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USAID Sector Reform and Utility Commercialization (SRUC): Haiti CPU Transaction Project

Deliverable 11: Guidelines & Recommendations for Conducting a
Competitive Procurement, Reflecting Haitian Law & International Leading
Practice

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— PROCUREMENT METHODS BASED on INTERNATIONAL LEADING PRACTICE

Caracol Power Utility (CPU) Procurement Objective

Engage a technically and financially well-qualified private partner that will manage the CPU in the longer term, including:

- Investment in additional generation and distribution capacity and replacement of depreciated assets.
- Funding of any negative operating cash flows.
- Acceptance of all financial risks, ideally without subsidies from Government of Haiti (GoH).

Therefore:

The goal should be to maximize competition with a transparent international tender

United Nations PPP Guidebook

Following are fundamental principles recommended in the Guidebook and based on international leading practice:

Transparency:

- Information sharing & evaluation criteria

Neutrality:

- Tender rules that “do not provide scope for discretion”
- Sufficient time for potential private partners to assess the opportunity and prepare bids.

Non-discrimination:

- “Equal treatment...foreign & domestic”

Chile: Positive PPP & Privatization Examples

- Over 80 PPPs awarded since 1991
- Responsibility for the Concessions with the Coordination Department at the Ministry of Public Works
- Categories: Highways, airports, reservoirs, ports, urban transport, hospitals
- **Electricity sector** 100% privatized (not PPP) and unbundled, beginning in 1986:
 - * Generation – 26 private companies
 - * Transmission – 5 private companies
 - * Distribution – 25 private companies



Public & Private participation in Chile's Electricity Sector

Chile: PPP Procurement Process Fundamental to Success

The following tenets were central to the procurement process for Chilean PPPs:

- Competitive and open to domestic and foreign bidders
- Post-tender negotiation avoided
- Transparent:
 - Widely advertised
 - Results made public

PPP Contracts

- Renegotiations during contract term restricted since 2010, giving more confidence to investors.

A standard infrastructure procurement has three key steps based on international leading practice and historically successful PPPs

1

Request for Expressions of Interest (EOI)

2

Request for Proposals (RFP)

3

Selection of Winning Bidder and Contracting

Step I: Request for Expressions of Interest (REI)

Pre-qualification process:

- Advertise EOI domestically and internationally
- Direct solicitations: Permissible, but must be unbiased & transparent
- Project information: not necessarily the full Information Memorandum but sufficient to provide key details on the asset
- Period to submit EOI: About six weeks is sufficient based on leading practice

Pre-qualification Criteria

- Not unreasonably confining – would undermine competition
- Reasonable technical & financial qualification criteria (Private entities may partner with other entities)
- Pre-qualifications criteria made available to parties expressing interest
- Pre-qualified bidders published on Internet

Step 2: Request for Proposals (RFP)

Pre-qualified bidders may request tender documents to inform their decision bid:

- Information memorandum
- Obligations of private partner (cahier des charges)
- Tender rules
 - o Proposal requirements & submission deadline
 - o Bid evaluation criteria
- Draft contract

Furthermore, the pre-qualified bidders would typically have rights to:

- Site visits
- Data Room access

Selection Criteria for Winning Bidder

Selection criteria should be objective, transparent, and simple; in order to maximize transparency, avoid subjective weighting when feasible

Private partner's investment & other obligations should be clearly stated in tender conditions.

Leading Practice Utilizes the Following Criteria:

- **Winning bid**: Ideally, single selection criterion, e.g. highest annual lease payment to government or lowest affermage fee to private partner
- **Technical and financial qualifications of bidder**: Should be principally addressed in prequalification phase

Selection committee is responsible for upholding transparency

— HAITIAN LAW RELEVANT FOR THE CPU TRANSACTION

Roles of the Ministries of Finance and Public Works

- Collaboration between the two Ministries throughout the CPU PPP process.
- Ministry of Public Works (Travaux Publics), through its Energy Cell, is the “relevant ministry” and therefore takes the leading policy role in preparation of Information Memorandum and Cahier des Charges.
- Ministry of Economy & Finance (MEF) takes the leading role in preparing the Request for Expressions of Interest, the Request for Proposals, and Contracting with the winning bidder.
- The foregoing Tender Documentation must be approved by the Commission Nationale des Marchés Publics, with final approval by the Cour des Comptes.

GoH Public Procurement & Concession Act of 2009

- **PPP Unit** prepares tender documentation in consultation with **relevant ministry** (Travaux Publics in for Caracol Utility)
- **Commission Nationale des Marchés Publics (CNMP)** must review documentation
- **Cour Supérieur des Comptes** must give final approval to government contracts, including tender documents
- **Settlement of disputes** (Article 95): Superseded by Haiti's approval of the International Centre for Settlement of Investment Disputes (ICSID) Convention approved by Haiti in 2009
- **International arbitrator** should be selected if winning bidder is a foreign entity, which is permitted under the law.

Modernization of Public Enterprises Law (CMEP Law)

- The CMEP law would apply if CPU were deemed to be a “public enterprise”.
- In that case, a concession of a public enterprise requires parliamentary approval.
- Based upon discussions with GoH officials, their view is:
 - Referencing the 17 May 2005 decree on the “Organization de l’Administration Centrale de l’Etat,” CPU is not established by law or constitution and therefore is not a public enterprise.
 - Therefore the CMEP Law would not apply, and Parliamentary approval of the CPU concession is not required.

Authority of the Haitian Municipalities

- **Constitution:** Municipal Councils have authority over the state private domain real estate.
- **Decentralization Decree of 2006:** Responsibilities of local authorities/municipalities include the energy sector.
- Identify authorizations granted to EdH, Ministry of Travaux Publics, or Ministry of Finance for land occupied by distribution lines and for provision of electricity services in relevant service area.
- Verify if authorizations are transferable to private partners.

Potential Tax Holiday

- Tariffs assume 15-year tax holiday for private partner, as for other occupants of Caracol Industrial Park.
- If no tax holiday, commercially viable tariffs would need to be higher.
- Formal GoH approval of tax holiday is needed.

— 2016 PRESIDENTIAL ENERGY SECTOR DECREES and FUTURE IMPLICATIONS FOR ATTRACTING PRIVATE PARTNERS

GoH Decrees Governing the Electrical Energy Sector have the following characteristics relevant to the CPU:

- Promote competition and private sector participation in generation, transmission, distribution, and commercialization.
- Licenses and management contracts to be subject to public service procedures of procurement and concessions.
- Tariffs and licensing would be under authority of proposed new regulatory agency.

Government of Haiti is preparing amendments to the three energy sector decrees of February 2016

Regulatory Authority (ANARSE) Decree (February 2016)

- ANARSE, the electricity sector regulator is not yet established.
- The amendments to the February 2016 Regulatory Decree are in the process of being drafted by a committee in the Office of the Prime Minister, and will subsequently need Parliamentary approval.
- ANARSE would have authority to reform tariffs and license private operators, in line with leading practice for regulatory authorities
- According to the Letters of Implementation signed by GoH and USAID in August 2016: Prior to the establishment of ANARSE the Ministries of Travaux Public, Finance, and Planning have authority to revise tariffs in communes served by Caracol Power Utility.

Government of Haiti is currently preparing amendments to the three energy sector decrees of February 2016

Electricité d'Haiti Decree (February 2016)

According to the subject decree, EDH should “maintain energy tariffs at a level enabling it to defray at least” the following:

- All operating expenses
- Debt interest and principal payments
- Amortization of fixed assets
- *Profit corresponding to a rate of return on investment as specified by the regulatory authority.*

Government of Haiti is currently preparing amendments to the three energy sector decrees of February 2016

— POTENTIAL CPU CONCESSION STRUCTURE

EXAMPLES DISCUSSED WITH THE GOVERNMENT OF
HAITI, BASED ON INTERNATIONAL LEADING PRACTICE

Example: Potential Prequalification Criteria for CPU

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering the following criteria for potential inclusion in the CPU REI:

Financial:

- Sufficient financial capacity to finance US\$7 million or more in capital investment, Years 1 to 3 (Ref: Session 2 slide)
- Audited financial statements of the candidate

Technical:

- Successful management of an electric utility
- Experience in operating generation, transmission, or distribution.

Example: Private Partner Concession Obligations (I)

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering the following as integral components of a CPU concession:

Full financial responsibility:

- Finance operations & investments **(with no subsidies from GOH)**
- Annual lease payments to government for existing assets
- Make ~\$300,000 annual contribution for 16 years to independent reserve escrow fund toward 2032 replacement investments (Private partner will be responsible for shortfall)

Full management responsibility:

- Generation, distribution, and collection for a period of 30 years

Example: Private Partner Concession Obligations (2)

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering the following as integral components of a CPU concession:

Service area:

- Complete expansion in current communes & Fort Liberté

Electricity supply:

- 24 hour supply, subject to reasonable availability (e.g. 98%)

Employment:

- Engage current Haitian PPSELD employees for their experience and assistance with expansion

Example: Potential Government Obligations

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering commitment to the following to attract a private partner:

- Accept 30-year lease of existing assets and replacements.
- Grant rights to private partner to use of new assets for term of concession.
- Abide by tariff schedule and quarterly adjustment formula specified in tender documentation throughout term of concession.
- Set and monitor safety standards.
- Set and monitor environmental standards.

Example: Potential Tender Conditions (I)

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering the following criteria for potential inclusion in the CPU RFP:

Deadline for submitting bids

- At least three months after prequalification period and launch of Request for Proposals.

Expansion options for private partner, three-year decision period:

- Ouanaminthe & Ferrier
- Quartier Morin
- Cap Haïtien

Example: Potential Tender Conditions (2)

Based on international examples and on sessions with the MEF, Ministry of Public Works, and NRECA (the current CPU operator), the GoH is considering the following criteria for potential inclusion in the CPU RFP:

Bid Criterion:

- Highest annual lease payments for term of lease, *or*
- Lowest tariffs proposed
- Single criterion is ideal for transparency, as prequalification addresses other requirements. Consistent with UN neutrality principle and World Bank Group preference.

Potential second criterion:

- Minimum investment commitment for expansion options
- Would require weighting of criteria

GOH identified the next steps to launch a CPU PPP tender, based on leading practice

1

Determine Appropriate Tariff Level & Adjustment Formula

Tariff levels are fundamental to design of the PPP

2

PPP Type Selection

Approval of PPP type by GoH and USAID/Haiti

3

Engage Government Entities

Sequencing of engagement of government entities

4

Draft Tender Documentation

Including Pre-qualification, Information Memorandum, Tender Rules

5

Launch REI, Determine Pre-qualified Bidders, then Launch RFP

Develop time frame to launch REI and RFPs

— END



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