Subject: 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:

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

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

[c]. 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

[d]. 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 the part of 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 increases, 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 assesses risk allocation from the investment and banking perspectives. It would also ensure that projects are scrutinized 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 PPPAC 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.

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