

**Standardisation of PPP Contract  
provisions in India**

**Consultation Document  
for Consultation with Private Sector  
Bodies**

**Prepared for the  
Department of Economic Affairs, Ministry  
of Finance, Government of India  
by  
Partnerships UK PLC**

Name of Body Being Consulted
<b>Name :</b>

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## Section 1

### The Consultation Process

1. This paper has been prepared for the Ministry of Finance, Government of India ("GOI") by Partnerships UK plc in order to consult private bodies in India regarding :

The establishment of a list of common and consistent principles of risk allocation for PPP projects in India, based on what is now a substantial body of international and domestic best practice.

2. In addition to this consultation with private sector bodies, a similar consultation is being conducted with public sector bodies in India.
3. We are grateful for your time in responding to this consultation. The results of both these consultations will help inform the development of policy and best practice in this area.

### Approach

1. Stage 1 : The area for consultation is set out in section 2 of this paper. Key questions for consultation are inserted throughout in outlined boxes and you are invited to submit your answers in the outlined box provided. Please then, by e mail, return the completed paper to [ + +], clearly identifying your name on the cover sheet. In order for your submission to be considered please make your return by [+ time date+].
2. Stage 2 : A representative from Partnerships UK will then hold a consultation session at [+ +] on 13 January at [+ +] to which you will be invited, where there will be an opportunity to discuss the principal findings coming out of these responses.
3. Stage 3 : will be the production of recommendations for on-going contract development and standardization processes.

## Section 2 : Part 1

### Provisions which may be Suitable for Standardisation Drafting

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?						
1.	"Compensation Events" being events which are at the risk of the Authority and which trigger a right to compensation for the Contractor.	Authority (being the public sector body)	<p>Examples:</p> <ul style="list-style-type: none"> <li>• Access to existing land/project site (to build)</li> <li>• Provision of further land (for build)</li> <li>• License to use land to provide services</li> <li>• Payment of subsidy/grant</li> <li>• Access to utilities</li> </ul> <table border="1" data-bbox="898 871 1671 1098"> <tr> <td><b>Question:</b> Are the above standard across sectors?</td> </tr> <tr> <td><b>Answer:</b></td> </tr> <tr> <td><b>Question:</b> What other additional standard Compensation Events should there be?</td> </tr> <tr> <td><b>Answer:</b></td> </tr> </table> <p><i>Comment: international financiers would not normally wish to take risk on land availability or title, or relevant consents – and would expect that these should either be available from the outset or "de-risked" in some other way.</i></p>	<b>Question:</b> Are the above standard across sectors?	<b>Answer:</b>	<b>Question:</b> What other additional standard Compensation Events should there be?	<b>Answer:</b>	<p>Yes for a core list. Additional project specific ones can be added on a sector basis.</p> <table border="1" data-bbox="1718 810 2038 1235"> <tr> <td><b>Question:</b> It is usually practice to set out a mechanism in the contract for determining claims for monetary compensation and extension of time where Compensation Events occur. Would this be useful for an Indian PPP?</td> </tr> <tr> <td><b>Answer:</b></td> </tr> </table>	<b>Question:</b> It is usually practice to set out a mechanism in the contract for determining claims for monetary compensation and extension of time where Compensation Events occur. Would this be useful for an Indian PPP?	<b>Answer:</b>
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	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
			<p><i>Question: Who should take risk of land availability, planning consents, environmental and clearance consents, and other applicable consents?</i></p> <p><i>Answer:</i></p>	
2.	<p>“Force Majeure Event” being events beyond the control of either party which causes either party to be unable to comply with a material part of its obligations, for a specified period, and which can then allow either party to terminate the contract.</p>	<p>Shared – after an initial period either party can call for termination of the contract with some measure of compensation for the Contractor</p>	<p>A number of GOI contracts have a relatively unusual form of force majeure provision which includes (a) Non Political Force Majeure Events – including fairly usual classes of force majeure event (such as act of god, and certain strikes) (b) Indirect Political Events (such as war, terrorist action, civil commotion, certain strikes) and (c) Political Events (such as requisition, unlawful revocation of licence and certain types of change in law above a threshold). There are then 3 different levels of compensation payable with Non Political being the lowest and Political the highest.</p> <p><i>Comment: these contracts appear to have a very particular form of force majeure here, which differs from some PPP practice elsewhere e.g. Change in Law is often dealt with under separate provisions (and may not lead to termination) and Political Events would normally be dealt with under Authority Events of Default.</i></p> <p><i>Question: are there particular reasons why this approach is used in India or could alternatives usefully be considered?</i></p> <p><i>Answer:</i></p>	<p>Yes – it is considered that the events of force majeure and the termination mechanics and payments could be standardised for PPP projects.</p>

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
			<i>Additional comment: other Indian contracts (Mumbai Airport Contract) however bear greater similarity to international practice.</i>	
3.	“Change in Law” legislation/ binding court precedents happening after the date of the contract.	Shared	<p>Normal GOI practice seems to be that the Contractor bears the risk of cost consequences up to a threshold, beyond which an Authority indemnity is triggered. Costs beyond a further threshold can trigger termination.</p> <p><i>Comment: in other sectors and jurisdictions an alternative approach is to distinguish between different types of change (e.g. discriminatory, tax, changes giving rise to capital costs or operating costs, foreseeable/unforeseeable change, change in build phase and operating phase. A more nuanced approach to risk transfer is possible).</i></p> <div data-bbox="898 970 1688 1129" style="border: 1px solid black; padding: 5px;"> <p><b>Question:</b> Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p><b>Answer:</b></p> </div>	Yes – as to both change in law events and compensation mechanisms.
4.	“Restrictions on the transfer of the Contract by the Authority”	Authority	<i>Comment: standard provisions seem to allow an unrestricted right of the Authority to transfer its rights and obligations. International financiers/contractors would commonly require some limitation on such right (in order to preserve their credit risk).</i>	Yes

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
			<p><b>Question:</b> Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p><b>Answer:</b></p>	
5.	“Authority Default” and related termination and compensation provisions.	Authority	<p>Examples include repudiation, material payment failure, material breach with material adverse effect. An international financier may also expect breach of the Authority transfer provisions to be a default. The precise scope of defaults does however commonly vary across jurisdictions.</p> <p><b>Question:</b> Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p><b>Answer:</b></p>	<p>Yes – both as to Default events and termination payments. There are a range of different possible compensation on termination payments – based on repayment of Senior Debt in full and payment of some equity return to equity investors.</p> <p>It should however be possible to fix a standard approach.</p>
6.	“Contractor Default” and related termination and compensation provisions.	Contractor	<p>Examples include abandonment of build, failure to complete build on time, maintenance/service failures, payment failures, insolvency failures, breach of ownership requirements.</p>	<p>Yes – both as to default events and compensation payments.</p> <p>There is some variety</p>

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
			<p><i>Comment: compensation provisions are amongst the most important and difficult provisions to settle. Currently most of the forms of GOI contract reviewed offer a 90% senior debt underpin for termination after the build phase has been completed – and this represents a major transfer of risk back to the Authority and a significant contingent liability for the Authority. International practice varies in this area; the UK does not offer such a debt underpin, but some other countries do.</i></p> <p><i>It is noted that the school annuity contract does not offer a 90% debt underpin but offers 70% book value payment.</i></p> <div data-bbox="898 836 1688 948" style="border: 1px solid black; background-color: #e0e0e0; padding: 2px;"> <p><b>Question:</b> <i>Is it felt that projects could be financed in India without a 90% debt underpin and could alternatives usefully be considered?</i></p> </div> <div data-bbox="898 948 1688 995" style="border: 1px solid black; padding: 2px;"> <p><b>Answer:</b></p> </div>	<p>over default events at present, but it should be possible to have a core set of standard defaults.</p> <p>It should be possible to standardise a compensation approach. Whether or not this should offer 90% debt underpin would need to be considered.</p>
7.	Ownership Interests in the Contractor	Contractor	<p>Examples in GOI contracts include maintenance of 51% or more shareholding during the construction phase and reducing amounts thereafter, and an excluded class of transferees.</p> <p>International practice varies on this, with some prohibiting all transfer in the build phase, but then allowing 100% transfer shortly thereafter. Equity funds in particular normally require the ability to realise their whole investment after a four/five</p>	Yes

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
			<p>year period (e.g. the construction phase plus one year).</p> <p><b>Question:</b> <i>Are there particular reasons to keep to the example mentioned above, currently common in the Indian market, or could alternatives usefully be considered?</i></p> <p><b>Answer:</b></p>	
8.	Warranties	Contractor and Authority	<p>Examples of contractor warranties include constitution, standing, powers etc.</p> <p>Examples of Authority warranties include power and authority etc.</p>	Yes – it should not be difficult to agree a core set of warranties.
9.	“Voluntary termination” by Authority and related compensation provisions.	Authority	<p>This is a normal provision in PPP contracts in other jurisdictions (though it does not appear to be standard in Indian PPPs).</p> <p><b>Question:</b> <i>Are there particular reasons why this is not common in the Indian market. Should it be considered?</i></p> <p><b>Answer:</b></p>	Yes – these provisions should not be controversial and may offer some additional flexibility.
10.	Changes to project documents	Contractor	Example: Contractor wants to change his build or services subcontracts.	Yes
11.	“Hand back” or divestment arrangements”.	Contractor	Example: Contractor must hand back project assets in a required minimum condition, with relevant records and documents, and the Authority has a right to inspect and survey.	Yes – at least for a core set of standard provisions

	Type of Core principle or provision	Required risk allocation	Examples, comments and questions for consultation	Capable of required drafting (based on international best practice)?
12.	Dispute Resolution	Both	<p>Example: disputes are submitted to a dispute resolution procedure and if not resolved will go to arbitration – an optional conciliation process may also be offered.</p> <p><i>Comment: international investors will regard these procedures as important.</i></p>	Yes – it is considered that it should be possible to agree a common approach to disputes.
13.	“Boiler plate” or ancillary provisions	Both	There are a number of small provisions, such as Interpretation, governing law and jurisdiction, waiver of immunity, survival, entire agreement, notices etc which could usefully be standardised.	Yes

**Question: Do you agree that the above provisions should be capable of standardisation across sectors in Indian PPPs? Are there others which are not listed?**

**Answer:**

## Section 2 : Part 2

### Provisions which are not so Suitable for Standardisation across Sectors

Provision	<i>Do you Agree?</i>
Build provisions	
Handover provisions	
Detailed service provisions	
Detailed maintenance provisions	
Detailed payment provisions (grant, toll, fee, monthly payment etc)	
Detailed indemnities	
Revenue sharing	
Utilities	

Consultees to complete the column headed "Do you agree?"

## Section 2 : Part 3

### Provisions which have some Consistency of Principle but are not suitable for Detailed Standard Drafting across Sectors

Provision	<i>Do you Agree ?</i>
Insurance	
"Change" provisions	
Step in by Authority	
Utilities	
Subcontracting	
Information provisions	
Refinancing	

N.B It may be that some of these provisions could be standardised at a future point in market development.