

SHAPING SUCCESSFUL PROCUREMENT FUTURES: THE EVOLVING LANDSCAPE OF PUBLIC-PRIVATE PARTNERSHIP IN SRI LANKA

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ABSTRACT

Public Private Partnership (PPP) is a long-term arrangement wherein a government agency and a private sector consortium work together to supply public asset or service, with the private sector bearing considerable risk and administrative burden. In the modern world, PPP is a strategic approach that many governments use to manage their public obligations while additionally earning the benefits of the private sector's engagement in the development of infrastructure. In practice, there are two approaches that PPP initiatives can begin: by solicitation or un-solicitation. For both approaches, the ultimate product's delivery is influenced by the performance of the procurement process. One important factor in the success of PPP projects is seen to be a fair and transparent procurement procedure. The authors conducted a comprehensive study on the evolution of Sri Lanka's PPP procurement process. The results of the comprehensive analysis revealed that the PPP procurement process in Sri Lanka has been evolving for more than 25 years, utilising both unsolicited and solicited approaches. Finally, it was noted that the evolution of the PPP procurement process can be utilised to guide future developments and reforms to shape a fair and transparent PPP procurement process.

Keywords: Circulars; Guidelines; Procurement Process; Public Private Partnership.

1. INTRODUCTION

Governments all over the world have been enlisting the private sector to assist with the development of modernised sustainable infrastructure since the late 1990s (Hettige et al., 2021; Osei-Kyei et al., 2018). In this sense, the quantity of Public Private Partnership (PPP) initiatives has grown significantly over time, especially in lower and middle-income countries (World Bank, 2021). As per the opinion of many countries around the world, PPP is a crucial tool for executing major and sophisticated infrastructure projects (Yu et al., 2018). In the industrialised world, the United States, Canada, Australia, and the United Kingdom have all consistently drawn significant amounts of private

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investment into their PPP markets, while notably, PPP investments are rising rapidly among the leading developing nations, including China, India, Brazil, and South Africa (Fernando et al., 2023).

PPP is a long-term contractual arrangement whereby a public sector organisation and a private company share resources and risks for the development of public facilities (European Investment Bank, 2023; World Bank, 2021). Governments all over the world preferred to use PPP over traditional public procurement since it offered the advantages of having the private sector (Keers & Fenema, 2018). In practice, PPP projects can be initiated through two main approaches: solicitation and un-solicitation (Fernando, 2020; World Bank, 2021). The solicited approach is where the government identifies a project and invites private investors to bid and develop the project (World Bank, 2021). In contrast, under the unsolicited approach, a private investor proposes a project to the government without an open invitation by private sector organisations seeking business opportunities (Public-Private Infrastructure Advisory Facility, 2017). Since PPP is a cooperation between the public and private sectors to accomplish a common goal and its tremendous benefits, PPPs are favoured by governments in both solicited and unsolicited approaches (Fernando et al., 2022). Osei-Kyei et al. (2018) stated that a clear procurement process leads to the success of PPP projects and attracts the benefits of having PPP to the government. The establishment of a fair and transparent procurement process necessitates the identification of gaps in the existing process and the implementation of appropriate reforms to address them (Fernando & Chandanie, 2018; Fernando et al., 2025). It is highly beneficial to observe the evolution of the PPP procurement process over time in order to identify the gaps and propose reforms to close such gaps (European Investment Bank, 2023; Osei-Kyei et al., 2018). In addition, the evolution of the PPP procurement process provides us insight into the impact of past modifications, alterations, and reforms made to the current procedure, which assists in selecting the best reforms to fill the gaps in the process (European Investment Bank, 2023; Zawawi, et al., 2016).

Therefore, this paper aims to explore the evolution of PPP procurement process in Sri Lanka. Accordingly, the paper begins with a brief outline of the study, followed by the adopted research method. Then, the data collected from the literature are presented and analysed to visualise the evolution of PPP procurement process. Further, this study was limited to the evolution of the procurement process of PPP in Sri Lanka.

2. METHODOLOGY

A thorough literature review assists the researcher in obtaining current information about the research area and allows the study's foundation to be strengthened (Khallaf et al., 2018). Saunders et al. (2019) viewed that a strong body of literature may help researchers ensure that the information already known about their field of study is up to date and that they are creating new, original knowledge that does not already exist in the literature. Thus, a thorough literature review was conducted to investigate how the PPP procurement process evolved over the years in Sri Lanka. Accordingly, an in-depth investigation was carried out studying 15 documented records which include amendments to the constitution, circulars, regulations, guidelines and supplements to guidelines, as indicated in Table 1.

From the inception of PPP in Sri Lanka, every document pertaining to PPP procurement that legally constituted entities have issued, have been selected for this study. For selecting the listed documents in Table 01, the National Procurement Commission, the legal entity currently in charge of regulating PPP procurement in Sri Lanka, and the Department of Public Finance, the legal body in charge of overseeing PPP procurement in Sri Lanka prior to the establishment of the National Procurement Commission, were consulted.

Table 1: Details of reviewed documents

No.	Name of Source	Published Year	Nature of the source
01	Financial regulations	1966	Regulation
02	Financial regulations – revised	1992	Regulation
03	Guidelines on Government Tender Procedure – Part I and II	1996	Guideline
04	Guidelines on Government Tender Procedure – Part I (Revised)	1997	Guideline
05	Guidelines on Government Tender Procedure – Part II (Revised)	1998	Guideline
06	Government Procurement Guidelines for Goods and Works	2006	Guideline
07	Public Finance Department Circular No. 444	2010	Circular
08	Supplement No. 23 to Guidelines on Government Tender Procedure – Part II	2011	Supplement to Guideline
09	19th Amendment to Constitution	2015	Amendment to Constitution
10	Supplement No. 30 to Guidelines on Government Tender Procedure – Part II	2016	Supplement to Guideline
11	Public Finance Department Circular No. 2/2019	2019	Circular
12	Ministry of Finance Circular No. PFD/PPP/Guidelines/2019	2019	Circular
13	20th Amendment to Constitution	2020	Amendment to Constitution
14	21st Amendment to Constitution	2022	Amendment to Constitution
15	Government Procurement Guidelines for Goods, Works and Non-consulting Services	2024	Guideline

Finally, the evolution of the PPP procurement process was investigated for both solicited and unsolicited approaches based on a synthesis of the literature. This helps to visualise future development and reformations that are essential for achieving a fair and transparent procurement process for PPP.

3. PPP PROCUREMENT PROCESS IN SRI LANKA

Public Property Act (1992) mandated that government employees are required to make sure that public resources are used in a way that safeguards the interests of the public. In

the Premchandra v. Jayawickreme [1994] case, the Supreme Court held that there is no absolute or unrestricted authority in public law, that competent public officials are granted discretion to be used for the public good, and that the objective of exercising that discretion must be considered in relation to the reasons it was granted. Considering this, the state assumes the role of trustee for the use of natural and national resources for the benefit of the public as a party to the PPP, and all public agencies are obligated to act impartially, honestly, and transparently while implementing PPPs.

In Sri Lanka, there is no explicit legislation pertaining to PPP procurement, and neither the general contract law nor any of its sections particularly address PPP procurement (Fernando et al., 2023; United States Agency for International Development, 2016). However, it deals with general branches of law such as the Unfair Contract Terms Act, Employment, Taxes, Customs, Insurance, Banking, and Foreign Exchange Regulation (United States Agency for International Development, 2016). In the 1997 case of Smithkline Beecham Biological S. A. and Others v. State Pharmaceutical Corporation, Honourable Justice Dr. Amerasinghe of the Supreme Court rendered a judgement on a procurement case, declaring that “*In my view, law includes regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities*”. Accordingly, there is no uncertainty that in absence of specific provision in the basic contract law or specific act to deal with PPP procurement, procurement guidelines and regulations related to PPP are set forth for PPP procurement law.

In accordance with Article 43 (1) of the Constitution, the President had delegated authority to the Minister of Finance on “*Government Financial Regulations, Interpretation and Amendments*” (Fernando et al., 2023). The financial regulations were first published in 1966 (Ministry of Finance and Planning, 1966) and updated in 1992 (Ministry of Finance and Planning, 1992). Chapter XIII of the financial regulations in 1966 and its updated version in 1992 outlined the procedures to be followed when procuring works, goods, and services. Whereas it does not deal with the procurement of PPP.

Later, Guidelines on Government Tender Procedure have been issued in two sections in 1996: Part I: Projects financed by public funds, including donor funds; and Part II: Private sector financed infrastructure projects also known as Part II Guidelines (Ministry of Finance and Planning, 1996). Part I Guidelines were revised in 1997 (Ministry of Finance and Planning, 1997), and Part II Guidelines were revised in 1998 (Ministry of Finance and Planning, 1998). Part II Guidelines provide spaces for both solicited and unsolicited and describe the procurement process in detail (Ministry of Finance and Planning, 1998). Guidelines on Government Tender Procedure - Part I, was replaced by the Government Procurement Guidelines for Goods and Works – 2006 (National Procurement Agency, 2006) and later, Government Procurement Guidelines for Goods and Works (2006) was replaced by Government Procurement Guidelines for Goods, Works and Non-Consulting Services -2024 (National Procurement Commission, 2024). Further, National Procurement Commission (2024) stated that Guidelines on Government Tender Procedure - Part II - 1998, remain in effect. By Public Finance Circular No. 2/2019, Part II Guidelines was renamed as Guidelines for private sector infrastructure projects on PPP basis in 2019 (Ministry of Finance, 2019b). In light of the above, the Government Tender Procedure - Part II is the first to establish the legal framework for PPP procurement in Sri Lanka by providing space to both solicited and unsolicited PPP approaches.

3.1 PROCUREMENT PROCESS FOR SOLICITED PPPs

PPP concepts are relatively new to the country (Ministry of Finance and Planning, 1998). Reference 225 of the Part II Guidelines sets forth the procedure for infrastructure projects that have not been identified as eligible for funding from the Consolidated Fund. As per Part II Guidelines, the procedure for procurement of solicited PPP includes identifying PPPs, preparing an expression of interest, evaluating pre-qualification, preparing request for proposal documents, evaluating proposals, negotiating submitted offers, preparing an implementation agreement and signing the implementation agreement. As outlined in Part II Guidelines, Figure 1 depicts the main steps in the procurement process of solicited PPPs.

According to the set forth procedure in Part II Guidelines, the priority project should be identified by the line ministry, and its feasibility is verified along with the Bureau of Infrastructure Investment (BII), a specially dedicated unit established under the Board of Investment (BOI). Later, the Bureau of Infrastructure Investment was inactive, and its power was granted to the National Agency for PPP by Public Finance Circular No. 2/2019 (Ministry of Finance, 2019b). Once it is determined as a feasible project, then it is forwarded to the cabinet for its approval with the line ministry recommendations.

Cabinet Appointed Negotiation Committee: a special committee set forth under Part II Guidelines, issue Expression of Interests jointly with the Project Committee: special technical committee appointed under Part II Guidelines. The Project Committee evaluates Expression of Interests and prepares a shortlist for Cabinet Appointed Negotiation Committee approval. Afterwards, Request for Proposal documents are issued to all shortlisted applicants.

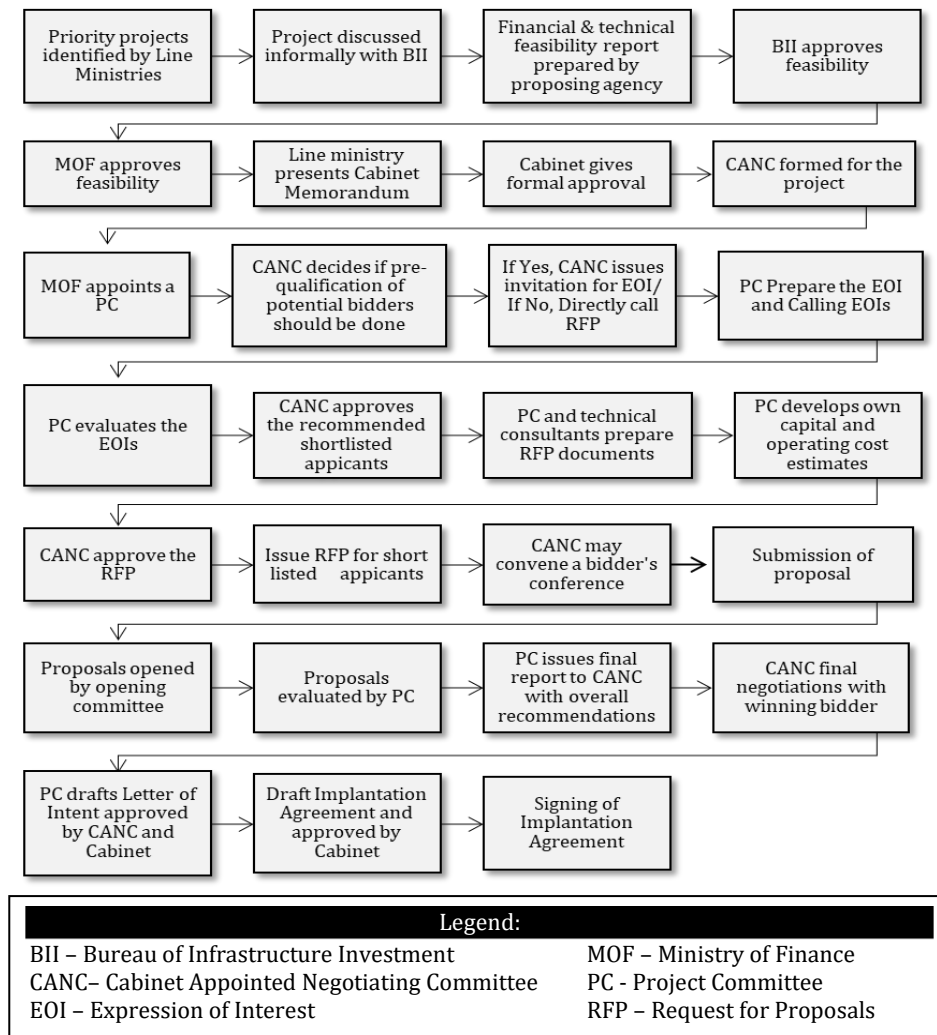


Figure 1: Procurement process for solicited PPPs as per Part II Guidelines – 1998

Once the proposal is received from applicants, the Project Committee shall verify during the first screening that all proposals are (i) technically sound in relation to the project's functional objectives, (ii) environmentally acceptable, and (iii) financially feasible. In the detail evaluation, (i) compliance with the major technical performance criteria, (ii) compliance within the key environmental standards, and (iii) compliance with health and safety standards are taken into consideration for the technical proposal assessment while financial proposal is assessed under (i) proposal's financial acceptability, (ii) the high financial standing and reputation of the private proponent and their financial partners, (iii) the soundness of the financing plan, (iv) projections of all pertinent capital and operating costs of the project, (v) the basis for the tariff. Later, the Cabinet Appointed Negotiation Committee negotiates with the winner on the terms of the contract. Then implement agreement is drafted and forwarded to the cabinet for its approval. Once the implementation agreement is approved, the contract is signed to implement PPP. Accordingly, as shown in Figure 1, it is required to follow a lengthy process to procure solicited PPPs. Ministry of Finance and Bureau of Infrastructure Investment play a major role in PPP procurement, and two special committees appointed by the cabinet and the Ministry of Finance: Cabinet Appointed Negotiation Committee and the Project

Committee respectively, play a role similar to the Procurement Committee and Technical Evaluation Committee in traditional public procurement.

3.2 PROCUREMENT PROCESS FOR UNSOLICITED PPPs

Reference 237 (a) of Part II Guidelines states, “Line ministries, agencies and BOI/BII receiving unsolicited proposals should have them processed according to the procedures applicable to solicited proposals”. Further, as stated in reference 237(b), it was recommended that open competitive proposals be called for before making the decision based only on unsolicited proposals. In addition, Reference 237 (b) of Part II Guidelines states “When owing to urgent and exceptional circumstances, it becomes necessary to deviate from the above-prescribed procedure, specific Cabinet approval should be obtained for such deviation”. As per the provisions of the Part II Guidelines, solely unsolicited PPPs should not be entertained and only in urgent and exceptional circumstances such unsolicited PPPs can be launched with a specific Cabinet approval.

Thus, the processes that must be taken to implement unsolicited PPPs formally are identical to those for solicited PPPs, as shown in Figure 1, except for the first step. Instead of identifying the priority projects by line ministry or coordinating agency, the first step in processing unsolicited PPPs is, receipt of the proposal by the private proponent. However, the Part II Guidelines are silent about the procedure that needs to be followed in unsolicited PPPs that are launched because of a specific Cabinet decision.

In August 2010, the Public Finance Department issued Circular No. 444, and it was highlighted that various government units misused the provision of Part II Guidelines to entertain unsolicited PPP in urgent and exceptional circumstances that are to be launched with a specific Cabinet approval (Ministry of Finance, 2010). Due to that backdrop, a Standing Cabinet Appointed Review Committee (SCARC) was established to make assessment of such unsolicited PPP as per Public Finance Circular No. 444 and set forth procedure to procure unsolicited PPPs is as given in Figure 2.

Accordingly, the Standing Cabinet Appointed Review Committee decides the suitable procedure to way forward the unsolicited PPP and such process is not specifically mentioned in the Public Finance Circular No. 444, and it remains a question on the transparency of such procedure.

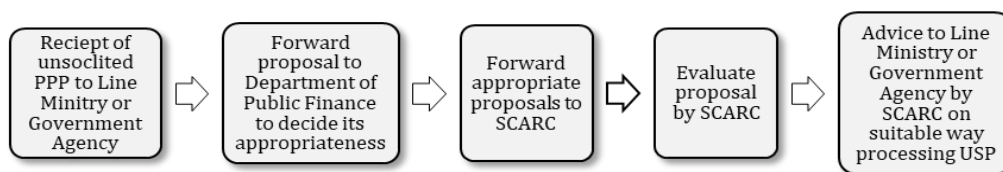


Figure 2: Procurement process of unsolicited PPPs as per public finance circular No. 444

Supplement 23 to Part II Guidelines was released in 2011, and it permits handling of all unsolicited PPPs without following the standard procurement process, according to the Standing Cabinet Appointed Review Committee's recommendations and with the assistance of a supporting committee through the “Direct Negotiation” method (Ministry of Finance, 2011). It is an improvement for the set-forth procedure in Public Finance Circular No. 444, to access unsolicited PPPs. As outlined in Supplement No. 23, Figure 3 depicts the main steps involved in the process of procuring USPs.

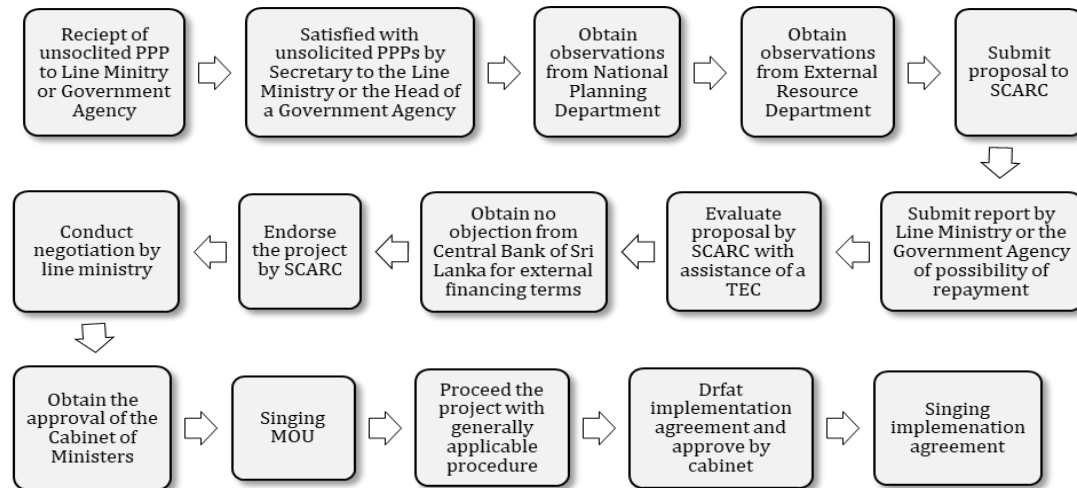


Figure 3: Procurement process of unsolicited PPPs as per supplement No. 23

The Secretary to the Line Ministry or the Head of a Government Agency must first be satisfied with the submissions by determining whether the unsolicited PPPs are relevant to the Public Investment Plan of the relevant line Ministry or the Government Agency, within the overall policy strategies of the Government, and when compared to the funding arrangements that are currently in place. Subsequently, unsolicited PPPs must be presented to the Standing Cabinet Appointed Review Committee together with a report verifying the possibility of repayment and the remarks of the Departments of External Resources and National Planning.

Afterwards, with the assistance of the Project Committee, the Standing Cabinet Appointed Review Committee performs unsolicited PPPs evaluation by taking into account the proposed project's strategic importance. If the Standing Cabinet Appointed Review Committee accepts the proposal, the line ministry will proceed with project negotiations with the potential investor, consulting the Standing Cabinet Appointed Review Committee, over technical concerns, project costs, contract terms, etc. After the completion of successful negotiations, approval from the Cabinet of Ministers should be required before finalising the contract or agreement. A memorandum of understanding should be signed with considering the project's nature and the level of commitments expected from the government or a government agency. Afterwards, the project is proceeding with the acceptable procedure to get development approvals and finally an implementation agreement is signed by the private proponent and the government.

Later, Supplement 30 to Part II Guidelines were issued in 2016 to supersede the Supplement 23 that leads to corruptive practices arisen from Direct Negotiation method. Supplement 30 introduces the "Swiss Challenge" procurement process to deal with unsolicited PPPs (Ministry of Finance, 2016). The procedure of Swiss challenge approach as stipulated in Supplement 30 to Part II Guideline, is shown in Figure 4.

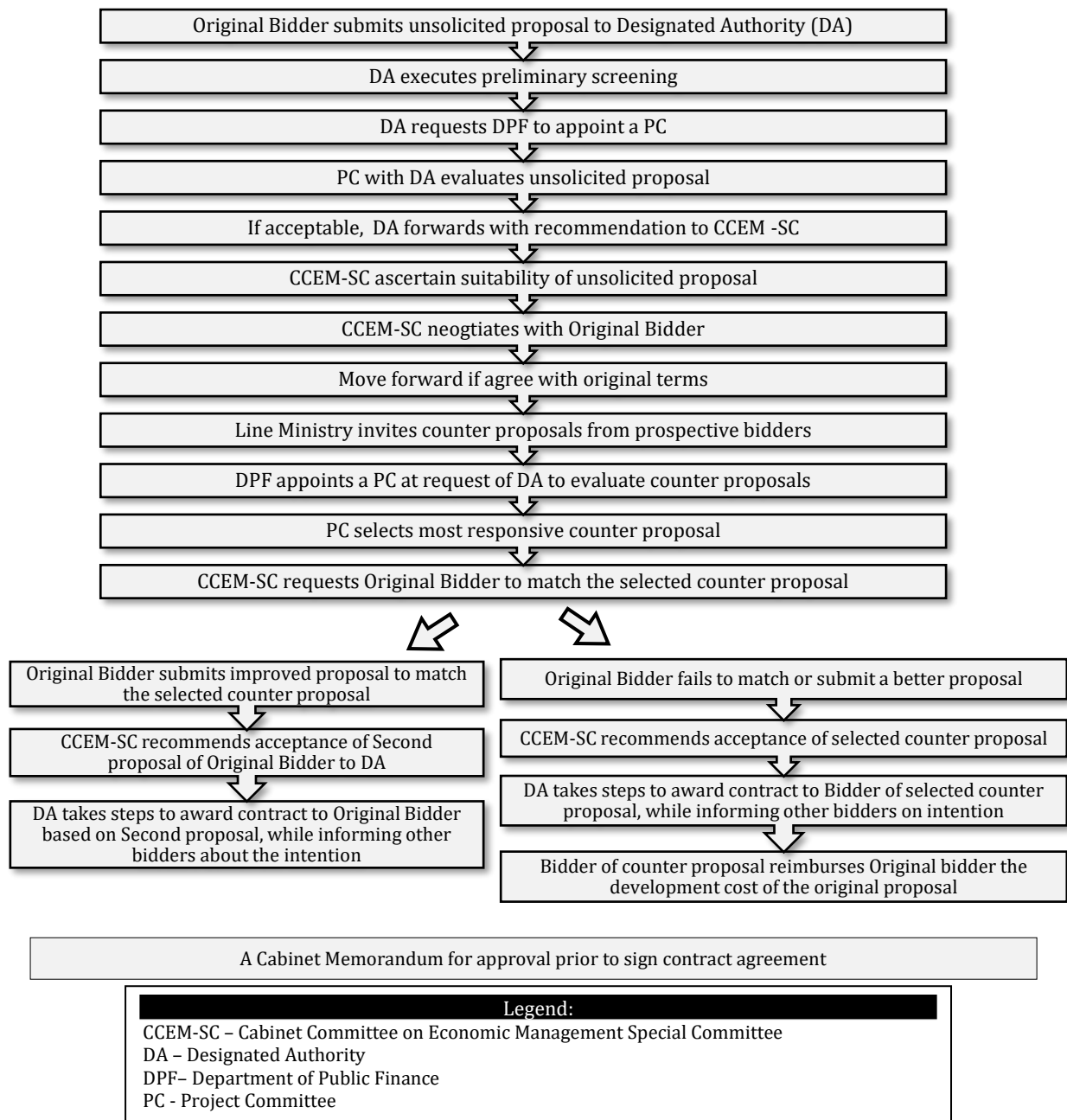


Figure 4: Procurement process of unsolicited PPPs as per supplement No. 30

First, the original proponent submits proposal to Designated Authority (DA): Line Ministry or Government Agency. Designated Authority executes preliminary screening of such unsolicited PPP and afterwards, the Department of Public Finance appoints a Project Committee to evaluate unsolicited PPP in detail if it is sound. Accordingly, Project Committee evaluate unsolicited PPP in detail giving due consideration for: (i) significance and relevance of the proposal in terms of sectorial priority within government overall policy priorities, (ii) alternative delivery options, (iii) merits of the proposed project and its conformity with the existing legal, regulatory and environmental policy of the country, (iv) reputation, and experience possessed by the original proponent in the sector, (v) industry and/or field of the proposed project, (vi) experience and proven track

record and financial capability of the original proponent, (vii) acceptability and feasibility of the implementation plan.

If it is determined by the Project Committee that proposal is acceptable, it forwards to the Cabinet Committee on Economic Management Special Committee (CCEM –SC) to assess its suitability and negotiate with the original proponent. The Cabinet Committee on Economic Management Special Committee is empowered to negotiate with the original proponent to agree upon the terms of the proposal giving due consideration to the above matters. Then the Designated Authority calls counter proposals from prospective bidders and forwards them to the Project Committee to evaluate. The Project Committee selects the most responsive counter proposal and the Cabinet Committee on Economic Management Special Committee requests original bidder to match the selected counter proposal.

If the original proponent submits an improved proposal (Second proposal) to match the selected counter proposal, the Designated Authority takes steps to award contract to the original proponent unless the bidder of selected counter proposal. However, project is awarded to bidder of selected counter proposal, cost of original proposal should be compensated. Finally, Cabinet approval is obtained to award the contract to selected proponent.

The Swiss Challenge procurement method, which was introduced by Supplement 30 to Part II Guidelines, was declared to be ineffective in September 2019 by the Ministry of Finance circular No. PFD/PPP/Guidelines/2019 due to its inherent issues. The Ministry of Finance (2019a) instructed that the methodology recommended in Part II Guideline in 1998 be used again instead of the Swiss Challenge procurement method until suitable mode is suggested. With the ratification of the 19th Amendment to the Constitution, the National Procurement Commission was established pursuant to Section 156(B) of the Constitution to develop sound public procurement procedures and policies (Nineteenth Amendment to the Constitution, 2015). The National Procurement Commission was subsequently abolished with the introduction of the 20th Amendment to the Constitution (Twentieth Amendment to the Constitution, 2020) and then re-established under the 21st Amendment (Twenty-First Amendment to the Constitution, 2022). Nevertheless, the National Procurement Commission has not yet introduced comprehensive PPP guidelines or procedure to entertain USP.

4. ANALYSIS AND DISCUSSION

In Sri Lanka, there is no explicit legislation governing PPP procurement, instead unique PPP procurement laws exist in some countries having developed PPP environment, such as Chile, Jordan, and Mexico (Economic Intelligence Unit, 2017; Economic Intelligence Unit, 2019). The President of Sri Lanka assigned the responsibility of Financial Regulations to the Minister of Finance in accordance with Article 43 (1) of the Constitution. Accordingly, the Financial Regulations were first published in 1966 and were later revised in 1992. Though, the Chapter XIII of Finance Regulations address public procurement, PPP procurement is not specifically covered from it. The Ministry of Finance published two parts of guidelines on government tender procedures in 1996. Part I that were revised in 1997, deals with projects financed by public funds, including donor funds while Part II that were revised in 1998, uses for PPP projects. Government Procurement Guidelines for Goods and Works - 2006 replaced the Government Tender

Procedure - Part I - 1997, and later Government Procurement Guidelines for Goods, Works and Non-Consulting Services - 2024 replaced Government Procurement Guidelines for Goods and Works - 2006. However, Guidelines on Government Tender Procedure - Part II -1998 are still in force. Accordingly, the first legislative framework addressing PPP procurement was Guidelines on Government Tender Procedure - Part II, which was originated in 1996 and revised in 1998.

Both solicited and unsolicited proposals are encouraged in Part II of the Government Tender Procedure. It sets forth the procedure for procurement of solicited PPP including identification of PPPs, project feasibility studies, project development, prepare expression of interest, evaluate pre-qualification, prepare request for proposal documents, evaluate proposals, negotiate submitted offers, prepare implementation agreement and sign implementation agreements. Economic Intelligence Unit (2017) highlighted that Chile and Mexico also followed similar steps for procurement of solicited PPP.

Unsolicited PPPs should not be accepted on their own and procured as a solicited proposal in line with the Government Tender Procedure - Part II; instead, it should only be begun with special Cabinet approval in circumstances of exceptional and urgent. In August 2010, Circular No. 444 of the Public Finance Department disclosed the process that needs to be followed in unsolicited PPPs that are launched because of a specific Cabinet decision, since the Government Tender Procedure - Part II was silent on that. To embrace unsolicited PPPs, the “Direct Negotiation” method was introduced in 2011 by Supplement 23. Afterwards, Supplement 23 was superseded by Supplement 30 in 2016, introducing with it the “Swiss Challenge” method for managing unsolicited PPPs. Peru successfully uses the Swiss Challenge method and Chile utilises the Bonus approach to convert USP into competition (Economic Intelligence Unit, 2017), while South Africa uses the Best and Final Offer method (Economic Intelligence Unit, 2015).

The Ministry of Finance announced in September 2019 that the Swiss Challenge procurement method was no longer in use due to its inherent flaws and further instructed to follow the procedure outlined in Government Tender Procedure - Part II for unsolicited PPPs until a proper procedure is introduced. Even though the National Procurement Commission was set up to provide appropriate public procurement regulations and processes, no comprehensive PPP guidelines or process to deal with USP has yet been implemented.

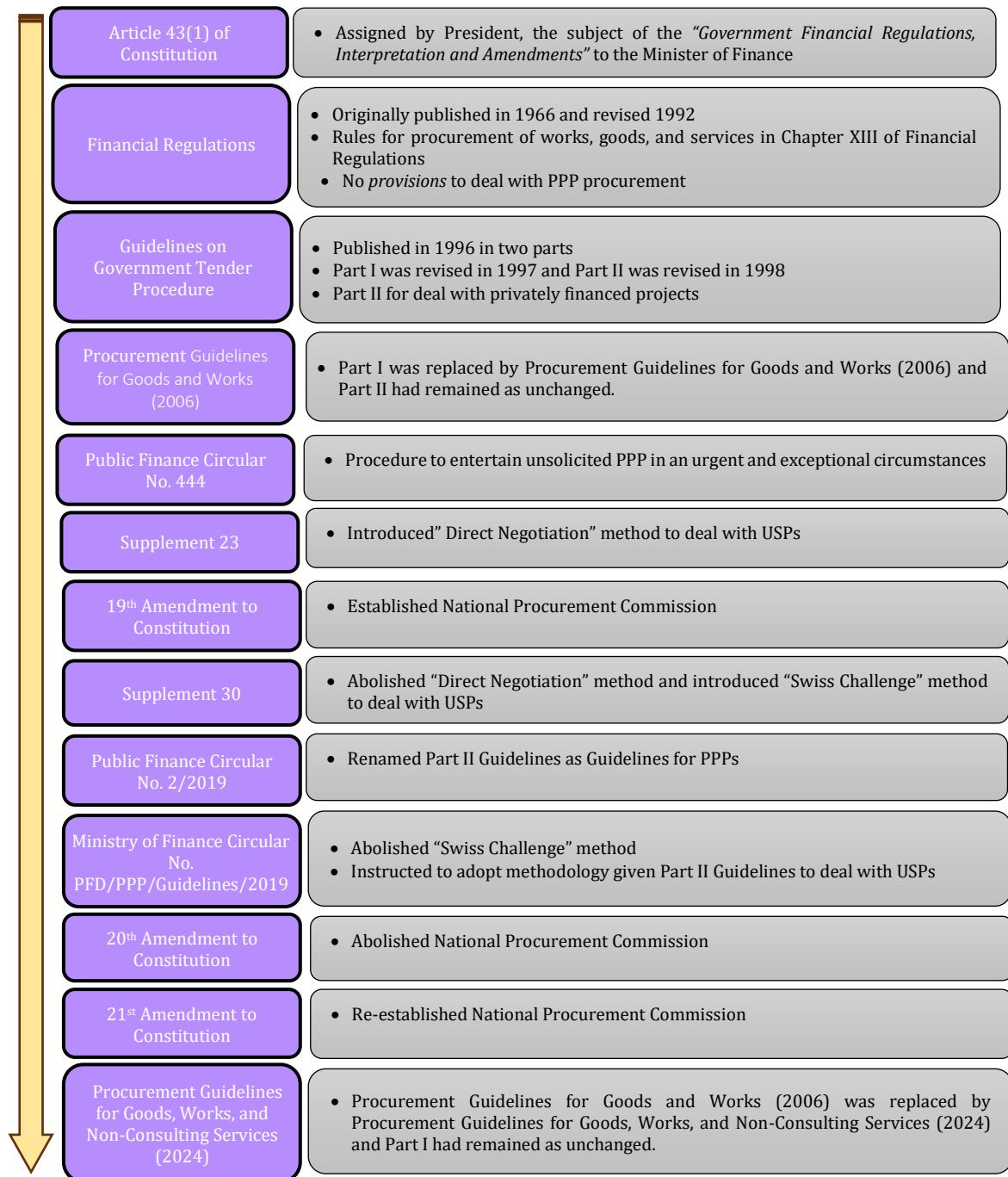


Figure 5: Evaluation of PPP procurement process in Sri Lanka

In a nutshell, Figure 5 offers a summary and visual representation of the PPP evolution for both unsolicited and solicited approaches in Sri Lanka. According to Figure 5, the PPP procurement procedure has been evaluated for over 25 years and allows for both unsolicited and solicited offers. Furthermore, it shows that formal procedure reformed and develop to ensure a fair and transparent procurement process for PPP, even while several approaches were considered to embrace unsolicited PPPs while providing lengthy process for solicited PPPs.

5. CONCLUSION

This study presents the findings of a literature review based on amendments to the constitution, regulations, guidelines and circulars related to PPP procurement in Sri Lanka. The results indicate that although the Financial Regulations of 1966 marked the beginning of formal public procurement, the Government Tender Procedure - Part II in 1996, was the initial regulation that governed PPP procurement.

Government Tender Procedure - Part II, revised in 1998, is the present guideline for PPP procurement, with some revisions. Part II Guidelines are open for both solicited and unsolicited PPPs. It provides a lengthy process to entertain solicited PPPs. Initially, unsolicited PPPs have been entertained with full competition, and later Direct Negotiation method and the Swiss Challenge approach were introduced for initiating unsolicited PPPs. Subsequently, the Swiss Challenge and Direct Negotiation procurement methods were eliminated due to inherent problems. In order to create fair and transparent procurement for Sri Lanka in the future, this study highlights the necessity for a thorough and simplified PPP procurement process and offers improved methods for accepting unsolicited PPPs.

A comprehensive review of 15 documents led to the development of Figure No. 05, which visualises in detail the evolution of PPP procurement for both solicited and unsolicited approaches from its inception. It was observed that a lengthy procedure must be followed in the circumstance of the procurement of solicited PPPs. Even though various strategies have been considered, no procedure has been firmly established for the procurement of unsolicited PPPs. Accordingly, the diagram shown in Figure 5 can be utilised to collect primary data for future developments and reformations that are required for a successful PPP procurement process as a future research direction. Although the study's primary focus is on the development of the PPP procurement process in Sri Lanka, it is expected that the article's findings and discussion will inspire policymakers and government officials in other countries to shape suitable PPP procurement processes in their own nations, adding global significance of this study.

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