STATE-OWNED ENTERPRISES

GUIDANCE NOTE ON PROCUREMENT

JUNE 2018

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Notes:

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ABOUT THIS PUBLICATION

In April 2017, the Asian Development Bank (ADB) approved its new procurement framework, the ADB Procurement Policy: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time); and the Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time). These replace the former Guidelines on the Use of Consultants (2013, as amended from time to time) and Procurement Guidelines (2015, as amended from time to time). The procurement policy and the procurement regulations address the procurement activities of project executing agencies and implementing agencies on projects financed in whole or in part by a loan or grant from ADB, or by ADB-administered funds. ADB designed the 2017 procurement policy to deliver significant benefits and flexibility throughout the project procurement cycle, as well as to improve project delivery through a renewed focus on the concepts of quality, value for money (VFM), and fitness for purpose.

This note is part of a series of guidance notes published by ADB in 2018 to accompany the 2017 procurement policy and the procurement regulations. Each note discusses a topical issue for borrowers (including grant recipients), bidders, and civil society under the new framework (see list below). The guidance notes cross-reference each other frequently and should be read in conjunction. All references to “guidance notes” pertain to these notes. The notes may be updated, replaced, or withdrawn from time to time.

List of Guidance Notes for the 2017 ADB Procurement Policy and the Procurement Regulations

1. Value for Money	14. High-Level Technology
2. Procurement Risk Framework	15. Quality
3. Strategic Procurement Planning	16. Bidding-Related Complaints
4. Procurement Review	17. Noncompliance in Procurement
5. Alternative Procurement Arrangements	18. Standstill Period
6. Open Competitive Bidding	19. State-Owned Enterprises
7. Price Adjustment	20. E-Procurement
8. Abnormally Low Bids	21. Framework Agreements for Consulting Services
9. Domestic Preference	22. Public-Private Partnerships
10. Prequalification	23. Contract Management
11. Subcontracting	24. Fragile, Conflict-Affected, and Emergency Situations
12. Consulting Services Administered by ADB Borrowers	
13. Nonconsulting Services Administered by ADB Borrowers	
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ADB procurement reforms intend to ensure VFM by improving flexibility, quality, and efficiency throughout the procurement cycle (see illustration below and the *Guidance Note on Value for Money*). VFM is part of a holistic procurement structure with three support pillars: efficiency, quality, and flexibility. The two key principles of transparency and fairness weave across all elements of the structure.

Time

Time is an important element of VFM. When a project is delivered promptly or when a process is completed rapidly, greater value is created for all stakeholders. For example, a road project completed early provides economic benefit, security, or other value to the community it serves. It increases the return on investment to the executing agency and accelerates the project and payment cycle to the successful bidder. Likewise, a project delivered late loses significant value.

When considering VFM in the context of procurement, pay attention to anything that (i) shortens the procurement cycle time frame or (ii) accelerates delivery of the development project.

Objective

This guidance note is intended to assist readers by elaborating on and explaining ADB's 2017 procurement policy and procurement regulations for borrowers (including grant recipients).

This note identifies additional information for the reader to consider when applying ADB's procurement policy and procurement regulations to their circumstances.

Living Document

This guidance note is intended to be a living document and will be revised as required.

Be sure to check the ADB Business Center website for the latest version and updates, <https://www.adb.org/business/main>.

The Reader

In many circumstances, readers are expected to use this guidance note in a manner unique to their needs. For consistency throughout the suite of guidance notes, the following assumption is made about the reader:

The reader is a professional involved in activities financed in whole or in part by an ADB loan or grant, or by ADB-administered funds.

FAQs

Frequently asked questions, clarifications, examples, additional information, links to training, and other useful resources will be made available on the ADB website.

Be sure to check the ADB Business Center website for more information, <https://www.adb.org/business/main>.

Legal and Order of Priority

This guidance note explains and elaborates on the provisions of the Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services (2017, as amended from time to time) applicable to executing (and implementing) agencies under sovereign (including subsovereign) projects financed in whole or in part by an investment loan from ADB (i.e., excluding ADB results- or policy-based loans), ADB-financed grant (excluding ADB-administered technical assistance and staff consultancies), or by ADB-administered funds.

In the event of any discrepancy between this guidance note and the procurement regulations, the latter will prevail. The financing agreement governs the legal relationships between the borrower and ADB. The rights and obligations between the borrower and the provider of goods, works, or services are governed by the specific procurement document issued by the borrower and by the contract signed between the borrower and the provider, and not by this guidance note.

ABBREVIATIONS

ADB	—	Asian Development Bank
DMC	—	developing member country
SOE	—	state-owned enterprise
VFM	—	value for money

EXECUTIVE SUMMARY

This guidance note aims to assist borrowers to understand and assess the eligibility of government or state-owned enterprises (SOEs) in the borrower's country to participate in contracts financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, whether for goods, works, or services relating to ADB's sovereign operations. This guidance note is not a guide for ADB's nonsovereign operations, which are governed by separate procedures.

How does this guidance note help the user?

- Clarifies the issues regarding participation of SOEs in ADB-financed or -administered contracts.
- Explains the conditions that an SOE must satisfy to establish its eligibility to participate in a particular contract.
- Provides a list of supporting documents that an SOE bidder should provide to enable the borrower to fully assess its eligibility to participate.
- Describes the requirements for ADB's no-objection to the participation of an SOE.

I. Introduction

1.1 This guidance note aims to assist users in determining whether a government- or state-owned enterprise (SOE) is eligible to participate in procurement of a contract financed in whole or in part by an Asian Development Bank (ADB) loan or grant, or by ADB-administered funds, whether for goods, works, or services. This guidance note will be relevant during procurement planning, to identify whether SOEs are likely to play a significant role in the project's procurement. It will also be relevant at the bidding and bid evaluation stages, to clarify the conditions under which an SOE bidder will be eligible to participate, such that ADB's core procurement principle of fairness and its guidelines and policies related to integrity and conflict of interest will be satisfied. This will contribute to effective competition and deliver value for money. Figure 1 shows where SOEs feature in the ADB procurement cycle.

1.2 ADB recognizes the continuing significance of SOEs in its developing member country (DMC) economies in the context of procurement, but limits SOE participation in any bidding process financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, to situations that do not compromise ADB's procurement principles.¹

1.3 Therefore, the goal is to ensure that ADB's procurement rules and procedures are respected, especially with reference to the principles of fairness and transparency, by ensuring a level playing field between SOEs and private sector bidders. There are three main issues to consider:

- (i) state ownership or control may
 - (a) grant an SOE access to information that is not available to the public, which would give the SOE an unfair advantage when competing with private sector entities; and

¹ See ADB. 2017. *ADB Procurement Policy: Goods, Works, Nonconsulting and Consulting Services*. Manila. Article III; ADB. 2017. *Procurement Regulations for ADB Borrowers: Goods, Works, Nonconsulting and Consulting Services*. Manila. Section 1.18(b), which provides that "Government-owned enterprises in the borrower's country may participate as a bidder only if specifically agreed by ADB."

- (b) create the potential for conflict of interest, through the state's direct or indirect control or ownership of both a purchaser and supplier;² and
- (ii) the SOE's enjoyment of direct or indirect subsidies, grants, relief, or other benefits may provide it with an unfair advantage when competing with private sector entities that do not enjoy the same.

Figure: State-Owned Enterprises in the ADB Procurement Cycle

Source: Asian Development Bank.

² Conflict of interest risks may also be present in private ownership, such as: (i) when a person having private ownership or control in an SOE uses it as a veil to compete against such person's own affiliates or subsidiaries, which can create a conflict of interest situation; or (ii) when the private ownership or control traces up to shareholders or ultimate beneficial owners that present significant integrity risks.

II. Types of State-Owned Enterprises

2.1 SOEs are defined in different ways in ADB's DMCs, depending on local law and regulation. For the purposes of this guidance note,³ the term "SOE" includes, but is not limited to, any entity recognized by the borrower's⁴ national law as an enterprise in which the state or government⁵ exercises direct or indirect (whole or partial) ownership or control. This term includes majority or minority owned, listed or unlisted, joint stock and/or limited liability companies, partnerships, unincorporated associations, and statutory corporations.⁶ SOEs must be distinguished from public agencies, quasi-governmental, or parastatal organizations that carry out public policy functions, but that do not include any economic or similar type objectives and activities such as commercial supply of goods, works, or services.⁷ This guidance note does not apply to ADB's nonsovereign operations.

2.2 SOEs may take on different legal forms and be subject to either public or private legal and regulatory frameworks, or a combination of both, depending on the approach taken by the country in which the SOE operates. SOEs may be subject to national or subnational law and regulation, again depending on the applicable country context.

2.3 An SOE can be a statutory corporation established by an act of parliament and governed by its own special statute. In many DMCs, public utilities providing essential or critical public services are generally set up as statutory corporations. SOEs may also be constituted under a special SOE or public enterprise law or enabling legislation. An SOE can also be a company incorporated under national (or subnational) corporate law and regulation in the same way as any other

³ This guidance note, including the general description of SOEs it presents, is intended to clarify and address issues regarding the participation of SOEs in open competitive bidding processes. It does not reflect ADB's understanding of or policies relating to SOEs in any other respect.

⁴ The term "borrower" includes recipients of ADB-financed grants and ADB-administered funds, and refers to the executing agency for the ADB-financed project, in each case in the context of ADB's sovereign operations. Unless specifically stated, a borrower does not include a borrower under ADB's nonsovereign operations. In some cases, the borrower acts only as an intermediary and the project is carried out by another agency or entity, in which case references in this guidance note to the borrower include such agencies and entities, as well as sub-borrowers under on-lending arrangements.

⁵ "State" and "government" are used interchangeably in this guidance note.

⁶ Statutory corporations are typically established under specific legislation or by charter, as distinct from an incorporation process required under local corporate law or regulation.

⁷ World Bank Group. 2014. *Corporate Governance of State-Owned Enterprises: A Toolkit*. Washington, DC, p. 26.

commercial private sector enterprise, subject exclusively to those laws and regulations, without any special statutory privileges or exemptions.

2.4 However, many SOE enterprise laws or regulations, as well as local company-related legislation, allow the government extensive managerial and operational powers over SOEs that override typical corporate regulatory provisions. There may be restrictions imposed on SOEs that reduce operational autonomy in key areas such as budgeting, investments, pricing, payment of dividends, and human resources, among others.

2.5 This guidance note focuses on enterprises under the direct or indirect control of the government:

- (i) Direct control can be through either
 - (a) majority shareholding; or
 - (b) minority shareholding, when coupled with effective management and operational control, even if the SOE is incorporated under local companies' legislation and subject to a private sector legal framework for corporate management and operation, including dealings with creditors and winding up. For example, the government's minority ownership may provide effective control of the SOE through:
 - › management or shareholder agreements;
 - › special voting rights that allow effective operational control such as "golden share" holdings by the government;
 - › control or the ability to appoint and/or control the SOE's management, board, or senior decision makers; and/or
 - › setting corporate strategy.
- (ii) Indirect ownership or control may exist where the government does not directly own any shares in an SOE, but has effective direct or indirect ownership or control of another enterprise, even through multiple layers of ownership, which itself has a direct ownership or control of that SOE.

2.6 Such effective operational or management control may compromise the transparency of a bidding process by creating unfair competitive conditions for private sector bidders. For example, the government's control over the SOE bidder may create potential or actual conflicts of interest and/or give the SOE bidder an undue competitive advantage over other bidders.

2.7 While unfair competitive conditions may be created by participation of foreign SOEs, their impact will be mitigated when operating outside their home countries. For example, they will have no preferred access to import licenses, operating permits, or inputs such as water and electricity. Also, there will be no conflict of interest arising from any relationship to the borrower. For these reasons, combined with the difficulty in conducting due diligence on entities operating in another legal system and probably in another language, SOEs registered or incorporated outside the borrower's country are not subject to the conditions of participation described in this guidance note.

2.8 The potential importance of SOEs in the procurement of the ADB-supported operation should be explored during the procurement planning phase. This can identify at an early stage where SOEs may play an important role, due to their dominant position in a given market, compatibility requirements with legacy systems, and/or lack of competition in geographic areas or difficult operating environments.

2.9 Where SOEs have a significant potential role under the project, early identification will allow sufficient time for the borrower to carry out the initial assessment of eligibility, including assessing relevant aspects of the country's legal and operational framework as part of the country and sector/agency procurement risk assessment (refer to the *Guidance Note on Procurement Risk Framework*). The financing plan may allow the borrower to use counterpart funding for those contracts likely to attract noneligible SOEs. Where SOE participation is permitted for specific contract packages financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, details will be included in the procurement plan and incorporated in the relevant procurement documents.

III. Conditions for the Participation of State-Owned Enterprises

3.1 The 2017 procurement regulations set out conditions for eligibility for bidders to participate in contracts financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, that, among others, prohibit a borrower to deny participation of, or disqualify, a bidder for reasons unrelated to its capacity and resources to successfully perform a contract.⁸ However, the procurement regulations, in para. 1.18(b), permit SOEs in the borrower's country to participate as a bidder only if specifically agreed to by ADB.

3.2 ADB's agreement to an SOE bidder's eligibility will only be provided if the bidder

- (i) can operate as a commercial entity,
- (ii) is legally and financially autonomous, and
- (iii) is not a dependent agency of the borrower.⁹

By meeting these conditions, ADB will be satisfied that robust competition is maintained through a "level-playing field" by (i) avoiding any conflict of interest between the borrower and an SOE bidder; and (ii) preventing any undue competitive advantage benefiting such SOE bidder, to ensure that the 2017 procurement policy, including the core procurement principle of fairness, and ADB policies and guidelines related to integrity and conflict of interest will be satisfied.¹⁰ Nevertheless, integrity risks may still exist due to the participation of an SOE bidder(s), and appropriate due diligence should be applied and maintained throughout the procurement process.

⁸ To this end, qualification requirements must be nonrestrictive and limited to criteria designed to show that a bidder possesses necessary professional and technical qualifications and competence, financial resources, equipment and physical facilities, managerial capability, general and specific experience, business reputation, and capacity to perform the contract, as per the procurement regulations in paras. 1.16–1.17.

⁹ The procurement regulations, in para. 1.18(c), also permit engaging SOEs on a case-by-case basis when the services of government-owned universities or research centers in the borrower's country are of a unique and exceptional nature, and their participation is critical to project implementation. This also applies to staff from such universities or research centers, who can be engaged on an individual basis.

¹⁰ See the procurement regulations, in paras. 1.19–1.22. While SOE eligibility conditions protect the integrity of the bidding process and help to avoid the risks of undue competitive advantage and broader potential or actual conflicted situations, conflict of interest in terms of potential or actual violation of ADB's Anticorruption Policy (1998, as amended to date) and ADB's Integrity Principles and Guidelines (2015, as amended from time to time) is a separate and independent ground for challenging any SOE or borrower activities arising out of, or in connection with, a bidding process, contract award, and/or subsequent contract management until completion.

3.3 In deciding whether an SOE meets these conditions, the country's legal and operational framework as it relates to the SOE must be carefully reviewed, preferably during the country and sector procurement risk assessment (refer to *Guidance Note on Procurement Risk Framework*). This will assist in determining any actual or potential conflict of interest between the SOE bidder and the procuring government entity or other bidder, and the ways in which that conflict of interest can be effectively addressed, mitigated, or managed to ensure competitive neutrality in the bidding process. The assessment must be carried out on any bidder that may potentially be an SOE, either because it is an entity recognized by the borrower's national law as an enterprise in which the state or government exercises direct or indirect (whole or partial) ownership or control, or based on information contained in its bid, or on the borrower's own general knowledge, even if the bidder does not specifically state in its bid that it is an SOE.

3.4 The borrower is responsible for carrying out the initial assessment of SOE eligibility. Any level of ownership or control of the borrower (including the executing agency or implementing agency) over an SOE bidder, whether direct or indirect, must be immediately declared to ADB, and ADB's no-objection should be obtained before such an SOE can be considered as an eligible bidder and subjected to further assessment. In all cases, full details of the assessment of an SOE bidder's eligibility, including the required information and documents described in Appendix 1 and Appendix 2, must be provided in the bid evaluation report.

3.5 The three conditions are explained in the subsections below.¹¹

1. The State-Owned Enterprise Can Operate as a Commercial Entity

3.6 The SOE must establish that it can enter into commercial activities and related legal contracts, assume commercial liabilities, borrow funds and be liable for repayment of its debts, sue and be sued in its own name, and be declared bankrupt and subject to winding up in accordance with local law and regulation without any immunity from judicial process. The SOE must also establish that it does not possess or exercise any exclusive regulatory function that gives it dominant market position or preferential status (e.g., licensing, authorization, certification, subsidies, budgetary support, etc.) from or by the government or any of its agencies or instrumentalities.

2. The State-Owned Enterprise Is Legally and Financially Autonomous

3.7 The SOE must establish that

- (i) it has a legal personality or status that is separate and distinct from the government, i.e., it cannot be an agency or instrumentality of the government without a separate and distinct legal personality;

¹¹ SOEs that receive ADB nonsovereign loans or in which ADB has equity are eligible to participate in procurement contracts financed in whole or in part by an ADB loan or grant, or by ADB-administered funds, if the three conditions are met.

- (ii) it does not at the time of bid submission or anticipated contract award and implementation receive, or is likely to receive:
 - (a) any substantial subsidy or subsidies;¹²
 - (b) regular or certain substantial budgetary allocations (e.g., budgetary appropriations, unconditional cash or asset transfers, etc.) from the government;¹³
 - (c) any tangible benefits (e.g., access to land, foreign exchange, import licenses, etc.) not enjoyed by the private sector; and/or
 - (d) exemption from or reduced liability for taxation; and
- (iii) it operates under the same commercial conditions as private sector actors, e.g.,
 - (a) its prices, fees, etc., are based on actual costs and market considerations;
 - (b) its purchases, capital investments, operating costs, and employment levels are determined by market forces;
 - (c) it pays market rates on its working capital and investment financing;
 - (d) it complies with the same regulations with respect to information availability, reporting, and transparency as other actors; and
 - (e) it makes market-based returns to its investors or shareholders.

3. The State-Owned Enterprise Is Not a Dependent Agency of the Borrower

3.8 The SOE must establish that it is not bidding (or submitting a proposal) for a procurement contract to be awarded by the borrower (i) that is responsible, either directly or indirectly, for regulation or supervision of that SOE; (ii) to whom that SOE must effectively report; (iii) that directly or indirectly owns that SOE; or (iv) which has the ability to directly or indirectly exercise control over that SOE in terms of management, financial, and/or operational decisions, actions, or structure, or has a material interest.

3.9 Ownership of the SOE's shares is not the sole determining factor in establishing independence between the SOE and the borrower. Majority ownership of an SOE's shares by the government does not necessarily equate with a lack of independence in every case, for example, where the majority government ownership is held by an agency that is not the borrower and over which the borrower has no direct or indirect management, financial control, and/or

¹² A "subsidy" exists if there is a financial contribution by the government or any form of material income or price support. A financial contribution for this purpose is a direct transfer of funds such as grants, loans, equity support or infusion, and/or other material financial support, such as by loan guarantee, tax credit or exemption, or provision or purchase of goods and/or services by the government to or from the SOE at nominal or less than market rates. In this paragraph, "substantial" means sufficient to create inconsistency with ADB's procurement principles.

¹³ In certain situations, payments received by SOEs in connection with government-mandated operations may not be construed as budgetary support, provided such payments are clearly separated from the normal commercial operations of the SOE and are expressly and exclusively earmarked for expenditures arising out of, or related to, such government-mandated operations.

operational control. This is an example of how the borrower's country legal and operational framework can be reviewed and considered in determining an SOE's eligibility.

3.10 At the same time, minority ownership by the borrower in the SOE may also result in a lack of independence (see para. 2.5 of this guidance note). Particular areas of control, such as the presence of agency officials on the board of an SOE, need to be carefully reviewed to determine if the borrower has effective control over the SOE, or if the borrower can be controlled by the SOE.

3.11 Lack of independence between a reporting or supervisory borrower and an SOE may introduce influences over the selection decision. Such extrinsic factors may include, for example, increasing the turnover of the SOE or optimizing the use of its resources to satisfy certain owner and/or management objectives of the borrower or borrower-controlled agency.

3.12 In most circumstances, the borrower is best positioned to self-identify those SOEs under its direct or indirect administrative and/or operational control, in accordance with its legally prescribed authority, if any, for a specific industry or sector. The borrower shall exclude any such SOEs from participation in contracts financed in whole or in part by an ADB loan or grant, or by ADB-administered funds. However, the borrower's determination to allow an SOE bidder to participate is subject to ADB's no-objection (para. 3.4).

3.13 Appendix 1 gives a checklist that sets out the steps that should be followed by borrowers (and SOEs) to determine whether an SOE is eligible to participate in a bidding process. Appendix 2 lists supporting documentation that should be requested in the bidding documents¹⁴ where SOE participation is anticipated and/or, if not provided by an SOE bidder in its bid, requested from it during the bid evaluation process.

¹⁴ In the case of contracts for consulting services, this includes requests for expressions of interest and requests for proposals.

Appendix 1: State-Owned Enterprise Eligibility Checklist

Eligibility Condition	Documentation or Information on Which Decision Is Based	Who Decides
1. Is the SOE a dependent agency of the borrower?	<ul style="list-style-type: none"> • Foundation documentation (e.g., charter, articles of incorporation, relevant statutory provisions, etc.) • Bylaws, board resolutions, corporate power of attorney, etc. • Actual and/or beneficial ownership trail to determine control • Certification from the DMC's government corporate counsel (Appendix 2, para. A2.1) • Certification from the SOE (Appendix 2, para. A2.2) • Corporate governance structure 	<p>For post review (sampling) and prior review contracts:</p> <ul style="list-style-type: none"> • The borrower must obtain all relevant documentation to accurately determine the exact status of the SOE in terms of "dependency" or control in relation to the borrower. • <u>Any</u> level of ownership or control of the borrower (including the executing agency or implementing agency) over an SOE bidder, whether direct or indirect, must be immediately declared to ADB. • ADB's no-objection should be obtained before such an SOE can be considered as an eligible bidder. <p>If the borrower assesses that the SOE does <u>not</u> meet this eligibility condition, the bid will be rejected and</p> <ul style="list-style-type: none"> • for post review (sampling) contracts, ADB's no-objection to this assessment is not required; or • for prior review contracts, ADB's no-objection to this assessment, if supported, will be provided through its no-objection to the bid evaluation report.

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Table continued

Eligibility Condition	Documentation or Information on Which Decision Is Based	Who Decides
2. Can the SOE operate as a commercial entity?	<ul style="list-style-type: none"> • Foundation documentation (e.g., charter, articles of incorporation, relevant statutory provisions, etc.) • Bylaws, board resolutions, corporate power of attorney, etc. • Certification from the DMC's government corporate counsel (Appendix 2, para. A2.1) • Certification from the SOE (Appendix 2, para. A2.2) 	<p>If the borrower assesses that the SOE does <u>not</u> meet this eligibility condition, the bid will be rejected and</p> <ul style="list-style-type: none"> • for post review (sampling) contracts, ADB's no-objection to this assessment is not required; or • for prior review contracts, ADB's no-objection to this assessment, if supported, will be provided through its no-objection to the bid evaluation report.
<ul style="list-style-type: none"> (i) Ability to enter into legally binding commercial contracts and assume liabilities (ii) Authority to borrow funds and undertake repayment of debts (iii) Legal process for winding up and dissolution of entity (iv) Can be declared bankrupt (v) Can sue and be sued in its own name 		
3. Is the SOE legally and financially autonomous?	<ul style="list-style-type: none"> • Foundation documentation (e.g., charter, articles of Incorporation, relevant statutory provisions, etc.) • Bylaws, board resolutions, corporate power of attorney, etc. • Financial accounts of SOE • Certification from the DMC's government corporate counsel (Appendix 2, para. A2.1) • Certification from the SOE (Appendix 2, para. A2.2) • Borrower country's general appropriations act 	<p>If the borrower assesses that the SOE does <u>not</u> meet this eligibility condition, the bid will be rejected and</p> <ul style="list-style-type: none"> • for post review (sampling) contracts, ADB's no-objection to this assessment is not required, or • for prior review contracts, ADB's no-objection to this assessment, if supported, will be provided through its no-objection to the bid evaluation report.
<ul style="list-style-type: none"> (i) Legally autonomous, i.e., has a legal personality or status that is separate and distinct from the state (ii) Financially autonomous, i.e., SOE is not receiving at the time of bid submission or anticipated contract award and implementation, or is not likely to receive, <ul style="list-style-type: none"> • any material direct or indirect government subsidy or budgetary support; • any tangible benefits (e.g., access to land, foreign exchange, import licenses, etc.) not enjoyed by the private sector; • any exemption from or reduced liability for taxation; 		

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Table continued

Eligibility Condition	Documentation or Information on Which Decision Is Based	Who Decides
<ul style="list-style-type: none">• its prices, fees, etc., are based on actual costs and market considerations;• its purchases, capital investments, operating costs and employment levels are determined by market forces;• it pays market rates on its working capital and investment financing;• it complies with the same regulations with respect to information availability, reporting and transparency as other actors; and• it makes market-based returns to its investors or shareholders.		

Overall Assessment

For post review (sampling) and prior review contracts, if the borrower assesses that the SOE meets all three eligibility conditions (following ADB's no-objection to the assessment that the SOE is not a dependent agency of the borrower), ADB's no-objection is also required for this overall assessment.

For prior review contracts, ADB's no-objection, if supported, will be provided through its no-objection to the bid evaluation report.

ADB = Asian Development Bank, DMC = developing member country, SOE = state-owned enterprise.

Source: Asian Development Bank.

Appendix 2: Documentation and Informational Requirements for State-Owned Enterprises

A2.1 Any enterprise that is (i) applying for prequalification, bidding for, and/or providing a quotation for civil works, goods, or nonconsulting services; or (ii) expressing interest in or submitting a proposal for consulting services; and is wholly or partially (either directly or indirectly) owned or controlled by any borrower government agency or instrumentality (either national or subnational), should provide the following documents with their applications, bids, expressions of interest, proposals, and/or quotations:¹

- (i) foundation documents, e.g., charter, memorandum and articles of incorporation, and/or any other official documents confirming the official establishment of the state-owned enterprise (SOE);
- (ii) certification of business or commercial registration;
- (iii) current (i.e., updated) shareholding or equivalent evidence of ownership of the SOE, including identification of any indirect beneficial government ownership and/or control of the SOE;
- (iv) description of the nature and type of connections or links, if any, between members of the board of directors, board of management, or any similar supervisory board and/or senior management of the SOE and the responsible executing agency and/or any borrower agency or instrumentality;
- (v) latest audited or current operational statements of the SOE;
- (vi) the borrower country's government corporate counsel certification as to the commercial nature, financial autonomy, and independence of the SOE concerned;
- (vii) the borrower country's general appropriations act, to ascertain whether the SOE receives direct budgetary allocations from the government or one of its instrumentalities, and
- (viii) any other relevant documentation providing information on the ownership and/or control of the SOE and its relationship with the responsible executing agency.

¹ Such requirements would normally be included in the applicable application data sheet or bid data sheet.

A2.2 Such SOE applicants or bidders should also provide a certification² substantially in form and substance as follows:

“...We hereby certify that:

- (i) we are not subject to any direct or indirect ownership or control by any governmental agency or authority which directly or indirectly also supervises, manages, or controls the executing agency;
- (ii) we have no immunity from courts with competent jurisdiction, can be declared insolvent or bankrupt under applicable laws, and can sue and be sued in our own name;
- (iii) we pay taxes and duties in accordance with applicable law;
- (iv) we are not receiving at the time of bid submission or anticipated contract award and implementation, and are not likely to receive:
 - (a) any material direct or indirect government subsidy or budgetary support;
 - (b) any tangible benefits (e.g., access to land, foreign exchange, import licenses, etc.) not enjoyed by the private sector; and/or
 - (c) any exemption from or reduced liability for taxation;
- (v) we comply with the same regulations with respect to information availability, reporting and transparency as other actors;
- (vi) we maintain minutes of Board meetings (and any subject-specific Board committees) and are subject to internal and external audits; and
- (vii) we neither possess nor exercise any exclusive regulatory function that affords us or our affiliates dominant market position or preferential status (e.g., licensing, authorization, certification, subsidies, budgetary support, etc.) from or by the government or any of its agencies or instrumentalities...”

² This may be included in the text of the application submission sheet or letter of bid, or a separate prequalification or bidding form.

State-Owned Enterprises

Guidance Note on Procurement

This guidance note assists borrowers to understand how participation of government or state-owned enterprises (SOEs) in contracts financed in whole or in part by an ADB sovereign loan or grant, or by ADB-administered funds, may create issues of unfairness or conflict of interest. The note also clarifies the conditions under which ADB will agree to the participation of SOE bidders in the borrower's country in such contracts: namely, the SOE (i) can operate as a commercial entity, (ii) is legally and financially autonomous, and (iii) is not a dependent agency of the borrower. The note describes information to be provided by SOE bidders to meet these conditions.

About the Asian Development Bank

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to a large share of the world's poor. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

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