial and/or legal perspective, and the management and mitigation of risk);
  - (iv) the ability for a Climate Project to be scaled up; and
  - (v) whether delivery of a Climate Project has the opportunity to unlock further potential funding; and
- (b) develop and implement procurement strategies and project pipeline for Climate Projects to meet the desired timescales for the realisation of the State's NDCs;
  - (c) commission of early design, surveys and feasibility studies;
  - (d) selection of contractor(s) for the relevant Climate Project or pipeline using the procurement methods described in this Law; and
  - (e) successfully deliver Climate Projects.

#### *Unsolicited Proposals*

Comments
To be customised on a jurisdiction-specific basis.

- (6) An unsolicited proposal submitted by a Qualified Investor to the Climate Procurement Authority shall satisfy all of the following criteria:
  - (a) the proposed Climate Project demonstrates the implementation of private capital at speed and at scale;
  - (b) the proposed Climate Project transfers potential risks to the Person best able to manage those risks. For this purpose, the assessment of risk allocation shall be carried out on the same basis as if the proposed Climate Project was originated by the Climate Procurement Authority and not by the Qualified Investor;
  - (c) the proposed Climate Project is aligned with [national NDC and Net Zero development plans], and fulfils the criteria to be considered a Climate Project;
  - (d) the Qualified Investor has submitted full evidence of qualifications and experience to carry out the Climate Project, as part of the unsolicited proposal. Such evidence shall be commensurate to the scope of the unsolicited proposal and include as a minimum:
    - (i) details of the Qualified Investor's qualification and experience in respect of implementing projects similar in nature and size to that proposed in the unsolicited proposal; and
    - (ii) details of the Qualified Investor's financial capability to implement the unsolicited proposal;
  - (e) the Qualified Investor has given confirmation that the unsolicited proposal was independently initiated and developed by the Qualified Investor;
  - (f) to the extent relevant to the proposed Climate Project, the Qualified Investor demonstrates the inclusion of innovation in the unsolicited proposal;

- (g) the Qualified Investor has carried out and provided as part of the unsolicited proposal a pre-feasibility study, including without limitation a financial model, cost benefit analysis, risk allocation matrix and business plan; and
- (h) such other criteria as may be relevant in the context of the State's [national NDC and Net Zero development plans].

## CHAPTER SIX

### FRAMEWORK AGREEMENTS

#### Introduction

A Framework Agreement is an agreement between the Climate Procurement Authority with one or more providers, the purpose of which is to govern the terms (particularly relating to price, quality and quantity) on which a defined scope of goods, services or works may be ordered when required by the Climate Procurement Authority over a defined period without the Climate Procurement Authority having to commence a new public procurement each time the goods, services or works are required.

The Climate Procurement Authority is not obliged to place orders for the goods, services or works, unless and until the Climate Procurement Authority needs those goods, services or works and 'calls off' a specific order. The Framework Agreement sets out the legal and commercial terms under which the provider(s) will provide goods, services or works at whichever point in the future they are required. The Framework Agreement also sets out the process for 'call off' and a standard 'call off' purchase order and contract terms.

Framework Agreements will typically be used where the Climate Procurement Authority knows they are likely to have a need for particular goods, services or works at short notice, but they are unsure of the extent or precise timing. Framework agreements are commonly set up to cover the procurement of consultancy services. In the context of the Model Law, Framework Agreements in respect of, for example, legal services, financial services, technical services, modelling, surveys and enabling works will be very useful in terms of accelerating the procurement of Climate Projects.

The Framework Agreement itself should be procured by the Climate Procurement Authority under a Climate Procurement Procedure so that the financial strength and technical capacity of the providers, and their Bids for the requirements of the Framework Agreement, can be evaluated. Those providers who are successfully appointed to the framework will generally sit on the framework "panel" for a fixed period of time – for example, five years or such period as will not preclude a competitive market or such period over which the prices tendered by provider represent value for money.

Generally, there are two types of Framework Agreements:

- **Single provider Framework Agreements:** where only a single provider is selected and any 'call-off' contracts are based on the terms laid down in the Framework Agreement.
- **Multi-provider Framework Agreements:** where a number of providers are appointed to the framework and any 'call-off' contracts can be awarded either by:
  - **direct award** based on the terms laid down in the Framework Agreement. This may include adopting an initial ranking of the providers on the basis of the award criteria used at the time that the framework was established. For example, a Framework Agreement might be concluded with five providers for the supply of certain services, separately priced, and for delivery within set timescales. If the Climate Procurement Authority simply wants to order the defined services, it would go to the provider offering the most economically advantageous offer, using the original award criteria, without reopening the competition. If that provider for any reason could not supply the items required at that time (e.g. lack of capacity to provide the services), the Climate Procurement Authority would go to the provider offering the next most economically advantageous offer, and so on. Equally, if it is made clear in the Framework Agreement, the placing of orders by the Climate Procurement Authority could be made on a random basis, by percentage allocation, or through an agreed rotation between providers.

- **Mini Competition:** where not all the terms are set out in the Framework Agreement, the Climate Procurement Authority may run a mini competition between providers who are capable of performing the proposed 'call-off' contract. Under a mini-competition, the 'call-off' contract must be placed with the provider who has submitted the best tender in accordance with previously agreed award criteria.

The main advantage to the Climate Procurement Authority of using a Framework Agreement is that the Climate Procurement Authority does not need to use a full public procurement procedure every time a requirement to purchase goods, services or works arises. Instead, the Climate Procurement Authority uses the full public procurement procedure once in respect of the procurement of the Framework Agreement itself and uses the 'call off' process in the Framework Agreement to place orders for goods, services or works. This will obviously reduce tendering costs for both the Climate Procurement Authority and Bidders. It also means there is less 'downtime' between identifying the need for specific goods, services or works and fulfilling that need, which considering how lengthy the public procurement process can be, is a considerable benefit to the Climate Procurement Authority. Another advantage is that there are potential savings to purchasing authorities because of economies of scale arising out of the 'bulk' purchasing which is possible under a framework arrangements, and this can be used to prompt providers to offer more competitive prices and volume discounts, as well as other 'value added' benefits such as training.

A disadvantage of using a Framework Agreement for Climate Procurement Authority could be that Framework Agreements can be relatively unresponsive to change – there may be new providers and/or new solutions within the market that were not reflected when the Framework Agreement was initially set up. However, Framework Agreements do not place any obligation on the Climate Procurement Authority to actually buy anything. Therefore, if a requirement for goods, services or works cannot be fulfilled by the Framework Agreement or if the Climate Procurement Authority believes that they can achieve better value for money by not using the Framework Agreement, then they can go procure their requirement by using the other Climate Procurement Procedures in this Model Law.

Electronic auctions are a procurement tool which can be layered on to use of a Framework Agreement to improve value for money by encouraging Bidders to bid lower prices and offer their best terms in order to win the work from Climate Procurement Authority.

#### **Model Documents required for this Chapter**

The following model documents will need to be drafted:

- Model Framework Agreement (including call-off contract).

#### **Guidelines relevant to this Chapter**

Guidelines could be developed in respect of the following topics:

- Structuring a Framework Agreement; and
- Operation of Framework Agreements.

### **Article 25 Framework Agreements**

- (1) The Climate Procurement Authority may conclude Framework Agreements, provided that they apply the procedures provided for in this Law.
- (2) The term of a Framework Agreement shall not exceed 5 years, save in exceptional cases duly justified, in particular by the subject-matter of the Framework Agreement.

- (3) Climate Contracts based on a Framework Agreement shall be awarded in accordance with the procedures laid down in this Article 25.
- (4) Those procedures may be applied only between the Climate Procurement Authority and those parties to the Framework Agreement as concluded.
- (5) Climate Contracts based on a Framework Agreement may under no circumstances entail substantial modifications to the terms laid down in that Framework Agreement, in particular in the case referred to in Article 25(6).

*Awarding contracts based on a Framework Agreement*

- (6) Where a Framework Agreement is concluded with a single party:
  - (a) Climate Contracts based on that Framework Agreement shall be awarded within the limits laid down in the Framework Agreement; and
  - (b) for the award of those Climate Contracts, the Climate Procurement Authority may consult the party which is party to the Framework Agreement in writing, requesting it to supplement its Bid as necessary.
- (7) Where a Framework Agreement is concluded with more than one party, Climate Contracts based on that Framework Agreement shall be awarded in one or more of the following ways:
  - (a) following the terms and conditions of the Framework Agreement, without reopening competition, where the Framework Agreement sets out:
    - (i) all the terms governing the provision of the works, services and supplies concerned, and
    - (ii) the objective conditions for determining which of the parties that are party to the Framework Agreement shall perform the works, services and supplies concerned;
  - (b) where the Framework Agreement sets out all the terms governing the provision of the works, services and supplies concerned:
    - (i) partly without reopening competition in accordance with Article 25(7)(a), and
    - (ii) partly through reopening competition amongst the parties which are party to the Framework Agreement,  
  
where this possibility has been stipulated by the Climate Procurement Authority in the Framework Agreement;
  - (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the Framework Agreement, through reopening competition amongst the parties to the Framework Agreement.
- (8) For the purposes of Article 25(7)(b):
  - (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the Framework Agreement shall be made pursuant to objective criteria, which shall be set out in the Framework Agreement;
  - (b) the Framework Agreement shall also specify which terms may be subject to reopening of competition.
- (9) The possibilities provided for in Article 25(7)(b) shall also apply to any lot of a Framework Agreement for which all the terms governing the provision of the works, services and supplies concerned are set

out in the Framework Agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.

- (10) The competitions referred to in Article 25(7)(b) and Article 25(7)(c) shall be based on the same terms as applied for the award of the Framework Agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the Framework Agreement, in accordance with the following procedure:
  - (a) for every Climate Contract to be awarded under the Framework Agreement, the Climate Procurement Authority shall consult in writing with the parties to the Framework Agreement that are capable of performing the Climate Contract;
  - (b) the Climate Procurement Authority shall fix a time limit which is sufficiently long to allow Bids for each specific Climate Contract to be submitted, taking into account factors such as the complexity of the subject-matter of the Climate Contract and the time needed to send in Bids;
  - (c) Bids shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
  - (d) the Climate Procurement Authority shall award each Climate Contract to the Bidder that has submitted the best tender on the basis of the award criteria set out in the Framework Agreement.

*Division of Framework Agreements into lots*

- (11) The Climate Procurement Authority may decide to award a Framework Agreement in the form of separate lots and may determine the size and subject-matter of such lots.
- (12) The Climate Procurement Authority shall indicate, in the Climate Contract Notice, whether Bids may be submitted for one, for several or for all of the lots.
- (13) The Climate Procurement Authority may, even where Bids may be submitted for several or all lots, limit the number of lots that may be awarded to one Bidder, provided that the maximum number of lots per Bidder is stated in the Climate Contract Notice.
- (14) The Climate Procurement Authority shall indicate in the Request for Proposals the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one Bidder being awarded more lots than the maximum number.
- (15) Where more than one lot may be awarded to the same Bidder, the Climate Procurement Authority may award contracts combining several or all lots where they have specified in the Climate Contract Notice that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

## CHAPTER SEVEN

### CLIMATE PROCUREMENT PROCEDURES

#### Introduction

for the purpose of seeking Bids in respect of a proposed Climate Project or a proposed Climate Contract (in addition to, or an alternative to the award of Climate Contracts pursuant to the Investor Qualification System), the Climate Procurement Authority may use one of the following procurement methods:

- competitive dialogue;
- negotiated procedure;
- direct procurement; or
- restricted procedure.

#### Model Documents required for this Chapter

The following model documents will need to be drafted:

- Model Climate Prior Information Notice;
- Model Climate Contract Award Notice;
- Model Climate Contract Notice;
- Model Prequalification Document;
- Model Request for Proposals; and
- Model Template evaluation report.

#### Guidelines relevant to this Chapter

Guidelines could be developed in respect of the following topics:

- Planning for the procurement of Climate Projects and Climate Contract;
- Use of the different types of Procurement Methods;
- Development of Climate Procurement Documents; and
- Negotiating Climate Contracts.

## Comments

### What is competitive dialogue?

The Model Law requires a Climate Procurement Authority which is undertaking a competitive dialogue to:

- open a dialogue with prequalified Bidders to identify and define the means best suited to satisfying its needs;
- continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs; and
- having declared that the dialogue is concluded ask each Participant to submit their final Bids on the basis of the solution or solutions presented and specified during the dialogue.

Competitive dialogue may take place in successive stages to reduce the number of solutions to be discussed by applying the contract award criteria.

In practice, dialogue is conducted through a series of meetings with each Bidder and the Climate Procurement Authority. These meetings typically include:

- "kick-off" briefing meetings;
- technical meetings;
- commercial meetings (legal, financial and insurance).

The basic rules for competitive dialogue include:

- The Climate Procurement Authority may discuss all aspects of the procurement with the Bidders;
- The Climate Procurement Authority shall ensure equality of treatment among all Bidders by not providing information in a discriminatory manner which may give some Participants an advantage over others;
- The Climate Procurement Authority shall not reveal to the other Bidders' solutions or other confidential information proposed by a Bidder without its agreement;
- Final Bids shall contain all of the elements required and necessary for the performance of the Climate Contract;
- Final Bids may be clarified, specified and optimised but that process should not involve changes to the essential aspects of a final Bid or the Climate Procurement Documents, distort competition or have a discriminatory effect; and
- The Climate Procurement Authority shall assess the final Bids received on the basis of the award criteria set out in the Request for Proposals.

### *Starting the procedure, prequalification and selection*

- (1) If the Climate Procurement Authority has decided to use competitive dialogue as its procurement method pursuant to Article 18(3), the Climate Procurement Authority shall commence a competitive dialogue procedure for the award of a Climate Contract by the publication of a Climate Contract Notice inviting interested Bidders to submit Prequalification Responses to the Climate Procurement Authority.
- (2) Each competitive dialogue shall be conducted in accordance with this Article 26 and this Law.

- (3) If a Bidder wishes to participate in a prequalification procedure published in a Climate Contract Notice, then such Bidder shall contact the Climate Procurement Authority named in the Climate Contract Notice and submit a Prequalification Response to such Climate Procurement Authority by the deadline stated in the Climate Contract Notice, and in accordance with the requirements of the Prequalification Document.
- (4) Subject to Article 40, the minimum time limit for submission of Prequalification Responses shall be 30 days from the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (5) The Climate Procurement Authority may hold a meeting with all Bidders to discuss the Climate Project, the Climate Contract, the Prequalification Document and the associated Climate Procurement Procedure at least 10 days after the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (6) The Prequalification Responses which are submitted by Bidders shall be evaluated by the Climate Procurement Authority in accordance with the Prequalification Document.
- (7) Only those Bidders invited to do so by the Climate Procurement Authority following its evaluation of the Prequalification Responses may submit a Bid.
- (8) The Climate Procurement Authority may limit the number of suitable Bidders to be invited to participate in the Climate Procurement Procedure in accordance with Article 30.
- (9) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of Prequalification Responses.
- (10) The Bidders who have been selected by the Climate Procurement Authority and the Bidders who have not been selected by the Climate Procurement Authority will be notified by the Climate Procurement Authority.

*Issue of the Request for Proposals, dialogue, submission of final Bids, negotiation and contract award*

- (11) Only those Bidders selected by the Climate Procurement Authority may participate in the dialogue and they will receive a Request for Proposals. Such Request for Proposals shall be issued simultaneously to those Bidders as soon as reasonably practicable after the notification of Bidders pursuant to Article 26(10).
- (12) The Climate Procurement Authority may hold a meeting with each Bidder to discuss the Climate Project, the Climate Contract, the Request for Proposals and the associated Climate Procurement Procedure at least 10 days after the date on which the Request for Proposals is issued by the Climate Procurement Authority.
- (13) The Climate Procurement Authority:
  - (a) shall open, with each Bidder, a dialogue the aim of which shall be to identify and define the means best suited to satisfying the Climate Procurement Authority's needs. Such dialogue shall include separate meetings with each Bidder;
  - (b) may discuss all aspects of the procurement with each Bidder during this dialogue; and
  - (c) shall invite draft Bids and submissions for dialogue meetings, as well as initial Bids if the option described in Article 26(16) is being applied to the competitive dialogue.
- (14) During the dialogue, the Climate Procurement Authority shall ensure equality of treatment among all Bidders and, to that end, the Climate Procurement Authority shall not provide information or hold dialogue meetings in a discriminatory manner which may give some Bidders an advantage over others.

- (15) Without prejudice to Article 17(2), the Climate Procurement Authority shall not reveal to the other Bidders the solutions proposed or other confidential information communicated by a Bidder participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (16) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the evaluation criteria and evaluation procedure identified in the Request for Proposals. In the final stage, the number of solutions arrived at shall make for genuine competition in so far as there are enough solutions.
- (17) In the Prequalification Document, the Climate Procurement Authority shall indicate whether it will use the option described in Article 26(16).
- (18) The Climate Procurement Authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

#### *Final Bids*

- (19) Having declared that the dialogue is concluded and having so informed the remaining Bidders, the Climate Procurement Authority shall issue a written notification to those Bidders asking each of them to submit their final Bids on the basis of the solution or solutions presented and specified during the dialogue. Subject to Article 40, the minimum time limit for submission of final Bids shall be 28 days from the date on which the Climate Procurement Authority requested the Bidders to submit their final Bids.
- (20) Final Bids shall be submitted by Bidders in accordance with the Request for Proposals.
- (21) Final Bids shall contain all the elements required and necessary for the performance of the Climate Contract.
- (22) Final Bids shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure identified in the Request for Proposals, and the Climate Procurement Authority shall select the Preferred Bidder based on this evaluation.
- (23) During evaluation, final Bids may be clarified, specified and optimised at the request of the Climate Procurement Authority, but such clarifications, specification or optimisation, or any additional information, may not involve changes to the essential aspects of the Bid or of the Climate Procurement Documents, including the requirements set out in the Request for Proposals, where variations to those aspects or requirements are likely to distort competition or have a discriminatory effect.
- (24) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of the Bids.
- (25) The Climate Procurement Authority may carry out negotiations with the Preferred Bidder to confirm financial commitments or other terms contained in its Bid by finalising the terms of the Climate Contract, provided this:
  - (a) does not have the effect of materially modifying essential aspects of the Bid (such as the financial, technical or legal elements of the Bid) or of the procurement method, including the information set out in the Climate Procurement Documents, and
  - (b) does not risk distorting competition or causing discrimination.
- (26) Subject to Article 56, the finalised Climate Contract shall be executed by the Climate Procurement Authority and the Preferred Bidder.

## Article 27 Negotiated procedure

### Comments

The negotiated procedure permits the Climate Procurement Authority to invite selected Bidders to submit initial Bids and, following one or more rounds of negotiation, final Bids. However, negotiation following submission of final Bids is not permitted, thus maintaining maximum competitive tension in the submission of final Bids. Limited negotiation and clarification is permitted under the competitive dialogue procedure following submission of final Bids.

The negotiated procedure is likely to be the more suitable procedure for the procurement of a Climate Contract where negotiation of the Climate Contract is required prior to submission of final Bids, but the funding and financing associated with the Climate Contract is comparatively simple and a separate financial close period is not required.

If the Climate Procurement Authority decides to use the negotiated procedure, there is real opportunity for the Climate Procurement Authority to be creative and structure a procurement competition which can deliver an excellent result. The Climate Procurement Authority will need to make a number of key decisions which will not only influence how the Preferred Bidder is chosen, but will also influence the procurement programme and associated costs, including:

- **how many Bidders should be selected at the prequalification stage and invited to submit initial Bids?**

There will be procurement cost and time savings if fewer bidders are selected and invited to submit initial Bids. However, there is a risk to competitive tension if fewer Bidders are selected and subsequently a Bidder withdraws and does not submit a final Bid. Three is the minimum number which is permitted under the Model Law.

- **following selection, how many stages should there be in the negotiation phase and will there be any staged reduction of Bids?**

The Model Law does not prescribe how the negotiation phase should be structured. Therefore, the process is very flexible, and could be divided into one negotiation stage, or one or more stages, reducing the number of Bidders involved at each stage on the basis of the award criteria. If there is to be a staged reduction in the number of Bidders (which will add complexity to the procedure), this will need to be specified in the Prequalification Document, and careful consideration will be required in terms of how many Bidders will be invited to submit final Bids.

- **what are the appropriate evaluation criteria for the selection of Bidders and contract award?**

Robust evaluation methodologies will be required for the selection of Bidders and the evaluation of Bids. The Climate Procurement Documents should set out the selection criteria and the award criteria (including any sub-criteria and weightings) and the procedure for carrying out the evaluations. In terms of evaluation criteria, these will need to match the requirements of the Climate Contract.

### *Starting the procedure, prequalification and selection*

- (1) If the Climate Procurement Authority has decided to use the negotiated procedure as its procurement method pursuant to Article 18(3), the Climate Procurement Authority shall commence a negotiated procedure for the award of a Climate Contract by the publication of a Climate Contract Notice inviting interested Bidders to submit Prequalification Responses to the Climate Procurement Authority.
- (2) Each negotiated procedure shall be conducted in accordance with this Article 27 and this Law.
- (3) If a Bidder wishes to participate in a prequalification procedure published in a Climate Contract Notice, then such Bidder shall contact the Climate Procurement Authority named in the Climate Contract Notice and submit a Prequalification Response to such Climate Procurement Authority by the deadline

stated in the Climate Contract Notice, and in accordance with the requirements of the Prequalification Document.

- (4) Subject to Article 40, the minimum time limit for submission of Prequalification Responses shall be 30 days from the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (5) The Climate Procurement Authority may hold a meeting with all Bidders to discuss the Climate Project, the Climate Contract, the Prequalification Document and the associated Climate Procurement Procedure at least 10 days after the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (6) The Prequalification Responses which are submitted by Bidders shall be evaluated by the Climate Procurement Authority in accordance with the Prequalification Document.
- (7) Only those Bidders invited to do so by the Climate Procurement Authority following its evaluation of the Prequalification Responses may submit a Bid.
- (8) The Climate Procurement Authority may limit the number of suitable Bidders to be invited to participate in the Climate Procurement Procedure in accordance with Article 30.
- (9) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of Prequalification Responses.
- (10) The Bidders who have been selected by the Climate Procurement Authority and the Bidders who have not been selected by the Climate Procurement Authority will be notified by the Climate Procurement Authority.

*Issue of the Request for Proposals, negotiation, submission of Bids, and contract award*

- (11) Only those Bidders selected by the Climate Procurement Authority will receive a Request for Proposals and such Request for Proposals shall be issued simultaneously to those Bidders as soon as reasonably practicable after the notification of Bidders pursuant to Article 27(10).
- (12) Following receipt of such Request for Proposals, Bidders shall submit an initial Bid, and such initial Bid shall be the basis for the subsequent negotiations.
- (13) Subject to Article 40, the minimum time limit for submission of initial Bids shall be 30 days from the date on which the Request for Proposals is issued by the Climate Procurement Authority
- (14) The Climate Procurement Authority may hold a meeting with each Bidder to discuss the Climate Contract, the Request for Proposals and the associated Climate Procurement Procedure at least 14 days after the date on which the Request for Proposals is issued by the Climate Procurement Authority.
- (15) Bids (including the initial Bid and the final Bid) shall be submitted by Bidders in accordance with the Request for Proposals.
- (16) The Climate Procurement Authority shall negotiate with Bidders the initial and all subsequent Bids submitted by Bidders, except for the final Bid, to improve their content.
- (17) Any minimum requirements and the award criteria stated in the Request for Proposals shall not be subject to negotiation.
- (18) During the negotiations, the Climate Procurement Authority shall ensure equal treatment of all Bidders and, to that end the Climate Procurement Authority shall not provide information in a discriminatory manner which may give some Bidders an advantage over others;

- (19) Without prejudice to Article 17(2), the Climate Procurement Authority shall not reveal to the other Bidders confidential information communicated by a Bidder participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
- (20) Negotiated procedures may take place in successive stages in order to reduce the number of Bids to be negotiated by applying the evaluation criteria and evaluation procedure identified in the Request for Proposals. In the final stage, the number of Bids arrived at shall make for genuine competition in so far as there are enough Bids.
- (21) In the Prequalification Document, the Climate Procurement Authority shall indicate whether it will use the option described in Article 27(20).
- (22) Where the Climate Procurement Authority intends to conclude the negotiations, it shall:
  - (a) inform the remaining Bidders and set a common deadline to submit final Bids; and
  - (b) verify that the final Bids are in conformity with any minimum requirements identified in the Request for Proposals.
- (23) Final Bids shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure described in the Request for Proposals, and the Climate Procurement Authority shall select the Preferred Bidder based on this evaluation.
- (24) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of the Bids.
- (25) Subject to Article 56, the Climate Contract shall be executed by the Climate Procurement Authority and the Preferred Bidder.

## Article 28 Direct Procurement

### Comments

The ability to use direct procurement should be limited.

#### *Overview of the direct procurement procedure*

- (1) If the Climate Procurement Authority is permitted to use direct procurement as its procurement method pursuant to Article 18(4), the direct procurement procedure shall be conducted in two phases (i) identification of the Bidder or Bidders (as appropriate) who will be invited to participate in the direct procurement, and (ii) issue of the Request for Proposals to that Bidder or Bidders (as appropriate) , submission of Bid, evaluation, negotiation and contract award.
- (2) Each direct procurement procedure shall be conducted in accordance with this Article 28 and this Law.
- (3) Where a direct procurement is being used pursuant to Article 18(3) the Climate Procurement Authority shall invite the Bidder who has been identified as the sole source to participate in the direct procurement.

#### *Justification of the use of the direct procurement procedure and identification of the Bidder who will be invited to participate in the direct procurement procedure*

- (4) Prior to issuing the Request for Proposals to a Bidder, the Climate Procurement Authority using direct procurement as its procurement method shall submit a report to the [Office of the President]:

- (a) recording the fact that it is using direct procurement, explaining that at least one of the circumstances described in Article 18(4) has arisen and providing justification that the Climate Procurement Authority is entitled to use the direct procurement method of procurement pursuant to Article 18(3)(c); and
- (b) identifying the Bidder who are being invited to participate in the direct procurement and explaining the reasons why a particular Bidder has been invited to participate in the direct procurement, which may include (as appropriate):
  - (i) the Bidder's experience and qualifications in respect of implementing projects of a similar size and nature as the relevant Climate Contract;
  - (ii) the Bidder's financial capability to implement the relevant Climate Contract;
  - (iii) evidence that the Bidder is the only Person who is capable of providing the required services; and
  - (iv) the availability of the Bidder to support the relevant Climate Contract,

provided always that the Climate Procurement Authority must comply with this Law in respect of the identification of any Bidder who has been invited to participate in the direct procurement and this shall include (but shall not be limited to) provisions relating to fraud and corruption, and conflict of interest.

- (5) Within 14 days of receiving a report from the Climate Procurement Authority pursuant to Article 28(4), the [Office of the President] shall review such report and approve or reject the Climate Procurement Authority's use of the direct procedure. Approval shall be on the basis that:
  - (a) the Climate Procurement Authority is entitled to use the direct procurement method of procurement pursuant to Article 18(4); and
  - (b) the Climate Procurement Authority has complied with the requirements contained in Article 28(4)(b) in respect of the identification of the Bidder who are being invited to participate in the direct procurement.

*Issue of the Request for Proposals, submission of Bid, negotiation and contract award*

- (6) Only the Bidder selected by the Climate Procurement Authority to participate in the direct procurement will receive a Request for Proposals.
- (7) A Bid shall be submitted by the Bidder in accordance with the Request for Proposals.
- (8) The Bid shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure described in the Request for Proposals, and the Climate Procurement Authority shall select the Preferred Bidder based on this evaluation.
- (9) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of the Bid.
- (10) The Climate Procurement Authority shall enter into negotiations with the Preferred Bidder to finalise the Climate Contract in accordance with the provisions of the Request for Proposals.
- (11) The finalised Climate Contract shall be executed by the Climate Procurement Authority and the Preferred Bidder.

## Article 29 The Restricted Procedure

### Comments

#### Introduction

The key feature of the restricted procedure is that it allows any potential Bidder to request to participate in the Climate Procurement Procedure but only those selected by the Climate Procurement Authority following a pre-qualification stage may submit a tender.

An important factor for the Climate Procurement Authority is, therefore, the minimum requirements that are imposed at the pre-qualification stage as it will be possible to limit the number of Bids that the Climate Procurement Authority must evaluate by imposing certain selection criteria in the pre-qualification stage.

After pre-qualification, the restricted procedure is designed as a one-stage tender process. There is only one round of tenders and no mechanism for dialogue, negotiation or down-selecting after pre-qualification. The restricted procedure is unsuitable for the procurement of more complex Climate Contracts and Climate Projects.

#### *Starting the procedure, prequalification and selection*

- (1) If the Climate Procurement Authority has decided to use the restricted procedure as its procurement method pursuant to Article 18(3), the Climate Procurement Authority shall commence a restricted procedure for the award of a Climate Contract by the publication of a Climate Contract Notice inviting interested Bidders to submit Prequalification Responses to the Climate Procurement Authority.
- (2) Each restricted procedure shall be conducted in accordance with this Article 29 and this Law.
- (3) If a Bidder wishes to participate in a prequalification procedure published in a Climate Contract Notice, then such Bidder shall contact the Climate Procurement Authority named in the Climate Contract Notice and submit a Prequalification Response to such Climate Procurement Authority by the deadline stated in the Climate Contract Notice, and in accordance with the requirements of the Prequalification Document.
- (4) Subject to Article 40, the minimum time limit for submission of Prequalification Responses shall be 30 days from the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (5) The Climate Procurement Authority may hold a meeting with all Bidders to discuss the Climate Project, the Climate Contract, the Prequalification Document and the associated Climate Procurement Procedure at least 10 days after the date on which the Climate Contract Notice is published by the Climate Procurement Authority.
- (6) The Prequalification Responses which are submitted by Bidders shall be evaluated by the Climate Procurement Authority in accordance with the Prequalification Document.
- (7) Only those Bidders invited to do so by the Climate Procurement Authority following its evaluation of the Prequalification Responses may submit a Bid.
- (8) The Climate Procurement Authority may limit the number of suitable Bidders to be invited to participate in the Climate Procurement Procedure in accordance with Article 30.
- (9) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of Prequalification Responses.

- (10) The Bidders who have been selected by the Climate Procurement Authority and the Bidders who have not been selected by the Climate Procurement Authority will be notified by the Climate Procurement Authority.

*Issue of the Request for Proposals, submission of Bids and contract award*

- (11) Only those Bidders selected by the Climate Procurement Authority will receive a Request for Proposals and such Request for Proposals shall be issued simultaneously to those Bidders as soon as reasonably practicable after the notification of Bidders pursuant to Article 29(10).
- (12) Following receipt of such Request for Proposals, Bidders shall submit a Bid, and subject to Article 40, the minimum time limit for submission of Bids shall be 30 days from the date on which the Request for Proposals is issued by the Climate Procurement Authority
- (13) Where a state of urgency duly substantiated by the Climate Procurement Authority renders impracticable the time limits laid down in this Article 29, the Climate Procurement Authority may fix:
- (a) a time limit for the submission of Prequalification Responses which shall not be less than 15 days from the date on which the Climate Contract Notice is published by the Climate Procurement Authority; and
  - (b) a time limit for the receipt of Bids which shall not be less than 10 days from the date on which the Request for Proposals is issued by the Climate Procurement Authority.
- (14) Bids shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure described in the Request for Proposals, and the Climate Procurement Authority shall select the Preferred Bidder based on this evaluation.
- (15) The Climate Procurement Authority shall prepare an evaluation report which shall describe the evaluation of the Bids.
- (16) Subject to Article 56, the Climate Contract shall be executed by the Climate Procurement Authority and the Preferred Bidder.

**Article 30 Reduction of the number of otherwise qualified Bidders to be invited to participate in a Climate Procurement Procedure**

- (1) In restricted procedures, negotiated procedures and competitive dialogue procedures, the Climate Procurement Authority may limit the number of Bidders that the Climate Procurement Authority will select to receive a Request for Proposals, provided that the minimum number of Bidders selected by the Climate Procurement Authority shall be three.
- (2) The Climate Procurement Authority shall indicate, in the Prequalification Document, the objective and non-discriminatory criteria or rules they intend to apply in the selection, and the number of Bidders they intend to select.
- (3) The Climate Procurement Authority shall select a number of Bidders at least equal to the minimum number indicated in Article 30(1). Where the number of Bidders meeting the selection criteria is below that minimum number, the Climate Procurement Authority may continue the Climate Procurement Procedure by inviting those Bidders who meet the selection criteria. In the context of the same Climate Procurement Procedure, the Climate Procurement Authority shall not include Bidders that did not request to participate, or that do not have the required capabilities.

## Article 31 Electronic auctions

### *Preliminary matters*

- (1) The Climate Procurement Authority may use electronic auctions, in which the following elements of Bids are submitted in an electronic auction:
  - (a) new prices, revised downwards;
  - (b) new values concerning certain elements of Bids; or
  - (c) or both of the above.
- (2) The Climate Procurement Authority shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the Bids to ensure that a Bid is compliant with the requirements of the Request for Proposals, enabling the element of the Bid which is the subject of the electronic auction to be ranked using automatic evaluation methods.
- (3) The Climate Procurement Authority which decide to hold an electronic auction shall state that fact in the Climate Contract Notice.
- (4) Where the Climate Procurement Authority has decided to hold an electronic auction, the Request for Proposals shall include at least the following details:
  - (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
  - (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the Climate Contract;
  - (c) the information which will be made available to Bidders in the course of the electronic auction and, where appropriate, when it will be made available to them;
  - (d) the relevant information concerning the electronic auction process;
  - (e) the conditions under which the Bidders will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; and
  - (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

### *Commencement and structure of the electronic auction*

- (5) All Bidders that have submitted compliant Bids shall be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the Request for Proposals or notified separately by the Climate Procurement Authority to the Bidders, the connections in accordance with the instructions set out in the Request for Proposals.
- (6) The electronic auction may take place in a number of successive phases.
- (7) The Request for Proposals shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.

### *Communication of information*

- (8) Throughout each phase of an electronic auction the Climate Procurement Authority shall instantaneously communicate to all Bidders at least sufficient information to enable them to ascertain their relative rankings at any moment.

- (9) The Climate Procurement Authority may, where this has been previously indicated, communicate other information concerning other prices or values submitted.
- (10) The Climate Procurement Authority may also at any time announce the number of Bidders in the current phase of the electronic auction.
- (11) In no case, however, may the Climate Procurement Authority disclose the identities of the Bidders during any phase of an electronic auction.

*Closing the electronic auction*

- (12) The Climate Procurement Authority shall close an electronic auction in one or more of the following manners:
  - (a) at the previously indicated date and time;
  - (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
  - (c) when the previously indicated number of phases in the electronic auction has been completed.
- (13) After closing an electronic auction, the Climate Procurement Authority shall complete the evaluation procedure and award the Climate Contract in accordance with the Request for Proposals.

## CHAPTER EIGHT

### GENERAL PROCUREMENT RULES AND CLIMATE PROCUREMENT DOCUMENTS

#### Comments

Where possible, the Climate Procurement Authority should streamline the requirements for Climate Procurement Procedures. Provisions relating to the provision of bid security and the public opening of Bids have not been included in this Model Law.

#### **Model Documents required for this Chapter**

The following model documents will need to be drafted:

- Model non-disclosure agreement;
- Model Climate Prior Information Notice;
- Model Climate Contract Award Notice;
- Model Climate Contract Notice;
- Model Prequalification Document;
- Model Request for Proposals; and
- Model Template evaluation report.

#### **Guidelines relevant to this Chapter**

Guidelines could be developed in respect of the following topics:

- Structing and running procurement competitions; and
- Operation of electronic document systems.

#### **Article 32 Electronic Procurement**

#### Comments

Electronic means of information and communication can greatly simplify procurement processes as well as increase the efficiency and transparency of procurement processes.

In addition, the use of electronic procurement as the standard means of communication and information exchange in Climate Procurement Procedures, greatly enhances the possibilities of Bidders' participation wherever that Bidder is located.

For that purpose, publication of Climate Prior Information Notices and Climate Contract Notices in electronic form, electronic availability of the Climate Procurement Documents and full electronic communication, meaning communication by electronic means at all stages of the Climate Procurement Procedure, including the electronic submission of Prequalification Responses electronic submission of Bids and the operation of any clarification process with Bidders, has been made mandatory in this Model

Law.

It should also be clarified that mandatory use of electronic means of communications pursuant to this Law does not oblige the Climate Procurement Authority to carry out electronic processing of Bids, nor does it mandate electronic evaluation or automatic processing. This is at the discretion of the Climate Procurement Authority.

The Climate Procurement Authority should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with products in general use and which do not restrict Bidders' access to the Climate Procurement Procedure.

It should be clarified that the obligation to use electronic means at all stages of the Climate Procurement Procedure would not be appropriate either where the use of electronic means would require specialised tools or file formats that are not generally available or where the communications concerned could only be handled using specialised office equipment. The Climate Procurement Authority should therefore not be obliged to require the use of electronic means of communication in the submission process in certain cases.

There can be other exceptional cases where the Climate Procurement Authority should be allowed not to use electronic means of communication where not using such means of communication is necessary in order to protect the particularly sensitive nature of information.

On a jurisdiction-specific basis, in the context of implementation of provisions relating to use of electronic means of communication, consideration will need to be given in respect of any existing laws relating to data protection and the use of electronic signatures.

Consideration should also be given to the use of virtual data rooms where the Climate Procurement Authority has information which it wishes to share with Investors and Bidders for the purpose of due diligence in respect of Climate Projects and Climate Contracts.

#### *General principles about the use of electronic and non-electronic means of communication*

- (1) Subject to Article 32(3), Article 32(5) and Article 32(6), all communication and information exchange in the context of Climate Procurement Procedures, including electronic submission, shall be performed using electronic means of communication in accordance with the requirements of this Article.
- (2) The tools and devices to be used for communicating by electronic means, and their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict Bidders' access to a Climate Procurement Procedure.
- (3) The Climate Procurement Authority is not obliged to require electronic means of communication in the submission process in the following situations:
  - (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
  - (b) the applications supporting file formats that are suitable for the type of Bids use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the Climate Procurement Authority;
  - (c) the use of electronic means of communication would require specialised office equipment that is not generally available to the Climate Procurement Authority;
  - (d) the Climate Procurement Documents require the submission of physical or scale models which cannot be transmitted using electronic means; or

- (e) to the extent that the use of means of communication other than electronic means is necessary either:
  - (i) because of a breach of security of the electronic means of communication, or
  - (ii) for the protection of information of a particularly sensitive nature requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are generally available to Bidders.
- (4) Where, in accordance with Article 32(3), electronic means of communication are not used, communication shall be carried out:
  - (a) by post or by other suitable carrier, or
  - (b) by a combination of post or other suitable carrier and electronic means.
- (5) Oral communication may be used in respect of communications other than those concerning the essential elements of a Climate Procurement Procedure, provided that the content of the oral communication is documented to a sufficient degree. The essential elements of a Climate Procurement Procedure include the Climate Procurement Documents, Prequalification Responses and Bids for that Climate Procurement Procedure.
- (6) Oral communications with Bidders which could have a substantial impact on the content and evaluation of Bids shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.
- (7) In all communication, exchange and storage of information, the Climate Procurement Authority shall ensure that the integrity of data and the confidentiality of such communication and information, including Prequalification Responses and Bids, are preserved.
- (8) The Climate Procurement Authority shall examine the content of Prequalification Responses and Bids only after the time limit set for submitting them has expired.

*Technical requirements for tools and devices*

- (9) Tools and devices for the electronic receipt of Prequalification Responses and Bids and any other submissions from Bidders during a Climate Procurement Procedure must at least guarantee, through technical means and appropriate procedures, that:
  - (a) the exact time and date of the receipt of Prequalification Responses and Bids can be determined precisely;
  - (b) it may be reasonably ensured that, before the time referred to in Article 32(8), no-one can have access to data transmitted under the requirements in this Article;
  - (c) only authorised persons may set or change the dates for opening data received;
  - (d) during the different stages of the Climate Procurement Procedure, access to all data submitted, or to part of such data, must be possible only for authorised persons;
  - (e) only authorised persons may give access to data transmitted and only after the time referred to in Article 32(8);
  - (f) data received and opened in accordance with the requirements in Article 32(9)(a) to (e) must remain accessible only to persons authorised to acquaint themselves with the data; and
  - (g) it must be reasonably ensured that any infringement, or attempted infringement, of the access prohibitions or conditions referred to in Article 32(9)(b) to (f) are clearly detectable.

- (10) In addition to the requirements in Article 32(9), the following rules apply to tools and devices for the electronic submission and receipt of Prequalification Responses and Bids, and communication between the Climate Procurement Authority and the Bidders:
- (a) information on specifications for the electronic submission of Prequalification Responses and Bids, including encryption and time-stamping, shall be available to interested parties; and
  - (b) the Climate Procurement Authority shall, acting in accordance with Article 32(11) and Article 32(12), specify the level of security required for the electronic means of communication in the various stages of the specific Climate Procurement Procedure, and that level shall be proportionate to the risks attached.

#### *Security requirements*

- (11) In deciding the level of security required at each stage of a Climate Procurement Procedure, the Climate Procurement Authority shall assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.
- (12) In doing so, the Climate Procurement Authority shall, in particular, have regard to such of the following matters as are relevant:
- (a) the risk to the proper functioning and integrity of the specific Climate Procurement Procedure, including risks of breach of this Law;
  - (b) risks to national security;
  - (c) the risk of inadvertent or unauthorised disclosure of, or access to, any Bidder's confidential information;
  - (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the Climate Procurement Authority including information relating to the specific Climate Procurement Procedure;
  - (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the Climate Procurement Authority, any Bidder or any other person, including introduction of malware or denial of service attacks;
  - (f) other material risks relating to the Climate Procurement Procedure in question;
  - (g) the need for proportionality between, on the one hand the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in Article 32(a) to Article 32(f), and on the other hand the costs, burdens and obligations which those requirements may impose on Bidders.

#### **Article 33 Electronic availability of the Climate Procurement Documents and Climate Contract**

- (1) The Climate Procurement Authority shall, by means of the internet, offer unrestricted and full direct access free of charge to the Climate Procurement Documents and the Climate Contract from the date of the publication of a Climate Contract Notice.
- (2) The text of the Climate Contract Notice shall specify the internet address at which the Climate Procurement Documents and Climate Contract are accessible.
- (3) Where unrestricted and full direct access free of charge to certain Climate Procurement Documents cannot be offered by means of the internet for one of the reasons set out in Article 32(3), the Climate Procurement Authority may indicate in the Climate Contract Notice that the Climate Procurement Documents concerned will be transmitted by means other than the internet.

- (4) Where unrestricted and full direct access free of charge to certain Climate Procurement Documents and the Climate Contract cannot be offered by means of the internet because the Climate Procurement Authority intends to apply Article 17(3), the Climate Procurement Authority shall indicate in the Climate Contract Notice which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the Climate Procurement Documents and Climate Contract concerned.
- (5) Provided that it has been requested in good time, the Climate Procurement Authority shall supply to all Bidders taking part in a Climate Procurement Procedure additional information relating to the Climate Procurement Documents, Climate Contract and/or Climate Project not later than 5 days before the time limit fixed for the receipt of Prequalification Responses or Bids as the case may be.

#### **Article 34 Preparation of Model Climate Procurement Documents and Climate Procurement Procedures**

Comments
<p>As part of the process of standardising documents and processes in respect of the procurement of Climate Projects, a suite of Model Climate Procurement Documents should be prepared in order to assist the Climate Procurement Authority with their Climate Procurement Procedures. This will also:</p> <ul style="list-style-type: none"> <li>■ provide the market with clarity in respect of the requirements for the Climate Procurement Procedures which will be applied by the Climate Procurement Authority;</li> <li>■ ensure key Government policy drivers are appropriately to the fore, and;</li> <li>■ save time and costs to the Climate Procurement Authority in the development of the Climate Procurement Documents for each Climate Project.</li> </ul>

- (1) The Climate Procurement Authority shall prepare Model Climate Procurement Documents which shall comply with the relevant provisions of this Law, including this Chapter Eight.
- (2) Each Model Climate Procurement Document which has been prepared by the Climate Procurement Authority pursuant to Article 34(1) may be amended from time to time by the Climate Procurement Authority.
- (3) Additional supporting contracts and documents in relation to each Model Climate Procurement Document which has been prepared by the Climate Procurement Authority pursuant to Article 34(1) may be developed from time to time by the Climate Procurement Authority.
- (4) The Climate Procurement Authority shall prepare the Climate Procurement Documents for each Climate Procurement Procedure using the relevant Model Climate Procurement Documents as may be appropriately developed and customised for such Climate Procurement Procedure by the Climate Procurement Authority.

#### **Article 35 Climate Contract Notice**

Comments
<p><b>What is the purpose of a Climate Contract Notice?</b></p> <p>The purpose of a Climate Contract Notice is to announce to the market the scope of the proposed Climate Procurement Procedure by reference to the Climate Procurement Authority's requirements, so that (together with information set out in the other Climate Procurement Documents) all Bidders are fully informed of what is required of them. A material change to the scope of what is described in the</p>

Climate Contract Notice may lead to the procurement terminating and having to be re- advertised.

**What information should be included in a Climate Contract Notice and what is the process for publishing Climate Contract Notices?**

Climate Contract Notices are required to contain details of the Climate Procurement Authority, the Climate Procurement Procedure chosen, the scope of the Climate Contract, the estimated value of the Climate Contract and/or Climate Project and the timescale for replying to the Climate Contract Notice.

Climate Contract Notices need to be sent for publication in accordance with Article 35(2).

**What information needs to be published electronically at the same time as the Climate Contract Notice?**

Article 33 requires all Climate Procurement Documents to be freely available electronically for Bidders from the date on which the Climate Contract Notice. Therefore, where relevant in the context of a Climate Procurement Procedure, the following documents must be made available at the same time as the Climate Contract Notice is published:

- Prequalification Document;
- Climate Contract;
- technical specification; and
- Request for Proposals.

Consideration should be given as to whether there are any other documents which should be made available with the Climate Contract Notice in addition to the documents listed above. For example, documents which describe or determine elements of the Climate Project or Climate Contract, or which could affect an Bidder's interest in submitting a Prequalification Response, should also be available with the Climate Contract Notice.

- (1) Any Climate Contract Notices shall, as a minimum, contain the following information:
  - (a) name, address, telephone, email and internet address of the Climate Procurement Authority;
  - (b) type of Climate Procurement Procedure;
  - (c) scope of the Climate Contract (including location, brief description of the scope and nature and extent of works, services and/or supplies (as appropriate)) and the Climate Project;
  - (d) the estimated value of the Climate Contract and/or Climate Project;
  - (e) duration of the Climate Contract;
  - (f) the timescale for replying to the Climate Contract Notice;
  - (g) date of dispatch of the Climate Contract Notice; and
  - (h) any other relevant information.
- (2) The publication of a Climate Contract Notice by the Climate Procurement Authority is subject to the following rules:
  - (a) the Climate Contract Notice shall be published in [local language] on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority;] and

- (b) the Climate Contract Notice shall be published in English on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority].

## Article 36 Prequalification Document

### What is prequalification (selection)?

Prequalification is a means of assessing whether Bidders are not "excluded" in respect of a number of grounds for disqualification in the Law, and have the requisite economic and financial standing, and professional and technical ability to perform a Climate Contract. This is contrasted with the contract award stage which is used to evaluate the tenders which are submitted.

### What does the Prequalification Document contain?

The Prequalification Document contains a set of standard questions which requires Bidders to:

- confirm that they are not in breach of the grounds for disqualification;
- provide information requested by the Climate Procurement Authority to enable analysis of the Bidder's financial capacity;
- answer questions to provide assurance as to the Bidder's technical capacity; and
- provide information on its experience and performance on similar projects.

### *Prequalification Document*

- (1) Each Prequalification Document shall contain a clear statement of the requirements of the Climate Procurement Authority for the Climate Contract and Climate Project, as well as other relevant information.
- (2) Within the period stated in the Prequalification Document, a Bidder shall have the right to request from the Climate Procurement Authority in writing, necessary information and clarifications in connection with the Prequalification Document. As soon as reasonably possible, the Climate Procurement Authority shall share such information or clarification (together with the request) with all Bidders provided that doing so will not disclose any confidential information or proprietary intellectual property of the Bidder making such request.
- (3) The deadline for submitting Prequalification Responses shall be stated in the Prequalification Document. Subject to Article 16 and Article 40, the Climate Procurement Authority may amend such deadline for any reason which it considers necessary, and any amendment of such deadline shall be notified by the Climate Procurement Authority to all Bidders.

### *Development of Prequalification Evaluation Criteria and Evaluation Procedure*

- (4) The Climate Procurement Authority shall develop specific prequalification evaluation criteria, based on the principles outlined in this Article 36 and a suitable evaluation procedure for the Prequalification Responses. Such evaluation criteria and evaluation procedure shall be fully disclosed and identified by the Climate Procurement Authority in the Prequalification Document.
- (5) An evaluation procedure which is developed by the Climate Procurement Authority pursuant to Article 36(4) may have the following characteristics:
  - (a) a numerical or other form of evaluation mechanism (such as pass/fail) may be attributed by the Climate Procurement Authority to each question in the Prequalification Document pertaining to each prequalification evaluation criterion;

- (b) a minimum threshold score or requirement may be set by the Climate Procurement Authority for any prequalification evaluation criterion; and/or
- (c) the Climate Procurement Authority may identify a weighting for any prequalification evaluation criterion.

#### *Submission and Evaluation of Prequalification Responses*

- (6) Prequalification Responses shall be submitted by Bidders in accordance with the requirements stated in the Prequalification Document.
- (7) Prequalification Responses shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure developed in accordance with Article 36(4) and identified in the Prequalification Document.
- (8) The Climate Procurement Authority shall exclude Prequalification Responses if exclusion is mandatory pursuant to the evaluation procedure identified in the Prequalification Document.
- (9) The Climate Procurement Authority shall disqualify a Bidder if any of the grounds for disqualification described in Article 36(16) apply to such Bidder.
- (10) The outcome of the evaluation including the individual results for each Bidder together with reasons why such results were achieved, shall be contained in an evaluation report prepared by the Climate Procurement Authority.
- (11) Where information or documentation to be submitted by Bidders is or appears to be incomplete or erroneous, or where specific documents are missing, the Climate Procurement Authority may request the Bidders concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

#### *Prequalification Criteria*

- (12) The Climate Procurement Authority shall impose prequalification requirements on Bidders in respect of their participation in a Climate Procurement Procedure. The Climate Procurement Authority shall limit such requirements to those that are appropriate to ensure that a Bidder has (a) the economic and financial standing and (b) the technical and professional ability, to perform the Climate Agreement to be awarded. All prequalification requirements shall be related and proportionate to the subject-matter of the Climate Agreement.
- (13) With regard to economic and financial standing, the Climate Procurement Authority shall impose requirements ensuring that Bidders possess the necessary economic and financial capacity to perform the Climate Agreement. The Climate Procurement Authority may require that Bidders:
  - (a) have a certain minimum yearly turnover;
  - (b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
  - (c) have an appropriate level of professional risk indemnity insurance.
- (14) With regard to technical and professional ability, an Climate Procurement Authority shall impose requirements ensuring that Bidders possess the necessary human and technical resources and experience to perform the Climate Agreement to an appropriate quality standard. The Climate Procurement Authority shall require, in particular, that Bidders have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. This shall include the provision of information by Bidders about any significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination of that prior public contract, damages or other comparable sanctions.

- (15) The Climate Procurement Authority shall indicate the prequalification requirements for participation, which may be expressed as minimum levels of ability, together with the required means of proof, in the Prequalification Document. The Climate Procurement Authority may require that any required proof consists of, where relevant, a notarized certification of authenticity or legal confirmation of such proof.

#### *Grounds for Disqualification*

- (16) If any of the following circumstances apply to a Bidder, such Bidder shall be disqualified from the relevant Climate Procurement Procedure:
- (a) the Bidder is insolvent or has become bankrupt;
  - (b) the Bidder has undergone or completed guardianship, bankruptcy proceedings or has been placed under liquidation by court order;
  - (c) the business of the Bidder is being run by a court or by a judicial agent or an administrator whether voluntarily or by court decision;
  - (d) the Bidder's business activities have been suspended by a court decision;
  - (e) the Bidder has tax debts, debts arising from the non-payment of social security contributions or is in debt of any nature to [country];
  - (f) the Bidder does not have the legal capacity to enter into the Climate Agreement.
  - (g) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction, by a final court order in the preceding five years for criminal offences in relation to their business or professional behaviour or in relation to the making of false statements or giving of incorrect or misleading information on their qualifications with a view to entering into a contract with any public institution;
  - (h) the Bidder has been disqualified or sanctioned in the preceding [five] years as a result of administrative suspensions or licensing procedures in [country] and such disqualification or sanction is relevant to the Climate Agreement which is being procured;
  - (i) the Bidder is disqualified on any of the grounds specified in this Law, the Prequalification Document, the Request for Proposals or any other document issued in respect of a Procurement Procedure;
  - (j) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for any Coercive Practice, Collusive Practice, Corrupt Practice or Fraudulent Practice or Obstructive Practice; or
  - (k) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for money laundering, an offence in connection with the proceeds of drug trafficking, a terrorism offence or offence linked to terrorism offences, terrorist financing, or child labour or other forms of trafficking in human beings; or
  - (l) the Bidder who has submitted false information or submitted falsified or erroneous certificates containing material errors or omissions to any Government department or agency in [country].
- (17) The Climate Procurement Authority may apply to the relevant competent authority to obtain further information regarding the Bidder and, in particular, details of any court orders or decisions, or details of convictions for the offences listed in Article 36(16) if the Climate Procurement Authority considers it needs such information to decide on any disqualification referred to in Article 36(16),

- (18) The Climate Procurement Authority shall disqualify any Bidder who has at any time submitted false information or submitted falsified or erroneous certificates containing material errors or omissions to any public institution in [country].
- (19) The Climate Procurement Authority may require a Bidder to provide such information as the Climate Procurement Authority considers it needs to consider disqualification.

### **Article 37 The Request for Proposals**

- (1) Each Request for Proposals shall contain a clear statement of the requirements of the Climate Procurement Authority for the Climate Contract and Climate Project, as well as a copy of the proposed Climate Contract for the relevant Climate Procurement Procedure and other relevant information.
- (2) The award criteria and evaluation procedure developed by the Climate Procurement Authority pursuant to Article 44 for the evaluation of Bids shall be fully disclosed and identified by the Climate Procurement Authority in the Request for Proposals.
- (3) Within the period stated in the Request for Proposals, a Bidder shall have the right to request from the Climate Procurement Authority in writing, necessary information and clarifications in connection with the Request for Proposals. As soon as reasonably possible, the Climate Procurement Authority shall share such information or clarification (together with the request) with all Bidders provided that doing so will not disclose any confidential information or proprietary intellectual property of the Bidder making such request.
- (4) Bids shall be submitted in accordance with the requirements and instructions set out in the Request for Proposals.
- (5) The deadline for submitting Bids shall be stated in the Request for Proposals. Subject to Article 16 and Article 40, the Climate Procurement Authority may amend such deadline for any reason which it considers necessary, and any amendment of such deadline shall be notified by the Climate Procurement Authority to all Bidders

#### *Variant Bids*

- (6) The Climate Procurement Authority may permit or require Bidders to submit variants.
- (7) If variant Bids can be submitted by Bidders or are required by the Climate Procurement Authority, this shall be stated in the Request for Proposals. If variant Bids are not permitted, any variant Bids which are submitted by a Bidder shall be rejected by the Climate Procurement Authority.
- (8) The Climate Procurement Authority shall state in the Request for Proposals the minimum requirements to be met by the variants and any specific requirements for their presentation, and in particular, whether variants may be submitted only where a Bid which is not a variant has also been submitted.
- (9) The Climate Procurement Authority shall ensure that the chosen contract evaluation criteria can be applied to variants meeting those minimum requirements as well as to conforming Bids which are not variants.
- (10) Only variants meeting the minimum requirements laid down by the Climate Procurement Authority shall be taken into consideration.

#### *Validity Period*

- (11) The validity period of a Bid shall be set for each Climate Procurement Procedure by the Climate Procurement Authority and shall be specified in the Request for Proposals. Such validity period shall be adequate to permit evaluation of Bids by the Climate Procurement Authority and the securing of all necessary approvals associated with such Bids, so that any resultant Climate Contract for such Climate Procurement Procedure can be executed within such validity period.

- (12) Before the expiry of the validity period for each Bid, the Climate Procurement Authority may request Bidders to extend such validity period.

### **Article 38 Bid Costs and other forms of Government Support**

#### **Comments**

In respect of certain types of Climate Contract, in certain jurisdictions, the Climate Procurement Authority may elect to support a Climate Procurement Procedure by the payment of a proportion of Bid costs to Bidders where it is anticipated that Bidders may need to be incentivised to participate in that Climate Procurement Procedure. This may be the case in a new jurisdiction which is launching a Climate Procurement Procedure for the first time.

- (1) Unless expressly stated otherwise by the Climate Procurement Authority in the Climate Procurement Documents, the expenses incurred for the participation in a Climate Procurement Procedure (including the preparation and submission of Bids, Prequalification Responses and Investor Qualification System Responses) shall be the responsibility of each Bidder and Investor, regardless of the outcome of the Climate Procurement Procedure.
- (2) The Climate Procurement Authority shall set out in the Climate Procurement Documents and, where appropriate, the Climate Contract the details of any government support as approved by the [Office of the President], the State or Climate Procurement Authority (as appropriate).

### **Article 39 Local Community Development Requirements**

- (1) Where and to the extent required in the Request for Proposals, Bidders shall make proposals in their Bids in respect of local community development requirements and the Private Partner shall, in accordance with any proposals in its Bid and any requirements in the relevant Climate Contract, deliver local community benefits including the creation of local jobs, the institution of training programmes for the transfer of skills to local people and acquire an appropriate proportion of works, goods or services (where relevant) locally in [country].

### **Article 40 Setting Time Limits**

- (1) When fixing the time limits for the receipt of Bids and Prequalification Responses, the Climate Procurement Authority shall take account of the complexity of the Request for Proposals and the Prequalification Document, and the time required for drawing up Bids and Prequalification Responses, without prejudice, as appropriate, to the minimum time limits set out in Article 26(4), Article 27(4), Article 27(13), Article 29(4) and Article 29(12).
- (2) The Climate Procurement Authority shall extend the time limits for the receipt of Bids and Prequalification Responses so that all Bidders concerned may be aware of all the information needed to produce Bids and Prequalification Responses in the following cases:
- (a) where, for whatever reason, additional information, although requested by the Bidder in good time, is not supplied at the latest seven days before the time limit fixed for the receipt of Bids or Prequalification Responses; and
  - (b) where significant changes are made to the Request for Proposals or the Prequalification Document.
- (3) The length of the extension shall be proportionate to the importance of the information or change.

- (4) Where additional information has either not been requested in good time or its importance with a view to preparing responsive Bids or Prequalification Responses is insignificant, the Climate Procurement Authority is not required to extend the time limits.

## CHAPTER NINE

### EVALUATION

#### Introduction

#### **What are the general requirements relating to evaluation under the Model Law?**

There are two distinct phases for evaluation pursuant to the Model Law – the evaluation of Bidders (prequalification and selection) and the evaluation of Bids (awarding the Climate Contract).

As at any other phase of a Climate Procurement Procedure, in the context of evaluation, the Climate Procurement Authority must comply with the general principles set out in Article 16.

#### **What principles must be applied by Climate Procurement Authority in respect of conducting evaluations and developing evaluation methodologies?**

When conducting evaluations, there are four basic principles which any evaluation must always meet:

- it must be non-discriminatory;
- it must not distort competition;
- it must be systematic and objective; and
- it must be well documented.

It is, therefore, important to ensure that a robust AUDIT TRAIL is maintained in order to demonstrate that the evaluation has followed the principles outlined above. An unsuccessful Bidder may want to challenge the decision made, and so the audit trail must be sufficiently detailed to show that the evaluation followed these principles.

Practical tips for developing evaluation methodologies and carrying out an evaluation include:

- evaluation methodologies for selection and for contract award should be developed at the same time as the Prequalification Document and Request for Proposals (respectively). Each evaluation methodology should be finalised before the relevant documentation is issued. Guidance for evaluators should also be prepared at the same time;
- the questions, deliverables and submission requirements in the Prequalification Document and Request for Proposals must correlate with the published selection and award criteria. This may seem obvious, but it is often overlooked;
- an evaluation team should be established by the Climate Procurement Authority to evaluate Prequalification Responses and Bids. It is recommended that this team is involved in the development of the Prequalification Document, the Request for Proposals and the associated evaluation methodologies. This same team should also participate in dialogue/negotiation meetings (as appropriate to the Climate Procurement Procedure which has been selected) and debrief unsuccessful Bidders. See further comments below in respect of the Climate Procurement Authority's evaluation team;
- a calibration of each evaluation methodology should be carried out. This will enable the Climate Procurement Authority's evaluation team to confirm whether or not the weightings and scorings work in practice and will not operate to cause a "perverse" result;
- Prequalification Responses and Bids must be evaluated in strict accordance with the relevant evaluation methodology stated in the Prequalification Document and Request for Proposals (as appropriate);
- only information contained in the Prequalification Responses and Bids is to be evaluated.

Evaluators may also take into account any clarification of Prequalification Responses and Bids which is obtained from Bidders;

- depending on the Climate Procurement Procedure chosen, consideration should be given to the need to keep any pricing or other commercial information confidential from the other evaluation team members who are not working on that part of the evaluation;
- a robust "opening" procedure for e-submissions should be developed by Climate Procurement Authority and guidance should be given as to how late or non-compliant Prequalification Responses and Bids will be dealt with;
- a robust procedure should be developed by Climate Procurement Authority to deal with any clarifications and interviews;
- all members of the Climate Procurement Authority's evaluation team should be given a detailed briefing and training to ensure that they understand the evaluation procedures and audit requirements; and
- a programme for evaluation meetings, preparation of evaluation reports and internal stakeholder sign-off/governance should be put in place by Climate Procurement Authority and adhered to.

#### **What are the key requirements for the Climate Procurement Authority's evaluation team?**

Prior to issue of the Climate Contract Notice and during development of the Climate Procurement Documents, the Climate Procurement Authority should establish an evaluation team for the Climate Contract. The Climate Procurement Authority's evaluation team (which could include external consultants appointed by the Climate Procurement Authority pursuant to a Framework Agreement if additional capacity or specialist expertise is required) should include evaluators with the requisite expertise who will be able to evaluate the Prequalification Responses and Bids, as appropriate.

To promote consistency it is important that this evaluation team remains in place for the duration of the Climate Procurement Procedure.

The Climate Procurement Authority must take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of the Climate Procurement Procedure so as to avoid any distortion of competition and to ensure equal treatment of Bidders. A conflict of interest covers any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the Climate Procurement Procedure. Consequently, members of the Climate Procurement Authority's evaluation team should be asked to confirm that they do not have any personal, economic or financial interest in relation to any of the Bidders which could present a material or perceived risk to the objectivity of the evaluation process.

The Climate Procurement Authority should remind evaluators that maintaining confidentiality is critical during the Climate Procurement Procedure and no discussions are to take place regarding the content of any of the Prequalification Responses and Bids with other team members outside of the evaluation process, and within the members of the evaluation team where an aspect of the evaluated has been 'ring-fenced' from the wider evaluation team.

#### **Use of an electronic system to manage the evaluation process**

An essential part of the evaluation process will be to establish the mechanism for recording it. Electronic systems are available and it is recommended that the Climate Procurement Authority consider the use of such as system for reasons of transparency, accessibility, monitoring of progress and providing an audit trail.

#### **Model Documents required for this Chapter**

The following model documents will need to be drafted:

- evaluation methodology process documents;
- template evaluation report

### **Guidelines relevant to this Chapter**

Guidelines could be developed in respect of the following topics:

- development of selection and award criteria; and
- development of evaluation methodologies

## **Article 41 Prequalification Evaluation**

### **Prequalification Evaluation: General Principles**

The objectives of the prequalification evaluation process for Climate Contracts are:

- to ensure that Bidders are not "excluded" in respect of the grounds for disqualification, and have the requisite economic and financial standing, and professional and technical ability to perform the Climate Contract which is the subject of the Climate Procurement Procedure;
- to evaluate Prequalification Responses in accordance with the selection criteria and methodology set out in the Prequalification Document; and
- in the context of Article 30, to provide a robust and objective means for ranking Prequalification Responses, and to enable selection of the required number of Bidders to receive a Request for Proposals.

The prequalification evaluation process will be carried out in the following stages:

- compliance and completeness check of submitted Prequalification Responses;
- evaluation of grounds for disqualification;
- evaluation of economic and financial standing (an analysis of accounts); and
- evaluation of technical and professional ability (including an evaluation of previous relevant experience).

The evaluation process could consist of pass/fail and scored elements. For example, pass/fail elements could include a series of "minimum requirements" whereby each Bidder must demonstrate that they have satisfied such minimum requirements previously (e.g. constructed, designed and maintained a climate project of the same size and complexity as the Climate Project). The scored elements could be based on the evaluation of essay answers to questions on topics which are relevant to the particular Climate Contract such as technical experience, health and safety, the delivery of local community benefits and working with stakeholders. In respect of these type of questions, Bidders would be permitted to refer to a defined number of reference projects in their essay answers. The reference projects themselves would not be scored.

In relation to any questions to be scored, the scores for these questions could be weighted and have a requirement for a minimum score. If this is required, any weighting and any minimum threshold scores should reflect the relative importance of the issues being tested to the Climate Procurement Authority and in the context of the Climate Contract. The evaluation methodology (including any scoring system, weighting and minimum requirements) should be clearly disclosed in the Prequalification Document. In accordance with the Law, the selection criteria should be related and proportionate to the subject matter of the Climate Project.

### **How many Bidders should be selected?**

Subject to any minimum number of Bidders expressed in this Law, there will be procurement cost and time savings if fewer Bidders are selected and invited to participate in a Climate Procurement Procedure. However, there is a risk to competitive tension if fewer Bidders are selected and subsequently a Bidder withdraws and does not submit a Bid.

Relevant considerations for the Climate Procurement Authority can be summarised as follows:

- taking more Bidders forward beyond the prequalification stage will place significant additional requirements on the project team, workstream and adviser resources (especially time), potentially leading to increased procurement costs;
- the time period for the Climate Procurement Procedure would be extended, requiring the overall procurement timescales to be increased; and
- potential Bidders are likely to have concerns about resourcing and financing their Bid for the duration of the Climate Procurement if the chance of success is reduced below a certain percentage.

#### *Development of Prequalification Evaluation Criteria and Evaluation Procedure*

- (1) The Climate Procurement Authority shall develop specific prequalification evaluation criteria, based on the principles outlined in this Article 41 and a suitable evaluation procedure for the Prequalification Responses. Such evaluation criteria and evaluation procedure shall be fully disclosed and identified by the Climate Procurement Authority in the Prequalification Document.
- (2) An evaluation procedure which is developed by the Climate Procurement Authority pursuant to Article 41(4) may have the following characteristics:
  - (a) a numerical or other form of evaluation mechanism (such as pass/fail) may be attributed by the Climate Procurement Authority to each question in the Prequalification Document pertaining to each prequalification evaluation criterion;
  - (b) a minimum threshold score or requirement may be set by the Climate Procurement Authority for any prequalification evaluation criterion; and/or
  - (c) the Climate Procurement Authority may identify a weighting for any prequalification evaluation criterion.

#### *Submission and Evaluation of Prequalification Responses*

- (3) Prequalification Responses shall be submitted by Bidders in accordance with the requirements stated in the Prequalification Document.
- (4) Prequalification Responses shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure developed in accordance with Article 41(4) and identified in the Prequalification Document.
- (5) The Climate Procurement Authority shall exclude Prequalification Responses if exclusion is mandatory pursuant to the evaluation procedure identified in the Prequalification Document.
- (6) The Climate Procurement Authority shall disqualify a Bidder if any of the grounds for disqualification described in Article 41(13) apply to such Bidder.

- (7) The outcome of the evaluation including the individual results for each Bidder together with reasons why such results were achieved, shall be contained in an evaluation report prepared by the Climate Procurement Authority.
- (8) Where information or documentation to be submitted by Bidders is or appears to be incomplete or erroneous, or where specific documents are missing, the Climate Procurement Authority may request the Bidders concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

#### *Prequalification Evaluation Criteria*

- (9) The Climate Procurement Authority shall impose prequalification requirements on Bidders in respect of their participation in a Climate Procurement Procedure. The Climate Procurement Authority shall limit such requirements to those that are appropriate to ensure that a Bidder has (a) the economic and financial standing and (b) the technical and professional ability, to perform the Climate Agreement to be awarded. All prequalification requirements shall be related and proportionate to the subject-matter of the Climate Agreement.
- (10) With regard to economic and financial standing, the Climate Procurement Authority shall impose requirements ensuring that Bidders possess the necessary economic and financial capacity to perform the Climate Agreement. The Climate Procurement Authority may require that Bidders:
  - (a) have a certain minimum yearly turnover;
  - (b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
  - (c) have an appropriate level of professional risk indemnity insurance.
- (11) With regard to technical and professional ability, an Climate Procurement Authority shall impose requirements ensuring that Bidders possess the necessary human and technical resources and experience to perform the Climate Agreement to an appropriate quality standard. The Climate Procurement Authority shall require, in particular, that Bidders have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. This shall include the provision of information by Bidders about any significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination of that prior public contract, damages or other comparable sanctions.
- (12) The Climate Procurement Authority shall indicate the prequalification requirements for participation, which may be expressed as minimum levels of ability, together with the required means of proof, in the Prequalification Document. The Climate Procurement Authority may require that any required proof consists of, where relevant, a notarized certification of authenticity or legal confirmation of such proof.

#### *Grounds for Disqualification*

- (13) If any of the following circumstances apply to a Bidder, such Bidder shall be disqualified from the relevant Climate Procurement Procedure:
  - (a) the Bidder is insolvent or has become bankrupt;
  - (b) the Bidder has undergone or completed guardianship, bankruptcy proceedings or has been placed under liquidation by court order;
  - (c) the business of the Bidder is being run by a court or by a judicial agent or an administrator whether voluntarily or by court decision;
  - (d) the Bidder's business activities have been suspended by a court decision;

- (e) the Bidder has tax debts, debts arising from the non-payment of social security contributions or is in debt of any nature to [country];
  - (f) the Bidder does not have the legal capacity to enter into the Climate Agreement.
  - (g) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction, by a final court order in the preceding five years for criminal offences in relation to their business or professional behaviour or in relation to the making of false statements or giving of incorrect or misleading information on their qualifications with a view to entering into a contract with any public institution;
  - (h) the Bidder has been disqualified or sanctioned in the preceding [five] years as a result of administrative suspensions or licensing procedures in [country] and such disqualification or sanction is relevant to the Climate Agreement which is being procured;
  - (i) the Bidder is disqualified on any of the grounds specified in this Law, the Prequalification Document, the Request for Proposals or any other document issued in respect of a Procurement Procedure;
  - (j) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for any Coercive Practice, Collusive Practice, Corrupt Practice or Fraudulent Practice or Obstructive Practice; or
  - (k) the Bidder has, or directors or officers of the Bidder with powers of representation, decision or control have, been convicted in any jurisdiction by a final court order in the preceding [five] years for money laundering, an offence in connection with the proceeds of drug trafficking, a terrorism offence or offence linked to terrorism offences, terrorist financing, or child labour or other forms of trafficking in human beings; or
  - (m) the Bidder who has submitted false information or submitted falsified or erroneous certificates containing material errors or omissions to any Government department or agency in [country].
- (14) The Climate Procurement Authority may apply to the relevant competent authority to obtain further information regarding the Bidder and, in particular, details of any court orders or decisions, or details of convictions for the offences listed in Article 41(13) if the Climate Procurement Authority considers it needs such information to decide on any disqualification referred to in Article 41(13).
- (15) The Climate Procurement Authority shall disqualify any Bidder who has at any time submitted false information or submitted falsified or erroneous certificates containing material errors or omissions to any public institution in [country].
- (16) The Climate Procurement Authority may require a Bidder to provide such information as the Climate Procurement Authority considers it needs to consider disqualification.

#### **Article 42 Reliance on the Capacities of other Persons**

- (1) With regard to economic and financial standing and technical and professional ability, a Bidder may rely on the capacities of other Persons, regardless of the legal nature of the links which it has with them, subject to the following provisions of this Article.
- (2) With regard to technical or professional ability, Bidders may only rely on the capacities of other Persons where those Persons will perform the works or services for which these capacities are required.
- (3) Where a Bidder wants to rely on the capacities of other Persons, it shall prove to the Climate Procurement Authority that any such Person is prepared to provide this capacity to the Bidder, for example by producing a commitment by those Persons to that effect, and the Bidder shall prove that the necessary resources will be available to it for the purposes of the Climate Contract.

- (4) The Climate Procurement Authority shall verify whether the Persons on whose capacity the Bidder intends to rely to fulfil the relevant evaluation criteria identified in the Prequalification Document, and whether there are grounds for disqualification under Article 41(13) and the Climate Procurement Authority shall require that the Bidder replaces a Person who does not meet a relevant requirement for the Prequalification Document, or in respect of whom there are compulsory grounds for exclusion.

#### **Article 43 Groups of Persons**

- (1) Groups of Persons may participate in a Climate Procurement Procedure and shall not be required by the Climate Procurement Authority to have a specific legal form in order to submit a Qualification System Response, Prequalification Response or Bid.
- (2) Where necessary, the Climate Procurement Authority may clarify in the Qualification System Document, Prequalification Document and/or Request for Proposals (as appropriate) how groups of entities are to meet the requirements referred to in the Qualification System Document, Prequalification Document and/or Request for Proposals (as appropriate) provided that this is justified by objective reasons and is proportionate.
- (3) Any conditions for the performance of the obligations of the Private Partner pursuant to a Climate Contract by such groups of Persons which are different from those imposed on individual participants shall also be justified by objective reasons and shall be proportionate.
- (4) The Climate Procurement Authority may require groups of Persons to assume a specific legal form once they have been awarded the Climate Contract, to the extent that such legal form is necessary for the satisfactory performance of the obligations of the Private Partner pursuant to a Climate Contract.

#### **Article 44 Evaluation of Bids and Award Criteria**

- (1) The Climate Procurement Authority Board shall develop specific award criteria, based on the principles outlined in this Article 44, and a suitable evaluation procedure for the Bids which are to be submitted. Such evaluation criteria and evaluation procedure shall be fully disclosed and identified by the Climate Procurement Authority in the Request for Proposals.
- (2) An evaluation procedure which is developed by the Climate Procurement Authority pursuant to Article 44(1) may have the following characteristics:
  - (a) a numerical or other form of evaluation mechanism (such as pass/fail) may be attributed by the Climate Procurement Authority to each question in the Request for Proposals pertaining to each evaluation criterion; and/or
  - (b) a minimum threshold score or pass/fail requirement may be set by the Climate Procurement Authority Board for any evaluation criterion; and/or
  - (c) the Climate Procurement Authority Board may identify a weighting for any Bid evaluation criterion.

#### *Submission and Evaluation of Bids*

- (3) Bids shall be submitted by Bidders in accordance with the requirements stated in the Request for Proposals.
- (4) Bids shall be evaluated by the Climate Procurement Authority in accordance with the evaluation criteria and evaluation procedure developed in accordance with Article 41(1)Article 36(4) and identified in the Request for Proposals.
- (5) The Climate Procurement Authority shall exclude Bids if exclusion is mandatory pursuant to the evaluation procedure identified in the Request for Proposals.

- (6) The outcome of the evaluation including the individual results for each Bidder together with reasons why such results were achieved, shall be contained in an evaluation report prepared by the Climate Procurement Authority.
- (7) Where information or documentation to be submitted by Bidders is or appears to be incomplete or erroneous, or where specific documents are missing, the Climate Procurement Authority may request the Bidders concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

#### *Award Criteria*

- (8) The Climate Procurement Authority shall develop award criteria which are linked to the subject matter of the Climate Contract and which may, where relevant, include the following:
  - (a) quality, including technical merit, aesthetic and functional characteristics, social, environmental and innovative characteristics, and local community benefits;
  - (b) organisation, qualification and experience of staff assigned to performing the Climate Contract, where the quality of the staff assigned can have a significant impact on the level of performance of the Climate Contract; or
  - (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.
- (9) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the Climate Procurement Authority.
- (10) Award criteria shall:
  - (a) ensure the possibility of effective competition; and
  - (b) be accompanied by specifications that allow the information provided by the Bidders to be effectively verified in order to assess how well the Bids meet the award criteria.
- (11) In case of doubt, the Climate Procurement Authority shall verify effectively the accuracy of the information and proof provided by the Bidders.
- (12) The Climate Procurement Authority shall specify, in the Request for Proposals, the relative weighting which it gives to each of the award criteria chosen.

#### **Article 45 Abandoned Bids**

- (1) If the Preferred Bidder following the evaluation of Bids does not execute the required Climate Contract with the Climate Procurement Authority on the required date or fails to fulfil any condition precedent prior to execution of the Climate Contract which has been specified in the Request for Proposals, the Bid from that Preferred Bidder shall be deemed to have been abandoned.
- (2) If a Bid is deemed to have been abandoned, the Climate Procurement Authority may:
  - (a) select the next ranked Bid in accordance with the order of the results of the evaluation; or
  - (b) if above is not possible, exercise an option to reject all Bids.

#### **Article 46 Abnormally Low Bids**

- (1) Where relevant in the context of the Climate Procurement Procedure, the Climate Procurement Authority shall require Bidders to explain the price or costs proposed in their Bid where such Bid appears to be abnormally low in relation to the subject of the Climate Contract.

- (2) The explanations given in accordance with Article 46(1) may in particular relate to:
  - (a) the economics of the manufacturing process, of the services provided or of the construction method;
  - (b) the technical solutions chosen or any exceptionally favourable conditions available to the Bidder for the supply of the products or services or for the execution of the work; and
  - (c) the originality of the work, supplies or services proposed by the Bidder.
- (3) The Climate Procurement Authority shall assess the information provided by consulting the Bidder.
- (4) The Climate Procurement Authority may only reject the Bid where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in Article 46(2).

## CHAPTER TEN

### CLIMATE CONTRACTS

#### Introduction

As part of the process of standardising documents and processes in respect of the procurement of Climate Projects, a suite of Model Climate Contracts should be prepared in order to assist the Climate Procurement Authority with their Climate Procurement Procedures. This will also provide the market with clarity in respect of the standard provisions in Climate Contracts which will be applied by the Climate Procurement Authority (including in respect of risk allocation), ensure key Government policy drivers are appropriately to the fore and save time and costs to the Climate Procurement Authority in the development of the Climate Contracts for each Climate Project.

Some examples of Climate Contracts which should become Model Climate Contracts have been included in this Chapter. However, in practice, many more types of Model Climate Contract will need to be developed on country-specific and sector-specific bases to match the requirements for the types of Climate Project which a country will need to procure in order to fulfil its NDCs. For example, a standard power purchase agreement in the context of renewable energy projects.

As an alternative to many different types of Model Climate Contract being described in the Law, the types and detailed content for any Model Climate Contracts (including those Model Climate Contracts already mentioned in this Chapter and/or any additional contracts) could be included in secondary legislation (which should be more flexible than primary legislation) or the Climate Procurement Authority could choose to go straight to drafting the required Model Climate Contracts based on its requirements.

Qualified Investors should be consulted in respect of the draft form of the Model Climate Contracts to ensure the Model Climate Contracts reflect internationally recognised and bankable risk allocation.

#### Risk Allocation

Risk management will be central to the successful delivery of the Climate Project in that it will support and inform the process of project delivery by identifying risk and the party best able to manage or share in that risk. A detailed review will be required in relation to the risks associated with each Climate Project. Risk allocation matrices will be required. In addition, workshops on risk analysis, management, mitigation and the preparation of contingency plans are an extremely useful means of informing the procurement strategy and developing the contractual documentation.

#### Dispute Resolution

In the context of dispute resolution, model clauses could include the following:

##### Provision allowing international arbitration

Any disputes arising from or in connection with this Climate Project Agreement, including any non-contractual disputes and any question regarding the agreement's existence, validity or termination, shall be referred to and finally resolved by arbitration under the rules of *[specify chosen arbitration institution]*. The number of arbitrators shall be *[number]*. [Each party shall have the right to nominate *[number]* arbitrator(s).] The place of arbitration shall be *[specify location - typically the same location as the arbitration institution]* unless the parties agree otherwise. The language to be used in the arbitration proceedings shall be *[language of choice]*.

##### *Drafting notes:*

- *The parties should consider whether they wish to waive any right of appeal to any court potentially having jurisdiction over disputes covered by this arbitration agreement.*

OR

Each party shall refer any disputes arising from or in connection with this Climate Project Agreement, including non-contractual disputes and any question regarding the agreement's existence, validity or termination, to international arbitration.

*Drafting notes:*

- *This provision avoids committing the parties to a particular seat or location. It should be noted that while this provision affords greater flexibility, it also increases the risk of parallel proceedings and disputes over jurisdiction.*
- *This provision should be checked against the governing law of the agreement to ensure that it will be recognised as a valid arbitration clause if it does not designate a seat or venue.*

#### Provision waiving sovereign immunity

"The Climate Procurement Authority irrevocably waives, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit; (ii) jurisdiction of any court; (iii) relief by way of injunction or order for specific performance or recovery of property; (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any disputes arising from or in connection with this Climate Project Agreement in the courts of any jurisdiction, including non-contractual disputes, and irrevocably agrees that it will not claim any such immunity in any such disputes."

*Drafting notes:*

- *The Bidder may also want to seek an extension of the waiver as against any shareholders or any relevant group entities involved in the Climate Project.*
- *The specific form and content of this provision should be checked against national laws to ensure that it meets the requirements for a valid waiver under such laws.*

#### **Model Climate Contracts required for this Chapter**

The following Model Climate Contracts will need to be drafted:

- Climate Project Agreements (versions suitable for use in respect of different sectors);
- IIPP Collaboration Agreement;
- Shareholders' Agreement; and
- Framework Agreements (versions suitable for legal advisers, procurement advisers, technical advisers, financial advisers, insurance advisers and surveyors (different types)).

#### **Guidelines relevant to this Chapter**

Guidelines could be developed in respect of the following topics:

- Risk allocation;
- Drafting output specifications;
- Expiry and handover;
- Local content and local community benefits;
- Direct agreements;

- Variation of Climate Contracts; and
- Contract administration of Climate Project Agreements (including variations, change in law, contract management and disputes).

#### **Article 47 Preparation of Model Climate Contracts**

- (1) The Climate Procurement Authority shall prepare Model Climate Contracts which shall comply with the relevant provisions of this Law, including this Chapter Ten.
- (2) Each Model Climate Contract which has been prepared by the Climate Procurement Authority pursuant to Article 47(1) may be amended from time to time by the Climate Procurement Authority.
- (3) Additional supporting contracts and documents in relation to each Model Climate Contract which has been prepared by the Climate Procurement Authority pursuant to Article 47(1) may be developed from time to time by the Climate Procurement Authority.
- (4) Subject to the provisions of this Chapter Ten, the Climate Procurement Authority shall prepare a Climate Contract using any relevant Model Climate Contract as may be appropriately developed and customised for such Climate Contract by the Climate Procurement Authority.

#### **Article 48 Preparation and Content of an IIPP Collaboration Agreement**

##### *Preparation of an IIPP Collaboration Agreement for a Climate Project*

- (1) The Climate Procurement Authority shall prepare the IIPP Collaboration Agreement for a Climate Project, and such IIPP Collaboration Agreement shall:
  - (a) be consistent with the provisions of this Law;
  - (b) comply with all relevant laws and regulations of [country];
  - (c) reflect the specific requirements for the Climate Project;
  - (d) include, as relevant, the provisions identified in Article 48(2);
  - (e) be based on the relevant Model Climate Contract form of IIPP Collaboration Agreement if already prepared by the Climate Procurement Authority pursuant to Article 47(1) where use of such Model Climate Contract is appropriate in the context of the requirements for the relevant Climate Project, and such Model Climate Contract shall be subject to any amendments to reflect the nature and requirements of the specific Climate Project; and
  - (f) be discussed and agreed with the Qualified Investor appointed in respect of the particular IIPP Collaboration Agreement and Climate Project.

##### *Content of an IIPP Collaboration Agreement*

- (2) Each IIPP Collaboration Agreement (including the model form of IIPP Collaboration Agreement prepared by the Climate Procurement Authority pursuant to Article 47(1) which shall include, as appropriate, draft text and placeholders) shall include the following provisions, as appropriate to the Climate Project and to the arrangements agreed with the Qualified Investor pursuant to Article 48(1)(f):
  - (a) the full legal designation of the parties to the IIPP Collaboration Agreement;
  - (b) details of the purpose of the IIPP Collaboration Agreement;
  - (c) requirements for collaborative working to:

- (i) encourage the Climate Procurement Authority and the Qualified Investor to work in mutual co-operation to fulfil their agreed roles and responsibilities under the IIPP Collaboration Agreement,
  - (ii) to minimise and give early warning to one another of any proposed matter which is likely to or will have a material impact on the Climate Project, and
  - (iii) to ensure the success of the Climate Project
- (f) requirements for the identification of priority Climate Projects (pre-procurement) by reference to criteria such as:
- (i) strategic importance to the delivery of [country's] NDCs and its Net Zero planning;
  - (ii) the level of economic, environmental and social benefit which a particular Climate Project would deliver to [country];
  - (iii) prospects of successful delivery (including feasibility from a technical, financial and/or legal perspective, and the management and mitigation of risk);
  - (iv) the ability for a Climate Project to be scaled up; and
  - (v) whether delivery of a Climate Project has the opportunity to unlock further potential funding; and
- (g) requirements for the development and implementation of procurement strategies for Climate Projects to meet the desired timescales for the realisation of [country's] NDCs, including the identification of the other contracts which will be required for the Climate Project;
- (h) requirements related to the successful delivery of Climate Projects;
- (d) details of the scope of the Climate Project such as, if relevant to the type of Climate Project, the specific technologies to be utilised;
- (e) the term of the IIPP Collaboration Agreement and the rights and obligations of the parties upon its expiry or earlier termination;
- (f) details of any land to be contributed by the State;
- (g) regulatory and permitting requirements;
- (h) the proposed shareholding and corporate structure of the project company;
- (i) a description of key activities, responsibilities and accompanying programme and milestones to be completed in order to achieve financial close for the Climate Project;
- (j) cost sharing and reimbursement arrangements amongst all parties for all activities prior to financial close and how those costs will be reimbursed by the project company once incorporated;
- (k) a description of the agreed parameters for financing the Climate Project together with equity contributions and shareholder loans, where relevant;
- (l) the establishment of a steering committee and the scope of its mandate for managing the project activities and making key decisions prior to establishing a project company with its own governance arrangements;
- (m) the extent to which the IIPP Collaboration Agreement may be varied and the procedure for the variation thereof;

- (n) provisions prohibiting Corrupt Practice, Fraudulent Practice, Impairing Practice or Collusive Practice;
- (o) confidentiality and public announcements;
- (p) events of default and appropriate remedies available to non-defaulting parties;
- (q) the governing law and the mechanisms for settlement of disputes between the Climate Procurement Authority and the Private Partner, including the ability of either party to refer any dispute in connection with the IIPP Collaboration Agreement to international arbitration and the waiver of sovereign immunity by the Climate Procurement Authority;
- (r) the extent to which either the Climate Procurement Authority and/or the Private Partner may be exempt from liability for failure or delay in complying with any obligations under the IIPP Collaboration Agreement, including in the event of occurrence of a force majeure event; and
- (s) any other matters in relation to the particular Climate Project.

#### **Article 49 Preparation and content of an Climate Project Agreement**

##### *Selection of a contractual model for a Climate Project*

- (1) For the purpose of selecting a contractual model for a Climate Project which includes an Climate Project Agreement, the Climate Procurement Authority shall consider the following:
  - (a) the specific nature and characteristics of the Climate Project including the risks which will need to be allocated in the Climate Project Agreement;
  - (a) the functions (design, construction, financing, operation and/or maintenance) the Private Partner will perform and the risks it will assume;
  - (b) whether the Climate Project is a new build or an expansion, renovation or monetization of an existing asset;
  - (c) whether it is appropriate to batch the Climate Project with other Climate Projects to increase the scale of what is being procured;
  - (d) the degree of operational control the Climate Procurement Authority wants to have over any aspect of the Climate Project;
  - (e) the duration of the Climate Project;
  - (f) any sectoral considerations for the Climate Project Agreement;
  - (g) the major revenue sources for the Climate Project; and
  - (h) the contracts, in addition to the Climate Project Agreement which will be required for the Climate Project.
- (2) The Climate Procurement Authority shall carry out an analysis of:
  - (a) the different types of contractual model which have been considered for use in respect of the particular Climate Project;
  - (b) the advantages and disadvantages of each type of contractual model which have been considered for use in respect of the particular Climate Project; and
  - (c) how the most appropriate contractual model for the Climate Project was selected.

*Preparation of the Climate Project Agreement for a Climate Project*

- (3) The Climate Procurement Authority shall prepare the Climate Project Agreement for a Climate Project, and such Climate Project Agreement shall:
- (a) be consistent with the provisions of this Law;
  - (b) comply with all relevant laws and regulations of [country];
  - (c) reflect the specific requirements for the Climate Project;
  - (d) include, as relevant, the provisions identified in Article 48(4);
  - (e) be based on the relevant Model Climate Contract form of Climate Project Agreement if already prepared by the Climate Procurement Authority pursuant to Article 47(1) where use of such Model Climate Contract is appropriate in the context of the requirements for the relevant Climate Project, and such Model Climate Contract shall be subject to any amendments to reflect the nature and requirements of the specific Climate Project; and
  - (g) be discussed and agreed with the Qualified Investor appointed in respect of the particular IIPP Collaboration Agreement and Climate Project.

*Content of a Climate Project Agreement*

- (4) Each Climate Project Agreement (including the model form of Climate Project Agreement prepared by the Climate Procurement Authority pursuant to Article 47(1) which shall include, as appropriate, draft text and placeholders) shall include the following provisions, as appropriate to the Climate Project:
- (a) the full legal designation of the parties to the Climate Project Agreement;
  - (b) the duration of the Climate Project Agreement and the rights and obligations of the parties upon its expiry or earlier termination (including handback);
  - (c) the responsibility for obtaining licences, permits and approvals;
  - (d) the remuneration of the Private Partner in respect of the Climate Project and/or any right of the Private Partner to charge, receive or collect tariffs, tolls, rentals, charges or fees from the Climate Procurement Authority or users in respect of their use of an asset or the services provided by such Private Partner in respect of a Climate Project pursuant to the Climate Project Agreement, and the methods and formulae for calculation and amendment thereof;
  - (e) the nature and scope of any works to be performed and any services or supplies to be provided by the Private Partner and the terms and conditions for provision by the Private Partner of any such works, services and supplies;
  - (f) the procedures for testing, inspection, approval and acceptance, as appropriate, of any works to be performed or services or supplies to be provided by the Private Partner, including, where appropriate, the appointment of an independent engineer;
  - (g) the extent of the Private Partner's obligations to provide the Climate Procurement Authority and/or a regulatory agency, as appropriate, with reports and other information in respect of the Private Partner's activities;
  - (h) design review procedure;
  - (i) programme requirements;
  - (j) the extent to which the Climate Project Agreement may be varied and the procedure for the variation thereof;

- (k) changes in law;
  - (l) any security and guarantees of performance to be provided by the Private Partner and/or its shareholders and insurance policies to be maintained in respect of the implementation and operation of the Climate Project;
  - (m) any requirements for collateral warranties and direct agreements;
  - (n) the Climate Procurement Authority's or other public authority's right to monitor and to take any action to ensure that the Climate Project Agreement is implemented by the Private Partner in accordance with the applicable legal and contractual requirements;
  - (o) provisions prohibiting Corrupt Practice, Fraudulent Practice, Impairing Practice or Collusive Practice;
  - (p) confidentiality and public announcements;
  - (q) intellectual property rights;
  - (r) grounds for termination and suspension;
  - (s) any remedies available in the event of default of either the Climate Procurement Authority or the Private Partner;
  - (t) financing requirements;
  - (u) the ownership of the assets relating to the Climate Project Agreement and the rights and obligations of the Climate Procurement Authority and/or the Private Partner, as appropriate, relating to such assets;
  - (v) the governing law and the mechanisms for settlement of disputes between the Climate Procurement Authority and the Private Partner, including the ability of either party to refer any dispute in connection with the Climate Project Agreement to international arbitration and the waiver of sovereign immunity by the Climate Procurement Authority;
  - (w) the extent to which either the Climate Procurement Authority and/or the Private Partner may be exempt from liability for failure or delay in complying with any obligations under the Climate Project Agreement, including in the event of occurrence of a force majeure event;
  - (x) any indemnities and liabilities;
  - (y) any rights of the State to conduct any inspections, investigations, audits and/or seizures of any accounts, records or other documents relating to or in connection with the Climate Project in accordance with and pursuant to this Law, any applicable law of the [country] and the State's policy on fraud and corruption;
  - (z) provisions in respect of land, facilities, equipment or other State resources which may be transferred to or made available to the Private Partner; and
  - (aa) any other matters in relation to the particular Climate Project.
- (5) A Private Partner shall have the right to charge, receive or collect tariffs, tolls, rentals, charges or fees from an Entity or users in respect of their use of the asset or the services which are provided by such Private Partner pursuant to an Climate Project Agreement.
- (6) The Private Partner and/or its shareholders, shall have the right to create security interests over any of the assets, rights or interests relating to the Climate Project, and enter into any other arrangements with the persons extending financing for a Climate Project, as required to secure any financing needed for the Climate Project, including, without limitation, the following:

- (a) security over movable or immovable property owned by the Private Partner or its interests in Climate Project assets; and
  - (b) a pledge of the proceeds of, and receivables owed to the Private Partner for, the use of the Climate Project assets or the services it provides.
- (7) The Climate Procurement Authority may, if appropriate, agree with [the Qualified Investor and the Persons providing financing] for a Climate Project and the Private Partner to provide for the substitution of the Private Partner by a new Person appointed to perform under the existing Climate Project Agreement upon serious breach by the Private Partner or other events that could otherwise justify the termination of the Climate Project Agreement or other similar circumstances.

## **Article 50 Preparation and Content of a Shareholders' Agreement**

### *Preparation of a Shareholders' Agreement for a Climate Project*

- (1) The Climate Procurement Authority shall prepare the Shareholders' Agreement for a Climate Project, and such Shareholders' Agreement shall:
- (a) be consistent with the provisions of this Law;
  - (b) comply with all relevant laws and regulations of [country];
  - (c) reflect the specific requirements for the Climate Project;
  - (d) include, as relevant, the provisions identified in Article 50(2);
  - (e) be based on the relevant Model Climate Contract form of Shareholders' Agreement if already prepared by the Climate Procurement Authority pursuant to Article 47(1) where use of such Model Climate Contract is appropriate in the context of the requirements for the relevant Climate Project, and such Model Climate Contract shall be subject to any amendments to reflect the nature and requirements of the specific Climate Project; and
  - (f) be discussed and agreed with the Investor appointed in respect of the particular Climate Project.

### *Content of a Shareholders' Agreement*

- (2) Each Shareholders' Agreement (including the model form of Shareholders' Agreement prepared by the Climate Procurement Authority pursuant to Article 47(1) which shall include, as appropriate, draft text and placeholders) shall include the following provisions, as appropriate to the Climate Project:
- (a) the full legal designation of the parties to the Shareholders' Agreement;
  - (b) timing and jurisdiction of incorporation of the holding company/project company;
  - (c) equity ownership and authorised share capital;
  - (d) objectives of the holding company/project company;
  - (e) shareholder funding requirements for the Climate Project through equity contributions and shareholder loans, plus any required credit support in support of equity commitments;
  - (f) a description of the agreed parameters for financing the Climate Project together with equity contributions and shareholder loans, where relevant;
  - (g) management of the holding company/project company including establishment of a board, quorums, frequency of meetings, appointment of directors and governance arrangements;
  - (h) mechanisms regarding agreement and amendment of budgets and work plan;

- (i) a description of any board committees and their membership, voting and associated provisions;
- (j) appointment of senior officials of the holding company/ project company;
- (k) shareholder meetings including listing matters reserved for different voting thresholds;
- (l) mechanism for managing related entity transactions;
- (m) mechanism for managing deadlock amongst board directors and/or shareholders;
- (n) dividend and distribution policy;
- (o) restrictions on share transfers to third parties and priority rights of existing shareholders to pre-empt a transfer to a third party;
- (p) events of default and appropriate remedies available to non-defaulting shareholders;
- (q) provisions prohibiting Corrupt Practice, Fraudulent Practice, Impairing Practice or Collusive Practice;
- (r) confidentiality and public announcements;
- (t) the governing law and the mechanisms for settlement of disputes between the shareholders, including the ability of either party to refer any dispute in connection with the Shareholders' Agreement to international arbitration and the waiver of sovereign immunity by the Climate Procurement Authority;
- (u) the extent to which a shareholder may be exempt from liability for failure or delay in complying with any obligations under the Shareholders' Agreement, including in the event of occurrence of a force majeure event; and
- (v) any other matters in relation to the particular Climate Project.

## Article 51 Preparation and Content of a Framework Agreement

### Comments

In framework consultancy contracts, a feature which should be included in the model form is a requirement on the consultant to provide knowledge transfer and training. For example, an engineering consultant could be required to offer a specified number of training places to local engineers.

#### *Preparation of a Framework Agreement*

- (1) The Climate Procurement Authority shall prepare a Framework Agreement, and such Framework Agreement shall:
  - (a) be consistent with the provisions of this Law;
  - (b) comply with all relevant laws and regulations of [country];
  - (c) reflect the specific requirements for the Framework which is being procured;
  - (d) include, as relevant, the provisions identified in Article 51(2); and

- (e) be based on the relevant Model Climate Contract form of Framework Agreement if already prepared by the Climate Procurement Authority pursuant to Article 47(1) where use of such Model Form Climate Contract is appropriate in the context of the requirements for the relevant Climate Project, and such Model Form Climate Contract shall be subject to any amendments to reflect the nature and requirements of the specific Climate Project.

*Content of a Framework Agreement*

- (2) Each Framework Agreement (including the model form of Framework Agreement prepared by the Climate Procurement Authority pursuant to Article 47(1) which shall include, as appropriate, draft text and placeholders) shall include the following provisions, as appropriate to the Framework which is being procured
  - (a) the full legal designation of the parties to the Framework Agreement;
  - (b) the duration of the Framework Agreement and the rights and obligations of the parties upon its expiry or earlier termination;
  - (c) the call-off process and the contractual provisions in relation thereto;
  - (d) the responsibility for obtaining licences, permits and approvals;
  - (e) the remuneration of the Private Partner;
  - (f) the nature and scope of any works to be performed and any services or supplies to be provided by the Private Partner and the terms and conditions for provision by the Private Partner of any such works, services and supplies;
  - (g) the procedures for testing, inspection, approval and acceptance, as appropriate, of any works to be performed or services or supplies to be provided by the Private Partner including, where appropriate, the appointment of an independent engineer;
  - (h) the extent of the Private Partner's obligations to provide the Climate Procurement Authority and/or a regulatory agency, as appropriate, with reports and other information in respect of the Private Partner's activities;
  - (i) design review procedure;
  - (j) programme requirements;
  - (k) the extent to which the Framework Agreement may be varied and the procedure for the variation thereof;
  - (l) changes in law;
  - (m) any security and guarantees of performance to be provided by the Private Partner and insurance policies to be maintained in respect of the Framework Agreement and implementation of a call-off contract under the Framework Agreement;
  - (n) any requirements for collateral warranties and direct agreements;
  - (o) the Climate Procurement Authority's or other public authority's right to monitor and to take any action to ensure that the Framework Agreement and any call-off contract under the Framework Agreement is implemented by the Private Partner in accordance with the applicable legal and contractual requirements;
  - (p) provisions prohibiting Corrupt Practice, Fraudulent Practice, Impairing Practice or Collusive Practice;
  - (q) confidentiality and public announcements;

- (r) intellectual property rights;
- (s) grounds for termination and suspension;
- (t) any remedies available in the event of default of either the Climate Procurement Authority or the Private Partner;
- (u) the governing law and the mechanisms for settlement of disputes between the Climate Procurement Authority and the Private Partner, including the ability of either party to refer any dispute in connection with the Framework Agreement to international arbitration and the waiver of sovereign immunity by the Climate Procurement Authority;
- (v) the extent to which either the Climate Procurement Authority and/or the Private Partner may be exempt from liability for failure or delay in complying with any obligations under the Framework Agreement, including in the event of occurrence of a force majeure event;
- (w) any indemnities and liabilities;
- (x) provisions in respect of land, facilities, equipment or other State resources which may be transferred to or made available to the Private Partner; and
- (y) any other matters in relation to the particular Framework Agreement.

## Article 52 Modification of Climate Contracts

### Comments

The ability to modify Climate Contracts could be dealt with in the context of the variation clause in a Climate Contract. However, having some key principles enshrined in Law to address the modification of executed Climate Contracts assists with any negative perception that Climate Procurement Procedures are being avoided in lieu of continual modification of executed Climate Contracts.

- (1) Climate Contracts may be modified without a new Climate Procurement Procedure in any of the following cases:
  - (a) where the modification, irrespective of its monetary value, has been provided for in the Request for Proposals and the Climate Contract in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for amendments, variations or options that would alter the overall nature of the Climate Contract; or
  - (b) for additional works, services or supplies by the original Private Partner that have become necessary and were not included in the initial procurement where a change of Private Partner:
    - (i) cannot be made for any economic or technical reasons; and
    - (ii) would cause substantial duplication of costs for the Climate Procurement Authority; and

provided that any increase in value as a result of the modification shall not exceed [50%] of the value of the original Climate Contract. Where several successive modifications are made, the price or value of each modification shall be assessed separately for the purpose of applying the limitation of [50%] unless such successive modifications have been made with the aim of circumventing the application of this Law, in which case such successive modifications shall be assessed on the basis of the net cumulative value of the modifications for the purpose of applying the limitation of [50%]; or

- (c) where all of the following conditions are fulfilled:
    - (i) the need for modification has been brought about by circumstances which the Climate Procurement Authority, acting diligently, could not have foreseen;
    - (ii) the modification does not alter the overall nature of the Climate Contract; and
    - (iii) any increase in value arising as a result of the modification is not higher than [50%] of the value of the original Climate Contract. Where several successive modifications are made, the price or value of each modification shall be assessed separately for the purpose of applying the limitation of [50%] unless such successive modifications have been made with the aim of circumventing the application of this Law, in which case such successive modifications shall be assessed on the basis of the net cumulative value of the modifications for the purpose of applying the limitation of [50%]; or
  - (d) where a new private partner replaces the one to which the Climate Procurement Authority had initially awarded the Climate Contract as a consequence of either:
    - (i) an unequivocal review clause or option in conformity with Article 52(1)(a); or
    - (ii) universal or partial succession into the position of the initial Private Partner, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another private party which fulfils the criteria for selection identified in the Prequalification Document provided that this does not entail other substantial modifications to the Climate Contract and is not aimed at circumventing the application of this Law; or
  - (e) where the value of the modification is below [25%] of the original value of the Climate Contract provided that the modification may not alter the overall nature of the Climate Contract. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive amendments or variations.
- (2) A new Climate Procurement Procedure in accordance with this Law shall be required for modifications of a Climate Contract during its term other than those provided for under this Article.

**Article 53 Authority for Execution of a Climate Contract and Modifications to a Climate Contract**

Comments
To be customised according to the governance requirements for the execution of contracts in the specific jurisdiction.

- (1) A Climate Contract or a modification of a Climate Contract shall not bind the Climate Procurement Authority which is a party to such Climate Contract unless the Climate Contract or modification of that Climate Contract is executed by a Person who has prior written authorization from the Climate Procurement Authority to execute such Climate Contract or the modification of that Climate Contract.

**Article 54 Contract Management**

- (1) The Climate Procurement Authority is responsible for ensuring that a Climate Contract is properly administered and enforced in accordance with its terms and conditions. For this purpose:
- (a) the Climate Procurement Authority shall establish a contract management team which shall oversee the administration of the Climate Contract;

- (b) the Climate Procurement Authority shall provide the necessary resources, including human resources, to its contract management team to enable effective contract administration; and
  - (c) where required, the Climate Procurement Authority may appoint technical, financial and legal experts as members of the Climate Procurement Authority's contract management team to assist with any aspect of the administration or enforcement of the Climate Contract which may include:
    - (i) in respect of the legal expert, interpretation of the terms and conditions of the Climate Contract, variations of the Climate Contract, termination of the Climate Contract and disputes in connection with the Climate Contract;
    - (ii) in respect of the financial expert, operation of the payment mechanism, audit and accounting regarding the Climate Contract, variations of the Climate Contract, and the operation of performance guarantees; and
    - (iii) in respect of the technical expert, design and construction, completion and commissioning, defects rectification, operation and maintenance, variations of the Climate Contract, and handback and transfer issues.
- (2) The Climate Procurement Authority, supported by its contract management team, shall establish procedures for the administration of each Climate Contract which shall include:
- (a) managing governance of the Climate Contract (which shall include a process for the recording and communication of the appropriate decision-making authorities in respect of the Climate Contract);
  - (b) communicating and liaising with the Private Partner (which shall include the preparation of a comprehensive communications plan) and any independent engineer or third party who has been appointed pursuant to the Climate Contract;
  - (c) monitoring, evaluating and regulating the performance by the Private Partner of the Climate Contract and the implementation of the relevant Climate Project by the Private Partner (which shall include the preparation of a comprehensive contract management plan);
  - (d) measuring outputs related to the performance of the Private Partner in terms of the Climate Contract, including the involvement in such measurement by any independent engineer or third party who has been appointed pursuant to the Climate Contract;
  - (e) receiving, reviewing and addressing issues arising from reports submitted by the Private Partner to the Climate Procurement Authority pursuant to the Climate Contract;
  - (f) the provision of reports by the Private Partner to the Climate Procurement Authority in respect of the relevant Climate Project and its progress, including but not limited to achievements, challenges, obstacles and outstanding issues;
  - (g) ensuring that all rectification measures are undertaken by the Private Partner on a timely basis and performance regimes are strictly and timeously enforced in accordance with the Climate Contract;
  - (h) managing stakeholder engagement;
  - (i) managing any variation, termination or dispute;
  - (j) managing transfer or handback of the Climate Project; and
  - (k) managing accounting, audit and other compliance and regulatory matters.
- (3) Where relevant, the Climate Procurement Authority, supported by its contract management team, shall establish a procedure for the transfer or handback of the asset comprised as part of the Climate

Project on the occurrence of the date of expiry of the Climate Contract. Such procedure shall ensure that the asset is handed back or transferred to the Climate Procurement Authority in a condition which is in accordance with the terms of the Climate Contract, with the required documentation for the Climate Procurement Authority or another Private Partner to manage and operate the asset. Such procedure may also include:

- (a) joint inspection by the Climate Procurement Authority and the Private Partner to assess the condition of the asset prior to transfer or handback; and
  - (b) pursuant to such joint inspection, identification of any remedial measures which require to be taken by the Private Partner (at the Private Partner's costs) before the asset is transferred or handed back to the Climate Procurement Authority;
- (4) The Climate Procurement Authority shall ensure that the Private Partner is satisfying its contractual obligations (including in respect of any amendments to the Climate Contract) in accordance with the provisions of this Law and the Climate Contract.
- (5) The Climate Procurement Authority shall provide a report on a quarterly basis to the [Office of the President] about the operation of each Climate Contract and the relevant Climate Project, which shall include details in respect of:
- (a) the relevant Climate Project and its progress;
  - (b) any achievements of the Climate Procurement Authority in respect of the Climate Project;
  - (c) any challenges or obstacles which have been encountered by the Climate Procurement Authority in respect of the Climate Project, and how the Climate Procurement Authority dealt with those challenges or obstacles;
  - (d) any outstanding issues in respect of the Climate Contract and how the Climate Procurement Authority plans to deal with those outstanding issues;
  - (e) the performance of the Private Partner measured against the requirements of the Climate Contract;
  - (f) any variations or disputes under the Climate Contract;
  - (g) any preparations for transfer or handback of the Climate Project; and
  - (h) any local development opportunities and any community involvement, including
    - (i) support given to local small and medium-sized businesses;
    - (ii) the number of jobs to be created for citizens of [country];
    - (iii) the extent of transfer of skills and technology to citizens of [country];
    - (iv) proportion of construction works, goods and/or services required for the Climate Project which have been acquired locally; and
    - (v) support given for regional and district development.
- (6) The requirement under Article 54(5) for the Climate Procurement Authority to provide a report on annual basis to the [Office of the President] about the operation of each Climate Contract and the relevant Climate Project, shall be without prejudice to the right of the [Office of the President] to require the Climate Procurement Authority to provide information about any Climate Contract or Climate Project at any time.

## Article 55 Technical specifications

- (1) The technical specifications shall be included in the Climate Procurement Documents.
- (2) The technical specifications shall lay down the characteristics, as relevant, for the works, services or supplies required in respect of a Climate Contract.
- (3) In the case of a Climate Contract involving works, the technical specification shall define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the Climate Procurement Authority which may include:
  - (a) levels of environmental and climate performance, design for all requirements and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works;
  - (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
- (4) In the case of a Climate Contract including supplies or services, the required characteristics may include quality levels, environmental and climate performance levels, design for all requirements and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.
- (5) In the case of any Climate Contract, the required characteristics may, where relevant, also refer to:
  - (a) the specific process or method of production or provision of the requested works, supplies or services, or
  - (b) a specific process for another stage of its life cycle,even where such factors do not form part of the characteristics' material substance provided that they are linked to the subject-matter of the Climate Contract and proportionate to its value and its objectives.
- (6) Technical specifications shall afford equal access of Bidders to the Climate Procurement Procedure and shall not have the effect of creating unjustified obstacles to the opening up of competition.
- (7) As appropriate, technical specifications shall be formulated by reference to international standards where no international standards exist, reference can be made to national standards but each reference shall be accompanied by the words "or equivalent".
- (8) Unless justified by the subject-matter of the Climate Contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific Bidder, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.
- (9) But such reference is permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the Climate Contract is not possible, in which case the reference shall be accompanied by the words "or equivalent".

## CHAPTER ELEVEN

### STANDSTILL NOTICES, CONTRACT AWARD NOTICES, INFORMATION, DOCUMENTATION AND REPORTING REQUIREMENTS AND REMEDIES

#### Introduction

#### What are Standstill Notices?

Article 56 requires the Climate Procurement Authority to send "a notice communicating its decision to award a Climate Contract or conclude a Framework Agreement" ("**Standstill Notice**"). The Climate Procurement Authority must not enter into a Climate Contract or conclude the Framework Agreement before the end of the standstill period has expired.

#### When does the standstill period expire?

Where the Climate Procurement Authority sends a Standstill Notice by electronic means, the standstill period ends at midnight at the end of the 10th day after the date on which the notice under Article 561.1(1) is sent by electronic means to the relevant Bidders.

The date on which the standstill period will end or the date before which the Climate Procurement Authority will not, in conformity with Article 561.1(5) enter into the Climate Contract or conclude the Framework Agreement should be stated in the Standstill Notice.

By way of example, when calculating the standstill period, establish the date on which the Standstill Notices were sent out - e.g. 11 January. Count forward ten days from that date - so do not include 11 January. The last day of the standstill period is 21 January, unless that day is not a "working day". So if 21 January is not a working day, then the standstill period ends on 22 January if that is a working day. In accordance with Article 56(6)1.1(6), the standstill period ends at midnight on 22 January.

#### What information should be included in a Standstill Notice?

It is stated in Article 56(2) that the following information should be included in a Standstill Notice:

- the criteria for the award of the Climate Contract or Framework Agreement;
- the reasons for the decision, including the characteristics and relative advantages of the successful Bid, the score obtained by the Bidder who is to receive the Standstill Notice and the Preferred Bidder; and
- the name of the Preferred Bidder(s).

#### Is any information exempt from a Standstill Notice?

In terms of Article 56(4), the Climate Procurement Authority may withhold any information to be provided in accordance with the Model Law where the release of such information:

- would impede law enforcement or would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of a particular Bidder, whether public or private; or
- might prejudice fair competition between Bidders.

#### Should unsuccessful Bidders receive a "face to face" debrief in addition to a Standstill Notice?

The Model Law does not mandate that a further debrief is given in addition to a Standstill Notice. However, if possible and especially in the context of complex Climate Projects undertaken under a competitive dialogue procedure, unsuccessful Bidders should also be entitled to request a debriefing

from the Climate Procurement Authority.

If an unsuccessful Bidder, is granted a debrief, then the following principles should be applied:

- the Climate Procurement Authority should be very well prepared for debriefs and must be able to speak to all aspects of the unsuccessful Bid.
- Members of the Climate Procurement Authority's evaluation team should attend. This should include the Climate Procurement Authority's project team (including external advisers). Debriefs should address any concerns and clarifications from Bidders.
- Genuine and constructive feedback must be provided so as to enable Bidders to understand how they could improve.
- Good debriefings can address misunderstandings and help minimise the risk of challenge, as well as encourage Bidders to participate in future projects in the Climate Procurement Authority's pipeline.
- Be sensitive as to how important losing a contract is to the business of Bidders, and to the personnel who have worked in their bid teams.

#### **When should a contract award notice be published?**

Not later than 30 days after the award of a Climate Contract, or the conclusion of a Framework Agreement following the decision to award or conclude it, the Climate Procurement Authority must publish a Climate Contract Award Notice on the results of the Climate Procurement Procedure (Article 57).

#### **What information should be included in a contract award notice?**

Contract award notices must contain the information set out in Article 57(3) and must be sent for publication in accordance with Article 57(4).

#### **Is any information exempt from publication in a contract award notice?**

In terms of Article 57(5), certain information on the award of the contract may be withheld from publication where its release:

- would impede law enforcement or would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of a particular Bidder, whether public or private; or
- might prejudice fair competition between Bidders.

#### **What other information are Bidders entitled to?**

In terms of Article 58, the Climate Procurement Authority must as soon as possible inform each Bidder and Bidder of any decision reached concerning not to conclude a Framework Agreement, not to award a Climate Contract for which there has been publication of a Climate Contract Notice, to recommence a Climate Procurement Procedure, or not to implement an Investor Qualification System.

On request from Bidders, the Climate Procurement Authority must, as quickly as possible, and in any event within 15 days from receipt of a written request, inform any unsuccessful Bidder of the reasons for the rejection of its Prequalification Response or its Investor Qualification System Response, the reasons for the rejection of its Bid in circumstances where the Climate Procurement Procedure is taking place in successive stages, and the award of a Climate Contract based on a Framework Agreement.

The Climate Procurement Authority may, in accordance with Article 58(3), decide to withhold certain information.

## Remedies

It is recommended that there is an effective forum for Bidders and Investors to challenge a procurement process or decision, and Bidders and Investors must have confidence when they commit time and resources to bid for a Climate Contract that there will be effective remedies available to them if they decide to bring a challenge. In some jurisdictions, there will be an established court system which can be used to facilitate challenges and some jurisdictions will have specialist courts with judges who are experienced dealing with such procurement challenges. The benefit of a court system is that it provides a robust system but it can also be slow and expensive as a court challenge can take over a year to reach trial depending on its complexity, the quantity of evidence including the number of disclosure documents required to be located and reviewed and another factor is the capacity of the courts. Jurisdictions have different rules around costs recovery and a decision needs to be made about whether an inability to recover costs in an expensive legal process will deter parties with a strong challenge.

Other jurisdictions will have tribunal systems which can often provide a specialist review of procurement issues and this can be quicker and cheaper and, therefore, more accessible to Bidders and Investors without the need to incur significant fees and risk adverse costs orders. A failure to have an effective remedies system in place can lead to a loss of confidence in the market when deciding whether to bid or not.

Each jurisdiction must make a decision about which system, either using the courts or a specialist tribunal system, will work best for them. The key is that Bidders and Investors know that when they incur significant time and resources into a procurement process, there is a challenge system which provides effective remedies.

Bidders and Investors in a procurement competition who need to challenge either the procurement process or the end result have different remedies available to them. For example the remedies in the English court system are dependent on whether the contract has been signed off with the winning supplier before the claim has been issued at court and the contracting authority has been notified of the claim. The benefit of this system is that it provides certainty to the contracting authority and the winning supplier that once a procurement process has been followed and the contract signed off, it cannot be unpicked and a challenger can only pursue damages. However, it can be difficult for challenges in the English court system to pursue the remedy of seeking the contract itself rather than a damages claim and any system should be careful not to make the remedy which most challengers want, the contract itself, too difficult to pursue compared to a damages claim.

### Example of the English Court System

#### *Pre-contractual remedies*

- Many suppliers who have lost a procurement competition and believe they have grounds for challenge want to pursue a claim to unpick the original result in order to secure the contract award for themselves. This remedy is only available if the claim is commenced before the contract has been entered into. Issuing proceedings in court acts as an automatic injunction preventing the contracting authority from signing off the contract with the winning bidder until the court orders otherwise or the end of the litigation. However, it is often difficult to maintain the injunction if the contracting authority applies to court to lift it.
- If the injunction is lifted, the challenger can still pursue a damages claim but the right to the contract itself is lost as the contract with the winning bidder can be signed.
- Even if the injunction remains in place, the challenger will normally have to put in place a cross undertaking in damages (a commitment evidenced by funds to pay such damages) to cover potential losses suffered by the contracting authority (and sometimes also the winning bidder) caused by the delay in signing the contract brought about by the litigation. This means that securing the contract as an effective remedy through litigation is often difficult and normally involves high risk litigation because defeat could mean paying for the costs of delaying the contract as well as legal costs.

- A challenger can also pursue a damages claim when the contract has yet to be signed off.
- Where a challenger issues a claim in relation to the procurement procedure (i.e. whilst the procurement is ongoing) the remedy it will be seeking is for the contracting authority to remedy the breach of procedure. For example, it may be asked to remedy and reissue a relevant document correcting the legal breach.

### **Post Contractual remedies**

- Once the contract has been signed off, a supplier can, in only very specific circumstances, apply to have the contract set aside (known as securing a declaration of ineffectiveness). Such an order ends the contract from the date of the Court Order and the contracting authority will also receive a fine.
- If the challenger does not have grounds to set aside the contract, it can still pursue a damages claim if it feels it was the rightful winner of the competition or has lost at least a lawful opportunity to be the winner because of a breach of the procurement rules.

### **Summary**

Each jurisdiction should decide which system delivers what is required in the context of local circumstances. The key is that the system provides confidence to the market that if there is a problem with the procurement process or a grievance regarding the result, there are effective remedies available. A court system can provide confidence of a robust system with expert judges but it can be slow and expensive whereas a tribunal system may offer a quicker and cheaper option to challenge but may provide less confidence on high value complex challenges.

### **Model Documents required for this Chapter**

The following model documents will need to be drafted:

- Model Standstill Notice;
- Model Climate Contract Award Notice; and
- pro-forma report for the purposes described in Article 59.

### **Guidelines relevant to this Chapter**

Guidelines could be developed in respect of the following topics:

- Preparation of Standstill Notices; and
- Dealing with procurement challenges.

## **Article 56 Notices of decisions to award a Climate Contract or conclude a Framework Agreement**

- (1) Subject to Article 56(3) and Article 56(4), the Climate Procurement Authority shall send to each unsuccessful Bidder a notice communicating its decision to award a Climate Contract (except in respect of an Investor Qualification System) or conclude a Framework Agreement.

### *Content of notices*

- (2) Where it is to be sent to a Bidder, the notice referred to in Article 56(1) shall include:
  - (a) the criteria for the award of the Climate Contract or the Framework Agreement;

- (b) the reasons for the decision, including the characteristics and relative advantages of the successful Bid, the score (if any) obtained by:
  - (i) the Bidder who is to receive the notice; and
  - (ii) the Bidder to be awarded the Climate Contract, or to become a party to the Framework Agreement;
- (c) the name of the Bidder:
  - (i) to be awarded the Climate Contract, or
  - (ii) to become a party to the Framework Agreement; and
- (d) a precise statement of either:
  - (i) when, in accordance with Article 56(6), the standstill period is expected to end; or
  - (ii) the date before which the Climate Procurement Authority will not, in conformity with Article 56(5) enter into the Climate Contract or conclude the Framework Agreement.

#### *Exemptions*

- (3) The Climate Procurement Authority need not comply with Article 56(1) in any of the following cases:
  - (a) direct award of a Climate Contract pursuant to Article 28;
  - (b) where the only Bidder is the one who is to be awarded the Climate Contract or who is to become a party to the Framework Agreement;
  - (c) where the Climate Procurement Authority awards a Climate Contract under a Framework Agreement.
- (4) The Climate Procurement Authority may withhold any information to be provided in accordance with the preceding requirements of this Article where the release of such information:
  - (a) would impede law enforcement or would otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular Bidder, whether public or private; or
  - (c) might prejudice fair competition between Bidders.

#### *Standstill period*

- (5) Where Article 56(1) applies, the Climate Procurement Authority must not enter into the Climate Contract or conclude the Framework Agreement before the end of the standstill period.
- (6) Where the Climate Procurement Authority sends a notice under Article 56(1) to all the relevant Bidders by electronic means, the standstill period ends at midnight at the end of the 10th day after the date on which the notice under Article 56(1) is sent by electronic means to the relevant Bidders

#### **Article 57 Climate Contract Award Notices**

- (1) Not later than 30 days after the award of a Climate Contract, or the conclusion of a Framework Agreement following the decision to award or conclude it, the Climate Procurement Authority shall publish a Climate Contract Award Notice on the results of the Climate Procurement Procedure.

- (2) In the case of Framework Agreements, the Climate Procurement Authority shall not be bound to publish the results of the Climate Procurement Procedure for each Climate Contract based on such Framework Agreement.
- (3) Any Climate Contract Award Notices shall, as a minimum, contain the following information:
  - (a) name, address, telephone, email and internet address of the Climate Procurement Authority;
  - (b) description of the Climate Contract (including location, brief description of the scope and nature and extent of works, services and/or supplies (as appropriate)) and the Climate Project;
  - (c) type of Climate Procurement Procedure;
  - (d) information about the Preferred Bidder;
  - (e) date of publication of the associated Climate Contract Notice;
  - (f) date of dispatch of the Climate Contract Award Notice; and
  - (g) any other relevant information.
- (4) The publication of a Climate Contract Award Notice by the Climate Procurement Authority is subject to the following rules:
  - (a) the Climate Prior Information Notice shall be published in [local language] on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority;] and
  - (b) the Climate Prior Information Notice shall be published in English on the website of the Climate Procurement Authority and the website of [e.g. the national procurement authority].
- (5) Certain information on the award of the Climate Contract or the conclusion of the Framework Agreement may be withheld from publication where its release:
  - (a) would impede law enforcement or would otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular Bidder, whether public or private; or
  - (c) might prejudice fair competition between Bidders.

#### **Article 58 Informing Bidders**

- (1) The Climate Procurement Authority shall as soon as possible inform each Bidder of decisions reached concerning the conclusion of a Framework Agreement, the award of a Climate Contract or admittance to the Investor Qualification System, including the grounds for any decision
  - (a) not to conclude a Framework Agreement;
  - (b) not to award a Climate Contract for which there has been publication of a Climate Contract Notice;
  - (c) to recommence a Climate Procurement Procedure, or
  - (d) not to implement an Investor Qualification System.
- (2) On request from the Bidder concerned, the Climate Procurement Authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:
  - (a) any unsuccessful Bidder of the reasons for the rejection of its Prequalification Response;

- (b) any unsuccessful Bidder of the reasons for the rejection of its Investor Qualification System Response;
  - (c) any unsuccessful Bidder of the reasons for the rejection of its Bid in circumstances where the Climate Procurement Procedure is taking place in successive stages; and
  - (d) any unsuccessful Bidder about the award of a Climate Contract based on a Framework Agreement.
- (3) The Climate Procurement Authority may decide to withhold certain information referred to in Article 58(1) and Article 58(2) where the release of such information:
- (a) would impede law enforcement or would otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular Bidder, whether public or private; or
  - (c) might prejudice fair competition between Bidders.

### Article 59 Reporting and Documentation Requirements

Comments
<p>Requirements on reporting and documentation have been set out below.</p> <p>Consideration will be required in terms of which entity the Climate Procurement Authority reports to, how compliance with the Law by the Climate Procurement Authority is assured and how audits of Climate Procurement Procedures are undertaken.</p> <p>A balance is required in terms of ensuring governance and due process against the introduction of over-complicated bureaucratic procedures.</p>

#### *Individual reports*

- (1) For every Climate Contract or Framework Agreement, the Climate Procurement Authority shall draw up a written report which shall include at least the following:
- (a) the subject-matter and value of the Climate Contract or Framework Agreement;
  - (b) a summary of the Climate Procurement Procedure which was undertaken, including the names of Bidders who participated in the Climate Procurement Procedure, and the timeline for that Climate Procurement Procedure;
  - (c) the reasons for the rejection of tenders found to be abnormally low, if applicable;
  - (d) the name of the Preferred Bidder and the reasons why its Bid was selected;
  - (e) where applicable, the reasons why the Climate Procurement Authority has decided not to award a Climate Contract or Framework Agreement;
  - (f) where applicable, conflicts of interests detected and subsequent measures taken; and
  - (g) any other relevant matters.
- (2) Such a written report is not required in respect of each Climate Contract awarded by the Climate Procurement Authority under a Framework Agreement.

- (3) A Climate Procurement Authority shall communicate the report
- (a) to the [Office of the President]; and
  - (b) [identify suitable Government department with audit function].

*Documentation of progress and decisions*

- (4) The Climate Procurement Authority shall document the progress of all Climate Procurement Procedures.
- (5) To that end, the Climate Procurement Authority shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the Climate Procurement Procedure, such as documentation on:
- (a) communications with Bidders and internal deliberations;
  - (b) preparation of the Climate Procurement Documents and Climate Contracts;
  - (c) dialogue or negotiation if any; and
  - (d) selection and award of the Climate Contract.
- (6) The documentation shall be kept for a period of at least 3 years from the date of award of the Climate Contract.

*Retention of contract copies*

- (7) The Climate Procurement Authority shall, at least for the duration of the Climate Contract, keep copies of all concluded Climate Contracts.

**Article 60 Remedies**

**Comments**

Each jurisdiction must decide which forum to rely on for procurement processes and decisions to be challenged. The appropriate court, tribunal or expert determination process should be set out below:

- (1) [Insert details for the forum of challenge together with details of which remedies will be available.]

## CHAPTER TWELVE

### MISCELLANEOUS PROVISIONS

#### Introduction

#### Guidelines relevant to this Chapter

Guidelines could be developed in respect of the following topics:

- Sanction Policy / Guidelines

#### Article 61 Fraud and Corruption

#### Comments

A secondary level policy or procedure should be established to further detail the sanctions and consequences of breach of the provisions of this Law, such as in the case of Article 61(3) and Article 65.

This could take the form of a 'Sanctions' or 'Enforcement' Policy which develops upon the sanction and declaration of ineligibility process provision in this Article 61, with the objective of providing investors with a greater degree of certainty and transparency in relation to the potential sanctions process and outcomes for any relevant breaches of the Law.

At a high-level, a Sanctions or Enforcement Policy should detail the overall scope and process, which may include:

- an investigation or fact-finding phase;
- permitted representations and submissions;
- a determination body or committee;
- means of settlement; and
- an appeal mechanism.

Other factors and content to consider in implementing any Sanctions or Enforcement Policy include:

- mitigating and aggravating factors;
- independence and members of the investigation and/or overseeing body;
- the standards of proof;
- transparency arrangements; and
- overall (indicative) timelines and any limitation periods.

- (1) All Persons involved in Climate Projects, including but not limited to Public Officials, Private Partners, Bidders, suppliers, contractors and their subcontractors, agents and consultants shall during Climate Procurement Procedures, the implementation of Climate Contracts and any associated documents

and contracts, and the operation of the Investor Qualification System or the operation of a Framework Agreement:

- (a) observe the highest standard of ethics;
  - (b) comply with all applicable anti-fraud and anti-corruption laws of [country]; and
  - (c) refrain from, directly or indirectly, engaging in Corrupt Practice, Collusive Practice, Impairing Practice or Fraudulent Practice.
- (2) A proposal for award of a Climate Contract to the Preferred Bidder shall be rejected if it is determined that such Preferred Bidder, directly or indirectly, engaged in Corrupt Practice, Collusive Practice, Impairing Practice or Fraudulent Practice in competing for such Climate Contract or the procurement competition for the Investor Qualification System or Framework Agreement.
- (3) A firm or Person shall be sanctioned and declared ineligible, either indefinitely or for a stated period of time, to be awarded a Climate Contract or to participate in the Investor Qualification System or a Framework Agreement, if at any time it is determined that they have, directly or indirectly, engaged, in Corrupt Practice, Collusive Practice, Impairing Practice or Fraudulent Practice in relation to any Climate Contract, Investor Qualification System or Framework Agreement.
- (4) Without prejudice to the provisions of this Article, any Corrupt Practice, Collusive Practice, Impairing Practice or Fraudulent Practice may be prosecuted and punishable in accordance with [insert applicable anti-fraud and anti-corruption laws of [country]].

#### **Article 62 Conflict of Interest involving a Bidder**

- (1) A Bidder shall not, and shall ensure that its officers, employees, agents, sub-contractors, consultants and advisers do not, place themselves in a position that may or does give rise to actual, potential or perceived conflict of interest between the interests of the Climate Procurement Authority and the Bidder's interests during, as appropriate, a Climate Procurement Procedure and the operation of the Investor Qualification System or the operation of a Framework Agreement.
- (2) An actual, potential or perceived conflict of interest between the interests of the Climate Procurement Authority and a Bidder's interests during a Climate Procurement Procedure or the operation of the Investor Qualification System or Framework Agreement may arise in situations including where a Bidder obtains an unfair advantage in the Climate Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement:
- (a) by obtaining information, access to or any advantage or other assistance from, a Person employed by, or otherwise involved or connected with, the Climate Procurement Authority and/or the State;
  - (b) through any position which any officer, employee, agent or adviser of a Bidder holds with the Climate Procurement Authority and/or the State;
  - (c) by the involvement of a Bidder or any officer, employee, agent, sub-contractor, consultant or adviser of a Bidder, in the preparation or conduct of the Climate Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement; or
  - (d) by the involvement of a Bidder in other work for the Climate Procurement Authority and/or the State.
- (3) The Climate Procurement Authority may disqualify a Bidder from a Climate Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement if:
- (a) the Bidder fails to notify the Climate Procurement Authority of an actual, potential or perceived conflict of interest; or

- (b) the Bidder has notified the Climate Procurement Authority of an actual, potential or perceived conflict of interest and the Bidder has failed to resolve such conflict of interest to the satisfaction of the Climate Procurement Authority following such notification.
- (4) A Climate Procurement Procedure may be cancelled by the Climate Procurement Authority because of any actual, potential or perceived conflict of interest.

## **Article 63 Public Officials**

### *Conflicts of Interest*

- (1) The Climate Procurement Authority shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of a Climate Procurement Procedure, the operation of the Investor Qualification System or the operation of a Framework Agreement, and for the duration of Climate Projects so as to avoid any distortion of competition, ensure equal treatment of all Bidders and [stakeholders/parties] to Climate Projects.
- (2) For the purposes of Article 63(1), the concept of conflicts of interest shall at least cover any situation where Public Officials and agents of the Climate Procurement Authority have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of that Climate Procurement Procedure or the Investor Qualification System or the operation of a Framework Agreement (as relevant).

### *Prohibitions on Persons who may represent or assist a Public Official*

- (3) While conducting a Climate Procurement Procedure or operating the Investor Qualification System or Framework Agreement, Public Officials shall not be represented by, or in any way be assisted by, the following persons:
  - (a) any Person who is employed by or otherwise professionally associated with one of the Bidders in that Climate Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement, or has been employed by or otherwise professionally associated with such Bidder in the six months prior to the commencement of the Climate Procurement Procedure or the Investor Qualification System or the operation of a Framework Agreement (as appropriate) unless, in respect of a Person who has been employed by or otherwise professionally associated with such Bidder in the six months prior to the commencement of the Climate Procurement Procedure or the Investor Qualification System or the operation of a Framework Agreement (as appropriate), prior written consent has been provided by the Climate Procurement Authority in respect of representation or assistance by such Person; or
  - (b) any Person who is engaged as a partner or associate in a professional capacity of one of the Bidders in that Climate Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement, or has been engaged as a partner or associate in a professional capacity of one of the Bidders in that Procurement Procedure or the operation of the Investor Qualification System or the operation of a Framework Agreement, in the six months prior to the commencement of the Climate Procurement Procedure or the operation of an Investor Qualification System or Framework Agreement (as appropriate) unless, in respect of a Person who has been engaged as a partner or associate in a professional capacity of one of the Bidders in that Climate Procurement Procedure in the six months prior to the commencement of the Climate Procurement Procedure, that procurement competition for the Investor Qualification System or Framework Agreement, the operation of the Investor Qualification System or the operation of a Framework Agreement, prior written consent has been provided by the Climate Procurement Authority in respect of representation or assistance by such Person.
- (4) The Climate Procurement Authority shall not award a Climate Contract to:

- (a) any first degree or second degree blood relative of a Public Official, if such Public Official is involved in any aspect of the Climate Procurement Procedure pertaining to such Climate Contract or any award of Climate Contracts under the Investor Qualification System or a Framework Agreement;
- (b) a husband or a wife of a Public Official, if such Public Official is involved in any aspect of the Climate Procurement Procedure pertaining to such Climate Contract or any award of Climate Contracts under the Investor Qualification System or a Framework Agreement;
- (c) any Person, if such Person is involved in any aspect of the Climate Procurement Procedure pertaining to such Climate Contract or any award of Climate Contracts under the Investor Qualification System or a Framework Agreement, on behalf of the Climate Procurement Authority; or
- (d) any Bidder who employs or has employed within the last three years, or is or has been otherwise professionally associated within the last three years with:
  - (i) any first degree or second degree blood relative of a Public Official, if such Public Official is involved in any aspect of the Climate Procurement Procedure pertaining to such Climate Contract or any award of Climate Contracts under the Investor Qualification System or a Framework Agreement; or
  - (ii) a husband or a wife of a Public Official, if such Public Official is involved in any aspect of the Climate Procurement Procedure pertaining to such Climate Contract or any award of Climate Contracts under the Investor Qualification System or a Framework Agreement.

*Prohibition on Bidders*

- (5) A Bidder shall not directly, or indirectly through a third party, seek to influence any Public Official or agent of the Climate Procurement Authority in respect of any aspect of a Climate Procurement Procedure or the operation of the Investor Qualification System or Framework Agreement.

**Article 64 Sanctions for Breach of this Law**

*Cancellation of Climate Procurement Procedures*

- (1) A Climate Procurement Procedure may be cancelled immediately by the Climate Procurement Authority at any stage if there has been any breach of this Law which undermines the integrity of such Climate Procurement Procedure.
- (2) Notice of cancellation of any Climate Procurement Procedure shall be given promptly to all Bidders.

*Breach by Public Officials*

- (3) If there is any breach of this Law by Public Officials or agents of the Climate Procurement Authority, the Climate Procurement Authority or other competent authorities of [country] may immediately institute an inquiry or disciplinary proceedings as required, in accordance with the applicable law of [country] and, to the extent applicable, the procedures of the respective competent authorities.
- (4) Public Officials who breach this Law may be criminally and/or financially liable in accordance with applicable laws of [country] and, to the extent applicable, the procedures of the respective competent authorities.

## Article 65 Delegation

### Comments

The powers to delegate under this Model Law will need to be assessed on a jurisdiction-specific basis to reflect what is legally possible. Where appropriate, other entities (e.g. responsible Ministries or public procurement bodies) to be added to this Article.

- (1) The [Office of the President] or the Climate Procurement Authority may delegate any power, function or task under this Law, to a Person who is an officer of the [the Office of the President] or the Climate Procurement Authority (respectively), provided that:
  - (a) such delegation shall be reasonably related to powers, functions and tasks generally performed by the Person to whom there is a delegation;
  - (b) such delegation shall be in writing;
  - (c) such delegation may be revoked in writing; and
  - (d) notwithstanding such delegation, the [Office of the President] or the Climate Procurement Authority, as appropriate, shall remain responsible for the performance of the power, function or task and shall provide any required oversight over the Person to whom there is a delegation.

## Article 66 Regulations, Procedures, Guidelines and Model Documents

### Comments

The powers to make regulations and publish procedures, guidelines and model documents will need to be assessed on a jurisdiction-specific basis to reflect what is legally possible.

- (1) Regulations may be made by [the Office of the President/Ministry] for the purposes of better implementation of the provisions of this Law.
- (2) The Climate Procurement Authority may propose regulations to the [Office of the President/Ministry] for the purposes of better implementation of the provisions of this Law.
- (3) The Climate Procurement Authority may publish procedures, guidelines and model documents (including Model Climate Contracts and Model Climate Procurement Documents) in order to support the implementation of this Law.

## Article 67 Final provisions

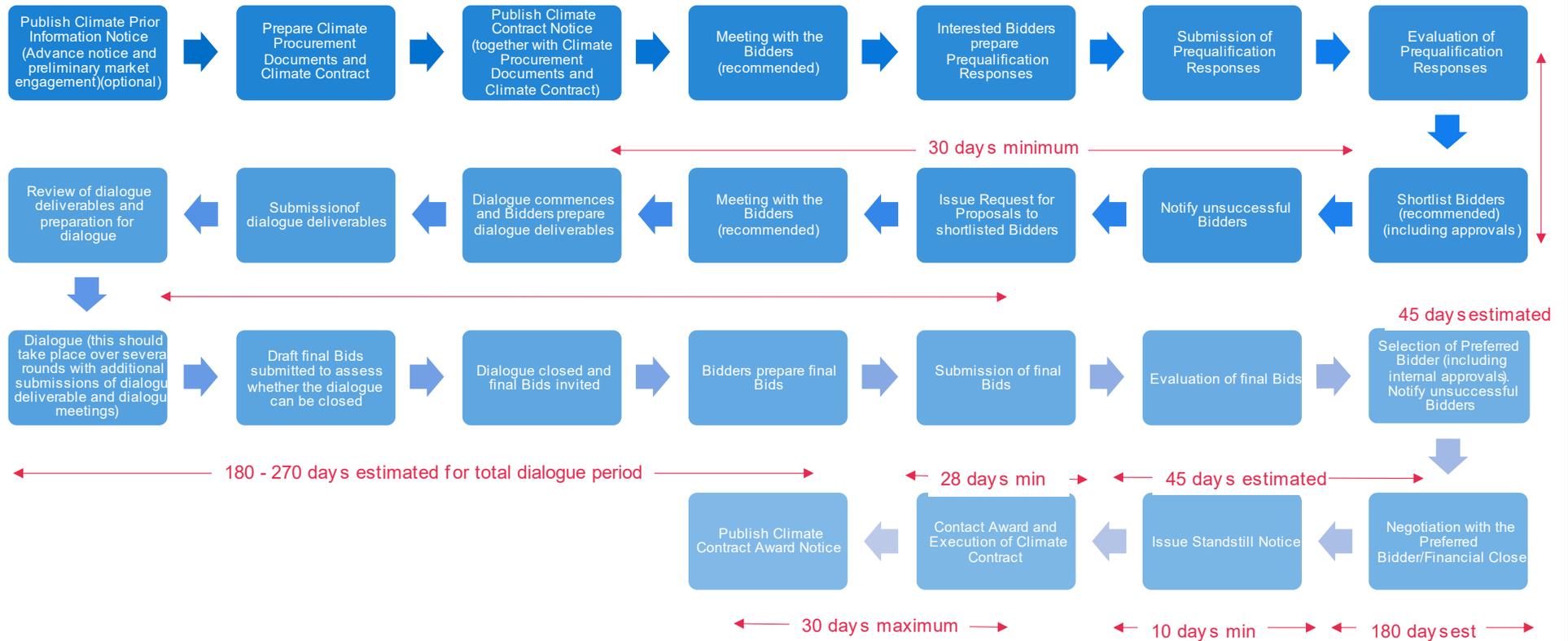
### Comments

Prior to implementation of the Model Law, its impact on existing legislation will need to be considered and reference to any repeals and necessary amendments to existing legislation should be included in the Model Law in the customary manner for the jurisdiction.

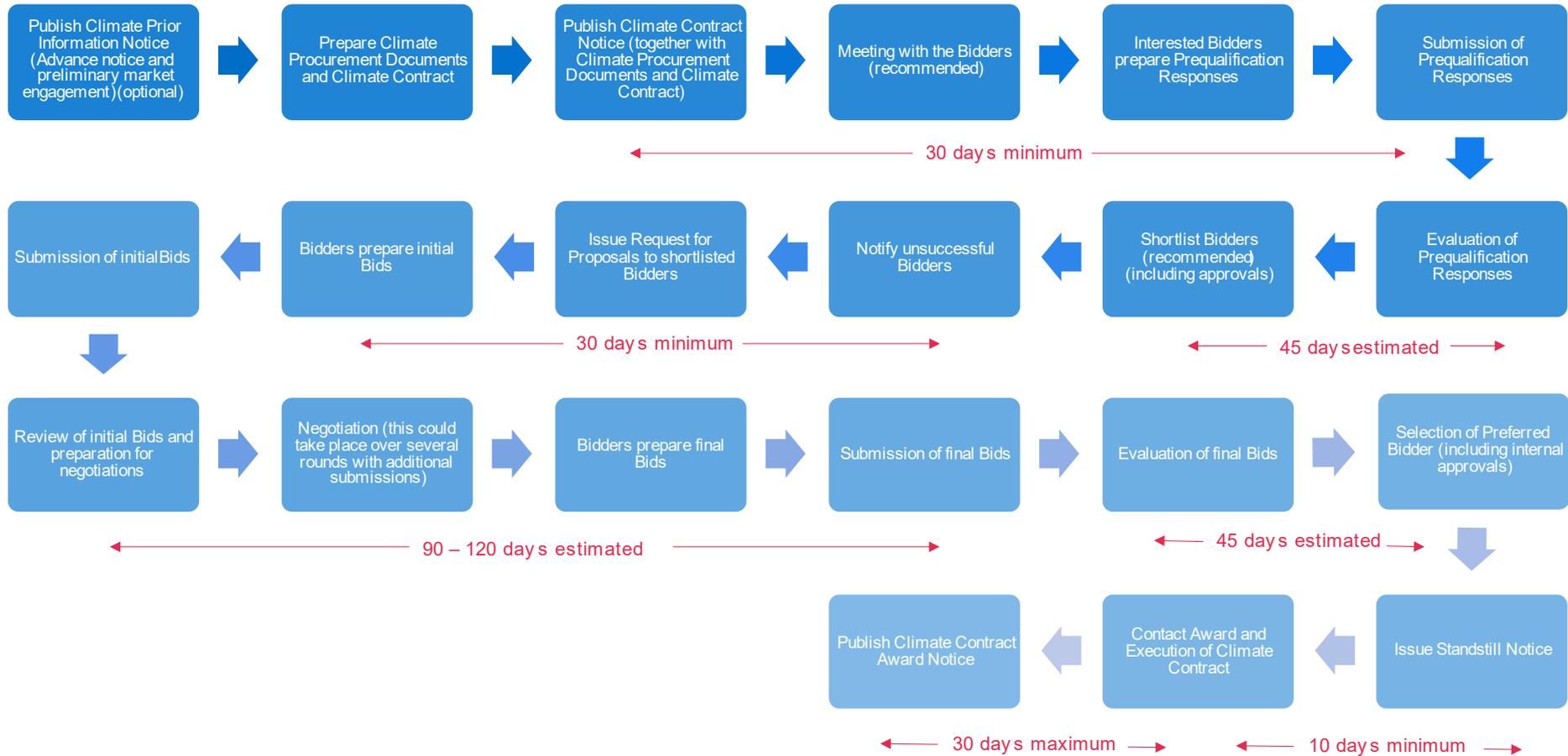
- (1) This Law shall be cited as the [\*\*\*\*] Law and shall come into effect upon its publication in [the official gazette.]
- (2) [In the event of any conflict between the provisions of this Law and any other legislative instrument, this Law shall prevail.]
- (3) [Upon enforcement of this law, [\*\*\*\* published in the Official Gazette No.\*\*, dated \*\*), and any provision of any other law that is contrary to this law, is abrogated/amended.]

# ANNEXES

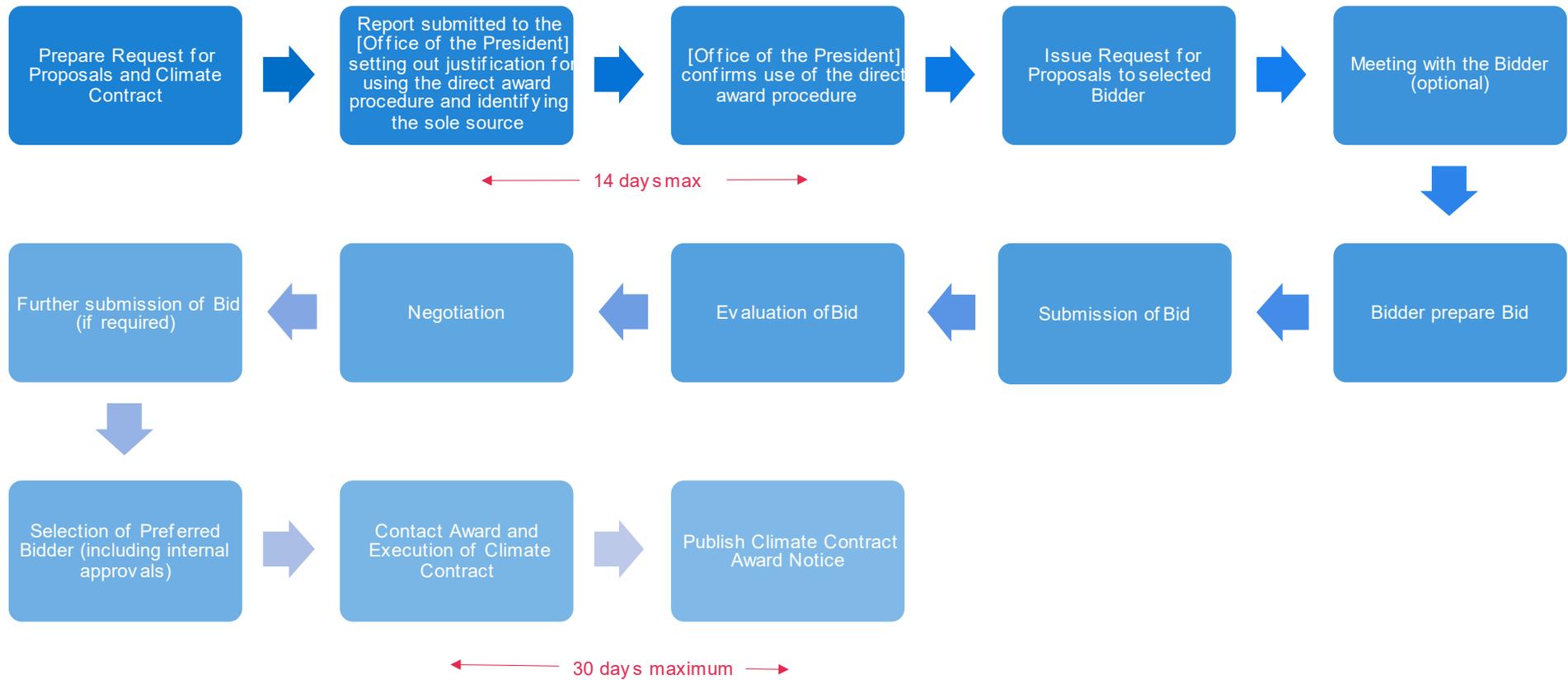
# Competitive Dialogue Procedure



# Negotiated Procedure



# Direct Award



# Restricted Procedure

