Compendium

of

Guidelines for Public Private Partnerships

Planning Commission
Government of India

Published by the PPP & Infrastructure Division
Planning Commission
Yojana Bhavan
Parliament Street
New Delhi-110 001
www.infrastructure.gov.in

Printed by Brijbasi Art Press Ltd.
A-80-81, Sector 5, Noida – 201 203

April 2014

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Preface

Several initiatives were taken by the Central Government in the mid-1990s for attracting private participation in different infrastructure sectors. This included creation of an enabling policy and regulatory framework, besides amendment of several laws. These efforts were intensified in 2004, following constitution of the Committee on Infrastructure (CoI) chaired by the Prime Minister. The policy of promoting PPPs as a means of increasing investment in infrastructure was a conscious decision of the Government responding to the fact that infrastructure required large investments which could not be funded from public resources alone, especially since there were other competing demands. It was recognised that the available public resources should be leveraged as much as possible by attracting private investment in the form of PPPs, which would also improve the quality of service while reducing costs.

The aforesaid policy has met with significant success. There has been a remarkable expansion in private participation over the Eleventh Plan. Data compiled by the Planning Commission shows that 712 PPP projects with an investment of Rs. 1,61,425 crore have actually been completed while 779 PPP projects with an investment of Rs. 4,68,138 crore, are under various stages of implementation. This includes 236 national highway projects and 352 state highway projects which are either operational or under construction.

During the period 2008-12, India was the top recipient of PPP investment, according to the database of the World Bank. According to a World Bank Report on Private Participation in Infrastructure, India has been the top recipient of PPP activity and remained the largest market for PPP in the developing world. It attracted 98 per cent of the PPP investment in South Asia.

A study by the Economic Intelligence Unit of the Economist commissioned by Asian Development Bank (ADB) states that while UK and Australia, both mature economies, have successfully exploited PPP possibilities, India has also done well. India has outscored China and Japan to rank second on PPP projects performance among the Asian nations and fourth among the Asia-Pacific nations. According to their Report, PPP development in India has been driven by strong political will coupled with advances in public capacity and processes. The Report states that PPP projects have a huge level of overall acceptance and use in India. It further states that government agencies have a relatively high level of proficiency in PPP projects and that as a result of introduction of Model Concession Agreements, the risk allocation has been improving. The report also notes that there have been significant initiatives in making finance available through creation of the Viability Gap Funding scheme and the India Infrastructure Finance Company Limited, thus enabling greater participation of private finance in infrastructure.

The success of PPP in India can be largely attributed to standardization of documents and processes. The Model Concession Agreements for different sectors as well as the model bidding documents such as the Request for Qualification (RFQ) and Request for Proposals (RFP) provided the requisite framework while constitution of the India Infrastructure Finance Company Limited (IIFCL), the Public Private Partnership Approval Committee (PPPAC) and other similar initiatives provided the institutional mechanism for speedy appraisal, approval and delivery of PPP projects. These standardised documents as well as the streamlined processes helped to accelerate the award of projects in a fair, transparent and competitive manner while facilitating their financing through the Banks and IIFCL.

This volume brings together the various guidelines that were issued in the recent years with a view to providing the institutional framework required for approval, appraisal, financing, regulation and monitoring of projects and processes. It can be asserted that in the absence of these guidelines, the PPP programme may have been subjected to *ad hoc* and case by case approach that may have delayed project delivery and compromised outcomes. Institutionalization of the processes also brought in consistency and fair play alongwith a rigorous appraisal and approval process to ensure that the interests of the public exchequer and the users are not compromised.

These Guidelines were mostly initiated and drafted in the Secretariat for PPP and Infrastructure in the Planning Commission which worked closely with the Finance Ministry and other stakeholders to build consensus and have them issued by the relevant authorities. The Committee on Infrastructure, chaired by the Prime Minister, provided the requisite guidance and endorsement that was essential for adoption of these guidelines across sectors and ministries. The architecture of PPP framework comprising these documents and processes has been instrumental in attaining the aforesaid global top rank in PPP investments.

For ready reference of the practitioners and researchers of PPP, these guidelines have been consolidated in a single volume. It is expected that in the years to come, the guidelines included in this volume will continue to ensure the robustness of the PPP programme in India.

April 2, 2014

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

Government of India

Guidelines for

Financial Support to PPP in Infrastructure

Published by
PPP & Infrastructure Division
Planning Commission, Government of India Yojana
Bhawan, Parliament Street
New Delhi - 110 001

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Secretariat for the Committee on Infrastructure

Preface

This scheme aims at supporting infrastructure projects that are economically justified but fall short of financial viability usually arises from long gestation periods and the inability to increase user charges to commercial levels. Infrastructure projects also involve externalities that are not adequately captured in direct financial returns to the project sponsor. Through the provision of a catalytic grant assistance of up to 20% of the capital costs, several projects may become bankable and help mobilize the much needed private capital and efficiencies.

Support under this scheme would be available only for infrastructure projects where private sector sponsors are selected through a process of competitive bidding. The project agreements must also adhere to best practices that would secure value for public money and safeguard user interests. The scheme would thus incentivise the evolution of sound practices in PPP projects and help eliminate the pitfalls hitherto observed in several cases where adequate 'due diligence' was not observed.

Apart from the financial support to be made available under this scheme, an additional grant of up to 20% can be provided by the sponsoring Ministry or State Government. The lead financial institution for the project shall be responsible for regular monitoring and periodic evaluation of project compliance with agreed milestones and performance levels, particularly for the purpose of grant disbursement. The scheme was formulated by the Ministry of Finance in consultation with the Planning Commission and other stakeholders. The scheme was considered and approved by the Committee on Infrastructure, chaired by the Prime Minister, and was subsequently endorsed by the Union Cabinet. Following a notification by the Finance Ministry in January 2006, the scheme has been operationalised and assistance to several projects is already under consideration.

This intervention would enable the Government to enhance private sector participation in critical infrastructure sectors. By offering grant assistance of up to 20% of the project costs, the Government will be able to use its scarce budgetary resources to leverage a much larger pool of private capital. At the same time, 'due diligence' by the Government and project lenders would help maximize efficiency and value for public money.

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

Guidelines for Financial Support to Public Private Partnerships (PPPs) in Infrastructure

The guidelines were notified by the Ministry of Finance, Department of Economic Affairs vide O.M. No. 1/5/2005-PPP dated 12th January, 2006.

1. Introduction

1.1 The Central Government has notified a scheme for financial support to infrastructure projects that are to be undertaken through Public Private Partnerships (PPP). A copy of the scheme is at Annex-I.

1.2 The procedure to be followed for submission, appraisal and approval of financial support under this scheme is specified below.

2. Institutional structure

2.1 The institutional structure for appraisal and approval of financial support to PPPs is specified at Annex-II.

3. Applicability

3.1 These guidelines will apply to PPP projects posed by the Central Ministries, State Governments and statutory authorities, as the case may be, which owns the underlying assets (see Rule 5.1).

3.2 Proposals to be made under this scheme shall be considered for providing Viability Gap Funding (VGF), one time or deferred, with the objective of making a PPP project commercially viable (see definition).

3.3 The proposal shall relate to a Public Private Partnership (PPP) project which is based on a contract or concession agreement between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges (see definition).

3.4 This scheme will apply only if the contract/ concession is awarded in favour of a private sector company in which 51% or more of the subscribed and paid up equity is owned and controlled by a private entity (see definition).

3.5 A private sector company shall be eligible for VGF only if it is selected on the basis of open competitive bidding and is responsible for financing, construction, maintenance and operation of the project during the concession period (see Rule 3.1).

3.6 The project should provide a service against payment of a pre-determined tariff or user charge (see Rule 3.1).

4. Appraisal and 'in principle' approval by Empowered Institution

4.1 The proposal for seeking clearance of the Empowered Institution shall be sent (in six copies, both in hard and soft form) to the PPP Cell of the Department of Economic Affairs in the format specified at Annex-III. The proposal should include copies of all project agreements (such as concession agreement, state support agreement, substitution agreement, escrow agreement, O&M agreement and shareholders' agreement, as applicable) and the Project Report (see Rules 3.1 and 5.1).

4.2 The proposal will be circulated by the PPP Cell to all members of the Empowered Institution for their comments. All comments received within four weeks shall be forwarded by the PPP Cell to the concerned Administrative Ministry, State Government or statutory authority, as the case may be, for submitting a written response to each of the comments. In case the project is based on a model concession agreement, the comments will be furnished within two weeks (see Rules 5.2 and 5.4).

4.3 The proposal, along with the project report, concession agreement and supporting agreements/ documents, together with the comments of the respective Ministries and the response thereto, will be submitted by the PPP Cell to the Empowered Institution for consideration and 'in principle' approval.

4.4 While submitting the proposal to the Empowered Institution, the PPP Cell will indicate whether the proposal conforms to the mandatory requirements of the scheme. Deficiencies, if any, will be indicated in the note of PPP Cell. In particular, the Department of Economic Affairs and the Department of Expenditure will examine the proposals with a view to ensuring that they conform to the conditions specified in the scheme. The Planning Commission will examine the project report and the concession agreement with a view to ensuring that the proposal is broadly in order.

4.5 The Empowered Institution will either approve the proposal in principle (with or without modifications) or advise the concerned Ministry, State Government or statutory authority, as the case may be, to provide additional clarifications/ information or to make necessary changes for further consideration of the Empowered Institution (see Rule 5.3).

4.6 Approval under this scheme will be for the purposes of this scheme only. All other statutory, financial or administrative approvals shall be obtained as applicable (see Rule 5.6). For projects owned by the Central Government or its statutory entities, approval of PPPAC shall also be obtained in accordance with the guidelines issued by the Ministry of Finance. However, these approvals may be obtained simultaneously in order to save on time.

4.7 In cases where financial support is available from any other Ministry of the Central Government under an on-going scheme for assistance to PPPs, the

proposal would be sent to such Ministry for consideration. In case the Ministry recommends that the proposal be considered for additional assistance under this scheme, the same shall be submitted to the Empowered Committee for consideration
(see Rule 5.7).

4.8 Once cleared by the Empowered Institution, the project would be eligible for financial support under this scheme.

5. Viability Gap Funding

5.1 The quantum of financial support (VGF) to be provided under this scheme shall be in the form of a capital grant at the stage of project construction. The amount of VGF shall be equivalent to the lowest bid for capital subsidy, but subject to a maximum of 20% of the total project cost. In case the sponsoring Ministry/ State Government/ statutory entity proposes to provide any assistance over and above the said VGF, it shall be restricted to a further 20% of the total project cost (see Rule 4.1 and 4.2).

6. Invitation to bid

6.1 Financial bids shall be invited by the concerned Ministry, State Government or statutory entity, as the case may be, for award
of the project within four months of the approval of the Empowered Institution. This period may be extended by the Department of Economic Affairs, as necessary (see Rule 7.1).

6.2 The private sector company shall be selected through a transparent and open competitive bidding process. The criterion for bidding shall be the amount of VGF required by a private sector company where all other parameters are comparable (see Rule 6.1).

7. Final approval by the Empowered Institution

7.1 Within three months from the date of award, or such extended period as may be permitted, the Lead Financial Institution shall present its appraisal of the project (in six copies, the in hard and soft form) for consideration and approval of the Empowered Institution. The appraisal shall be accompanied by an updated application in the format specified at Annex-III along with the project report and project agreements. The Lead Financial Institution shall verify the contents of the application and convey its recommendation to the Empowered Institution (see Rule 7.2).

7.2 Prior to final approval by the Empowered Institution, the Ministry, State Government or statutory authority, as the case may be, proposing the project, shall certify that the bidding process conforms to the provisions of this scheme and that all the conditions specified in the scheme have been complied with (see Rule 6.2).

7.3 The procedure specified in para 4 above shall be followed mutatis mutandis for examination and approval of the appraisal report of the Lead Financial Institution.

8. Disbursement of VGF

8.1 Prior to disbursement, the Empowered Institution, the Lead Financial Institution and the private sector company shall enter into a Tripartite Agreement in such format as may be prescribed by the Empowered Committee from time to time (see Rule 8.3).

8.2 For the purposes of this scheme, a Lead Financial Institution shall be the financial institution (FI) that is funding the project, and in case of a consortium of FIs, the FI designated as such by the consortium shall be the Lead Financial Institution (see definition).

8.3 VGF shall be disbursed only after the private sector company has subscribed and expended the equity contribution required for the project and will be released in proportion to debt disbursements remaining to be disbursed thereafter (see Rule 8.1).

8.4 VGF shall be released to the Lead Financial Institution as and when due (see Rule 8.2).

9. Monitoring

9.1 The Lead Financial Institution shall be responsible for regular monitoring and periodic evaluation of project compliance with agreed milestones and performance levels, particularly for the purposes of disbursing the VGF. It shall also send a quarterly progress report to the Empowered Institution (see Rule 7.3).

Scheme for Support to Public Private Partnerships in Infrastructure

A. Whereas the Government of India recognizes that there is significant deficit in the availability of physical infrastructure across different sectors and that this is hindering economic development;

B. whereas the development of infrastructure requires large investments that cannot be undertaken out of public financing alone, and that in order to attract private capital as well as the techno-managerial efficiencies associated with it, the Government is committed to promoting Public Private Partnerships (PPPs) in infrastructure development; and

C. whereas the Government of India recognizes that infrastructure projects may not always be financially viable because of long gestation periods and limited financial returns, and that financial viability of such projects can be improved through Government support.

D. Now, therefore, the Government of India has decided to put into effect the following scheme for providing financial support to bridge the viability gap of infrastructure projects undertaken through Public Private Partnerships.

1. Short Title and Extent

(i) This scheme will be called the Scheme for Financial Support to Public Private Partnerships (PPPs) in Infrastructure. It will be a Plan Scheme to be administered by the Ministry of Finance. Suitable budgetary provisions will be made in the Annual Plans on a year-to-year basis.

(ii) The scheme shall come into force with immediate effect.

2. Definitions

In this scheme, unless the context otherwise requires:

Empowered Committee means a Committee under the Chairmanship of Secretary (Economic Affairs) and including Secretary (Planning Commission), Secretary (Expenditure) and the Secretary of the line ministry dealing with the subject.

Empowered Institution means an institution, company or inter-ministerial group designated by the Government for the purposes of this scheme.

Lead Financial Institution means the financial institution (Fl) that is funding the PPP project, and in case there is a consortium of FIs, the Fl designated as such by the consortium;

Private Sector Company means a company in which 51% or more of the subscribed and paid up equity is owned and controlled by a private entity;

Project Term means the duration of the contract or concession agreement for the PPP project;

Public Private Partnership (PPP) Project means a project based on a contract or concession agreement, between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges;

Total Project Cost means the lower of the total capital cost of the PPP Project: (a) as estimated by the government/statutory entity that owns the project, (b) as sanctioned by the Lead Financial Institution, and (c) as actually expended; but does not in any case include the cost of land incurred by the government/ statutory entity; and

Viability Gap Funding or Grant means a grant one-time or deferred, provided under this Scheme with the objective of making a project commercially viable.

3. Eligibility

1. In order to be eligible for funding under this Scheme, a PPP project shall meet the following criteria:

(a) The project shall be implemented i.e. developed, financed, constructed, maintained and operated for the Project Term by a Private Sector Company to be selected by the Government or a statutory entity through a process of open competitive bidding; provided that in case of railway projects that are not amenable to operation by a Private Sector Company, the Empowered Committee may relax this eligibility criterion.

(b) The PPP Project should be from one of the following sectors:

(i) Roads and bridges, railways, seaports, airports, inland waterways;

(ii) Power;

(iii) Urban transport, water supply, sewerage, solid waste management and other physical infrastructure in urban areas;

(iv) Infrastructure projects in Special Economic Zones; and

(v) International convention centres and other tourism infrastructure projects;

Provided that the Empowered Committee may, with approval of the Finance Minister, add or delete sectors/sub-sectors from the aforesaid list.

(c) The project should provide a service against payment of a pre-determined tariff or user charge.

(d) The concerned Government/statutory entity should certify, with reasons;

(i) that the tariff/user charge cannot be increased to eliminate or reduce the viability gap of the PPP;

(ii) that the Project Term cannot be increased for reducing the viability gap; and

(iii) that the capital costs are reasonable and based on the standards and specifications normally applicable to such projects and that the capital costs cannot be further restricted for reducing the viability gap.

4. Government Support

(1) The total Viability Gap Funding under this scheme shall not exceed twenty percent of the Total Project Cost; provided that the Government or statutory entity that owns the project may, if it so decides, provide additional grants out of its budget, but not exceeding a further twenty percent of the Total Project Cost.

(2) Viability Gap Funding under this scheme will normally be in the form of a capital grant at the stage of project construction. Proposals for any other form of assistance may be considered by the Empowered Committee and sanctioned with the approval of Finance Minister on a case- by-case basis.

(3) Viability Gap Funding up to Rs. 100 crore (Rupees One hundred crore) for each project may be sanctioned by the Empowered Institution subject to the budgetary ceilings indicated by the Finance Ministry. Proposals up to Rs. 200 crore (Rupees Two hundred crore) may be sanctioned by the Empowered Committee, and amounts exceeding Rs. 200 crore may be sanctioned by the Empowered Committee with the approval of Finance Minister.

(4) Unless otherwise directed by the Ministry of Finance, the Empowered Institutions may approve project proposals with a cumulative capital outlay equivalent to ten times the budget provisions in the respective Annual Plan.

(5) In the first two years of operation of the Scheme, projects meeting the eligibility criteria will be funded on a first-come, first served basis. In later years, if need arises, funding may be provided based on an appropriate formula, to be determined by the Empowered Committee, that balances needs across sectors in a manner that would make broad base the sectoral coverage and avoid pre-empting of funds by a few large projects.

5. Approval of project proposals

(1) Project proposals may be posed by a Government or statutory entity which owns the underlying assets. The proposals shall include the requisite information necessary for satisfying the eligibility criteria specified in paragraph 3 above.

(2) Projects based on standardized/model documents duly approved by the respective Government would be preferred. Stand-alone documents may be subjected to detailed scrutiny by the Empowered Institution.

(3) The Empowered Institution will consider the project proposals for Viability Gap Funding and may seek the required details for satisfying the eligibility criteria.

(4) Within 30 days of receipt of a project proposal, duly completed as aforesaid, the Empowered Institution shall inform the sponsoring Government/ statutory entity whether the project is eligible for financial assistance under this Scheme. In case the project is based on stand- alone documents (not being duly approved model/standard documents), the approval process may require an additional 60 (sixty) days.

(5) In the event that the Empowered Institution needs any clarifications or instructions relating to the eligibility of a project, it may refer the case to the Empowered Committee for appropriate directions.

(6) Notwithstanding the approvals granted under this scheme, projects promoted by the Central Government or its statutory entities shall be approved and implemented in accordance with the procedures specified from time to time.

(7) In cases where viability gap funding is budgeted under any on-going Plan scheme of the Central Government, the inter-se allocation between such on-going scheme and this scheme shall be determined by the Empowered Committee.

6. Procurement process for PPP Projects

(1) The Private Sector Company shall be selected through a transparent and open competitive bidding process. The criterion for bidding shall be the amount of Viability Gap Funding required by a Private Sector Company for implementing the project where all other parameters are comparable.

(2) The Government or statutory entity proposing the project shall certify that the bidding process conforms to the provisions of this Scheme and convey the same to the Empowered Institution prior to disbursement of the Grant.

7. Appraisal and monitoring by Lead Financial Institution

(1) Within four months from the date on which eligibility of the project is conveyed by the Empowered Institution to the concerned Government/ statutory entity, the PPP project shall be awarded in accordance with paragraph 6 above; provided that upon application made to it by the concerned Government/statutory entity, the Empowered Institution may extend this period by not more that two months at a time.

(2) The Lead Financial Institution shall, within three months from the date of bid award, present its appraisal of the project for the consideration and approval of the Empowered Institution; provided that upon application made to it by the

concerned Government/statutory entity, the Empowered Institution may extend this period by not more than one month at a time.

(3) The Lead Financial Institution shall be responsible for regular monitoring and periodic evaluation of project compliance with agreed milestones and performance levels, particularly for the purpose of disbursement of Viability Gap Funding. It shall send quarterly progress reports to the Empowered Institution which will make a consolidated progress report once every quarter for review by the Empowered Committee.

8. Disbursement of Grant

(1) A Grant under this scheme shall be disbursed only after the Private Sector Company has subscribed and expended the equity contribution required for the project and will be released in proportion to debt disbursements remaining to be disbursed thereafter.

(2) The Empowered Institution will release the Grant to the Lead Financial Institution as and when due, and obtain reimbursement thereof from the Finance Ministry.

(3) The Empowered Institution, the Lead Financial Institution and the Private Sector Company shall enter into a Tripartite Agreement for the purposes of this scheme. The format of such Tripartite Agreement shall be prescribed by the Empowered Committee from time to time (see Annex-IV).

9. Revolving Fund

A revolving fund of Rs. 200 crore (Rupees Two hundred crore) shall be provided by the Finance Ministry to the Empowered Institution. The Empowered Institution shall disburse funds to the respective lead financial Institutions and claim reimbursement thereof from the Ministry of Finance.

10. Guidelines

The Guidelines issued vide Ministry of Finance Press Release as well as OM of F. No. 2/10/04-INF dated 19th August, 2004 stand withdrawn with immediate effect.

Annex-II

Institutional Structure

F.No. 2/10/2004-INF
Government of India
Ministry of Finance
Department of Economic Affairs
Infrastructure-11 Section
New Delhi, the 18th August, 2005

Notification

Subject: Setting up an Empowered Committee and Empowered Institutions.

1. Cabinet Committee on Economic Affairs in its meeting of 25th July, 2005 approved the Scheme for support to Public Private Partnerships in Infrastructure. In pursuance of the decision of the Cabinet, it has been decided to constitute an Empowered Committee and Empowered Institution for approving financial assistance to such projects which satisfies all the eligibility criteria indicated in the Scheme.

2. The composition of Empowered Committee will be as follows:

(i) Secretary (Economic Affairs)

(ii) Secretary (Planning Commission)

(iii) Secretary (Expenditure)

(iv) Secretary of the line Ministry dealing with the subject

3. The Empowered Committee will:

(a) Sanction Viability Gap Funding up to Rs. 200 crore (Rupees Two hundred crore) for each project subject to the budgetary ceilings indicated by the Finance Ministry. Amounts exceeding Rs. 200 crore may be sanctioned by the Empowered Committee with the approval of Finance Minister;

(b) Determine the appropriate formula that balances needs across sectors in a manner that broad bases the sectoral coverage and avoids pre- empting of funds by a few large projects;

(c) Determine the inter-se allocation between any on-going Plan Scheme providing viability gap funding and this Scheme; and

(d) Provide clarifications or instructions relating to eligibility of a project for such support as and when requested by Empowered Institution.

4. The Composition of the Empowered Institution is as follows:

(i) Additional Secretary (Economic Affairs)

(ii) Additional Secretary (Expenditure)

(iii) Representative of Planning Commission not below the rank of Joint Secretary

(iv) Joint Secretary in the line Ministry dealing with the subject

(v) Joint Secretary, DEA -- Member Secretary

5. The Empowered Institution will sanction projects for Viability Gap Funding upto Rs. 100 crore (Rupees one hundred crore) for each eligible project subject to the budgetary ceiling indicated by the Finance Ministry. Empowered Institution will also consider other proposals and place them before the Empowered Committee.

6. Eligible Sector: The sectors eligible for Viability Gap Funding under this Scheme are:

(i) Roads and bridges, railways, seaports, airports, inland waterways;

(ii) Power;

(iii) Urban transport, water supply, sewerage, solid waste management and other physical infrastructure in urban areas;

(iv) Infrastructure projects in Special Economic Zones; and

(v) International convention centres and other tourism infrastructure projects;

Provided that the Empowered Committee may, with approval of the Finance Minister, add or delete sectors/sub-sectors from the aforesaid list.

Sd/-
(Pradip K. Deb)
Joint Secretary (FT)

Copy to: All Members of the Empowered Committee

Copy also for information to:

1) Cabinet Secretary
2) Secretary, Planning Commission
3) Secretary, Ministry of Road Transport & Highways
4) Secretary, Department of Shipping
5) Secretary, Ministry of Power
6) Secretary, Civil Aviation
7) Secretary, Tourism
8) Secretary, Ministry of Urban Development
9) Chairman & Ex-officio Principal Secretary (Railway Board)

(Pradip K. Deb)
Joint Secretary (FT)

Memorandum for Empowered Institution

(Scheme for financial support to PPPs in infrastructure)

S.No.	Item	Response
1.	**General**	
1.1	Name of the Project	
1.2	Type of PPP (BOT, BOOT, BOLT, OMT etc.)	
1.3	Location (State/District/Town)	
1.4	Central Ministry/ State Government/ Statutory Authority posing the project as owner of the underlying assets (see Rule 5.1)	
1.5	Name of the government/ statutory entity which will sign the concession agreement (see definition)	
1.6	Whether the contract/ concession is to be awarded to a private sector company (see definition)	
1.7	Will the private sector company be responsible for financing, construction, maintenance and operation of the project (see Rule 3.1)	
2.	**Project Description**	
2.1	Brief description of the project	
2.2	Justification for the project	
2.3	Possible alternatives, if any	
2.4	Estimated total project cost with break-up under major heads of expenditure. Also indicate the basis of cost estimation (see definition)	
2.5	Phasing of investment	
2.6	Project Implementation Schedule (PIS)	
3.	**Financing Arrangements**	
3.1	Sources of financing (equity, debt, mezzanine capital etc.)	

S.No.	Item	Response
3.2	Indicate the revenue streams of the Project (annual flows over project life). Also indicate the underlying assumptions.	
3.3	Indicate the NPV of revenue streams with 12% discounting	
3.4	Who will fix the tariff/ user charges? Please specify the process in detail.	
3.5	Will the project have pre-determined user charges/ tariffs? (see Rule 3.1)	
3.6	Can the user charges/ tariffs be increased for reducing the viability gap? If no, please furnish the certificate as per Appendix-A (see Rule 3.1)	
3.7	Can the concession period be increased for reducing the viability gap? If no, please furnish the certificate as per Appendix-B (see Rule 3.1)	
3.8	Can the total project costs be restricted or phased out for reducing the viability gap? If no, please furnish the certificate as per Appendix-C (see Rule 3.1)	
3.9	Have any FIs been approached for funding the project? If yes, their response may be indicated	
4.	**IRR**	
4.1	Economic IRR (if computed)	
4.2	Financial IRR, indicating various assumptions (attach separate sheet if necessary)	
5.	**Clearances**	
5.1	In case the project is owned by the Central Government or its statutory entities, the status of PPPAC approval may be indicated	

S.No.	Item	Response
5.2	Status of environmental clearances	
5.3	Clearance required from the State Government and other local bodies	
5.4	Other support required from the State Government	
6.	**GoI Support**	
6.1	Likely amount of VGF required for the project (also indicate as percent of item 2.4)	
6.2	Will the VGF be used as a capital grant at the stage of project construction? If no, please furnish details of the alternative proposal (see Rule 4.2)	
6.3	Will the sponsoring Ministry/ State Government/ statutory entity provide any assistance in addition to the VGF under this scheme? If yes, please furnish details (see Rule 4.1)	
6.4	Is there any other scheme of the Central Government under which this project is eligible for financial assistance? If yes, indicate the details thereof (see Rule 5.7)	
7.	**Concession Agreement**	
7.1	Is the Concession Agreement based on a duly approved model concession agreement? If yes, indicate the details thereof (in a note to be attached) along with a copy of the MCA (see Rules 5.2 and 5.4)	
7.2	Have any variations in the MCA been proposed? If yes, please provide a detailed note (to be attached)	
7.3	Details of the Concession Agreement (attached at Appendix-D)	

S.No.	Item	Response
8.	**Criteria for short-listing**	
8.1	Is short-listing to be in one stage or two stages?	
8.2	Indicate the criteria for short-listing (attach separate sheet if necessary)	
9.	**Criteria for Bidding**	
9.1	Will the bidding parameter be the minimum VGF required? If no, please indicate the bidding parameter(s) (see Rules 3.1 and 6.1)	
9.2	Have all other conditions, specifications and project agreements been frozen prior to inviting financial bids? If no, please furnish the details with justification thereof (see Rule 6.1)	
10.	**Others**	
10.1	Remarks, if any	

The … … … … … … (name of project) has been submitted by the undersigned as the duly authorised officer of … … … … … … (name of Ministry, State Government or statutory authority, as the case may be) for seeking Viability Gap Funding under the scheme for financial support to PPPs in Infrastructure.

It is certified that the proposal complies with the provisions and eligibility criteria specified in the aforesaid scheme.

The above statements as also the information contained in the enclosures are true to the best of my knowledge and belief.

Dated:

(Name and designation
of officer along with
official stamp)

Certificate relating to User Charge/ Tariff

(To be furnished as required under Rule 3 of the Scheme for financial support to PPPs in Infrastructure)

It is certified that:

(a) The … … … … … … (name of project) has been submitted by the undersigned as the duly authorised officer of … … … … … … (name of Ministry, State Government or statutory authority, as the case may be) for seeking Viability Gap Funding under the scheme for financial support to PPPs in Infrastructure.

(b) The undersigned hereby certifies that the proposal complies with the provisions and eligibility criteria specified in the aforesaid scheme.

(c) The user charge/ tariff for the project has been fixed under and in accordance with … … … … … … (state law and rule along with relevant sections). A copy of the relevant Act and Rules is attached.

(d) The user charge/ tariff as fixed for this project is indicated below (attach separate sheet if necessary):

* * *

(e) The aforesaid user charge/ tariff cannot be fixed at a higher level for the reasons stated below:

* * *

(f) That the above statements are true to the best of my knowledge and belief.

Dated:

(Name and designation
of Officer along with
official stamp)

Certificate relating to Concession Period for the Project

(To be furnished as required under Rule 3 of the Scheme for financial support to PPPs in Infrastructure)

It is certified that:

(a) The … … … … … … (name of project) has been submitted by the undersigned as the duly authorised officer of … … … … … … (name of Ministry, State Government or statutory authority, as the case may be) for seeking Viability Gap Funding under the scheme for financial support to PPPs in Infrastructure.

(b) The concession period for the project has been fixed keeping in view the considerations noted below:

* * *

(c) The aforesaid concession period cannot be increased for the reasons stated below:

* * *

(d) That the above statements are true to the best of my knowledge and belief.

Dated: (Name and designation of Officer along with official stamp)

Annex-III **(Appendix-C)**

Certificate relating to Total Project Costs

(To be furnished as required under Rule 3 of the Scheme for financial support to PPPs in Infrastructure)

It is certified that:

(a) The … … … … … … (name of project) has been submitted by the undersigned as the duly authorised officer of … … … … … … (name of Ministry, State Government or statutory authority, as the case may be) for seeking Viability Gap Funding under the scheme for financial support to PPPs in Infrastructure.

(b) The total project cost for the project is reasonable and has been fixed in accordance with the standards and specifications normally followed for similar projects (attach separate sheet if any details are to be furnished).

(c) That the aforesaid total project costs cannot be reduced for reasons indicated below (attach separate sheet if necessary):

* * *

(d) That the above statements are true to the best of my knowledge and belief.

Dated:

(Name and designation
of Officer along with
official stamp)

Brief particulars of the Concession Agreement

A. Sponsoring Ministry:

B. Name and location of the Project:

C. Legal Consultant:

D. Financial Consultant:

S.No.	Item	Clause No.	Description
I	**General**		
1.1	Scope of the Project (Please state in about 200 words)		
1.2	Nature of Concession to be granted		
1.3	Period of Concession and justification for fixing the period		
1.4	Estimated capital cost		
1.5	Likely construction period		
1.6	Conditions precedent, if any, for the concession to be effective		
1.7	Status of land acquisition		
II	**Construction and O&M**		
2.1	Monitoring of construction; whether an independent agency/engineer is stipulated		
2.2	Minimum standards of Operation and Maintenance/Performance standards		
2.3	Penalties for violation of prescribed O&M standards/Performance standards		
2.4	Safety provisions relating to structures, users and construction works		
2.5	Penalties for violation of safety related provisions		
2.6	Environment related provisions		
III	**Financial**		
3.1	Maximum period for achieving financial close		
3.2	Nature and extent of capital grant/ subsidy stipulated		

S.No.	Item	Clause No.	Description
3.3	Bidding parameter (capital subsidy or other parameter)		
3.4	Provisions for change of scope and the financial burden thereof		
3.5	Concession fee, if any, payable by the Concessionaire		
3.6	User charges/ fee to be collected by the Concessionaire		
3.7	Indicate how the user fee has been determined; the legal provisions in support of user fee (attach the relevant rules/notification); and the extent and nature of indexation for inflation		
3.8	Provisions, if any, for mitigating the risk of lower revenue collection		
3.9	Provisions relating to escrow account, if any		
3.10	Provisions relating to insurance		
3.11	Provisions relating to audit and certification of claims		
3.12	Provisions relating to assignment/ substitution rights relating to lenders		
3.13	Provisions relating to change in law		
3.14	Provisions, if any for compulsory buy-back of assets upon termination/ expiry		
3.15	Contingent liabilities of the government		
	(a) Maximum Termination Payment for Government/ Authority Default		
	(b) Maximum Termination Payment for Concessionaire Default		
	(c) Specify any other penalty, compensation or payment contemplated under the agreement		
IV	**Others**		
4.1	Provisions relating to competing facilities, if any		
4.2	Specify the Dispute Resolution Mechanism		
4.3	Specify the governing law and jurisdiction		
4.4	Other remarks, if any		

Annex-IV

Tripartite Agreement

(To be executed as required under Rule 8(3) of the Scheme for financial support to PPPs in Infrastructure)

This Tripartite Agreement is made at New Delhi on this *** day of ***, 20**

BETWEEN

1. ***, acting through [Shri ***, Department of ***, Ministry of ***, Government of India, New Delhi] (hereinafter referred to as "**Empowered Institution**"),

2. ***, acting for itself and for the Lenders, listed in the Schedule as Lender, (hereinafter referred to as the "**Lead Institution**") and having its registered office at *** and its principal administrative offices at ***

AND

3. *** LIMITED, a company incorporated and existing under the Companies Act, 1956 and having its registered office at ***, acting through its Director, Shri ***, who is duly authorised by the resolution passed at the meeting of its Board of Directors held on *** (hereinafter referred to as the "**Concessionaire**").

(The expressions "**Empowered Institution**", the "**Lead Institution**" and the "**Concessionaire**" shall include their respective successors, and are hereinafter collectively referred to as the "**Parties**" and individually as "**Party**")

AND WITH

***, a statutory body constituted under the provisions of the *** Act, *** / ***, a government company within the meaning of the Companies Act, 1956 / the State of *** through its ***@ (the "**Owner**") as confirming Party.

@ *Delete whichever is inapplicable*

Note: Tripartite Agreement for the purposes of the Scheme for Financial Support to PPPs in Infrastructure was notified by Ministry of Finance, Department of Economic Affairs, vide OM No. 3A/I/2008-PPP dated May 23, 2008.

WHEREAS

A. The Owner had pursuant to the Notice Inviting Proposals No *** dated *** (the "**Tender Notice**") laid down and prescribed the technical and commercial terms and conditions and invited bids for construction, operation and maintenance of *** [name of the Project] (the "**Project**") on BOT basis.

B. After evaluation of the bids so received the Owner had accepted the bid of the Consortium comprising of ***, *** and *** and has consequent thereto entered into the Concession Agreement (as defined hereinafter), a true copy of which is annexed hereto and marked as Annexure 'A'; with the Concessionaire which has been promoted by the Consortium to undertake the Project.

C. The Central Government has notified a Scheme called the "Scheme for Support to Public Private Partnerships in Infrastructure" (the "**Scheme**") for financial support to infrastructure projects that are to be undertaken through Public Private Partnerships.

D. On an Application made by the Owner (the "**Proposal**") for the Project to be considered for viability gap funding ("**VGF**") under the Scheme, the Empowered Institution has agreed to provide to the Concessionaire VGF by way of grant under and in accordance with the Scheme to the extent and in the manner set forth hereinafter.

E. The Scheme requires certain representations by the Owner and entering into of the tripartite agreement setting forth, *inter alia*, the terms and conditions of VGF grant.

NOW, THEREFORE, THE PARTIES HERETO HEREBY AGREE AND THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. Definitions and Interpretations

1.1 For the purposes of this Agreement, the following terms shall have the meaning hereinafter respectively assigned to them:

1.1.1 "**Agreement**" means this Tripartite Agreement, and amendments if any thereto made in accordance with the provisions contained herein in this behalf.

1.1.2 "**Balance Debt**" shall mean the balance principal amount of the debt agreed to be provided by the Lenders to the Concessionaire under the Financing Agreements for financing the Project Cost and which remains to be disbursed by the Lenders to the Concessionaire after the Concessionaire has subscribed and expended the equity contribution required for the Project.

1.1.3 "**Concession Agreement**" means the Concession Agreement dated *** entered into between the Owner and the Concessionaire, and shall include all Annexures and appendices thereto and any amendments thereto made in accordance with the provisions contained in this behalf therein provided any amendments thereto made hereafter which materially alter any of the terms and conditions thereof shall not be binding on the Empowered Institution and the Central Government unless previously approved by the Empowered Institution.

1.1.4 "**Total Project Cost**" means the lower of the following total capital cost of the Project:

(a) Rs.*** (Rupees *****) as estimated by the Owner;

(b) Rs.*** (Rupees *****) as contained in the Financial Package approved, *inter alia*, by the Lead Institution; and

(c) the amount as actually expended on the Project as certified by the statutory auditors, but shall not include the cost of the land comprised in the Project.

1.1.5 "**VGF Grant**" means the grant payable by the Central Government under and in accordance with the Scheme as set forth in the Guidelines for Financial Support to Public Private Partnerships in Infrastructure notified by the Finance Ministry on 12.1.2006 vide OM No. 1/5/2005-PPP and as referred to in Clause 2.1 of this Agreement.

1.2 The words and expressions beginning with or in capital letters used in this Agreement and not defined herein but defined in the Concession Agreement shall have, unless repugnant to the context, the meaning respectively assigned to them in the Concession Agreement.

1.3 In this Agreement unless the context otherwise requires:

(a) Any reference to a statutory provision shall include such provision as is from time to time modified or re-enacted or consolidated so far as such modification or re-enactment or consolidation applies or is capable of applying to any transactions entered into hereunder;

(b) The words importing singular shall include plural and vice versa, and words denoting natural persons shall include all genders, partnerships, firms, companies, corporations, joint ventures, trusts, associations, organisations or other entities (whether or not having a separate legal entity);

(c) The headings are for convenience of reference only and shall not be used in and shall not affect the construction or interpretation of this Agreement;

(d) Terms beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein;

(e) The words "**include**" and "**includin**g" are to be construed without limitation; (f) Any

reference to a "**day**" shall mean reference to a calendar day;

(g) Any reference to "**month**" shall mean reference to a calendar month;

(h) Any reference to any agreement, deed, instrument, licence or document of any description shall be construed as reference to that agreement, deed, instrument, license or other document as amended, varied, supplemented, modified or suspended at the time of such reference provided that this clause shall not operate so as to increase liabilities or obligations of the Empowered Institution hereunder or pursuant hereto in any manner whatsoever;

(i) References to Recitals, clauses, sub-clauses, paragraphs, Annexures or appendices in this Agreement shall, except where the context otherwise requires, be deemed to be references to Recitals, Articles, clauses, sub-clauses, paragraphs, Annexures and appendices of this Agreement;

(j) Any agreement, consent, approval, authorisation, proposal, notice, communication, information or report required under or pursuant to this Agreement from or by any Party shall be valid and effectual only if it is in writing under the hands of duly authorised representative of such Party, in this behalf and not otherwise; and

(k) Any reference to any period commencing "**from**" a specified day or date and "**till**" or "**until**" a specified day or date shall include both such days or dates.

1.4 Priority of Agreements:

In the event of any conflict between this Agreement and

(i) the Concession Agreement; or

(ii) any of the Project Agreements,

the provisions of this Agreement shall prevail.

2. Grant

2.1 Relying on the representations made by the Concessionaire and the Owner as set forth hereinafter and believing them to be true, the Empowered Institution hereby grants to the Concessionaire and the Concessionaire hereby accepts from the Empowered Institution the VGF grant in a sum of [Rs. *** (Rupees ***** crore)] (the "**VGF Grant**") for the Project under the Scheme subject to and on the terms and conditions set forth in this Agreement and the Scheme. The VGF Grant shall be disbursed to the Concessionaire by Lead Institution for and on behalf of the Empowered Institution in the manner as setout in Clause 2.2.

2.2 The Lead Institution shall disburse the VGF Grant in the manner set forth herein to the Concessionaire for and on behalf of the Empowered Institution in proportion to the disbursements of the Balance Debt, and shall after each such disbursement of VGF Grant to the Concessionaire, notify the Empowered Institution of the same.

2.3 The Lead Institution shall along with the disbursement of the Balance Debt disburse in proportion thereto the VGF Grant to the Concessionaire in the same manner as such Balance Debt and, upon such disbursement, shall be deemed to have been received by the Concessionaire.

2.4 Notwithstanding anything to the contrary contained in this Agreement in the event of:

(i) any suspension of the Concessionaire's rights under the Concession Agreement or termination of the Concession Agreement; or

(ii) any suspension of the rights of the Concessionaire under this Agreement or termination of this Agreement; or

(iii) occurrence of any VGF Default,

The disbursement of the balance of the undisbursed amount of VGF Grant shall be suspended or terminated, as the case may be, in the sole discretion of the Empowered Institution without the Empowered Institution or the Lead Institution being liable to the Concessionaire or the Owner in any manner whatsoever for the same. Such suspension or termination as the case may be, of the undisbursed portion of the VGF Grant shall be deemed to be with mutual agreement of the Parties.

2.5 The Concessionaire and the Lead Institution agree and acknowledge that the VGF is for and shall solely be used to fund such part of the Total Project Cost as is on account of viability gap which necessitated the VGF Grant and for no other purpose whatsoever.

2.6 The Concessionaire and the Lead Institution acknowledge and the Owner confirms that VGF Grant under this Scheme shall be disbursed only after the Concessionaire subscribes to and has expended the equity contribution required for the Project from the Concessionaire under the Financial Package.

3. Representations and Warranties

3.1 The Confirming Party represents, warrants and confirms to the Empowered Institution and the Lead Institution respectively the following:

(a) The Total Project Cost does not include the cost of the land comprised in the Project incurred by the Owner;

(b) The Concessionaire has been selected through a transparent and open competitive bidding process conforming to the provisions of the Scheme;

(c) The Project shall provide service against payment of predetermined tariff/user charge as set forth in the Concession Agreement;

(d) The pre-determined tariff/user charges payable pursuant to the Concession Agreement to the

Concessionaire for provision of services pursuant thereto, cannot be increased to eliminate or reduce the viability gap, which necessitated the application for the VGF Grant for the Project under the Scheme by the Owner;

(e) The Concession Period under the Concession Agreement cannot be increased for reducing the viability gap, which necessitated the application for the VGF Grant under the Scheme;

(f) The Total Project Cost is reasonable and based on the standards and specifications normally applicable to such projects as the Project and the same cannot be restricted for reducing the viability gap, which necessitated application by the Owner for VGF Grant under the Scheme; and

(g) The grants made or which may hereafter be made by the Owner to the Concessionairefor meeting the Total Project Cost or any part thereof shall not exceed in aggregate, a further 20% of the Total Project Cost.

3.2 The Concessionaire represents and warrants to the Empowered Institution and the Lead Institution that:

(a) It is duly organised and validly existing under the laws in India and has full power and authority to execute and perform its obligations under this Agreement and to carry out the transaction hereby contemplated;

(b) It has taken all necessary corporate and other actions under applicable laws to authorise the execution and delivery of this Agreement and to perform its obligations under this Agreement;

(c) This Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under this Agreement will be legally valid, binding and obligations enforceable against it in accordance with its terms;

(d) The execution, delivery and performance of this Agreement will not conflict with or result in a breach or constitute default under or accelerate performance required by any of the terms of Memorandum and Articles of Association of the Concessionaire or any applicable law or any covenant, contract, arrangement or understanding, or any decree or order of any court to which it is a party or by which it or any of its properties or assets is bound or affected;

(e) All information furnished to the Empowered Institution, the Lead Institution and the Owner and as updated on or before the date of this Agreement is true and accurate in all material respect;

(f) There are no actions, suits, proceedings or investigations pending or to its knowledge threatened against it at law or in equity before any court or any other judicial, quasi judicial or other authority or body, the outcome of which may result in the breach of this Agreement;

(g) It has complied with all Applicable Laws and Applicable Permits in all material respects;

(h) It is not in breach of the Concession Agreement or of any Project Agreements or Financing Agreements; and

(i) No representation or warranty contained herein or in the Concession Agreement or any other document furnished by it to the Empowered Institution or the Owner or the Lead Financial Institution contains or will contain any untrue or misleading statement of material facts or omits or will omit to state a material fact necessary to make such representation or warranty not misleading.

3.3 In the event of any occurrence or circumstance coming to the knowledge of the Party making any representation hereunder which renders any of its aforesaid representations or warranties untrue or incorrect at any time during the subsistence of this Agreement, such party shall immediately notify the other parties hereto about the same. Such notification shall not have the effect of remedying any such representation or warranty that has been found to be incorrect or untrue.

4. Project Monitoring

4.1 Lead Institution agrees and undertakes that subject to the provisions of this Agreement, the Lead Institution shall undertake regular monitoring and periodic evaluation of Project compliance with the agreed milestones and performance levels as set forth in the Concession Agreement and it shall, through periodic reports, advise and keep informed the Empowered Institution about the slippages or otherwise in Project compliances with the agreed milestones and performance levels as set forth in the Concession Agreement together with brief description of the causes of slippages or non- compliances, if any, therein. Without prejudice to the generality of the foregoing, the Lead Institution shall as part of its monitoring obligation hereunder undertake the following:

4.1.1 From the date of this Agreement, the Lead Institution shall through its representative, inspect the Project Site on a monthly basis and shall keep a regular inspection log recording progress of the Project; and

4.1.2 The Lead Institution shall send on a quarterly basis progress reports of the Project to the Empowered Institution together with brief description of the causes of slippages or non-compliances, if any, therein.

5. Role of Lead Institution

5.1 The Concessionaire and the Lead Institution acknowledge that the Lead Institution is only acting as trustee for the Empowered Institution in respect of the VGF Grant and has no rights to the VGF Grant in any manner whatsoever.

5.2 The Empowered Institution hereby authorises the Lead Institution to exercise such rights, powers, authorities and discretion as are conferred by this Agreement on the Lead Institution together with all such rights, powers, authorities and discretion as are reasonably incidental hereto.

5.3 In performing its functions and duties under this Agreement, the Lead Institution shall act in trust for the benefit of, and as agent for the Empowered Institution or its nominees, successors or assigns, in accordance with the provisions of this Agreement.

5.4 The Lead Institution shall maintain accurate account of all VGF Grant disbursements made by it pursuant to this Agreement and shall by the 15th day of every month furnish a copy thereof as at the close of the immediately preceding month, duly certified under the hands of an officer of the Lead Institution duly authorised in this behalf, to the Empowered Institution together with statement showing the tentative disbursement schedule of the balance of the VGF Grant remaining to be disbursed.

5.5 In discharge of its duties and obligations hereunder, the Lead Institution:

(a) may, in the absence of bad faith or gross negligence on its part, rely as to any matters of fact which might reasonably be expected to be within the knowledge of the Concessionaire upon a certificate signed by and on behalf of the Concessionaire by an officer of the Concessionaire duly authorised in this behalf by the Board of Directors of the Concessionaire;

(b) may, in the absence of bad faith or gross negligence on its part, rely upon the authenticity of any communication or document believed by it to be authentic;

(c) shall, within 5 (five) business days of its receipt, deliver to the Empowered Institution a copy of any notice or document received by the Lead Institution in its capacity as the trustee for the Empowered Institution from the Concessionaire or any other person hereunder or in connection herewith; and

(d) shall, within 5 (five) business days of its receipt, deliver to the Concessionaire a copy of any notice or document received by the Lead Institution from the Empowered Institution in connection herewith.

5.6 The Lead Institution agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to any amount of the VGF Grant pending disbursement to the Concessionaire. For the avoidance of doubt, it is hereby acknowledged and agreed by the Lead Institution that the monies, if any, received from the Empowered Institution and held by the Lead Institution on account of the VGF Grant and awaiting disbursement to the Concessionaire shall not be considered as part of the assets of the Concessionaire and being trust property held in trust for the Empowered Institution, and shall, in the case of bankruptcy or liquidation of the Lead Institution, be wholly excluded from the assets of the Lead Institution in such bankruptcy or liquidation and shall be made over to the Empowered Institution or its nominee.

6. VGF Default

6.1 Following events shall constitute an event of default by the Concessionaire ("**VGF Default**") under this Agreement unless such event of default has occurred as a result of Force Majeure or any act or omission of the Empowered Institution:

(a) The Concessionaire causes the Lead Institution to transfer the VGF Grant to any account of the Concessionaire in breach of the terms of this Agreement and fails to cure such breach by depositing the relevant funds into the designated Account or any Sub-Account in which such transfer should have been made, within a Cure Period of 5 (five) business days; or

(b) The Concessionaire commits or causes any other breach of the provisions of this Agreement; or

(c) Any of the representation and warranties of the Concessionaire are found at any time to be false or incorrect and fails to cure the same, within a Cure Period of 5 (five) business days; or

(d) Any of the representation and warranties of the Owner are found at any time to be false or incorrect and the Owner fails to cure the same, within a Cure Period of 5 (five) business days; or

(e) The Concessionaire commits Concessionaire Default under the Concession Agreement unless such default has occurred solely as a result of any breach of the Concession Agreement by the Owner or due to Force Majeure; or

(f) The Concessionaire is adjudged bankrupt or insolvent or is ordered to be wound up or passes an effective resolution for its winding up or a receiver is appointed for the Concessionaire or for the whole or a material part of its assets.

6.2 Upon occurrence of a VGF Default, the consequences thereof shall be deemed to be a material breach of the Concession Agreement by the Concessionaire and treated as a Concessionaire Default under the Concession Agreement, and shall be accordingly dealt with under and in accordance with the provisions of the Concession Agreement for such breach under the Concession Agreement.

7. Terms of the Agreement

7.1 This Agreement shall come into force and effect upon the execution hereof and shall remain in full force and effect so long as any of the Lead Institution or the Concessionaire obligations to the Empowered Institution remain to be discharged, or a period of seven years from the date hereof, whichever is later.

8. Indemnity

8.1 The Concessionaire will indemnify, defend and hold harmless the Empowered Institution and Lead Institution against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Concessionaire of this Agreement, or the Concession Agreement or any of Project Agreement or the Financing Agreements, or on account of failure of the Concessionaire to comply with Applicable Laws or Applicable Permits, or on account of disbursement or failure to disburse the VGF Grant or any part thereof.

8.2 The Lead Institution will indemnify, defend and hold the Empowered Institution harmless at all times against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Lead Institution to fulfil its obligations under this Agreement other than any loss, damage, cost and expense, arising out of acts done in discharge of their lawful functions by the Lead Institution, its officers, servants and agents.

8.3 The Empowered Institution will indemnify, defend and hold harmless the Lead Institution at all times against any and all proceedings, action and third party claims for any loss, damage, cost and expense arising on account of disbursement of the VGF Grant pursuant hereto for and on behalf of the Empowered Institution or on account of failure of the Empowered Institution to fulfill its obligations under this Agreement or the Lead Institution complying with any direction of the Empowered Institution given pursuant to this Agreement other than any loss, damage, cost and expense arising out of acts done in discharge of their lawful function by the Empowered Institution, its officers, servants and agents.

8.4 In the event that any Party hereto receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity hereunder or in respect of which it is entitled to reimbursement (the "**Indemnified Part**y"), it shall notify the other Party responsible for indemnifying such claim hereunder (the "**Indemnifying Party**") within 15 (fifteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party, which approval shall not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim, it may conduct the proceedings in the name of the Indemnified Party and shall bear all costs involved in contesting the same. The Indemnified Party shall provide all cooperation and assistance in contesting any claim and shall sign all such writings and documents as the Indemnifying Party may reasonably require.

9. Dispute Resolution

9.1 Any dispute, difference or claim arising out of or in connection with this Agreement which is not resolved amicably within *** days of communication thereof shall be decided finally by reference to arbitration to a Board of three Arbitrators comprising of one nominee of the Party which is the Claimant in such dispute, one nominee of the Empowered Institution and the third to be appointed in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "**Rules**"). Such arbitration shall be held in accordance with the said Rules and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.

9.2 The Arbitrators shall issue a reasoned award and such award shall be final and binding on the Parties. The venue of arbitration shall be Delhi and the language of arbitration shall be English.

10. Miscellaneous Provisions

10.1 Governing Law and Jurisdiction

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at Delhi shall have jurisdiction over all matters arising out of or relating to this Agreement.

10.2 Waiver of Sovereign Immunity

The Empowered Institution unconditionally and irrevocably:

(a) Agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;

(b) Agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Empowered Institution with respect to its assets;

(c) Waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and

(d) Consents generally in respect of the enforcement of any judgment or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgment that may be made or given in connection therewith).

10.3 Rights of the Concessionaire

The rights and remedies of the Concessionaire in the VGF Grant, including in any balance thereof awaiting disbursement to the Concessionaire, are set forth in their entirety in this Agreement and the Lead Institution and the Concessionaire shall have no other rights or remedy against or to such VGF Grant including in any balance thereof awaiting disbursement to the Concessionaire.

10.4 Amendments

All additions, amendments, modifications and variations to this Agreement shall be valid, effectual and binding on the Parties and the Owner only if in writing and signed by their respective duly authorised representatives.

10.5 Waiver

10.5.1 Waiver by any Party of a default by another Party in the observance and performance of any provision of or obligations under this Agreement:

(a) Shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;

(b) Shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and

(c) Shall not affect the validity or enforceability of this Agreement in any manner.

10.5.2 Neither the failure by any Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any obligation thereunder nor time or other indulgence granted by any Party to another Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.

10.6 No Third Party Beneficiaries

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

10.7 Survival

10.7.1 Termination of this Agreement:

(a) Shall not relieve the Parties of any obligations hereunder which expressly or by implication survive termination hereof; and

(b) Except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination.

10.7.2 All obligations surviving the cancellation, expiration or termination of this Agreement shall only survive for a period of 3 (three) years following the date of such termination or expiry of this Agreement.

10.8 Severability

If for any reason whatever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to dispute resolution under Clause 10.1 of this Agreement or otherwise.

10.9 Successors and Assigns

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

10.10 Notices

All notices or other communications to be given or made under this Agreement shall be in writing, shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile. The address for service of each Party and its facsimile number are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof save that where it is received after 5.30 (five thirty) p.m. on a business day or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

10.11 Language

All notices, certificates, correspondence and proceedings under or in connection with this Agreement shall be in English.

10.12 Authorised Representatives

Each of the Parties shall by notice in writing designate their respective authorised representatives through whom only all communications shall be made. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorised representative by similar notice.

10.13 Original Document

This Agreement may be executed in four counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

10.14 Confirming Party

The Owner has signed this Agreement as confirming party in token confirmation of the representations and warranties of the Owner set forth herein and in ratification of the terms hereof.

IN WITNESS WHEREOF THE PARTIES HERETO HAVE EXECUTED THESE PRESENTS ON THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

For and on behalf of the Lead Institution

By:

Name:

Designation:

For and on behalf of the Empowered Institution

By:

Name:

Designation:

For and on behalf of the Concessionaire

By: Name:

Designation:

In the presence of:

1.

2.

In token confirmation and ratification of the Owner's representations and warranties and of the terms hereof

For and on behalf of the Owner

By: Name:

Designation:

In the presence of:

1.

2.

Annex-V

F.No.1/4/2005-PPP
Government of India
Ministry of Finance
Department of Economic Affairs
Infrastructure-II Section

New Delhi, the 4th September, 2006

Subject: Guidelines for forwarding proposals to DEA to ascertain their eligibility under the Scheme

In continuation of the Notification of even number dated January 23, 2006, it may be noted that prior to making a formal request to the Empowered Institution under the Viability Gap Funding (VGF) Scheme of GoI, the Sponsoring Authority of a Public Private Partnership (PPP) project may if it so desires submit the project concept to the Department of Economic Affairs to ascertain the admissibility of a project under the VGF Scheme based on the mandatory conditions of the Scheme. The proposal in this regard may be submitted to the Department of Economic Affairs in the attached proforma. Within 7 (seven) working days of receipt of the duly filled proforma the Department of Economic Affairs would indicate to the Project Authority whether the project proposal could be posed for the consideration of the Empowered Institution. Such a proposal could be made in case a doubt exists regarding the admissibility of the project under the VGF Scheme. Upon receipt of the response from the Department of Economic Affairs, the Project Authority could then prepare the detailed project proposal and submit the proposal as per the prescribed proforma contained in Notification of even number dated January 23, 2006 along with the supporting documents for the consideration of the Empowered Institution.

Sd/-
(Arvind Mayaram)
Joint Secretary to Govt. of India

Note: The Guidelines for forwarding proposals to DEA to assess the eligibility of the proposal under the Scheme were notified by the Ministry of Finance, Department of Economic Affairs vide OM No. I/4/2005-PPP dated September 4, 2006.

Viability Gap Funding Scheme Memorandum to the Department of Economic Affairs

Name of the Project

State/Central Sector Project

Name of the Applicant

Administrative Ministry/Department

Sponsoring Authority

Implementing Agency

Location

Sector

Activities proposed

Type of PPP

Type of VGF sought

S. No.	Condition	Comment
A. Conditions of the VGF Scheme		
1.	Whether the project proposal has been posed by a Government or statutory entity which owns the underlying assets	
2.	Whether the project is to be implemented i.e. developed, financed, constructed, maintained and operated for the Project Term by a Private Sector Company	
3.	Is the project from the sectors identified in the guidelines	
4.	Whether the Private Sector Company will be selected by the Government or a statutory entity that owns the project through a transparent and open competitive bidding process	
5.	Whether the Project provides a service against payment of a pre-determined tariff or user charge	
6.	Whether user charges/tariff has been fixed by Government or a statutory authority	
7.	Whether the Government/statutory entity making the proposal has certified/will be able to certified with reasons; i. That the tariff/user charge cannot be increased to eliminate or reduce the viability gap of the PPP; ii. That the Project Term cannot be increased for reducing the viability gap; iii. That the capital costs are reasonable and based on the standards and specifications normally applicable to such projects and that the capital costs cannot be further restricted for reducing the viability gap.	
8.	Is the total VGF within the gap stipulated in the guidelines	

S. No.	Condition	Comment
9.	Whether the proposed project is (or will be) based on standardised/model documents duly approved by the respective Government	
B. Other project related information (if available)		
1.	Total Project Cost (in Rupees Cr.)	
2.	VGF sought from GoI (in Rupees Cr.)	
3.	VGF as a percent of Total project cost	
4.	Additional grant from the Sponsoring Authority	
5.	Construction period (from Financial closure)	
6.	Likely year in which VGF sought	
7.	Is the project viable without VGF	
8.	If not, is it viable with VGF	
9.	Status of the concession agreement: - has it been finalised - if not, is it proposed to be based on a model document	

Government of India

Guidelines for

Formulation, Appraisal & Approval of PPP Projects

Published by
PPP & Infrastructure Division
Planning Commission, Government of India
Yojana Bhawan, Parliament Street
New Delhi - 110 001

www.infrastructure.gov.in

Contents

Part-IV

Secretariat for the Committee on Infrastructure

Preface

These Guidelines articulate the need for 'due diligence' in the formulation, appraisal and approval of Public Private Partnership (PPP) projects of the Central Government. Unlike private projects where prices are generally determined competitively and Government resources are not involved, PPP infrastructure projects typically involve transfer of public assets, delegation of governmental authority for recovery of user charges, private control of monopolistic services and sharing of risks and contingent liabilities by the Government. Protection of user interests and the need to secure value for public money, as such, demand a more rigorous treatment of these projects.

Predictability and risk mitigation are key to successful Public Private Partnerships. They require a framework that can assure the private investor of a market driven return at reasonable levels of risk, and the user of adequate service quality at an affordable cost. These preconditions are more difficult to establish than is commonly realised. Because of the nature of the risks and the involvement of many participants including project sponsors, lenders, Government agencies, and regulatory authorities, the terms of the project agreements as well as the tendering arrangements are usually complex. These involve detailed legal and contractual agreements that clearly set forth the risks, rewards and obligations of various participants.

In the past, inadequate preparatory work has led to higher transaction costs, contingent liabilities and delays in project implementation.

International experience too indicates that inadequately prepared projects, and more particularly negotiated projects, have led to renegotiations exposing the respective governments and users to adverse consequences. Learning from past experience, it is necessary to create policy and regulatory frameworks that would eliminate similar pitfalls.

Responding to the above concerns, the Finance Ministry, in consultation with the Planning Commission, has evolved these guidelines to enshrine an independent appraisal and approval process. Under this arrangement, administrative ministries can adopt a 'proactive' developmental approach while the Planning Commission would focus on due diligence, consistency with processes in other sectors and consideration of best practices. The Finance Ministry would examine the extent of direct and indirect

Central Government exposure and also act as an arbiter. Standardisation of the approval process will also ensure that planning, approval and execution of PPP projects is expedited, thus restricting the tendency to 're-invest the wheel' with each PPP transaction.

These guidelines were considered and approved by the Committee on Infrastructure, chaired by the Prime Minister, and subsequently endorsed by the Union Cabinet. The guidelines have since been mandated by the Ministry of Finance for application to all PPP projects.

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

Part-I

Procedure for Approval of Public Private Partnership Projects

F. No.2/10/2004-INF
Government of India
Ministry of Finance
Department of Economic Affairs
Infrastructure-II Section

New Delhi, the 29th of November, 2005

Notification

Subject: Setting up of Public Private Partnership Appraisal Committee

The Cabinet Committee on Economic Affairs (CCEA) in its meeting of October 27, 2005 approved the procedure for approval of public private partnership (PPP) projects. Pursuant to this decision, a Public Private Partnership Appraisal Committee (PPPAC) is being set up comprising of the following:

(a) Secretary, Department of Economic Affairs (in the Chair);

(b) Secretary, Planning Commission;

(c) Secretary, Department of Expenditure;

(d) Secretary, Department of Legal Affairs; and

(e) Secretary of the Department sponsoring a project.

2. The Committee would be serviced by the Department of Economic Affairs, who will set up a special cell for servicing such proposals. The Committee may co-opt experts as necessary.

3. The procedure approved by the CCEA for the approval of the PPP projects is enclosed at Annex-I. Detailed guidelines for the appraisal/ approval procedure will be notified separately by this Department.

Sd/-
(Pradip K. Deb)
Joint Secretary to Government of India

Approval Procedures for Public Private Partnership Projects

1. The Central Government has in place an elaborate system for investment approval relating to Public sector projects revolving around the Public Investment Board (PIB) chaired by Secretary, Department of Expenditure with the Planning Commission providing independent appraisal through the Project Appraisal Division, followed by approval of the Cabinet/CCEA. Expenditure on approved projects is governed by financial rules and delegation of powers.

2. As government shifts to development through Public Private Partnership (PPP), it would be necessary to establish suitable approval mechanisms that aim at securing value for money. PPP projects in sectors such as roads, ports, airports and urban infrastructure are not ordinary private sector projects, which are governed by competitive markets, where prices are determined competitively and government resources are not involved. In the PPP projects, there would be need for due diligence by the government because the projects typically involve:

i. Transfer of public assets, including land (e.g. an existing road or airport facility);

ii. Delegation of governmental authority to collect and appropriate user charges that are levied by force of law and must therefore be 'reasonable';

iii. Provision of services to users in a monopoly or semi-monopoly situation, which imposes a special obligation on the government to ensure adequate service quality; and

iv. Sharing of risks and contingent liabilities by the government, e.g. when claims are made under the respective agreements or when the Central Government has to provide a backup guarantee for non-performance by the entity granting the concession. Even where an explicit guarantee is not included there is a danger that non- performance on part of the State Governments could attract claims under bilateral investment promotion agreements.

3. PPPs are still at a nascent stage in India, but as reliance on PPPs increase, the terms of the projects will invite close scrutiny. Disputes arising out of project terms could also lead to significant payouts by the government, underscoring the importance of careful design of concession terms.

4. These concerns are not addressed even if project sponsors are selected through competitive bidding. In fact competitive bidding only creates a level playing field for selection of bidders; it may not necessarily secure good value in terms of performance standards, user concerns, public revenues and contingent liabilities. Project terms are, therefore, crucial.

5. Recognising these problems, it has been decided to stipulate the following mechanism for approving the PPP projects henceforth:

PPP Appraisal Committee

6. A PPP Appraisal Committee (PPPAC) on the model of the PIB will be set up comprising of the following:

(a) Secretary, Department of Economic Affairs (in the Chair);

(b) Secretary, Planning Commission;

(c) Secretary, Department of Expenditure;

(d) Secretary, Department of Legal Affairs; And

(e) Secretary of the Department sponsoring a project.

The Committee would be serviced by the Department of Economic Affairs, who will set up a special cell for servicing such proposals. The Committee may co-opt experts as necessary.

7. The Ministry of Finance will be the nodal Ministry responsible for examining concession agreements from the financial angle, deciding on guarantees to be extended, and generally assesing risk allocation from the investment and banking perspectives. It would also ensure that projects are scrutinised from the perspective of government expenditure.

8. The Planning Commission will set up a PPP Appraisal Unit (PPPAU), similar to the existing PAMD which appraises public sector projects. This unit will prepare an appraisal note for the PPPAC providing specific suggestions for improving the concession terms, where this is possible.

9. Ministry of Law and Justice, Department of Legal Affairs, would also be represented on the PPP Appraisal Committee, as the concession agreements would require careful legal scrutiny.

10. In view of the size and complexity of PPP projects, it may be necessary to secure the assistance of qualified legal, financial or technical experts to undertake the requisite due diligence. This may be necessary in order to protect government interest, particularly in the face of highly qualified expertise that the private sector participants may employ while negotiating these projects. Planning Commission and the Finance Ministry would engage the experts as necessary.

11. Projects where the capital cost or underlying value of the assets is more than Rs. 100 crore would be brought before the PPP Appraisal Committee. Once cleared by the Committee, the project would be put up to the Competent Authority for final approval.

Project Formulation and Appraisal

12. The Ministry concerned may develop individual proposals using legal, financial and technical consultants and also avail the benefit of an inter-ministerial consultative group, if necessary. The proposal as formulated by the Ministry would be considered by the PPP Appraisal Committee for 'in principle' clearance before inviting expressions of interest from prospective investors.

13. Following the 'in principle' clearance of the PPP Appraisal Committee, the concerned Ministry may invite expressions of interest and develop the documents further. Where necessary inter-ministerial consultations and pre-bid conferences with bidders may also be held. The concession agreements thus finalised for the purposes of inviting financial bids should be cleared by the PPP Appraisal Committee before technical and financial bids are invited.

14. In cases where the PPP project is based on a duly approved Model Concession Agreement (MCA), 'in principle' clearance by the PPP Appraisal Committee would not be necessary. In such cases, approval of the PPP Appraisal Committee may be obtained only before inviting the technical and financial bids.

15. In case there are departures from the MCA which are not material or substantive, such departures may be cleared by the PPP Appraisal Committee with the approval of Finance Minister. Where the departures are material or substantive, approval of the authority that approved the MCA would be necessary.

16. For projects where the capital costs or underlying value of the assets is less than Rs. 100 crore, the Department of Expenditure would issue detailed guidelines for appraisal of concession agreements. Such projects would not require appraisal/approval of the PPP Appraisal Committee and would be cleared by the EFC/SFC as applicable.

17. The above arrangement enshrines an independent approval process. The administrative Ministry can adopt a “pro-active” developmental approach while the Planning Commission can focus on due diligence, consistency with processes in other sectors and consideration of best practice. The Finance Ministry can consider the extent of direct and indirect Central Government exposure and also act as an arbiter.

Part-II

Guidelines for Formulation, Appraisal and Approval of Public Private Partnership (PPP) Projects

The Guidelines for Formulation, Appraisal and Approval of Public Private Partnership Projects were notified by Ministry of Finance, Department of Economic Affairs, vide OM No. 1/5/2005 - PPP, dated January 12, 2006.

1. Introduction

1.1 The Central Government has notified a system for appraisal/ approval of projects to be undertaken through Public Private Partnership (PPP). Detailed procedure to be followed for this purpose is specified below.

2. Institutional structure

2.1 The institutional structure for the appraisal/approval mechanism is specified at Annex-I.

3. Applicability

3.1 These guidelines will apply to all PPP projects sponsored by Central Government Ministries or Central Public Sector Undertakings (CPSUs), statutory authorities or other entities under their administrative control.

3.2 The procedure specified herein will apply to all PPP projects with capital costs exceeding Rs. 100 crore or where the underlying assets are valued at a sum greater than Rs. 100 crore. For appraisal/approval of PPP projects involving a lower capital cost/value, detailed instructions will be issued by the Department of Expenditure.

4. Project identification

4.1 The sponsoring Ministry will identify the projects to be taken up through PPPs and undertake preparation of feasibility studies, project agreements etc. with the assistance of legal, financial and technical experts as necessary.

5. Inter-ministerial consultations

5.1 The Administrative Ministry may, if deemed necessary, discuss the details of the project and the terms of concession agreement in an inter-ministerial consultative committee and comments, if any, may be incorporated or annexed to the proposal for consideration of PPPAC.

5.2 There could be projects, which involve more than one Ministry/Department. While considering such projects, PPPAC may seek participation of such Ministries/ Departments.

6. 'In principle' approval of PPPAC

6.1 While seeking 'in principle' clearance of PPPAC, the Administrative Ministry shall submit its proposal (in six copies, both in hard and soft form) to the PPPAC Secretariat in the format specified at Annex-II and accompanied by the pre- feasibility/ feasibility report and a term-sheet containing the salient features of the proposed project agreements.

6.2 PPPAC Secretariat will circulate the copies of PPPAC memo and associated documents to all concerned. A meeting of the PPPAC will be convened within three weeks to consider the proposal for 'in principle' approval.

6.3 In cases where the PPP project is based on a duly approved Model Concession Agreement (MCA), 'in principle' clearance by the PPPAC would not be necessary. In such cases, approval of the PPPAC may be obtained before inviting the financial bids as detailed below.

7. Expression of Interest

7.1 Following the 'in principle' clearance of PPPAC, the Administrative Ministry may invite expressions of interest in the form of Request for Qualification (RFQ) to be followed by short-listing of pre-qualified bidders.

8. Formulation of project documents

8.1 The documents that would need to be prepared would, *inter alia*, include the various agreements to be entered into with the concessionaire detailing the terms of the concession and the rights and obligations of the various parties. These project documents would vary depending on the sector and type of project. Typically, a PPP will involve the concession agreement that will specify the terms of the concession granted to the private party and will include the rights and obligations of all parties. There could be associated agreements based on specific requirements.

9. Appraisal/Approval of PPPAC

9.1 RFP (Request for Proposals), i.e. invitation to submit financial bids, should normally include a copy of all the agreements that are proposed to be entered into with the successful bidder. After formulating the draft RFP, the Administrative Ministry would seek clearance of the PPPAC before inviting the financial bids.

9.2 The proposal for seeking clearance of PPPAC shall be sent (in six copies) to the PPPAC Secretariat in the format specified at Annex-III along with copies of all draft project agreements and the Project Report. The proposal will be circulated by PPPAC Secretariat to all members of the PPPAC.

9.3 Planning Commission will appraise the project proposal and forward its Appraisal Note to the PPPAC Secretariat. Ministry of Law and any other Ministry/ Department involved will also forward written comments to the PPPAC Secretariat within the stipulated time period. The PPPAC Secretariat will forward all the comments to the Administrative Ministry for submitting a written response to each of the comments.

9.4 The concession agreement and any supporting agreements/ documents thereof, alongwith the PPPAC Memo, will be submitted for consideration of PPPAC. The PPPAC will take a view on the Appraisal Note and on the comments of different Ministries, alongwith the response from the Administrative Ministry.

9.5 PPPAC will either recommend the proposal for approval of the competent authority (with or without modifications) or request the Administrative Ministry to make necessary changes for further consideration of PPPAC.

9.6 Once cleared by the PPPAC, the project would be put up to the competent authority for final approval. The competent authority for each project will be the same as applicable for projects approval by PIB.

10. Invitation of bids

10.1 Financial bids may be invited after final approval of the competent authority has been obtained. However, pending approval of the competent authority, financial bids could be invited after clearance of PPPAC has been conveyed.

11. Time frame

11.1 The time frame for the appraisal of projects under the above procedure is at Annex-IV.

12. Exemption from the above procedure

12.1 Ministry of Defence, Department of Atomic Energy and Department of Space will not be covered under the purview of these guidelines.

Annex-I

Institutional Structure

Public Private Partnership Appraisal Committee

1. Pursuant to the decision of the Cabinet Committee on Economic Affairs (CCEA) in its meeting of 27th October, 2005, a Public Private Partnership Appraisal Committee (PPPAC) has been set up comprising of the following:

(a) Secretary, Department of Economic Affairs (in the Chair);

(b) Secretary, Planning Commission;

(c) Secretary, Department of Expenditure;

(d) Secretary, Department of Legal Affairs;

and

(e) Secretary of the Department sponsoring a project.

The Committee may co-opt experts as necessary.

2. The Committee would be serviced by the Department of Economic Affairs, who will set up a special cell, called the PPPAC Secretariat for servicing such proposals.

3. The Ministry of Finance will be the nodal Ministry responsible for examining concession agreements from the financial angle, deciding on guarantees to be extended, and generally assesses risk allocation from the investment and banking perspectives. It would also ensure that projects are scrutinised from the perspective of government expenditure.

4. The Planning Commission will set up a PPP Appraisal Unit (PPPAU), similar to the existing PAMD which appraises public sector projects. This unit will prepare an appraisal note for the PPPAC providing specific suggestions for improving the concession terms, where this is possible.

5. Ministry of Law and Justice, Department of Legal Affairs, would also be represented on the PPP Appraisal Committee, as the concession agreements would require careful legal scrutiny.

Memorandum for PPP Appraisal Committee (for 'in principle' approval)

S.No.	Item	Response
1.	**General**	
1.1	Name of the Project	
1.2	Type of PPP (BOT, BOOT, BOLT, OMT etc.)	
1.3	Location (State/District/Town)	
1.4	Administrative Ministry/ Department	
1.5	Name of Sponsoring Authority	
1.6	Name of the Implementing Agency	
2.	**Project Description**	
2.1	Brief description of the project	
2.2	Justification for the project	
2.3	Possible alternatives, if any	
2.4	Estimated capital costs with break-up under major heads of expenditure. Also indicate the basis of cost estimation.	
2.5	Phasing of investment	
2.6	Project Implementation Schedule (PIS)	
3.	**Financing Arrangements**	
3.1	Sources of financing (equity, debt, mezzanine capital etc.)	
3.2	Indicate the revenue streams of the Project (annual flows over project life). Also indicate the underlying assumptions.	
3.3	Indicate the NPV of revenue streams with 12% discounting	
3.4	Who will fix the tariff/ user charges? Please specify in detail.	

S.No.	Item	Response
3.5	Have any FIs been approached? If yes, there response may be indicated	
4.	**IRR**	
4.1	Economic IRR (if computed)	
4.2	Financial IRR, indicating various assumptions (attach separate sheet if necessary)	
5.	**Clearances**	
5.1	Status of environmental clearances	
5.2	Clearance required from the State Government and other local bodies	
5.3	Other support required from the State Government	
6.	**GoI Support**	
6.1	Viability Gap Funding, if required	
6.2	GOI guarantees being sought, if any	
7.	**Concession Agreement**	
7.1	Term sheet of the proposed Concession Agreement (Attached at Appendix-A)	
8.	**Criteria for short-listing**	
8.1	Is short-listing to be in one stage or two stages?	
8.2	Indicate the criteria for short-listing (attach separate sheet if necessary)	
9.	**Others**	
9.1	Remarks, if any	

Annex-II
(Appendix-A)

Term Sheet of the proposed Concession Agreement

A. Sponsoring Ministry:

B. Name and location of the Project:

C. Legal Consultant:

D. Financial Consultant:

S.No.	Item	Description
1.	**General**	
1.1	Scope of the Project (Please state in about 200 words)	
1.2	Nature of Concession to be granted	
1.3	Period of Concession and justification for fixing the period	
1.4	Estimated capital cost	
1.5	Likely construction period	
1.6	Conditions precedent, if any, for the concession to be effective	
1.7	Status of land acquisition	
2.	**Construction and O&M**	
2.1	Monitoring of construction; whether an independent agency/ engineer is contemplated	
2.2	Minimum standards of Operation and Maintenance	
2.3	Penalties for violation of prescribed O&M standards	
2.4	Safety related provisions	
2.5	Environment related provisions	
3.	**Financial**	
3.1	Maximum period for achieving financial close	

S.No.	Item	Description
3.2	Nature and extent of capital grant/ subsidy contemplated	
3.3	Bidding parameter (capital subsidy or other parameter)	
3.4	Provisions for change of scope and the financial burden thereof	
3.5	Concession fee, if any, payable by the Concessionaire	
3.6	User charges/ fee to be collected by the Concessionaire	
3.7	Indicate how the user fee is to be determined; the legal provisions in support of user fee (attach the relevant rules/ notification); and the extent and nature of indexation for inflation	
3.8	Provisions, if any, for mitigating the risk of lower revenue collection	
3.9	Provisions relating to escrow account, if any	
3.10	Provisions relating to insurance	
3.11	Provisions relating to audit and certification of claims	
3.12	Provisions relating to assignment/ substitution rights relating to lenders	
3.13	Provisions relating to change in law	
3.14	Provisions, if any for compulsory buy-back of assets upon termination/ expiry	
3.15	Contingent liabilities of the government	
	(a) Maximum Termination Payment for Government/ Authority Default	
	(b) Maximum Termination Payment for Concessionaire Default	
	(c) Specify any other penalty, compensation or payment contemplated under the agreement	

S.No.	Item	Description
4.	**Others**	
4.1	Provisions relating to competing facilities, if any	
4.2	Specify the proposed Dispute Resolution Mechanism	
4.3	Specify the proposed governing law and jurisdiction	
4.4	Other remarks, if any	

Memorandum for PPP Appraisal Committee (for final approval)

S.No.	Item	Response
1.	**General**	
1.1	Name of the Project	
1.2	Type of PPP (BOT, BOOT, BOLT, OMT etc.)	
1.3	Location (State/District/Town)	
1.4	Administrative Ministry/ Department	
1.5	Name of Sponsoring Authority	
1.6	Name of the Implementing Agency	
2.	**Project Description**	
2.1	Brief description of the project	
2.2	Justification for the project	
2.3	Possible alternatives, if any	
2.4	Estimated Capital costs with break-up under major heads of expenditure. Also indicate the basis of cost estimation.	
2.5	Phasing of investment	
2.6	Project Implementation Schedule (PIS)	
3.	**Financing Arrangements**	
3.1	Sources of financing (equity, debt, mezzanine capital etc.)	
3.2	Indicate the revenue streams of the Project (annual flows over project life). Also indicate the underlying assumptions.	
3.3	Indicate the NPV of revenue streams with 12% discounting	

S.No.	Item	Response
3.4	Who will fix the tariff/ user charges? Please specify in detail.	
3.5	Have any FIs been approached? If yes, there response may be indicated	
4.	**IRR**	
4.1	Economic IRR (if computed)	
4.2	Financial IRR, indicating various assumptions (attach separate sheet if necessary)	
5.	**Clearances**	
5.1	Status of environmental clearances	
5.2	Clearance required from the State Government and other local bodies	
5.3	Other support required from the State Government	
6.	**GoI Support**	
6.1	Viability Gap Funding, if required	
6.2	GOI guarantees being sought, if any	
7.	**Concession Agreement**	
7.1	Is the Concession Agreement based on MCA? If yes, indicate the variations, if any, in a detailed note (to be attached)	
7.2	Details of Concession Agreement (Attached at Appendix-A)	
8.	**Criteria for short-listing**	
8.1	Is short-listing to be in one stage or two stages?	
8.2	Indicate the criteria for short-listing (attach separate sheet if necessary)	
9.	**Others**	
9.1	Remarks, if any	

Annex-III
(Appendix-A)

Brief particulars of the Concession Agreement

A. Sponsoring Ministry:

B. Name and location of the Project:

C. Legal Consultant:

D. Financial Consultant:

S.No.	Item	Clause No.	Description
1.	**General**		
1.1	Scope of the Project (Please state in about 200 words)		
1.2	Nature of Concession to be granted		
1.3	Period of Concession and justification for fixing the period		
1.4	Estimated capital cost		
1.5	Likely construction period		
1.6	Conditions precedent, if any, for the concession to be effective		
1.7	Status of land acquisition		
2.	**Construction and O&M**		
2.1	Monitoring of construction; whether an independent agency/ engineer is stipulated		
2.2	Minimum standards of Operation and Maintenance		
2.3	Penalties for violation of prescribed O&M standards		
2.4	Safety related provisions		
2.5	Environment related provisions		

S.No.	Item	Clause No.	Description
3.	**Financial**		
3.1	Maximum period for achieving financial close		
3.2	Nature and extent of capital grant/ subsidy stipulated		
3.3	Bidding parameter (capital subsidy or other parameter)		
3.4	Provisions for change of scope and the financial burden thereof		
3.5	Concession fee, if any, payable by the Concessionaire		
3.6	User charges/ fee to be collected by the Concessionaire		
3.7	Indicate how the user fee has been determined; the legal provisions in support of user fee (attach the relevant rules/ notification); and the extent and nature of indexation for inflation		
3.8	Provisions, if any, for mitigating the risk of lower revenue collection		
3.9	Provisions relating to escrow account, if any		
3.10	Provisions relating to insurance		
3.11	Provisions relating to audit and certification of claims		
3.12	Provisions relating to assignment/ substitution rights relating to lenders		
3.13	Provisions relating to change in law		
3.14	Provisions, if any for compulsory buy-back of assets upon termination/expiry		

S.No.	Item	Clause No.	Description
3.15	Contingent liabilities of the government		
	(a) Maximum Termination Payment for Government/ Authority Default		
	(b) Maximum Termination Payment for Concessionaire Default		
	(c) Specify any other penalty, compensation or payment contemplated under the agreement		
4.	**Others**		
4.1	Provisions relating to competing facilities, if any		
4.2	Specify the Dispute Resolution Mechanism		
4.3	Specify the governing law and jurisdiction		
4.4	Other remarks, if any		

Time required for various steps under the appraisal procedure for PPP projects

S.No.	Action	Time taken
1.	'In principle' approval by PPPAC	Three weeks from the time of submission of the proposal by the Administrative Ministry
2.	Comments of Planning Commission, DEA or any other Ministry/ Deptt. on the final documents forwarded by the Administrative Ministry	Three weeks from the time of submission of the final documents by the Administrative Ministry
3.	Final approval by PPPAC	Two weeks from the sub mission of the PPPAC Memo along with final documents by the Administrative Ministry

Part-III

Guidelines for Projects costing less than Rs. 250 crore (Rs. 500 crore for NHDP)

1. Introduction

1.1 The procedure approved for appraisal of Public Private Partnership (PPP) projects by decision of CCEA in its meeting of October 27, 2005, as notified vide DEA notification No. 2/10/2004-INF dated November 29, 2005, has been modified by decision of CCEA in its meeting of March 22, 2007, as notified vide DEA notification No. 10/32/2006-INF dated April 2, 2007.

1.2 Detailed procedure to be followed for appraisal/approval of PPP projects (i) of all sectors of cost greater than Rs. 100 crore but less than Rs. 250 crore and (ii) under NHDP of cost Rs. 250 crore or more but less than Rs. 500 crore and fulfilling certain conditions as stated in para 3.1 (ii) (a) to (c) is specified below.

2. Institutional Structure

2.1 Pursuant to the decision of the CCEA notified vide notification of DEA dated April 2, 2007,

i. For appraisal of PPP projects of all sectors of cost greater than Rs. 100 crore but less than Rs. 250 crore, a Committee has been set up comprising of the following:

   a. Secretary, Department of Economic Affairs

   b. Secretary of the Ministry/ Department sponsoring the project

ii. For appraisal of projects under NHDP of cost Rs. 250 crore or more but less than Rs. 500 crore and which fulfill conditions as specified in para 3.1 (ii) (a) to (c) below, the Committee shall be as follows:

   a. Secretary, Department of Economic Affairs

   b. Secretary, Department of Road Transport and Highways

2.2 Initially the projects will be appraised by the Standing Finance Committee (SFC). The composition of SFC will be as follows:

Secretary of the Administrative Ministry	*Chairman*
Financial Adviser	*Member*
Joint Secretary of the concerned Division	*Member*
Representative of the Department of Legal Affairs	*Member*

Representative of Planning Commission and any other Ministry/Department may also be invited, if required. SFC will either recommend the proposal for approval to the Committee in para 2.1 above or request the Administrative Ministry to make necessary changes for further consideration of SFC.

2.3 The competent authority for each project will be the same as applicable for normal investment proposals costing more than Rs. 100 crore but less than Rs. 500 crore.

Applicability

3.1 The procedure specified below will apply to the following PPP projects sponsored by Central Government Ministries, statutory authorities or other entities under their administrative control:

i. Projects of all sectors costing more than Rs. 100 crore and less than Rs. 250 crore.

ii. NHDP projects of cost Rs. 250 crore or more but less than Rs. 500 crore which fulfill the following conditions:

a. The bidding is according to the procedure endorsed by PPPAC. This includes the process of two-stage bidding, pre- bid qualification norms etc. This implies that in the first stage, NHAI could short list and pre-qualify bidders on the basis of pre-bid qualification norms for inviting financial bids in the second stage.

b. The Model Concession Agreement (MCA) approved by the Competent Authority is being followed.

c. The project has been designed in accordance with the manual of standards and specifications as approved by the competent authority in the Administrative Ministry and stipulated in the approved MCA.

3.2 Projects of cost Rs. 250 crore or more and less than Rs. 500 crore which do not fulfill the conditions as stated in para 3.1(ii) (a) to (c) above would be submitted by the Administrative Ministry to the PPPAC for approval.

4. Project Identification

4.1 The sponsoring Ministry/entity will identify the projects to be taken up through PPPs and undertake preparation of feasibility studies, project agreements etc., with the assistance of legal, financial and technical experts as necessary.

5. Formulation of Project Documents

5.1 The documents that would need to be prepared would, *inter alia*, include the various agreements to be entered into with the Concessionaire detailing the terms of the concession and the rights and obligations of the various parties. These project documents would vary depending on the sector and type of project. Typically, a PPP will involve the concession agreement that will specify the terms of the concession granted to the private party and will include the rights and obligations of all parties. There could be associated agreements based on specific requirements.

6. Appraisal/Approval of SFC

6.1 RFP (Request for Proposals), i.e. invitation to submit financial bids should include a copy of all the agreements that are proposed to be entered into with the successful bidder. After formulating the draft RFP, the Administrative Ministry would seek clearance of the SFC.

6.2 The proposal for seeking clearance of SFC shall be circulated to all members of SFC in the format specified at Annex-I along with copies of all draft project agreements and the Project Report within one week of receipt.

6.3 Planning Commission will appraise the project proposal and forward its Appraisal Note to the Administrative Ministry. Ministry of Law and any other Ministry/Department involved will also forward written comments to the Administrative Ministry. The SFC will take a view on the Appraisal Note and on the comments of different ministries, along with the response from the Administrative Ministry.

6.4 SFC will either recommend the proposal for approval of the Committee in para 2.1 (i) or 2.1 (ii) above whichever is applicable (with or without modifications) or request the Administrative Ministry to make necessary changes for further consideration of SFC.

7. Approval by Committee in Para 2.1

7.1 Once cleared by the SFC, the project would be put up for approval of the Committee in para 2.1 on file. The Committee may either recommend the proposal for approval of the competent authority or request the Administrative Ministry to make necessary changes for further consideration of the Committee. Once cleared by the Committee, the project would be put up to the competent authority for approval.

8. Invitation of bids

8.1 Financial bids may be invited after approval of the competent Authority has been obtained. The competent authority for each project will be the same as applicable for normal investment proposals costing more than Rs. 100 crore. However, pending approval of the Competent Authority, financial bids could be invited after the approval/clearance by the Committee.

9. Time frame

9.1 The time frame for the appraisal of projects under the above procedure is at Annex-II.

10. Exemption from the above procedure

10.1 Ministry of Defence, Department of Atomic Energy and Department of Space will not be covered under the purview of these guidelines.

Annex-I

Memorandum for SFC

[**Note:** Use the same format as at Annex-III of the Guidelines dated January 12, 2006 (Refer page 19 of this volume)]

Annex-I
(Appendix-A)

Brief particulars of the Concession Agreement

[**Note:** Use the same format as at Annex-III/Appendix-A of the Guidelines dated January 12, 2006 (Refer page 21 of this volume)]

Annex-II

Time required for various steps under the appraisal procedure

S.No.	Action	Time taken
1.	Comments of Planning Commission, or any other Ministry/Department on the documents circulated by the Administrative Ministry	Three weeks from the time of circulation of the SFC memo by the Administrative Ministry
2.	Appraisal of proposal by SFC	Five weeks from the time of circulation of the SFC memo by the Administrative Ministry
3.	Clearance by Committee consisting of Secretary, DEA and Secretary of Administrative Ministry/Secretary, DORTH on file	Seven weeks from the time of circulation of the SFC memo by the Administrative Ministry
4.	Approval by competent authority	Nine weeks from the time of circulation of the SFC memo by the Administrative Ministry

Part-IV

Guidelines for Projects costing less than Rs. 100 crore

1. Introduction

1.1 The Central Government has notified a system for appraisal/approval of projects to be undertaken through Public Private Partnership (PPP). Department of Economic Affairs has issued Guidelines for formulation, appraisal and approval of PPP projects with capital costs of Rs. 100 crore or where the underlying assets are valued at an amount greater than Rs. 100 crore. Detailed procedure to be followed for appraisal/ approval of PPP projects involving less than Rs. 100 crore is specified below.

2. Institutional structure

2.1 Projects costing upto Rs. 5 crore will be appraised by the Administrative Ministry. Projects costing above Rs. 5 crore but less than Rs. 25 crore will be appraised by the Standing Finance Committee (SFC). The forum for appraisal of projects costing Rs. 25 crore and above but less than Rs. 100 crore will be the Expenditure Finance Committee (EFC) chaired by the Secretary of the Administrative Ministry. The composition of SFC and EFC will be the same as laid down for appraisal of normal investment proposals costing less than Rs. 100 crore, except that Department of Legal Affairs would also be represented on these Committees, as the concession agreements would require careful legal scrutiny. The competent authority for each project will be the same as applicable for normal investment proposals costing less than Rs. 100 crore.

3. Applicability

3.1 These guidelines will apply to all PPP projects sponsored by Central Government Ministries, statutory authorities or other entities under their administrative control. In respect of CPSEs, these guidelines will apply only in respect of proposals which are beyond the existing delegated powers of CPSEs for normal investment decisions.

4. Project Identification

4.1 The sponsoring Ministry/entity will identify the projects to be taken up through PPPs and undertake preparation of feasibility studies, project agreements etc. with the assistance of legal, financial and technical experts as necessary.

5. Inter-ministerial consultations

5.1 The Administrative Ministry will circulate the details of the project and the terms of concession agreement to the appraising agencies and comments received will be incorporated or annexed to the proposal for consideration of SFC/EFC.

5.2 There could be projects, which involve more than one Ministry/ Department. While considering such projects, participation of such Ministries/ Departments will be sought.

6. Formulation of Project Documents

6.1 The documents that would need to be prepared would, *inter alia,* include the various agreements to be entered into with the concessionaire detailing the terms of the concession and the rights and obligations of the various parties. These project documents would vary depending on the sector and type of project. Typically, a PPP will involve the concession agreement that will specify the terms of the concession granted to the private party and will include the rights and obligations of all parties. There could be associated agreements based on specific requirements.

7. Appraisal/Approval of SFC/EFC

7.1 RFP (Request for Proposals), i.e. invitation to submit financial bids, should normally include a copy of all the agreements that are proposed to be entered into with the successful bidder. After formulating the draft RFP, the Administrative Ministry would seek clearance of the SFC/ EFC before inviting the financial bids.

7.2 The proposal for seeking clearance of SFC/EFC shall be circulated to all members of SFC/EFC in the format specified at Annex-I along with copies of all draft project agreements and the Project Report.

7.3 Planning Commission will appraise the project proposal and forward its Appraisal Note to the Administrative Ministry. Ministry of Law and any other Ministry/Department involved will also forward written comments to the Administrative Ministry within the stipulated time period. The SFC/EFC will take a view on the Appraisal Note and on the comments of different Ministries, alongwith the response from the Administrative Ministry.

7.4 SFC/EFC will either recommend the proposal for approval of the competent authority (with or without modifications) or request the Administrative Ministry to make necessary changes for further consideration of SFC/EFC.

7.5 Once cleared by the SFC/EFC, the project would be put up to the competent authority for approval.

8. Invitation of bids

8.1 Financial bids may be invited after approval of the competent authority has been obtained. The competent authority for each project will be the same as applicable for normal investment proposals costing less than Rs. 100 crore.

9. Time frame

9.1 The time frame for the appraisal of projects under the above procedure is at Annex-II.

10. Exemption from the above procedure

10.1 Ministry of Defence, Department of Atomic Energy and Department of Space will not be covered under the purview of these guidelines.

Annex-I

Memorandum for SFC/EFC

[**Note:** Use the same format as at Annex-III of the Guidelines dated January 12, 2006 (Refer page 19 of this volume)]

Annex-I
(Appendix-A)

Brief particulars of the Concession Agreement

[**Note:** Use the same format as at Annex-III/Appendix-A of the Guidelines dated January 12, 2006 (Refer page 21 of this volume)]

Annex-II

Time required for various steps under the appraisal procedure

S.No.	Action	Time taken
1.	Comments of Planning Commission, Department of Expenditure or any other Ministry/Department on the documents circulated by the Administrative Ministry	Four weeks from the time of circulation of the SFC/EFC memo by the Administrative Ministry
2.	Appraisal of proposal by SFC/EFC	Six weeks from the time of circulation of the SFC/EFC memo by the Administrative Ministry
3.	Approval by competent authority	Eight weeks from the time of circulation of the SFC/EFC memo by the Administrative Ministry

INFRASTRUCTURE
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Scheme for

Financing Infrastructure Projects through The India Infrastructure Finance Company

Published by
PPP & Infrastructure Division
Planning Commission, Government of India
Yojana Bhawan, Parliament Street
New Delhi - 110 001

www.infrastructure.gov.in

comp.ppp.260314

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Secretariat for the Committee on Infrastructure

Preface

This initiative addresses the need for providing long-term debt for financing infrastructure projects that typically involve long gestation periods. Debt finance for such projects should be of a sufficient tenure that enables cost recovery across the project life. Indian capital markets, however, are deficient in long-term debt instruments. Setting up of the India Infrastructure Finance Company (IIFC) is aimed at bridging the gap.

Underdeveloped pension and long-term debt markets have restricted the tenure of project finance in India. Most of the available debt is of seven to twelve years, maturity whereas infrastructure projects require a longer pay back period. This constraint leads to front loading of tariffs during the initial years of the project cycle with a view to ensuring repayment of debt. Besides affecting the users, this handicap also affects the competitiveness of infrastructure projects.

This scheme was evolved by the Ministry of Finance after extensive deliberations with the Planning Commission, financial institutions, experts and other stakeholders. The scheme thus formulated was considered and approved by the Committee on Infrastructure, chaired by the Prime Minister, and subsequently endorsed by the Union Cabinet.

The India Infrastructure Finance Company (IIFC) has since been corporatised and operationalised. It will provide financial assistance through long term debt; either by way of refinance to banks and financial institutions or by direct lending to project companies. It will lend up to 20% of the capital costs of a project. For project appraisal and lending operations, IIFC would rely on the lead banks associated with the respective projects.

Built into this scheme is a preference for Public Private Partnership (PPP) projects that are awarded to private companies selected through a competitive bidding process. Such projects will be eligible for direct lending by IIFC, and will also receive overriding priority.

IIFC will raise funds from both domestic as well as external markets on the strength of government guarantees, which will be extended as necessary. In the first year of its operation, a guarantee limit of Rs.10,000 crore (US$ 2.2 billion) has been specified by the Government.

IIFC is expected to provide the much needed long-term debt for financing infrastructure projects. In doing so, it will play a catalytic role in building world-class infrastructure in India.

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

Scheme for Financing Infrastructure Projects through the India Infrastructure Finance Company Limited (IIFCL)

The scheme was notified by the Ministry of Finance, Department of Economic Affairs vide O.M. No. 10/12/2005-INF dated 4th January 2006.

1. Introduction

A. Whereas the Government of India recognizes that there is significant deficit in the availability of physical infrastructure across different sectors and that this is hindering economic development.

B. Whereas the development of infrastructure requires debt of longer maturity to supplement the debt funds presently available; and

C. Whereas the Government of India recognizes that such debt is usually not available because of the following constraints:

(a) Absence of benchmark rates for raising long term debt from the market;

(b) Asset-liability mismatch of the tenor of debt in case of most financial institutions; and

(c) High cost of long term debt.

D. Now, therefore, the Government of India has decided to put into effect the following scheme for providing financial support to improve the viability of infrastructure projects.

2. Short Title and Extent

2.1 The Scheme will be called the Scheme for financing Viable Infrastructure Projects. It will be administered by the Ministry of Finance through IIFCL.

2.2 The Scheme will come into force with immediate effect.

3. Definitions

3.1 In this Scheme unless the context otherwise requires:

(a) **Empowered Committee** means a Committee set up for the purposes of this Scheme under the chairmanship of Secretary (Economic Affairs) and including Secretary, Planning Commission, Secretary (Expenditure) , Secretary (Financial Sector) and in his absence Special Secretary / Additional Secretary (Financial Sector) and Secretary of the line Ministry dealing with the subject;

(b) **IIFCL** means the India Infrastructure Finance Company Ltd (a company incorporated under the Companies Act, 1956);

(c) **Lead Bank** means the Financial Institution (FI) that is funding the project and is designated as such by the Inter- Institutional Group or consortium of financial institutions; provided the risk exposure of IIFCL is less than that of the lead bank in a project;

(d) **Long Term Debt** means the debt provided by the IIFCL to the Project Company where the average maturity for repayment exceeds 10 years;

(e) **Private Sector Company** means a company in which 51% or more of the subscribed and paid-up equity is owned and controlled by private entities;

(f) **Project Company** means the company which is implementing the infrastructure project for which assistance is to be given by the IIFCL;

(g) **Project Term** means the duration of the contract or concession agreement for a PPP project;

(h) **Public Private Partnership (PPP) Project** means a project based on a contract or concession agreement, between a

Government or a statutory entity on the one side and a Private Sector Company on the other-side, for delivering an infrastructure service on payment of user charges;

(i) **Public Sector Company** means a company in which 51% or more of the subscribed and paid-up equity is owned and controlled by the Central or a State Government, jointly or severally, and includes any undertaking designated as such by the Department of Public Enterprises and companies in which majority stake is held by Public Sector Companies other than financial institutions; and

(j) **Total Project Cost** means the lower of the total capital cost of the project:

(i) as estimated by the government/ statutory entity that owns the project;

(ii) as sanctioned by the Lead Bank; and

(iii) as actually expended.

But does not include the cost of land incurred by the government/ statutory entity.

4. Funding of IIFCL

4.1 Apart from its equity, the IIFCL shall be funded through long-term debt raised from the open market. This debt can be any or all of the following:

(a) Rupee debt raised from the market through suitable instruments created for the purpose; the IIFCL would ordinarily raise debt of maturity of 10 years and beyond.

(b) Debt from bilateral or multilateral institutions such as the World Bank and Asian Development Bank.

(c) Foreign currency debt, including through external commercial borrowings raised with prior approval of the Government.

4.2 The IIFCL would raise funds as and when required, for on lending, in consultation with the Department of Economic Affairs. The magnitude of funds raised would be determined by demand from viable infrastructure projects. To the extent of any mismatch between the raising of funds and their disbursement, surplus funds would be invested in marketable government securities.

4.3 The borrowings of IIFCL may be guaranteed by the Government of India. The extent of guarantees to be provided shall be set at the beginning of each fiscal year by the Ministry of Finance, within the limits available under the Fiscal Responsibility & Budget Management Act. However, bonds issued by IIFCL, unless otherwise directed by Government of India, will not be included against Statutory Liquidity Ratio requirements. For 2005-06, the extent of guarantee to be provided by Government of India will be Rs.10,000 crore.

4.4 The guarantee fee payable by the IIFCL would be 0.25% per annum on outstanding balances.

4.5 The facility of guarantees including the terms for guarantee will be reviewed after 5 years, and its continuation shall be subject to the outcome of the review.

5. Eligibility

5.1 The IIFCL shall finance only commercially viable projects. Viable projects may also include those projects that will become viable after receiving viability gap funding under a government scheme.

5.2 In order to be eligible for funding under this Scheme, a project shall meet the following criteria:

(a) The project shall be implemented (i.e. developed, financed and operated for the Project Term) by:

(i) A Public Sector Company;

(ii) A Private Sector Company selected under a PPP initiative; or

(iii) A Private Sector Company

Provided that IIFCL shall assign overriding priority to Private Public Partnership projects that are implemented by Private Sector Companies selected through a competitive bidding process.

Provided further that a Private Sector Company, other than that defined in the first proviso above, would not be eligible for direct lending by IIFCL and may be funded only through the refinance mode. The total lending for such private projects shall not exceed 20% of the lending programme of IIFCL in any accounting year. The eligibility for direct lending and/or raising the limit of 20% will be reviewed at the end of one year having regard to the progress made in funding public sector and PPP infrastructure projects.

Provided also that the IIFCL may lend directly to projects set up by Private Sector Companies subject to the following conditions:

(i) The service to be provided by the infrastructure project is regulated, or the project is being set up under an MOU arrangement with the Central Government, any State Government or a PSU;

(ii) the tenor of IIFCL lending should be longer than that of the longest tenor commercial debt by at least two years; and

(iii) direct lending plus the refinance business, if any, on account of this category of borrowers (Private Sector Companies not selected through a competitive bidding process) should not exceed 20% of the total lending by IIFCL in any accounting year. (This limit is the same as the limit currently imposed for the refinance window.)

(b) Provided that in case of Railway projects that are not amenable to operation by a Private Sector Company, the Empowered Committee may relax the eligibility criterion relating to operation by such company.

(c) The project should be from one of the following sectors:

(i) Roads and bridges, railways, seaports, airports, inland waterways and other transportation projects;

(ii) Power;

(iii) Urban transport, water supply, sewage, solid waste management and other physical infrastructure in urban areas;

(iv) Gas pipelines;

(v) Infrastructure projects in Special Economic Zones; and

(vi) International convention centres and other tourism infrastructure projects.

Provided that the Empowered Committee may, with approval of the Finance Minister, add or delete any sector/sub-sectors from this list.

5.3 Only such projects which are implemented through a Project Company set up on a non-recourse basis shall be eligible for financing by IIFCL.

It is clarified that only such projects, which are implemented by the borrower company directly, or though a special purpose vehicle, on a non-recourse basis, shall be eligible for financing by IIFCL.

It is further clarified that the aforesaid would be subject to maintaining an escrow account which may be entrusted to any bank involved in financing of the project and the discretion with regard to the bank would be that of the Board of Directors of IIFCL.

5.4 In the event that the IIFCL needs any clarification regarding eligibility of a project, it may refer the case to the Empowered Committee for appropriate directions.

6. Appraisal & Monitoring by Lead Bank

6.1 The Lead Bank shall present its appraisal of the project for the consideration of the IIFCL. Based on such appraisal, the IIFCL may consider and approve funding to the extent indicated in Article 7 below.

6.2 The IIFCL will not normally be required to carry out any independent appraisal of the project.

6.3 The Lead Bank shall be responsible for regular monitoring and periodic evaluation of compliance of the project with agreed milestones and performance levels, particularly for purpose of disbursement of IIFCL funds. It shall send periodic progress reports in such form and at such times, as may be prescribed by IIFCL.

7. Lending Terms

7.1 The IIFCL may fund viable infrastructure projects through the following modes:

(a) Long Term Debt;

(b) Refinance to Banks and Financial Institutions for loans, with tenor exceeding 10 years, granted by them; and

(c) Any other mode approved by Government from time to time.

7.2 The Project Company will have the right to choose any of the modes of lending given above. The terms at which the Project Company can access Long Term Debt shall not be inferior to the terms at which refinanced debt is available to the Project Company.

7.3 The total lending by the IIFCL to any Project Company shall not exceed 20% of the Total Project Cost. Loans will be disbursed in proportion to debt disbursements from financial institutions.

7.4 The rate of interest charged by IIFCL shall be such as to cover all funding costs including administrative costs and guarantee fee, if any.

7.5 The IIFCL will release funds to the Lead Bank as and when due. The Lead Bank/FI consortium will make disbursements on behalf of the IIFCL and seek reimbursement which shall be made within one month of receiving a demand, with necessary particulars, from the Lead Bank.

7.6 Recovery of loans advanced by IIFCL shall be the responsibility of the Lead Bank. Recovery of IIFCL loans shall be *pari passu* with project debt (other than subordinate debt) till 80% of the project debt (other than subordinate debt) of the Lead Bank and FI consortium (inclusive of interest due) has been recovered. Thereafter the Lead Bank/FI Consortium would assume the payment risk as guarantors of the IIFCL loan from that stage onwards.

Provided, however, that IIFCL may not insist on guarantee by the Lead Bank, but it shall position on its staff, personnel with expertise in risk assessment, and the regulatory norms that should govern IIFCL shall be defined and brought into operation at the earliest.

7.7 The charge on project assets shall be *pari passu* with project debt (other than subordinate debt) and will continue beyond the tenure of project debt (other than subordinate debt) till such time the amounts lent by IIFCL, together with interest and other charges thereon remain outstanding.

7.8 The IIFCL, the Lead Bank and the Project Company shall enter into a Tripartite Agreement for the purposes of this scheme. The format of such Tripartite Agreement shall be prescribed by the Empowered Committee from time to time.

7.9 In the first two years of operation of the Scheme, projects meeting the eligibility criteria could be funded on a first-come, first served basis. In later years, if need arises, funding may be provided based on an appropriate formula, to be determined by the Empowered Committee that balances needs across sectors in a manner that would broad-base sectoral coverage and avoid pre- empting funds by a few large projects.

7.10 Subordinate Debt

IIFCL may provide Debt which ranks lower in security than the project debt carrying a *pari passu* charge (the "**Subordinate Debt**") to finance PPP Projects subject to the following conditions:

(a) The project should have been awarded through open competitive bidding;

(b) it should have been approved by the PPPAC (Public Private Partnership Approval Committee) under the Guidelines for Formulation, Appraisal and Approval of PPP projects or by the Empowered Institution under the Guidelines for Financial Support to PPP in infrastructure;

(c) the concession agreement should provide for an escrow account that would secure the annual repayment of Subordinate Debt before returns on equity are paid;

(d) in case of termination of concession agreement, the concessioning authority will pay in terms of termination payment at least 80% of the Subordinate Debt on account of a concessionaire default or concessioning authority default, during operation period of the concession, in the escrow account as mentioned in the Model Concession Agreement (MCA). Where MCA is not available, a similar provision should be incorporated;

(e) Subordinate Debt shall not exceed 10% of the Total Project Cost and shall form part of the maximum limit of 20% as specified in para 7.3 of the SIFTI;

(f) Subordinate Debt to be borrowed by the Project Company from any or all sources shall not exceed one half of its paid up and subscribed equity;

(g) interest on Subordinate Debt shall be 2% to 3% higher than the highest interest charged by any bank in the consortium of lenders for the project;

(h) there may be a moratorium of 4 to 5 years on repayment of principal and interest due in respect of Subordinate Debt. IIFCL may take this aspect into account while assessing the project's viability;

(i) repayment of principal shall not commence before 6 to 7 years from the Commercial Operation Date (COD) of the project and shall extend between a period of 12 to 15 years from COD;

(j) Subordinate Debt lenders shall have second charge on all assets (including receivables) of the Borrower, both present and future, to secure the Subordinate Debt in accordance with the loan agreement. The said second charge to secure Subordinate Debt shall rank *pari passu* with all lenders for their subordinate debts. The aforesaid second charge of subordinate debt lenders shall be subordinate to the first *pari passu* charge of the senior lenders for their senior debts; and

(k) Subordinate Debt shall not be converted into equity.

8. Lending to PPP Projects

8.1 A project awarded to a Private Sector Company for development, financing, construction, maintenance and operation through Public Private Partnership (as defined in the Scheme for Viability Gap Funding) shall be accorded priority for lending under this Scheme.

8.2 In case of PPP projects, the private Sector Company shall be selected through a transparent and open competitive bidding process.

8.3 PPP projects based on standardized/ model documents duly approved by the respective government would be preferred. Standalone documents may be subjected to detailed scrutiny by the IIFCL.

8.4 Prior to inviting offers through a open competitive bid, the concerned government or statutory entity may seek 'in principle' approval of the IIFCL for financial assistance under the Scheme. Any indication given by IIFCL at the pre-bid stage shall not be
treated as a final commitment. Actual lending by IIFCL shall be governed by the appraisal by the Lead Bank carried out before
financial closure of the project.

9. Review of the Scheme

9.1 The Scheme may be reviewed by the Government at the end of 5 years or earlier if required. The continuation of the Scheme, with or without modifications, will be dependent on the outcome of such a review.

9.2 IIFCL would be regulated directly by the Government and a *sui-generis* regulatory regime for IIFCL may be brought into operation at the earliest.

9.3 In order to avoid frequent references to the Cabinet on procedural matters, modifications to the SIFTI may be made at the level of Empowered Committee already set-up under the Scheme subject to the approval of the Finance Minister and the Prime Minister.

9.4 An Oversight Committee of Secretaries would be constituted for reviewing the working of IIFCL on a bi-annual basis.

9.5 The debt equity ratio in respect of the road sector projects considered for financing may not exceed 4:1.

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Published by
PPP & Infrastructure Division
Planning Commission, Government of India
Yojana Bhawan, Parliament Street
New Delhi – 110 001

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Foreword

The 12th Plan provides for an investment of Rs. 55,74,663 crore in the infrastructure sector of which 46 per cent is proposed to be met out of private investment as against 36 per cent during the Eleventh Plan. Several initiatives have been taken by the Central Government to induct private participation in different infrastructure sectors. This included creation of an enabling policy and regulatory framework, including amendment of several laws. The policy of promoting Public Private Partnership (PPP) as a means of increasing investment in infrastructure was a conscious decision of the Government in response to the fact that infrastructure required huge investments while public resources were not only limited, there were other pressing demands on them. It was, therefore, essential that the available public resources should be leveraged as much as possible by attracting private investment through PPPs.

PPP concessions can either be sustained by user charges to be collected by the concessionaire or through annuity payments to be made by the government. Annuity payments are typically borne by the government out of the annual budgetary allocations spread over time and are essentially in the nature of deferred budgetary payments. Annuity payments create a burden on future budgets for a long period of time. Proliferation of BOT (Annuity) projects and the consequent long-term committed liabilities pose a limitation on the resources available for future plan programmes. Its effect would be akin to raising excessive borrowings that would commit a bulk of future revenues for debt service, leaving inadequate resources for development.

Commenting on the annuity-based PPPs undertaken in the UK, the International Monetary Fund has noted that the "off-balance sheet" status of PPPs introduces an "unwarranted bias in their favour", providing a superficial relaxation of budgetary constraints because investment through PPP has exactly the same revenue effect as conventional capital spending or direct borrowing. This public sector cost that PPP gives rise to, can only be met through a redirection of revenue from other parts of the public sector, increased taxation or, for sectors like roads and water, higher user charges. The budgetary advantage of PPP, that while direct borrowing counts against the capital budget, borrowing through a PPP intermediary is not the consequence of financial reporting structures, and does not reflect any economic difference between alternative forms of financing.

The proliferation of annuity based contracts would tend to jeopardise the fiscal balance on account of reduction in debt service liability and add further to the budgetary liability of Government of India. It is, therefore, necessary to prescribe a safeguard ceiling for annuity based PPP projects of each Department so as to restrict the fiscal commitment of the government to a sustainable level for maintaining fiscal stability while at the same time enabling the departments to take up a reasonable programme through annuity-based PPP projects.

An Inter-Ministerial Task Force was constituted under the chairmanship of Member (B. K. Chaturvedi), Planning Commission for recommending budgetary ceilings for annuity commitments under PPP projects which finalized its report on September 22, 2010. Thereafter, the recommendations contained in the Report were approved by the Cabinet and the guidelines notified on March 5, 2014. These budgetary ceilings on annuity payments would be a significant step in the direction of prudent fiscal management while allowing adequate elbow room to take up annuity projects when their advantages can be clearly demonstrated.

April 2, 2014

(Montek Singh Ahluwalia)
Deputy Chairman,
Planning Commission

G-20011/01/2013-Infra
Government of India
Planning Commission
(PPP & Infrastructure Division)

Yojana Bhavan, New Delhi
Dated, the 5th March, 2014

OFFICE MEMORANDUM

Subject: Budgetary Ceiling on Annuity Payments for PPP Projects

Pursuant to approval of the Union Cabinet, the undersigned is directed to state that all PPP projects to be approved on Annuity basis shall adhere to the budgetary ceilings specified herein.

1.2 Further, other conditions such as for Value for Money (VfM) analysis, allocation of expenditure between Plan and Non-Plan, application of standards and specifications, disclosure of annuity commitments in budget documents, and adoption of the EPC approach in lieu of Annuity shall also apply to all projects proposed to be taken up on Annuity basis henceforth.

1.3 This O.M. shall apply to all Ministries, Departments, statutory authorities and Public Sector Undertakings of the Central Government.

2. *Context*

2.1 Public - Private Partnership (PPP) concessions can either be sustained by user charges to be collected by the concessionaire or through annuity payments to be made by the government. Annuity payments are typically borne by the government out of the annual budgetary allocations spread over time and are essentially in the nature of deferred budgetary payments.

2.2 Annuity contracts can be structured in different ways. The most commonly used structure is the Design, Build, Finance, Operate and Transfer (DBFOT) model under which the selected private sector entity (the "concessionaire") takes on the responsibility for provision of a facility on a long-term basis in conformity with the given specifications. The private entity receives annuity payments from public funds, based on its performance throughout the contract period. If the private service provider fails to meet the performance targets, its payment is reduced.

2.3 Annuity or unitary charge normally refers to the periodic payment received by the concessionaire for financing, construction, operation and maintenance of the project. In the past, capital has often been invested through conventional construction contracts without a clear commitment to adequate future spending on maintenance, leading to poorly maintained assets, inefficient service provision and premature replacement. In contrast, PPPs ensure that assets are maintained properly, but this may tend to increase the total cost to the exchequer. For a fair comparison of the lifecycle costs of PPP (annuity) projects with those built through conventional contract, a normative component of maintenance costs should be added to the costs of conventional contracts with a view to making a like-to-like assessment of their comparative advantages.

2.4 However, annuity payments create a burden on future budgets in the form of long-term committed liabilities spread over multiple Plan periods. This implies that the resources available for future plan programmes would shrink and could even turn out to be zero or negative. This would, in effect, constrain future Plan programmes and foreclose new initiatives that may be necessary over time, as funds would already have been committed to the annuity projects awarded in earlier years. Its effect would be akin to raising excessive borrowings that would commit a bulk of future revenues for debt service, leaving inadequate resources for development. It has, therefore, been considered necessary to prescribe a suitable limit upto which the future budgetary options may be restricted on account of liabilities undertaken for the present.

3. Budgetary implications of Annuity projects

3.1 It would be seen that Annuity projects are similar in nature to public sector contracts so far as government funding is concerned. Although Annuity projects transfer certain risks to the concessionaires, such as the construction and maintenance risks, yet the annuity payments are assured from the government budget. In the case of concessions based on user charges, the concessionaires are responsible for recovering their capital through collection of user charges, thus bearing the demand risk of the project, although the concession agreements provide for mitigation of such demand risks to some extent.

3.2 As distinct from an Annuity project, a PPP project which is sustained by user charges does not normally impose a recurring burden on the budgetary resources. Hence, PPP projects based on user charges imply mobilisation of additional resources. By comparison, an Annuity project does not have a revenue stream of its own and must essentially rely on payments out of budgetary allocations over the years. Annuity projects thus imply deferred budgetary payments akin to borrowings. Moreover, the mere fact that these commitments can be made 'off-budget' for the present should not lead to excessive annuity commitments that would pre-empt future budgetary resources.

3.3 Proliferation of Annuity projects would tend to impact the fiscal balance of the budget by adding further to the budgetary liability which could become unsustainable if not kept within reasonable limits. It is, therefore, necessary to prescribe a safeguard ceiling for Annuity projects of each Department so as to restrict the fiscal commitment of the government to a sustainable level for maintaining fiscal stability while at the same time enabling the Departments to take up a reasonable programme through Annuity projects.

4. Plan and Non-Plan expenditure

4.1 While the expenditure incurred on cash construction contracts is typically charged as Plan expenditure, annual maintenance payments over the years are normally booked as Non-Plan expenditure. Interest payments on borrowings used for funding such Plan expenditure are also typically booked as Non-Plan expenditure.

4.2 This issue assumes significance because treating the entire annuity commitment as either Plan or Non-Plan would alter the present principles that determine this categorisation. By way of illustration, if the annuity payments for roads or hospitals are to be made entirely out of their respective Plan allocations for the entire concession period, the ability of the respective Departments to take up new projects in subsequent Five Year Plans would be correspondingly reduced or may even reach a negligible level whereas under the present arrangement, Plan projects taken up during a particular Five Year Plan typically shift to the Non-Plan side during subsequent Plan periods, thus vacating space in the Plan outlays for taking up fresh initiatives.

4.2 Therefore, the treatment of Plan and Non-Plan outlays for Annuity projects shall be as under:

(i) Projects that commence during the first three years of a Five Year Plan will be booked under the Plan head during the current Plan period and the subsequent Plan period. In effect, this would mean that such projects would be booked as Plan expenditure for 8 to 10 years depending on their year of commencement. Subsequent annuity payment would have to be made from Non-Plan allocations.

(ii) Projects commencing in the last two years of the Plan period should be treated as Plan projects during the current Plan period and two subsequent Plan periods. In effect, such projects would be booked under Plan for 11 to 12 years and as Non-Plan thereafter.

5. Appraisal of Annuity projects

5.1 Since the entire funding for Annuity projects is to be met out of government's budget although on a deferred basis, the total cost of such projects and the budgetary allocations for the same should be scrutinised in a manner similar to conventional projects.

5.2 It would be in public interest if Annuity projects are taken up only after it is established through the Value for Money (VfM) analysis in each case that the annuity mode of delivery will yield a more efficient and cost-effective outcome as compared to conventional contracts. Each project should, therefore, be subjected to a VfM analysis to establish that the likely annuity payments are justified and offer value for money. The methodology for VfM analysis should be fair and transparent.

5.3 In addition to the VfM analysis, the Public Sector Comparator should also be applied as a tool for evaluating whether the annuity mode of procurement would be more advantageous as compared to the conventional mode, duly adjusted for the cost of capital and O&M expenses. In making these comparisons, the Net Present Value (NPV) should be worked out using a suitable discount rate to be fixed with due regard to the cost of borrowings by the Government. The annual average cost of government borrowings has been about 7.5 – 7.9 per cent in the four years ending 2012-13.

5.4 While undertaking the aforesaid appraisals, the project authorities should conform with the Vfm framework and Guidance Notes issued by the Government from time to time with a view to making a fair comparison of alternative approaches.

6. Adoption of EPC contracts

It is possible that owing to the prevalent risk perception, high interest rates, return requirements or the project structure, the costs of an Annuity project do not represent value for money from the Government's perspective. In such cases, the conventional contracts based on 'item rates' should not be viewed as the only alternative. An effort should be made to explore the possibilities of an EPC contract based on the turnkey or lump sum approach. Such EPC contracts can capture most of the advantages of an annuity project and yet provide a comparatively economic option compared to a high-cost Annuity project.

7. Standards and Specifications

The deferment of payment liability should not lead the project authorities to view the annuity mode as a means of procuring higher standards and specifications compared to those prevailing under the conventional cash contracts. Any move that leads to more expensive standards and specifications would only add to future budgetary commitments. As such, there should be a clear mandate that the annuity mode would rely on the same standards and specifications as are applicable to the conventional mode. The standards and specifications should be need-based, cost-effective and appropriate while over-engineering in project design should be avoided. Deviations, if any, should be clearly justified and adopted only with approval of the competent authority after assessing their cost implications.

8. Disclosure of annuity contracts

8.1 The nature of liabilities created by annuity payments is similar to that of borrowings, as both require repayments spread over a long period (10-15 years or even longer). Hence, it is imperative that the treatment accorded to annuities in fiscal management should be similar to that accorded to borrowings. As such, annuity commitments, like borrowings, should be subject to hard budgetary constraints.

8.2 Hence, the actual annuity commitments that are entered into by a Ministry/ Department should be compiled by the Budget Division of Finance Ministry annually and the statement of annuity commitments may be depicted transparently in the budget documents. Any preferential financing provided through government on-lending or via public financial institutions should also be disclosed. Further, any project financing or off-balance-sheet project support provided by entities owned or controlled by government, which may give rise to contingent liabilities should also be stated. A separate object head for ease of accounting of annuity pay-outs should also be created for this purpose.

9. Ceiling on Annuity projects

Commitments for annuity payment by each Department shall be subject to the following ceilings to be applied individually and collectively to all Annuity projects:

(a) The sum of total annuity commitments for a particular grant or scheme of the Department for the next five years should not exceed 25 per cent of the current Five Year Plan outlay of such grant or scheme of the Department. For example, if the allocation for a particular scheme of a Department under the current Five Year Plan is Rs. 20,000 crore, its committed annuity payments for the next five years should not exceed Rs.

5,000 crore. This would ensure that enough resources are available for future programmes. Towards this end the Ministries/Departments are advised to draw up a rolling plan for, say three years, and prioritise projects in consultation with their respective Financial Advisors.

(b) Assuming that the annual plan outlay of a Department would increase at a CAGR of 10 per cent, the annuity commitments that may be made in any one year should not lead to outflows of more than 20 per cent of the projected Annual Plan outlays for the respective grant or scheme in any subsequent year. For example, if the projected annual plan outlay in the third year from the current year is Rs. 10,000 crore, the maximum annuity commitments from all projects awarded during and before the current year should not exceed Rs. 2,000 crore per annum in the said third year. This discipline would ensure a gradual roll-out of PPP projects within prudent financial limits.

(c) In any given year, the annuity projects awarded should not involve a total capital expenditure exceeding the total Plan outlay of that grant or scheme for that year. For example, if the Annual Plan allocation for any grant or scheme of a department is Rs. 10,000 crore, then the annuity projects awarded in that year under such grant or scheme should not involve a total capital investment of Rs. 10,000 crore. This would help avoid excessive bunching in the award of projects.

(d) For unitary charge or revenue-based projects such as in health, education etc., the revenue expenditure during the current Five Year Plan and for the following Five Year Plan period should be treated as Plan expenditure and should also be governed by the above ceilings.

(e) Some of Ministries/Departments, such as the Ministry of Home Affairs have a comparatively smaller Plan budget accompanied by a large Non-Plan budget. In such cases, it may be useful to look at the total budget (both Plan and Non-Plan) of a Department prior to fixing a limit for annuity projects under Plan and Non-Plan outlays. In the case of Non-Plan expenditure, the ceiling of annuity commitments shall be fixed at 5 per cent of their annual Non-Plan budget or such lower proportion as the Department of Expenditure may determine from time to time.

(f) There may be schemes that acquire urgency during the course of a Five Year Plan and may require enhanced outlays in the current and subsequent Five Year Plans. In such cases, the aforesaid ceilings may have to be suitably increased. A Department seeking such enhanced ceilings shall, in consultation with the Finance Ministry and the Planning Commission, submit its proposals for consideration of the Cabinet.

(g) The annuity ceiling for the Ministry of Road Transport and Highways shall continue to be governed by the decisions of the Empowered Group of Ministers with such modifications as may be made from time to time.

10. Conclusion

10.1 It is expected that the above provisions would help to rationalise the process of structuring and approval of PPP projects under the annuity mode.

10.2 All administrative Ministries, statutory authorities and Public Sector Undertakings of the Central Government may please adhere to the provisions of this O.M. with immediate effect.

(Namita Mehrotra)
Director (Infra)
Telefax: 2309 6618

1. Secretary, Ministry of Home Affairs, North Block, New Delhi
2. Chairman, Railway Board, Rail Bhawan, New Delhi
3. Secretary, Ministry of Road Transport & Highways, Transport Bhawan, New Delhi
4. Secretary, Department of School Education & Literacy, Shastri Bhawan, Dr. Rajendra Prasad Road, New Delhi

5. Secretary, Ministry of Urban Development & Poverty Alleviation, Nirman Bhawan, New Delhi
6. Secretary, Department of Health & Family Welfare, Nirman Bhawan, New Delhi
7. Secretary, Ministry of Shipping, Transport Bhawan, New Delhi
8. Secretary, Ministry of Power, Shram Shakti Bhawan, New Delhi
9. Secretary, Ministry of Civil Aviation, Rajiv Gandhi Bhawan, Safdarjung Airport, New Delhi
10. Secretary, Ministry of Rural Development, Krishi Bhawan, Dr. Rajendra Prasad Road, New Delhi
11. Secretary, Ministry of Housing & Urban Poverty Alleviation, Nirman Bhawan, Maulana Azad Road, New Delhi
12. Secretary, Department of Food and Public Distribution, Krishi Bhawan, Dr. Rajendra Prasad Road, New Delhi
13. Secretary, Ministry of Drinking Water & Sanitation, 9th Floor, Paryavarn Bhawan, CGO Complex, Lodhi Road, New Delhi
14. Secretary, Ministry of Labour & Employment, Shram Shakti Bhawan, Rafi Marg, New Delhi
15. Secretary, Department of Sports, Ministry of Youth Affairs & Sports, Shastri Bhawan, New Delhi
16. Secretary, Ministry of Water Resources, Shram Shakti Bhawan, New Delhi.

Copy to:

1. Secretary, Department of Economic Affairs, Ministry of Finance, North Block, New Delhi
2. Secretary, Department of Expenditure, Ministry of Finance, North Block, New Delhi

Report of the Task Force on Ceilings for Annuity Commitments

Background

1.1 1.1 An Inter-Ministerial Task Force was constituted under the chairmanship of Member (B. K. Chaturvedi), Planning Commission for recommending budgetary ceilings for annuity commitments under PPP projects. The constitution of the Task Force was as follows:

(i) Member (B.K. Chaturvedi), Planning Commission - Chairman

(ii) Secretary, Department of Economic Affairs;

(iii) Secretary, Department of Expenditure;

(iv) Chief Economic Adviser, Ministry of Finance;

(v) Secretary, Ministry of Home Affairs;

(vi) Secretary, Ministry of Road Transport & Highways,

(vii) Secretary, Department of School Education & Literacy,

(viii) Secretary, Department of Urban Development;

(ix) Secretary, Department of Health & Family Welfare;

(x) Secretary, Ministry of Shipping; and

(xi) Adviser to Deputy Chairman, Planning Commission.

1.2 The first meeting of the Task Force was held on May 12, 2010. After discussion on the broad principles and parameters, the Task Force constituted a sub-group under the chairmanship of Adviser to Deputy Chairman, Planning Commission, with representatives from Department of Expenditure, Department of Economic Affairs, Ministry of Home Affairs and an official with experience of having worked with the Finance Commission, to examine the issues in detail and submit their recommendations. The Sub-group held its meetings on June 22, June 30 and August 10, 2010, and submitted its Report for consideration of the Task Force. The Report of the Sub-Group was discussed in a meeting of the Task Force held on September 22, 2010 when this Report was finalised.

1.3 The Task Force noted that fiscal prudence requires a ceiling to be established on the extent of annuity commitments under PPP projects as they pre-empt the annual budgets of future years. It was, therefore, necessary to lay down the principles for fixing such a ceiling. It was also necessary to decide the apportioning of annuity payments between Plan and Non-Plan outlays. A view also needs to be taken as to how annuity expenditure would be met out of the budget of the respective departments which have a large Non-Plan outlay but a comparatively small Plan allocation. Further, the specifications and standards to be adopted and the process of approval of annuity-based projects needs to be laid down. This may include the adoption of appraisal techniques such as 'Value for Money' (VFM) analysis and 'Public Sector Comparator' which have been extensively used in the UK where a large number of annuity projects have been undertaken across sectors.

2. Annuity based PPPs

2.1 Public - Private Partnership (PPP) concessions can either be sustained by user charges to be collected by the concessionaire or through annuity payments to be made by the government. Annuity payments are typically borne by the government out of the annual budgetary allocations spread over time and are essentially in the nature of deferred budgetary payments.

2.2 Annuity or unitary charge refers to the periodic payment received by the concessionaire for financing, construction, operation and maintenance of the project. Private Finance Initiative (PFI) of the UK has extensively used the annuity mode for building schools, hospitals and accommodation, which are designed, built, financed and managed by private sector entities, under contracts that typically last for 30 years. Some annuity based PPPs for highway projects have also been undertaken in the UK where roads are not tolled.

2.3 Annuity contracts can be structured in different ways. The most commonly used structure is Design, Build, Finance and Operate (DBFO) model under which the private sector takes on the responsibility for provision of a facility on a long-term basis in conformity with the given output specifications. The private entity is paid regularly from public funds, based on its performance throughout the contract period. If the private service provider misses performance targets, its payment is reduced.

2.4 Annuity payments create a burden on future budgets for a long period of time. One possibility is to treat all annuity pay-outs as plan expenditure since new infrastructure is being created. However, proliferation of BOT (Annuity) projects and the consequent long-term committed liabilities, spread over multiple Plan periods, would mean that the resources available for future plan programmes would shrink and may even turn out to be zero or negative. This would, in effect, constrain future Plan programmes and foreclose new initiatives that may be necessary over time, as funds would already have been committed to the annuity projects awarded in earlier years. Its effect would be akin to raising excessive borrowings that would commit a bulk of future revenues for debt service, leaving inadequate resources for development. It is in this context that prescribing a suitable cap for annuity commitments becomes important.

2.5 It would be seen that annuity-based projects are similar in nature to public sector contracts so far as government funding is concerned. Although these projects transfer certain risks to the concessionaires, such as the construction and maintenance risks, yet the annuity payments are assured through the government budget. In the case of concessions based on user charges, the demand risk is transferred to the concessionaires, thereby exposing them to considerable commercial risk in recovering their capital. While concessions based on user charges lead to mobilisation of additional resources, annuity concessions imply deferred government payments akin to borrowings and do not normally lead to mobilisation of additional resources.

3. International perspective

3.1 The International Monetary Fund has noted in the context of the UK PPP programme that the “off-balance sheet” status of PPPs introduces an “unwarranted bias in their favour”, providing a superficial relaxation of budgetary constraints because investment through PPP has exactly the same revenue effect as conventional capital spending or direct borrowing. This public sector cost that PPP gives rise to can only be met through a redirection of revenue from other parts of the public sector, increased taxation or, for sectors like roads and water, higher user charges. The budgetary advantage of PPP - that while direct borrowing counts against the capital budget, borrowing through a PPP intermediary does not – is the consequence of financial reporting structures developed by the Treasury, and does not reflect any economic difference between alternative forms of financing.

3.2 Across Europe, finance ministries are interested in PPP because of its ability to deliver investment, the upfront costs of which do not count against measures of public sector debt. All EU member states are subject to fiscal constraints under the Maastricht Treaty, which restricts ‘gross government debt’ to 60 per cent of national Gross Domestic Product (GDP). In the UK, the fiscal rules are less flexible. Since 1998, the Labour government’s ‘sustainable investment rule’ has imposed a ceiling of 40 per cent on the ratio of ‘public sector net debt’ (PSND) to GDP, which is consistent with a much lower debt-to-GDP ratio than that specified in the EU Stability and Growth Pact. As long as privately financed investment is recorded off the public sector’s balance sheet, it does not count towards PSND.

3.3 The UK budgeting process follows a golden fiscal rule: “over the economic cycle, the Government will borrow only to invest and not to fund current spending”. Further, the Sustainable Investment Rule states that the public sector net debt as a proportion of GDP will be held over the economic cycle at a stable and prudent level. Other things equal, net debt will be maintained below 40 per cent of GDP over the economic cycle." This has been restated in each budget/ pre-budget report since the Code of Fiscal Stability in 1998. The rationale behind such rules is to promote fairness between generations, that is, the bill for today's current spending, which mainly benefits today's taxpayers, will not be passed on to future generations.

3.4 In the UK, over 85 per cent of public investment is still carried out through conventional terms of procurement. PFI remains a limited proportion of government investment within any particular sector. In no case does PFI represent more than around a quarter of the public investment being undertaken in a sector. They also have individual Departmental Spending Limits for each department ranging from 6 to 7 per cent of their total annual spending. Brazil's currently enacted PPP law prohibits undertaking new PPPs if the projected stream of payments under the programme exceeds 1 per cent of government revenue in any future year. In Korea, the PPP investment is 10-15 per cent of total public investment. In Greece, the current payments of approved PPP projects account for 6-7 per cent of its Public Investments Program and are expected to reach 10-12 per cent in 5 years, and ultimately capped at a limit of 15 per cent.

4. Potential for Annuity based PPPs in India

4.1 In the UK, GBP 69.24 billion (Rs. 5.12 lakh crore) have been invested through annuity-based PPP in 902 projects, of which 696 projects are operational. In India, however, annuity projects have so far been implemented only in the national highway sector.

4.2 The Ministry of Road Transport and Highways (MoRTH) has undertaken 30 PPP (Annuity) projects through NHAI for a capital cost of Rs.14,986 cr. MoRTH has also adopted the annuity mode for projects in the North-East and J&K where toll revenues would be far too low to sustain the construction and O&M costs.

4.3 PPPs based on annuity or unitary charge can be extensively undertaken for construction and maintenance of infrastructure and related services in the social sectors where user charges cannot be recovered for sustaining the investments. Such PPP projects could include government accommodation, education (school and higher), hospitals, jails, etc where the annuity payments/unitary charge are not linked to user charges. The Ministry of HRD has already proposed establishment of 2,500 model schools under the PPP mode. Several initiatives in different sectors have also been initiated by the respective State Governments.

5. Budgetary implications of Annuity projects

5.1 As distinct from an annuity based project, a PPP project which is sustained by user charges does not normally impose a recurring burden on the budgetary resources. Hence, PPP projects based on user charges imply an additionality of resources. By comparison, an annuity-based project does not have a revenue stream of its own and must essentially rely on payments out of budgetary allocations over the years. The mere fact that these commitments can be made 'off-budget' for the present should not lead to excessive annuity commitments that would pre-empt future budgetary resources.

5.2 Annuity based projects require well-considered decisions about long-term service delivery requirements. The financial commitments entered into for the life of the contract not only include the cost of physical assets, but also of a guaranteed service to specified performance levels. The annuity payments would, therefore, have to cover the cost of capital as well as the cost of operation and maintenance of the project. Under a conventionally procured project too, the public sector would have to bear similar costs in the form of budgetary expenditure on a year to year basis. In the past, capital has often been invested through conventional contracts without a clear commitment to adequate future spending on maintenance, leading to poorly maintained assets, inefficient service provision and premature replacement. In contrast, PPPs invest in the future because they ensure that assets are maintained properly, but this may tend to increase the total cost to the exchequer. On balance, the annuity approach offers some advantages as compared to the conventional mode of procurement.

5.3 In the case of annuity based PPP projects, the annuity commitments would create a burden on the future budgets over a long period of time as compared to conventional contracts where the capital costs have to be budgeted upfront. As a result of annuity commitments, the budgets for several years would become inflexible to the extent of these commitments. It is, therefore, important to determine the extent to which the future budgetary options should be restricted due to liabilities undertaken for the present.

6. Impact on fiscal deficit

6.1 Government of India has consistently followed a path of fiscal prudence which includes reduction in fiscal deficit as well as in the proportion of borrowings to GDP. As at present, the total public debt as a proportion of GDP is 51.1 per cent. For 2009-10, the debt servicing burden of the Central Government, as a percentage of the total expenditure in the annual budget, has been estimated at 34.8 percent. Further, interest payments constitute about 30 per cent of the revenue receipts of the Central Government. This is a fairly high debt burden, by any standards.

6.2 The 12th Finance Commission had recommended that the Centre's interest payments relative to revenue receipts should reach about 28 per cent by 2009-10. In the case of States, the level of interest payments relative to revenue receipts should fall to about 15 per cent by 2009-10. In actual terms, the Centre's interest payment relative to the revenue receipts (as per RE of 2009-10) are 29.81 per cent. The 13th Finance Commission has projected that with the augmentation of revenue receipts fuelled by growth, the interest component will in effect come down to 20 per cent of the total revenue receipts by 2014-15.

6.3 In such a scenario, the proliferation of annuity based contracts would tend to neutralise the improved fiscal balance on account of reduction in debt service liability and add further to the budgetary liability of Government of India. It is, therefore, necessary to prescribe a safeguard ceiling for annuity based PPP projects of each Department so as to restrict the fiscal commitment of the government to a sustainable level for maintaining fiscal stability while at the same time enabling the departments to take up a reasonable programme through annuity-based PPP projects.

7. Possible options for fixing ceilings

7.1 For striking a balance between fiscal stability on the one hand and the need for accelerating development through the PPP (annuity) projects on the other hand, the following departmental caps, individually and collectively, could be considered while approving an annuity project.

(a) The sum of total annuity commitments for a particular grant or scheme of the Department for the next five years should not exceed 25 per cent of the current Five Year Plan outlay for such grant or scheme of the Department. For example, if the allocation for a particular scheme of a Department under the current Five Year Plan is Rs. 20,000 crore, its committed annuity payments for the next five years should not exceed Rs. 5,000 crore. This would ensure that enough resources are available for future programmes.

(b) Assuming that the annual plan outlay of a Department would increase at a CAGR of 10 per cent, the annuity commitments that may be made in any one year should not lead to outflows of more than 20 per cent of the projected Annual Plan outlays for the respective grant or scheme in any subsequent year. For example, if the projected annual plan outlay in the third year from the current year is Rs. 10,000 crore, the maximum annuity commitments from all projects awarded during and before the current year should not exceed Rs. 2,000 crore per annum in the said third year. This discipline would ensure a gradual roll-out of PPP projects within prudent financial limits.

(c) In any given year, the annuity projects awarded should not involve a total capital expenditure exceeding the total Plan outlay of that grant or scheme for that year. For example, if the Annual Plan allocation for any grant or scheme of a department is Rs. 10,000 crore, then the annuity projects awarded in that year under such grant or scheme should not involve a total capital investment of Rs. 10,000 crore. This would help avoid excessive bunching in the award of projects.

(d) For revenue projects such as in health, education etc., the revenue expenditure during the current Five Year Plan and for the following Five Year Plan period should be treated as Plan expenditure and should also be governed by the above ceilings.

(e) Some of Ministries/Departments, such as the Ministry of Home Affairs have a comparatively smaller Plan budget accompanied by a large Non-Plan budget. In such cases, it may be useful to look at the total budget (both Plan and Non-Plan) of a Department prior to fixing a limit for annuity projects under Plan and Non-Plan outlays. In the case of Non-Plan expenditure such as on modernisation of police, housing for police, accommodation for judiciary, jails, etc., the ceiling of annuity commitments may be fixed at 5 per cent of their annual Non-Plan budget or such lower proportion as the Department of Expenditure may determine from time to time.

(f) There may be schemes that acquire urgency during the course of a Five Year Plan and may require enhanced outlays in the current and subsequent Five Year Plans. In such cases, the aforesaid ceilings may have to be suitably increased. A Department seeking such enhanced ceilings may, in consultation with the Finance Ministry and the Planning Commission, submit its proposals for consideration of the Cabinet.

8. Plan and Non-Plan expenditure

8.1 Another issue which needs to be resolved is the charging of annuity payments to Plan and Non-Plan outlays. While the expenditure incurred on cash construction contracts is typically charged as Plan expenditure, annual maintenance payments over the years are normally booked as Non-Plan expenditure. Interest payments on borrowings used for funding such Plan expenditure are also typically booked as Non-Plan expenditure.

8.2 Annuity payments would normally include the cost of capital as well as the expenditure needed to operate and maintain the assets and to provide related services. In some cases, services may include catering, computer labs etc. In a typical PFI hospital in the UK, payments for services make up between 40 and 50 per cent of the unitary charge. For a typical PFI school project in UK, around 30 per cent of the unitary charge goes towards caretaking, maintenance and other services. If a project is built using conventional procurement, these future costs for services are not normally accounted for, monitored or disclosed, and they get added to the future budgets as and when required.

8.3 In the case of annuity projects in Europe, the entire budgetary allocation for such projects is provided by their respective Finance Ministries as they do not have any distinction between Plan and Non-Plan expenditure. However, this issue assumes significance in India because treating the entire annuity commitment as either Plan or Non-Plan would alter the present principles that determine this categorisation. On the one hand, the Department of Expenditure would typically wish to reduce the Non-Plan expenditure in order to contain the fiscal deficit in future years, categorising all annuity payments over a 15-20 year period would mean that several expenditures that would have normally moved over to the Non-Plan side would continue to be funded out of the Plan budget, thus reducing the room for taking up new projects in future.

8.4 By way of illustration, if the annuity payments for roads or hospitals are to be made entirely out of their respective Plan allocations for the entire concession period, the ability of the respective Departments to take up new projects in subsequent Five Year Plans would be correspondingly reduced or may even reach a negligible level whereas under the present arrangement, Plan projects taken up during a particular Five Year Plan typically shift to the Non-Plan side during subsequent Plan periods, thus vacating space in the Plan outlays for taking up fresh initiatives.

8.5 In case the entire annuity expenditure is booked on the Plan side, a Department that takes a long-term view would not opt for annuity projects as they would unduly reduce its Plan allocations in future years because interest payments and maintenance costs would also get included in the annuity payments spread over the concession period. On the other hand, a Department taking a short-term view may actually take on large annuity commitments leaving little room for new projects in future while hoping that its successors would alter the balance of allocations and manage to usurp some allocations from other Departments in order to take up new projects. Either of the two approaches would be sub-optimal and may arise primarily because of the attempt to book all annuity payments as Plan expenditure.

8.6 A rational approach would seem to suggest that the allocation of annuity payments to Plan or Non-Plan expenditure should not be used as an occasion to alter the present balance as that would raise larger questions beyond the scope of the present exercise. The Task Force, therefore, took the view that an effort should be made to maintain the existing rationale which allows Plan expenditures to be shifted to Non-Plan in due course. If this is not done, the future Plan allocations of individual Departments would be crowded out by past annuity commitments, thus restricting their ability to take up new schemes.

8.7 One option could be that the annuity payments for a specified period, say five years, are charged to Plan expenditure. Another option could be to quantify the total capital cost of a project and treat the annuity payments equivalent to such cost as Plan expenditure. This would include financing costs such as interest during construction (IDC) and price contingencies, which are otherwise funded out of non-Plan allocations. The balance annuity payments could be made from Non-Plan allocations. For the revenue expenditure component of annuity payments, all payments during the current Five Year Plan could be treated as Plan expenditure and thereafter booked as Non-Plan expenditure.

8.8 After considering all relevant factors, the Task Force recommends that all expenditure on annuity payments for the first ten years may be booked as Plan expenditure and thereafter shifted to the Non-Plan side. To give effect to this broad principle, projects that commence during the first three years of a Five Year Plan will be booked under the Plan head during the current Plan period and the subsequent Plan period. In effect, this would mean that such projects would be booked under Plan expenditure for 7 to 10 years depending on their year of commencement. Projects commencing in the last two years of the Plan period should be treated as Plan projects during the current Plan period and two subsequent Plan periods. In effect, such projects would be booked under Plan for 11 to 12 years.

9. Norms for approval of Annuity projects

9.1 As brought out above, PPP projects undertaken in the annuity mode are in the nature of deferred government spending. The entire funding for such projects is to be met out of government's budget although on a deferred basis. Hence, the total cost of such projects and the budgetary allocations for the same would need a scrutiny similar to the conventional projects so far as government expenditure is concerned.

9.2 In the UK, annuity based PPP projects have primarily been viewed as an alternative mode of procurement in substitution of the conventional contracts. The justification is that the conventional contracts do not capture the private sector efficiencies and life cycle costs of a project. As a result, they cause greater financial burden on the exchequer as compared to long-term annuity contacts. However, before the PPP mode is adopted, a careful evaluation is undertaken to establish that the government is likely to get the value for its money. This is normally described as a Value for Money (VfM) analysis. In addition, the government also applies a Public Sector Comparator to establish that the cost to the exchequer would be lower in the case of PPP-based procurement as compared to the conventional mode of procurement. Considering the practice followed in the UK, where the annuity approach has evolved over time, it should be evident that adoption of the annuity mode in respect of any project would be justified only if it saves public money. However, no such analysis is presently being done in India before approval or award of the annuity based projects.

9.3 A quick analysis of 12 projects (list at Annex-I) undertaken in the road sector during the last one year indicates that the annual annuity payments would be about 24 per cent of the Total Project Cost (TPC). In these projects, the TPC also includes interest during construction, contingencies etc. which are usually assumed as 25 per cent of the construction costs. If these are excluded, the construction cost will be 80 per cent of the TPC. In effect, what is being built under these annuity projects would have required a budgetary allocation equal to 80 per cent of the TPC had the conventional mode been adopted. Under the annuity mode, however, about 96 per cent of the TPC of these road projects would have to be paid out of budgetary allocations in the first four years after completion of construction. Though this comparison has to be adjusted for some relevant factors, the basic point which emerges is that the budgetary payout in the first four years after construction will be almost equal to the TPC and for the remaining about 10-14 years, the government would still continue to bear an annual outgo of 24 per cent of the TPC. This is evidently a high cost to bear.

9.4 This issue is not confined to highway projects alone. In case of the residential projects being undertaken by Ministry of Home Affairs for Central Para Military Forces, the cost of construction of 5 clusters is expected to be Rs. 2,488 crore and the annual annuity commitment as projected by the consultants is Rs. 600 crore or 24.1 per cent of construction cost.

9.5 As against the above examples of high levels of annuity commitments, in recently bid out transmission project in Haryana, the annuity payment is Rs. 54 crore against a TPC of Rs. 287.5 crore. This would reduce by 3 per cent p.a. over the concession period. At the stage of award, the annuity commitment constitutes about 18 per cent of the TPC, but the average over a 25 year concession period would be less than 16 per cent.

9.6 A close scrutiny of the aforesaid annuity payments in different sectors seems necessary to arrive at some broad conclusions relating to the cost that may be acceptable to the government for procurement through the annuity mode. By way of a simple illustration, if a housing loan is borrowed with a repayment period of 15 years, the annual outgo would be about 12 per cent of the borrowed amount. However, the annuities being paid by the government in the case of road projects are, on an average, about 24 per cent of TPC (refer para 9.4 above). These annuity payouts also include the maintenance costs and concessionaire's profit. The gap between the annuity payments for the road projects and the annual repayment for a housing loan appears to be 12 per cent and the question that arises is whether this gap of 12 per cent per annum for a period of 15 years is a justified financial burden that the government should agree to bear against the likely maintenance costs and the concessionaire's profits. It is also relevant to note here that annuity projects do not carry much financing or commercial risk and as a result, the risk premium should be quite low. *Prima facie,* therefore, this does not seem to represent value for money.

9.7 It would, therefore, be in public interest if projects are taken up through the annuity mode only after it is established through the VfM analysis in each case that the annuity mode of delivery will yield a more efficient and cost-effective outcome. In addition to the VfM analysis, the Public Sector Comparator should also be applied as a tool for evaluating whether the annuity mode of procurement would be more advantageous as compared to the conventional mode. In making these comparisons, the Net Present Value (NPV) should be worked out using a suitable discount rate to be fixed with due regard to the cost of borrowings by the Government.

9.8 It is possible that owing to the prevalent risk perception, high interest rates, return requirements or the project structure, the costs of an annuity project do not represent value for money from the government's perspective. In such a situation, the conventional contracts based on 'item rates' need not necessarily be viewed as the only alternative. An effort should be made to explore the possibilities of an EPC contract based on the turnkey or lump sum approach. Such EPC contracts can capture most of the advantages of an annuity project and yet provide a comparatively economic option compared to a high-cost annuity project.

10. Standards and Specifications

10.1 The deferment of payment liability should not lead the project authorities to view the annuity mode as a means of procuring higher standards compared to those prevailing under the conventional mode. Any move that leads to more expensive specifications and standards would only add to future budgetary commitments. As such, there should be a clear mandate that the annuity mode would rely on the same standards as are applicable to the conventional mode. Deviations, if any, should be clearly justified and adopted with approval of the competent authority after assessing their cost implications.

11. Disclosure of annuity contracts

11.1 The nature of liabilities created by annuity payments is similar to that of borrowings, as both require repayments spread over a long period (10-15 years or even longer). Hence, it is imperative that the treatment accorded to annuities in fiscal management should be similar to that accorded to borrowings. As such, annuity commitments, like borrowings, should be subject to hard budgetary constraints.

11.2 In the UK, since PFI transactions lead to long-term commitments on annuity payments which will have an impact on future spending plans, the Government has taken steps to ensure that Parliament is fully informed of the extent of the estimated commitments. This information is laid before the Parliament at least twice a year. The Treasury Task Force has issued guidance, in consultation with the National Audit Organisation, on the arrangements for the reporting of information on PFI projects to the Parliament.

11.3 The Government of UK publishes its estimates of the unitary charge payments – single annual payments made by the procuring authority to the private sector which cover all the costs, both capital and service, of PFI projects – to be made under all signed PFI contracts in the Financial Statement and budget Report. These payments represent the full price of the specified facility being made available and cover all costs over the life of the contract. These Departmental commitments of future revenue are monitored by Government, included in consideration of future budgets and therefore, taken into account by Departments in deciding how much of PFI investment to undertake. In addition to the provision of general information on future commitments, the guidance sets out the need for procuring authorities to inform Parliament of projects where contracts contain clauses which depart from those set out in the Standardisation of PFI contracts, in addition to those which give rise to reportable contingent liabilities.

11.4 The 13th Finance Commission has also deliberated on this issue in its Report. The relevant extracts of the Report of the 13th Finance Commission (Chapter 9) are reproduced below.

It is important that contingent liabilities be reported fully and that adequate provisioning be made for such liabilities. We have recommended modification of the fiscal rule that limits government guarantees. The public sector as a whole is vastly enhancing its use of the Public Private Partnership (PPP) mode for project financing. This frees valuable fiscal space for the provision of public goods in areas where such finance is unlikely to be forthcoming.

We welcome this trend of private participation in the public sector. We also recognize that PPPs create explicit and implicit obligations on the part of the public entity that is party to them so that, in the final instance, they become contingent liabilities of the Government of India. The fiscal fallout of such partnerships could reflect on the health of the aggregate balance sheet of the public sector and may create demands for enhanced budgetary support to the public sector entities contracting such liabilities. Explicit contingent liabilities, which may be in the form of stipulated annuity payments over a multi-year horizon, should be spelt out. Implicit contingent liabilities in this context are obligations to *compensate the private sector partners for contingencies such as changes in specifications, breach of obligations and/or early contract termination for force majeure. These are relatively difficult to quantify. We think that the FRBM Act should stipulate these contingent liabilities.*

11.5 In view of the above, it is proposed that the actual annuity commitments that are entered into by a Ministry/ Department should be compiled by the Budget Division of Finance Ministry annually and the statement of annuity commitments may be depicted transparently in the budget documents. Any preferential financing provided through government on-lending or via public financial institutions should also be disclosed. Further, any project financing or off-balance sheet project support provided by entities owned or controlled by government which may give rise to contingent liabilities should also be stated. Further, a separate object head for ease of accounting of annuity pay-outs should also be created.

12. Recommendations

12.1 In the interests of efficiency and accelerated development, it seems necessary to encourage annuity based projects, especially in the social sectors where user charges cannot sustain these investments. However, such projects should be undertaken only if they satisfy the following criteria.

12.2 A study of annuity projects should be undertaken based on current data of NHAI and other sectors to assess its success in comparison with other countries and to assess our inability to get good offers.

12.3 *Value for Money (VfM):*

Each project should be subjected to a VfM analysis to establish that the likely annuity payments are justified and offer value for money. The methodology for VfM analysis should be fair and transparent. A Public Sector Comparator should also be applied to establish and ensure that the cost of a PPP project to the exchequer is lower than the cost under a conventional contract, duly adjusted for the cost of capital and O&M expenses.

12.4 EPC/ Turn-key contracts:

It is possible that owing to the prevalent risk perception, high interest rates, return requirements or the project structure, the costs of an annuity project do not represent value for money from the government's perspective. In such a situation, the conventional contracts based on 'item rates' need not necessarily be viewed as the only alternative. An effort should be made to explore the possibilities of an EPC contract based on the turnkey or lump sum approach. Such EPC contracts can capture most of the advantages of an annuity project and yet provide a comparatively economic option compared to a high-cost annuity project.

12.5 Ceiling on annuity commitments

Commitments for annuity payment by each Department may be made subject to the following ceilings to be applied individually and collectively to all annuity projects:

(a) The sum of total annuity commitments for a particular grant or scheme of the Department for the next five years should not exceed 25 per cent of the current Five Year Plan outlay of such grant or scheme of the Department. For example, if the allocation for a particular scheme of a Department under the current Five Year Plan is Rs. 20,000 crore, its committed annuity payments for the next five years should not exceed Rs. 5,000 crore. This would ensure that enough resources are available for future programmes.

(b) Assuming that the annual plan outlay of a Department would increase at a CAGR of 10 per cent, the annuity commitments that may be made in any one year should not lead to outflows of more than 20 per cent of the projected Annual Plan outlays for the respective grant or scheme in any subsequent year. For example, if the projected annual plan outlay in the third year from the current year is Rs. 10,000 crore, the maximum annuity commitments from all projects awarded during and before the current year should not exceed Rs. 2,000 crore per annum in the said third year. This discipline would ensure a gradual roll-out of PPP projects within prudent financial limits.

(c) In any given year, the annuity projects awarded should not involve a total capital expenditure exceeding the total Plan outlay of that grant or scheme for that year. For example, if the Annual Plan allocation for any grant or scheme of a department is Rs. 10,000 crore, then the annuity projects awarded in that year under such grant or scheme should not involve a total capital investment of Rs. 10,000 crore. This would help avoid excessive bunching in the award of projects.

(d) For revenue projects such as in health, education etc., the revenue expenditure during the current Five Year Plan and for the following Five Year Plan period should be treated as Plan expenditure and should also be governed by the above ceilings.

(e) Some of Ministries/Departments, such as the Ministry of Home Affairs have a comparatively smaller Plan budget accompanied by a large Non-Plan budget. In such cases, it may be useful to look at the total budget (both Plan and Non-Plan) of a Department prior to fixing a limit for annuity projects under Plan and Non-Plan outlays. In the case of Non-Plan expenditure such as on modernisation of police, housing for police, accommodation for judiciary, jails, etc., the ceiling of annuity commitments may be fixed at 5 per cent of their annual Non-Plan budget or such lower proportion as the Department of Expenditure may determine from time to time.

(f) There may be schemes that acquire urgency during the course of a Five Year Plan and may require enhanced outlays in the current and subsequent Five Year Plans. In such cases, the aforesaid ceilings may have to be suitably increased. A Department seeking such enhanced ceilings may, in consultation with the Finance Ministry and the Planning Commission, submit its proposals for consideration of the Cabinet.

(g) Any project which has been approved upto October 2010 will not be reviewed on the ground that it exceeds the above ceilings.

12.6 Plan and Non-Plan outlays

All expenditure on annuity payments for the first ten years may be booked as Plan expenditure and, thereafter, shifted to the Non-Plan side. To give effect to this broad principle, projects that commence during the first three years of a Five Year Plan will be booked under the Plan head during the current Plan period and the subsequent Plan period. In effect, this would mean that such projects would be booked under Plan expenditure for 7 to 10 years depending on their year of commencement. Projects commencing in the last two years of the Plan period should be treated as Plan projects during the current Plan period and two subsequent Plan periods. In effect, such projects would be booked under Plan for 11 to 12 years.

12.7 *Standards and Specifications*

The standards and specifications to be adopted for annuity projects should be similar to those followed for similar conventional contracts. The deferment of payment liability should not lead to more expensive specifications and standards as that would only add to budgetary commitments.

12.8 *Disclosure of annuity commitments*

The actual annuity commitments entered into by all the Departments may be compiled by the Budget Division of Finance Ministry annually and the statement of annuity commitments may be depicted transparently in the budget documents. This would conform to the recommendations of the 13th Finance Commission. Creating an object head for ease of accounting of annuity pay-outs may also be considered.

12.9 *Treatment of annuity commitments as debt*

Annuity projects imply a committed liability for annual payments over the concession period. These are akin to debt service or charged expenditure because annuity payments are a form of deferred budgetary liability. As in the case of debt, the Finance Ministry would review the annuity commitments from time to time and lay down further ceilings as may be necessary in the interest of prudent fiscal management.

Annex-1

List of Annuity Projects awarded since March-2009						
Sl.No	**Name of the Project**	**Length** (in km)	**EIRR (%)**	**Annual Annuity Commitment** (Rs. crore)	**TPC** (Rs. crore)	**Annuity as % of TPC**
1	Jammu - Udhampur	65	23.2	403	1,814	22.22
2	Quazigund - Banihal	15	22.37	490	1,987	24.66
3	Patna - Muzzaffarpur	60	28.38	189	672	28.13
4	Haridwar - Dehradun	39	20	106	478	22.18
5	Hazaribagh - Ranchi	75	18.31	128	625	20.48
6	Chhapra - Hazipur	65	16.84	131	575	22.78
7	Forbesganj - Jogbani	9	16.4	14	74	18.92
8	Jorbat – Shillong	62	22.54	145	536	27.05
9	Chenani to Nashri	12	22.66	635	2,519	25.21
10	Mokama - Munger	69	20.85	80	351	22.79
11	Nagpur - Betul	174	17.98	582	2,499	23.29
12	Muzaffarpur - Sonbarsa	86	15.27	105	512	20.51
13	Srinagar - Banihal Section	67	20.62	270	1434	18.83
Total				**3,278**	**14,076**	**23.29**

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Guidelines on

Institutional Mechanism for Monitoring of PPP Projects

Published by
PPP & Infrastructure Division
Planning Commission, Government of India
Yojana Bhawan, Parliament Street
New Delhi – 110 001

www.infrastructure.gov.in

Contents

Foreword

Traditionally, infrastructure has been financed through public funds. During the past few years, however, private participation in financing and operation of infrastructure projects has increased rapidly and as a result, the share of private investment in the total investment in infrastructure has risen from 22 per cent in the Tenth Plan to 38 per cent in the Eleventh Plan and is expected to reach about 47 per cent during the Twelfth Plan. In particular, a large number of projects in highways, ports, airports, urban development, railways and other sectors have been undertaken through Public Private Partnership (PPP).

PPP projects are typically based on long term concession agreements which specify outputs such as quality of service and performance standards that have a direct bearing on users of such projects. These agreements normally empower the concessionaires to use public assets for building projects and to collect statutory user charges for provision of infrastructure services. As such, these projects continue to be public projects even though private entities make investments and undertake delivery of specified services against payment of user charges.

A contract is as good as its enforcement. Hence, the purpose of a well structured concession can be defeated if the terms of the contract are not enforced. If deficiencies in the performance of concessionaires are not addressed in an institutionalised manner, criticism of poor delivery will be legitimately directed towards the government and it will be difficult to defend such criticism. The Guidelines issued by the Government for setting up an institutional mechanism to monitor PPP projects respond to the need for ensuring compliance of the terms of the concession agreements with the objective of safeguarding the interests of the public exchequer and the user.

While a number of PPP projects have been awarded in different sectors, and many more are in the pipeline, most of the project authorities have not yet created an institutional mechanism for monitoring these projects with a view to enforcing the obligations of the concessionaires, especially with respect to the quality of service and compliance with terms that have a bearing on public interest. This could lead to situations where government and user interests are compromised, which must to be avoided.

These Guidelines have been approved by the Cabinet after extensive inter-ministerial consultations. The institutional structure envisaged under these Guidelines requires the creation of a two-tier mechanism for monitoring PPP projects. A Monitoring Unit would be set up at the project level while a PPP Performance Review Unit would be constituted at the level of the Ministry or the State Government, as the case may be. Monitoring is to be carried out primarily through a reporting mechanism. The

Monitoring Reports for each project would include compliance of contract terms, adherence to time lines, assessment of performance, remedial measures and imposition of penalties. Non-compliance with the terms of concession agreements would be reported by the respective Ministries to the Planning Commission and Finance Ministry once every quarter for preparing a consolidated report to be placed before the Cabinet Committee on Infrastructure.

It is expected that the concerned Ministries and project authorities will establish the aforesaid institutional arrangements with the objective of ensuring that the concessionaires of PPP projects provide efficient and cost effective services consistent with the principles of good governance, accountability and efficiency.

(Montek Singh Ahluwalia)
Deputy Chairman,
Planning Commission

August 1, 2012

F.No.-14011/09/2008-Infra (Part-II)
Government of India
Planning Commission
(PPP & Infrastructure Division)

Yojana Bhavan, New Delhi
Dated, the 08th August, 2012

OFFICE MEMORANDUM

Subject: Institutional Mechanism for Monitoring of PPP projects – regarding.

Pursuant to the approval of the Cabinet Committee on Infrastructure (CCI), and in supersession of OM No. N-14070/10/2009-Infra dated May 08, 2009, the undersigned is directed to convey the Guidelines for an Institutional Mechanism for Monitoring of Public Private Partnership projects (the "PPP Projects") to be followed by all Ministries, Departments, statutory authorities and Public Sector Undertakings (the "Project Authorities"). These Guidelines shall also apply to all State projects that receive Viability Gap Funding (VGF) from the Central Government.

2. Context

2.1 PPP projects are typically based on long term concession agreements which specify clear and distinct outputs, such as quality of service and quantifiable performance standards that have a direct bearing on the users of such projects. These agreements normally empower the concessionaire to use public assets for building infrastructure projects. The concessionaire is also empowered to levy and collect user charges for the use of public assets. However, the Government always remains responsible and accountable for delivery of services to the users. These projects, therefore, require close monitoring by the Government with a view to ensuring that the provisions of the respective concession agreements and the applicable laws are enforced.

2.2 In managing a PPP Project, the Government should aim at ensuring that the services being delivered to the users meet the agreed time, cost, quantity and quality standards. It is, therefore, necessary to create a well-defined institutional structure that oversees contract performance effectively. For this purpose, the requirements of monitoring and enforcement of the contract terms need to be fully understood and

addressed in respect of each concession agreement.

3. Need for Guidelines

3.1 The aforesaid Guidelines respond to the need for establishing an institutional framework that would ensure compliance of the contractual framework contained in the concession agreements for PPP Projects mainly with a view to safeguarding the interests of the public exchequer and the users. While a number of PPP projects have been awarded in different sectors, and many more are in the pipeline, most of the Project Authorities have not yet created an institutional mechanism which monitors such projects for enforcing the obligations of the concessionaires, especially with respect to the quality of service as well as the user charges. This could lead to a situation where government and user interests are compromised due to inadequate compliance of the terms of the contract.

3.2 All Project Authorities are, therefore, advised to follow these Guidelines for monitoring their respective PPP projects, which are based on agreements between the Project Authority on the one side and a private entity on the other side, for delivering an infrastructure service on payment of user charges, tariff or annuity. These Guidelines may also be adopted for PPP Projects in social sectors where similar monitoring and enforcement is necessary. The key features of the Guidelines are outlined below.

4. Institutional Framework

4.1 The monitoring mechanism for overseeing implementation of the agreed terms and delivery of specified services should be capable of ensuring that the concessionaire carries out its obligations in accordance with the concession agreement, especially with regard to the provisions that affect user interest and the public exchequer. It should also be ensured that the medium and long-term objectives are clearly identified and pursued.

4.2 To enable a concessionaire to perform its obligations, a concession agreement also provides for certain obligations to be performed by the Project Authority. The monitoring mechanism should also oversee the performance of the obligations of the Project Authority with a view to ensuring that it is not in breach of the contract.

4.3 The Project Authorities may create a two-tier mechanism for monitoring the performance of PPP Projects. This should consist of:

- **PPP Projects Monitoring Unit (PPP PMU)** at the Project Authority level; and

- **PPP Performance Review Unit (PPP PRU)** at the Ministry level; or State Government level, as the case may be.

4.4 The PPP PMU and PPP PRU should be associated with the respective PPP projects as early as possible preferably at the award stage itself.

5. Monitoring Reports

5.1 Monitoring by the PMU should, inter alia, cover the following aspects to be summarised in a monthly 'PPP Project Monitoring Report' which should be submitted to the PPP Performance Review Unit within 15 days of the close of the relevant month:

(a) Compliance of the conditions precedent and achievement of financial close within the period specified in the concession agreement;

(b) adherence to the time lines and other obligations specified in the concession agreement;

(c) streamlining of, and adherence to, the reporting procedures between the concessionaire and the project authority, which may also include an MIS;

(d) assessment of performance against laid down standards;

(e) remedial measures and action plan for curing defaults, especially when performance standards are not fulfilled;

(f) imposition of penalties in the event of default;

(g) levy and collection of user charges based on approved principles;

(h) progress of on-going disputes and arbitration proceedings, if any; and

(i) compliance with the instructions of the project authority or Independent Engineer, as the case may be.

5.2 The PPP PRU should review the PPP Project Monitoring Reports submitted by the different PMUs and oversee or initiate action for rectifying any defaults or lapses. The PRU should also prepare quarterly reports on the status of such PPP Project. These reports should, in particular, focus on any non-compliance relating to the provisions of the relevant contract, especially in terms of the standards of performance or loss to the public exchequer and the users. It should clearly indicate the steps taken or required to be taken by the Project Authority in accordance with the provisions of the relevant contract. The PRU will submit its quarterly report to the competent authority. The quarterly report should include:

(a) a compliance report regarding implementation of the various PPP projects as per the provisions of the respective contracts;

(b) an 'Exception Report' highlighting issues where remedial action is to be taken for enforcing the provisions of the respective contracts;

(c) a review of the grievances of users and the manner and extent of their redressal; and

(d) matters affecting the interests of the public exchequer in relation to the expenditures and revenues arising from the PPP project.

5.3 The PPP Performance Review Unit should cause to be conducted an evaluation of the project performance, including a social audit wherever applicable, once every two years.

5.4 Illustrative formats of the Reports to be submitted by PPP PMU and PPP PRU are at Annex- I and II of the Guidelines. These are indicative in nature and meant for guidance of the PRUs who are expected to evolve the required formats for each project separately.

5.5 The respective Ministries are advised to send a quarterly compliance report to the Planning Commission with a copy to the Ministry of Finance. Planning Commission, in consultation with the Ministry of Finance, will prepare a summary of these reports, along with recommendations relating to further action/ improvements, which would be placed before the Cabinet Committee on Infrastructure (CCI) once every quarter.

6. Sanction of manpower

Central Ministries/ authorities dealing with a large number of PPP projects may consider obtaining sanction for additional manpower for manning the PPP PMUs and the PPP PRUs.

7. Conclusion

7.1 The process of performance monitoring needs to be dynamic and under constant review because project circumstances undergo a change over time due to the long duration of PPP contracts.

Since the accountability for providing infrastructure services primarily rests with the government, and the concessionaire is only a grantee of the government who acts in accordance with the terms of the concession, it is the responsibility of every Project Authority to safeguard user interests and the public exchequer. The monitoring mechanism is only a tool for ensuring that the objective of each PPP Project is fulfilled. The Project Authorities are, therefore, advised to ensure appropriate project-specific monitoring arrangements to ensure compliance of the above.

7.2 It may please be noted that these Guidelines are generic in nature, and meant to assist the Project Authorities in evolving their own institutional mechanism. The Project Authorities may, if deemed necessary, suitably strengthen or augment the suggested mechanism for ensuring that the objectives of PPP Projects are fully realised.

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7. Secretary, Department of Health & Family Welfare, Nirman Bhawan, New Delhi
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Guidelines for an Institutional Mechanism for Monitoring of PPP Projects

Background

1.1 In its development strategy, the Government has recognised that adequate, cost- effective and quality infrastructure is a pre-requisite for sustaining the growth momentum. Infrastructure development is capital intensive and requires huge resources. Traditionally, infrastructure has been largely funded through public investment. However, in view of limited budgetary allocations and lack of capacity within the government to implement large scale expansion of infrastructure, the strategy of the government has relied significantly on promoting investment through a combination of public investment and private participation. Private participation in the provisioning of infrastructure has grown significantly from 22% in the Tenth Plan to 38% in the Eleventh Plan and expected to go up further to 47% during the Twelfth Plan. A number of projects have been rolled out in highways, ports, urban development, railways, airports and other sectors through the Public Private Participation (PPP) mode. Development of PPP projects has been initiated in the social sectors as well.

1.2 PPP projects are typically based on long term concession agreements which specify clear and distinct outputs, such as quality of service and quantifiable performance standards that have a direct bearing on the users of such projects. These agreements normally empower the concessionaire to use public assets for building infrastructure projects. The Concessionaire is also empowered to levy and collect user charges for the use of public assets. However, the Government always remains responsible and accountable for delivery of services to the users. These projects, therefore, require close monitoring by the Government with a view to ensuring that the provisions of the respective concession agreements and the applicable laws are enforced.

Role of Government

2.1 The primary responsibility for providing services to the users would always rest with the Government and the concessionaire can only be regarded as a grantee of the Government for delivery of specified services on behalf of the Government. This is especially so because infrastructure projects typically provide non-discriminatory services that are regarded as public goods. Moreover, such projects are often monopolistic in character and, therefore, require government intervention for preventing user exploitation. In effect, PPP infrastructure projects are public projects in which private capital is being deployed for the benefit of the economy and the users. In case services of requisite standard are not provided to the public, it would give rise to legitimate criticism of the Government and even allegations of collusion between the project authority and the concessionaire.

2.2 In managing a PPP Project, it is critical for the Government to ensure that the services being delivered to the users meet the agreed time, cost, quantity and quality standards. It is, therefore, necessary to create a well-defined institutional structure that oversees contract performance. For this purpose, the requirements of monitoring and enforcement of the contract need to be fully understood and addressed prior to the execution of the concession agreement.

Oversight during implementation

3.1 For ensuring that the ultimate objective of a PPP project is achieved, implementation of the terms of the concession agreement needs to be monitored and enforced. While detailed guidelines have been laid down for award of PPP projects, the institutional mechanism for monitoring and enforcement of PPP contracts are yet to be specified. Such monitoring must address the two phases of a PPP contract viz. (a) construction phase; and (b) operations or O&M phase.

3.2 During the construction phase, project authorities are typically assisted by an Independent Engineer who inspects the project regularly and submits its reports. While this arrangement helps in monitoring the construction aspect, it may not address some of the other important obligations of the Concessionaire. Arrangements for regular monitoring during the Operations phase are also deficient, and even non-existent in many cases. Experience suggests that in many cases, the project authorities do not pay adequate attention to the monitoring and enforcement of the respective agreements with a view to safeguarding the public exchequer and the user interest. This is compounded by the fact that the project teams often change after execution of the concession agreement and the new teams do not have sufficient time, knowledge or expertise to enforce compliance of contractual terms. As a result, user interests and the public exchequer are exposed to avoidable exploitation.

Nature and content of oversight

4.1 Among the contractual obligations specified in the respective concession agreements, the following deserve to be identified and enforced on priority:

(i) satisfying the conditions precedent and milestones, as laid down in the concession agreement;

(ii) construction of the project as per specified time-schedule and agreed standards;

(iii) levy of user charges strictly within the limits specified in the concession agreement;

(iv) protection of user interests by ensuring that performance standards, safety and other requirements are adhered to;

(v) preventing misuse of public assets transferred to the concessionaire;

(vi) preventing any leakage, diversion or mis-classification of government revenues;

(vii) imposing and recovering penalties for breach of contract;

(viii) operating the escrow account in accordance with the terms of the concession agreement;

(ix) effective communication and exchange of information for monitoring and enforcement of obligations;

(x) placing all relevant information relating to user and performance standards in public domain;

(xi) overseeing the redressal of user grievances; and

(xii) supervision of the functioning of the Independent Engineer with a view to ensuring that it is discharging all its duties.

Concession Agreements

5.1 Planning Commission has published several Model Concession Agreements (MCAs) with the objective of specifying an appropriate balance of risks and obligations and also for establishing a faster rollout of PPP projects in a fair and transparent manner. The framework that has been evolved in the MCAs is comprehensive and conforms to internationally accepted principles and best practices. In sectors that do not have duly approved MCAs, the project-specific concession agreements should adopt similar provisions. Some of the provisions in the Model Concession Agreement, which help improve project monitoring and dissemination of information, are illustrated below.

Role of the Independent Engineer

5.2 In all the MCAs, the role of contract supervision is discharged by the Independent Engineer. Its functions include review, inspection and monitoring of construction works, examining the designs and drawings for their conformity with the concession agreement and conducting tests and issuing completion certificates during the construction period. During the operation period, the Independent Engineer is expected to monitor compliance with the performance and maintenance standards. The Independent Engineer is expected to identify delays and lapses that require action on part of the government for enforcing the terms of the agreement.

5.3 The role of Independent Engineer is mainly restricted to technical matters. Issues relating to legal, financial, real estate, revenue and other incidental matters do not typically fall in the domain of the Independent Engineer. It would, therefore, be necessary for project authorities to monitor these aspects.

Dissemination of Information

5.4 Infrastructure projects provide public goods and services. As such, the project documents have a direct bearing on public and user interests. The MCAs, therefore, require all the project documents to be placed in public domain.

5.5 In addition to the above, the project authorities should also disseminate information relating to compliance with agreed performance standards so that the users are aware of the compliance of agreed standards for which they are paying user charges. Once the data flow builds up, the project authorities may also get the performance rated by independent agencies and place it on their website.

Guidelines for Monitoring of PPP projects

6.1 These guidelines should be followed for monitoring all Public Private Partnership (PPP) projects which are based on a concession agreement between a Government or statutory entity on the one side and a private sector company on the other side, for delivering an infrastructure service on payment of user charges, tariffs or annuity from the government. These Guidelines may also be adopted for PPP projects in social sectors where similar monitoring and enforcement is considered necessary.

6.2 The Guidelines shall apply to all PPP projects sponsored by Central Government Ministries and statutory authorities. The proposed mechanism should also be followed for State projects that seek Viability Gap Funding from the Central Government.

Institutional Framework

7.1 As the PPP programme develops across sectors, a mechanism to monitor and enforce implementation of the agreed terms and delivery of services would need to be institutionalised. The mechanism should be capable of ensuring that the project authority and the concessionaire carry out their obligations in accordance with the respective concession agreement with a view to safeguarding the user interests and the public exchequer. It should also be ensured that the medium and long-term objectives are clearly identified and pursued.

7.2 A two-tier mechanism for monitoring the performance of PPP projects should be adopted as under:

(i) PPP Projects Monitoring Unit (PPP PMU) at the project authority level; and

(ii) PPP Performance Review Unit (PPP PRU) at the Ministry or State Government level, as the case may be.

7.3 The PPP PMU and PPP PRU should be involved in the respective projects as early as possible, preferably at the award stage itself. The above structure is in addition to the Independent Engineer who is expected to function independently and provide inspection reports for further action by the project authority and the concessionaire.

PPP Project Monitoring Unit

7.4 A PPP Project Monitoring Unit (PPP PMU) should be created at the project level for monitoring each PPP project. The PMU should be created at the level of the project authority or the government department which has granted the concession. The PMU should have sufficient capacity, resources and skills to oversee and monitor implementation of the PPP contract assigned to it. It may hire consultants to provide the requisite assistance as necessary. Where a number of projects are being executed, the project authority may choose to club 2-3 projects under a single PMU. Monitoring by PMU should, inter alia, cover the following aspects to be summarised in a monthly 'PPP Project Monitoring Report' which should be submitted to the PPP Performance Review Unit within 15 days of the close of the relevant month:

(a) Compliance of the conditions precedent and achievement of financial close within the period specified in the concession agreement;
(b) adherence to the time lines and other obligations specified in the concession agreement;
(c) streamlining of, and adherence to, the reporting procedures between the concessionaire and the project authority, which may also include an MIS;
(d) assessment of performance against laid down standards;
(e) remedial measures and action plan for curing defaults, especially when performance standards are not fulfilled;
(f) imposition of penalties in the event of default;
(g) levy and collection of user charges based on approved principles;
(h) progress of on-going disputes and arbitration proceedings, if any; and
(i) compliance with the instructions of the project authority or Independent Engineer, as the case may be.

7.5 At the beginning of each financial year, the PPP PMU, with the approval of PPP PRU, should finalise a format in which it shall submit its monthly report for each project. The format should be carefully prepared to include all the obligations of the concessionaire and the project authority, as specified in the concession agreement. It should serve as a check-list for ensuring that the provisions of the concession agreement are being complied with, in letter and spirit.

7.6 The Monthly Report should clearly bring out the compliance of the concessionaire and the project authority with respect to each and every item included in the aforesaid format and the concession agreement. The Monthly Report should also contain a summary which should highlight the items where a default has occurred or is likely to occur. The proposed action for rectifying the default should also be included in the summary. The intention should be to ensure that both the parties, public and private, perform their respective obligations in accordance with the concession agreement.

7.7 The PPP PMU should be manned by at least three officers, of which, at least one should be from the finance discipline. The head of the PPP PMU should be an officer of, at least, the rank of a Director/Deputy Secretary/Superintendent Engineer. The other two personnel could either be officers or consultants. It should be ensured that the personnel of PPP PMU spend at least two days at the project site during every two months and must interact with user representatives during such visits.

7.8 As an indicative norm, each PPP PMU may oversee two or three PPP projects with an aggregate project cost not exceeding Rs. 2,500 crore. In case of a large project, the PMU should only look after a single project. The respective Ministries may establish their own norms keeping in view the size and complexity of their projects.

PPP Performance Review Unit

7.9 A Performance Review Unit (PPP PRU), headed by an officer not below the rank of Joint Secretary should be set up at the level of the Central Ministry / State Government/ statutory entity for reviewing the monitoring of all PPP projects within its jurisdiction. In case a PPP cell exists in the respective Ministry/Department, it could be suitably strengthened for serving as the PRU. In case the PPP PRU is to review a number of PPP projects, it should preferably have a dedicated team with no other functions. The PRU may also hire consultants as necessary.

7.10 The PPP PRU should review the PPP Projects Monitoring Report submitted by the different PMUs and oversee or initiate action for rectifying any defaults or lapses. The PRU should also prepare quarterly reports on the status of the PPPs. These reports should have particular focus on any non-compliance relating to the provisions of the relevant contract, especially in terms of the standards of performance or loss to the public exchequer and the users. It should clearly indicate the steps taken or required to be taken by the project authority in accordance with the provisions of the relevant contract. The PRU will submit its quarterly report to the competent authority. The quarterly report should include:

(a) a compliance report regarding implementation of the various PPP projects as per the provisions of the respective contracts;

(b) an 'Exception Report' highlighting issues where remedial action is to be taken for enforcing the provisions of the respective contracts;

(c) a review of the grievances of users and the manner and extent of their redressal; and

(d) matters affecting the interests of the public exchequer in relation to the expenditures and revenues arising from the PPP project.

7.11 The PPP Performance Review Unit should cause to be conducted an evaluation of the project performance including a social audit, wherever applicable, once every two years.

7.12 The respective Ministries should send a quarterly compliance report to the Planning Commission with a copy to the Ministry of Finance. Planning Commission, in consultation with the Ministry of Finance, will prepare a summary of these reports, along with the recommendations relating to further action/ improvements, which would be placed before the Cabinet Committee on Infrastructure (CCI) once every quarter for the next two years.

Reporting Formats

8.1 An illustrative format of a PPP PMU monthly report to PPP PRU, based on the MCA for National Highway projects, may be seen at Annex –I. Format for Exception Reports by PPP PRU to competent authority is placed at Annex-II. These are only indicative in nature for the purpose of guidance and would have to be evolved for each project separately.

Sanction of Manpower

9.1 Central Ministries/ authorities dealing with a large number of PPP projects may consider obtaining sanction for additional manpower for manning the PPP PMUs and the PPP PRUs.

Conclusion

10.1 PPPs are long-term commitments by the concessionaires and project authorities. Their successful delivery will depend entirely on the performance of their respective obligations by the concessionaire and the authority. A sound and robust contract will fail to meet the desired objectives if it is not managed and monitored effectively. Moreover, documentation of the relevant communications, follow- actions and decisions relating to contract execution are critical to the delivery of these agreements since they help to ensure the accountability of the entire process. Inadequate attention to timely and appropriate action can not only compromise government and user interests, it can also give rise to disputes and claims in arbitration proceedings and courts of law.

10.2 The process of performance monitoring needs to be dynamic and under constant review because project circumstances undergo a change over time due to the long duration of PPP contracts. The above guidelines provide the mechanism by which this objective can be achieved

Annexes

Annex-I

Statement – I

Summary Sheet of the PPP PMU Report

(Based on MCA of National Highways)

Project: **Period:**

Issues requiring action by Project Authority:	Action taken by PMU	Action taken by the Authority
1. Timelines not met by the concessionaire (i) (ii) 2. Timelines not met by the Authority (i) (ii) 3. Performance Standards not met by the concessionaire (i) (ii) 4. Default in payments by the concessionaire/Authority (i) (ii) 5. Other issues which may lead to default on the part of concessionaire (i) (ii) 6. Other issues which may lead to default on the part of Authority (i) (ii)		

7. Issues under arbitration/litigation (i) (ii) 8. Potential issues for arbitration/litigation (i) (ii) 9. Brief comment on the progress and performance of the project 10. Suggestions, if any:		

Statement – II

Obligations of the Authority during Construction Period

(Based on MCA of National Highways)

Sl. No.	Obligations of the Project Authority	Is any action required to be taken (Yes/No)	If yes, provide details of action taken
1.	Satisfied the Conditions Precedent (Cl. 4.1.2): a) Provided to the Concessionaire the Right of Way to the Site b) Issued the Fee Notification c) Provided for the Concessionaire the Right of Way to **** d) Procured approval of Railway Authorities to construct road over bridges / under bridges at level crossings e) Procured all Applicable Permits relating to environmental protection and conservation of the site		
2.	Granted to the concessionaire the authority to regulate traffic on the Project Highway (Cl. 6.1.2)		
3.	Maintaining the Project Highway during Development Period (Cl. 6.2)		
4.	Preventing construction of any competing road (Cl. 6.3)		
5.	Invoking Performance Security for Concessionaire Default (Cl. 9.2)		
6.	Termination for non-replenishment of Performance Security (Cl. 9.2)		
7.	Release of Performance Security (Cl. 9.3)		

Sl.	Obligations of the Project Authority	Is any action	If yes, provide details
8.	Granting leave and license rights to the Concessionaire (Cl. 10.2.2)		
9.	Preparing inventory of the Site (Cl. 10.3.1)		
10.	Payment of Damages for delay in granting Right of Way (Cl. 10.3.4)		
11.	Acquisition of real estate (Cl. 10.8)		
12.	Recovery of Damages for failure to achieve milestone (Cl. 12.4.2)		
13.	Termination for failure to complete four-laning within the specified period (Cl. 12.4.3)		
14.	Recovery of Damages for failure to complete six-laning (Cl. 12.5.2)		
15.	Has the monthly report from IE been acted upon (Cl. 13.2)		
16.	Suspension of Construction Works (Cl. 13.5.1)		
17.	Viewing the video recording and taking action, if necessary (Cl. 13.6)		
18.	Issue of Completion Certificate by IE (Cl. 14.2)		
19.	Recovery of Damages for delay in COD (Cl. 12.4.2)		
20.	Response of the Authority to any Change of Scope notice (Cl. 16.1.2)		
21.	Issue of Change of Scope notice to the concessionaire (Cl. 16.2.3)		
22.	Release of advance payment for Change of Scope (Cl. 16.3.1)		
23.	Reimbursement of costs arising out of Change of Scope orders (Cl. 16.3.2)		
24.	Recovery of sums saved from works not completed (Cl. 16.6.1)		
25.	Appointing a Safety Consultant (Cl. 18.1.2)		

26.	Setting up of Safety Fund (Cl. 18.2)		
27.	Appointing an Independent Engineer (Cl. 23.1)		
28.	Recovery of Damages for failure to achieve financial close (Cl. 24.1.1)		
29.	Appropriating/returning Bid Security upon failure to achieve Financial Close (Cl. 24.2.2)		
30.	Disbursing Grant (Cls. 25.2 and 25.3)		
31.	Is Escrow Account in order (Cl. 31.1)		
32.	Issuing notice for a Force Majeure Event (Cls. 34.5.1 and 34.5.2)		
33.	Extending Financial Close in the event of Force Majeure event (Cl. 34.6.1)		
34.	Taking action for Force Majeure after Appointed Date (Cl. 34.6.2)		
35.	Allocation of costs arising out of Force Majeure (Cl. 34.7)		
36.	Informing concessionaire regarding intention to terminate (Cl. 34.8)		
37.	Termination Payment for Force Majeure(Cl. 34.9)		
38.	Action taken for being in material default (Cls. 35.2 and 35.3)		
39.	Compensating for Additional Tollway/ Competing Road (Cl. 35.4)		
40.	Suspension upon occurrence of Concessionaire Default (Cl. 36.1)		
41.	Informing concessionaire of intent to terminate (Cl. 34.8)		
42.	Informing Lenders of the intent to Terminate (Cl. 37.1.3)		
43.	Termination Payment for Authority Default (Cls. 37.3.2 and 37.3.3)		
44.	Exercising rights and obligations upon Termination (Cl. 37.4)		

45.	Issuing a Divestment Certificate (Cl. 38.3)		
46.	Adjusting the costs arising out of Change in Law (Cl. 41.1)		
47.	Complying with General Indemnity requirements (Cl. 42.1)		
48.	Amicably resolving disputes (Cl. 44.1 and 44.2)		
49.	Any other observation, complaint or suggestion		

Annex-I

Statement -III

Obligations of the Authority during Operation Period

(Based on MCA of National Highways)

Sl. No.	Obligations of the Project Authority	Is any action required to be taken (Yes/No)	If yes, provide details of action taken
1.	Preventing construction of Competing Road (Cl. 6.3)		
2.	Invoking Performance Security for Concessionaire Default (Cl. 9.2)		
3.	Termination for non-replenishment of Performance Security (Cl. 9.2)		
4.	Release of Performance Security (Cl. 9.3).		
5.	Recovery of Damages for failure to complete six-laning (Cl. 12.5.2)		
6.	Has the monthly report from IE been acted upon (Cl. 13.2)		
7.	Recovery of Damages for default on Punch List items (Cl. 14.4)		
8	Response of the Authority to any Change of Scope notice (Cl. 16.1.2)		
9.	Issue of Change of Scope notice to the concessionaire (Cl. 16.2.3)		
10.	Release of advance payment for Change of Scope (Cl. 16.3.1)		
11.	Reimbursement of costs arising out of Change of Scope orders (Cl. 16.3.2)		
12.	Recovery of Damages for failure to rectify defects set forth in the Maintenance Requirements (Cl. 17.8.1)		
13.	Recovery of amount spent by Authority on remedial works (Cl. 17.9.1)		

14.	Procuring that no barriers are erected on Project Highway (Cl. 17.14)		
15.	Appointing a Safety Consultant (Cl. 18.1.2)		
16.	Setting up of Safety Fund (Cl. 18.2)		
17.	Appointing an Independent Engineer (Cl. 23.1)		
18.	Is Escrow Account in order (Cl. 31.1)		
19.	Issuing notice for Force Majeure Event (Cls. 34.5.1 and 34.5.2)		
20.	Taking action for Force Majeure after Appointed Date (Cl. 34.6.2)		
21.	Allocation of costs arising out of Force Majeure (Cl. 34.7)		
22.	Informing concessionaire regarding intention to terminate (Cl. 34.8)		
23.	Termination Payment for Force Majeure(Cl. 34.9)		
24.	Action taken for being in material default (Cls. 35.2 and 35.3)		
25.	Compensating for Additional Tollway/ Competing Road (Cl. 35.4)		
26.	Suspension upon occurrence of Concessionaire Default (Cl. 36.1)		
27.	Informing concessionaire of intent to terminate (Cl. 34.8)		
28.	Informing Lenders of the intent to Terminate (Cl. 37.1.3)		
29.	Termination Payment for a Concessionaire Default (Cl. 37.3.1)		
30.	Termination Payment for Authority Default (Cls. 37.3.2 and 37.3.3)		
31.	Exercising rights and obligations upon Termination (Cl. 37.4)		
32.	Issuing a Divestment Certificate (Cl. 38.3)		
33.	Retaining reserves in the Escrow Account (Cl. 39.2)		

34.	Adjusting the costs arising out of Change in Law (Cl. 41.1)		
35.	Complying with General Indemnity requirements (Cl. 42.1)		
36.	Amicably resolving disputes (Cl. 44.1 and 44.2)		
37.	Is the complaint redressal mechanism working satisfactorily (Cl. 46.2)		
38.	Any other observation, complaint or suggestion		

Statement -IV

Obligations of the Concessionaire during Construction Period

(Based on MCA of National Highways)

Sl. No.	Obligations of the Concessionaire	Is any action required to be taken (Yes/No)	If yes, provide details of action taken
1.	Provided Performance Security (Article 9)		
2.	Satisfied Conditions Precedent (Cl. 4.1.3) (a) Executed and procured execution of the Escrow Agreement (b) Executed and procured execution of the Substitution Agreement (c) Procured all the Applicable Permits specified in Schedule-E (d) Delivered copies of Financing Agreements to the Authority (e) Delivered 3 copies of Financial Package and Financial Model (f) Delivered from the Consortium Members confirmation of representations and warranties (g) Delivered a legal opinion with respect to the authority of the Concessionaire		
3.	Obtaining and keeping in force the Applicable Permits (Cl. 5.1.4 (f))		
4.	Procuring proprietary rights, licences, permissions, etc. (Cl. 5.1.4 (b)).		
5.	Maintaining harmony and good industrial relations (Cl. 5.1.4 (d)).		
6.	Submitted drafts of Project Agreements to the Authority (Cl. 5.2.2)		
7.	Obtaining consent for amendments to Project Agreements (Cl. 5.2)		

8	Obtaining approval for Change in Ownership (Cl. 5.3)		
9.	Obtaining prior consent for any business other than Project (Cl.5.6)		
10.	Providing in each Project Agreement the right of Authority to step in (Cl. 5.2.4)		
11	Employed foreign nationals in accordance with Cl. 5.4		
12.	Replenishing Performance Security in event of appropriation (Cl. 9.2)		
13.	Remedying Concessionaire Default within Cure Period (Cl. 9.2)		
14.	Keeping the Highway open to traffic at all times (Cl. 10.2.3)		
15.	Submitting its detailed design, methodology, time schedule, etc (Cl. 12.1 (a))		
16.	Performing all other necessary acts, deeds and things before construction (Cl. 12.1 (c))		
17.	Maintaining existing lanes of the Project Highway (Cl. 12.2)		
18.	Submitting a complete set of 'as-built' drawings (Cl. 12.3 (g))		
19.	Completing four – laning within the specified period (Cl. 12.4.1)		
20.	Paying damages for failure to achieve any milestone (Cl. 12.4.2)		
21.	Submitting monthly progress reports (Cl. 13.1)		
22.	Rectifying defects pointed out in IE's monthly report (Cl. 13.2)		
23.	Carrying out tests and furnishing reports (Cl. 13.3.1)		
24.	Communicating steps taken to expedite progress (Cl. 13.4)		
25.	Crediting the balance to the Safety Fund (Cl. 16.3.2)		
26.	Evolving Maintenance Manual in consultation with IE (Cl. 17.3)		
27.	Not displaying advertisements on the Site (Cl. 17.15)		

28.	Constructing and handing over Traffic Aid Posts (Cl. 20.2)		
29.	Setting up and operationalising Medical Aid Posts (Cl. 21.1)		
30.	Achieving Financial Close within the specified period (Cl. 24.1.1)		
31.	Paying Damages for delay in Financial Close (Cl. 24.1.1)		
32.	Providing 3 copies of Financial Package and Financial Model (Cl. 24.1.2)		
33.	Depositing specified inflows and receipts in the Escrow Account (Cl. 31.2)		
34.	Payments from Escrow Account as per specified order (Cl. 31.3.1)		
35.	Appropriation from Escrow Account after Termination (Cl. 31.4.1)		
36.	Effecting and maintaining insurance cover (Cls. 32.1 and 32.2)		
37.	Depositing and using the proceeds from insurance claims (Cl. 32.7)		
38.	Maintaining books of accounts (Cl. 33.1)		
39.	Appointing Statutory Auditors (Cl. 33.2.1)		
40.	Issuing notice for Force Majeure Event (Cls. 34.5.1and 34.5.2)		
41.	Informing the Authority regarding intent to Terminate (Cl. 34.8)		
42.	Compensating the Authority for material default (Cl. 35.1)		
43.	Complying with the Divestment Requirements (Cl. 38.1)		
44.	Paying all costs incidental to divestment (Cl. 38.5)		
45.	Paying to the Authority the benefits arising out of Change in Law (Cl. 41.2)		
46.	Complying with General Indemnity requirements (Cls. 42.1 and 42.2)		
47.	Allowing free access to the Site at all times to the Authority (Cl. 43.2)		

48.	Amicably resolving disputes (Cl. 44.1and 44.2)		
49.	Availability of Specified Documents and documents for inspection (Cls. 45.1 and 45.2)		
50.	Maintaining public relations office and Complaints Register (Cl. 46.1)		
51.	Inspecting Complaints Register every day and taking prompt and reasonable action (Cl. 46.2)		
52.	Any other observation, complaint or suggestion		

Annex-I

Statement -V

Obligations of the Concessionaire during Operation Period

(Based on MCA of National Highways)

Sl. No.	Obligation of the Concessionaire	Is any action required to be taken (Yes/No)	If yes, provide details of action taken
1.	Obtaining and keeping in force the Applicable Permits (Cl. 5.1.4 (f))		
2.	Procuring proprietary rights, licences, permissions, etc (Cl. 5.1.4 (b)).		
3.	Maintaining harmony and good industrial relations (Cl. 5.1.4 (d)).		
4.	Obtaining consent for amendments to Project Agreements (Cl. 5.2)		
5.	Obtaining approval for selection of O & M Contractor (Cl. 5.2.5)		
6.	Obtaining approval for Change in Ownership (Cl. 5.3)		
7.	Obtaining prior consent for interest in business other the Project (Cl.5.6)		
8	Employed foreign nationals in accordance with Cl. 5.4		
9.	Replenishing the Performance Security (Cl. 9.2)		
10.	Remedying Concessionaire Default within Cure Period (Cl. 9.2)		
11	Submitting monthly progress reports (Cl. 13.1)		
12.	Rectifying defects pointed out in the IE's monthly report (Cl. 13.2)		
13.	Carrying out tests and furnishing reports (Cl. 13.3.1)		
14.	Adhering to the following obligations (Cl. 17.1.1):		

	a) Permitting safe, smooth and uninterrupted flow of traffic b) Collecting and appropriating the Fee c) Minimizing disruption to traffic d) Carrying out periodic preventive maintenance e) Undertaking routine maintenance including prompt repairs f) Undertaking major maintenance g) Preventing unauthorized use of the Project Highway; h) Preventing encroachments on the Project Highway; including the Site; i) Protection of the environment j) Operation and maintenance of all communication, control and administrative systems k) Maintaining a public relations unit l) Complying with Safety Requirements		
15.	Compliance with the maintenance requirements (Cl. 17.2)		
16.	Submitting the Maintenance Programme (Cl. 17.4.1)		
17.	Ensuring safe conditions for users (Cl. 17.5)		
18.	Not displaying advertisements on the Site (Cl. 17.15)		
19.	Complying with the Safety Requirements (Cl. 18.1.1)		
20.	Submitting Monthly status report (Cl. 19.1)		
21.	Reporting on the O&M Inspection Report or the test results (Cl. 19.4.1)		

22.	Furnishing the Monthly Fee Statement (Cl. 19.5)		
23.	Operationalising the Medical Aid Posts (Cl. 21.1)		
24.	Furnishing weekly data on vehicles census (Cl. 22.1)		
25.	Installing and operating a computer system (Cl. 22.4)		
26.	Paying the Additional Concession Fee (Cls. 26.2 and 26.4)		
27.	Depositing into the Safety Fund, the Fee exceeding the Traffic Cap (Cl. 27.6.2)		
28.	Displaying the Fee Rates (Cl. 27.12.1)		
29.	Repaying Revenue shortfall loan (Cl. 28.2)		
30.	Not offering discounts on opening of an Additional Tollway (Cl. 30.3)		
31.	Depositing the specified inflows and receipts in the Escrow Account (Cl. 31.2)		
32.	Payments from Escrow Account as per specified order (Cl. 31.3.1)		
33.	Appropriation from Escrow Account after Termination (Cl. 31.4.1)		
34.	Effecting and maintaining insurance cover (Cls. 32.1 and 32.2)		
35.	Depositing and using the proceeds from insurance claims (Cl. 32.7)		
36.	Maintaining books of accounts (Cl. 33.1)		
37.	Submitting the Balance sheet, profit and loss account, etc. (Cl. 33.1.1)		
38	Submitting unaudited financial results for each quarter (Cl. 33.1.2)		
39.	Providing information on traffic count, Fee received, etc. (Cl. 33.1.3)		

40.	Appointing Statutory Auditors (Cl. 33.2.1)		
41	Issue notice for Force Majeure Event (Cls. 34.5.1 and 34.5.2)		
42.	Informing the Authority regarding intent to Terminate (Cl. 34.8)		
43.	Compensating the Authority for material default (Cl. 35.1)		
44.	Complying with the Divestment Requirements (Cl. 38.1)		
45.	Complying with Maintenance Requirements prior to Termination (Cl. 38.2)		
46.	Paying all costs incidental to divestment (Cl. 38.5)		
47.	Responsibility for all defects after Termination (Cl. 39.1)		
48.	Paying to the Authority the benefits arising out of Change in Law (Cl. 41.2)		
49.	Complying with General Indemnity requirements (Cl. 42.1 and 42.2)		
50.	Allowing free access to the Site at all times to the Authority (Cl. 43.2)		
51.	Amicably resolving disputes (Cl. 44.1 and 44.2)		
52.	Availability of Specified Documents for inspection (Cl. 45.1 and 45.2)		
53.	Maintaining public relations office and Complaints Register (Cl. 46.1)		
54.	Inspecting Complaints Register and taking prompt action (Cl. 46.2)		
55.	Any other observation, complaint or suggestion		

Annex-I

Statement VI

Key Performance Indicators (KPI)/ Performance Standards

(Based on MCA of National Highways)

Sl. No.	Maintenance /Performance Standard		Complied (Yes/No)	If no, details of action taken
	Nature of defect or deficiency	**Time limit for repair/ rectification**		
	ROADS			
	(a) Carriageway and paved shoulders			
	(i) Breach or blockade	- Temporary / restoration of traffic within 24 hours; permanent restoration within 15 days		
	(ii) Roughness value exceeding 2,500 mm in a stretch of 1 km (as measured by a standardised roughometer/bump integrator)	- 180 days		
	(iii) Pot holes	- 48 hours		
	(iv) Cracking in more than 5% of road surface in	- 30 days		

	a stretch of 1 km (v) Rutting exceeding 10 mm in more than 2% road surface in a stretch of 1 km (measured with 3 m straight edge) - 30 days of (vi) Bleeding/skidding - 7 days (vii) Ravelling/Stripping of bitumen surface exceeding 10 sq m - 15 days (viii) Damage to pavement edges exceeding 10 - 15 days cm (ix) Removal of debris - 6 hours **(b) Hard/earth shoulders, side slopes, drains and culverts** (i) Variation by more than 2% in the prescribed slope of camber/cross fall - 30 days (ii) Edge drop at shoulders exceeding 40 mm - 7 days (iii) Variation by more than 15% in the prescribed side (embankment) slopes - 30 days (iv) Rain cuts/gullies in slope - 7 days (v) Damage to or silting of culverts and side drains during and immediately preceding the rainy season - 7 days		

	(vi) Desilting of drains in urban/semi-urban areas - 48 hours **(c) Road side furniture including road signs and pavement marking** (i) Damage to shape or position; visibility or loss of retro-reflectivity - 48 hours poor **(d) Street lighting and telecom (ATMS)** (i) Any major failure of the system - 24 hours (ii) (i i) Faults and minor failures - 8 hours **(e) Trees and plantation** (i) Obstruction in a minimum head-room of 5 m above carriageway or obstruction in visibility of road signs - 24 hours (ii) Deterioration in health of trees and bushes - Timely watering and treatment (iii) Replacement of trees and bushes - 90 days (iv) Removal of vegetation affecting sight line road structures - 15 days and **(f) Rest areas**		

	(i) Cleaning of toilets - Every 4 hours (ii) Defects in electrical, water and sanitary installations - 24 hours **(g) Toll plaza[s]** (i) Failure of toll collection equipment or lighting - 8 hours (ii) Damage to toll plaza - 7 days **(h) Other Project Facilities and Approach roads** (i) Damage or deterioration in Approach Roads, -[pedestrian facilities, truck lay-bys, bus-bays, bus- shelters, cattle crossings, Traffic Aid Posts, Medical Aid Posts and other works] - 15 days **BRIDGES** **(a) Superstructure of bridges** (i) Cracks Temporary measures - within 48 hours Permanent measures - within 45 days (ii) Spalling/scaling - 15 days		

(b) Foundations of bridges

(i) Scouring and/or cavitation - 15 days

(c) Piers, abutments, return walls and wing walls of bridges

(i) Cracks and damages including settlement and tilting - 30 days

(d) Bearings (metallic) of bridges

(i) Deformation - 15 days

(e) Joints in bridges

(i) Loosening and malfunctioning of joints - 15 days

(f) Other items relating to bridges

(i) Deforming of pads in elastomeric bearings - 7 days

(ii) Gathering of dirt in bearings and joints; or clogging of spouts, weep holes and vent-holes - 3 days

(iii) Damage or deterioration in parapets and handrails - 3 days

(iv) Rain-cuts or erosion of banks of the side slopes of approaches - 15 days

(v) Damage to wearing coat - 15 days

	(vi) Damage or deterioration in approach slabs, pitching, apron, toes, floor or guide bunds - 30 days (vii) Growth of vegetation affecting the structure or obstructing the waterway - 15 days		

Exception Report by PRU to the Competent Authority

Project: **Period:**

Subject	Action taken by PMU/Authority	Action taken by PRU
I. **Exception Report on non-compliance** 1. Timelines not met by the concessionaire (a) (b) 2. Timelines not met by the Authority (a) (b) 3. Performance Standards/KPI not met by the concessionaire (a) (b) 4. Default in payments by the concessionaire/Authority (a) (b) 5. Other issues which may lead to default on the part of concessionaire (a) (b) 6. Other issues which may lead to default on the part of Authority (a) (b)		

7. Issues under arbitration/litigation and their status
    (a)
    (b)

8. Potential issues for arbitration/litigation
    (a)
    (b)

II. Report on matters affecting public exchequer

1. Any additional project costs or expenditure affecting the Authority

    (a)
    (b)

2. Levy or collection of any user charges having adverse impact on Users or Authority
    (a)
    (b)

3. Any other financial matter having adverse bearing on Authority or Users
    (a)
    (b)

III. General remarks about the progress and performance of the project

IV. Suggestions, if any.

INFRASTRUCTURE
Building for Growth

Government of India

Guidelines
on
Establishing Joint Ventures in Infrastructure

Published by
PPP & Infrastructure Division
Planning Commission, Government of India Yojana
Bhawan, Parliament Street
New Delhi - 110 001

www.infrastructure.gov.in

Contents

Preface

Public Private Partnerships (PPPs) are normally governed by an agreement between a private entity and a public entity. Agreements for provision of roads, ports, airports, railways and power transmission systems are thus entered into between the respective public and private entities. These agreements typically contain provisions that determine the user charges, performance standards and other matters affecting the users and the public exchequer. They may also involve transfer of valuable public assets, delegation of the power to collect user charges and payment guarantees constituting a contingent liability for the exchequer.

Though a single concession/procurement agreement is the norm for PPP projects, public entities sometimes prefer the joint venture (JV) route which requires them to subscribe to the equity of the selected private entity. This implies a two-level relationship i.e. a shareholders' agreement for a JV between a public entity (holding a minority stake) and a private company (holding the controlling stake) on the one hand and a concession/ procurement agreement between the public entity and the JV on the other hand. These two parallel agreements often pose issues that are more complex than those arising in case of a JV that sells its output in a competitive market and does not enter into other parallel agreements with the public entity.

In the absence of guidelines, some JVs for PPP projects in infrastructure sectors have been formed without a clear appreciation of the potential problems that can lead to unintended outcomes and loss to the public exchequer and users. There could also be a perceived conflict of interest in awarding an infrastructure project to a JV inasmuch as the public sector entity which is the grantor of the concession is also a partner in the recipient JV which is a private sector company. The grantor would normally be enforcing the terms of the concession, including imposition of penalties, with a view to securing the best possible outcome for the users and the public exchequer. On the other hand, it would be a shareholder in the JV which is controlled by a private sector entity that has profit as its primary objective. The public sector entity would thus be the 'regulator' of the concession agreement as well as the 'regulated' under the same agreement.

Notwithstanding the above, in cases where it is decided to form a JV, it would be necessary to address issues relating to conflict of interest, accountability of the public sector entity, valuation of assets, contingent liabilities, exit and termination clauses etc. The public sector entity should be fully aware of the risks and responsibilities it is undertaking as a partner in a JV which is a private entity that would normally have to be treated at par with other private entities, especially in the matter of procurement. Moreover, the process of selection of the private entity would have to be competitive, fair and transparent, as it would confer upon the selected entity several financial and other advantages.

Where the public sector's contribution to a JV is in terms of assets or assured revenues, the valuation of such assets or revenues should be carried out diligently and reflected appropriately. The public sector entity will have to assess the possible recourse it would have for recovery of its investment in case the JV is unsuccessful. Since the formation of a JV involves public funds, it should also be established that the objective cannot be met through alternate means that would save on public expenditure and eliminate the potential liabilities arising out of a JV.

A note on the aforesaid issues was considered in the 17th meeting of the Committee on Infrastructure (COI) held under the chairmanship of Prime Minister on December 5, 2007 when it was resolved that the matter be deliberated upon in a Committee of Secretaries (CoS) with a view to formulating appropriate guidelines. The guidelines contained in this volume are an outcome of the deliberations in the CoS and have since been approved by the Finance Minister and Deputy Chairman, Planning Commission.

These guidelines will apply to all Ministries and Departments of the Central Government, all statutory entities under the control of Central Government and all Central Public Sector Undertakings (CPSUs). They may also be adopted by the State Governments by way of best practices.

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

July 20, 2009

No.24 (24)/PF-II/2009
Ministry of Finance
Department of Expenditure
(PF-II Division)

New Delhi, dated the 21st July 2009

OFFICE MEMORANDUM

Subject: Guidelines for Establishing Joint Venture Companies in Infrastructure Sectors

1. The laying down of a clear set of guidelines for establishing joint venture companies in infrastructure sectors has been under consideration for some time. Based on wide discussions, guidelines for establishing joint ventures in infrastructure sectors have been framed and are enclosed. These guidelines shall apply to all Central Ministries/Departments and autonomous bodies/Public Sector Undertakings under the control of the Central Government.

2. This issues with the approval of Finance Minister.

3. These instructions would come into force with immediate effect.

(Meena Agarwal)
Joint Secretary (PF-II)

To All Secretaries to the Government of India

Guidelines for establishing joint venture companies in infrastructure sectors

1. Introduction

1.1 In the meeting of the Committee on Infrastructure (COI) held under the chairmanship of Prime Minister on 5th December, 2007, it was resolved that Planning Commission would prepare a note regarding joint ventures in infrastructure sectors and send it to the Cabinet Secretary for further deliberations in a Committee of Secretaries (COS).

1.2 In pursuance of the above decision, a meeting of the COS was held on 8th September, 2008 when it was agreed that it would be desirable to formulate a set of guidelines to deal with proposals of Joint Ventures in infrastructure projects that typically involve Public Private Partnerships (the "**PPPs**").

1.3 Accordingly, draft guidelines were prepared by the Planning Commission and circulated to the participants of the COS. The views of the members of the COS have been considered and incorporated in the guidelines that follow.

2. Scope

2.1 These guidelines would be applicable in cases where the Central Government or an entity owned or controlled by it (the "**public sector entity**") and a private sector entity (the "**private sector entity**") set up a Joint Venture Company (the "**JV**") to formulate, develop or implement any infrastructure project or services associated with it.

2.2 The objective of these Guidelines is to lay down criteria which need to be examined carefully while considering formation of JVs in infrastructure sectors. Any deviation from these guidelines would need to be adequately explained and justified by the concerned Ministries/Departments.

3. Nature and scope of JVs in infrastructure projects

3.1 JVs are usually established because the JV partners have complementary objectives which they would be unable to achieve independently at lower cost or risk. These JVs have their own legal capacity, separate from the founders or equity holders. In most cases, 50 per cent or more of the equity of such JVs is owned by private sector entities and, therefore, these JVs are usually private sector companies.

3.2 Projects in infrastructure sectors often provide services of a monopolistic nature based on a power purchase agreement, concession agreement or project agreement (the "concession agreement") between a public sector entity and a private sector entity. These services can be provided either directly to the users, as in the case of airports, ports and highways, or to a public sector entity such as in the case of purchase of power or transmission services by a public entity. In case a JV is formed for providing these services, it implies a two-level relationship i.e. a JV between a public sector entity and a private sector company on the one hand and a concession agreement between the public sector entity and the JV (controlled by the private sector entity) on the other hand. As a result, such transactions involve two separate agreements which pose issues that are more complex than the ones arising out of a JV formed as per extant guidelines of the Department of Public Enterprises that normally apply to production activity where the output is sold in the open market (eg. Maruti Udyog).

4. Conflict of Interest

4.1 There would normally be an element of conflict of interest in awarding an infrastructure project to a JV inasmuch as the public sector entity which is the grantor of the concession is also a partner in the recipient JV which is a private sector company. The grantor would normally be enforcing the terms of the concession, including imposition of penalties, with a view to securing the best possible outcome for the users and the public exchequer. On the other hand, it would be a shareholder in the JV which is controlled by a private sector entity that would normally have profit maximisation as its primary objective. At times, this could lead to conflicts of interest especially as the public sector entity would be the 'regulator' of the concession agreement as well as the 'regulated' under the same agreement.

4.2 Conflict of interest has the potential of leading to unintended outcomes at different stages of a transaction. Be it in the form of a JV or in any other form, good governance requires identification and elimination of conflicts of interest in the formulation, award and implementation of infrastructure projects and services. This would also extend to the consultants and advisers of the public sector entity who should not be allowed to become advisers or beneficiaries of the private sector entity for the same project.

5. Accountability of public sector entity

5.1 A JV would be seen in the public eye as a partnership between the public sector entity and private sector entity. Any lapses or failures of JV would expose the public sector entity to legitimate criticism even though the JV is managed and controlled by the private sector entity. Moreover, even the Government Directors on the Board of the JV would be liable and accountable for certain actions and decisions of the JV. These aspects should receive due consideration while evaluating a proposal to form a JV.

6. Multiplicity of agreements and obligations

6.1 In infrastructure projects based on concession agreements between a public sector entity and a private sector entity, the entire range of rights, obligations, duties and support should be adequately covered in the concession agreement itself. In such a situation, no further value would normally accrue to the public sector entity through the formation of a JV and entering into a shareholders' agreement. Since, the rights and obligations of the equity partners in a JV would normally be determined by a shareholders' agreement which is essentially a commercial agreement, the sovereign rights being exercised by the public entity through the concession agreement could be compromised if the private entity takes recourse to enforcing its rights the shareholders' agreement.

6.2 The coexistence of a Concession Agreement and Shareholders' Agreement may allow the private sector entity to do 'forum shopping' by raising disputes either under the shareholders' agreement or under the concession agreement, depending on what is beneficial to it.

6.3 In view of the above, reliance on Shareholders' Agreement should normally be avoided. However, where a JV is to be formed and entering into a Shareholders' Agreement is considered essential, the Agreement should be simple and brief. It should only contain provisions that are typically required for protecting the legal rights of a shareholder and not for addressing any issue that is or can be covered under the Concession Agreement.

7. Shareholding in a JV

7.1 The share of the public sector entity in a JV could be in any proportion, say 74:26, 50:50 or 40:60, etc. If the public sector entity owns more than 50 per cent share, the JV would be regarded as a public sector entity. However, if the share of public sector entity is 50 per cent or less, then the JV is a private sector company and would, therefore, not be accountable to the Government, Public Accounts Committee, Public Undertakings Committee, C&AG, etc. Nor would the Government rules relating to procurement and expenditure apply to such a JV. Such a JV must, therefore, be treated at par with other private companies and any procurement of goods or services from such a JV must follow the normal tendering processes as per GFR.

7.2 The share of public sector entity is often kept at 50 per cent or less so as to enable the JV to function as a private sector entity with greater commercial freedom. However, this implies that though the public exchequer would contribute to the equity of such an enterprise, it would hardly exercise control over its functioning. It should be borne in mind that private sector entities would find such a JV to be more attractive as it would provide them with government funds and support without any accountability as noted above. It could also give them an undue advantage in government procurement as a JV would often be perceived to be a government or semi-government company. Such possibilities of undue advantage or vitiating of the government procurement process should be identified and eliminated in case a JV is proposed to be formed.

8. Equity versus Grant

8.1 It is sometimes argued that where a project is financially unviable, the public sector entity should contribute to the equity of the proposed JV so as to make it viable. This view does not conform to established financial principles, as the financial viability of a project does not improve only because the equity is contributed by one party instead of another. The returns on project equity would normally remain the same whether or not the public sector entity contributes to its equity. On the other hand, if the objective is to improve project viability, the public sector entity should consider providing a grant to the project. The Viability Gap Funding (VGF) scheme of the Central Government reinforces the rationale for providing grant support to projects that are not viable.

8.2 Before considering a proposal to form a JV for infrastructure projects and services, the public sector entity should carefully evaluate whether its objectives would not be served better if a grant is provided instead of equity in the JV.

9. Selection of JV partner

9.1 In case it is decided to form a JV, the process of selection of the private sector entity must be fair and transparent, especially since the selection of a private sector entity to form a JV with a public sector entity confers financial and other advantages to the private sector entity. The selection of the private sector entity must be done on an open competitive basis so as to afford an equal opportunity to competing applicants and for securing the best outcome for the public sector entity. Selection through negotiations or on a nomination basis should normally be avoided.

10. Procurement of goods or services from a JV

10.1 If a JV is a private sector company, any procurement of goods or services by a public entity from such JV should conform to the GFR and must follow a transparent competitive route. However, procurement through nomination, to the extent permitted by GFR, may be undertaken from the JV.

11. Other assistance to JVs

11.1 A public sector entity should not encourage or advise other public sector entities or external agencies to contribute to the resources of such JVs or to procure any goods or services from the JVs. In other words, the public sector entity should treat the JV like any other private entity and ensure that it functions on a level playing field without getting any undue advantage on account of its partnership with the public sector entity.

12. Chairpersons of JVs

12.1 In the case of JVs, senior government officials are often invited to function as Chairpersons of their Board of Directors. This can lead to situations wherein:

(i) government officials function as chairpersons of the Boards of private companies, thus creating a perception that the JV is a government company;

(ii) the private sector entity may derive unintended benefits arising from the perception that it is an entity promoted and supported by the government; and

(iii) such an entity would be allowed to get business from the Ministry whose Secretary or Additional Secretary is its chairperson, thus leading to a potential conflict of interest.

12.2 It is, normally, not advisable for government officials to become chairpersons or hold other offices in a JV where the shareholding of private sector entities is 50 per cent or more.

12.3 In a JV under the Companies Act and where the Government is holding more than 50 per cent shareholding, the Central officers can only go on permanent absorption basis unless exempted by the competent authority. In other cases where Government's share is 50 per cent or less, Government officers cannot go to such organisations on deputation basis.

12.4 If a JV is set up as an autonomous / statutory organisation, then DOPT's guidelines on deputation for All India Services Officers issued on 28.11.2007 and similar guidelines for members of the organised Group 'A' and 'B' services, issued on 29.2.2008 would apply.

13. Equal share-holding by JV partners

13.1 It is not advisable to form a JV with a stake of 50:50 between a public sector entity and a private sector entity since such a JV would be regarded as a private sector entity and would function as such even though the public entity would be an equal shareholder. There may be little merit in a public sector entity contributing 50 per cent of the equity and allowing the private sector entity to manage the JV as a private company. Moreover, equal shareholding also has the potential of a deadlock where public interest may be compromised.

13.2 In some cases, JVs are formed with equal participation by the Central and State Governments, thereby creating JVs ostensibly in the public sector, but without applying the rules and regulations associated with public sector undertakings. Such PSUs are neither regarded as CPSUs nor as State PSUs. As a result, they are neither accountable to the Parliament nor to the State assembly. Moreover, neither the rules of Central Government nor the rules of the respective state governments apply to such companies. No such companies should, therefore, be formed by any public sector entity. It has been reported that in one such case, the C&AG is not clear whether its audit reports should be placed before the Parliament of the concerned state legislative assembly. It is necessary to examine these issues and find a suitable resolution. A separate exercise would be undertaken for making appropriate recommendations.

14. Valuation of assets

14.1 Where the public sector's contribution to a JV is in terms of assets, the valuation of assets should be carried out diligently and reflected appropriately. The public sector needs to ensure that its equity share properly reflects the value of the assets which it contributes. These may not be only tangible assets. In the case of assured or preferential procurement of any goods or services or other such revenue streams, it would be important for the public sector entity to identify the direct and indirect benefits to the private sector entity and factor the same in the structure and scope of the proposed agreement. The valuation of such tangible and intangible assets should be approved by the competent authority such as EFC, PIB, extended Railway Board, etc., as may be applicable.

14.2 In order to make a fair assessment of the potential value of the proposed JV, its projected revenue streams and business model should be assessed prior to the selection of the private sector entity. Further, the resource requirements, including funds, assets and staff, need to be considered at the outset. The manner of realizing returns and the dividend policy should also be determined upfront. The total resource commitment and estimation of revenue requirement should have the approval of the competent authority.

15. Contingent liabilities

15.1 The public sector entity should be fully aware of the risks and responsibilities it is undertaking by entering into the JV. It needs to consider carefully the implications of providing guarantees or warranties, or indemnifying the new company against any risks. Actions which may give rise to any potential liabilities should be avoided.

15.2 A careful assessment of potential operating losses should be made and the liability, if any, of the public sector entity to fund or support such losses must be clearly spelt out.

16. Exit and termination

16.1 The public sector entity will have to assess the possible recourse it would have for recovery of its investment in case the JV is unsuccessful. The exit provisions should also be formulated at the initial stage.

17. Appraisal and approval process

17.1 Since the formation of a JV involves public funds, assets, contingent liabilities and obligations, the objective for which the formation of JV is being considered needs to be examined carefully for establishing that the objective cannot be met by any other means. The public sector entity intending to form a JV with a private sector entity should carefully explore the possibility of meeting the desired objective through alternate means instead of creating a JV.

17.2 In particular, the proposal for formation of a JV should clearly identify and evaluate the following:

(i) whether the issues arising out of the nature and scope of the proposed JV, potential conflicts of interest, accountability of the public sector entity, multiplicity of agreements and obligations, and the extent of shareholding have been considered and addressed (see paragraphs 3,4,5,6 and 7);

(ii) whether the objectives of the public sector entity would be served better if grant is provided instead of equity in the JV (see paragraph 8);

(iii) the objective for formation of the JV and the other potential options which may serve the purpose (see paragraph 17);

(iv) the process of selection of the private sector entity is open and competitive (see paragraph 9);

(v) government officials would not normally be proposed as chairpersons of a JV in which the private sector has an equity of 50 per cent or more (see paragraph 12);

(vi) the extent of shareholding necessary by the Central Government in a JV with the State Government or a private entity (see paragraph 13);

(vii) valuation of tangible and intangible assets being contributed by the public sector has been carried out diligently and has the approval of the competent authority (see paragraph 14.1);

(viii) the total resource commitment and estimation of revenue requirement have been assessed and have the approval of the competent authority such as EFC, PIB, extended Railway Board, etc., as may be applicable. (see paragraph 14.2);

(ix) the implications of any actions which may give rise to potential liabilities, such as providing guarantees or warranties, or indemnifying the new company against any risks (see paragraph 15);

(x) an assessment of potential operating losses and the possible liability of the public sector entity to fund or support such losses (see paragraph 15.2);

(xi) formulation of exit provisions and assessment of the possible recourse it would have for recovery of its investment in case the JV is unsuccessful (see paragraph 16.1);

(xii) assessment of the liability and accountability of the public sector entity and the Government directors on the Board of the JV due to any lapses or failures of JV (see paragraph 5.1);

(xiii) whether the consultants and advisers of the public sector entity can potentially be engaged as advisers or beneficiaries of the private sector entity of JV for the same project (see paragraph 4.2); and

(xiv) whether the possibilities of any undue advantage or vitiating of the government procurement process have been evaluated and eliminated (see paragraph 7.2).

17.3 Proposals for formation of a JV in infrastructure sectors should be appraised and evaluated having regard to the issues raised above. Where an exception is to be made, approval of the competent authority should be obtained in accordance with extant procedures.

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Government of India

Best Practices
for
Selection of Consultants

Published by
PPP & Infrastructure Division
Planning Commission, Government of India Yojana
Bhawan, Parliament Street
New Delhi - 110 001

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Contents

Disclaimer

This volume is in the nature of Frequently Asked Questions (FAQs) to assist the Central/State Governments, statutory entities and Project Authorities in the selection of consultants. It is in conformity with the General Financial Rules, 2005 issued by the Department of Expenditure, Ministry of Finance (www.finmin.nic.in). In case of any conflict, the aforesaid Rules issued by the Department of Expenditure shall prevail.

Preface

The Eleventh Five Year Plan recognises that the deficit in infrastructure is a major constraint in achieving the projected growth rate of 9 per cent in GDP and that public sector resources are insufficient to meet the investment requirements. It is, therefore, envisaged that about 30 per cent of the projected investment during the Eleventh Five Year Plan would be sourced from private capital, mainly through Public Private Partnerships (PPPs).

The process of structuring PPP projects is complex and the requisite expertise is not available within the government. Nor do project authorities have the time and staff resources that go into fine-tuning the documentation of PPPs. It is, therefore, necessary to rely on consultants for securing financial, legal and technical advice in formulating project proposals and documents necessary for award and implementation of PPP projects in an efficient, transparent and fair manner.

A poorly structured PPP contract can compromise user interests by recovery of higher charges and provision of low quality services. It can also compromise the public exchequer in the form of costlier or uncompetitive bids as well as subsequent claims for additional payments or compensation. Being long-term contracts, their adverse impact on users and the public exchequer would normally be far greater than in a typical construction contract. Moreover, the losses of a concessionaire often include foregone revenues over the concession period, which implies very large claims against the public exchequer. For these reasons, it is critical to ensure that PPP projects are structured properly with the help of best available expertise.

The General Financial Rules, 2005 and the Manual of Policies and Procedure for Employment of Consultants issued by the Department of Expenditure, Ministry of Finance constitute the framework that governs the selection and employment of consultants. Detailed procedures and processes to be followed in the selection of consultants have also been published in duly approved Model Request for Proposals (RFPs) for selection and appointment of consultants. All these documents provide useful guidance for engaging consultants. However, during interactions with the concerned officials on various occasions, it was apparent that reader-friendly guidance material was necessary for facilitating a fair and transparent selection of consultants by the project authorities. Accordingly, a set of Frequently Asked Questions (FAQs) has been addressed in conformity with the extant instructions of the Department of Expenditure as well as international best practices.

The draft document prepared by the Planning Commission was circulated to all the concerned Ministries for their comments. The suggestions received have been suitably addressed and incorporated. The document 'Selection of Consultants: Best Practices' was thereafter approved by the Empowered Sub-Committee of the Committee on Infrastructure in its meeting held on April 13, 2009 under the chairmanship of Deputy Chairman, Planning Commission. It is being published for wide dissemination to serve as a useful guide in the appointment of consultants.

This booklet is expected to provide ready responses to the questions that frequently arise while engaging consultants for PPP projects. The purpose of this exercise is to provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.

(Gajendra Haldea)
Adviser to Deputy Chairman,
Planning Commission

May 15, 2009

N-14070/10/2009-Infra
Planning Commission
Secretariat for the Committee on Infrastructure

New Delhi, May 14, 2009

OFFICE MEMORANDUM

Subject: Selection of Consultants: Best Practices

1.1 Pursuant to the approval of the Empowered Sub-Committee of Committee on Infrastructure (ESCOI) in its meeting held on April 13, 2009, the undersigned is directed to circulate a set of Frequently Asked Questions (FAQs) titled 'Selection of Consultants: Best Practices' as a best practice document.

1.2 This set of FAQs is advisory in nature and would be useful for Ministries, State Governments and statutory / autonomous entities intending to procure consultants for award and implementation of infrastructure projects through PPP. It is in conformity with the General Financial Rules, 2005 issued by the Department of Expenditure, Ministry of Finance (www.finmin.nic.in). In case of any conflict, the aforesaid Rules issued by the Department of Expenditure shall prevail.

2. Context

2.1 The Eleventh Plan recognises that private sector participation is essential for achieving the targeted investment in infrastructure. With a view to enabling a smooth transition and for adoption of best practices, Government of India has recognised the critical role of standardising documents and processes to be adopted for award of PPP concessions. For this purpose, a number of Model Concession Agreements (MCAs) have since been evolved and adopted for different sectors. The process of pre-qualification and selection of private sector participants for award of concessions has also been standardised through adoption of model documents for a two-stage selection comprising the Request for Qualification (RFQ) and Request for Proposals (RFP).

2.2 Though the aforesaid standard documents lay down the norms, principles and parameters to be followed for PPP projects, they need to be suitably adapted for meeting the specific requirements of individual projects. The Central Ministries, State Governments and statutory / autonomous entities owning such projects would, therefore, require the assistance of professional advisers/ consultants for award and implementation of such projects in an efficient, fair and transparent manner.

2.3 Engaging legal consultants would be essential for drafting and/or adapting the bid documents, including RFQ, RFP, concession agreements, licences or other agreements. The legal consultants would also have to ensure that the project agreements are properly executed. They also play an important role in ensuring that the conditions necessary for making a contract effective and enforceable are fully met.

Technical consultants would be required for preparing the Feasibility Report and for determining the technical parameters, specifications and standards as well as the service quality and performance standards for the project. Financial consultants would be required for undertaking financial analysis, evolving a revenue model and suggesting and / or vetting the financial parameters and structure of the project.

2.4 Model RFPs for the selection of Technical Consultants (including architects) and Legal Advisers have been published by the Planning Commission. These documents are based on extant rules of the Department of Expenditure. They have been drafted after extensive consultations with ministries, stakeholders and experts. The RFP for Technical Consultants was also deliberated upon in an IMG headed by Special Secretary (Expenditure) and approved by the ESCOI. The RFP for Legal consultants is based on the same principles as the RFP for Technical Consultants and has been approved by ESCOI following detailed inter-ministerial consultations.

3. Objective

3.1 The purpose of this set of FAQs is to provide guidance to Project Authorities in selection and appointment of professional consultants. The costs as well as the quality of services to be provided by consultants would be largely dependent on the manner of their selection as well as their Terms of Reference (TOR). The FAQs provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.

4. Key Principles

4.1 Procurement of goods/services and consultants:

The appointment of consultants should not be treated in the same manner as procurement of goods/ services where the bid is awarded to the lowest bidder based on pre-determined specifications. This is so because what sets consultancy services apart from other procurements is the advisory and intellectual nature of services which are not amenable to precise quantification.

4.2 Role of experts:

The quality of advice in a consulting assignment is normally dependent on the expertise of individuals who are deployed on the project. The focus should, therefore, be on selecting experts who have the requisite qualifications, skills and experience, with a comparatively lower weightage to be assigned to the experience of their respective firms. Each such key personnel should be evaluated individually and marks assigned.

4.3 Appropriate method:

The selection of consultants should be based on the appropriate method to be chosen from among the alternatives such as Quality and Cost based selection, Combined Quality-cum-Cost based selection, Quality based selection and Cost based selection. Since PPPs are complex transactions with large financial and other implications for the government as well as users, the consultants for structuring PPP projects should be chosen on the basis of Combined Quality-cum-Cost based selection.

4.4 'Two-envelope system' of bidding:

Consultancy services are normally procured through a 'two-envelope' system comprising a technical bid and a financial bid. The technical bid comprises the information relating to the experience and qualification of the consultant whereas the financial bid comprises the financial offer made by the consultant for performing the services as per the Terms of Reference. The technical bid is to be opened and evaluated first.

4.5 Evaluation criteria:

The technical proposal should be evaluated mainly for the experience of the applicant firm as well as the experience and qualifications of the key personnel offered for the project.

4.6 Forms of contract:

The various forms of contract that can be entered into with the consultant are lump-sum, time- based, success-fee based, percentage-based and indefinite delivery. The lump-sum contract is the preferred form of contract and should be employed under normal circumstances. It is preferable to adopt the lump-sum form of contract since the content, duration and deliverables of PPP related consultancies can be clearly defined. In the case of legal advisers, however, it may be necessary to introduce an element of time-based remuneration.

4.7 Appointments on nomination basis:

Appointments on nomination basis may be less costly and quicker in execution, however, such appointments are open to criticism for their lack of transparency. Selection by nomination may normally be restricted to a financial ceiling of Rs. ten lakh.

4.8 Procurement of consultancy services through advertisement:

In cases where the estimated cost of work is likely to exceed Rs. twenty five lakh, the bids should be obtained through open advertisement. In cases of lower value, procurement may be carried out through preparation of a list of consultants through formal/informal enquiries.

4.9 Role of Consultancy Evaluation Committee:

Technical bids should be analysed and evaluated by a Consultancy Evaluation Committee (CEC) constituted by the Ministry or Department. The CEC should be duly constituted at the level, competence and composition consistent with the value and importance of the assignment and should be able to own responsibility and have accountability for the evaluation process.

4.10 Conflict of interest:

Conflict of interest refers to the consultant or its affiliates engaging in consulting activities that conflict with the interest of the Project Authority. The consultant should hold the interests of the project authority paramount, avoid conflicts with other assignments or its own corporate interests and act without any consideration for future work.

5. Conclusion

With a view to facilitating the selection of consultants in the best interests of the Project Authorities and the users of infrastructure services, the enclosed FAQs are being published by way of guidelines. The administrative Ministries, State Governments, statutory / autonomous entities intending to procure infrastructure projects through PPP should find the document useful in selection and appointment of consultants in a fair and transparent manner.

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Copy to: PS to Secretary, Planning Commission.
PS to Adviser to Deputy Chairman.

Selection of Consultants: Best Practices

1. Context

1.1 The Eleventh Five Year Plan (2007-08 to 2011-12) recognises the deficit in existing infrastructure as also the additional demand arising out of the projected growth rate of 9 per cent in GDP. Continued shortfall in infrastructure could pose a significant constraint in realisation of the development potential of the Indian economy. Since the required investment in infrastructure cannot be met through public sector resources alone, a significant inflow of private investment in public infrastructure projects is considered necessary in the form of Public Private Partnerships (PPPs).

1.2 The shift from public sector projects to PPPs requires a significant change in governance and mindset. It involves a shift from project construction, operation and maintenance by the public sector to a 'hands off' approach where the focus shifts to quality of service delivery at competitive costs. Instead of taking day to day decisions relating to implementation and operation, the PPP approach relies on a comprehensive contract for delivery of pre-determined outcomes. In effect, the quality of a PPP project is largely dependent on the PPP contract/concession that must be preceded by a fair, transparent and competitive selection of the project sponsor.

1.3 With a view to enabling a smooth transition and for adoption of best practices, Government of India has recognised the critical role of standardising documents and processes to be adopted for award of PPP concessions. For this purpose, a number of Model Concession Agreements (MCAs) have since been evolved and adopted for different sectors. The process of pre-qualification and selection of applicant firms has also been standardised through adoption of model documents for a two-stage selection comprising the Request for Qualification (RFQ) and Request for Proposals (RFP).

1.4 Though the aforesaid standard documents lay down the norms, principles and parameters to be followed for PPP projects, they need to be suitably adapted for meeting the specific requirements of individual projects. Moreover, the nature, extent and scope of each project needs to be determined through feasibility studies. For undertaking all these tasks with the objective of structuring bankable projects, the Central Ministries, State Governments and Statutory entities owning such projects (the '**Project Authorities**') would normally require the assistance of professional advisers/ consultants.

2. What is the objective of these Guidelines?

2.1 As mentioned above, the Project Authorities would need consultants to secure financial, legal and technical advice for formulating project proposals and documents necessary for award and implementation of PPP projects in an efficient, transparent and fair manner. The purpose of these Guidelines is to provide guidance to Project Authorities in selection and appointment of professional consultants.

2.2 The costs as well as the quality of services to be provided by consultants would be largely dependent on the manner of their selection as well as the Terms of Reference (TOR). These Guidelines provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.

3. What are the financial rules governing the selection of consultants?

In particular, Rules 163 to 177 of the 'General Financial Rules 2005' lay down the framework that governs the selection of consultants. The Department of Expenditure has also issued a 'Manual of Policies and Procedure for Employment of Consultants' ***(www.finmin.nic.in)***. The Manual provides useful guidance for conducting the selection and appointment of consultants.

4. What is the difference between procurement of goods/services and consultants?

The appointment of consultants should not be treated in the same manner as procurement of goods and other services where the bid is awarded to the lowest financial applicant firm based on pre-determined specifications. This is so because what sets consultancy services apart from other procurements is the advisory and intellectual nature of services which are not amenable to precise quantification. For example, selection of lawyers, financial consultants and technical experts cannot be done on the basis of financial offers alone as that would lead to sub-optimal outcomes. The expertise, skills and experience of a prospective consultant should carry the dominant weightage in the evaluation process rather than the price determining the selection of the successful applicant firm. The objective is to select the economically most advantageous applicant firm rather than the lowest financial bidder.

5. Why hire consultants?

5.1 The process of structuring PPPs is complex and the requisite expertise is normally not available within the government. Nor do the Project Authorities have the time and staff resources that go into fine-tuning the documentation for PPPs. Employing experienced consultants enables the Project Authorities to enhance the possibilities of a successful project, helps in avoiding costly mistakes, promotes capacity building within the government and builds investor confidence in the entire process.

5.2 A poorly structured PPP contract can compromise user interests by recovery of higher charges and provision of low quality services. It can also compromise the public exchequer in the form of costlier or uncompetitive bids as well as subsequent claims for additional payments or compensation. Being long-term contracts, their adverse impact on users and the public exchequer would normally be far greater than in a typical construction contract. Moreover, the claims of a concessionaire often include foregone revenues over the concession period, which implies very large claims against the public exchequer. For these reasons, it is critical to ensure that PPP projects are structured properly with the help of best available expertise.

6. Does the expertise and experience of the consultants matter?

Yes, the selection of the consultant is heavily weighed in favour of its technical qualifications and experience since the quality of services rendered by it would be determined by its expertise, skills and experience. The Project Authority should ensure that the prospective consultant has the capacity to deliver outputs of high standards. The selected consultant should be required to perform the specified services with due diligence, efficiency and economy while conforming with generally accepted professional techniques and practices. A good consultant can also be expected to observe sound management practices and employ appropriate advanced technology in delivery of its services.

7. What are the roles and responsibilities of consultants and the Project Authority?

The term consultant(s) includes a wide variety of private and public entities, including consulting firms, engineering firms, construction management firms, management firms, procurement agents, inspection agents, auditors, investment & merchant bankers, universities, research institutions, government agencies, Non- Governmental Organizations (NGOs) and individuals/experts (See Para 1.1.2 of Manual of Policies and Procedure of Employment of Consultants issued by the Ministry of Finance). The consultant uses experience and skills in providing the Project Authority with recommendations and advice. The responsibility of accepting the recommendations of a consultant and for implementing its advice rests with the Project Authority. It is for the Project Authority to ensure that the consultants are selected and managed effectively. Employment of consultants does not in any manner diminish the responsibility and liability of the government; the consultants only assist and advise the Project Authorities in discharging their duties.

8. What is the role of individual experts in a consultancy assignment?

The quality of advice in a consulting assignment is normally dependent on the expertise of individuals who are deployed on the project though the reputation and experience of their consulting firm also plays a role as it enables the individual experts to draw upon the pool of resources available with the firm. The focus should, therefore, be on selecting experts who have the requisite qualifications, skills and experience, with a comparatively lower weightage to be assigned to the experience of their respective firms. The eligibility and evaluation criteria should be designed to achieve this outcome as it is necessary to avoid a situation where a large and experienced firm is engaged for a high fee, but the Project Authorities end up receiving advice from comparatively junior and inexperienced personnel.

9. Is it possible to hire a general consultant for handling all aspects?

9.1 Project Authorities sometimes seek the comfort of a single consultancy firm to handle all aspects of project preparation and award. While it may appear to be a convenient approach especially for Project Authorities lacking in experience, this can often lead to sub-optimal outcomes in the form of a poorly structured project which may compromise quality of service and impose avoidable costs, besides creating potential liabilities or claims arising out of the project contract. For example, if a technical consultant is also asked to provide legal advice on bidding documents and contracts, it could either do so in-house or engage an inexperienced lawyer, as it would want to save on its cost for enhancing profit. Further, such an arrangement would deprive the Project Authority of independent legal advice as the advice of a legal counsel hired by the technical consultant would tend to be coloured by the perception of the latter. Moreover, it is an international best practice to engage technical, legal and financial consultants separately as the firms rendering such services are independent of each other and must also provide their advice independently. Where necessary, the Project Authorities may separately engage a transaction adviser to coordinate the process or ask the financial consultant to discharge this function.

9.2 To begin with, it would be essential to engage technical consultants for preparing a feasibility report. In case of complex projects, a pre-feasibility report can also be considered. When the technical feasibility and financial viability of a project are established, it would be necessary to engage financial consultants for developing a financial model for the project and for assisting the Project Authorities in conducting the bid process. It would also be necessary to engage legal consultants for adopting the model documents for individual projects. Such model documents include the RFQ, RFP and the MCAs. In case of sectors where an MCA is not available, it would be necessary to engage qualified and reputed law firms who have experience in drafting such concession agreements and can draw upon the provisions of MCAs to the extent they can be applied.

9.3 In the case of a small project, a Project Authority, especially if it is lacking in experience, may find it difficult and expensive to engage separate consultants, particularly when it is proposed to follow the model documents. Small projects could mean projects where the value of the underlying assets or the capital costs of the project are less than Rs. 10 crore. In such cases, the Project Authority may engage a financial or technical firm with responsibility for engaging other expert firms as may be specified.

10. Can the same firm provide legal, financial and technical advice?

No, a consultant or any of its affiliates should not be hired for any assignment/job that, by its very nature, does not form part of its core competence. Combining of multiple services in one firm reduces the scope for engaging qualified legal, financial and technical consultants that are appropriate for the project.

Only in situations where the Project Authority is of the view that the role to be played by a financial expert is limited, such as in the case of a Feasibility Report, the technical consultancy may include an element of financial advice.

11. What is the role of different (legal, financial, etc) consultants?

Engaging legal consultants would be essential for drafting and/or adapting the bid documents, including RFQ, RFP, concession agreements, licences or other agreements. The legal consultants would also have to ensure that the final agreement is properly executed. They also play an important role in ensuring that the conditions necessary for making a contract effective and enforceable are fully met. Technical consultants would be required for preparing the Feasibility Report and for determining the technical parameters, specifications and standards as well as the service quality and performance standards for the project. Financial consultants are required for undertaking financial analysis, evolving a revenue model and suggesting and/or vetting the financial parameters and structure of the project.

The role of different consultants is briefly explained below:

- **Lead Consultants or Transaction Advisers:** They can play an important role in policy formulation and where new structures or arrangements such as regulation, pricing, etc. are being put in place. Lead consultants are also able to advise on industry and market structures as well as the design of the regulatory framework. They can also assist in managing the bid process of a project, including the process of selection of legal, financial or technical consultants. Where necessary or convenient, the aforesaid tasks of a Lead Consultant could be assigned to the financial consultants while separately engaging the legal and technical consultants for their respective areas of work.

- **Financial Consultants:** They are required for preparing a financial model for the project and for assisting in the bid process. The key to selecting a competent firm is a thorough investigation of the financial skills and previous relevant experience. The role of financial consultants should be confined to providing commercial and financial expertise that is not available in-house. Where required, financial consultants may also function as lead consultants and transaction advisers.

- **Legal Consultants:** Since the success of a PPP project depends on a sound contract, the role of legal consultants is critical. This includes adapting model documents and/or drafting contracts and bid documents. Legal firms also provide consultancy on matters ranging from regulatory review to executing and enforcing the project contracts. They can draft contracts, concessions, lease agreements and licences and provide advice on the prequalification process, evaluation of bids and execution of contracts. The firm and the individuals proposed to be deployed should have the necessary experience in dealing with such commercial contracts. An important aspect of good legal advice is that the consultant should clearly explain to the Project Authorities the implications of contract terms and contingent liabilities. However, in cases where standard documents are to be applied, such as the Model RFQ, RFP and MCA, the role of legal consultants should largely be confined to adapting these documents to project-specific situations and for providing legal counsel in the course of bid process and award, including execution of the agreement and its coming into effect.

- **Technical Consultants**: They may be required for preparing Feasibility Reports, evolving standards and specifications, setting performance standards and determining the likely project costs. The preferred consultants should have specific and geographically wide-ranging experience of the particular sector. Depending on project specific requirements, they can provide a range of skills and services including engineering design, architectural design, costing and quantity surveying, traffic studies, technical feasibility studies and reviews, performance standards, lifecycle costing and analysis, implementation schedule and project monitoring and management.

12. When should lead consultants be engaged?

12.1 Management consultancy companies and large financial services companies are normally able to constitute multi-disciplinary teams to manage the PPP process. This ensures consistency over time and components. In large and complex infrastructure projects where the Project Authority's experience in PPP is limited, lead consultants may be considered. They can also be engaged where the Project Authority has no past experience in dealing with PPP projects.

12.2 Lead consultants could assist in:

- deciding the appropriate policy framework and structure of a PPP project;
- undertaking pre-feasibility studies;
- designing the implementation process and schedule; and
- selection of technical, legal and financial consultants for subsequent stages.

12.3 Lead consultants can also function as "transaction advisers" for the project. However, they should not be regarded as substitutes for technical and legal consultants.

13. What are the advantages and disadvantages of lead consultants?

Lead consultants or transaction advisers can advise the Project Authority on a wide range of issues thereby minimising the possibility of costly mistakes; can identify the areas where specialist input is needed and also assist in conducting the bid process for selection of suitable consultants for this purpose. However, lead consultants tend to be costly and may have a tendency to limit outsourcing of specialist tasks so that they can perform the same. As a prudent practice, lead consultants or transaction advisers should be excluded from providing such specialist advice in relation to the project owing to a conflict of interest in ensuring their own selection and eliminating competent specialists.

14. On what considerations should lead consultants be appointed?

Lead consultants should have the relevant sector and project experience, both as an organization and in the deployment of personnel. This should include experience in successfully managing the bid process of PPP projects.

15. What should be the procedure for selection of consultants?

The selection of consultants should be based on the appropriate method to be chosen from among the alternatives listed below (Refer Clause 1.5.2 of Manual of Policies and Procedure of Employment of Consultants):

Quality and Cost based selection:- This method requires the applicant firms to clear the minimum threshold criteria. The financial bids of all the applicant firms who clear the threshold are opened and the lowest applicant firm is awarded the contract. This method can be used where additional weightage for the technical expertise of a consultant is not considered necessary and all those who cross the threshold are to be regarded as equally competent.

Combined Quality-cum-Cost based selection:- This method of selection should be used for projects where weightage needs to be given to a higher level of expertise. PPPs being complex projects with long- term implications, the Combined Quality- cum-Cost based selection method that applies appropriate weightages to technical and financial capacities is generally preferred. The applicant firm scoring the maximum combined score is awarded the contract.

Quality based selection:- This method of selection may be used in the following circumstances:

- The outcome of the assignment will have a high impact and, hence, it is essential to engage the most qualified consultant; or

- the assignment is very complex or highly specialised where it is difficult to define the scope of work with accuracy.

Cost based selection:- This method of selection may be used for assignments of the following nature:

- Assignment where any experienced consultant can deliver the services without requirement of specific expertise; and

- the cost of assignment should not exceed Rs. ten lakh.

16. What is the 'two-envelope system' of bidding?

16.1 Consultancy services are normally procured through a 'two-envelope' system comprising a technical bid and a financial bid. The technical and financial bids are submitted in two separate sealed covers duly superscribed and kept inside a bigger cover which should also be duly sealed and superscribed. The technical bid comprises the information relating to the experience and qualification of the consultant whereas the financial bid comprises the financial offer made by the consultant for performing the services as per the Terms of Reference. The technical bid is to be opened first (Refer Rule 172 of GFR).

16.2 A technical evaluation should be carried out by an evaluation committee constituted by the Project Authority for all cases having a financial implication greater than Rs. ten lakh (Refer Rule 174 of GFR). A list of applicant firms qualifying the technical criteria should be prepared at this stage, based on pre-determined criteria. The applicant firms should be ranked according to their respective technical scores. Only the applicant firms scoring the minimum prescribed marks should be pre-qualified and not more than five applicant firms should normally be short-listed so that the final selection is restricted to the five applicant firms who have the best expertise. This conforms to Rule 169 of the GFR which requires short- listing of at least there eligible applicants. However, in case eligible applicants are not available, the Project Authority may pre-qualify a lower number as per Rules.

16.3 In the second stage a financial evaluation is to be carried out. The financial bids of only the short-listed applicant firms should be opened for the purpose of further evaluation (Rule 175 of GFR).

17. What should be the evaluation criteria?

17.1 Details of the evaluation criteria must be clearly specified in the invitation notice. Normally this would relate to the experience/ credentials of the applicant firm, the key personnel proposed to be deployed on the project, the proposed methodology and the work plan. The applicant firm should be required to submit sufficient documentary evidence for meeting the evaluation criteria.

17.2 The consultants could be evaluated on the basis of the following information:

- Experience and past assignments of the firm, its revenues from consulting assignments and other relevant factors;
- details of recent assignments in the relevant sector or similar fields which demonstrate the required expertise;
- details of relevant experience and qualifications of the project team members including the CV of all team members;
- other terms and conditions of contract, especially fees; and details of any actual or potential conflicts of interest or any pending investigation by any governmental authority.

18. What should be the weightage for technical and financial bids?

For the purpose of arriving at combined scores, appropriate weightages should be determined for the technical and financial bids. The ratio of weightages for technical and financial bids should be established well in advance and incorporated in the Request for Proposal (RFP) document. The RFP document should be precise, transparent and explicit so that the bidders get a very clear idea of the evaluation methodology and process. The respective weightages should normally be 70 per cent for the technical bid and 30 per cent for the financial bid (Refer Clause 3.12.1 of Manual of Policies and Procedures for Selection of Consultants). However, in contracts where quality plays a more critical role and it is important that highly experienced and qualified consultants are appointed, weightage to technical capacity may be enhanced to 80 per cent.

19. What is the purpose of the technical bid?

The technical bid provides an opportunity to the applicant firms to demonstrate their suitability for undertaking the work. Technical bids will usually contain information about the firm bidding for the project, credentials of the members of the consultancy team and a work plan.

20. What does the financial bid contain?

The financial bid normally contains the time inputs and rates of fee payable for the team members along with a breakdown of reimbursable expenses such as travel costs and other over-head expenses. The bid documents should clearly state whether the bid should be inclusive or exclusive of taxes. In many situations, a lump sum fee may be the preferred option.

21. How should the technical proposal be evaluated?

21.1 The technical proposal should be evaluated mainly for the experience of the applicant firm as well as the experience and qualifications of the key personnel offered for the project. The following indicative weightages may be used for evaluation:

Past experience of the firm - 25 per cent of the maximum marks for technical evaluation may be assigned to the experience of the applicant firm.

Of these marks, about 30 per cent may be assigned for the number of relevant/ eligible assignments undertaken by the firm and the balance 70 per cent could be assigned for comparative size and quality of such assignments as well as for other relevant experience and turnover of the applicant firm.

- **Evaluation of key personnel -** The quality of the consulting assignment would largely depend on the qualifications and relevant experience of the key personnel proposed to be deployed on the project. 70 per cent of the maximum marks for technical evaluation should, therefore, be assigned to the key personnel. The Project Authority must carefully determine the nature and discipline of the advice required and identify a limited number of key personnel, including the team leader, who would play a critical role in the consulting assignment. These key personnel should be clearly specified in the bid documents and their minimum qualifications and experience should also be specified.

- **Experience of key personnel -** Each such key personnel should be evaluated individually and marks assigned. About 30 per cent of the marks for each key personnel may be awarded for the number of relevant eligible assignments the respective key personnel has worked on and the remaining 70 per cent may be awarded for the comparative size and quality of such assignments and other relevant experience. Evaluation of such key personnel is the most important component of evaluation and must, therefore, be undertaken with care and diligence.

- **Methodology and Work Plan -** Upto 5 per cent of the total marks can be earmarked for the proposed methodology and work plan of the applicant firm.

21.2 Only those applicants whose technical proposals score 70 points or more out of 100 should be ranked as per score achieved by them, from highest to the lowest technical score (S_T). Each key personnel must also score a minimum of 70 per cent mark and any key personnel who scores less than 70 per cent should be replaced during negotiations with a better candidate who meets the benchmark of 70 per cent. However, Project Authorities may, in exceptional cases, consider lowering the eligibility score but in no case less than 60 per cent.

22. What if less than two applicants are pre-qualified?

22.1 In case the number of pre-qualified applicants is less than two, the Authority may pre-qualify the applicants whose technical score is less than 70 per cent provided that in such an event the total number of prequalified and shortlisted applicants should not exceed two. This relaxation is aimed at avoiding the pre-qualification of a single applicant firm and for introducing an element of competition in financial bids. In case the next applicant firm secures low marks that are not acceptable to the Project Authority, it may either justify and accept the single bid or invite fresh bids. The Rules relating to acceptance of single bids should be followed in such cases.

22.2 In the event that no applicant firm crosses the 70 per cent mark, the Authority may, in its discretion, pre-qualify two applicant firms who secure the highest scores.

23. Should all applicants securing more than 70 per cent marks be shortlisted?

No, of the applicants ranked on the basis of technical scores, not more than five or six should be prequalified and shortlisted for financial evaluation in the second stage. The purpose of restricting the number to five or six is to ensure that only proposals of high technical standards are considered. This would also provide

applicant firms an incentive to prepare sound proposals and offer the best available experts. The advantages of getting competent professionals are obvious from the perspective of the Project Authority, especially as the scope for value addition in PPP projects is significantly greater.

24. Should all financial bids be opened?

The financial proposals of the firms which are not pre-qualified and short-listed should not be opened (Refer Rule 175 of GFR) and may be kept in sealed record, to be destroyed after the consultancy assignment is completed or returned to the unsuccessful bidders along with bid security.

25. How should financial evaluation be carried out?

In the second stage, financial evaluation should be carried out by assigning a financial score (S_F) to each financial proposal. The total cost indicated in the financial proposal should be considered for the purpose of financial evaluation. The evaluation committee should determine whether the financial proposals are complete, unqualified and unconditional. The lowest financial proposal (F_M) should be given a financial score (S_F) of 100 points. The financial scores of other proposals should be computed as follows:

$$S_F = 100 \times F_M / F$$

(F = amount of financial proposal)

26. How should the final ranking of proposals be done?

Proposals should finally be ranked according to their combined technical (S_T) and financial (S_F) scores as follows;

$$S = S_T \times T_W + S_F \times F_W$$

Where T_W and F_W are weights assigned to technical and financial proposals that could be 0.8 and 0.2 or 0.7 and 0.3 respectively. Generally the successful applicant shall be the applicant having the highest combined score. In the event two or more proposals have the same scores in the final ranking, the proposal with the higher technical score should be ranked first.

27. Whether the time input of each key personnel should be specified?

The minimum time required from each key personnel must be clearly spelt out in the bid documents so that their services are made available for the period specified in the bid documents. This would also check the tendency of including well qualified experts in the application with the objective of securing high scores, but actually deploying them superficially for brief spells when work begins. It is also necessary to ensure that the key personnel who have been offered in the application are actually deployed for project work or else the entire assignment would be vitiated.

28. Whether applicants should be allowed to form a consortium?

28.1 Generally, a firm should be selected on the strength of its own experience and capacity rather than the capacity of multiple firms who form a consortium. It is often difficult to supervise and ensure that all members of the consortium play the expected role. It can also lead to a situation where the selection is made on the credentials of a competent firm whereas much of the consulting services are later provided by the junior partner of a consortium. In cases where more than one firm needs to be involved, it is better to enable the applicant firm to hire other firms as sub-consultants for performing specified tasks while the primary responsibility continues to remain with the applicant firm.

28.2 A consultancy assignment should normally consist of homogeneous disciplines and not very diverse fields. As such, technical consulting assignments should not normally be combined with legal or financial advice as it often leads to situations where the dominant firm assigns a less significant role to its consortium partner, who is usually not accountable to the Project Authority. In addition, though a consortium may involve joint and several liability in relation to the assignment, it may often be difficult to deal with multiple firms for enforcing the consultancy contract. It is, therefore, recommended that consultancy proposals may be evaluated only with respect to the lead firm, which should always remain responsible for delivery of services. As such, proposals from consortia should not be entertained.

29. What are the various forms of contracts for consultancy?

The various forms of contract that can be entered into with the consultant are briefly described below:

- **Lump sum:** This form of payment is mainly used for assignments in which the content and duration of the services as well as the required output of the consultants are clearly and precisely defined. This form can be used for planning and feasibility studies, environmental studies, design of standard or common structures, preparation of data processing systems, and so forth (Refer Clause 5.1 of Manual of Policies and Procedure of Employment of Consultants).

- **Time based:** This form is appropriate when it is difficult to determine the precise scope and length of services, either because the services are related to or dependent on actions of others, which may expand the scope of services or delay completion, or because the inputs of the consultants are difficult to assess and quantify. This type of contract is widely used for complex studies, supervision of construction, legal advice etc. In such a contract, payments are based on agreed hourly, daily, weekly, or monthly rates for key personnel and on reimbursable basis for actual expenses and/or agreed unit prices for specified items (Refer Clause 5.2 of Manual of Policies and Procedure of Employment of Consultants).

- **Success fee based:** This form is used when consultants (banking and financial firms) are advising the government on sale of its equity or for mergers of firms, especially as part of privatization or disinvestment. The remuneration of the consultant includes a retainer and a success fee, the latter being normally expressed as a percentage of the sale price of assets (Refer Clause 5.3 of Manual of Policies and Procedure of Employment of Consultants).

- **Percentage based:** This form is normally used for architectural services. It can also be used for procurement or inspection agents (Refer Clause 5.4 of Manual of Policies and Procedure of Employment of Consultants).

Indefinite delivery: This form can be used for 'on call' specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance.

The lump sum contract is the preferred form of contract and, under normal circumstances, the employer shall use this form of contract (Clause 1.8.2 of the Manual of Policies and Procedure of Employment of Consultants).

30. Which form of contract is preferable for PPP related consultants?

It is preferable to adopt the lump sum form of contract since the content, duration and deliverables of PPP related consultancies can be clearly defined. Moreover, these consultancies normally relate to pre-award activities and do not, therefore, suffer from the uncertainties associated with project implementation as such. The terms of reference of such consultancies can normally be precise and the consultant will, therefore, be clear about the time and effort likely to be involved in the entire effort, hence, it can quote a competitive lump sum price for the assignment.

31. Is success fee an appropriate form for PPP related advisers?

31.1 Success fee based contracts are not appropriate for PPP related advisers since the success of PPP projects is mainly driven by the policy framework and not so much by the efforts of the consultants. Since infrastructure projects comprise public goods, the government is directly accountable for their costs, user charges and performance standards. These aspects must be carefully addressed by the government with utmost caution and due diligence as they would directly determine the quality and success of the project. On the other hand, a consultancy assignment based on success fee could incentivise the consultant to cut corners and somehow award the project since its remuneration is mainly dependent on the "success" of project award. In the process, the project structure and quality could be compromised exposing the government to legitimate criticism.

31.2 Since success fee is typically linked to project costs, the consultant may have an incentive to increase project costs to the detriment of the public exchequer and the user. While the success fee concept may be useful for assignments such as disinvestment, it can actually be counter-productive in the case of PPP projects. However, if the Project Authority wishes to incentivise the consultant to deliver "success", it can still do so by awarding a lump sum contract which can also include a pre- determined sum (not percentage based) that would be paid only if the project is successfully awarded.

32. Can consultants be selected purely on the basis of financial offers?

No, except in the case of cost-based selection method which may be adopted where any consultant having the prescribed qualifications can deliver the services without much impact on the quality of output. Such assignments could include traffic surveys, market surveys, etc. However, the cost of the assignment in

Such cases should not exceed Rs. ten lakh.

33. Can consultants be appointed on nomination basis?

33.1 No, except in special circumstances and where adequate justification exists for a single source selection in the context of overall interest of the Project Authority (Rule 176 of GFR). These special circumstances (refer para 1.5.3 of 'Manual of Policies and Procedure of Employment of Consultants') may include:

- Tasks that represent a natural continuation of previous work carried out by the same consultant;
- emergencies, situations arising out of natural disasters or situations where timely completion of the assignment is of utmost importance; and
- situations where the execution of assignment may involve the use of proprietary techniques or where only one consultant has the requisite expertise.

33.2 Appointments on nomination basis may be less costly and quicker in execution; however, such appointments are open to criticism for their lack of transparency.

33.3 Selection by nomination may normally be restricted to a financial ceiling of Rs. ten lakh. In order to obtain value for money and to procure the appropriate consultancy services, it is necessary to rely on competitive bidding procedures for selection of consultants (Rule 168 of GFR).

34. Should procurement of consultancy services be through advertisement?

In cases where the estimated cost of work is likely to exceed Rs. twenty five lakh, the bids should be obtained through open advertisement. In cases of lower value, procurement may be carried out through preparation of a list of consultants through formal/informal enquiries. The whole process of hiring consultants may sometimes be long-drawn, hence, sufficient time should be provided for the process. If the process is unduly compressed due to paucity of time, the costs are likely to be higher and the quality of output poor (Rules 168 & 169 of GFR).

35. What information should be given to enable applicants to bid?

The tender documents should normally contain the following information:

- Minimum required experience of the applicant firm;
- minimum qualifications and experience of key personnel;
- Terms of Reference;
- deadline for receiving proposals;
- the manner in which proposals should be sent;
- format of the proposal;
- details of the evaluation process including the evaluation criteria;
- timetable for making decisions;
- name and telephone numbers of contact persons;
- draft contract agreement; and
- other relevant instructions to the bidders.

36. What is the role and relevance of TOR?

36.1 The Terms of Reference (TOR) of the consultant provide a broad outline of the services the consultant is required to perform. They should normally include:

(a) background information;

(b) a statement of objectives;

(c) a precise scope of work;

(d) the nature and number of key personnel to be deployed;

(e) the indicative work plan;

(f) schedule for completion of each task;

(g) the inputs to be provided by the Project Authority; and

(h) the final outputs or deliverables that will be required from the consultant (refer Rule 170 of GFR).

36.2 The TOR should be clear and precise since the performance of a consultant would necessarily have to be measured in terms of the agreed TOR. Clarity in TOR is essential for ensuring that the consultants have a good understanding of the aims and objectives of the Project Authority and the relevance of their consultancy. The TOR should focus on mainly on the deliverables and the level of effort required.

36.3 In the event that the Project Authority requires a consultant firm for advising on a number of projects with a similar TOR, a cluster of projects could be combined into a package and a single consultant selected for the same.

37. Who should evaluate the technical bids?

Technical bids should be analysed and evaluated by a Consultancy Evaluation Committee (CEC) constituted by the Ministry or Department (Refer Rule 174 of GFR). The CEC should be duly constituted at the level, competence and composition consistent with the value and importance of the assignment and should be able to own responsibility and have accountability for the evaluation process. The CEC can avail the services of an appraisal committee, if need be, to assist them. As a rule, bid evaluation should not be entrusted to consultants. They can at best be asked to assist the CEC in an advisory capacity or assist the appraisal committee in conducting the appraisal.

38. Is the Consultancy Evaluation Committee required in all cases?

A Consultancy Evaluation Committee (CEC) comprising at least three members of appropriate level, including a financial representative and a representative of the user entity is required in all cases having financial implications of more than Rs. ten lakh (Clause 1.6 of 'Manual of Policies and Procedure of Employment of Consultants'). This is also applicable for appointment of individual consultants (Clause 7.3 of 'Manual of Policies and Procedure of Employment of Consultants').

39. What are the international best practices for selection of consultants?

The international best practices for selection of consultants rely on the following four rules:

- **Transparency:** Transparency is achieved when as much information as possible is made publicly available. A transparent process eliminates doubt about the quality of the final winning team. Furthermore, openness is a pre-requisite to the participation of most top consultancies, which may not participate in an opaque, difficult to understand process. Processes should also be open to the normal mechanisms for government review and appeal.

- **Fairness:** Fairness is achieved when all parties are treated equally; when they received the same information at the same time and are evaluated on the same criteria.

- **Cost effectiveness:** Cost can be minimised by choosing the appropriate method for selecting consultants, e.g., competitive bidding for lump sum contracts. The effort should be to minimise costs without compromising on quality. Imparting clarity to the criteria for selection of consultants and specifying the scope of work precisely would also help reduce costs through the competitive process.

- **Mechanism to avoid conflict of interest:** The selection process should avoid both actual and perceived conflict of interest. These include the participation of firms that may be involved in later stages of PPP, participation of government officials who have current or recent connections to the companies involved, and the linking of rewards to anything other than performance.

40. What is conflict of interest?

40.1 Conflict of interest refers to the consultant or its affiliates engaging in consulting activities that conflict with the interest of the Project Authority. The consultant should hold the interests of the Project Authority paramount, avoid conflicts with other assignments or its own corporate interests and act without any consideration for future work. It should, at all times, render professional, objective and impartial advice. The Consultant should not accept or engage in any assignment that would be in conflict with its prior or current obligations to other employers, or that may place it in a position of not being able to carry out the assignment in the best interests of the Project Authority. Any applicant found to have a conflict of interest should be disqualified. An applicant, and any of its associates, may be regarded as having a conflict of interest and hence ineligible for selection if:

(i) the applicant, its consortium member or associate (or any constituent thereof) and any other applicant, its member or associate (or any constituent thereof) have common controlling shareholders or other ownership interest. However, this disqualification should not apply to a bank, insurance company or pension fund; or

(ii) a constituent of an applicant is also a constituent of another applicant; or

(iii) an applicant receives or has received any direct or indirect subsidy or grant from any other applicant; or

(iv) an applicant has the same legal representative for purposes of this application as any other applicant; or

(v) an applicant has a relationship with another applicant, directly or through common third parties, that puts them in a position to have access to each others' information about, or to influence the application of either or each of the other applicant; or

(vi) there is a conflict among the current and other consulting assignments of the consultant (including its personnel and sub-consultant) and any subsidiaries, associates or entities controlled by such consultant or having common controlling shareholders. While providing consultancy services to the Project Authority for the current assignment, the consultant should be required not to take up any assignment that by its nature will result in conflict with the current assignment; or

(vii) the applicant or its associates have been engaged by the Authority to provide goods or works for the same project; conversely, a firm or its associates, hired to provide consulting services for the project will be disqualified from subsequently providing goods or works or services related to the same project; or

(viii) the applicant or its associate (or any constituent thereof) and the concessionaire, its contractor(s) or sub-contractor(s) (or any constituent thereof) have common controlling shareholders or other ownership interest, however, this disqualification should not apply to a bank, insurance company or pension fund.

(Associate means, in relation to the Applicant/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant/ Consortium Member. As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise.)

40.2 Conflicts of interest may arise among government and consultants; and consultants and future contractors/operators. In order to eliminate these conflicts, it should be ensured that:

- No potential consultant should have defined the project when previously working for the government or Project Authority;
- no potential consultant should be privy to information not available to others;
- no potential consultant should have recently worked for the government department overseeing the project in question;
- consultants should not be offered success fee and other revenue maximization incentives for advice on industry and market design, regulation and project structure/strategy;
- no consultant should be involved in owning or operating entities arising out of or resulting from its consultancy; or
- no consultant should bid for works arising out of or relating to its consultancy.

40.3 A Guidance Note on Conflict of Interest is at Annex-I.

41. What are the obligations of consultants?

41.1 The obligations of the consultant refer to the responsibility the consultant owes to the Project Authority in the discharge of its services in accordance with the terms of contract. The obligations and liabilities of the consultant should be charted out carefully. Any direct loss or damage accrued or likely to accrue due to deficiency in services rendered by the consultant should be attributable to him. Reporting obligations of the consultant should also be specified. The issues relating to intellectual property rights and dispute resolution should also be suitably addressed.

41.2 The obligations of consultants would normally include/address the following:

- **Standards of Performance:** The consultant should perform services and carry out its obligations with due diligence, efficiency, economy and in accordance with generally accepted professional techniques and practices while observing sound management practices and methods;

- **Terms of Reference:** The Consultant should perform the specified tasks and provide deliverables in conformity within the stated time-schedule;

- **Applicable Laws:** The Consultant should perform the services in accordance with Applicable Laws;

- **Conflict of Interest:** Discussed in para 40 above;

- **Not to benefit from commissions, discounts, etc.:** The remuneration of the consultant should constitute his sole remuneration in connection with the assignment or services and he should not accept for his own benefit any trade commission, discount or similar payment from an interested party in connection with activities pursuant to the concerned assignment or in the discharge of his obligations;

- **Corrupt practices:** The consultant and his personnel should observe the highest standards of ethics and should not engage in any corrupt, fraudulent, coercive, undesirable or restrictive practices; and

- **Confidentiality:** The consultant, its sub-consultants and their personnel should not, for a defined reasonable period, after the expiration or termination of the assignment disclose any proprietary information or any information provided by or relating to the Project Authority, its technology, technical processes, business affairs or finances or any information which the consultant is under an obligation to keep confidential in relation to the project or the services or the concerned assignment, except with the prior written consent of the Project Authority.

42. What are the liabilities of consultants?

42.1 The consultant's liability will be governed by applicable laws, and the contract may not deal with the matter unless it is sought to limit the liability of the consultant.

42.2 The consultant should be liable to the Project Authority for any direct loss or damage accrued or likely to accrue due to deficiency in services, negligence or willful misconduct on the part of the consultant or on the part of any person or firm acting on behalf of the consultant in carrying out the services, but its liability should be limited to the total payments expected to be made for the consultancy or the proceeds the consultant is entitled to receive against insurance, whichever is higher. The consultant should not be liable to the Project Authority for any indirect or consequential loss or damage.

42.3 The limitation of liability should not affect the consultant's liability for damage to third parties caused by the consultant or any person or firm acting on behalf of the consultant in carrying out the services.

43. Are the consultants required to take out any insurance?

Yes, the consultants should take out and maintain, for the period of its consultancy, insurance against risks and for the coverage as specified in the agreement and in accordance with good industry practice. This would normally include, but not be limited to, the following:

- Third Party liability insurance;
- employer's liability and workers' compensation insurance; and
- professional liability insurance.

44. Are pre-bid meetings necessary?

Yes, pre-bid meetings play an important role in clarifying the applicants' doubts with the view to enabling a clear understanding of the TOR and the conditions of contract. If the Project Authority decides to make changes in the terms/ scope of work as a result of pre-bid meetings or otherwise, a formal corrigendum should be issued and reasonable time should be provided to the applicant firms to submit their bids (Clause 3.5 of 'Manual of Policies and Procedure of Employment of Consultants').

45. Should the offers be checked for responsiveness?

Yes, prior to evaluation of proposals the responsiveness of each proposal should be determined. A proposal could be considered responsive provided it is received by the due date, is signed, sealed and marked as required, contains all the documents and information as required, and fulfills the conditions of eligibility.

46. What are the conditions of eligibility?

For the purpose of determining the conditions of eligibility, the minimum relevant experience of the firm and the minimum annual revenues from professional fees should be prescribed in the bid documents. Similarly, the minimum academic qualifications and relevant experience of key personnel should also be prescribed. This is necessary for ensuring that only a well qualified and experienced applicant is selected.

47. Why should the draft contract agreement be given at the bidding stage?

The draft contract agreement specifies the terms and conditions of employment of the selected firm. A standard contract should be used for this purpose. Key elements that the contract ought to include are:

- A brief recital specifying the parties and explaining the background of the agreement;
- the term or duration of the contract;
- description of the scope of work (attached as an Annex to the draft agreement);
- provisions for modifications to the scope of work;
- responsibility for contract administration and project management (both substantive review/management and handling of invoices) by the Project Authority;
- responsibility for project management on the consultant's side, and definition of specific task responsibilities;
- provisions for identifying and eliminating conflicts of interest;
- confidentiality requirements;
- substitution of personnel;
- use of sub-consultants;
- right to audit related documents and financial statements of the consultant;
- penalties for non-performance;

- rights or restrictions for the assignment of contractual obligations to third parties, including sub-contracts;
- ownership or disposal of property used by the consultant during the course of the project;
- insurance requirements with specified level of coverage;
- indemnification of the client;
- exemption of liability from consequential damages;
- dispute resolution, including the use of specified rules for arbitration;
- provisions for dealing with events of Force Majeure;
- conditions for termination, including period of notice;
- definitions of “corrupt” or “fraudulent” practices that would lead to a termination;
- contract price and payment schedule detailing all milestones; and
- copyright and use of intellectual property as it pertains to the deliverables resulting from the contract.

48. Why is negotiation with the lowest applicant firm required?

The first ranked consultant should be called for negotiations for reconfirming the obligations specified in the RFP and for determining the course of action, apart from negotiation for reducing the price, if required. Issues such as deployment of key personnel, understanding of RFP, methodology and quality of work plan, etc,
should be discussed during negotiations.

49. How can transparency be ensured in the evaluation process?

Transparency in the evaluation process can be ensured by the following:

- specifying a clear, transparent and predictable criteria for evaluation;
- opening of offers in the presence of all applicants who chose to be present;
- abiding by the evaluation criteria specified in the bid documents; and
- constituting a committee of relevant officials who should conduct the evaluation of applications in a fair and transparent manner, and submit a report.

50. What are the circumstances under which individual consultants can be appointed?

Individual consultants can be employed on assignments for which (a) teams of personnel are not required; (b) no additional outside professional support is required; and (c) the experience and qualifications of the individual are the paramount requirement.

51. Can individual consultants be appointed on direct nomination basis?

51.1 No, except with due justification in exceptional circumstances such as:

- tasks that are a continuation of previous work that the consultant has carried out and for which the consultant was selected competitively;
- assignments lasting less than six months;
- emergency situations resulting from natural disasters; and

- when the individual is the only consultant qualified for the assignment.

51.2 Selection of individual consultants should normally be carried out by advertising the requirement in at least one national newspaper of repute. The selection should be based on the qualifications and experience required for the assignment (Clause 7.2 of 'Manual of Policies and Procedure of Employment of Consultants').

52. How should the payment structure for the consultants be established?

The payment structure should broadly reflect the cost of expected inputs, payments against defined outputs, and retention of some leverage for final delivery.

53. What is the role of the Project Authority after the appointment of consultants?

The Project Authority should deploy the most skilled resources available with it to manage the consultants. This will serve a dual purpose. Firstly, the close involvement of Project Authority personnel will ensure the quality of deliverables which tend to have a profound effect on the implementation of the PPP Project. Secondly, it will help in capacity building within the Project Authority. If the consultants are not utilized effectively, it will only lead to a drain on the public exchequer besides a serious adverse impact on the project.

54. Does the appointment of consultants assist in capacity building?

The association with consultants may provide opportunities for the transfer of skills so that in subsequent procurement, there is less dependence on consultants. Intellectual Property Rights to any output should rest with the Project Authority so that any future consultants can have full access to the work done earlier.

55. Will documents prepared by the consultants be their property?

No, all plans, drawings, specifications, designs, reports and other documents prepared by the consultant in performing the services shall become, and remain the property of the Project Authority. The consultant may retain a copy of such documents, but restrictions on the future use of these documents by the consultants should be specified in the agreement.

56. Are any model documents available in India for selection of consultants?

Planning Commission has published model documents for selection of consultants based on the guidelines and instructions issued by Government of India. These have been hosted on the website of the Planning Commission (www.infrastructure.gov.in) as model documents.

References for International Best Practices

- *World Bank (PPIAF) Toolkit: A guide for hiring and managing advisors for private participation in infrastructure:*

  www.ppiaf.org/hiringadvisors/fulltoolkit.pdf

- *Guidelines: Selection and Employment of Consultants by World Bank Borrowers:*

  www.worldbank.org

- *HM Treasury Guidance Technical Note 3:*

  http://hm-treasury.gov.uk

Guidance Note on Conflict of Interest

1. This Note further explains and illustrates the provisions of Clause 40 above and should be read together therewith in dealing with specific cases.

2. Consultants should be deemed to be in a conflict of interest situation if it can be reasonably concluded that their position in a business or their personal interest could improperly influence their judgment in the exercise of their duties. The process for selection of consultants should avoid both actual and perceived conflict of interest.

3. Conflict of interest may arise between the Authority and a consultant or between consultants and present or future concessionaries/ contractors. Some of the situations that would involve conflict of interest are identified below:

(a) Authority and consultants:

(i) Potential consultant should not be privy to information from the Authority which is not available to others.

(ii) Potential consultant should not have defined the project when earlier working for the Authority.

(iii) Potential consultant should not have recently worked for the Authority overseeing the project.

(b) Consultants and concessionaires/ contractors:

(i) No consultant should have an ownership interest or a continuing business interest or relationship with a potential concessionaire/ contractor.

(ii) No consultant should be involved in owning or operating entities resulting from the project.

(iii) No consultant should bid for works arising from the project.

The participation of companies that may be involved as investors or consumers and officials of the Authority who have current or recent connections to the companies involved, therefore, needs to be avoided.

4. The normal way to identify conflicts of interest is through self-declaration by consultants. Where a conflict exists, which has not been declared, competing companies are likely to bring this to the notice of the Authority. All conflicts must be declared as and when the consultants become aware of them.

5. Another approach towards avoiding a conflict of interest is through the use of “Chinese walls” to avoid the flow of commercially sensitive information from one part of the consultant’s company to another. This could help overcome the problem of availability of limited numbers of experts for the project. However, in reality effective operation of “Chinese walls” may be a difficult proposition. As a general rule, larger companies will be more capable of adopting Chinese walls approach than smaller companies. Although, “Chinese walls” have been relatively common for many years, they are an increasingly discredited means of avoiding conflicts of interest and should be considered with caution. As a rule, “Chinese walls” should be considered as unacceptable and may be accepted in exceptional cases upon full disclosure by a consultant coupled with provision of safeguards to the satisfaction of the Authority.

6. Another way to avoid conflicts of interest is through the appropriate grouping of tasks. For

example, conflicts may arise if consultants drawing up the terms of reference or the proposed documentation are also eligible for the consequent assignment or project.

7. Another form of conflict of interest called “scope–creep” arises when consultants advocate either an unnecessary broadening of the terms of reference or make recommendations which are not in the best interests of the Authority but which will generate further work for the consultants. Some forms of contractual arrangements are more likely to lead to scope- creep. For example, lump-sum contracts provide fewer incentives for this, while time and
material contracts provide built in incentives for consultants to extend the length of their assignment.

8. Every project contains potential conflicts of interest. Consultants should not only avoid any conflict of interest, they should report any present/ potential conflict of interest to the Authority at the earliest. Officials of the Authority involved in development of a project shall be responsible for identifying and resolving any conflicts of interest. It should be ensured that safeguards are in place to preserve fair and open competition and measures should be taken to eliminate any conflict of interest arising at any stage in the process.