

The Draft National Public Private Partnership Policy

Preliminary Comments

Submitted by

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Background

Since 2005 the Government of India and several State Governments have increasingly adopted the Public Private Partnership (PPP) model for providing public services or creation of public assets in key sectors. PPP projects have been approved for execution in the infrastructure sector for roads, ports, airports etc. State Governments have adopted the PPP model to provide public services in the power, health and education sectors amongst others. According to statistics published by the Department of Economic Affairs, Government of India more than 750 PPP projects are either operational or have reached construction stage at an estimated cost of Rs. 383,332 crores as of July 2011.

In October 2011 the Department of Economic Affairs has published a Draft National Public Private Partnership Policy for PPPs (Draft Policy) on its website inviting comments from stakeholders. CHRI welcomes the proactive step taken by the Government of India to consult with peoples, groups and organisations prior to revising its policy on PPPs. This is indeed timely as several concerns have been raised over the PPP model of development by concerned citizens' groups and rights-based people's movements about the levels of transparency and accountability in the implementation of these projects. This consultation provides people with the opportunity to voice their concerns and suggest mechanisms for resolving the problems posed by the PPP model of development of assets and provision of public services.

CHRI is an international, independent, non-profit non-governmental organisation mandated to work for the practical realisation of the human rights of people in the countries of the Commonwealth. CHRI is headquartered in New Delhi, India with offices in London, UK and Accra, Ghana. Through policy advocacy and public education initiatives CHRI is promoting people's access to information and justice in the Commonwealth member States. CHRI was a member of the civil society committee that drafted the transparency legislation which was subsequently enacted by Parliament as *The Right to Information Act* (RTI Act) in 2005. Based on its rich knowledge of international best practice standards of RTI legislation CHRI has, on more than one occasion, made submissions to the Department Related Parliamentary Standing Committee on Personnel, Public Grievance, Law and Justice for deepening and expanding the transparency regime established by the RTI Act.

CHRI was a member of the Task Force set up by the Department of Personnel and Training (DoPT) in April 2011 for developing guidelines and templates for public authorities in order to improve the quality and content of their information disclosed proactively under the RTI Act. The report of the Task Force has since been submitted to the Government for approval. This submission draws from and builds upon the recommendations made in the Task Force's report. All comments given below are aimed at improving transparency in designing, implementation and monitoring of PPP projects in India.

Engendering greater levels of transparency in PPPs:

The Draft Policy intends to lay down broad principles for implementing projects in diverse sectors to complement the inclusive growth aspirations of the nation.¹ This is a welcome starting point as people, particularly those who are on the margins of the political economy with few choices and weak voices, must be involved at all stages of PPP projects and must share equally in the benefits that those projects aim to create. The Draft policy recognises the broad principle that PPP projects must be developed with not just the interests of the end users in mind, but must also protect the interests of project affected persons and other stakeholders in the public and private sectors.² However, nowhere in the Draft Policy is there any mention of how inclusive growth will be achieved through the PPP model. One way of ensuring inclusion is to improve transparency in the design, implementation and performance monitoring of PPPs and institutionalise consultative and participatory processes. However the commitment for transparency reflected in the Draft Policy is very narrow and focuses only on the bidders who participate in the procurement process.³

Conversations about transparency in PPPs between the Central Information Commission, Planning Commission, and the Government of India:

Having been called upon to adjudicate over several appeals and complaints about lack of access to information about PPP projects since 2005, the Central Information Commission sent a set of proposals to the Planning Commission in January 2011 to make them more transparent (Annexe 1). The Commission suggested that:

- 1) every PPP proposal including the draft agreement be published for inviting public comments and objections before finalising it;*

¹ Para 3 of the Preamble.

² Para 2.2.4 of Chapter 2.

³ Para 2.3.2 of Chapter 2.

- 2) *the PPP agreement should include a necessary condition that the Special Purpose Vehicle or any other entity that comes into being as a result of the PPP would be a public authority within the meaning of Section 2(h) of the RTI Act and that all information sought by the citizens about such entities be provided strictly in terms of that Act; or alternately*
- 3) *the Central Public Information Officer of the Ministry/Department/Public Sector Undertaking which has caused the PPP to come into being to be equally responsible to provide all information regarding the PPP project by securing it from the PPP entity.*

The Planning Commission in its response of March 2011 told the Central Information Commission that Model Concession Agreements (MCA) for PPP projects provide for full disclosure of the relevant Concession Agreement, the Maintenance Manual, the Maintenance Programme and the Maintenance Requirements (Annexe 2). The Planning Commission stated that where an MCA is followed any citizen can directly obtain certified copies of these documents from the respective concessionaires. The matter of declaring all PPP entities as public authorities under the RTI Act was referred to the Department of Legal Affairs, Government of India for legal opinion.

CHRI has obtained, recently, through the RTI Act, information about the opinion tendered by the Government to the Planning Commission in this regard. While the Department of Legal Affairs does not seem to have given any opinion yet, the DoPT has sent a detailed note expressing its views on transparency in relation to PPP entities (Annexe 3). The DoPT's views may be summarised as follows:

- 1) A decision on the publication of draft PPP proposals inviting people's feedback prior to the finalisation of the agreements must be taken by the respective ministries. If such a system were to be adopted it would lead to greater transparency;
- 2) After approval of a PPP project, all details of the project, periodic payments, if any, made to the concessionaire and achievements against targets of performance indicators specified in the contract must be disclosed *so motu* on a regular basis by the concerned Ministry or Department.
- 3) If the PPP entity or special purpose vehicle (SPV) created by the PPP agreement qualifies to be described as a 'public authority' within the definition of the term under Section 2(h) of the RTI Act then it must be directly responsible for giving access to its information under the RTI Act. However such an obligation cannot be legally imposed through a contractual provision on purely private entities.

- 4) In order to overcome the difficulty mentioned above, the draft concession agreement may include a provision requiring the SPV to provide all relevant information to the concerned Ministry or Department which could then provide that information to people *suo motu* or on request under the RTI Act.

Recommendations of the Task Force in Section 4 of the RTI Act:

Similar recommendations were made in the report of the Task Force set up by the DoPT for developing guidelines and templates for implementing and enforcing the proactive disclosure provisions under Section 4 of the RTI Act. The relevant recommendation is given below:

“Public Private Partnerships

2.1.2 Public services are proposed to be provided through a Public Private Partnership (PPP). All information relating to the PPPs must be disclosed in the public domain. This may include details of the special purpose vehicle, if any set up, concession agreements, operation and maintenance manuals and other documents generated as part of the implementation of the PPP project. Further, information about fees, tolls, or other kinds of revenue that may be collected under authorization from the Government may also be proactively disclosed. All payments made under the PPP project may also be disclosed in a periodic manner along with the purpose of making such payment.”

More categories of information have been specifically pinpointed for disclosure in this recommendation.

Recommendations for improvement in the Draft Policy on PPPs

CHRI endorses all the recommendations for improving transparency about PPPs made by various agencies mentioned above. The Draft Policy explains the various stages in the launching and the implementation of PPP projects in greater detail. It also proposes to publish separate mandatory disclosures and fair practices which all PPP projects should follow.⁴ It is not clear who will be responsible for ensuring compliance with these mandatory disclosures. If the promise of inclusive growth is to be truly and meaningfully realised then transparency must be engendered not only in the PPPs’ activities but also in the decision-making processes of the departments and ministries at the very inception of a PPP idea. The process of identifying PPP projects must be inclusive in the first place allowing for participation of all kinds of stakeholders, particularly people that are likely to bear the brunt of the PPP project because of

⁴ Para 2.3.2.i of Chapter 2.

displacement of home, hearth and livelihood. CHRI recommends that transparency be engendered at all stages of every PPP project in the following manner:

Phase 1: PPP Identification

The Draft Policy makes it clear that the responsibility for developing a PPP project is not that of any private entity. Instead it belongs to the concerned ministry or department. Each department is required to prepare a shelf of projects as part of its annual PPP plan and specify the extent of private investment in each project.⁵ This procedure is akin to the process of putting together an annual development plan under the Mahatma Gandhi National Rural Employment Guarantee Act/Scheme (MGNREGA/S). However while the MGNREGA/S adopts a bottom-to top approach, the Draft Policy adopts a top-down approach. There is no mention of people's direct involvement in the process of identification of projects. The Planning Commission and various committees and study groups have shown the shortcomings of a top down approach. Often projects are prepared by external consultants or bureaucrats without adequate knowledge or inputs of ground level realities. In the absence of such inputs development projects are poorly designed, poorly implemented and the desired outcomes are rarely achieved.

Recommendation: CHRI recommends that all PPP projects be developed based on the principle of inclusion and widespread consultation not only with end users but also all persons and groups that will eventually join the category of 'project affected persons' due to the PPP project. Gram sabhas, persons likely to be affected in urban areas, local self governing bodies like panchayats and municipalities and civil society organizations must be involved in the development of PPP projects in an informed manner. When projects are developed on the basis of consensus opposition to their implementation at a later stage may be minimal. This will be possible only by making all information such as pre-feasibility analysis, value for money assessments, environmental impact assessment reports available to people in the local language and explained in simple terms. Where the project requires acquisition of private land then extra effort must be put in to obtain the informed consent of the landowners. As the livelihoods of many more persons and families are affected by such acquisition they must also be consulted prior to the acquisition. All compensation packages must be just and fair keeping in mind the sacrifices expected of the project affected persons. No PPP project must be finalised unless and until the process of consultation has been completed in a credible manner. As all such information is generated or available in the custody of the ministry or department concerned the provisions of the RTI Act including those of proactive disclosure will and must apply. However efforts must be made to provide

⁵ Para 3.3.1 of Chapter 3.

information to people proactively instead of insisting upon the submission of formal RTI applications.

Phase 2: Development Stage

The Draft Policy states that this stage will involve project preparation and structuring, preparation of contractual documents and obtaining of project clearances and approval. These activities are also internal to government through the concerned ministry or department and all other relevant ministries. Essentially all of this information is covered by the RTI Act and must be accessible to any person on request.

Recommendation: *The recommendations of the Central Information Commission and the DoPT must be acted upon here by making the draft documents public. All assessment reports prepared at this stage along with the methodology used for the assessments must be publicly disclosed. All PPP project-related clearances and approvals received must also be made public. If the approval/clearance processes involve consultation with the people again, then all efforts should be made to disseminate the documents in the local languages using the print and electronic media as well as the Internet.*

Phase 3: Procurement Stage and PPP Rules

The Draft Policy indicates that all procurement processes will be made on the basis of PPP Rules to be notified by the Government of India in future. E-tendering and use of web-based market places for procurement processes is a welcome method as it enhances transparency.

Recommendation: *The PPP Rules must be notified after widespread public consultation. The Draft PPP Rules must be notified in the official gazette as well as all major national and regional language dailies for the purpose of seeking people's comments and suggestions. The final version of the PPP Rules must be notified with an Annexe explaining the reasons for rejection of any substantive suggestion received. Any information relating to the bids, that a bidder is entitled to, after they are opened must be made accessible to any interested person through the concerned ministry or department and through the Internet.*

Phase 4: PPP Contract Management and Monitoring Stage

The Draft Policy allows for modifications of a PPP contract after it has been awarded to a private entity under specific conditions. All such modifications must be made publicly available. The Draft Policy does not envisage any role for the people in general in monitoring the implementation of the PPP projects. This omission contradicts the principles of good governance that must inform the development administration during the 11th Five Year Plan. The Plan document states:⁶ "Space must be provided to VOs for developing citizen initiatives, acting as a watchdog on government systems and strengthening group initiatives. This can only

⁶ Para 10.9, Chapter 10, "Governance" 11th Five Year Plan, vol. 1, Planning Commission of India, Delhi, 2008, p.225.

be done if full transparency is assured.” The Plan documents also envisages an important role for local self governing bodies in the following words: “In addition to Gram Sabhas, several other for a such as SHGs, management committees, anganwadis and similar stakeholders’ institutions enhance participation and accountability. In addition, the mechanism for securing transparency and accountability at all levels needs to be strengthened and made a critical component in implementation.”⁷ These principles must inform the management and monitoring of PPP projects also. The institution and practice of social audit developed under the MGNREGA/S is one such tool that may be adapted for the purpose of monitoring the achievements and outcomes of a PPP project and assessing its performance vis-à-vis the indicators mentioned in the agreement.

Recommendations: All modifications of a PPP agreement after the contract has been awarded to the implementing entity must be made publicly available along with the reasons for modification. Schemes for mandatory disclosures for all PPPs must be developed in consultation with the Central and State Information Commissions. The relevant Information Commission must be made the appellate authority to adjudicate over disputes regarding the quality and content of the mandatory disclosure. A provision recognising the jurisdiction of the relevant Information Commission must be incorporated in the concession agreement.

As the assets created and services provided by a PPP project are essentially meant for the people of the country, a mechanism must be created for ensuring not merely financial and technical monitoring by specialists and auditing agencies but also by those very people. Social audit mechanisms developed under the MGNREGA/S must be suitably adapted to make an assessment of the performance of the PPP project. The social audit committees must represent the diversity characteristic of the communities and groups affected by the operation of the PPP Project. All documents must be made available to the social audit committees by the concerned departments. All reports of technical experts and statutory auditors regarding the performance of the PPP project must be made available in the public domain. All agreements with private entities must contain effectively worded clauses requiring supply of information to the statutory auditing authorities and the social audit committees either directly or through the implementing ministry, department or agency.

⁷ Ibid., Para 10.24.