

**Standardisation of PPP Contract
provisions in India**

**Consultation Document
for Consultation with Public Sector Bodies**

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

Name of Body Being Consulted
Name :

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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 public bodies in India regarding :
 - a. Identification of core Government of India ("GOI") policy objectives and assumptions for procurement and standardisation of PPP project documentation in India
 - b. 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
 - c. Identification of the key contractual requirements which international financiers are likely to require for investment in Indian PPPs.
2. In addition to this consultation with public sector bodies, a similar consultation on risk allocation is being conducted with private 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 the following section 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 these completed papers 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

What are the High Level GOI Priorities for its PPP procurements?

1. A number of key policy objectives need to be established and understood as a backdrop for the development of standard contractual provisions. The most important ones are set out for consideration below together with the key associated questions for consultation.
2. What benefits does GOI seek from its PPP Procurement Programme?

This is likely to be a combination of a number of potential benefits, from those listed below.

Policy objectives: Why do PPPs

- a. Nationwide consistency of approach/delivery?
- b. A platform for policy delivery?
- c. Best value for money over the life of the project?
- d. Better access to private capital?
- e. Lowest cost solutions?
- f. High quality infrastructure/service provision?
- g. To achieve more efficient service delivery?

Delivery objectives: How to do PPPs

- a. A quick procurement process?
- b. A low cost procurement process?
- c. A process that drives out value for money?
- d. A process which increases transparency and reduces scope for corrupt practices?
- e. A process which allows bidder innovation?

Question: *Please rank the above in order of priority to show which benefits are regarded as the most important? Are there any others not mentioned?*

Ranking of Policy Objectives
1.
2.
3.
4.
5.
6.
7.
Others?

Ranking of Delivery Objectives
1.
2.
3.
4.
5.
Others?

An understanding of the above will inform the standardisation and tender process, for instance if the priority is :

- a. to have a quick tightly controlled procurement process, without discretions for the public or private sector, with a non-negotiable contract and with a single final award criteria based on lowest price, this will imply one form of contract and tender process or
 - b. to gain long term value for money over the life of the project, and to allow a measure of negotiation/adaptation of the contract documents to develop this, this would imply another.
3. Which procurement Methodology: Negotiated or Not negotiated?

- a. GOI will need to confirm which procurement methodology it intends to follow. For example, in the United Kingdom, other EU PPP markets, and Australia, Canada and South Africa, a “negotiated” procedure has been adopted for PPP/PFI. This recognises the complexity of the projects being procured and the benefits that a degree of negotiation between the Authority (by which we mean, in this report, the public sector party) and the Contractor (by which we mean the private sector bidder or build/service supplier) can bring in working out the best project solution. A dialogue can serve to stimulate innovation and improve value for money. But, while negotiation in the tender process may help improve the ultimate project solution, a negotiated process may also (a) take longer to procure (b) be more expensive to run (for Authority and Contractor) (c) be more likely to result in challenge and change to the drafting of the contract and (d) be more susceptible to corrupt procurement practices or subjective decision-making.

Question: <i>Do you favour a negotiated or non-negotiated tender approach? Why?</i>

Answer:

- b. Recently in the EU a variant of the negotiated procedure has been used for PPPs; this is called the “competitive dialogue” procedure – where the bidder is given some opportunity to discuss provisions and offer alternatives. An important feature of this is that not all of the contract and plans need be open to dialogue (e.g. the design may be fixed by the Authority and the contract negotiated, or vice versa, or only some parts of the contract may be opened to debate). See further paragraph (d) below.

- c. If speed, simplicity, low bid costs, transparency and high standardisation are priorities, a non negotiated procedure may be more appropriate. This would suggest a more prescriptive approach to the contract standardisation process. Clearly, if no negotiation is allowed in the bid process then every provision is mandatory for the bidder. This would however give the bidders no opportunity to suggest changes to the contract which may otherwise make the contract more attractive to the market and allow (a) new entrants to the market and (b) existing bidders to bid more attractive prices. In particular some international financiers or overseas contractors may have certain minimum contract criteria without which they will not bid, so excluding otherwise potentially interesting bidders and reducing competition. Some sort of opportunity for contract feedback and development is essential. If no bidder feedback is possible in the bid process, it would be important for the standard form base document to be adequately consulted, with the private sector, in advance of publication. An alternative possibility would be to let an initial tranche of projects and then subsequently have a consultation to get market feedback on the form of document used. This could be repeated at intervals.

Question: *what sort of consultation or market feedback processes should there be for standard form contracts? Should there be an ongoing updating process?*

Answer:

- d. It may alternatively be possible to adopt a hybrid competitive dialogue approach, with a limited dialogue being allowed at an initial stage of the bid, but with strict contract compliance being required later on. This could be achieved through a modified competitive dialogue approach (see b above) to strike a balance between dialogue and transparency. This is an approach that has been used in Greece and Mexico. Alternatively the Authority may only allow dialogue against certain provisions in the contract.

Question: *should such a "middle way" be contemplated in India as an alternative to a "no dialogue" bid?*

Answer:

- e. It may also be possible to take different approaches in different sectors; for example a fairly standardised infrastructure project such as a road (with tightly prescribed technical requirements) may offer less scope (and therefore potential benefits) for bidder innovation or negotiation than a social asset such as hospital or a services asset such as waste management facility. Again in some sectors (such as an airport) it may be possible for some middle way to be followed where the public sector prepares and prescribes some form of initial design but the Contractor then takes it over and completes it. Such hybrid approaches have been used in Italy.

Question: *Should different procurement approaches be considered in different projects or sectors? Please give examples.*

Answer:

4. Approach to Governance to support Standardisation

- a. The adoption of a form of negotiated procedure and value for money assessment would suggest the need for (a) a compliance infrastructure and trained workforce in government to back it up, and (b) approval and enforcement policies and procedures within government. Without such supporting infrastructure the benefits of a negotiated procedure may be lost; well advised bidders may out-manoeuvre the public sector and consistency of approach may be lost.

In the United Kingdom, one of the lessons learned has been that it has only possible to impose a central system of enforcement, with derogations from specified required drafting requiring HM Treasury consent, once a working system of a central task force and satellite ministry based cells are in place to assist with projects across Government.

Question: *Should a similar development path for governance/project support structures of PPP Cells be considered in India (but with the added layers of federal, state, and municipal bodies to be taken into account)? Is there a better alternative?*

Answer :

- b. Best practice in the UK has been for core guidance and drafting to be developed at the centre and then flowed down (and adapted as necessary) into ministry or sector standard form contracts. It would be at this stage that any deviation from standard core drafting provisions necessary for the sector would be developed and approved for the sector as a whole. Such standard forms may then, in turn, need some adaptation by the ministry for particular projects in their sector or bidders may seek some changes if a negotiated procedure is adopted. After an initial developmental period of some years the UK established a “derogation” process for ensuring the core contract provisions are not further changed at these stages without approval. In the UK therefore there is a cascade of information with the Guidance at its head. It would however be considered unduly restrictive in the UK for a complex procurement not to allow any change at all to standard drafting which is why a derogation system has been developed.

Question: *Should some similar developmental path for guidance and approval be considered in India? Is there a better alternative?*

Answer:

5. Approach to Evaluation: Value-for-money or Lowest Cost?

- a. The second key procurement decision for GOI is whether to evaluate bids on the basis of lowest cost (or bid for least subsidy where “viability gap funding” is adopted) or best value for money (“vfm”)¹. The approach taken in countries such as Australia, Canada, South Africa and the United

¹ The premise underlying Vfm involves evaluating not only the cost (i.e. monthly payments or viability gap funding) to the Authority but the value of risk transferred; for example over the life of a project it may be that a contract with a low charge/subsidy but with significant retained public sector risk, ends up costing more than a project with a higher charge/subsidy but less risk transfer. One of the key risks typically transferred on a privately financed project is the life cycle risk. The value of this has become apparent, for instance, in the London Underground “privatisation”.

Kingdom, has been to evaluate on a value for money basis – and this approach underpins guidance in these markets. The Spanish approach on the other hand is to conduct fast procurements based on a "lowest cost wins" approach (however their approach is underpinned by their civil code legal system – which neither the United Kingdom or India share). In the roads sector, other countries which have chosen a lowest cost procedure include Mexico (based on availability and shadow toll payments), Chile (based on lowest toll), and Brazil (lowest cost). Greece has used both approaches.

- b. Evaluation on a value for money basis involves developing clear VfM evaluation criteria and methodologies, involving, amongst other things, evaluation of risk transfer. This may be seen as possibly more subjective and open to corruption and challenge than a simple "lowest price wins" approach. In addition, procurements based on VFM criteria usually take longer and are more expensive to complete. There is also an argument that for user-paid schemes where minimal use of public funds is contemplated, such VfM analysis is less meaningful and the reaction of the market to the bids serves as the test for economic viability.

Question: *which evaluation methodology do you favour for India : value for money or lowest cost? Why?*

Answer:

- c. Preferences on this may vary between jurisdictions and, indeed between different sectors, with simpler sectors lending themselves to simpler approaches. Where there is little scope for design innovation and where the technical specification is tightly prescribed a lowest cost approach may be satisfactory. Where however bidder innovation is needed and possible different design solutions form an important part of the evaluation process, then a value for money approach may be needed.

Question: *Should the same methodology be applied to all sectors? If not please give examples.*

Answer:

- d. In easily standardised and more straightforward sectors (such as roads) it may be possible to experiment with different approaches in the future and to see which seems most advantageous. In Brazil, for example, roads PPP bids are evaluated on price / viability gap funding basis once a quality/technical competence threshold is achieved (which has been the method adopted by GOI to date). In England, by contrast, VfM has been the chosen methodology for PFI roads projects (and all other PFI projects). PFI is the name of the UK PPP policy and generally refers to availability based, as opposed to concession based, PPPs.

6. Approach to Risk Transfer?

- a. In allocating risk between the public and private sectors it is important to have a clear methodology. In other jurisdictions in the early days of their PPP markets there has sometimes been a tendency to seek maximum possible risk transfer to the private sector. We suggest however that best practice does not seek "maximum" risk transfer, but rather "most

appropriate” risk transfer. This involves allocating the risk to the person best able to manage it. Almost any risk can be transferred to the Private sector – but it will be priced. This will only produce good value for money if the Contractor is better placed to manage the risk than the Contractor. In the early days of PFI in the United Kingdom too much emphasis was placed on maximising risk transfer; and more recently we have tried to develop a more balanced approach. Where neither side is well able to manage a risk, sharing mechanisms can be used. It is not possible to test the market on this if all provisions are “cast in stone”.

Question: *Would you seek to achieve maximum or most appropriate (from VfM perspective) risk transfer? Would you be prepared to allow a measure of flexibility to your contracts to test this out?*

Answer:

7. To what type of PPP should the standard provisions apply?
- a. It is necessary to place some parameter around the types of project the GOI standard provisions might apply to. For instance, it would be possible to have a high degree of standardisation around a small homogenous class of projects or a smaller degree of standardisation around a larger class of projects.
 - b. Where the parties come together in some form of joint venture (or other way) for the performance of Authority functions or to use institutional assets for commercial purposes, this would commonly be dealt with through a joint venture vehicle or other form of Public Private Partnership. We have recently finished drafting guidance for the United Kingdom on different forms of joint venture which can be used for such PPPs.² Rigid standardisation for this type of PPP would be very difficult (due to the variety of project and form of engagement that can be used) and is not something which has been attempted in the United Kingdom. Accordingly, references in this report to PPPs should be interpreted as references only to the narrower type of PPP which are privately financed (as outlined below).
 - c. This type of privately financed, or PFI, project (as understood in the UK and other jurisdictions) allows a higher degree of standardisation³ and typically would involve the Contractor building and maintaining some form of public sector asset (and often providing other services as well) over a long time period. This could involve some form of public infrastructure (such as a road) or social infrastructure (such as a school) where the public sector would perform its public or social functions; this may be for example the provision of schools in which teachers can teach, or hospitals in which doctors can operate, or office accommodation from which departments can perform their duties, or waste facilities where local authorities can dispose of their waste⁴. At heart, these types of contract

² We have recently finished work for HM Treasury in the United Kingdom on guidance called “Joint Ventures: a guide for public sector bodies forming joint ventures with the private sector” and this is currently up for consultation on the PUK Website under Guidance.

³ See for example “Standardisation of PFI Contracts Version 4 dated March 2007” as published on HMT Treasury’s website and Partnerships UK’s website in the United Kingdom.

⁴ Though sometimes the Contractor may take over more responsibilities – e.g. in the United Kingdom prison contractors may perform custodial functions as well as building prisons.

involve the construction and long term maintenance of public sector assets for an Authority or for the general public.

Question: *do you recognise a distinction between the various types of PPP projects (as broadly defined) and a more narrow class of privately financed projects as described above, and should the standardisation initiative be aimed only at the latter?*

Answer :

- d. This suggests that there are boundaries to the application of any standard contract or provision and that these need to be defined. Other forms of commercial exploitation of public sector assets or joint venturing may be dealt with in different ways, and these fall outside the scope of this report
- e. Our experience of best practice in the UK and other parts of the world suggest that it should be possible to establish a core set of standardised provisions for privately financed projects in a range of sectors including the following:
- i. roads,
 - ii. ports,
 - iii. light rail,
 - iv. waste/water supply,
 - v. solid waste management,
 - vi. health,
 - vii. education,
 - viii. prisons,
 - ix. government offices, and
 - x. various other municipal services.

Even within these sectors however some small adaptations of standard wording may be needed.

Question: *what are India's priority sectors (please list) and do you expect that all these are suitable for standard PPP treatment? Which are not?*

Answer:

- f. This type of standard form may however not work so well for:
- i. shorter term contracts or contracts where the Authority does not have a clear and long term service requirement
 - ii. contracts where the service solution is likely to change in the short term or where obsolescence is likely to occur (e.g. IT contracts)
 - iii. contracts which involve services only (and have no build involved)
 - iv. smaller projects – where the expense of the bid process may outweigh the benefits which may be derived from the contract
 - v. contracts for the provision of equipment rather than buildings. In this case, the principles can however be adapted, but significant changes would be needed to the contract (not fully covered in the Guidance).

Question: <i>Do you agree that such projects should remain outside the scope of PPP standardisation? Should others be excluded?</i>

Answer:

8. Standard Terms

- a. As may be seen from section 4 above, we do not believe that all provisions in a complex PFI contract are usefully capable of being standardised. We do consider however that a key set of core principles and provisions can be standardised across a range of PFI projects with only minor adaptation. **These are considered in Part 3 following.**
- b. Ideally a central administrative or support function within GOI would consider the application of these provisions (and approve the minor changes which might be needed as between different sectors) in order to ensure that standardisation was adhered to and produced the benefits being sought (as outlined in paragraph 4 above). If GOI adopted a negotiated procedure for any projects it would also need to consider if any central approval process was needed for changes suggested by bidders. In the UK such central approval is only needed for a set of core required drafting provisions (i.e. not the whole contract).

9. Concessions and Availability based PFI contracts

- a. A distinction needs to be drawn between two different forms of contract which are characteristically used in these sort of complex infrastructure or social project procurement namely (a) concession contracts where the contractor recoups his costs and returns wholly or partly from members of the general public who use the infrastructure (e.g. toll roads or railways or bridges) and (b) privately financed projects where the costs and returns are met wholly or largely by a public sector body – and based on the availability of the asset and/or standard of service provided (usually referred to in India as ‘annuity based payment schemes). Different countries may favour different models, for instance in the UK performance-based projects with payments being made by a public body are the norm, while in France concession-based contracts are more common, also reflecting sectoral priorities for investment. A core set of key provisions may still largely be used across both models. However some adaptation is needed (most obviously around the monitoring, price and payment regimes)⁵.

Question: <i>will India be primarily interested in concessions or availability-based projects (or both)? If both, how would these be split?</i> ⁶

Answer:

It is believed that there is a descending scale of the degree to which it is possible to standardise transactions, with availability based projects being most standardisable, concessions next (though capable of sharing a

⁵ Within the UK in the road sector we have examples of three types of road scheme: toll roads, “shadow toll roads” (payment by the Authority but based on traffic volumes) and availability-based roads.

⁶ We understand that on some road schemes a tender is invited for viability grant funding and if over 40% grant is required, the project may be retendered on an availability basis?

significant common ground with availability based projects) and joint venture PPPs the least (probably amenable only to general principles).

10. Project financing and corporate financing

- a. It is possible for privately financed projects to be supported by either project finance (where a special purpose company would normally be set up by the Contactor and given finance in return for granting security over the project cash flows and other assets of the company) or corporate finance (relying on the balance sheet of the borrower rather than the project assets and cash flows). In the United Kingdom we do not mandate any particular form of finance (however in most sectors limited recourse project finance has been prevalent).
- b. We understand that a normal debt /equity ratio for PPP projects in India is 70:30 and that a normal loan period may be 12/13 years. In some other jurisdictions higher ratios and longer loan terms may be obtained.

<i>Question: Are the above assumptions correct? Do you think it is feasible to move the market in these areas?</i>

Answer:

- c. Significant drafting changes may be appropriate where corporate finance is used. The standard provisions provided in UK guidance assume that the projects are being project financed.

<i>Question: can it be assumed that the standard approach in India for privately financed projects will be project finance?</i>

Answer :

11. Particular requirements for internationally resourced private finance

- a. We understand that GOI may be particularly interested in the sort of contractual provisions which international financiers may require as a pre-requisite to their entering the Indian market for PFI projects.

Those key principles/provisions which such financiers are likely to require are set out in Section 4.

Section 3 : 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	<p>Examples:</p> <ul style="list-style-type: none"> • Access to existing land/project site (to build) • Provision of further land (for build) • License to use land to provide services • Payment of subsidy/grant • Access to utilities <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="background-color: #e0e0e0;">Question: Are the above standard across sectors?</td> </tr> <tr> <td>Answer:</td> </tr> <tr> <td style="background-color: #e0e0e0;">Question: What other additional standard Compensation Events should there be?</td> </tr> <tr> <td>Answer:</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>	Question: Are the above standard across sectors?	Answer:	Question: What other additional standard Compensation Events should there be?	Answer:	<p>Yes for a core list. Additional project specific ones can be added on a sector basis.</p> <div style="border: 1px solid black; padding: 5px; background-color: #e0e0e0;"> <p>Question: 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?</p> </div> <p>Answer:</p>
Question: Are the above standard across sectors?								
Answer:								
Question: What other additional standard Compensation Events should there be?								
Answer:								

	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>Question: Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p>Answer:</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>Question: Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p>Answer:</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>Question: Are there particular reasons to keep to this approach in the Indian market or could alternatives usefully be considered?</p> <p>Answer:</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>Question: <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>Answer:</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>Question: Are there particular reasons to keep to the example mentioned above, currently common in the Indian market, or could alternatives usefully be considered?</p> <p>Answer:</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>Question: Are there particular reasons why this is not common in the Indian market. Should it be considered?</p> <p>Answer:</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 others which are not listed?

Answer:

Section 3 : 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 3 : 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

Section 4

Provisions which International Financiers are likely to Require

Consultees are asked to answer the questions at the end of this section.

This section of the report sets out some high-level considerations for potential overseas participants in India's PPP programme. The issues below are primarily focused on considerations for overseas lenders. As a general comment, what will be crucial to the success of India's PPP programme is that the PPP structure and the political and legislative environment are seen as bankable. The notion of bankability does not easily lend itself to objective definition but having regard to India being a strong developing economy the issues set out below may be regarded as general indications of whether a project is bankable.

1 Credit Standing of the Authority

The credit standing of the public sector counterparty underpins a PPP project. As such, counterparties to PPP projects in India (referred to as the "Authority") will need to be of sufficient credit standing so that they may discharge all financial obligations under the PPP contract as they arise. Such obligations may be distilled down to the payment of VGF, the monthly Unitary Charge ('annuity' payment) and compensation on termination payments that the Authority is required to make.

Where the credit standing of the Authority is likely to be an issue, it is, of course important to consider measures to address this issue at an early stage in the programme. Examples of such measures may include the contracting Authority ring-fencing funds for the payment of sums due under the PPP contract so that they are segregated from funds to be applied towards other purposes.

Other credit enhancement measures include the issue of Government guarantees, although this is may be fiscally constrained.

2 Public Sector Assignment

Lenders may be concerned that an Authority may transfer its obligations to a further body of lesser credit standing (even if mandated under applicable law), while at the same time the public sector will wish to retain flexibility to reorganise itself without contravening the provisions of its contracts. The GOI may wish to consider a provision to the effect that any Central Government body/department will only transfer its obligations to another Central Government body/department or will otherwise guarantee the obligations if the transfer is to any other body. Similarly, concerns may arise where the Authority is a local public body, and provisions may need to be included concerning transfers to other local bodies of lesser credit standing – or the furnishing of a suitable guarantee. The United Kingdom's Standardisation of PFI Contracts at Chapter 17 (Assignment) examines these issues.

3 Sub-contractors – Performance and Credit Standing

Given that the Contractor will largely seek to pass down its obligations under the PPP contract to its sub-contractors, it is important that such sub-contractors have the

requisite experience and capacity to perform obligations that they assume. Furthermore, such sub-contractors will need to be of sufficient credit standing, or procure the necessary credit enhancement (for example, a performance bond) to support its financial obligations under the sub-contract (for example to pay delay liquidated damages). It may be that at the early stages of a PPP programme, for certain perhaps larger and more complex projects, a parent or other members of the group will be required to wrap the performance of the local sub-contractor. Where overseas sub-contractors are involved (or indeed overseas shareholders), it would also be helpful if the engagement in the project of key personnel of such organisations could be easily facilitated (e.g. work permits etc.).

The importance of sub-contractors in PPPs is highlighted by the fact that what on the face of it may be seen as onerous terms in a PPP contract may be acceptable to overseas lenders provided that such terms can be effectively passed-down to the project company's sub-contractors.

We note the provision that a certain percentage of senior debt on a Contractor default is underwritten by the Authority. This will provide significant comfort to overseas lenders as far as the performance risk of the Contractor (and its subcontractors) is concerned.

4 Consents

Overseas lenders are likely to require that all the necessary consents in order to construct and operate the project are in place prior to loans being drawn-down. Furthermore, overseas lenders will seek to be insulated from changes to conditions attaching to consents or changes in interpretation that relate to such consents. In addition, consents should be transferable to a certain extent - with a balance being struck between the public sector's regulatory requirement and the lender's need to transfer consents in a work-out scenario or following enforcement of their security.

Of particular relevance to overseas lenders will be any required forex approvals. Overseas lenders' (and shareholders') requirements will be that such approvals cover all payments/receipts in relation to the project (so, for example, such approvals should cover issues such as receipt and application of insurance proceeds).

Planning consents are similarly likely to be critical to lender's willingness to lend. They will also require certainty over the availability and necessary title to all land required for the project.

5 Change of Law & Tax

Overseas lenders will be seeking to allocate change of law risk (and in particular imposition of any withholding tax) to the public sector. Lenders will also seek to limit the cost to the project company of any changes in law requiring future capital expenditure, *e.g.* new environmental or safety regulations requiring retrofitting of buildings or equipment.

6 Political Risk

Commercial overseas lenders will have limited appetite for political risk (e.g. restrictions on remittance abroad of foreign currency). Municipal or other public bodies may need some state guarantee. Ultimately however political risk may need to be managed offshore through export credit, multilateral agencies and political risk insurance.

7 Demand Risk

Overseas lenders will not normally take usage risk. There may therefore, in concession based projects, be a push by international lenders for more of the payments to be “availability” based rather than “usage” based. Where tolls are involved lenders will also have an interest in toll pricing policy and toll collection.

8 Timing of Financial Close

The basic model seems to provide for financial close to be 180 days after contract award (and to be hedged by a bid bond) and for finance to be put in place during this period. International lenders may be concerned at their inability to conduct significant due diligence prior to the concession/contract being signed.

9 90% debt underpin

We note that the standard contract provides for underpinning of 90% of the senior debt amount. Overseas lenders will find this attractive, in particular where they might be operating in a new jurisdiction or dealing with contractors that might not be well known to them, but the Authority should be aware that underpinning to this degree significantly lessens the incentive on lenders to conduct thorough due diligence on the project to ensure that the project’s technical solutions and contractual structure are robust. The Authority will need to balance increasing the attractiveness of a project to lenders through debt underpinning against the benefit to the project of third-party due diligence and structuring expertise.

10 Surveys and ground conditions

Lenders will require that extensive surveys of any building site be completed prior to financial close. To the extent that all or part of a site lies beneath an existing structure, they are likely to require that the public sector retain the risk that the project may be delayed or otherwise disrupted due to unforeseen ground conditions in areas that could not be surveyed. Additionally, to the extent that environmental legislation applies, lenders’ concerns about ground conditions will also encompass environmental hazards that would not necessarily have a direct impact on construction but which might present liabilities for the project company or themselves.

11 Force Majeure

Overseas lenders are likely to scrutinise carefully the scope of the force majeure provisions.

12 Insurance Arrangements

Overseas lenders will need to satisfy themselves that the scope of insurances available in the local insurance market will be sufficient for the purposes of the project. Furthermore, the credit standing of the local insurers themselves should be adequate. Availability of insurance (in terms of scope) and the credit standing of insurers are perhaps of greatest issue where local law requires insurance to be written locally (and availability of reinsurance, with relevant “cut through” clauses may need to be reviewed). Additionally, lenders may require that the Authority take the risk of events that are not insurable when the concession is signed or that become uninsurable during the life of the concession.

13 Exchange Rate Risk

Overseas lenders will seek to mitigate the risk arising where there is a mismatch between the currency of the loan to the project company and the currency in which Unitary Charge is paid. A usual mitigant for managing such risk is the effecting of currency swaps, although GOI will need to consider both the depth of financial markets for such swaps and the likely cost of such instruments. Alternatively, GOI may consider offering some form of currency indemnity. Local currency financing for projects will avoid any such issues.

14 Transfers of Shareholding

We note that the standard Agreement already provides for the exclusion from the Change in Control provision of the exercise by lenders of their security rights. Other than in cases in which national security is involved, the Authority should consider permitting share transfers in the post-construction period for the purpose of creating a more liquid market in project company equity and broadening investor interest in the market, thereby reducing the returns required by investors.

15 Legal Capacity

Lenders will need to be satisfied that the Authority and other project participants will have the necessary legal capacity (or vires) to enter into and perform all contractual obligations under the PPP contract as well as other project documentation into which it will be required to enter.

16 Security

It is assumed that any Authority will not allow security to be given over any of its own assets. As taking security over the Contactor's assets (including rights under the PPP contract) will however be a key tenet of limited recourse financing, lenders must have the ability to: (i) take security over the project company assets; (ii) establish the priority of such security as against other creditors of the project company (e.g. shareholders) and (iii) exercise such security when necessary.

Optimally, Lenders should be able to transfer their security interests to other lenders as and when their debt holding is transferred (for example, in a syndication of the loan facility) without onerous administrative requirements.

17 DRP/Arbitration

Lenders will be keen to ensure that arbitration procedures are conducted in accordance with international standards and possibly that the seat of arbitral proceedings is neutral. Lenders will also require that any arbitration award will be recognised and enforced by the Indian courts.

18 Utilities costs

If project companies are undertaking to manage utilities in a project, lenders are likely to require that the public sector take the risk associated with changes in the unit cost of electricity, gas and water while allowing the project company to take volume risk subject to the implementation of utility usage protocols in the concession agreement.

19 Changes in service costs

Lenders will require protection against long-term changes in the cost of service provision. In the UK, this takes the form of benchmarking or market-testing under which changes in the cost of providing services, whether higher or lower than in the initial contract, is periodically passed back to the Authority. Alternatively, the Authority may wish to adopt an obligation to adjust the Unitary Charges periodically so as to maintain the financial equilibrium of the project company as is done under concession agreements in parts of the continental European market (notably France, Spain and Portugal).

Please note that the issues noted above represent the sort of points which we might expect international financiers to be concerned with, and accordingly which they might raise at such time as they may enter the Indian PPP market. It is for the GOI to consider the extent to which these issues should now be taken into account in standard drafting and risk allocation principles.

Question: *Do you believe Indian PPP standard documentation should be adapted to deal with the above lender concerns? If so please list below the sections which should be taken into account (eg 1,2,3,4,6,)or state "All".*

Answer: