



# DISCLOSURE IN PUBLIC-PRIVATE PARTNERSHIPS: JURISDICTIONAL STUDIES

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# 1. Introduction

This volume contains detailed studies on the disclosure policy and practice of public-private partnerships (PPPs) in 13 jurisdictions. The jurisdictions were studied as part of the research and analysis carried out under the Disclosure in PPP Project jointly implemented by the World Bank Group Public-Private Partnerships Cross-Cutting Solution Area (WBG PPP CCSA), the Governance Global Practice (GGP), Construction Sector Transparency Initiative (COST), and Public-Private Infrastructure Advisory Facility (PPIAF), and jointly funded by the WBG PPP CCSA and the PPIAF. The WBG PPP CCSA commissioned Cambridge Economic Policy Associates to research and compile the jurisdictional studies.

This work was led by Shyamala Shukla, Senior Consultant, PPP CCSA. Petter Matthews and Christiaan Poortman of COST, and Victoria Lemieux and Michael Jarvis, Senior Governance Specialists, GGP, World Bank, provided valuable inputs. Laurence Carter, Senior Director, PPP CCSA; Robert Hunja, Director, GGP; Clive Harris, Practice Manager, PPP CCSA; and Francois Bergere, Program Manager, PPIAF, provided guidance.

The studies are based on material in the public domain and interviews with practitioners.

This volume of jurisdictional studies and the volume titled *Disclosure in Public-Private Partnerships: Good Practice Cases* serve as companion volumes for reference for users of *A Framework for Disclosure in Public-Private Partnerships*, which was prepared by the PPP CCSA. Table 1.1 summarizes the information provided in the jurisdictional studies.

TABLE 1.1: SUMMARY OF INFORMATION PROVIDED IN THE JURISDICTIONAL STUDIES

JURISDICTION	SUBSECTION 1 (INTRODUCTORY QUESTIONS)	SUBSECTION 2 (PRE-PROCUREMENT DISCLOSURE)	SUBSECTION 3 (POST-PROCUREMENT DISCLOSURE)	SUBSECTION 4 (CONCLUSIONS AND LESSONS LEARNED)
BIRISH COLUMBIA	All questions well covered, although unsolicited projects are not allowed, so there is less information for those	All questions well covered	All questions well covered	Developed
CHILE	All questions well covered	Could not find specific references on templates, retroactive effect, or validation of information	Could not find specific references on standard clauses or much detail on validation of information	Developed
COLOMBIA	All questions well covered	All questions well covered	All questions well covered	Developed
HONDURAS	Limited information on users of disclosure	No information on templates for disclosure, retroactive effect, or validation of information	Could not find specific references on standard clauses or much detail on validation of information	Developed
INDIA	All questions well covered	All questions well covered	All questions well covered	Developed
KARNATAKA	All questions well covered	Limited information available on validation	All questions well covered	Developed
KENYA	All questions well covered	No information available on specific templates, retroactive effect, or validation of information	No information available on confidentiality, specific templates, retroactive effect, validation of information, or performance and financial disclosure	Developed
MINAS GERAIS	All questions well covered	No information available on specific templates, retroactive effect, or validation of information; actual practice information unavailable, as the website is not accessible	No information available on standard clauses, specific templates, retroactive effect, or validation of information; actual practice information unavailable, as the website is not accessible	Not developed because of lack of information
NEW SOUTH WALES	All questions well covered	Limited information available on specific templates, retroactive effect, and validation	All questions well covered	Developed

PHILIPPINES	All questions well covered	No information available on validation; some gaps on actual practice	Limited information on confidentiality; no information available on standard clauses, financial disclosure, or validation of information; some gaps on actual practice	Developed
SOUTH AFRICA	All questions well covered	All questions well covered	Limited retroactive information; no information available on financial disclosure	Developed
UNITED KINGDOM	All questions well covered, although the United Kingdom does not allow unsolicited public-private partnerships, so no information here	No information on templates for disclosure, retroactive effect, or validation of information	No information on retroactive effect	Developed
VICTORIA	All questions well covered	Limited information on retroactive effect and validation of information	Limited information on retroactive effect	Developed

## 2. British Columbia



### PPP Context in British Columbia

How are PPPs undertaken in British Columbia?

#### **National Level (Canada)**

The Canadian PPP model, which was established in the early 1990s, is considered to be among the most successful in the world, alongside those of the United Kingdom and

Australia.<sup>1</sup> A recent report states that there are 209 PPP projects in Canada that have received (or *will* receive) government funding.<sup>2</sup>

In 1993, the Canadian Council for Public-Private Partnerships (the PPP Council) was established. The aim of the PPP Council is to encourage the PPP model in Canada.

In 2009, the Government of Canada created PPP Canada, a federal Crown corporation, to encourage investment via PPPs. One of PPP Canada's roles is to help execute "federal level PPPs." Another role is to provide support to "provincial, territorial, municipal and First Nations infrastructure," so PPP Canada works alongside provincial-level agencies to develop PPPs.<sup>3</sup>

### **Provincial Level (British Columbia)**

In 2005, the PPP Council stated that British Columbia had emerged as "a leader in the development of PPPs in Canada."<sup>4</sup> More recently, the World Bank has stated that British Columbia "can be considered fairly mature in terms of a strong PPP framework and some good disclosure practices," albeit with a "modest deal flow."<sup>5</sup>

The Treasury Board in the Government of British Columbia's Ministry of Finance has to approve all major capital projects, which includes PPPs. A recent report states that there are 35 PPP projects in British Columbia to date that have received (or will receive) government funding.<sup>6</sup> This is the second highest for Canadian provinces (after Ontario).

The delivery of major capital projects (including PPPs) is the responsibility of British Columbia's infrastructure agency, which is called Partnerships British Columbia (PBC): "PBC is a corporation wholly owned by the Province of British Columbia and is charged with planning delivery and oversight of major infrastructure projects, many of which are delivered under public-private partnership arrangements."<sup>7</sup> Even back In 2005, the PPP Council stated that PBC had played an important role (to date) in positioning British Columbia as a leader for PPPs in Canada.<sup>8</sup>

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<sup>1</sup> PWC (2012): [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/the-canadian-ppp-adrian-barrios.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/the-canadian-ppp-adrian-barrios.pdf).

<sup>2</sup> Canada's PPP market (ppt): <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38845655> (slide 3).

<sup>3</sup> PWC (2012): [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/the-canadian-ppp-adrian-barrios.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/the-canadian-ppp-adrian-barrios.pdf)

<sup>4</sup> PPP Council, "Responsible PPP Procurement for British Columbia," April 2005.

<sup>5</sup> World Bank, *Disclosure of Project and Contract Information in Public-Private Partnerships*, January 2013 (p. 17).

<sup>6</sup> Canada's PPP market (ppt): <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38845655> (slide 4).

<sup>7</sup> <http://www.tdslaw.com/knowledge-center/manitoba-legislation-regulating-p3-projects-proclaimed-into-force/#sthash.wpUbENdP.dpuf>.

<sup>8</sup> PPP Council report (2005): [http://www.pppcouncil.ca/pdf/bc\\_procure.pdf](http://www.pppcouncil.ca/pdf/bc_procure.pdf) (see p. 1).

What are the policy objectives behind disclosure?

### **National Level (Canada)**

PPP Canada has a mandate to “improve the delivery of public infrastructure by achieving better value, timeliness and accountability to taxpayers, through P3s (PPPs).”<sup>9</sup> Information disclosure is clearly linked to *accountability to taxpayers*, so we can identify this as a key driver. However, it is less clear whether the mandate to achieve better value and timeliness would be a driver for information provision.

### **Provincial Level (British Columbia)**

The 2005 PPP Council report highlights several PPP priority issues that British Columbia was seeking to address in 2005.<sup>10</sup> For several of these issues, the proposed solution involved information disclosure. The priority issues in relation to information disclosure are the following:

- *Generating greater public awareness and acceptance.* The aim is to build greater acceptance of this procurement model among the broader public, which is generated in part by greater transparency. In particular, the desire for greater transparency has been a response to concerns from PPP arrangements in other countries that PPPs were overly secretive because of low information disclosure.
- *Encouraging private sector involvement.* The aim is to build a strong market for PPPs and develop strong market interest, which is achieved by ensuring that there is good communication (including information flows) between the public sector and the market.
- *Reducing process costs for the private and public sectors.* The aim is to increase the attractiveness of the PPP model by minimizing the costs imposed during the procurement process, for example, by increasing the consistency of procurement documents.

PBC has published nondiscretionary guidelines for information disclosure in relation to PPPs since 2004. The latest version of PBC’s PPP guidance was published in 2010.<sup>11</sup>

There are two main drivers of PPP information disclosure in British Columbia:

*To build a strong market for PPPs in British Columbia.* This driver encourages potential private sector bidders by establishing a consistent, low-cost, and transparent procurement process, while protecting commercially sensitive information from public disclosure.

*To serve the public interest by increasing accountability.* The driver assures taxpayers that PPPs provide value for money (VFM), thereby increasing public confidence in the PPP model. Increased public confidence is achieved by creating a transparent process where as much information as possible is publicly disclosed.

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9 <http://www.p3canada.ca/en/about-us/>.

10 PPP Council report (2005): [http://www.pppcouncil.ca/pdf/bc\\_procure.pdf](http://www.pppcouncil.ca/pdf/bc_procure.pdf) (see p. 3).

11 An additional document was published in 2012, to provide external guidance. These appear to be based on the same requirements.

PPP information disclosure has increased over time, with earlier PPP projects (in the 1990s and early 2000s) not providing as much information as per the 2010 recommendations.

The Conference Board of Canada attributes this shift in the procurement environment to the establishment of dedicated public sector PPP agencies, such as PBC. These agencies have experience with multiple PPP transactions and have the benefit of relatively standardized procurement. The involvement of these agencies in the PPP process (via managing, co-managing, or guiding) has increased the consistency with which information is collected and presented, thus increasing the potential for information disclosure.

Uses and users of disclosure information and the exact nature of such use

It is not straightforward to identify the uses and users of disclosed PPP information, because this information is publicly available and so can be accessed by any person or organization. However, from our research, analysis, and consultations, we infer that there are several key groups of users:

- *Bidders.* PBC has stated that its website traffic (for PPP information) tends to increase significantly when there are specific procurement milestones, such as publication of the request for proposals (RFP). PBC's view is that this is largely because of interest from potential bidders. From discussion with other stakeholders, our understanding is that the VFM report in particular can provide helpful feedback to companies that bid during the procurement process, as they are able to gain a greater understanding of why the winning bidder was chosen.
- *Trade media.* PBC noted that trade media are also users of key PPP information documents, and therefore may also be significant contributors to the spikes in website traffic at certain times. Examples of these publications include *Infrastructure Journal*, *InfraNews*, and others.
- *Taxpayers/the public.* Although a few individuals may be interested in the data, most likely (local) government representatives, it is unlikely that many individuals would access documents such as the request for qualifications (RFQ) or RFP, if these are published. (However, the fact that information is available may increase public confidence in the transparency of PPPs.)

*Researchers.* An example is the Conference Board of Canada's 2010 report entitled "Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments," which used the VFM assessment document to assess the efficiency of PPP procurement.<sup>12,13</sup>

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<sup>12</sup> Conference Board of Canada report:

[http://www.fengatecapital.com/DispellingTheMythsRpt\\_WEB1.pdf](http://www.fengatecapital.com/DispellingTheMythsRpt_WEB1.pdf).

<sup>13</sup> The VFM assessment, a document that is often disclosed at the *post-procurement stage*, involves a detailed comparison of the total costs of the PPP and conventional procurement options on an *ex ante* basis.



List of laws, policies, and regulations

The majority of PPP information disclosure in British Columbia is driven by *provincial-level* legislation. However, there also appears to be some information that is covered by *national-level* legislation.

### **Provincial Level (British Columbia)**

*Two main legislative Acts related to information disclosure.* There are two main relevant Acts in British Columbia, and these are specific to the public sector. That is, the Acts do not relate to private sector companies (except for instances where a private company is interacting with the public sector<sup>14</sup>). The first has to do with *reactive* information disclosure and the second has to do with *proactive* disclosure.

- *Freedom of Information and Protection of Privacy Act (FOIPPA)*.<sup>15</sup> This Act is “to make public bodies more open and accountable by providing the public with a legislated right of access to government records” and “to protect your right to personal privacy by prohibiting the unauthorized collection, use or disclosure of your personal information by public bodies.” FOIPPA requires public bodies, rather than private companies, to disclose certain types of information, under certain freedom of information conditions. However, the public body will normally check with the relevant private company before releasing information, to ensure that confidentiality is maintained where appropriate.

FOIPPA is a general Act, rather than being specific to PPPs, and its starting point is to state that any public record can be requested: “A person who makes a request under Section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.”<sup>16</sup> Therefore, FOIPPA does not state which particular aspects of PPP information must be disclosed by law.

However, there are many special conditions and exemptions for the disclosure of information.

- *Budget Transparency and Accountability Act (BTAA)*.<sup>17</sup> This Act “requires ministries and Crown corporations to develop and submit annual service plans, complemented by annual service plan reports.” BTAA Sections 8 and 14 provide the most relevant information on detailed information disclosure requirements for major capital projects (not just PPPs).

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<sup>14</sup> “FOIPPA covers all provincial Government public bodies, including Government ministries and most Government agencies, boards, commissions and Crown corporations.”

([http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00))

<sup>15</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

<sup>16</sup> FOIPPA Part 2 Division 1 Section 4(1).

<sup>17</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

*Other PPP Acts.* British Columbia has other Acts that govern PPP arrangements, although these do not seem to contain requirements on information disclosure (except in relation to personal information):

- Transportation Investment Act, SBC 2002, c 65
- Health Sector Partnerships Agreement Act, SBC 2003, c 93
- Financial Administration Act, RSBC 1996, c 138
- Toll Exemption Regulation, B.C. Reg 269/2012
- Health Care Facility Designation Regulation, B.C. Reg 31/2004.

#### **Additional Nondiscretionary Guidance and Recommendations**

- PBC has published guidelines for information disclosure related to PPPs (in 2010) and more generally for major infrastructure projects (in 2012).<sup>18</sup>
- PBC's guidelines refer to proactive disclosure, as opposed to reactive (such as freedom of information requests). Furthermore, the guidelines contain detailed recommendations. They deal with specific areas and documents that, although covered in a broad sense by more high-level legislation, are not referred to directly in the legislation. Therefore, the *broad* nature of the legislation creates the need for PBC to develop its own recommendations, and we note that these recommendations are generally followed:

*“These guidelines deal with discretionary release of information, and not responses under the Freedom of Information and Protection of Privacy Act (FOIPPA) or disclosure otherwise required by law, such as by Sections 8 and 14 of the Budget Transparency and Accountability Act (BTAA).”*<sup>19</sup>

- However, although PBC describes the guidelines as *discretionary* (unlike BTAA and FOIPPA), PBC works with British Columbia government ministries to build these disclosure requirements into the actual PPP contracts.<sup>20</sup> Where this is achieved, these guidelines would become legally enforceable (assuming that the requirements do not relate to information that is deemed confidential).

#### **National Level (Canada)**

There does not seem to be any national-level legislation that requires the *proactive* disclosure of PPP information in British Columbia.

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<sup>18</sup> 2010 disclosure guidance in relation to PPPs:

[http://www.sadcppnetwork.org/index.php?option=com\\_phocadownload&view=category&download=764:pbcdisclosureguidance-19jan10-update-000&id=245:canada&Itemid=110](http://www.sadcppnetwork.org/index.php?option=com_phocadownload&view=category&download=764:pbcdisclosureguidance-19jan10-update-000&id=245:canada&Itemid=110).

<sup>19</sup> *Ibid.* p. 2.

<sup>20</sup> For example, see the RFP for the North Island Hospitals Project (p. 45):

<http://www.partnershipsbcc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20Final%20As%20Issued.pdf>.

Proactive pre- and post-procurement disclosure in unsolicited projects  
From discussions with PBC, we understand that unsolicited proposals and bids for potential projects are not permitted in British Columbia.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **National Level (Canada)**

There does not seem to be any national-level legislation that requires the *proactive* disclosure of PPP information in British Columbia.

### **Provincial Level (British Columbia)**

Overall, PPP information disclosure is driven by a combination of the following:

- *Mandatory requirements, as set out in legislation (FOIPPA and BTAA).* These requirements are not specific to PPPs and are broad, so they are open to interpretation. Most of these requirements seem to be reactive (such as freedom of information requests), although some proactive disclosure is mandated.
- *Discretionary recommendations for proactive disclosure.* These recommendations are provided as part of PBC's guidelines for PPP projects, so they are specific to PPPs and are fairly detailed. Because information disclosure is determined by a combination of guidelines, the exact legal requirements for PPP information disclosure in British Columbia are not precisely defined. On the one hand, the broad high-level principles for information disclosure are clearly mandated in legislation (such as the Freedom of Information Act). However, on the other hand, the requirement for particular PPP documents (for example, the RFP) to be disclosed is based on British Columbia's interpretation of these laws, which is why PBC describes its guidance as discretionary. Therefore, the precise set of PPP documents that legally must be disclosed could, in theory, be a matter of judgement, that is, determined on a case-by-case basis. However, British Columbia government ministries tend to follow PBC's recommendations by integrating its guidance into PPP contracts, so subsequently these conditions have become legally enforceable.

### **Mandatory Disclosure from Legislation: FOIPPA <sup>21</sup>**

Information should *not* be disclosed if it causes potential harm to a third party (for example, the release of commercially sensitive information) or to a public sector body. Although this is qualified in FOIPPA, it seems (to some extent) to be a matter of judgement, and therefore it is not possible to use FOIPPA precisely to define the types of PPP information that *must* or *must not* be disclosed.

### **Mandatory Disclosure from Legislation: BTAA <sup>22</sup>**

BTAA was established to improve accountability by requiring Canadian government ministries and Crown corporations to “develop and submit annual service plans, complemented by annual service plan reports.”<sup>23</sup>

There are several specific sections in BTAA that relate to major capital projects. These sections, although not purely specific to PPPs, are clearly relevant to PPPs.

- *Information to be presented in Parliament.* When fiscal estimates are being presented to the Legislative Assembly, “the Minister” must also present a “statement of the current and anticipated total cost to the entity in relation to the capital cost of the project” for any projects where the government expects its contribution to the project to exceed Can\$50 million (US\$40 million). The government’s contribution includes money; the value of any land, facilities, rights, or other benefits; and the amount of any guarantees. (This does not seem to apply to education and health sector organizations, although this is unclear because we have found published project plan information for health sector projects.) The exact legislation is in BTAA Section 8, “Information to be Presented with Estimates.”<sup>24</sup>
- *Information to be publicly disclosed.* For projects that satisfy the conditions in the paragraph above, “the responsible minister in relation to the project must make public a major capital project plan... within one month after commitments have been made” that includes the following information:
  - (a) Objectives of the project
  - (b) Costs and benefits of the project
  - (c) Risks associated with the costs and benefits.

The exception to this requirement is if the disclosure of information could potentially be harmful to a third party, such as for commercial reasons.<sup>25</sup>

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<sup>21</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

<sup>22</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

<sup>23</sup> Overview of BTAA:

<http://www2.gov.bc.ca/gov/topic.page?id=651FCA86343B4B468DAB81F472F78939>.

<sup>24</sup> BTAA Part 1 Section 8.

<sup>25</sup>This exception is introduced in BTAA Section 14 via the following phrase: “Subject to section 19 (5) [exception if disclosure would be harmful].”

## **Discretionary Guidelines**

One important point to note is that PBC's responsibility for information disclosure is mainly confined to the *pre-procurement stage* (up to financial close). Within this stage, there is a further split of responsibility between the British Columbia government and PBC. During the initial stages of project development, when the British Columbia government is considering the need for the project, the responsibility for disclosure falls to the relevant British Columbia government ministry. Once the procurement process is underway, PBC takes the lead in disclosing information, given its role as the procurement agent.

What material is required to be confidential?

### **Provincial Level (British Columbia)**

Whether information or material is confidential in the context of PPPs in British Columbia is mostly determined on a case-by-case basis. This is because information disclosure is determined by a combination of high-level legislation (not specific to PPPs) and detailed discretionary guidance and recommendations. As such, although the broad principles for information disclosure are clearly mandated in legislation, the requirement for particular PPP documents (such as the RFP) to be disclosed or to remain confidential is based on PBC's interpretation of these principles. Therefore, to some extent, it can vary on a case-by-case basis.

However, from discussions with PBC and other stakeholders, we understand that there is a reasonable consensus in British Columbia around the types of information that are confidential, such as financial bidding information. Interestingly, the threshold for confidentiality is lower than in many U.S. states, because in the latter there is sometimes no or limited legislation to protect companies from having to disclose information.

### **Mandatory Disclosure from Legislation: FOIPPA<sup>26</sup>**

#### *Information of Potential Harm to a Third Party*

FOIPPA legislates that information can be kept confidential if it would harm a third party's business interests or the financial or economic interests of a public body or the Government of British Columbia.

- Although the term "harmful to business interests of a third party" is defined in Section 21 of FOIPPA, we consider that it is still (to an extent) a matter of judgement.
- FOIPPA is a general Act, rather than being specific to PPPs. Therefore, FOIPPA does not provide specifics on whether particular aspects of PPP information should remain confidential.

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<sup>26</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

However, there are several scenarios under which such (potentially harmful) information could still be disclosed:

- If the third party consents, or if the record is over 50 years old (Section 21: Disclosure Harmful to Business Interests of a Third Party (continued)).<sup>27</sup>
- If the minister in charge of a public body wants to publish a record (which other parties might deem to be harmful), it can undertake a process to do so. This involves notifying the third party of the request, considering any subsequent representations, and reaching a decision.<sup>28</sup>

### **Mandatory Disclosure from Legislation: BTAA** <sup>29</sup>

BTAA includes provision for the nondisclosure of information under certain circumstances, stating that information disclosure should be subject to FOIPPA.

### **Discretionary Guidelines**

PBC recommends that the identity of the government's preferred proponent is disclosed, but not at a time that would harm the government's negotiating position.

Although this is discretionary guidance, PBC's recommendations have been prepared so as to be consistent with legislation. This particular timing example would fall under FIOPPA Part 2 Division 2 Section 16, which states that information should not be disclosed if it is "harmful to inter-governmental relations or negotiations."

PBC recommends that the best timing for the disclosure of the preferred proponent might be "when evaluation and decision making are sufficiently advanced, so that the information reflects the likely outcome of the procurement process."<sup>30</sup>

Collect and reference any specific templates/checklists being used for disclosure

PBC's latest guidelines for the pre-procurement stage are described in table 2.1.

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<sup>27</sup> FIOPPA: Part 2 Division 2 Section 21.

<sup>28</sup> FIOPPA: Part 2 Division 2 Sections 23 and 24.

<sup>29</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

<sup>30</sup> 2010 disclosure guidance in relation to PPPs: [http://www.sadcpppnetwork.org/index.php?option=com\\_phocadownload&view=category&download=764:psc-disclosure-guidance-19jan10-update-000&id=245:canada&Itemid=110](http://www.sadcpppnetwork.org/index.php?option=com_phocadownload&view=category&download=764:psc-disclosure-guidance-19jan10-update-000&id=245:canada&Itemid=110).

TABLE 2.1 PBC GUIDANCE COVERING THE PRE-PROCUREMENT STAGE, 2010, BRITISH COLUMBIA

MILESTONE	DISCLOSURE GUIDANCE AND RATIONALE
REQUEST FOR QUALIFICATIONS DOCUMENT (RFQ)	Disclosure is recommended. Generally the RFQ should be publicly available, such as on a project website or through a link to the British Columbia bid website. In addition, addenda to the RFQ will be made available to proponents who register through the British Columbia bid process.
NAME AND NUMBER OF PARTIES WHO RESPOND TO THE RFQ	Disclosure of the number of respondents is recommended.  Disclosure of names is generally not advised, but should be determined based on the specific project and its circumstances. The ability to attract qualified respondents may be affected by disclosing names at this stage; as such, names should generally be disclosed only when short lists are established or qualifying stages are reached. Further, disclosure of names may not be meaningful, as respondents may choose not to continue in the competitive process, and have not yet been qualified to proceed to the next stage of procurement.  It is recommended that the nature of respondents be characterized and that context about the number be provided (such as whether teams are expected to consolidate in later stages).
NAME AND NUMBER OF PARTIES WHO ARE SHORT-LISTED AT THE RFQ STAGE AND RECEIVE THE REQUEST FOR PROPOSALS (RFP) DOCUMENT	Disclosure of the number and names of successful parties is recommended.
RFP	Disclosure of the RFP is recommended.
DRAFT PROJECT AGREEMENT	Disclosure of the draft project agreement is not recommended, given that this contract is the basis for commercial negotiations and is subject to change.
NAME OF PREFERRED PROPONENT	Disclosure of the name of the preferred proponent is recommended; however, the timing of this disclosure needs to be such that the government's negotiating position will not be harmed. Disclosure of a preferred proponent may be best at a stage when evaluation and decision making are sufficiently advanced, so that the information reflects the likely outcome of the procurement process.

Do the documents in question have retroactive effect?

**Mandatory Disclosure from Legislation: FOIPPA<sup>31</sup>**

FOIPPA can apply to any record (subject to a list of exemptions). Therefore, it would seem to apply retroactively. However, FOIPPA is primarily a driver of *reactive* information disclosure (as opposed to proactive); as a result, retroactive disclosure is less of an issue.

<sup>31</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

## **Mandatory Disclosure from Legislation: BTAA** <sup>32</sup>

BTAA requires the submission of a major capital project plan within one month of commitments being made by the government. In relation to this requirement, BTAA includes the following condition in relation to retroactive effects:

“The obligation [to provide a statement on project capital costs, and therefore to submit a ‘project plan’] ends when no further cost to the Government reporting entity in relation to the capital cost of the project is anticipated.”<sup>33</sup>

Our interpretation of this statement is that the condition *would* apply retroactively if the government is still making financial contributions to the project. It *would not* apply if the government is no longer making contributions. That is, the government should continue to make information available about the project so long as the government is making financial contributions toward the project.

### Validation of information

PBC publishes information at the *pre-procurement stage* (RFQ, RFP, etc.). As a public-owned entity, PBC has strong reputational incentives to provide accurate information. As discussed with PBC, all posted documents are reviewed and determined in collaboration with owners and proponents or private partners prior to posting, which minimizes the potential for inaccuracies.

The Fairness Advisor’s role is to ensure that the procurement process is fair and transparent. The Fairness Advisor typically produces a final report on the entire procurement process, which is completed after financial close, and also may produce a draft or interim report after the RFQ stage. Although the focus of this report is on the fairness of the procurement process *in general*, it includes an element of information validation. For example, the Fairness Advisor will need to ensure that any information provided in the RFQ and RFP documents was accurate, as well as any responses to supplementary questions that were provided to potential proponents.

## Actual practice at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

The level of compliance with BTAA seems to be fairly mixed.

- In terms of information provided to British Columbia’s Legislative Assembly, some transcripts and minutes are published; however, these minutes have not been recorded in a way that makes it easy to search for references to particular PPP projects. Therefore, to date it has not been possible to confirm whether

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<sup>32</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

<sup>33</sup> BTAA Part 1 Section 8 Condition 3.



parliamentary disclosure has been undertaken consistently across all proposed projects.

- In terms of the major capital project plan, we were able to find that this document has been published in some cases, although not always. Of the five project examples discussed in the next subsection, we were only able to find the project plan for one project.<sup>34</sup>

It is possible that the legislative requirement for publication of a major capital project plan may be relatively recent, because we have not found any such project plans for older projects (before 2007). However, aside from these project plans, there is some published information on capital commitments by the Government of British Columbia.

- First, the Ministry of Finance publishes annual public accounts, including details of future payment commitments to the private sector for all projects with a total value of at least Can\$50 million. For example, table 2.2 shows the future contributions to the Fort St. John Hospital PPP project, from the 2012/13 public accounts.<sup>35</sup>

TABLE 2.2 COMMITMENTS TO THE FORT ST. JOHN HOSPITAL PROJECT, BRITISH COLUMBIA PUBLIC ACCOUNTS, 2012/13

COMMITMENT	2014	2015	2016	2017	2018	2019 AND BEYOND	TOTAL
Can\$, millions	9	9	10	10	11	354	403

- Second, the Ministry of Jobs, Tourism, and Skills Training publishes a quarterly Major Projects Inventory that contains summary information on all major projects in British Columbia that are more than Can\$15 million (US\$13 million) in capital cost. Taking the March 2014 edition, this includes a pdf document and an Excel spreadsheet, which show that there have been nearly 1,000 PPP projects proposed in British Columbia (of which 23 have been completed, and of which construction has started for almost 400). However, this Major Projects Inventory does not provide all the project details that BTAA requires for each major project capital plan (such as the costs and benefits for the project or the associated risks).

British Columbia’s actual information disclosure practices are closely aligned with the recommendations and guidelines developed by PBC. The British Columbia government ministries have tended to integrate disclosure conditions into the PPP contract documents, so participating companies must agree to certain documents being disclosed (such as the RFP).

<sup>34</sup> Capital Project Plan for North Islands Hospital:  
<http://www.health.gov.bc.ca/library/publications/year/2012/north-island-hospitals-project-capital-plan.pdf>.

<sup>35</sup> See [http://www.fin.gov.bc.ca/ocg/pa/12\\_13/Contractual\\_Obligations.pdf](http://www.fin.gov.bc.ca/ocg/pa/12_13/Contractual_Obligations.pdf).

### Summary table

The majority of information disclosed at the *pre-procurement stage* is made available on PBC's website. Table 2.3 provides further details.

TABLE 2.3 COMPLIANCE WITH PBC GUIDANCE COVERING THE PRE-PROCUREMENT STAGE, 2010, BRITISH COLUMBIA

#### (I) LEGISLATION UNDER BTAA

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Minutes/transcripts are available on the Legislative Assembly website, but it would be time-consuming to search through these to find information on specific PPP projects.	Mixed, but generally no
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Project plans are sometimes available, but not always (particularly for older projects).	Mixed

#### (II) GUIDANCE FROM PBC (AS PER 2010 PUBLICATION)

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	If yes, available on PBC website.	Mostly yes
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Occasionally referred to in the Fairness Advisor's report on RFQ process. However, for most example projects, there is no evidence of references to RFQ respondents.	Mostly no
COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on PBC website and/or project website.	Yes
RFP	Disclosure is recommended.	Published on PBC website.	Yes, but one exception
DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	Cannot see any reference to a draft project agreement on PBC website for any of the project examples.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Published on PBC website.	Yes

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

We have chosen a selection of projects from the PBC website, including projects at various stages of the procurement process. The projects are listed in table 2.4.

TABLE 2.4 CASE STUDIES OF PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, BRITISH COLUMBIA

CASE STUDY	NAME	PROCUREMENT PROCESS	CURRENT STATUS
1	Sierra Yoyo Desan Road	2003-2004	Operational/complete
2	Golden Ears Bridge	2004-2006	Operational/complete
3	Kitsilano Secondary School Renewal <sup>36</sup>	2012-2013	Under construction
4	John Hart Generating Station Replacement	2012-2014	Under construction
5	North Island Hospitals	2012-ongoing	Announced/in procurement

This is a design-build contract, so it may or may not be classified as a PPP, depending on the definition used.

It is interesting to note that there is less pre-procurement stage information available for the older/completed projects (for example, Golden Ears Bridge), compared with the more recent projects. This is likely to be because:

- Information disclosure has improved over time, mainly because of PBC’s advocacy of greater disclosure. For example, the Sierra Yoyo Desan Road project was the first PPP project in British Columbia and so the level of disclosure was considerably less than it is with current projects.
- PBC was not the procurement manager on all these projects, and therefore was less able to influence the level of information disclosed during the process. For example, the Golden Ears Bridge project was owned by Translink, which held all responsibility for information disclosure. PBC was an arm’s length advisor on this, not the procurement manager, and so had less influence on the process.

However, even in the more recent projects, PBC’s guidelines do not always dictate what information is available. For example, for the John Hart Generating Station project, BC Hydro’s disclosure practices were the driver for what information was made public, rather than PBC’s recommended guidelines. This demonstrates the point that PBC’s guidelines are not mandatory, and therefore the level of information disclosure will vary depending on the owner of the procurement process.

The rest of this subsection describes five PPP projects in British Columbia.

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<sup>36</sup> This is a design-build contract, so it may or may not be classified as a PPP, depending on the definition used.

**Project 1: Sierra Yoyo Desan Road** <sup>37</sup>

This was a Can\$40 million major upgrade to the Sierra Yoyo Desan Resource Road in Northeast British Columbia, to facilitate all-season oil and gas activities. The procurement process occurred during 2003-04, with the contract awarded in November 2004.

Table 2.5 notes whether information has been disclosed in accordance with (i) legislation under BTAA, and (ii) guidance from PBC.

**TABLE 2.5 PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, SIERRA YOYO DESAN ROAD, BRITISH COLUMBIA**

**(I) LEGISLATION UNDER BTAA**

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Unable to find any transcripts or minutes from the Legislative Assembly.	Unsure
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Unable to find project plan	No/unsure

**(II) GUIDANCE FROM PBC**

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>38</sup>	Yes
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Not found on PBC website (June 2014); unable to find Fairness Advisor's report on RFQ process.	No/unsure
COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on PBC website; available as of October 2014. <sup>39</sup>	Yes
RFP	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>40</sup>	Yes
DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	Not available on PBC website.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Link provided on PBC website, but link no longer works (June 2014).	No

<sup>37</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-sierra.php>.

<sup>38</sup> RFQ: [http://www.partnershipsbcc.ca/pdf/SYD\\_RFQ.pdf](http://www.partnershipsbcc.ca/pdf/SYD_RFQ.pdf).

<sup>39</sup> RFP shortlist: <http://www.partnershipsbcc.ca/pdf/2003EM0014-000769.pdf>.

<sup>40</sup> RFP shortlist: <http://www.partnershipsbcc.ca/pdf/2003EM0014-000769.pdf>.

In addition, further summary information on the project is provided on the website of the Ministry of Natural Gas Development (Government of British Columbia).<sup>41</sup>

### Project 2: Golden Ears Bridge <sup>42</sup>

The Golden Ears Bridge crosses the Fraser River in Vancouver, British Columbia. The bridge was built to improve the movement of goods and people across the Fraser River (which was previously undertaken via a ferry service), and was opened to traffic in June 2009. PBC states that the bridge has reduced travel times across this part of the river by a minimum of 20 to 30 minutes. The bridge is operated by a private consortium, the Golden Crossing General Partnership, under a PPP contract that will run until June 2041. There is further summary information in the one-page project summary on the PBC website.<sup>43</sup> The procurement process occurred during 2004-06, with the contract awarded in February/March 2006.

Table 2.6 notes whether information has been disclosed in accordance with (i) legislation under BTAA, and (ii) guidance from PBC.

TABLE 2.6 PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, GOLDEN EARS BRIDGE, BRITISH COLUMBIA

#### (I) LEGISLATION UNDER BTAA

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Unable to find any transcripts or minutes from the Legislative Assembly.	Unsure
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Unable to find project plan	No/unsure

#### (II) GUIDANCE FROM PBC

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	Not found on PBC or Translink website (June 2014).	No/unsure
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Not found on PBC or Translink website (June 2014).	No/unsure

<sup>41</sup> <http://www.empr.gov.bc.ca/OG/oilandgas/infrastructure/Sierra-Yoyo-Desan/Pages/default.aspx>.

<sup>42</sup> <http://www.partnershipsbcc.ca/files-4/project-goldeneears.php>.

<sup>43</sup> <http://www.partnershipsbcc.ca/files-4/documents/GEBcasestudy.pdf>.

COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on Translink's website; available as of October 2014. <sup>44</sup>	Yes
RFP	Disclosure is recommended.	Not found on PBC or Translink website (June 2014).	No/unsure
DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	Not available on PBC or Translink website.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Published on PBC website; available as of October 2014. <sup>45</sup>	Yes

### Project 3: Kitsilano Secondary School Renewal <sup>46</sup>

This project was to renew the Kitsilano Secondary School to be a neighborhood learning center that will provide specialty classrooms and fitness, arts, and library facilities. The estimated cost was Can\$62.2 million. The procurement process occurred during 2012-13, with the contract awarded in August 2013.

Table 2.7 notes whether information has been disclosed in accordance with (i) legislation under BTAA, and (ii) guidance from PBC.

TABLE 2.7 PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, KITSILANO SECONDARY SCHOOL RENEWAL, BRITISH COLUMBIA

#### (I) LEGISLATION UNDER BTAA

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Unable to find any transcripts or minutes from the Legislative Assembly	Unsure
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Unable to find project plan	No/unsure

<sup>44</sup> <http://www.translink.ca/en/About-Us/Media/2004/December/Golden-Ears-Bridge-TransLink-Board-approves-short-list-of-qualified-candidates.aspx>.

<sup>45</sup> <http://www.partnershipsbcc.ca/pdf/golden%20ears%20news%20release%207-dec-05.pdf>.

<sup>46</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-ksr.php>.

## (II) GUIDANCE FROM PBC

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>47</sup>	Yes
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Contained within the Fairness Advisor's report on the RFQ process, which is published on the PBC website. <sup>48</sup>	Yes
COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on PBC website; available as of October 2014. <sup>49</sup>	Yes
RFP	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>50</sup>	Yes
DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	Cannot see any reference to a draft project agreement on PBC website.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Published on PBC website; available as of October 2014. <sup>51</sup>	Yes

### PROJECT 4: John Hart Generating Station Replacement Project <sup>52</sup>

The John Hart Generating Station Replacement Project involves the replacement of the existing six-unit, 126 megawatt generating station. The procurement process occurred during 2012-14, with a recent contract awarded in February 2014, and PBC describes the project as under construction. Further information is provided in the section on BC Hydro's website that relates to this project.<sup>53</sup>

Table 2.8 notes whether information has been disclosed in accordance with (i) legislation under BTAA, and (ii) guidance from PBC.

<sup>47</sup> <http://www.partnershipsbcc.ca/files-4/documents/20120703KitsilanoRFQ-CONFORMED.pdf>.

<sup>48</sup> [http://www.partnershipsbcc.ca/files-4/documents/2012-09-13\\_Kits-FA-Report\\_RFQ.pdf](http://www.partnershipsbcc.ca/files-4/documents/2012-09-13_Kits-FA-Report_RFQ.pdf).

<sup>49</sup> [http://www.partnershipsbcc.ca/files-4/documents/2012-09-17\\_Kits-shortlist-info-bulletin.pdf](http://www.partnershipsbcc.ca/files-4/documents/2012-09-17_Kits-shortlist-info-bulletin.pdf).

<sup>50</sup> <http://www.partnershipsbcc.ca/files-4/documents/20130117-Kits-RFP-Final.pdf>.

<sup>51</sup> [http://www.partnershipsbcc.ca/files-4/documents/VSB\\_Kitsilano-Secondary-Renwal-on-Track-with-Selection-of-Firm-to-Design-and-Build-the-School.pdf](http://www.partnershipsbcc.ca/files-4/documents/VSB_Kitsilano-Secondary-Renwal-on-Track-with-Selection-of-Firm-to-Design-and-Build-the-School.pdf).

<sup>52</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-jhgsr.php>.

<sup>53</sup> BC Hydro website: [http://www.bchydro.com/energy-in-bc/projects/john\\_hart\\_generating.html](http://www.bchydro.com/energy-in-bc/projects/john_hart_generating.html).

TABLE 2.8 PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, JOHN HART GENERATING STATION REPLACEMENT PROJECT, BRITISH COLUMBIA

(I) LEGISLATION UNDER BTAA

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Did not find Legislative Assembly transcripts or minutes from Legislative Assembly.	Unsure
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Unable to find project plan	No/unsure

(II) GUIDANCE FROM PBC

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>54</sup>	Yes
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Cannot see any reference to RFQ respondents on PBC website; not included in Fairness Advisor's report on RFQ process.	No/unsure
COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on PBC website; available as of October 2014. <sup>55</sup>	Yes
RFP	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>56</sup>	Yes
DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	No reference to draft project agreement on PBC website.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Published on PBC website; available as of October 2014. <sup>57</sup>	Yes

**Project 5: North Island Hospitals Project** <sup>58</sup>

This is a PPP to build two new hospitals in British Columbia: a 153-bed hospital for the Comox Valley and a 95-bed hospital for Campbell River. The estimated capital cost is

<sup>54</sup>[http://www.partnershipsbcc.ca/files-4/documents/John-Hart-Replacement-Project\\_RFQ\\_March-13-2012.pdf](http://www.partnershipsbcc.ca/files-4/documents/John-Hart-Replacement-Project_RFQ_March-13-2012.pdf).

<sup>55</sup>[http://www.partnershipsbcc.ca/files-4/documents/2012076\\_IB\\_Companies-shortlisted-to-build-new-John-Hart-station.pdf](http://www.partnershipsbcc.ca/files-4/documents/2012076_IB_Companies-shortlisted-to-build-new-John-Hart-station.pdf).

<sup>56</sup> <http://www.partnershipsbcc.ca/files-4/documents/20120627JHTRFP.pdf>.

<sup>57</sup><http://www.partnershipsbcc.ca/files-4/documents/John%20Hart%20Project%20update%20notice%20-%20preferred%20contractor%20Nov%202013.pdf>.

<sup>58</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-nih.php>.



Can\$600 million. The procurement process started in 2012, and a proponent has been chosen for the delivery of the project (Tandem Health Partners). Further information is provided on the dedicated website.<sup>59</sup>

Table 2.9 notes whether information has been disclosed in accordance with (i) legislation under BTAA, and (ii) guidance from PBC.

**TABLE 2.9 PPP INFORMATION DISCLOSURE AT THE PRE-PROCUREMENT STAGE, JOHN HART GENERATING STATION REPLACEMENT PROJECT, BRITISH COLUMBIA**

**(I) LEGISLATION UNDER BTAA**

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
STATEMENT OF CONTRIBUTIONS	Disclosure to Legislative Assembly is required at the same time as fiscal estimates are presented.	Unable to find any transcripts or minutes from the Legislative Assembly.	Unsure
MAJOR CAPITAL PROJECT PLAN	Disclosure is required within one month of commitments.	Published on the British Columbia government's Ministry of Health website; available as of October 2014. <sup>60</sup>	Yes

**(II) GUIDANCE FROM PBC**

INFORMATION	LEGISLATION	ACTIAL PRACTICE	COMPLIANT?
RFQ	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>61</sup>	Yes
RFQ RESPONDENTS	Disclosure is recommended (of the number and nature of respondents, but not necessarily identities).	Cannot see any reference to RFQ respondents on PBC website.	No/unsure
COMPANIES SHORT-LISTED AT RFQ STAGE	Disclosure is recommended (of number and identities).	Published on PBC website; available as of October 2014. <sup>62</sup>	Yes
RFP	Disclosure is recommended.	Published on PBC website; available as of October 2014. <sup>63</sup>	Yes

<sup>59</sup> North Island hospital project website: <http://nihp.viha.ca/>.

<sup>60</sup> <http://www.health.gov.bc.ca/library/publications/year/2012/north-island-hospitals-project-capital-plan.pdf>.

<sup>61</sup> [http://www.partnershipsbc.ca/files-4/documents/NIHP\\_RFQ\\_2012-08-07.pdf](http://www.partnershipsbc.ca/files-4/documents/NIHP_RFQ_2012-08-07.pdf).

<sup>62</sup> <http://www.partnershipsbc.ca/files-4/documents/2012HLTH0114-001498.pdf>.

<sup>63</sup> [http://www.partnershipsbc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20\\_Final%20As%20Issued\\_.pdf](http://www.partnershipsbc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20_Final%20As%20Issued_.pdf).

DRAFT PROJECT AGREEMENT	Disclosure is not recommended.	Cannot see any reference to a draft project agreement on PBC website.	Yes
PREFERRED PROPONENT	Disclosure is recommended (subject to timing).	Published on PBC website; available as of October 2014. <sup>64</sup>	Yes



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### National Level (Canada)

There does not seem to be any national-level legislation that requires the *proactive* disclosure of PPP information in British Columbia.

### Provincial Level (British Columbia)

#### (1) Mandatory Disclosure from Legislation: FOIPPA<sup>65</sup>

The requirements at the post-procurement stage do not seem to differ from those at the pre-procurement stage.

#### (2) Mandatory Disclosure from Legislation: BTAA<sup>66</sup>

BTAA's requirements primarily seem to relate to the pre-procurement stage, such as the publication of a major capital project plan. However, our interpretation of the legislation is that the government is required to publish information on the project for as long as the government is making financial contributions. Therefore, BTAA may also apply to the post-procurement stage.

#### (3) Discretionary Guidelines

An important point to note is that PBC does not have jurisdiction over information disclosure at this phase of the project (post-financial close); therefore, PBC's influence over disclosure is much less than during the pre-procurement stage (up to financial close).

<sup>64</sup> [http://www.partnershipsbcc.ca/files-4/documents/2014-04-04\\_NIHP\\_NR\\_selected-proponent.pdf](http://www.partnershipsbcc.ca/files-4/documents/2014-04-04_NIHP_NR_selected-proponent.pdf).

<sup>65</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

<sup>66</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

The disclosure of PPP information at the post-procurement stage is the responsibility of the contractor or private company.

This difference is identified in a recent World Bank report,<sup>67</sup> and is also evident from the sourcing of information in the project examples (see section 2.4.6). However, we have not been able to identify whether this split in responsibility has been formally prescribed by PBC (or by legislation).

What material is required to be confidential?

**(1) Mandatory Disclosure from Legislation: FOIPPA<sup>68</sup>**

As per the equivalent section in relation to the *pre-procurement stage* (see subsection 2.2.1).

**(2) Mandatory Disclosure from Legislation: BTAA<sup>69</sup>**

As per the equivalent section in relation to the *pre-procurement stage* (see subsection 2.2.1).

**(3) Discretionary Guidelines**

Table 2.10 provides recommendations on how different types of information should be treated with regard to confidentiality. These are recommendations, not mandated requirements, although they have been prepared by PBC to be consistent with legislation (FOIPPA and BTAA).

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

PBC's PPP contract documents contain two main sections that are directly relevant to information disclosure. The first relates to reactive disclosure (related to FOIPPA); the second, which is the key driver of information disclosure, relates to proactive disclosure.

**(i) Reactive Disclosure Conditions**

The PPP contracts prepared by PBC state that information is subject to FOIPPA legislation, and therefore may need to be reactively disclosed following a freedom of information request. Namely, the contracts all contain the following statement in some form:

“All documents and other records in the custody of, or under the control of, the Authority are subject to the Freedom of Information and Protection of Privacy Act ('FOIPPA') and other applicable legislation.”<sup>70</sup>

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<sup>67</sup> World Bank, Disclosure of Project and Contract Information in Public-Private Partnerships, January 2013 (p. 56).

<sup>68</sup> FOIPPA: [http://www.bclaws.ca/Recon/document/ID/freeside/96165\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/96165_00).

<sup>69</sup> BTAA: [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_00023\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_00023_01).

<sup>70</sup> Sourced from the RFP for North Island Hospitals Project, Apr 2013 (p. 42):

[http://www.partnershipsbc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20\\_Final%20As%20Issued\\_.pdf](http://www.partnershipsbc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20_Final%20As%20Issued_.pdf).

We have compared this wording with the wording in some older RFPs (from 2004), and there is a high level of consistency over time.<sup>71</sup>

However, although overall there is a high level of consistency between the RFPs over time, there is a small amount of variation. For example, the following statement sometimes appears in PBC's RFP documents: "Except as expressly stated in this RFP, and subject to FOIPPA or other applicable legislation, all documents and other records submitted in response to this RFP will be considered confidential."<sup>72</sup>

### **(ii) Proactive Disclosure Conditions**

PBC's contracts contain a large section entitled Disclosure and Transparency. In this section, PBC references the specific documents that it expects to publicly disclose during the procurement stage (*pre-procurement*) and after financial close (*post-procurement*).

The wording of a recent RFP document (April 2013) is as follows, with the key documents shown in bold for clarity:

"The Authority is committed to an open and transparent procurement process. To assist the Authority in meeting its commitment, proponents will cooperate and extend all reasonable accommodation to this endeavour.

The Authority expects to publicly disclose the following information during this stage of the Competitive Selection Process:

- a. the RFP;
- b. the number of Proponents; and
- c. the name of Proponents.

Following Financial Close, the Authority expects to publicly disclose:

- a. the Fairness Advisor's report;
- b. a Project Report; and
- c. the final Project Agreement excluding those portions that may be redacted pursuant to the application of FOIPPA."<sup>73</sup>

However, "the Draft Project Agreement is confidential and is not intended to be made publicly available unless otherwise required by Government policy or applicable Laws."<sup>74</sup>

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<sup>71</sup> RFP for the Sea-to-Sky Highway Improvement Project, August 2004 (p. 50):  
[http://www.partnershipsbcc.ca/pdf/STS\\_RFP-Instructions\\_to\\_Proponents-2004-09-15.pdf](http://www.partnershipsbcc.ca/pdf/STS_RFP-Instructions_to_Proponents-2004-09-15.pdf).

<sup>72</sup> RFP for Fort St. John Hospital PPP Project, January 2009 (Volume 2, p. 26)  
[http://www.partnershipsbcc.ca/files-4/documents/FSJH\\_Volume2RFP\\_conformed\\_v2.pdf](http://www.partnershipsbcc.ca/files-4/documents/FSJH_Volume2RFP_conformed_v2.pdf).

<sup>73</sup> RFP for the North Island Hospitals Project, April 2013 (p. 45):  
[http://www.partnershipsbcc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20\\_Final%20As%20Issued\\_.pdf](http://www.partnershipsbcc.ca/files-4/documents/2013%2004%2008%20NIHP%20RFP%20_Final%20As%20Issued_.pdf).

<sup>74</sup> RFP for the Evergreen Line Rapid Transit Project, November 2011 (p. 66):  
<http://www.partnershipsbcc.ca/files-4/documents/EvergreenLineRapidTransitProjectRequestforProposals-InstructionstoProponents.pdf>.

Collect and reference any specific templates/checklists being used for disclosure

PBC’s latest guidelines for the *post-procurement stage* are described in table 2.10.

**TABLE 2.10 PBC GUIDANCE COVERING THE POST-PROCUREMENT STAGE, 2010, BRITISH COLUMBIA**

MILESTONE	DISCLOSURE GUIDANCE AND RATIONALE
REPORT OF THE FAIRNESS ADVISER (IF APPLICABLE)	Disclosure of the final report is recommended at or soon after financial close.  There may be interim opinions issued at earlier stages in the process.
PROJECT REPORT: ACHIEVING VALUE FOR MONEY (FOLLOWING CONCLUSION OF AN AGREEMENT)	Disclosure of a final project report, Achieving Value for Money, for the project soon after financial close is recommended. This is the stage when a commitment is made.  Final value for money assessment should include a multiple criteria analysis for the project; a value for money analysis of the final agreement achieved versus a base case, such as a public delivery option for the project if one was considered; and any further innovations or savings captured during the procurement process. This report will also include the objectives, costs and benefits, and risks of the project.
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close, protecting information that is personal, proprietary, or commercially confidential.
PROPOSALS FROM PROPONENTS	Disclosure of proposals from proponents and respondents is not recommended because disclosure of these documents could significantly harm the commercial and competitive interests of the proponents, and the ability of the government to attract the best possible project at the best cost.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

As per the equivalent section in relation to the *pre-procurement stage* (see subsection 2.2.4).

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

Performance information (such as actual performance of key performance indicators versus contract targets) is not included in PBC’s recommended list of items to disclose, and PBC does not provide any project-specific performance reports on its website.

The World Bank’s recent report, “Disclosure of Project and Contract Information in Public-Private Partnerships” (January 2013), states that “performance reports are not proactively

disclosed” for British Columbia’s PPPs and performance assessments of PPP projects are “not necessarily available.”<sup>75</sup>

To test this, we considered two PPP project examples to see whether performance reports can be found. For these projects, although we were able to identify statements in the contract documents stating that the projects *would* be monitored and assessed, it was difficult to locate many *actual documents* on performance monitoring in the public domain.

### **Example 1: Sky-to-Sea Highway Improvement Project (Financial Close in 2005)**

The value for money report states that monitoring would be undertaken to ensure that each phase of the construction, and the contract as a whole, is implemented as intended.<sup>76</sup>

For capex, certificates would be issued to demonstrate compliance with the specified build standards, although it is not clear if or where these are published.<sup>77</sup> For opex, performance was subject to monitoring by the Ministry of Transport, although it is unclear how or whether the results of the monitoring were published on a regular basis. The difficulty in sourcing these documents is likely to have arisen because the project website is being decommissioned.

There is one good source of performance information, which is a report by the Auditor General of British Columbia.<sup>78</sup> This report provided expert judgements on:

- Allocation of design and construction risks between the province and the private sector partners
- Management of the concession agreement
- Level of success experienced by the Ministry of Transportation and Infrastructure in achieving its long-term objectives for the project (improved safety, reliability, and capacity).

However, we note that this was a single report at a single point in time, and therefore is not the same as providing regular performance monitoring and reporting.

### **Example 2: Fort St. John Hospital Project (Financial Close in 2009)**

Similar to the Sea-to-Sky Highway Improvement project, the VFM report for the Fort St. John Hospital project contains a section dedicated to Ongoing Project Agreement Monitoring.<sup>79</sup> The VFM document states that “monitoring spans every phase of the project, from Financial Close through design and construction, and operations and maintenance over the term of the agreement.”

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<sup>75</sup> World Bank, Disclosure of Project and Contract Information in Public-Private Partnerships, January 2013 (pp. 11 and 57).

<sup>76</sup> <http://www.partnershipsbc.ca/pdf/SeatoSkyFinal.pdf> (p. 4).

<sup>77</sup> <http://www.partnershipsbc.ca/pdf/sts-all-schedules-14-nov-06.pdf> (Schedule 5, Part 3, Annex 1).

<sup>78</sup> <http://www.bcauditor.com/pubs/2012/report4/audits-two-p3-projects-sea-sky-corridor>.

<sup>79</sup> [http://www.partnershipsbc.ca/files-4/documents/fsjh\\_vfm\\_22dec09.pdf](http://www.partnershipsbc.ca/files-4/documents/fsjh_vfm_22dec09.pdf) (see pp. 18-19).

However, again it was not possible to find the performance reports that disclose whether the specifications of the contract have been met, either in terms of initial construction or ongoing operations and maintenance.

*Our research suggests that* performance reports are difficult to obtain, at least in these instances. Although there is one clear exception—namely, the audit report by the Auditor General for the Sea-to-Sky project—such audits do not seem to be common practice (across all projects) or regular (undertaken at different points in time for the same project).

A possible reason for this could be that the responsibility for publication lies with the project contractor, rather than PBC. Although PBC has considerable experience in publishing procurement-related information in a consistent format, the contractor may not be as familiar with PPP arrangements and so may not have easily available templates for publishing performance reports. In addition, although publishing information is part of PBC's remit (and is therefore linked to its effectiveness as an organization), the contractor is unlikely to have the same incentives to publish information in a timely fashion.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

From discussions with PBC, we understand that there is no specific requirement for the project's special purpose vehicle to publish any information, beyond what is required by stakeholders for annual reports, etc. This view was confirmed during discussions with other industry stakeholders, and is due to concerns over the commercial confidentiality of such information.

## Validation of information

The recent World Bank report “Disclosure of Project Information in Public-Private Partnerships” contains some useful information on the validation process for PPP information that is publicly disclosed:<sup>80</sup>

- The World Bank report states that the main project report (the VFM report) is formally approved by the relevant government minister. PBC will review the document, but is not required to provide a formal sign-off. For example, the project report for the William R. Bennett Bridge project (2005) is presented as a British Columbia Ministry of Transportation document, although it also bears the logo of PBC.<sup>81</sup>

The procurement process for PPP projects in British Columbia is reviewed by a Fairness Advisor. The role of the Fairness Advisor is to provide a view on whether the process

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<sup>80</sup> World Bank, Disclosure of Project and Contract Information in Public-Private Partnerships, January 2013 (pp. 57-58).

<sup>81</sup> William R. Bennett Bridge project, VFM report: <http://www.partnershipsbcc.ca/pdf/wrb-vfm-report-oct05.pdf>.

complies with general fairness principles, such as whether the process is fair and transparent, without bias being shown toward any one or more of the proponents.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

From a review of several case studies, it seems that PBC’s guidelines on PPP information disclosure are generally being upheld. The documents that are recommended for publication are usually available, either on the project website or on the PBC website (table 2.11).

**TABLE 2.11 COMPLIANCE WITH PBC GUIDANCE COVERING THE POST-PROCUREMENT STAGE, 2010, BRITISH COLUMBIA**

### GUIDANCE FROM PBC

INFORMATION	PBC DISCLOSURE GUIDANCE	COMPLIANCE
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Yes, published for all the case studies.
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended for soon after financial close.	Mixed, published for the majority of the case studies, but not for two of the more recent examples (John Hart Generating Station Replacement project and Kitsilano Secondary School Renewal project).
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Mostly yes, usually published on PBC website, and sometimes on project website; exception is the John Hart Generating Station (financial close in February 2014), where not available.
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended; it could harm proponents’ interests or government’s negotiating position.	Yes, proposals from proponents do not seem to be published for any of the case studies.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

We selected projects from the PBC website, including projects at various stages of the procurement process. The projects are the same as those assessed in the *pre-procurement stage* section, with one exception. We were not able to include the *North Island Hospitals Project* as a project example, because that project only recently reached financial close.



Therefore, we chose the *Evergreen Line Rapid Transit PPP project* as an additional example.

The projects are listed in table 2.12.

**TABLE 2.12 CASE STUDIES OF PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE, BRITISH COLUMBIA**

CASE STUDY	NAME	PROCUREMENT PROCESS	CURRENT STATUS
1	Sierra Yoyo Desan Road	2003-2004	Operational/complete
2	Golden Ears Bridge	2004-2006	Operational/complete
3	Kitsilano Secondary School Renewal <sup>82</sup>	2012-2013	Under construction
4	John Hart Generating Station Replacement	2012-2014	Under construction
5	Evergreen Line Rapid Transit	2012-2013	Under construction

The rest of this subsection discusses these example projects. Additional details are provided in section 2.3.

**Project 1: Sierra Yoyo Desan Road<sup>83</sup>**

Table 2.13 notes whether information has been disclosed in accordance with PBC's guidance.

**TABLE 2.13 PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE FOR THE SIERRA YOYO DESAN ROAD PROJECT, BRITISH COLUMBIA**

**GUIDANCE FROM PBC**

INFORMATION	PBC DISCLOSURE GUIDANCE	ACTIAL PRACTICE	COMPLIANT?
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Unable to find report on PBC or British Columbia government websites.	No/unsure
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended soon after financial close.	Published on PBC website. <sup>84</sup>	Yes

<sup>82</sup> This is a design-build contract, so it may or may not be classified as a PPP, depending on the definition used.

<sup>83</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-sierra.php>

<sup>84</sup> [http://www.partnershipsbcc.ca/pdf/SYD\\_VFM\\_Nov\\_4\\_04.pdf](http://www.partnershipsbcc.ca/pdf/SYD_VFM_Nov_4_04.pdf).

FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Published on PBC website. <sup>85</sup>	Yes
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended, as it could harm proponents' interests or government's negotiating position.	Proposals from proponents do not seem to have been published.	Yes

### Project 2: Golden Ears Bridge <sup>86</sup>

Table 2.14 notes whether information has been disclosed in accordance with PBC's guidance.

TABLE 2.14 PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE FOR THE GOLDEN EARS BRIDGE PROJECT, BRITISH COLUMBIA

### GUIDANCE FROM PBC

INFORMATION	PBC DISCLOSURE GUIDANCE	ACTUAL PRACTICE	COMPLIANT?
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Published on Translink website. <sup>87</sup>	Yes
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended soon after financial close.	Published on Translink website. <sup>88</sup>	Yes
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Published on Translink website <sup>89</sup> and announcement made on PBC website; <sup>90</sup> however, unsure on timing of publication.	Yes
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended, as it could harm proponents' interests or government's negotiating position.	Proposals from proponents do not seem to have been published.	Yes

<sup>85</sup> [www.partnershipsbcc.ca/pdf/SYD\\_Concession\\_Agreement\\_and\\_Ground\\_Lease\\_severed\\_nov%2005.pdf](http://www.partnershipsbcc.ca/pdf/SYD_Concession_Agreement_and_Ground_Lease_severed_nov%2005.pdf).

<sup>86</sup> <http://www.partnershipsbcc.ca/files-4/project-goldenears.php>.

<sup>87</sup> [http://www.translink.ca/~media/Documents/driving/golden\\_ears\\_bridge/technical\\_reports/fairness\\_monitors\\_final\\_report.ashx](http://www.translink.ca/~media/Documents/driving/golden_ears_bridge/technical_reports/fairness_monitors_final_report.ashx).

<sup>88</sup> [http://www.translink.ca/~media/Documents/driving/golden\\_ears\\_bridge/technical\\_reports/Value\\_for\\_Money\\_Report.ashx](http://www.translink.ca/~media/Documents/driving/golden_ears_bridge/technical_reports/Value_for_Money_Report.ashx).

<sup>89</sup> [www.translink.ca/~media/Documents/driving/golden\\_ears\\_bridge/agreements/Project\\_Agreement.ashx](http://www.translink.ca/~media/Documents/driving/golden_ears_bridge/agreements/Project_Agreement.ashx).

<sup>90</sup> <http://www.partnershipsbcc.ca/pdf/geb%20agreement%20media%20release%2010mar06.pdf>.

### Project 3: Kitsilano Secondary School Renewal <sup>91</sup>

Table 2.15 notes whether information has been disclosed in accordance with PBC’s guidance.

TABLE 2.15 PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE FOR THE KITSILANO SECONDARY SCHOOL RENEWAL PROJECT, BRITISH COLUMBIA

#### GUIDANCE FROM PBC

INFORMATION	PBC DISCLOSURE GUIDANCE	ACTIAL PRACTICE	COMPLIANT?
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Published on PBC website. <sup>92</sup>	Yes
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended soon after financial close.	Unable to find report on PBC or project website (June 2014).	No/unsure
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Published on PBC website. <sup>93</sup>	Yes
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended, as it could harm proponents’ interests or government’s negotiating position.	Proposals from proponents do not seem to have been published.	Yes

### Project 4: John Hart Generating Station Replacement Project <sup>94</sup>

Table 2.16 notes whether information has been disclosed in accordance with PBC’s guidance.

<sup>91</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-ksr.php>.

<sup>92</sup> [http://www.partnershipsbcc.ca/files-4/documents/Kitsilano-Secondary-School-Project\\_Fairness-Advisory-Report\\_30Sept2013.pdf](http://www.partnershipsbcc.ca/files-4/documents/Kitsilano-Secondary-School-Project_Fairness-Advisory-Report_30Sept2013.pdf).

<sup>93</sup> [www.partnershipsbcc.ca/files-4/documents/KSS\\_Design-Build-Agreement\\_and\\_Schedules-2-7-Redacted.pdf](http://www.partnershipsbcc.ca/files-4/documents/KSS_Design-Build-Agreement_and_Schedules-2-7-Redacted.pdf).

<sup>94</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-jhgsr.php>.

TABLE 2.16 PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE FOR THE JOHN HART GENERATING STATION REPLACEMENT PROJECT, BRITISH COLUMBIA

GUIDANCE FROM PBC

INFORMATION	PBC DISCLOSURE GUIDANCE	ACTIAL PRACTICE	COMPLIANT?
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Published on PBC website. <sup>95</sup>	Yes
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended soon after financial close.	Cannot find relevant documents on BC Hydro or PBC website (June 2014).	No/unsure
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Cannot find relevant documents on BC Hydro or PBC website (June 2014).	No/unsure
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended, as it could harm proponents' interests or government's negotiating position.	Proposals from proponents do not seem to have been published.	Yes

**Project 5: Evergreen Line Rapid Transit Project<sup>96</sup>**

The Evergreen Line is a new rapid transit line that will connect Coquitlam to Vancouver via Port Moody and Burnaby. The procurement process started in 2012, and although the contract was awarded relatively recently (January 2013), PBC describes the project as under construction.

Table 2.17 notes whether information has been disclosed in accordance with PBC's guidance.

<sup>95</sup> [www.partnershipsbcc.ca/files-4/documents/JHGSR\\_Fairness-Monitor-Report\\_RFP-Process\\_01Nov2013.pdf](http://www.partnershipsbcc.ca/files-4/documents/JHGSR_Fairness-Monitor-Report_RFP-Process_01Nov2013.pdf).

<sup>96</sup> PBC website: <http://www.partnershipsbcc.ca/files-4/project-elrt.php>.

TABLE 2.17 PPP INFORMATION DISCLOSURE AT THE POST-PROCUREMENT STAGE FOR THE EVERGREEN LINE RAPID TRANSIT PROJECT, BRITISH COLUMBIA

GUIDANCE FROM PBC

INFORMATION	PBC DISCLOSURE GUIDANCE	ACTUAL PRACTICE	COMPLIANT?
FINAL REPORT OF THE FAIRNESS ADVISER	Disclosure is recommended at or soon after financial close.	Several reports published on PBC website, including the final report. <sup>97</sup>	Yes
PROJECT REPORT: ACHIEVING VALUE FOR MONEY	Disclosure is recommended soon after financial close.	Published on PBC website. <sup>98</sup>	Yes
FINAL PROJECT AGREEMENT	Disclosure is recommended within 60 days of financial close; some redactions are recommended.	Published on PBC website. <sup>99</sup>	Yes
PROPOSALS FROM PROPONENTS	Disclosure is <i>not</i> recommended, as it could harm proponents' interests or government's negotiating position.	Proposals from proponents do not seem to have been published.	Yes

What are the challenges and benefits to disclosure?

**Challenges**

- There are costs involved in establishing PPP information disclosure practices. Primarily, it takes time to submit information in line with PBC's requirements, which imposes costs to the public and the proponents. The cost of running PBC will ultimately be borne by the public, particularly as it produces useful project summary reports (as opposed to just providing a pdf of the contract agreement). In addition, proponents may have to respond to information requests from PBC. However, these costs may be reduced over time as PBC makes efficiency gains in the procurement process.
- There seems to be less information disclosure at the *post-procurement* stage, that is, a lack of performance and monitoring reports, and sometimes the project report is not available within the recommended time. This is not unexpected, because

<sup>97</sup> [http://www.partnershipsbcc.ca/files-4/documents/ELRT\\_Final-Fairness-Reviewer-Report\\_20Sept2012.pdf](http://www.partnershipsbcc.ca/files-4/documents/ELRT_Final-Fairness-Reviewer-Report_20Sept2012.pdf).

<sup>98</sup> <http://www.partnershipsbcc.ca/files-4/documents/PBCEvergreen.pdf>.

<sup>99</sup> <http://www.partnershipsbcc.ca/files-4/project-elrt-schedules/Design-Build-Finance-Project-Agreement.pdf>.

PBC provides a strong advocacy role prior to financial close (and coordinates information publication via its website), whereas the company or special purpose vehicle has greater autonomy and responsibility for disclosing information at the *post-procurement* stage.

### **Benefits**

- Disclosure keeps the public sector accountable for expenditure via PPPs. For example, reactive information disclosure in relation to the Fort St. John Hospital project allowed analysts to put pressure on the government to achieve value for money from public expenditure.<sup>100</sup>
- Information disclosure creates a high level of confidence in the fairness of the PPP procurement process, which reduces uncertainty from a bidder's perspective (for example, potential concerns that a proponent has already *effectively* been selected and that the procurement process is simply a tick-box exercise). Greater confidence in the process reduces barriers to entry, encourages new potential bidders, and incentivizes more competitive tendering. For example, a recent presentation on PPPs in Canada cites very high levels of competition as a positive characteristic of the market for PPPs in Canada.<sup>101</sup> More competitive tendering is likely to cut economic rents to efficient levels, and therefore offer better value for money for taxpayers.

## What can we learn from this country study?

British Columbia has a highly proactive stance to PPP information disclosure. The majority of PPP Information disclosure is driven by specific, proactive PPP guidance from PBC that is incorporated into PPP contracts.

The legal framework seems to be effective. British Columbia's legislation includes two relatively broad, high-level Acts (FOIPPA and BTAA), which are interpreted by PBC to set a series of information disclosure conditions that are then incorporated into the PPP contracts.

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<sup>100</sup> <http://www.policynote.ca/how-the-rules-got-fiddled-to-make-sure-a-public-private-partnership-got-pushed-through/>.

<sup>101</sup> Canada's PPP market (ppt): <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38845655> (slide 2).

## 3. Chile



### PPP context in Chile

How are PPPs undertaken in Chile?

Chile has been undertaking PPPs for decades in different sectors. Projects (for roads, airports, hospitals, prisons, and other infrastructure) are originated in several ministries, then scrutinized by the Planning Ministry, and typically procured through open bidding processes by the Concessions Office, a department of the Ministry of Public Works. The Concessions Office website provides a list of PPP projects, including 45 operational projects, eight projects under construction, five projects in procurement, 23 in the pipeline, and nine cancelled projects. In 2010, Chile introduced a new *Concessions of Public Works Law*, which provides a refreshed framework for PPPs.

In addition, to ensure the transparency of public acts, in 2008 Chile introduced the *Access to Public Information Law*, and created the Transparency Council, which is the entity in charge of overseeing legal compliance.

What are the policy objectives behind disclosure?

Full disclosure of public acts (except when confidential) is required by Article 8 of Chile's Constitution. There are several principles on which the Access to Public Information Law is based, such as: freedom of information, transparency, maximum sharing, and facilitation.

Uses and users of disclosure information and the exact nature of such use

#### **Access to Public Information Law, Its Regulation, and Administrative Process**

According to the Access to Public Information Law, the information disclosed could be used by anyone with no specific distinctions. Public bodies providing information cannot restrict the use of the information (except where there are legal exceptions).

#### **Concessions of Public Works Law and Its Regulation**

The Concessions of Public Works Law details the information that the users of the good or service (and presumably anyone else) will have access to once the contract has been signed. There does not seem to be information about the exact nature of the use of the disclosed information.

List of laws, policies, and regulations

The main blocks of legislation that form the legal framework for information disclosure in the context of public procurement are

- 2008 Access to Public Information Law, its 2009 Regulation, and administrative processes defined in instructions 4, 5, 7, and 9 from the Transparency Council
- 2010 Concessions of Public Works Law and its 2010 Regulation.

Proactive pre- and post-procurement disclosure in unsolicited projects

Provided the projects proposed are not already being considered by the Ministry of Planning, unsolicited projects are allowed in Chile, and their rules are detailed in the Concessions of Public Works Law. In summary, the process for unsolicited projects has two stages:

- *Presentation stage*: the applicant presents ideas for projects to the government, which evaluates if there is public interest.
- *Proposal stage*: if there is public interest, the applicant provides further details to support the project.

The intellectual property rights are only transferred to the government at the end of proposal stage. From that point, the treatment in terms of information disclosure contemplated in the Concessions of Public Works Law seems to be the same as for standard projects.



Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

#### **Access to Public Information Law, Its Regulation, and Administrative Process**

There does not seem to be any explicit requirement to publish pre-procurement information proactively.

#### **Concessions of Public Works Law and Its Regulation**

The Concessions of Public Works Law does not mention proactive pre-procurement publication requirements other than the obligation to publish calls for tender (specifying at



least the object of the concession and the timeline for the procurement process) in the Official Bulletin (Boletín Oficial) and a newspaper with national circulation.

What material is required to be confidential?

### **Access to Public Information Law, Its Regulation, and Administrative Process**

Article 7 of the Access to Public Information Law lists the reasons why access to information could be denied. These reasons are the following:

- Publication would affect the performance of the public body in question.
- Publication would affect people's rights.
- Publication would affect the security of the nation.
- Publication would affect the national interest.
- The information relates to a confidential law.

Instruction 4 of the Access to Public Information Law administrative process requires that the documents that are edited to remove certain information should be marked clearly and should contain an explanation of the legal reasons for the removals.

### **Concessions of Public Works Law and Its Regulation**

There does not seem to be any explicit requirement on confidentiality.

Collect and reference any specific templates/checklists being used for disclosure

**This has not been specified in the current legislation.**

Do the documents in question have retroactive effect?

**This has not been specified in the current legislation.**

Validation of information

**This has not been specified in the current legislation.**

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

**Actual practice in terms of pre-procurement disclosure seems to be compliant.**

At the time of writing this report, the Ministry of Public Works list of projects at the pre-procurement stage included three projects. Assuming this list is exhaustive (that is, it includes all the projects at the pre-procurement stage), the information published seems to comply with legal requirements (as per analysis in the following question).

The Ministry of Public Works publishes information on the pipeline of projects under study, which may or may not lead to a call for tender. The information published includes a short summary of the project. There is no requirement in the legislation to disclose this type of pre-procurement information.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Project I: International Airport Arturo Merino Benítez**

*Project stage:* tender preparation.

*Key information published on the Ministry of Public Works website:* summary project description, link to Official Bulletin with call for prequalification, prequalification terms of reference, and project terms of reference.

*Cambridge Economic Policy Associates (CEPA) assessment of compliance:* complies with current legislation.

### **Project II: Red Sur Hospitals (Curicó, Linares, and Chillán)**

*Project stage:* tender preparation.

*Key information published on the Ministry of Public Works website:* summary project description, link to Official Bulletin with call for prequalification, prequalification terms of reference, terms of reference for the architecture and engineering pre-project design, and four subsequent versions of the project terms of reference.

*CEPA assessment of compliance:* complies with current legislation.

### **Project III: Punilla Dam**

*Project stage:* prequalification.

*Key information published on the Ministry of Public Works website:* summary project description and prequalification terms of reference.

*CEPA assessment of compliance:* the project seems to comply with current legislation, although there was no link to the call for prequalification in the Official Bulletin.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **Access to Public Information Law, Its Regulation, and Administrative Process**

Article 7 of the Access to Public Information Law includes a list of the information that public bodies should proactively publish on their websites and update monthly. This list includes subscribed contracts for the supply of goods, works, or services; and contracts for research, advisory, and consulting services related to investment projects. Where appropriate, this information should indicate the contractors and identify partners and principal shareholders of corporations or companies.

Article 50 of the Regulation of the Access to Public Information Law requires that the publication should be updated at least in the first 10 days of each month.

Instruction 7 of the Access to Public Information Law administrative process provides details of the elements of the contracts that the public bodies must publish proactively. These are the following:

- Individualization of the administrative act approving the contract (type, name, date, and number)
- Identification of the contractor (full name and tax identification code)
- Identification of partners or major shareholders
- Agreed total price
- Length of contract
- Full text of the contract
- Administrative approval act and its subsequent amendments.

In the case of a public or private tender, the administrative process set by the Council for Transparency establishes that it will be considered good practice to include the text of the terms of reference and a record of the bid evaluation and award process.

## **Concessions of Public Works Law and Its Regulation**

The Concessions of Public Works Law details the information that the users of the service (and presumably anyone else) will have access to once the contract has been signed (such as terms of reference, project plans and other project studies, winning bid, etc.). There is no explicit requirement to publish this information proactively.

What material is required to be confidential?

See response under pre-procurement (section 3.2.2).

List the standard clauses being used for disclosure in contracts, in request for proposal documents, or other documentation relating to PPPs

The reviewed legislation does not include details on how contracts, the request for proposals, or other PPP documents should be drafted.

Collect and reference any specific templates/checklists being used for disclosure

## **Access to Public Information Law, Its Regulation, and Administrative Process**

The Transparency Council publishes templates for public bodies to use when proactively publishing information, including a template for subscribed contracts. The template for subscribed contracts, which is in Excel format, includes a table for public and private tender contracts, with the following headings:

- Type of administrative act
- Administrative act identification number
- Name of administrative act
- Object of the contract or acquisition
- Link to the terms of reference
- Link to the assessment process minutes
- Link to the adjudication administrative act.

All the templates published by the Transparency Council are available at

<http://www.consejotransparencia.cl/plantillas-de-publicacion-de-ta/consejo/2013-09-24/212134.html>

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

### **Access to Public Information Law, Its Regulation, and Administrative Process**

Article 7 of the Access to Public Information Law requires the proactive publication of subscribed contracts. It is open to interpretation if this includes contracts subscribed before the Access to Public Information Law was enacted. Instruction 4 of the Access to Public Information Law administrative process determines that it is good practice to publish information prior to the enactment of the Access to Public Information Law, which suggests that proactive disclosure requirements are retroactive.

### **Concessions of Public Works Law and Its Regulation**

Templates or checklists for disclosure are not available.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

The Concessions Office proactively publishes monthly project performance reports on its website. However, the reviewed legislation does not require proactive disclosure of performance information, contract or project audit reports, or third party monitoring and evaluation reports.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

### **Access to Public Information Law, Its Regulation, and Administrative Process**

The Access to Public Information Law is focused on public bodies and does not mention special purpose vehicles (SPVs). However, the law applies to the following:

- Public corporations created by law
- State companies in which the state has greater than 50 percent shareholding
- State companies in which the state has board majority.

Instruction 5 of the Access to Public Information Law establishes that organizations falling into any of these three categories should publish within the first 10 days of each month the full text of updated annual financial statements and annual reports, including:

- Balance sheet
- Income statement
- Cash flow statement

- Explanatory notes and other supplementary annexes.

In addition, Instruction 5 establishes that the publication of previous financial statements and annual reports, or any other information that could help interested parties to understand the business, would be considered good practice.

This means that if an SPV was to fall into any of the three categories (which would be less likely for a PPP SPV), it would have to comply with the requirements of the Access to Public Information Law.

### **Concessions of Public Works Law and Its Regulation**

Article 21 of the Concessions of Public Works Law establishes that concessionaires shall submit, monthly, to the Ministry of Public Works information on payments made to contractors. This information shall be published on the website of the Ministry of Public Works and updated monthly.

Article 43 of the regulation of the Concessions of Public Works Law establishes that Concessionaires shall submit quarterly financial statements.

Validation of information

### **Access to Public Information Law, Its Regulation, and Administrative Process**

Article 9 of the Access to Public Information Law establishes that the areas in charge of internal control of public bodies will have the obligation to control compliance with proactive transparency requirements in the Access to Public Information Law.

However, there is no discussion in the law, its Regulation, or administrative process regarding validation of information.

### **Concessions of Public Works Law and Its Regulation**

There does not seem to be any explicit requirement on validation of information to be published.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

The Ministry of Public Works presents information on concession contracts organized on a tailored website that can be browsed project by project. There is a great deal of relevant information disclosed, which suggests the Ministry of Public Works is working toward fully complying with the current legislation.

In some cases, the Ministry of Public Works discloses more information than what is legally required, considering that the Concessions of Public Works Law does not require proactive information disclosure.

In addition, information from a recent survey of compliance with the Access to Public Information Law by the Transparency Council suggests that those SPVs that are affected by the Access to Public Information Law would also comply with current legislation. The survey finds that 95 percent of a sample of 30 public corporations and state companies, some of which CEPA presumes are legally formed as SPVs, would comply with the obligation to publish annual financial statements and annual reports.<sup>102</sup>

However, there are some areas where CEPA has found that current practice might not be compliant.

CEPA was not able to identify the signed final contracts for any of the projects reviewed, which could represent an infringement of the Access to Public Information Law. However, the concession contract might be the bundling of the terms of reference, the technical proposal, and the financial proposal. If that was the case, the technical proposal would be the part that is missing from the concession contract.

Article 21 of the Concessions of Public Works Law establishes that concessionaires shall submit, monthly, to the Ministry of Public Works information on payments made to contractors, which shall be published on the website of the Ministry of Public Works and updated monthly. CEPA was not able to find this information on the Ministry of Public Works website.

A broader question remains about whether disclosed information is updated monthly on the Ministry of Public Works website, as required by the Access to Public Information Law. Some information suggests that monthly updates are not being undertaken. For example, six of the eight projects listed as “in process of prequalification” have already been procured.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Project I: Motorway 5, Rio Bueno to Puerto Montt**

*Project stage:* in operation.

*Key information published on the Ministry of Public Works website:* project terms of reference, financial bid, decree of adjudication, service rules, resolutions modifying concession contract, supplementary agreements 1 and 2, tariff determination 2013, and monthly report (December 2013 and January 2014).

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<sup>102</sup> The Transparency Council seems to be an active organization. Since its inception in 2009, it has delivered 11 instructions on the application of the Access to Public Information Law; undertaken 16 reviews of compliance in public sector areas such as municipalities, universities, central government, and public companies; and delivered 30 sanctions for infringement of the Access to Public Information Law. This can be accessed at [http://www.consejotransparencia.cl/consejo/site/artic/20140505/asocfile/20140505111136/resultados ta 2014 empresas p blicas web.pdf](http://www.consejotransparencia.cl/consejo/site/artic/20140505/asocfile/20140505111136/resultados%20ta%202014%20empresas%20p%20blicas%20web.pdf).

*Information missing or not clearly identified:* technical proposal, signed final concession contract if there was any, previous price determinations (if there were any), and previous monthly reports (if there were any).

*CEPA's assessment of compliance:* a great deal of relevant information is published proactively, which suggests that in this project the Ministry of Public Works is close to full compliance. However, some information, such as the signed final concession contract or the technical proposal, seems to be missing or is not clearly identified on the website. Not making the final concession contract proactively available could represent an infringement of the Access to Public Information Law. In terms of the technical proposal, there are no requirements to publish it proactively in the Access to Public Information Law or the Concessions of Public Works Law, unless it was considered part of the contract, in which case it should be proactively disclosed under the Access to Public Information Law.

A question remains about whether the information is updated monthly, as required by the Access to Public Information Law. The latest performance report available was, at the time of drafting this report, five months old, which suggests that information might not be updated monthly.

### **Project II: Penitentiary infrastructure, Group 3**

*Project stage:* in operation.

*Key information published on the Ministry of Public Works website:* project terms of reference, financial bid, decree of adjudication, service rules, resolutions modifying concession contract, supplementary agreements 1 and 2, and monthly report (February 2014 and April 2014).

*Information missing or not clearly identified:* technical proposal, signed final concession contract if there was any, and previous monthly reports (if there were any).

*CEPA's assessment of compliance:* CEPA's assessment is identical to the assessment of project I.

### **Project III: Parque O'Higgins Stadium**

*Project stage:* in operation.

*Key information published on the Ministry of Public Works website:* project terms of reference, financial bid, decree of adjudication, supplementary agreement, and monthly report (December 2013, January 2014, and February 2014).

*Information missing or not clearly identified:* technical proposal, signed final concession contract if there was any, and previous monthly reports (if there were any).

*CEPA's assessment of compliance:* CEPA's assessment is identical to the assessment of project I.



#### **Project IV: Araucanía Region Airport**

*Project stage:* in construction.

*Key information published on the Ministry of Public Works website:* call for tender, investment prospectus, project terms of reference, financial bids of short-listed tenderers, decree of adjudication, and monthly report (February 2014 and April 2014).

*Information missing or not clearly identified:* technical proposal, signed final concession contract if there was any, payments from the concessionaire to its contractors, and previous monthly reports (if there were any).

*CEPA's assessment of compliance:* CEPA's assessment is almost the same as the assessment of project I. The only addition would be that the lack of information on payments from the concessionaire to its contractors would not be compliant with Article 21 of the Concessions of Public Works Law.

#### **Project V: Diego Aracena de Iquique Airport**

*Project stage:* in construction and operation.

*Key information published on the Ministry of Public Works website:* project terms of reference, financial bids of concessionaires, decree of adjudication, monthly construction reports (February 2014 and April 2014), and monthly operation reports (November 2013, December 2013, February 2014, and April 2014).

*Information missing or not clearly identified:* technical proposal, signed final concession contract if there was any, payments from the concessionaire to its contractors, and previous monthly reports.

*CEPA's assessment of compliance:* CEPA's assessment is almost the same as its assessment of project IV.

What are the challenges and benefits to disclosure?

CHALLENGE	BENEFITS OF OVERCOMING THE CHALLENGE
Align the two main blocks of legislation.	Would lead to a clearer legal framework that would be easier to comply with and monitor
Ensure the focus is not just on compliance, but also on the provision of helpful information for participants in PPP procurement processes.	Would lead to better and more helpful information available for bidders
Ensure that the Transparency Council effectively oversees compliance in the area of PPP contracts.	Would put pressure on public institutions, such as the Ministry of Public Works, to be transparent in their procurement processes

## What can we learn from this country study?

This case study is interesting because it shows the need for alignment between the Access to Public Information Law and the Concessions of Public Works Law.

For example, the Concessions of Public Works Law does not distinguish between proactive and reactive disclosure. This type of misalignment makes it more difficult to assess compliance, eventually threatening transparency of PPP procurement processes.

This issue might be resolved soon, as Chilean President Bachelet has announced that in 2014 she will send a project to Congress to set up a new, more transparent framework for public infrastructure procurement. From the perspective of proactive disclosure in the context of PPPs, this seems to be a step in the right direction.

In addition, the Chilean case study might be useful to help thinking about the role that institutions such as the Transparency Council might have in overseeing information disclosure in PPP procurement processes. At the moment, it seems that the Chilean Transparency Council has not focused on PPPs. This raises the question of what can be done to ensure that the Transparency Council oversees the transparency of PPPs as well as the other areas of the government.

In summary, the Chilean case might be a useful example for analyzing the impact of having some legislative gap as a result of key blocks of legislation being misaligned, and to think about ways of refocusing existing transparency institutions to foster transparency in PPP procurement.

Chile has gone further than all countries, apart from perhaps the United Kingdom, when it comes to financial and performance disclosure.

## 4. Colombia



### PPP context in Colombia

How are PPPs undertaken in Colombia?

#### **General Transparency Environment**

Colombia has a long history of recognizing the value of transparency that is traced back to the Constitution. As of 1880, the Code of Political and Municipal Organization gave citizens the right to request access to documents held by the government. In 1985, Colombia passed a law covering the publicity of official acts and documents and

establishing a right of appeal where a request for information is turned down. Colombia also has a general law on access to information in public archives that sets a 30-year timeline on publication, but restrictions are in place.

The legislative environment continues to develop with the Law of Proactive Disclosure being passed in 2013. However, there continues to be concern about the level of exemption from such laws. The 2013 law excludes matters of defense, national security, public order, and international relations. These exclusions are seen to be significantly wider than is the case in other jurisdictions. There are also concerns about the degree to which the laws are enforced.

In 2011, President Santos signed a new Anti-Corruption Statute, which seeks to create more transparency and accountability in the contracting of public works projects. The statute prohibits companies that are guilty of violating procurement regulations from participating in future procurement bids.

### **Overall Approach to Public Procurement**

Public procurement laws adopted in 1994 and 2007 and the related implementing regulations contain various mechanisms to ensure transparency and objectivity in the entire process of government contracting.<sup>103</sup> The Government of Colombia set up a single procurement portal (Sistema Electrónico De Contratación Pública, SECOP)<sup>104</sup> to promote transparency, efficiency, and use of technologies in the Internet publication of public procurement. The system, which is operated by the national procurement authority Colombia Compra Eficiente, is currently undergoing further development to add a greater level of functionality.

### **PPP Procurement**

Given recent economic stability, Colombia has focused on developing infrastructure, the lack of which is seen as a barrier to continued economic growth. The country has undertaken, or is undertaking, PPPs across a range of sectors, but led by transport, which has until recently focused on improving the road network. Approximately 22 road PPPs have so far been transacted, and around 20 PPP projects are listed as currently progressing through procurement.

Colombia has a significant PPP program covering all major transport modes and extending to social infrastructure. Under Colombian law, the government can bring forward projects under public procurement or private developers can bring forward unsolicited projects.

In the case of unsolicited projects, the proposer must show how the project furthers the government's objectives as set out in the National Infrastructure Plan, which is administered by the National Planning Department.

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<sup>103</sup> As reported by the OECD Investment Review: Colombia 2012.

<sup>104</sup> <http://www.colombiacompra.gov.co/es/quiere-ser-usuario-del-secop>.

What are the policy objectives behind disclosure?

There is a long-standing commitment to transparency in Colombia, but there is also a recognition that corruption has marred the appetite for doing business and much of the recent legislation focuses on an anti-corruption agenda.

Government policy is driven by the need to:

- Generate a pool of suitably qualified PPP bidders, which may include international firms that are to be treated fairly in the competition
- Ensure that the tender process is open to a wide range of bidders who are able to understand what projects are in procurement as well as those that are likely to be forthcoming, that is, to form part of future plans but are not yet in procurement
- Encourage innovation, bringing forward unsolicited proposals that are consistent with the National Infrastructure Plan but potentially offer wider insight or innovation into how plan objectives might be delivered
- Demonstrate commitment to removing corruption in public procurement

Comply with free trade agreements; for instance, the U.S. and Canadian free trade agreements encourage Colombia to apply emerging best practice to procurement, including the use of electronic procurement tools to facilitate transparency.

Uses and users of disclosure information and the exact nature of such use

In line with the objectives, policy is set to support the long held principle of providing public access to public decision making and document. The process also supports bidders by setting out policy objectives and plans and by giving early sight of potential projects (pipeline) as well as facilitating open and electronic access to tenders. International trade, which is important to the development of the Colombian economy, is also dependent on transparency.

Overall, transparency plays a fundamental part in the drive to reduce and remove corruption.

List of laws, policies, and regulations

Law 1508 of 2012 is the current PPP law and applies to all PPP projects in Colombia irrespective of sector. The main provisions of the law are set out in figure 4.1.

FIGURE 4.1 PROVISIONS OF LAW 1508, 2012, COLOMBIA



The law does not specifically cover transparency, given that other statutes are applicable. The selection process and the rules for entering into and carrying out PPPs are governed by the public procurement statute, which comprises Law 80/1993, Law 1150/2007, and Decree 734/2012.

Laws 80 and 1150 create the framework for public procurement, which includes the requirements to publish information on:

- Pre-procurement, such as annual plans that provide insight into the project pipeline
- Procurement, where all tender documents are to be centrally published
- Post-procurement, in the form of contract documents.

Although there is an overarching commitment to transparency, Law 1467 of 2012, the Code of Commerce, establishes the range of material that may be kept confidential. This includes aspects of the financial model, industrial trade secrets, intellectual property rights, etc.

The general position in Colombian law is that, where a statute does not cover a particular item, other statutes may also apply and must be reviewed. Other relevant statutes include 1682 of 2013, the Infrastructure Law, which seeks to reduce some of the administrative red tape that has slowed or stopped the progress of several PPP deals in the past.

Law 1474 of 2011 covers measures to prevent corruption and is the equivalent of the UK Bribery Act. It includes the ability to fine public officials for the abuse of office. Legislation is also available to ban officials found to be corrupt from holding public office in the future.

Proactive pre- and post-procurement disclosure in unsolicited projects

Under Colombian law, all states must publish details of forthcoming projects. These details are made available on SECOP, the central government procurement portal.<sup>105</sup> Details of all

<sup>105</sup> Example list: ANI PPPs currently on SECOP:  
<https://www.contratos.gov.co/consultas/resultadoListadoProcesos.jsp#>.

main types of public procurement are also published centrally, including government sponsored and unsolicited PPP projects. It appears that the procurement laws do not specify exactly what must be published; however, the requirement is that all documentation, beginning with the preliminary studies and including the contract itself, should be published through SECOP.<sup>106</sup> Contracts for transacted projects are also available on SECOP.

The SECOP system currently relies on uploading PDF documents, but is being developed to make it more straightforward to access and analyze the information.



## Provisions for proactive pre-procurement disclosure

What elements of the project are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The National Planning Department is responsible, via presidential decree, for developing a National Infrastructure Plan. The plan sets out government priorities by sector and is an important document used in developing PPPs; that is, the projects must support the objectives of the plan. This is important for public procurement and unsolicited projects, which must show that the project is beneficial by reference to the plan.

At the regional and state levels, procurement plans are required to be developed and published on SECOP to provide an indication of the likely project pipeline. Colombia Compra Eficiente provides guidance on the format of these plans.

For projects in procurement, the process varies depending on whether the project is being publicly procured or results from an unsolicited proposal:

- Public procurement requires an open tender and all relevant documents are to be placed on SECOP.
- For unsolicited projects, the process varies depending on whether the project requires direct or indirect financial support from the state (the PPP law allows up to 20 percent state support). Where there is government support, the project progresses through the open tender route with documents placed on SECOP. For projects that do not require support, an abbreviated procurement is permitted. Projects still appear on SECOP, but the project progresses on a faster timetable. Where there are no other bidders for these projects, they may progress as direct procurement. Relevant material includes a project reference number based on

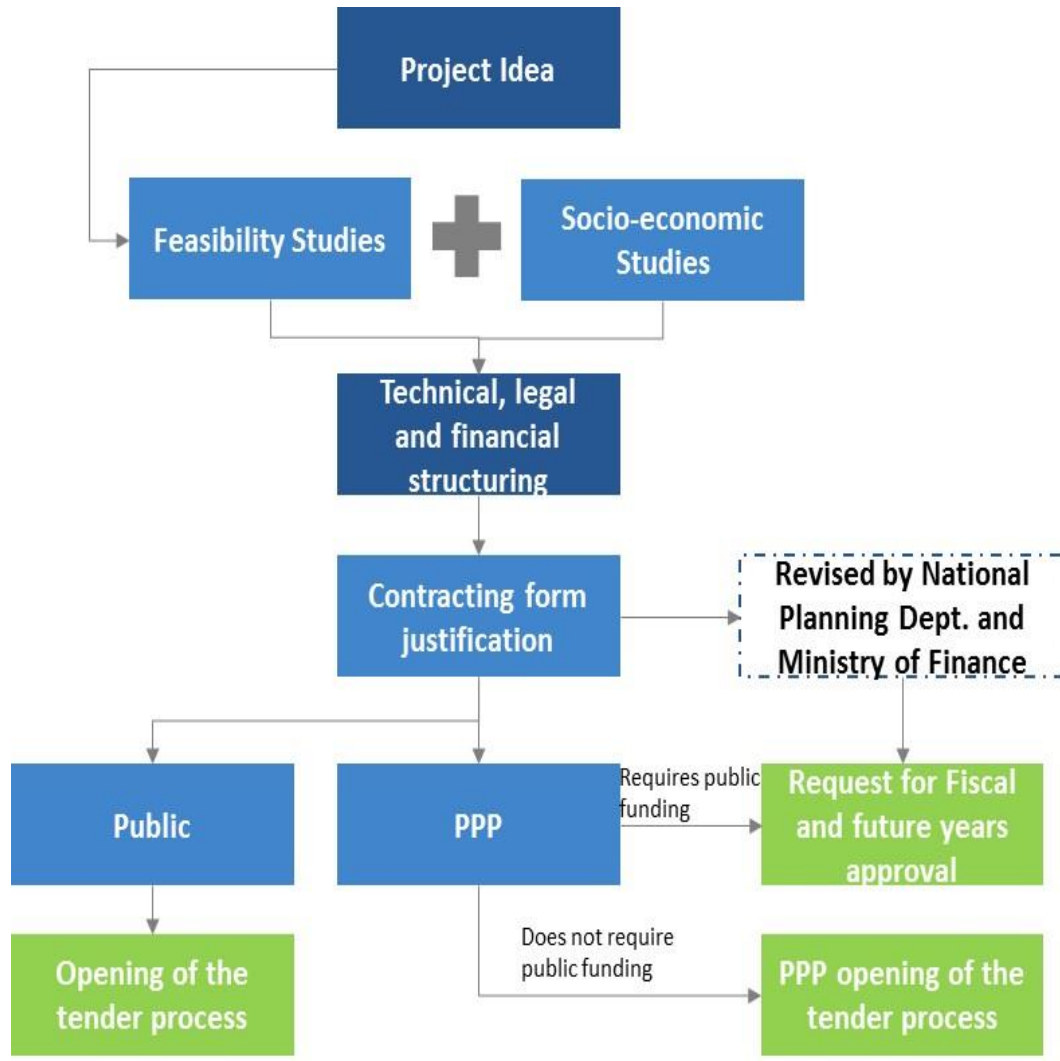
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<sup>106</sup> <http://www.opengovguide.com/country-examples/in-colombia-the-law-requires-all-documentation-related-with-a-public-contract-to-be-published/>.

which documents, for example from earlier stages, can be retrieved; the type of procurement process being followed, in this case direct award; the project's status, such as transacted; the location of the project, for example, Bogotá; and the cost and date of the award.

This process is illustrated in figure 4.2.

FIGURE 4.2 PROJECT DEVELOPMENT, COLOMBIA



Source: Department of National Planning of Colombia.

For an unsolicited proposal, the process differs.

What material is required to be confidential?

In pre-procurement, the rules require that project pipelines are published along with preliminary studies as projects start to take shape, and that all requests for proposals are openly published on the central procurement portal. The template PPP contract does not appear to include specific provisions on items that may be classified as confidential, perhaps because the legal framework already establishes exclusions from publication.

Collect and reference any specific templates/checklists being used for disclosure

Colombia Compra Eficiente provides user manuals that cover, for instance, the development of an annual plan (<http://www.colombiacompra.gov.co/sites/default/files/manuales/manualpaa.pdf> [in Spanish]). An example is provided in table 4.1. In addition to general information about the procuring agency, the plan should include the details in table 4.1.

TABLE 4.1 ANNUAL PROCUREMENT PLAN, COLOMBIA

Código UNSPSC	Descripción	Fecha estimada de inicio de proceso de selección	Duración estimada del contrato	Modalidad de selección	Fuente de los recursos	Valor total estimado	Valor estimado en la vigencia actual	¿Se requieren vigencias futuras?	Estado de solicitud de vigencias futuras	Datos de contacto del responsable
76111501 90101700	Servicio de aseo y cafetería para las sedes de la entidad ubicadas en Tumaco, Puerto Asís y Leticia.	Abril 2013	9 meses	Licitación	Recursos corrientes (del Tesoro)	\$300.000.000	\$300.000.000	No	N/A	Diana Rodríguez Analista de adquisiciones 630 0000 ext: 1390 diana.rodriguez@entidadabc.gov.co
78101501	Servicio de transporte de carga de Bogotá a las sedes ubicadas en Tumaco, Puerto Asís y Leticia.	Abril 2013	2 años	Licitación	Recursos propios	\$3.000.000.000	\$900.000.000	Si	No solicitadas	Diana Rodríguez Analista de adquisiciones 630 0000 ext: 1390 diana.rodriguez@entidadabc.gov.co
44111905	Tableros de 160cm x 300 cm para entrega en Bogotá.	Octubre 2013	N/A	Selección abreviada	Recursos propios	\$20.000.000	\$20.000.000	No	N/A	Diana Rodríguez Analista de adquisiciones 630 0000 ext: 1390 diana.rodriguez@entidadabc.gov.co
80101602	Estudio de violencia intrafamiliar en Norte de Santander con análisis basado en estudios de caso y análisis cuantitativo de información recolectada en campo.	Junio 2013	4 meses	Concurso de méritos	Recursos corrientes (del Tesoro)	\$300.000.000	\$300.000.000	No	N/A	Juan Pérez Jefe de Adquisiciones Tel: 630 0000 ext. 1345 juan.perez@entidadabc.gov.co
14111500 44103100 44121600 44121700 44121800	Suministro de elementos de papelería y útiles de oficina en todas las sedes.	Marzo 2013	10 meses	Mínima Cuantía	Recursos corrientes (del Tesoro)	\$15.000.000	\$15.000.000	No	N/A	Juan Pérez Jefe de Adquisiciones Tel: 630 0000 ext. 1345 juan.perez@entidadabc.gov.co

At the planning stage, the plans state that they are indicative and that the agencies procuring them are not obliged to undertake the projects that are listed.

Would-be bidders also have access to template PPP contracts, which are available on the National Infrastructure Agency (ANI) website:

<http://www.ani.gov.co/proyecto/general/cuarta-generacion-de-concesiones-1068>.



Do the documents in question have retroactive effect?

There do not appear to be any retroactive provisions.

## Validation of information

The onus for data accuracy is on those procuring. They are required to update SECOP and completing the systems is backed by sanctions—staff can be removed from office for abuse of it. There is general disclosure of project information, but this does not prevent human error. An example would be when projects are wrongly coded; an instance of this might be a public works contract being registered as a PPP project. The requirement does not ensure that disclosure is very timely—sometimes there is a delay, for example, before contracts appear in the system.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

For current, large-scale PPP contracts, many of which are being managed by ANI, disclosure appears to be consistent with policy. We also looked at projects in other agencies (for example, Cormagdalena) and found that although their websites might not contain the data, the link to SECOP is readily accessible and project information, as required by procurement law, is being uploaded to the system. Similarly, we reviewed practice at the municipal level and found appropriate information and links to SECOP for those municipalities. Project examples are provided in the next section.

Overall, there appears to be a lot of good practice led by ANI and Colombia Compra Eficiente, but there are some indications that this may not be delivered by other agencies. A particular issue appears to be maintaining up-to-date information on SECOP and sponsor websites. It is clear, however, that there is widespread use of SECOP and this provides a significant repository of pre-procurement information.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Barranquilla Airport**

This project involves significant works at Ernesto Cortissoz International Airport, including improving the freight and passenger terminals and upgrading the runway and taxiways. The project arose from the government taking control of the airport from Aeropuertos del Caribe, which was found not to be meeting required standards. The PPP concessioning process is being managed by ANI and the initial capital works, undertaken within the first five years, are worth approximately US\$62 million. Ten bidders were

prequalified in July 2013 and there was a plan to grant the concession by February 2014, but this appears to be delayed.

Notwithstanding the delay and as required by law, public information is available on the ANI website. The information comprises a note about a workshop on the project hosted by ANI. In addition, on the website there is a high-level fact sheet and a more detailed presentation.<sup>107</sup>

In addition to the material published by ANI, the Colombia Compres SECOP system contains relevant information for bidders. There are more than 100 documents available, starting with the prequalification process and working through the tender evaluation approach to material required for developing the bid, for example, the risk share matrices.<sup>108</sup>

We followed the relevant website links for several other projects sponsored by ANI and found that material is routinely available and in compliance with disclosure requirements. We therefore considered whether similar practice can be observed for other sponsoring bodies.

### **Magdalena River Highway**

This approximately \$1.2 billion project is being procured by CorMagdalena, the corporation responsible for managing and encouraging the use of the river, which runs the length of Colombia. The project is to channel and dredge 256 kilometers of the river to improve navigation. The project covers design, construction, operations, maintenance, and financing. After a series of delays, the project reached the prequalification stage in 2013, when nine bidders were reduced to three. Details of the successful bidder were scheduled to be announced on July 14, 2014.

CorMagdalena is the procuring authority and the project is discussed on its website at <http://www.cormagdalena.com.co/>. The limited information available on the site, for example, the timetable, is out of date. However, for information disclosure, the website provides the required link to SECOP, which is functioning. The SECOP site contains a wide range of material about the project, feasibility documents and evaluation report.<sup>109</sup>

### **Santa Marta Town Development–Santander**

This project is listed on SECOP and shown to be at the call for competition stage. Prequalification documents are available, as is project and process information.<sup>110</sup> However, the latest document on the system relates to an “abnormal” termination of the project. Santander also has a link to SECOP on its website.<sup>111</sup>

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<sup>107</sup> This information is available at <http://www.ani.gov.co/proyecto/general/cuarta-generacion-de-concesiones-1068>.

<sup>108</sup> The documents can be found at <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=13-19-1844585>.

<sup>109</sup> <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=13-19-1390566>.

<sup>110</sup> <http://www.colombiacompra.gov.co/es/proveedores>.

<sup>111</sup> [http://www.contratacion-santander.gov.co/Proyectos\\_Priorizados.shtml](http://www.contratacion-santander.gov.co/Proyectos_Priorizados.shtml).

Notification that the project has been stopped does not appear to have been published.

### **Bogotá Tram**

This project appears to be underway in that two companies have been appointed to undertake feasibility studies for two new tram lines. The studies were due to be completed by March 2015. It was anticipated that bidding to build the lines would occur thereafter. Alstom, one of the successful companies undertaking the feasibility works, describe its work as:

“...a public-private partnership (PPP), in which Canadian SNC Lavalin also participates, to deliver in March 2015 the studies for the structuring, design, construction, operation, and maintenance of the tramway of Bogotá. The line is 21 kilometers long and has an estimated cost of 1.3 billion pesos.”

However, it has not been possible to find details of the procurement that appointed these companies. The project appears to be making progress by the municipal rather than national government, but relevant websites do not provide details; although they do provide a link to SECOP, the system currently holds no information on this project. This may be because it is at an early stage, but if the feasibility work has been carried out as a PPP, it would be usual to find some information in SECOP based on analysis of the information for other projects.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

All contract documents are to be disclosed by the procuring agency, but it appears that the means by which this is achieved is generally SECOP. Throughout the procurement process, material is published at the end of the process. The evaluation report and scores and the contract are all made available on SECOP. Colombian law allows for some restrictions on the grounds of confidentiality.

What material is required to be confidential?

Potential restrictions on publication relate to:

- Financial information that could detrimentally impact competitiveness

- Trade secrets and intellectual property rights.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

The ANI website provides a template contract for its fourth-generation road PPPs. Within these, there are requirements for contractors in the preconstruction phase to establish a website that provides the following details of the project to the public:

- Objectives, mission, and vision
- Physical project scope
- Corporate governance policy
- The structure, ownership structure of the concessionaire, changes of control, rights and voting procedures, and composition of the governing bodies
- Details on the management of its principal businesses and changes in corporate strategy reports
- Information about potential conflicts of interest
- Information on technical, legal, financial, and accounting audit and the annual corporate governance report.

There must also be public disclosure on the Internet portal of financial information reported to the authorities or to the public and issued a maximum of two months after being approved by the board.

The contract provisions also call more generally for the project to be conducted in a transparent manner.

Collect and reference any specific templates/checklists being used for disclosure

The ANI model contract is at

<http://www.ani.gov.co/proyecto/general/cuarta-generacion-de-concesiones-1068>.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

See response under the pre-procurement in section 4.2.4.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

**The ANI model contract requires significant reporting to ANI, but there does not appear to be a requirement to publish information, for example, on the project website. However there is a requirement to publish audit reports and the annual governance report, which provide financial information. There is no indication of routine reporting (monthly key performance indicator style), although fourth-generation projects are carried out under a performance contract. There is a performance schedule in the model ANI contract.**

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

As in section 4.4.6

Validation of information

**The procurer, national government, state government, etc. is responsible for publication of documents. There is no independent validation of material added to SECOP.**

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

**From the projects that we studied, it seems that there is general compliance with the requirement to publish, via SECOP, key documents, including the contract, evaluation report, and award notice. Publication of data in the implementation phase is more limited. There is a good degree of compliance with the requirement under ANI contracts to establish a public website and make available performance data, although at this stage this is not consistently applied or very detailed. It seems that there are some restrictions on access to more detailed annual reports, with several of the websites we reviewed requiring a password to enter a secure area of the site when trying to obtain more detailed data.**

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Ruta del Sol Highway**

This highway is said to be one of the most important road corridors in the country, as it allows land communication between Bogotá and other cities in the country and the port cities of the Caribbean Region— Cartagena, Barranquilla, and Santa Marta. Work is underway via three PPPs with the concessionaires Helios, SAS, and Yuma. As required by the model contract, all three have websites:

Concession 1, Helios, <http://www.consorciivialhelios.com/>

Concession 2, SAS, <http://rutadelsol.com.co/>

Concession 3, Yuma, <http://yumacomc-cp92.webjoomla.es/>.

Each concessionaire produces and publishes high-level performance data based on construction progress. The sites have a link to technical reports or similar, but a password is required to access these. This approach does not seem consistent with the current model contract, but these projects may pre-date its use. These projects are not currently listed on SECOP.

### **Highway to Prosperity**

This is a series of road PPPs being procured by ANI that will link the central region of Antioquia to other states and ports. There are six PPPs in total, three of which were let in 2014. The projects are large and include the improvement, rehabilitation, operation, maintenance, and financing of various routes. Information about each of these projects is published on the ANI website.<sup>112</sup>

However, we were unable to locate the websites required by the model contract. Although this might be expected for two of the three PPPs, which were transacted in May and June 2014, it would seem likely that a website would be in place for the Rio Magdalena PPP, which was transacted at the end of 2013.

### **Amarilo Ciudad Verde in Soache, Cundinamarca**

This project is to provide social housing and is one of several similar projects that can be initiated by the private or public sector and that seeks to address the acute shortage of housing in Colombia. The project will deliver 49,500 new homes in a new town close to Soache. The project is being developed by a large consortium led by Amarilo, which is responsible for project management and marketing of the housing units. The project commenced in March 2010 and is due to be complete in 2016. Some details can be found at <http://www.ciudadverde.com.co/>, but contract documentation or performance information does not appear to be publicly available.

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<sup>112</sup> <http://www.ani.gov.co/tags/autopistas-para-la-prosperidad>.

## What are the challenges and benefits to disclosure?

- Although there has been a long tradition of public access to data in Colombia and a commitment to publish even confidential data, it seems that until relatively recently there has been only limited compliance.
- The PPP program in Colombia has been a catalyst for further disclosure driven by the growing economy and perhaps by free trade agreements and the anti-corruption agenda.
- The government recognized weaknesses in its approach and has been correcting these. In pre-procurement, use of the central procurement system SECOP is mandated and appears to be effective, although some agencies provide significantly more information via the system, exceeding expectations, than others.
- It is usual to be able to locate procurement plans (pipeline) and, for active projects, feasibility studies, prequalification and invitation to tender documents, evaluation reports, and contracts as appropriate to the project's stage of development. Links to the SECOP site from the procuring authority websites are also common, even if these sites are occasionally out of date.
- There has been movement toward model PPP contracts, in use at least by ANI. Greater emphasis in these appears to be on post-award performance management and monitoring. The terms are aimed at giving the procuring authority sufficient oversight rather than public access and therefore proactive disclosure. Where such disclosure requirements exist, at this stage, compliance seems to be less consistent than is the case via SECOP for the procurement process.
- For demonstrating value for money in delivery, that is, publishing details of ongoing contract performance, there is evidence of this becoming more important. However, this practice is not yet leading to widespread proactive publication of detailed performance data.

## What can we learn from this country study?

- Colombia demonstrates strong and growing commitment to transparency. Economic stability has meant that evolution of the transparency agenda can move at a good pace.
- Transparency has been facilitated by significant new PPP legislation that places importance on transparency as a part of developing trade in the country and internationally.
- The system of disclosure is centralized and the central agency gives clear and strong guidance with which there is general compliance (perhaps as this is backed by sanctions).

- Investment is being made to support more effective disclosure of PPP information via the development of SECOP. Colombia Compra Eficiente appears to be successful in setting and enforcing requirements.
- Alongside Colombia Compra, other key agencies, such as ANI, perform an important function in demonstrating compliance with disclosure requirements and even exceeding them.
- There is a strong commitment to unsolicited proposals and what appears at this stage to be an effective process for reviewing these, extending the process to public procurement and therefore transparency. It seems likely to be the case that despite such procurements being captured by disclosure rules as they progress, other private sector bidders will have limited appetite for them, given the likely perception of incumbent advantage.

## 5. Honduras



### PPP context in Honduras

How are PPPs undertaken in Honduras?

Created by the 2010 PPP Promotion Law, the Commission for the Promotion of PPPs (COALIANZA) centralizes all PPP contracting processes at the national and local levels. PPP project information is disclosed by COALIANZA on its website. At the time of drafting this case study, the information on COALIANZA's website included six projects that had already been tendered, one project in procurement, 28 projects in the pipeline, and two unsolicited projects. COALIANZA follows up the projects, works, or services provided through PPPs in coordination with regulatory agencies.

What are the policy objectives behind disclosure?

There are several objectives that the Transparency Law aims to help achieve, such as:

- Citizen participation in public issues
- Efficient use of public resources
- Transparency of public acts
- Elimination of state corruption and illegality.



Uses and users of disclosure information and the exact nature of such use

According to the Transparency Law, all citizens can use the disclosed information, with no specific distinctions. No further details are provided on this issue.

List of laws, policies, and regulations

Two main blocks of legislation form the legal framework for information disclosure in the context of PPPs:

- 2006 Transparency Law (Ley de Transparencia), its 2007 reform, and its 2008 Regulation
- 2010 PPP Promotion Law (Ley de Promocion de Alianza Publico-Privada) and its 2011 Regulation.

As a result, where possible, for this country study, we split the content into these two blocks of legislation.

There are other laws that relate to PPPs (for example, the Investment Promotion and Protection Law, and the Special Law for Simplification of Public Infrastructure Investment Procedures), but that do not include any relevant information disclosure requirements. We do not discuss these laws in this country case study.

Proactive pre- and post-procurement disclosure in unsolicited projects

Unsolicited projects (referred to as private initiatives) are allowed in Honduras, and their rules are detailed in Chapter IV of the PPP Promotion Law Regulation. In summary, applicants are required to present the following, among other things:

- Identification and detailed description of the project and its nature
- Presentation of base studies of the economic, financial, and technical feasibility of the project, work, service, or delegated activity
- Estimated total investment and details of investment per year, as well as the methodology used for its calculation
- If the project does not involve investment, the savings or improved quality, safety, or time when the goods or services will be provided
- Indication of the source of resources and the type of financing, including whether the project involves co-financing by the state and in what way
- Whether the project involves the use of material in the public domain or assets of the state, and their identification
- Environmental feasibility study in the case of projects that would have to undergo the process of environmental impact assessment under current legislation
- Identification of the public interest

- Once the proposals have been evaluated, COALIANZA shall inform the applicant on the outcome of the evaluation within a period not exceeding 10 working days.

For proactive procurement information disclosure, Article 44 of the PPP Promotion Law Regulation establishes that, after analyzing the unsolicited submission, if applicable, COALIANZA will publish the declaration of interest on its website and in the two newspapers of greatest circulation. This publication must contain at least the following information:

- A summary of the project that includes
  - Purpose and scope of the investment project
  - Goods and/or public services developed
  - Contractual modality and timeline
  - Referential amount of investment
  - Tentative schedule
  - Proposed form of payment
- Quality of service indicators, if applicable
- Essential elements of the draft contract, according to the criteria established by COALIANZA
- Guarantee of true compliance to contractual obligations
- Prequalification requirements
- Expression of interest template
- Deadline for expression of interest, which must be between 30 and 90 days from date of publication
- Sum of the offer guarantee, which shall be between 5 and 10 percent of the value of the project.

Article 51 establishes that COALIANZA shall maintain under its responsibility the confidentiality and privacy of the unsolicited submissions. This obligation extends to the public entities and public officials who, by their position or in virtue of their responsibilities, are aware of the filing and content of an unsolicited submission. The confidential and reserved character of unsolicited submissions will remain until they are declared of interest. In addition, Article 51 establishes that the aspects of the unsolicited submission that, because of their nature, represent intellectual property rights to the author, will be protected as such within the parameters established by law since the time of presentation, even in the case they are not declared of public interest.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **Transparency Law and Its Regulation**

It is unclear in the Transparency Law and its Regulation if the requirement to publish information related to procurement selection processes proactively is pre- or post-procurement. Article 22 of the Transparency Law Regulation suggests the requirement is post-procurement, as it is included within a group of information called “information related to signed contracts.”

### **PPP Promotion Law and Its Regulation**

Article 92 of the PPP Promotion Law Regulation establishes that all project information is considered confidential and shall not be made known to the public until after subscription of the contract for public-private partnerships.

The exception is the calls for tenders, which, according to Article 16 of the PPP Promotion Law Regulation, shall be published in two newspapers of general circulation in the country for two consecutive days, and on the COALIANZA web page, for at least 15 days between the second publication and the deadline for the submission of proposals.

What material is required to be confidential?

### **Transparency Law and Its Regulation**

This has not been specified in current legislation, as proactive pre-procurement information on projects and contracts does not seem to be required.

### **PPP Promotion Law and Its Regulation**

Everything except the call for tender is deemed confidential until the PPP contract subscription.

In addition, Article 27 of the PPP Promotion Law and Article 51 of the PPP Promotion Law Regulation establish that information related to unsolicited projects must be kept confidential until the projects are declared of interest.

Collect and reference any specific templates/checklists being used for disclosure

**Transparency Law and Its Regulation**

This is not specified in current legislation, as proactive pre-procurement information on projects and contracts does not seem to be required.

**PPP Promotion Law and Its Regulation**

No templates or checklists are described in the PPP Promotion Law.

Do the documents in question have retroactive effect?

**Transparency Law and Its Regulation**

This is not specified in current legislation, as proactive pre-procurement information on projects and contracts does not seem to be required.

**PPP Promotion Law and Its Regulation**

This is not specified in the current legislation.

Validation of information

**Transparency Law and Its Regulation**

This is not specified in the current legislation, as proactive pre-procurement information on projects and contracts does not seem to be required.

**PPP Promotion Law and Its Regulation**

This is not specified in the current legislation.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

Actual practice in pre-procurement seems to be compliant and in some cases goes beyond the legal and regulatory requirements.

For example, COALIANZA publishes a list of projects in the pipeline. This list currently includes a one-paragraph description and the estimated investment for 21 PPP projects in different sectors.

In addition, COALIANZA publishes a list of projects under development. This list includes different types of information depending on how advanced the structuring process is.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

COALIANZA publishes a list of projects in development. This list includes different types of information depending on how advanced the process is. At the time of writing this report, the COALIANZA list of projects under development included four projects. Information published for each one, and our assessment of compliance with the current legislation are described in this subsection.

#### **Project I: Carretera CA5-Sur**

*Project stage:* unclear. The project is listed as developed, but the timeline for request for tenders mentioned on the website is July 2013. The website does not include any information regarding delays or reasons for delays of this project.

*Key information published on COALIANZA's website:* one-sentence description of the project, estimated investment, and timeline for request for tenders.

*Cambridge Economic Policy Associates' (CEPA's) assessment of compliance:* it is not possible to assess compliance, as the date of the tender is not clear. If the project has not been tendered yet, there does not seem to be any legal requirement for COALIANZA to publish information on this project.

#### **Project II: Represa de Uso Múltiple El Tablón**

*Project stage:* the project seems to be at the expression of interest stage.

*Key information published on COALIANZA's website:* one-sentence description of the project, project fact sheet, power point presentation providing more details on the project, and the publication of the call for expression of interest.

*CEPA's assessment of compliance:* compliant, assuming the tender has not started yet (the deadline for submission of expressions of interest was May 2013).

#### **Project III: Libramiento de la Zona Metropolitana del Valle de Sula**

*Project stage:* unclear. The only date mentioned on the website relates to the diagnostics of the road (deadline August 2013).

*Key information published on COALIANZA's website:* .ppt presentation with some information on the project.

*CEPA's assessment of compliance:* compliant, assuming the tender has not started yet. There does not seem to be any legal requirement for COALIANZA to publish information on projects until the tender date.

#### **Project IV: Water and Sewerage System of Tela**

*Project stage:* unclear.

*Key information published on COALIANZA's website:* short description of project and total and disaggregated information on expected costs of construction.

*CEPA's assessment of compliance:* compliant, as per reasons mentioned for the other projects.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **Transparency Law and Its Regulation**

Article 13 of the Transparency Law includes a list of the information that public institutions should proactively publish. This includes contracts, concessions, auctions, calls to tender for public works, consulting contracts, minutes of offer opening and award processes, and declaration of direct sales and the results.

Article 22 of the Transparency Law Regulation defines in more detail the requirements for publications of contracts signed, which are as follows: institutions are required to publish on their websites (or any other means of quick access) all the processes for selection of suppliers and the signed contracts, together with the information related to acquisitions, rents, services, and public works, detailing the following in each case:

- Administrative unit that signed the contract
- Tendering process
- Name of person or company that signed the contract
- Date, object, amount, and timelines of the contracts
- Contract modification agreements, in each case including all the details required above.

Article 21 of the Transparency Law Regulation presents similar requirements as these for concessions. It is unclear if concession contracts would fall under Article 21 or Article 22 of the Transparency Law Regulation. However, this does not seem to be problematic, as the requirements are very similar.

Article 16 of the Transparency Law Regulation requires that each institution actualizes information published monthly, and that information should be published at least during the period of validity.

### **PPP Promotion Law and Its Regulation**

Article 95 of the PPP Promotion Law Regulation establishes that a body separate from COALIANZA, called the PPP Superintendence, will publish on its website all acts or declarations establishing the execution of and compliance with the obligations of PPP contracts.

There is no other requirement in the PPP Promotion Law and its Regulation to proactively publish information. The requirement in Article 93 of the PPP Promotion Law Regulation is for reactive disclosure. This article establishes that, once the PPP contract is signed, anyone may request and receive information related to the project, which must be provided by COALIANZA within a maximum period of 15 days of the request.

What material is required to be confidential?

### **Transparency Law and Its Regulation**

Article 16 of the Transparency Law and Article 24 of the Transparency Law Regulation determine that the right to access public information is restricted when:

- This was established in the National Constitution, international treaties, and laws compatible with international treaties
- It has been classified as reserved, has been given confidential status, or contained confidential data
- It was information of private companies and institutions that are not within the public bodies covered by the Transparency Law.

Article 17 of the Transparency Law and Article 25 of the Transparency Law Regulation establish that information can be classified as reserved when the damage caused by publication would be larger than the benefit, or when publication puts at risk the military or economic security of the nation or the life, security, or health of any person, among other aspects.

### **PPP Promotion Law and Its Regulation**

There are no confidentiality requirements for post-procurement information in the PPP Promotion Law and its Regulation.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

### **Transparency Law and Its Regulation**

The Transparency Law and its Regulation do not include details on how contracts, requests for proposals, or other PPP documents should be drafted.

### **PPP Promotion Law and Its Regulation**

Article 8 of the PPP Law presents a checklist of elements to include in a PPP contract. This list does not include any clause related to disclosure of information.

Collect and reference any specific templates/checklists being used for disclosure

### **Transparency Law and Its Regulation**

The Transparency Law and its Regulation do not discuss specific templates or checklists to be used for disclosure.

The Public Information Access Institute, which is the body created by the Transparency Law to promote and facilitate access to public information, does not seem to make available on its website any specific template or checklist to be used for disclosure.

### **PPP Promotion Law and Its Regulation**

The PPP Promotion Law and its regulation do not discuss specific templates or checklists to be used for disclosure. COALIANZA does not seem to make available on its website any specific template or checklist to be used for disclosure.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

### **Transparency Law and Its Regulation**

Article 80 of the Transparency Law Regulation establishes that there are retroactive effects for reactive disclosure (that is, for requests of information generated before the day of publication of the Transparency Law). However, there is less clarity about the retroactiveness of proactive disclosure.

Article 22 of the Transparency Law Regulation requires the proactive publication of subscribed contracts. It is open to interpretation whether this includes contracts subscribed before the Transparency Law enactment.

Article 17 of the Transparency Law Regulation establishes that the information should remain published during the period in which it is in force. It is open to interpretation whether this includes contracts subscribed before the Transparency Law enactment that remain in force after the enactment of the Transparency Law.

### **PPP Promotion Law and Its Regulation**

This is not specified in the current legislation.



Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

### **Transparency Law and Its Regulation**

The Transparency Law and its Regulation do not require proactive disclosure of performance information, contract or project audit reports, or third party monitoring and evaluation reports.

### **PPP Promotion Law and Its Regulation**

Article 95 of the PPP Promotion Law Regulation establishes that COALIANZA's PPP Superintendence will publish on its website all acts or declarations establishing the execution and compliance with the obligations of the PPP contracts.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

### **Transparency Law and Its Regulation**

The Transparency Law is focused on public bodies and does not mention special purpose vehicles. However, Article 13 of the Transparency Law includes a requirement to publish proactively information on the activities of private companies that provide public goods or services with exclusivity terms, or that sign contracts financed by the government. This information should be published by the public entity that has signed the respective contracts. In addition, Article 17 of the Transparency Law Regulation establishes that, on top of the monthly publication requirement, the information should be updated no later than 10 working days after any modification might have happened.

### **PPP Promotion Law and Its Regulation**

Article 84 of the PPP Promotion Law Regulation establishes that supervised agents shall provide what is necessary to facilitate COALIANZA' PPP Superintendence supervision; otherwise they will be subject to administrative penalties.

Validation of information

### **Transparency Law and Its Regulation**

The Transparency Law and its Regulation do not include details on how published information should be validated.

### **PPP Promotion Law and Its Regulation**

The PPP Promotion Law and its Regulation do not include details on how published information should be validated.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

In terms of provisions for post-procurement proactive disclosure, the two main blocks of legislation analyzed present slightly different requirements. The Transparency Law requires proactive disclosure of contracts (and a short list of related information). The PPP Promotion Law requires reactive disclosure of contracts and all available related information. This means that the Transparency Law is more stringent about how information is disclosed (that is, proactively versus reactively), and the PPP Promotion Law is more stringent about what information is disclosed (that is, all versus some).

COALIANZA seems to satisfy the most stringent requirements in the two blocks of legislation; that is, COALIANZA publishes proactively the PPP contracts and presumably all related information, with some minor exceptions.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

COALIANZA publishes a vast amount of information for PPP projects that have been adjudicated. At the time of writing this report, six projects were covered. Key information was published for five of them, and our assessment of compliance with current legislation is as follows.

### **Project I: Logistics Corridor of Honduras**

*Project stage:* adjudicated in 2012.

*Key information published on COALIANZA's website:* project terms of reference, adjudication letter, signed contract, contract modifications, decrees approving the contract and modifications, fact sheet, video description of the project, terms of reference for supervision of works, and signed contract for supervision of works.

*Information missing or not clearly identified:* financial and technical proposals and monitoring reports (if there were any).

*CEPA's assessment of compliance:* a great deal of relevant information is published proactively, which suggests that COALIANZA is close to full compliance. There is some information that has not been published, such as the financial and technical proposal. Information on performance has not been identified. However, it is not entirely clear that COALIANZA is required legally to publish this information proactively.

### **Project II: Tourist Corridor of Honduras**

*Project stage:* adjudicated in 2012.

*Key information published on COALIANZA's website:* project terms of reference, adjudication letter, signed contract, decree approving the contract and one modification, fact sheet, video description of the project, terms of reference for supervision of works, and signed contract for supervision of works.

*Information missing or not clearly identified:* financial and technical proposals and monitoring reports (if there were any).

*CEPA's assessment of compliance:* a great deal of relevant information is published proactively, which suggests that COALIANZA is close to full compliance. There is some information that has not been published, such as the financial and technical proposal. Information on performance has not been identified. However, it is not entirely clear that COALIANZA is required legally to publish this information proactively.

### **Project III: Containers and Loading Terminal General de Puerto Cortés**

*Project stage:* adjudicated in 2013.

*Key information published on COALIANZA's website:* fiduciary bank terms of reference, contract with the fiduciary bank, project terms of reference, adjudication letter, signed contract, fact sheet, and video description of the project.

*Information missing or not clearly identified:* financial and technical proposals, terms of reference for supervision of works (if there was any), signed contract for supervision of works (if there was any), and monitoring reports (if there were any).

*CEPA's assessment of compliance:* a great deal of relevant information is published proactively, which suggests that COALIANZA is close to full compliance. Some information that has not been published, such as the financial and technical proposal. Information on performance has not been identified. However, it is not clear that COALIANZA is required legally to publish this proactively.

### **Project IV: Road Carretera de Gracias, Lempira**

*Project stage:* adjudicated in 2012.

*Key information published on COALIANZA's website:* contract with the fiduciary bank, adjudication letter, signed contract, contract addendum, decrees approving the contract and addendum, project fact sheet, and video description of the project.

*Information missing or not clearly identified:* fiduciary bank terms of reference, project terms of reference, financial and technical proposals, terms of reference for supervision of works (if there was any), signed contract for supervision of works (if there was any), and monitoring reports (if there were any).

*CEPA's assessment of compliance:* a significant amount of relevant information is published proactively. However, there is some important information missing that represents key parts of the tendering process (for example, the terms of reference for the fiduciary bank and the project). As a result, in this instance, COALIANZA might not be complying with the requirements of Article 22 of the Transparency Law Regulation.

## Project V: Bulk Terminal of Puerto Cortés

*Project stage:* adjudicated in 2013.

*Key information published on COALIANZA's website:* fiduciary bank contract, project construction terms of reference, project construction financial proposal, project construction contract, project operation terms of reference, project operation financial proposal, project operation contract, and project fact sheet.

*Information missing or not clearly identified:* fiduciary bank terms of reference, project construction and project operation technical proposals, terms of reference for supervision of works (if there was any), signed contract for supervision of works (if there was any), and monitoring reports (if there were any).

*CEPA's assessment of compliance:* a significant amount of relevant information is published proactively. However, there is some important information missing that represents key parts of the tendering process (for example, the terms of reference for the fiduciary bank). As a result, in this instance, COALIANZA might not be fully complying with the requirements of Article 22 of the Transparency Law Regulation.

## What are the challenges and benefits to disclosure?

CHALLENGE	BENEFITS OF OVERCOMING THE CHALLENGE
Align the two main blocks of legislation.	This would lead to a clearer legal framework that would be easier to comply with and to monitor.
To ensure that there is transparency in post-procurement performance monitoring	This would provide stronger incentives for companies to deliver the agreed outputs.

## What can we learn from this country study?

The Honduran case is based on two main pieces of legislation: the 2006 Transparency Law and the 2010 PPP Promotion Law. These two pieces of legislation seem to provide a good framework for public bodies to approach disclosure of information.

However, the two pieces of legislation are slightly misaligned on some specific PPP disclosure requirements. For example, the Transparency Law requires proactive disclosure of contracts (and a short list of related information), while the PPP Promotion Law requires reactive disclosure of contracts and all related information.

Interestingly, however, when it comes to compliance, COALIANZA (the Commission for the Promotion of PPPs created by the PPP Promotion Law) seems to satisfy the most stringent requirements in the two laws (that is, it publishes proactively the PPP contracts and presumably all related information).

COALIANZA also seems to go beyond compliance in pre-procurement information, as it publishes details of a pipeline of projects, which is not required by the legislative and regulatory framework.

This country case flags that the strength and well-functioning of a key institution, such as COALIANZA, is fundamental to achieving disclosure of PPP information. However, the case suggests that a more solid base could be achieved if relevant legislation was fully aligned.

## 6. India



### PPP context in India

How are PPPs undertaken in India?

The Government of India and state and local governments undertake public-private partnerships (PPPs) in India. The former does so through various line ministries (such as the Ministry of Shipping, Road Transport and Highways, Civil Aviation, Urban Development, and Rural Development). All central government PPPs, other than Providing Urban Amenities to Rural Areas (PURA) PPPs above a prescribed value are subject to assessment and approval by the Public Private Partnership Approval Committee (PPPAC) before being procured.<sup>113</sup> State PPPs are approved at the state level. Local PPPs require approval at the local, state, or central level, depending on the type and financing structure of the PPP.

In the number of projects, roads and highways are emerging as the favored destination for PPPs, with roads and electricity leading in the private sector. The Government of India is focusing on PPPs in the railways, water supply and sewerage, and health and education sectors. During the 12th Five-Year Plan (2012-17), Re 500 billion (US\$8 billion) in investment is envisaged to come from the private sector.

Currently, there is no central law to govern public procurement or PPPs in India. The General Financial Rules, 2005, are applicable to govern public procurement processes at the national level, with procedures and policies laid down by the Ministry of Finance, the Ministry of Commerce and Industry, and the Public Works Department of respective states, which form the overall institutional framework of public procurement in India.

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<sup>113</sup> The PPPAC is an inter-ministerial committee chaired by the Secretary, Department of Economic Affairs, with other key ministries as members.

The regulatory framework encompasses the Finance Ministry's manual on policies and procedures for the procurement of works, the delegation of financial power rules, government orders on price or purchase preference or other facilities to sellers in certain sectors, in addition to guidelines issued by the Central Vigilance Commission to enhance transparency and objectivity in public procurement. These are general guidelines on government expenditures, with penalties seldom enforced for violation of rules.<sup>114</sup>

What are the policy objectives behind disclosure?

As stated on the website of the Ministry of Finance, the primary objective of PPP contract publication is to increase transparency in the award and implementation of PPPs and thereby to increase accountability for decisions taken under the PPP process and public trust in the outcomes of the process. A secondary objective is to assist in the monitoring and enforcement of PPPs by allowing members of the public to verify compliance with the contractual terms under which infrastructure services from a PPP project are to be provided.<sup>115</sup>

Uses and users of disclosure information and the exact nature of such use

Our discussions with stakeholders suggested that the main users of the information that is disclosed are large corporations that are potential bidders for PPP projects in India, as well as consultants, lenders, and financiers who are trying to make assessments on the viability of a PPP project.

Therefore, the proactive disclosure by most government line departments also caters primarily to potential bidders, and not the general public. However, the government's dealings with private partners are coming under increased scrutiny after the introduction of the Right to Information (RTI) Act, as citizens now obtain information through this mode of reactive disclosure.

List of laws, policies, and regulations

In the absence of a formal policy for PPPs in India, their procurement is governed by the General Financial Rules for government contracts, as well as case law evolving from the troika of Articles 14, 19, and 21 of the Indian Constitution. One of the extensions of these articles has been to encompass the state's actions in relation to allocation of public resources. The underlying principle is that the largess of the state should be distributed equally, to ensure fairness and a level playing field.

Initially, there was some ambiguity within the government on whether the disclosure of information relating to PPP project contracts falls under the purview of the RTI Act on two counts, that is, whether PPP project special purpose vehicles or project companies are

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<sup>114</sup> UNODC ( ). India: Probity in Public Procurement.

<sup>115</sup> <http://toolkit.pppinindia.com/ports/module2-p3-cfaa-pdotpa.php?links=cfaa1a>.

subject to the RTI Act and whether PPP project contracts are subject to disclosure at all. The latter ambiguity arose from the issue of whether PPP contracts in themselves are covered under the definition of “information” under the Act. However, this issue has been resolved after a recent Supreme Court ruling, and PPP contracts are now recognized as falling within the purview of information as defined under Section 4 of the Act.<sup>116</sup> In addition, the following guidelines and Acts are applicable to the disclosure of information for PPPs in India:

1. Central Vigilance Commission’s (CVC’s) Guidelines for the Procurement of Works, Goods and Services.
2. Guidelines issued by the various line departments of the Government of India, like the Department of Personnel and Training (Ministry of Personnel, Public Grievances, and Pensions) guidelines on strengthening the compliance with provisions for suo moto disclosures, as given under Section 4 of the RTI Act.<sup>117</sup> Similarly, the Ministry of Rural Development (MoRD) is currently preparing to disclose PURA project contracts through a more systematic disclosure policy, under which the Concession Agreement and the State Support Programme will be disclosed within 30 days of financial close on the MoRD website. Some concession agreements are already being published.
3. Provisions of the various state-level Acts, like the Karnataka Transparency in Public Procurement Act (Act 29 of 2000), which may mandate additional disclosure by the line departments in the given state.
4. The Public Procurement Bill of 2012, which includes Draft Rules for PPPs, has been drafted with the objective of defining norms and procedures for procuring PPP projects, guiding officers of the government in structuring PPP projects, and decision making. The Public Procurement Bill and the Draft Rules are intended to address gaps in procurement practice. However, the bill is still pending in Parliament and, because of the change of government, is unlikely to be passed in its current form.

### Proactive pre- and post-procurement disclosure in unsolicited projects

In the early 1990s, the government signed a memorandum of understanding with individual private contractors for each PPP project, and even accepted unsolicited bids. However, after the alleged discrepancies in the allocation of the contract to Enron International as part of the infamous Dabhol power project,<sup>118</sup> the government issued advisories stating that this practice should not be followed. Further CVC guidelines indicated specific circumstances where single-source procurement would be acceptable, for instance in cases

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<sup>116</sup> <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41429>.

<sup>117</sup> [http://persmin.gov.in/DOPT/RTICorner/ImpFiles/1\\_6\\_2011\\_IR\\_Corrs\\_Vol\\_II\\_01052014.pdf](http://persmin.gov.in/DOPT/RTICorner/ImpFiles/1_6_2011_IR_Corrs_Vol_II_01052014.pdf).

<sup>118</sup> “Unsolicited Proposals,” by John Hodges, published in *Public Policy for the Private Sector*. <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/257Hodge-031103.pdf>.

where a patented technology is required for the PPP project, and they advise that competitive bidding should take place wherever possible.

Therefore, the government appears to discourage unsolicited bids on the grounds of a lack of transparency, and lack of fair and equal treatment of potential bidders. Some states (like Andhra Pradesh, Kerala, Karnataka, Rajasthan, Gujarat, and Punjab) have a construct called a Swiss challenge to handle unsolicited proposals. Under a Swiss challenge, a government agency that has received an unsolicited bid for a public project publishes the bid and invites other parties to match or exceed it. Therefore, the unsolicited proposal serves the purpose of a detailed project report, and the basis for making the prequalification document (request for qualifications, RFQ), and is circulated to all interested bidders. If the third parties fail to better the offer, or in other words fail to challenge the original proponent (OP), the government agency has to extend the contract to the OP.

Recently, transport projects in the state of Karnataka (the monorail network in Bangalore) and Punjab (the personal rapid transport system in Amritsar) have adopted this form of bidding process. The certainty of success using this methodology, given that at least one willing private partner is available right from the beginning, as well as the time and cost savings on pre-project activities and feasibility studies are a few of the benefits of the Swiss challenge that have been cited by states like Madhya Pradesh while setting out their guidelines for adopting it. As per their Swiss challenge guidelines (2014), the OP's proposal would be made available to interested bidders. However, the proprietary information contained in the original proposal shall remain confidential and will not be disclosed. If the competing bidder provides the best financial offer, the OP shall be given an opportunity to match the competing counterproposal within a stipulated timeframe and then the contract shall be awarded to the OP. In case the OP is not able to match the competing counterproposal, the project shall be awarded to the bidder who submitted the best financial offer.<sup>119</sup>

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<sup>119</sup> <http://www.finance.mp.gov.in/SCM%2011.02.2013-Final.pdf>.





## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

India currently has no clear rules for regulating pre-procurement disclosure in PPP projects. The General Financial Rules, as well as the guidelines given by the CVC, the state, and central governments are the rules followed for public procurement by government line departments and various ministries across the country.

For pre-procurement disclosure, there are different sets of disclosures that are required by different entities. Disclosures required by government entities from the bidders are normally set out in the bidding documents for the respective projects.

Usually a two-stage process is adopted by all departments at the pre-procurement stage. The first stage is generally referred to as the RFQ or expression of interest. The objective is to prequalify and short-list eligible bidders for stage two of the process. In the second and final stage, generally referred to as the request for proposal (RFP) or invitation of financial bids, the bidders engage in a comprehensive scrutiny of the project before submitting their financial offers. The first stage involves preparing a detailed project report, which is shared with the short-listed bidders qualified after the RFQ process. A short brief of the project is normally uploaded or shared with the all bidders in the first stage. The project must then be publicized through advertisements in at least one daily of national circulation, and this advertisement must also be uploaded to their website. The advertisement details the information that needs to be submitted by interested bidders for the first stage of the process, or informs them of how they can obtain the RFQ that would provide them with these details. The RFQ must clearly state the bid evaluation criteria and the minimum qualification requirements for the process. In the second stage, the RFP usually needs to be purchased at a nominal fee by all short-listed bidders, and it contains a model concession agreement for the concerned project. This procedure is followed meticulously, although it varies slightly between the different line departments, and from state to state. Although certain sectors, like the water resources department, have a different type of documentation, no PPP project is to be awarded without publicizing the bidding process adequately.

Some of the states that have taken up the issue of transparency and actively enacted transparency legislation try to disclose the following documents: (i) prequalification document (RFQ), bidder registration document, bidding document, and any other modification or clarification, including those pursuant to pre-bid conference; (ii) list of

bidders that presented the bids, including for prequalification or bidder registration, and those bidders that were prequalified and registered; (iii) decisions taken during the process of grievance redressal; and (iv) names and particulars of bidders that have been deterred by the central government or a procuring entity.

The Supreme Court rulings now clearly put private entities with significant public interests under the ambit of the RTI Act.<sup>120</sup> Any information that has been collected for government records can be disclosed for public viewing, subject to certain caveats. For instance, it is possible to ask for disclosure on how the National Highways Authority of India (NHAI) granted a highways project, and submit an appeal if the RTI does not provide the required information. Although disclosure through the RTI Act is primarily reactive in nature, it encourages public authorities to proactively disclose as much information as possible and thereby reduce public resort to the Act.

What material is required to be confidential?

At the pre-procurement stage, there are very few requirements for proactive disclosure apart from the tender notice and advertisements and the prequalification document (RFQ). Therefore, the restrictions on disclosure are primarily in the RTI Act, used for reactive disclosure. Any commercial in-confidence trade secrets or intellectual property, the disclosure of which would harm the competitive position of the bidders or preferred bidder, can be kept confidential as per the provisions of the Act. Such information would not be disclosed unless the contracting authority is satisfied that the disclosure is in the larger public interest.

Collect and reference any specific templates/checklists being used for disclosure

The reference template in preparing the RFQ is the Model Request for Qualification for PPP Projects in infrastructure prepared by the Planning Commission of the Government of India. The most updated version available online can be found at [http://www.infrastructure.gov.in/pdf/PreQualif\\_bidders.pdf](http://www.infrastructure.gov.in/pdf/PreQualif_bidders.pdf). A model RFP is also prepared by the Planning Commission and the updated version of this document is available at [http://www.infrastructure.gov.in/pdf/Model\\_REQ.pdf](http://www.infrastructure.gov.in/pdf/Model_REQ.pdf). Deviation from the model documents are only allowed for the purpose of making the model documents suitable for a particular sector or PPP project. All such deviations must be approved by PPPAC for Type I PPP projects and by the relevant approving authority for Type II PPP projects.

This model RFQ is a good template for the information that is proactively disclosed by the government line department, and the model RFP gives a good picture of the other information that is available from the government department and could be requested for reactive disclosure. The PPP in India website contains the Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects. These

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<sup>120</sup> A discussion of this issue is provided at <http://www.moneylife.in/article/rti-judgement-series-a-body-substantially-funded-controlled-by-govt-is-a-public-authority/34621.html>.

contain templates of the memorandums for PPPAC/Standing Finance Committee /Expenditure Finance Committee (for “in principle” approval and “final” approval of a project).

The PPP database is set up to provide the following details for projects: project information, bidding information, project benefits and costs, legal instruments, and financial information. However, this is not completed systematically.

Do the documents in question have retroactive effect?

The advertisements for PPP projects, RFQ, and response to queries relating to the RFQ are only uploaded for the time period after the CVC guidelines were issued. Therefore, none of the proactive disclosure guidelines have retroactive effect.

Validation of information

There is not much validation of the information submitted by the aforementioned methods, apart from the litigation route.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

After examining the websites of several government line departments, it was observed that the RFQ for a past project is usually not available online unless the project was under a meticulous department like NHAI, the Ministry of Shipping, or a similar state infrastructure department, that maintained a clear database. The level of proactive disclosure at the pre-procurement stage is very limited. However, many of the line departments we have looked at are not geared up to meet even these basic requirements, as their websites are not updated on a regular basis. Our consultees suggested that NHAI was the only department to do so. Moreover, the government departments only publish a small notice on their website and in a national daily, giving basic details of a new project.

Apart from these two documents, there is no proactive pre-procurement disclosure intended for the general public. Although the guidelines issued for PPP information disclosure are aimed at providing transparency in the tender processes, and improving the dissemination of information to the citizens of the country, it is often seen that the disclosure of information by the government department is intended only for potential bidders. This has led to increased popularity of the RTI, and several petitions are filed by the general public to obtain information from the government through reactive disclosure.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Jhajjar Transmission Project**

The State Transmission Utility in the north Indian state of Haryana (Haryana Vidyut Prasaran Nigam Limited) decided to undertake the development of a transmission grid with a view to increasing and improving the supply of electricity in the state. As part of this endeavor, the authority decided to engage in a design, build, finance, operate, and transfer (DBFOT) PPP for the development of a 400/220 kilovolt transmission system for distribution of electricity from the 1,424 megawatt Adani Power Plant in Mohindergarh.

Information disclosure for the pre-procurement stage of this project, an elaborate prequalification document (RFQ) detailing the evaluation and minimum qualification criteria, is available online.<sup>121</sup> In addition, the RFPs for the selection of a technical consultant, a legal adviser, and the final bidder<sup>122</sup> are also available online. There is a manual of specifications and standards that provides technical details and the minimum standards with which the project must comply.<sup>123</sup>

### **Rail Coach Factory at Kanchrapara**

The Ministry of Railways decided to set up a factory to manufacture rail cars powered by a dedicated propulsion system at Kanchrapara in West Bengal (East India), for the supply of these cars on the basis of a long-term procurement-cum-maintenance contract through a PPP using the build, own, and operate method. A brief description of the project is in the information memorandum for the project on the authority's website, [www.indianrailways.gov.in](http://www.indianrailways.gov.in).

The RFQ for this project<sup>124</sup> and RFP for the selection of a technical consultant<sup>125</sup> are available online.

### **Hyderabad Metro Rail Project**

The Government of Andhra Pradesh, in South India, decided to engage in the development of mass rapid transit systems in the urban areas of Andhra Pradesh. As part of this endeavor, the authority decided to undertake the development and operation and maintenance of the Hyderabad Metro Rail project through a DBFOT PPP. A brief description of the project is available in the information memorandum of the project on the authority's website ([www.hyderabadmetrorail.in](http://www.hyderabadmetrorail.in)).

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<sup>121</sup> <http://www.infrastructure.gov.in/pdf/Jhajjar-Transmission-Project-RFQ.pdf>.

<sup>122</sup> <http://www.infrastructure.gov.in/pdf/Jhajjar-Transmission-project-RFP.pdf>.

<sup>123</sup> <http://www.infrastructure.gov.in/pdf/Jhajjar-Transmission-MSS.pdf>.

<sup>124</sup> <http://www.infrastructure.gov.in/pdf/Kancharapara-RFQ.pdf>.

<sup>125</sup> <http://www.infrastructure.gov.in/pdf/Kancharapara-TECH.pdf>.

The RFQ<sup>126</sup> and RFPs for selection of a technical consultant, financial consultant, and transaction adviser, as well as the final bidder,<sup>127</sup> are all available online, along with the manual of specifications and standards.<sup>128</sup>

### **Beawar-Gomti National Highway Project**

The Department of Road Transport and Highways decided to undertake the development of the Beawar-Gomti section of National Highway-63 in the State of Rajasthan (West India) through a DBFOT PPP. The project would include strengthening and augmenting the two-lane highway, including addition of paved shoulders.

The prequalification document<sup>129</sup> is available online; however, the link to the RFP for selection of the final bidder appears to be inaccessible.

### **Locomotive Factory at Madhepura**

The Ministry of Railways is engaged in setting up a factory to manufacture electric locomotives at Madhepura in the state of Bihar. The project would be undertaken through a build, own, and operate PPP, and the ministry expects to obtain a supply of 120 locomotives per annum for a period of 10 years, and receive maintenance services for these locomotives for a period of 15 years.

An elaborate prequalification document or RFQ is available online for this project.<sup>130</sup>



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The RTI Act encourages public authorities to disclose proactively as much information as possible and thereby reduce public resort to the Act, but fails to provide guidance on proactive disclosure of PPPs.<sup>131</sup> PPP projects were opened up to public scrutiny in a

<sup>126</sup> <http://www.infrastructure.gov.in/pdf/RFQ-Hyderabad-Metro-Rail.pdf>.

<sup>127</sup> <http://www.infrastructure.gov.in/pdf/Hyderabad-Metro-Rail-RFP.pdf>.

<sup>128</sup> <http://www.infrastructure.gov.in/pdf/Hyderabad-Metro-MSS.pdf>.

<sup>129</sup> <http://www.infrastructure.gov.in/pdf/Beawar-Gomti-RFQ.pdf>.

<sup>130</sup> <http://www.infrastructure.gov.in/pdf/RFQ-Locomotive-Factory-at-Madhepura.pdf>.

<sup>131</sup> The only exception to this is the MoRD Disclosure Guidelines for the PURA PPPs, which are expected to provide for proactive disclosure.

significant move toward transparency in April 2013, when the Government of India advocated for all public authorities proactively to disclose information relating to PPPs on their websites. It appears that the progress since has been limited. Prior to this, the union government and the state governments stonewalled recommendations from the Central Information Commission seeking disclosure of information on PPPs<sup>132</sup> This resistance has been attributed to the influence of the former head of the Planning Commission, Montek Singh Ahluwalia, who publicly opposed every attempt to throw PPPs open to RTI by stating that it would inhibit private investment.<sup>133</sup>

The Department of Personnel and Training (DoPT) issued guidelines for improving compliance with proactive disclosure obligations of public authorities under Section 4(1)(b) of the RTI, 2005. According to the guidelines, all information relating to PPPs for public services must be disclosed in the public domain by the public authority entering into the PPP contract or concession agreement. This would include details of the special purpose vehicle, if any set up, operation and maintenance manuals, and other documents generated as part of the implementation of the PPP project. Information about fees, tolls, or other revenues that may be collected under authorization from the government; information with respect to outputs and outcomes; and the process of selection of the private sector party may also be proactively disclosed. In addition, all payments made under the PPP project may be disclosed in a periodic manner along with the purpose of making such payment.<sup>134</sup>

The recommendations were driven by the objectives to increase transparency and facilitate the availability of this information without the need for individuals to request it formally. These guidelines were introduced at a time when all core infrastructure projects, including highways, ports, airports, metros, and the Delhi-Mumbai Industrial Corridor, were being developed under the PPP model.<sup>135</sup>

In June 2014, the NHAI announced that it proposed to place all information relating to projects taken up by NHAI on PPP mode in the public domain to be available on their website. The information would include a copy of the agreement, details of every stage of the project, toll collection at toll plazas, and internal correspondence regarding the project. Details would also be given about all stages of the project development, such as construction, operation, and maintenance. Each project implementation unit (PIU) would have a separate link and information for each project would include the names of the concessionaire, independent engineer, and safety consultant; project location details; location of toll plazas, etc. The concession agreement between NHAI and the

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<sup>132</sup><http://timesofindia.indiatimes.com/india/Govt-shifts-stand-wants-PPP-project-details-revealed/articleshow/19587780.cms>.

<sup>133</sup><http://www.governancenow.com/news/regular-story/out-shadow-ppps-last-come-under-rti-ambit#sthash.egANmL5t.dpuf>.

<sup>134</sup> Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training (2013). Office Memorandum No.1/6/2011-IR. Accessed at [http://www.iitbbs.ac.in/documents/Suo\\_moto\\_disclosure-15042013.pdf](http://www.iitbbs.ac.in/documents/Suo_moto_disclosure-15042013.pdf).

<sup>135</sup><http://timesofindia.indiatimes.com/india/Govt-shifts-stand-wants-PPP-project-details-revealed/articleshow/19587780.cms>.

concessionaire and between NHAI and the independent engineer and safety consultant will also be hosted on their website. Reports of the independent engineer on important parameters, such as quality of construction, quality of maintenance, road safety, and tolling, will also be available.<sup>136</sup>

What material is required to be confidential?

According to the guidelines published by a task force, documents under the ambit of the exemption from disclosure of information under Section 8(1)(d) and 8(1)(j) of the RTI Act would not be disclosed suo motu.<sup>137</sup> This would cover information including commercial confidence, trade secrets, or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. In such cases, the redacted documents would be publicly disseminated.<sup>138</sup> The type of information likely to be excluded here is pricing details. In the case of the Mysore Corridor project in Karnataka, the Law Department advised the Government of Karnataka not to disclose details of the project to the general public, even through an RTI. The State Law Secretary and Additional Law Secretary (Opinion) gave their legal opinion in this regard, citing a “confidentiality clause” in the framework agreement that the Government of Karnataka had signed with the project contractor, NICE, in 1997. This confidentiality clause pertained to any disclosure of the financials of the project.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

The standard clauses in the Model Concession Agreement (MCA) differ by sector and the different line departments of the Government of India. Since the most easily accessible agreements are those for the national highways, the list of standard clauses in those agreements has been reviewed (<http://www.nhai.org/concessionagreement.htm>).

Paragraph 40.1 of the MCA for projects of Re 100 crores (US\$16 million) and above sets out that the concessionaire should make available to members of the public copies of this Concession Agreement, the operation and maintenance contract, the tolling contract, and the state support agreement at the concessionaire’s site office.<sup>139</sup>

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<sup>136</sup> <http://www.moneylife.in/article/nhai-starts-uploading-ppp-project-details/37637.html>.

<sup>137</sup> Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training (2013). Office Memorandum No.1/6/2011-IR. Accessed at. [http://www.iitbbs.ac.in/documents/Suo\\_moto\\_disclosure-15042013.pdf](http://www.iitbbs.ac.in/documents/Suo_moto_disclosure-15042013.pdf).

<sup>138</sup> Government of India, Ministry of Law and Justice (2005). Right to Information Act.

<sup>139</sup> <http://www.nhai.org/concessionagreement.htm>.

Collect and reference any specific templates / checklists being used for disclosure

The Planning Commission of India has prepared model concession agreements for the different sectors (<http://www.infrastructure.gov.in/model-agreement.php>).

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

We were unable to find any evidence of retroactive effects of the documents reviewed.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

We did not find any evidence of performance disclosure in the documents we reviewed.

As per the recent Indian Supreme Court rulings,<sup>140</sup> all projects that are recipients of grants of land or concessional tax rates must undergo a statutory Comptroller and Auditor General (CAG) audit. These reports are disclosed by the CAG,<sup>141</sup> and information in them can be obtained using the RTI as well. However, the reports are more in the nature of audits of sectors with PPP as a whole, rather than an audit of stand-alone PPP projects (for example, a recent report on the performance of major ports, many of which have privately operated terminals).

The Contracting Authority is required to facilitate the audit, by making available documentation and information including:

- Data and documents on the bids, bid evaluation, and proceedings of the contracting authority
- Concession agreement
- Reports submitted by the independent engineers, independent monitors, and independent auditors, as the case may be
- All communication and documentation that details the exception circumstances relating to post-award negotiations and/or contract modifications.

MoRD proposed to disclose monthly and quarterly reports of PURA projects by the independent engineer and validated by the Gram Panchayat (the contract manager), and provide links to PURA audit reports as part of its proposed project summaries. MoRD also

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<sup>140</sup>[http://www.business-standard.com/article/economy-policy/cag-wants-govt-to-insert-clause-in-ppp-agreements-to-audit-private-partners-114080200295\\_1.html](http://www.business-standard.com/article/economy-policy/cag-wants-govt-to-insert-clause-in-ppp-agreements-to-audit-private-partners-114080200295_1.html).

<sup>141</sup> <http://saiindia.gov.in/english/home/Recent/Recent.html>.



proposed to disclose user surveys and third-party assessments that may be undertaken as part of the project.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

We did not find any evidence of this in our review of the documents for this case study.

## Validation of information

Each department is responsible for the accuracy of its proactive disclosures. There do not appear to be any specified procedures for certifying or validating information or databases. MoRD proposed to carry out an internal validation process for PURA PPPs wherein all contract documents and proposed project summaries to be proactively disclosed would be examined and approved by the Joint Secretary and Director/Deputy Secretary supervising PURA PPPs.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

In general, most public authorities have not seriously undertaken implementation of Section 4 of the RTI Act, mandating them to proactively disclose information of public interest. Thus, websites and public documents are often found to have outdated information, necessitating individuals to apply under the RTI Act for information that should be easily accessible.<sup>142</sup> Further, in issuing the guidelines for proactive disclosure, the DoPT conceded that “the quality and quantity of proactive disclosure is not up to the desired level” and that the problem is partly because certain provisions of the RTI Act “have not been fully detailed,” and that “in case of certain other provisions there is need for laying down detailed guidelines.” DoPT also highlighted the need to set up a compliance mechanism to ensure that requirements under Section 4 of the RTI Act are met.<sup>143</sup>

The extent of disclosure of PPP contracts varies among different departments of the Government of India. The Airport Authority of India (AAI) has disclosed online certain agreements relating to Delhi and Mumbai airports. The NHAI recently published close to 150 highway contracts on its website. However, other sectors and departments have not

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<sup>142</sup><http://timesofindia.indiatimes.com/india/Govt-shifts-stand-wants-PPP-project-details-revealed/articleshow/19587780.cms>.

<sup>143</sup> Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training (2013). Office Memorandum No.1/6/2011-IR. Accessed at [http://www.iitbbs.ac.in/documents/Suo\\_moto\\_disclosure-15042013.pdf](http://www.iitbbs.ac.in/documents/Suo_moto_disclosure-15042013.pdf).

made project contract documents available proactively. The NHAI website provides access to a database of all its projects, including PPP projects, 99 of which include a summary of each phase of the National Highway Development project with information on the number of contracts awarded, length in kilometers, total project cost, awarded cost, number of contracts, and length completed. Monthly and cumulative progress reports and year-wise contract completion schedules are also posted. In addition, information system reports beginning in April 2010 and ending in August 2011 are available. The NHAI website also provides a list of terminated contracts. Some dated reports available on the AAI website provide information on the cost, status of the project, PPP type, and name of the developer with respect to some airport PPP projects.

The Ministry of Finance has a website dedicated to PPP projects and provides access to a database of state and central PPP projects, which contains information on project costs, names of equity holders in special purpose vehicles, initial risk allocation between the parties, dates of various milestones over the tender process, results of renegotiations, tariff fixation methodologies, etc. However, the website is not comprehensive, as it does not provide data uniformly for all projects. Details of actual grant disbursements, detailed performance indicators, and performance against these indicators are not available.

The PPP database website has a master list of all PPPs in India, which includes the name of the state, sector, project name, status (whether under operation or completed), cost, type, and name of implementing agency.<sup>144</sup>

As of December 2013, central government officials released a statement requesting all departments to comply immediately with its mandatory directive of proactive disclosure of information on PPP projects, stating also that none of the departments had complied with the directive issued by DoPT 21 months ago, requiring yearly third party audit of such information.<sup>145</sup> Since then, NHAI has taken steps to upload all information relating to projects taken up under a PPP mode in the public domain (accessed at: <http://www.nhai.org.in/>). Specific project details can be obtained by typing the name of the particular stretch/PIU along with this link, with each PIU given a separate link. The information provided includes concession agreements and details on the progress of project development, including construction, operation, and maintenance.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Sitapur-Lucknow Highway**

The Sitapur-Lucknow highway was commissioned on a build-operate-transfer basis, by the Government of Uttar Pradesh, to DSC Limited. The 75.9 kilometer Lucknow-Sitapur Road

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<sup>144</sup><http://www.pppindiadatabase.com/Uploads/Master%20List%20PPP%20Projects%20in%20India%20as%20on%20January%2031,2011.pdf>.

<sup>145</sup> <http://www.dailyexcelsior.com/govt-slams-departments-for-not-putting-info-in-public-domain/>.

Link is expected to upgrade and widen the existing two-lane road into a four-lane road on National Highway 24 between Lucknow and Sitapur in Uttar Pradesh.

There is a dedicated website for this PPP project as part of the online PIU information system of the NHAI rules passed in June 2014.<sup>146</sup> The concession agreement between NHAI and Lucknow Sitapur Expressway Limited is available on this website, along with the agreement between NHAI and the consultant. The website also has the monthly traffic and operation report, the monthly progress report of the independent consultant, and various correspondence between NHAI and Lucknow Sitapur Expressway Limited. Thus, for transparency, this project complies with the information disclosure requirements recently passed by NHAI.

### **Rajiv Gandhi (Hyderabad) International Airport**

GMR Hyderabad International Airport Limited is a PPP project promoted by the GMR Group (63 percent), Government of India (13 percent), Government of Andhra Pradesh (13 percent), and Malaysia Airports Holdings Berhad (11 percent) and is structured on a build, own, operate, and transfer basis.

The final concession agreement signed between the Ministry of Civil Aviation and the Hyderabad International Airport Ltd. is available online.<sup>147</sup>

### **Bangalore International Airport**

The “greenfield” Bangalore International Airport, the first PPP airport in the country, was developed on a PPP model and is a joint venture between AAI, Karnataka State Industrial Investment and Development Cooperation Ltd., and private promoters. For transparency, there is a significant amount of information available on the GVK website<sup>148</sup> and the Bangalore airport website.<sup>149</sup> These contain summary information on the concession agreement, fast facts (for example, land area and passenger flow), and the master plan and future projects of the airport. The concession agreement, which was published on July 5, 2004,<sup>150</sup> as well as the amendment to the agreement, which was published on November 22, 2006,<sup>151</sup> are readily available on the website of the Government of India’s Ministry of Civil Aviation. The multi-year tariff proposal (2011-12 to 2015-16) and business plan for the same period, including the financial statements and assumptions, are available.

### **Krishnapatnam Port, Nellore District, Andhra Pradesh**

The CVR Group, represented by Krishnapatnam Port Company Ltd., and the Government of Andhra Pradesh entered into a PPP to develop the existing minor port in Nellore into a modern, deep water, and high productivity port, on a build-operate-share-transfer

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<sup>146</sup> <http://nhai.org.in/spw/Agreementslup.aspx>.

<sup>147</sup> [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_000742.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_000742.pdf).

<sup>148</sup> <http://www.gvk.com/ourbusiness/airports/kiabengaluru.aspx>.

<sup>149</sup> [http://www.bengaluruairport.com/bial/faces/pages/ourBusiness/ourBusiness.jspx?\\_adf.ctrl-state=b2cbqisv0\\_94&\\_afLoop=325844572161875](http://www.bengaluruairport.com/bial/faces/pages/ourBusiness/ourBusiness.jspx?_adf.ctrl-state=b2cbqisv0_94&_afLoop=325844572161875).

<sup>150</sup> [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_000743.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_000743.pdf).

<sup>151</sup> [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_001326.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_001326.pdf).

concession basis for 50 years. The project was to be developed in three phases, and currently the second phase is in operation.

Limited information is available on the PPP cell of the finance department of the Government of Andhra Pradesh, including details such as the name of the implementing agency, project description, project location, project cost, and PPP type.<sup>152</sup> Although details are required to be included for the bid criteria, financial details, concession details, and consultant and developer details, these are not actually included on the website. Although there is a dedicated website for this port (<http://www.krishnapatnamport.com/>), it does not contain more details on the PPP contract agreement.

### **Dahej LNG Terminal Project**

The first phase of the Dahej LNG Terminal project involved the construction and operation of a liquefied natural gas import and re-gasification terminal with a capacity of five million metric tons per annum (MMTPA) at Dahej in the state of Gujarat. In the second phase, the terminal was expanded to 10 MMTPA.

Information on this project is available on the Gujarat Infrastructure Board website on the financing (costs and investments in each phase), means of finance, and project structuring. Several case studies on key lessons learned from the project are also available. However, contract documents for the project are not uploaded.

## What are the challenges and benefits to disclosure?

- The main challenge facing disclosure in India is the reluctance of public bodies to share any information under the current framework, as they do not wish to open their decisions to public scrutiny. In the absence of a unified bill to look into the allocation of PPPs in the country, there are very few requirements for proactive disclosure by the government currently in place.
- There is also a lack of pressure on private entities to disclose any information or set up websites for their projects to keep the general public informed of the developments taking place with the project.
- The Government of India's PPP program database is not comprehensive. An online database, consisting of all the project documents, including feasibility reports, concession agreements, and the status of various clearances and land acquisitions, would be helpful to all the bidders.
- There are several benefits of information disclosure, as it has led to a reformulation of government practices with regard to PPPs. Although earlier it was common for the government to sign memorandums of understanding with individual firms, disclosure of information has led to the unearthing of scams like the Dabhol Power

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<sup>152</sup> <https://ppp.cgg.gov.in/ProjectDesc.aspx?Recordkey=MjM>.

project granted to Enron International. Now the Government of India engages in competitive bidding for the allocation of PPP projects wherever possible.

What can we learn from this country study?

- A unified policy is needed to govern the government's procurement activities, to ensure that all mandatory disclosure requirements are clearly specified and met by both contracting parties. A more coherent approach to disclosure, potentially led by one coordinating entity responsible for ensuring that all documents relating to the project are publicly available, would be a significant step forward.
- Constitutional authorities set up for the purpose of monitoring and evaluation, like the CAG in India, can wield a lot of influence if they are permitted to function independently.
- The increased interest shown by the members of the public in the allocation of resources through PPPs in India has led to a shift in the attitude of the government.

## 7. Karnataka



PPP context in Karnataka

How are PPPs undertaken in Karnataka?

In 2007, the Ministry of Finance (Government of India) advised all the state governments to set up a PPP cell and designate a secretary-level officer as PPP nodal officer for the state. In response to this, the state Government of Karnataka set up a PPP cell in the Infrastructure Development Department (IDD), with the Principal Secretary of IDD as the nodal officer. This cell is staffed with appropriate professional and technical experts to assist the government in formulating, processing, evaluating, and monitoring the PPP projects. It is the nodal agency to receive proposals regarding PPP projects. Projects worth Re 31.5 billion (US\$0.5 billion) have been completed in the State of Karnataka, and another Re 13.8 billion (US\$225 million) worth of projects are currently in the implementation stage. However, the Government of Karnataka plans to scale up the investment through PPPs, and has projects worth Re 632 billion (US\$10 billion) that are still in the planning stage.<sup>153</sup>

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<sup>153</sup> <http://www.idd.kar.nic.in/ppp-projects.html>.

IDD is assisted by the Infrastructure Development Corporation-Karnataka, a joint venture between the Government of Karnataka, Infrastructure Development Finance Company Limited, and Housing Development Finance Corporation Limited. The Rail Infrastructure Development Co. Karnataka Ltd., a joint venture of the Government of Karnataka and the Ministry of Railways, as well as Karnataka State Industrial and Infrastructure Development Corporation–airport cell, also provide technical advice and support to IDD.

The current Infrastructure policy of the Government of Karnataka (2007)<sup>154</sup> states that as far as possible, for all new investments in infrastructure, the option of implementing the project through PPPs would be considered first. The Government of Karnataka would directly invest in a project only after satisfying itself that the same cannot be implemented through a PPP. The Bangalore International Airport, the Sandur bypass road, and the International Technological Park in Bangalore are all examples of successful PPP projects undertaken by the Government of Karnataka. The government is actively promoting PPPs in airport projects, software parks, biotech parks, elevated expressways, railway lines, ports, etc.

What are the policy objectives behind disclosure?

As stated by the Government of Karnataka, the main objective of its current infrastructure policy is to provide a fair and transparent policy framework to help facilitate and encourage PPPs in upgrading, expanding, and developing infrastructure in the state.

The Karnataka Transparency in Public Procurement (KTPP) Act<sup>155</sup> of 1999 noted that in the recent past irregularities in the processing of tenders occurred in various government departments, public sector undertakings, statutory boards, etc., because of inadequate publicity of tenders and restricted supply of tender documents, resulting in a lack of transparency in evaluation and acceptance of tenders. Bearing this in mind, the budget speech of 1997-98 announced that to prevent the recurrence of such irregularities, it has been decided to bring about legislation to provide for transparency in the tender processes and to regulate the procedures for inviting, processing, and accepting tenders.

Uses and users of disclosure information and the exact nature of such use

The proactive disclosure of information is meant primarily for potential bidders in the industry, to be aware of the new projects that the government is looking to open for private investment; the general public, to understand the manner in which government spending is being utilized; and the government, to keep a check on irregularities in spending by any of its organs or departments. It is our understanding that reactive disclosure of information, in the form of rights to information (RTIs), are usually filed by firms in the industry against their competitors when they sense any wrongdoing in the award of a tender or allocation of investment.

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<sup>154</sup> <http://www.karnatakaindustry.gov.in/documents/Infrastructure%20Policy%20-%202007.pdf>.

<sup>155</sup> <http://www.finance.kar.nic.in/trans/Trans-Act.pdf>.

List of laws, policies, and regulations

The following items are relevant to *pre-procurement* and *post-procurement*:

- Right to Information Act 2005, Section 4(1)(b)
- Central Vigilance Commission Guidelines for the Procurement of Works, Goods and Services
- KTPP Act (Act 29 of 2000)
- Infrastructure Policy for the State of Karnataka (2007)
- Draft Karnataka Infrastructure Development and Regulation Bill, 2011
- Draft Infrastructure Policy, 2013
- Public Procurement Bill 2012. This bill was drafted in 2011, and an amended version was archived in 2012. As of this writing, the bill is still pending in Parliament.<sup>156</sup> The bill includes Draft Rules for PPP 2011, which have been drafted with the objective of defining norms and procedures for procuring PPP projects, guiding officers of the government in structuring PPP projects, and decision making. The Public Procurement Bill and the Draft Rules address gaps in procurement practice. However, as this bill has been shelved for a while, it is widely believed that it would not be passed in its current form, and requires major amendments.

Therefore, as no formal policy governing PPPs is currently in place, these projects continue to be governed by case law, based on Articles 14, 19, and 21 of the Indian Constitution, as well as the Acts mentioned.

Proactive pre- and post-procurement disclosure in unsolicited projects

The CVC guidelines and case law strongly suggest that if the government wishes to contract a private contractor, then it must be through open competitive bidding procedures and, as such, unsolicited proposals or single-source procurement are only permitted when there is a patented technology involved, or when there is a time constraint on the project.

In 2011, the Karnataka government approved a detailed project report of a consortium of IL&FS, Scomi, and Geodesic for a 60-kilometer-long monorail network in Bangalore. The project is being implemented in PPP mode under the Swiss challenge procurement process, which was a first-of-its-kind venture in Karnataka.

The original proposal (with the exception of proprietary information and details of the financial proposal) and contract principles of the original proposal would be made available to interested applicants.<sup>157</sup> Therefore, under the method of unsolicited proposals, the

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<sup>156</sup> <http://www.prsindia.org/downloads/bills-pending-in-parliament/2012/>.

<sup>157</sup> <http://www.karnatakaindustry.gov.in/documents/Infrastructure%20Policy%20-%202007.pdf>.

original proposal serves the same purpose as a request for proposals (RFP) to invite other competitive bids for a project.

After the monorail project, a project to build a sea port at Haldipur was granted to MEL under the Swiss challenge route. The proactive disclosure for both these projects was the same as that for projects that involved competitive bidding. The data sheet summarizing the key infrastructure projects in the state of Karnataka gave a brief summary of the project and its components, the estimated cost structure, feasibility study, and justification for the project, as well as the current status and way forward for the project.<sup>158</sup>



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

Most disclosure at the pre-procurement stage is reactive, through the RTI act of 2005. Although initially there was a lot of doubt about whether the Act applies to PPPs or whether it can only be applied to wholly public-owned units, this has been put to rest by Supreme Court rulings that clearly stated if any private entity is the recipient of any form of public largesse, including land or even concessional tax rate, then they would be subject to the RTI Act's disclosure requirements, as well as to a Comptroller and Auditor General (CAG) audit.<sup>159</sup>

Proactive disclosure at the state level falls under the ambit of the KTPP Act (Act 29 of 2000), which states that contracts would be awarded on the basis of a transparent process. The Act lays down the procedures to be followed by the established tendering organizational structure during the tendering process. In all cases, the award criteria would be spelled out upfront, and the minimum qualification criteria for a bidder is disclosed. The stages in the procurement process could be single-stage or multi-stage, depending on the size or level of complexity of the project. For this purpose, the Government of Karnataka may use the services of suitably qualified independent advisers with the requisite technical knowledge. In general, the stages in the procurement process would include:

- Expression of interest and request for qualifications (RFQ)
- RFP

<sup>158</sup> [http://idd.kar.nic.in/key\\_infra\\_proj.html](http://idd.kar.nic.in/key_infra_proj.html).

<sup>159</sup> <http://www.outlookindia.com/news/article/PPP-Projects-Come-Under-RTI-Act-Govt/853614>.



- Technical and financial proposals
- Signing of agreements.

The Government of Karnataka would appoint a tender bulletin officer to publish the state or district tender bulletin. For any specified procurement, or a specified class of goods or services, one or more officers or a committee of officers would be appointed as the tender inviting authority and the tender accepting authority.

Under Section 8 of the Karnataka Transparency in Public Procurement Act (1999), the tender inviting authority is mandated to provide for the publication of notices with regard to information on tendering through the tender bulletin officer, and is also responsible for supplying the Schedule of Rates and Tender Documents to every intending tenderer who has applied to receive such documents. The tender inviting authority is also mandated to collect all the details received in response to the notice inviting tender, within the time stipulated and, unless it is itself authorized to open the tender, shall compile and forward all the tenders received to the authority or officer authorized to open the tenders.

The procurement entity may authorize either the tender inviting authority or the tender accepting authority or any other officer to open the tenders and draw up a list of tenderers responding to the notice inviting tender, in each case.

The tender inviting authority is required to provide in writing prequalification of tenders.

Only the tenders of prequalified tenderers are then considered for evaluation, with a detailed report prepared by the tender accepting authority (or a tender scrutiny committee that they may appoint), following which final decision on the tender is taken. Details on the procedure for evaluating bids are provided in Chapter VI of the Karnataka Transparency in Public Procurement Rules (2000).<sup>160</sup>

The tender accepting authority shall, after following such procedure as may be prescribed, pass an order accepting the tender and shall communicate the information relating to acceptance of tender together with a comparative analysis and reasons for accepting of tender to the procurement entity and the tender bulletin officer.

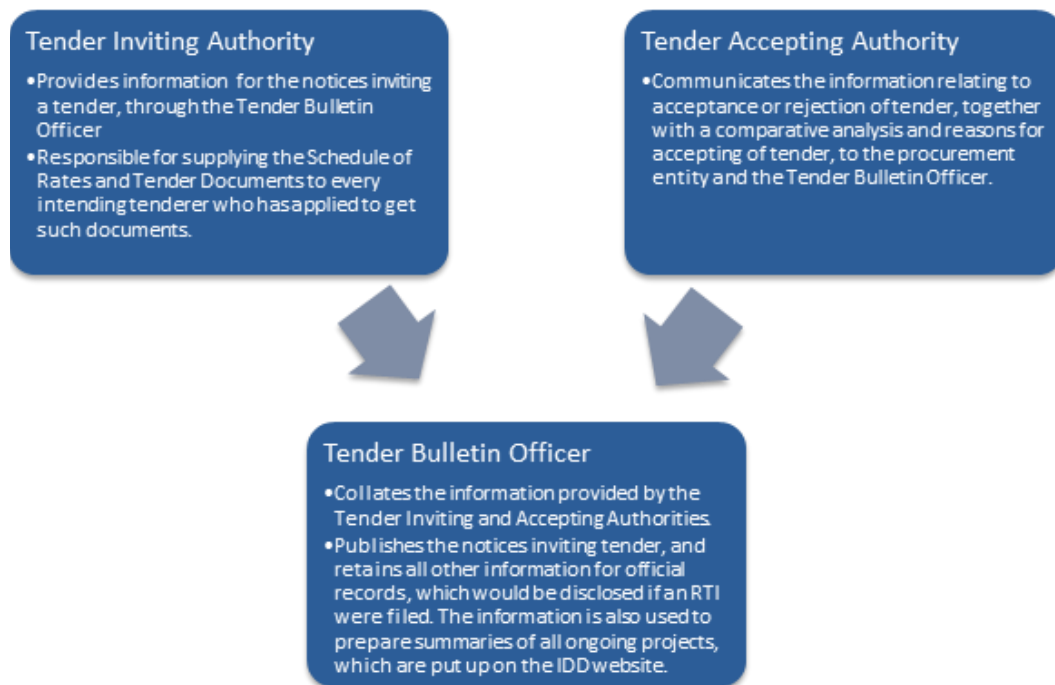
Provided further that subject to such general or special order as may be issued by the government from time to time, the tender accepting authority may, before passing order accepting a tender, negotiate with the lowest tenderer.

The governance structure and the responsibilities are summarized in figure 7.1.

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<sup>160</sup> Government of Karnataka (2000). The Karnataka Transparency in Public Procurement Rules.

FIGURE 7.1 GOVERNANCE STRUCTURE, KARNATAKA, INDIA



However, the level of statutory proactive disclosure to the general public in India is extremely low. Proactive disclosure is usually sector-specific, so the Telecom Regulatory Authority of India and the Major Ports Trust Act have their own proactive disclosure requirements.

What material is required to be confidential?

There are no requirements to publish information at the pre-procurement stage beyond the contract notices and tenders. Although some contracting authorities choose to disclose further information, the existing statutes permit it to be kept confidential.

However, under the KTPP Act, the Government of Karnataka has the power to obtain any information that it requires. The Act states that notwithstanding any other law for the time being in force, the government may with a view to ensuring transparency call for and obtain, from any authority under this Act, any information relating to any matter in the process of procurement. Under the central Draft PPP Policy, there are certain restrictions on using RTI for disclosure of commercial in-confidence trade secrets or intellectual property, the disclosure of which would harm the competitive position of the bidders or preferred bidder. Such information would not be disclosed unless the contracting authority is satisfied that the disclosure is in the larger public interest.

Collect and reference any specific templates / checklists being used for disclosure

The reference template in preparing the RFQ is the Model Request for Qualification for PPP Projects dated May 18, 2009, issued by the PF-II Section, Department of Expenditure, Ministry of Finance, as amended from time to time. The reference template in preparing the RFP is the Model Request for Proposal for PPP Projects dated November 30, 2007, issued by the same. Links to these model bidding documents are available on IDD's website.<sup>161</sup>

In addition, the format for proposal submission is available for a few projects.<sup>162</sup> This format could be considered a template for the manner in which submission of information by a prospective bidder takes place. As there is very limited proactive disclosure, and any that takes place is voluntarily done by certain sector-specific departments, there is no template available for it.

Do the documents in question have retroactive effect?

Under Chapter III, Section 22 of the KTPP Act, it has the power to override other laws. The provisions of this Act have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage, agreement, decree, or order of a court or a tribunal or other authority. Therefore, the government can request such documentation from a contracting authority even if they received the tender before the enactment of this policy. However, none of the proactively disclosed documents has been uploaded for the period before the law requiring them to be disclosed came into force.

Validation of information

There is not much validation of the information submitted by the aforementioned methods, apart from the litigation route.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

IDD's website has a link to a database for all PPP projects in Karnataka,<sup>163</sup> with a template for the provision of general information on the project (for example, project stage and brief description), development information (for example, key dates for pre-feasibility studies

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<sup>161</sup> <http://www.iddkarnataka.gov.in/ppp-lf-ip.html>.

<sup>162</sup> <http://www.iddkarnataka.gov.in/tech-consultant.html>.

<sup>163</sup> <http://119.226.79.212/pppdb/ViewProjects.aspx>.

and environmental studies), and bidding information (for example, dates of issues of RFQ, date of announcements of short lists, contract award methods, and bid criteria). However, this information is often at least partially incomplete on the IDD website, showing the inconsistency in actual practice as compared with the provisions for disclosure set out in the KTPP Act.

Further, the contract documents are not available through any of these sources. Although the KTPP Act was envisioned to be legislation that would provide for transparency in the tender processes and improve the dissemination of information to the general public, it is often seen that the disclosure of information by the government department is intended only for potential bidders. For instance, the government departments only publish a small notice on their website, and a limited number of national dailies, giving basic details of a new project. The RFP/RFQ are not always available online, and need to be purchased from the relevant department, after following the procedure set out in the advertisement for the project.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

#### **Sea Port at Tadadi/Tadri**

For the purpose of developing a sea port at Tadadi, the Government of Karnataka proposed a PPP on the design, build, finance, operate, and transfer basis. As part of the disclosure for this project, an advertisement inviting tender, the prequalification document (RFQ), the minutes of the pre-application conference, the response to queries related to the RFQ, and the pre-feasibility report were uploaded on the website for the Karnataka State Industrial and Infrastructure Development Corporation Ltd. (<http://www.ksiidc.com/Tadri.html>).

#### **K-KISAN: Karnataka Krishi Information Services and Networking**

To strengthen the state's agriculture extension system, enhance efficiency, provide easy access to information and services to farmers, and minimize the risk of crop failure, the Department of Agriculture in Karnataka recognized that there was a need to revamp and modernize the extension system and enable greater use of modern, state of the art Information and communications technology. For this purpose, the department decided to partner with a private firm to improve various aspects of the information services and networking systems, and issued a notice inviting tender for this purpose in a state newspaper, as well as a national daily. The RFP for this project was later uploaded to the department's website as well (<http://raitamitra.kar.nic.in/kisan.pdf>).

#### **Super-Specialty Hospitals across Bangalore**

The Department of Health and Family Welfare under the Government of Karnataka aims to develop four super-specialty hospitals at four locations across Bangalore on a PPP basis. For the purpose of this project, the department has uploaded the advertisement it gave in the newspaper, the RFQ document, as well as a corrigendum and response to queries in relation to the same (<http://www.ksiidc.com/hospital.html>).

## High-Speed Rail Link to Bangalore International Airport

For the purpose of developing a high-speed rail link between Bangalore's city center and Bangalore International Airport (Devanahalli), the Bangalore Airport Rail Link Ltd. invited applications through an RFQ. The list of firms that were short-listed after the prequalification process was published on the IDD website (<http://www.iddkarnataka.gov.in/hsrl.html>).

## Development of Monorail in Bangalore

The Government of Karnataka, through the IDD, intended to develop monorail/light rail transit system services, which would function as a feeder service to the metro rail. For the purpose of finding a technical consultant for this project, the government uploaded the notice inviting tender, the RFP document, along with responses to queries and addendums in relation to the same (<http://www.iddkarnataka.gov.in/monorail.html>).



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The documentation that the government body is required to make publicly available at this stage is the concession agreement, which should clearly state the framework governing the project in question, including all grants and tax exemptions that have been given to the private operator.

The Draft Karnataka Infrastructure Development and Regulation Bill (2011), however, would also require the contracting authority to disclose generic risks involved in the project, along with the allocation and treatment of such risks in the concession agreement or other contract entered into between the contracting authority and the developer.<sup>164</sup>

In addition, each department may have its own model disclosure agreements, based on its mandate, and it would be responsible for disclosure of the same. For instance, the model disclosure agreement for the Telecom Regulatory Authority of India may disclose restrictions on the tariff that the private operator can charge.

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<sup>164</sup> [http://www.iddkarnataka.gov.in/docs/Karnataka\\_Infra\\_Bill.pdf](http://www.iddkarnataka.gov.in/docs/Karnataka_Infra_Bill.pdf).

Although there are relatively few post-procurement disclosure requirements in Karnataka, proactive disclosure requirements advocated at the central level would nonetheless apply to disclosure of information for projects in the state. For instance, in April 2013, the Government of India advocated for disclosure by public authorities of information relating to PPPs on their websites. The Department of Personnel and Training also issued guidelines for improving compliance with the proactive disclosure obligations of public authorities under Section 4(1)(b) of the RTI, 2005. Under these guidelines, the public authority entering into the contract or concession agreement must disclose all information relating to PPPs for public services in the public domain, including, for instance, information about details of the special purpose vehicle (SPV), if any set up, operation and maintenance manuals, and other documents generated as part of the implementation of the PPP project. Information about fees, tolls, or other revenues that may be collected under authorization from the government may also be disclosed, in addition to information regarding payments made under the PPP project.<sup>165</sup>

What material is required to be confidential?

The RTI Act contains provisions for withholding certain information—commercial confidence, trade secrets, or intellectual property—if disclosure is likely to harm a third party, unless the larger public interest warrants disclosure. However, there appears to be no specific guidance on redaction of PPP contracts.

The Draft PPP Policy requires the contracting authority to carry out information audits with inputs from the private entity, so as to determine the information that can be shared with the public in light of the exception clauses of the RTI Act, including those related to third party rights and involving proprietary rights. The contracting authority would have to document the reason for declaring information as commercially sensitive and therefore not subject to disclosure.<sup>166</sup>

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

The standard clauses in the Model Concession Agreement (MCA) differ by sector and the different line departments of the Government of India. Since the most easily accessible agreements are for the national highways, the list of standard clauses in those agreements have been reviewed (<http://www.nhai.org/concessionagreement.htm>).

Paragraph 40.1 of the MCA for projects of Re 100 crores (US\$16 million) and above sets out that the concessionaire should make available to members of the public copies of this

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<sup>165</sup> Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training (2013). Office Memorandum No.1/6/2011-IR. Accessed at [http://www.iitbbs.ac.in/documents/Suo\\_moto\\_disclosure-15042013.pdf](http://www.iitbbs.ac.in/documents/Suo_moto_disclosure-15042013.pdf).

<sup>166</sup> <http://www.pppinindia.com/chapter12.php>.

concession agreement, the operation and maintenance contract, the tolling contract, and the state support agreement at the concessionaire's site office.<sup>167</sup>

Collect and reference any specific templates/checklists being used for disclosure

MCA's are available on IDD's website for several sectors and subsectors, including highways (national and state), airports, rail, and ports (<http://www.iddkarnataka.gov.in/ppp-lf-ip.html>). These appear to be quite detailed and set out the framework that would govern the project, including rules around the levy and collection of tariffs by the private operator, and payments to the contracting authority.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

**We did not find any evidence of this in our review.**

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

As per the recent Supreme Court rulings, all projects that are recipients of grants of land or concessional tax rates must undergo a statutory CAG audit. These reports are to be disclosed by the CAG, and information in relation to them can be obtained using RTI as well.

For state-level provisions, according to the Draft Infrastructure Policy (2013), the Government of Karnataka would be required to undertake conscious efforts to govern contracts after execution, with the objective of ensuring that activities are carried out as per schedule, and that project objectives are met as per prescribed performance standards. To this end, the PPP cells in each department are responsible for creating a team to monitor all projects awarded.<sup>168</sup>

In general, information on project performance does not appear to be easily available for PPPs in Karnataka. The IDD database has a facility for providing some post-procurement information, but this does not appear to be a requirement. Operational guidelines for mobile health clinics established under a PPP in the state provide predetermined indicators for project appraisal, disclosing that there will be a baseline project survey for mobile medical clinic areas, with a follow-up survey in the second year. Results from these surveys

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<sup>167</sup> <http://www.nhai.org/concessionagreement.htm>.

<sup>168</sup> Infrastructure Development Department, Government of Karnataka (2013). Draft Infrastructure Policy 2013.

combined with information from monthly and quarterly reports and supervisory visits are to form the basis for appraising the performance of the service provider.<sup>169</sup> However, the results of these surveys and appraisals do not appear to be easily available.

Similar issues exist at the central department level. Although the National Highways Authority of India (NHAI) management information system presents a statewide summary of land acquisition, providing an overview of the status of works, it is difficult to gather information on the status and performance of individual projects in Karnataka against agreed performance targets.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

We did not find any evidence of this in our review.

### Validation of information

Each department is responsible for the accuracy of its proactive disclosures and there do not appear to be any specified procedures for certifying or validating information or databases. The Ministry of Rural Development proposed to carry out an internal validation process for Providing Urban Amenities to Rural Areas (PURA) PPPs wherein all contract documents and proposed project summaries to be proactively disclosed will be examined and approved by the Joint Secretary and Director/Deputy Secretary supervising PURA PPPs.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

Progress reports are not available for most of the projects reviewed, although these are published for NHAI projects.

As per an RTI query, only one PPP was audited in Karnataka between 2008 and 2011, by the CAG. Even among those audited in the past, the reports were not easily accessible, as none of the official websites appears to be functional.<sup>170</sup> As the Supreme Court has only recently passed a judgement to clear the air on whether the CAG has the power to audit

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<sup>169</sup> Government of Karnataka, Department of Health and Family Welfare Services (2008). Operational Guidelines for Mobile health Clinic under Public-Private Partnership.

<sup>170</sup> [http://www.rtifoundationofindia.com/there-any-check-public-funds-spent-through-ppp-1181#.U-L\\_Q-OSzfJ](http://www.rtifoundationofindia.com/there-any-check-public-funds-spent-through-ppp-1181#.U-L_Q-OSzfJ).



private entities with significant public interests, it is possible that we would see more frequent audits of PPPs in the future.<sup>171</sup>

Further, concession agreements are usually only available for a 30-day period in draft form on the official websites, when the award of the contract is not complete. After the contract has been awarded, these do not remain available online. However, they may be obtained from central departments overseeing specific sectors. For instance, the NHAI website has a database of all its projects, including concession agreements for PPP projects in Karnataka's transport and highways sector, although the link to some of these documents is broken.

The database of PPP projects in infrastructure accessed through IDD's website has a template for the provision of post-procurement information for state projects on legal instruments (and allocation of risks to the concessionaire), costs of the project, and other financial information, in addition to the provision of details of project monitoring for issues requiring action by the project authority. As is the case with the pre-procurement aspects, this database is not comprehensive and does not provide data uniformly for all projects.

The Ministry of Finance has a website dedicated to PPP projects, which provides a database of state PPP projects, including information on project costs, names of equity holders in special purpose vehicles, initial risk allocation between the parties, dates of various milestones over the tender process, results of renegotiations, tariff fixation methodologies, etc. However, the website is not comprehensive, as it does not provide data uniformly for all projects. Details of actual grant disbursements, detailed performance indicators, and performance against these indicators are not available.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

State-level guidelines have limited provisions for proactive disclosure requirements at the post-procurement stage. The concession agreement is the key document, which is mandated to be publicly available.

### **National Highways Authority of India Projects**

The document is relatively straightforward to access projects in the roads sector, as NHAI maintains an elaborate database of all information for highway projects in its online project implementation unit system, which was created as part of the NHAI rules passed in June 2014 (<http://nhai.org.in/>). The following are a few examples of NHAI highway projects in Karnataka:

- *Hoskote-Dobbaspeth project*: the concession agreements with the concessionaire, independent engineer, and safety consultant have been uploaded,<sup>172</sup> along with the

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<sup>171</sup><http://timesofindia.indiatimes.com/india/CAG-to-audit-new-PPP-projects-report-on-telecom-gas-sectors-soon/articleshow/35089909.cms>.

<sup>172</sup> <http://nhai.org.in/spw/Agreementflhd.aspx>.

elaborate project progress report of the independent engineer.<sup>173</sup> Pictures are available from the ground to show actual construction on the project.<sup>174</sup> There is also information on the toll plaza rates that are levied on users, and a notification from NHAI regarding the same.

- *Devihalli Hassan project*: the concession agreements, progress reports, and toll information are available for this project (<http://nhai.org.in/bangalore-devh/>).
- *Bangalore Neelamangala project*: the reports available for the previous two projects can also be easily accessed for the Bangalore Neelamangala project (<http://nhai.org.in/bangalore-bnsl/>).
- *Belgaum Dharwad project*: each of the required documents pertaining to this project can be accessed at <http://nhai.org.in/dharwad-slbd>.

### **Bangalore International Airport Limited (BIAL)**

The concession agreement, which was published on July 5, 2004,<sup>175</sup> as well as the amendment to the agreement, which was published on November 22, 2006,<sup>176</sup> are readily available on the website of the Government of India's Ministry of Civil Aviation (MoCA). In addition, a performance report is available on the website of the Airport Economic Regulatory Authority (AERA), summarizing the results of the Airports Quality Survey from 2009.<sup>177</sup> Although subsequent results do not appear to be available on the website, AERA has published other documents submitted by BIAL, such as the Multi-Year Tariff Proposal FY2011-12 to FY2015-16 and Business Plan FY2011-12 to FY2020-21, in which audited financial information is provided in the annex.<sup>178</sup> Further information can also be found in IDD's project database, which presents general information on the project, a summary of legal instruments including risk allocation, and financial information for the contract.<sup>179</sup>

## What are the challenges and benefits to disclosure?

There are several benefits to disclosure, as illustrated by the case study on the tendering procedure for BIAL described in subsection 2.5.2. In particular, in addition to project-specific RFQ and RFP documents, disclosure of independent reports and public sector commitments at the pre-procurement stage are important inputs for bidders in evaluating the project and putting together a feasible proposal guided by a more reliable assessment

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<sup>173</sup> <http://nhai.org.in/spw/IEReportflhd.aspx>.

<sup>174</sup> <http://nhai.org.in/spw/projectprogressflhd.aspx>.

<sup>175</sup> [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_000743.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_000743.pdf).

<sup>176</sup> [http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca\\_001326.pdf](http://civilaviation.gov.in/cs/groups/public/documents/agreement/moca_001326.pdf).

<sup>177</sup> <http://aera.gov.in/documents/pdf/BIAL0001.pdf>.

<sup>178</sup> <http://aera.gov.in/documents/pdf/Annexure%20II%20cp%2014-13-14.pdf>.

<sup>179</sup> <http://119.226.79.212/pppdb/SearchResult.aspx?v=4oLAuEulm9Y=>.

of the project’s feasibility. A key challenge in this regard, however, is the availability and accuracy of such government data.

Among the post-procurement challenges, although disclosure is largely limited to concession agreements, in practice these documents are often not readily available. Consultations suggest that a key constraint is the limited capacity of government agencies in publishing these contracts on their websites. A related issue could be the multiplicity of agencies overseeing particular projects, as this could give rise to uncertainty and/or ambiguity about their respective disclosure responsibilities at the post-procurement stage. For instance, although BIAL is regulated by AERA and overseen by the Airport Authority of India, the concession agreement for the project has been published on MoCA’s website. Moreover, there is very little monitoring and evaluation of existing projects. This challenge is being dealt with by appointing the Infrastructure Development Corporation-Karnataka to look at mega-PPP projects, but strong legislation needs to be put in place to define the norms governing post-procurement disclosure.

An additional challenge is the applicability of the RTI Act to projects implemented prior to 2005. Although the Act would apply in theory, the feasibility of implementing this retroactive effect on documents in practice is questionable.

## What can we learn from this country study?

A key message emerging from the consultations and case studies concerns the importance of disclosures relating to land acquisition and other required clearances during the procurement process. Disclosing such information before the signing of the concession agreement in particular would increase the transparency and time-efficiency of the tendering process.

# 8. Kenya



## PPP context in Kenya

How are PPPs undertaken in Kenya?

Kenya does not have a long history of PPPs. However, the past decade has seen an increase in interest in and use of PPPs, with PPPs in Kenya considered to have been a success story. This has been driven largely by Kenya’s desire to transition into a newly industrialized, middle-income country, as outlined in the Kenya Vision 2030 national strategy.

Overall, it is estimated that to catch up with other developing countries, Kenya would have had to spend US\$4 billion per year between 2010 and 2015, comparable in gross domestic product terms to what China invested in its infrastructure in the 2000s. This is a significant requirement. Of this, US\$1 billion per year would be required to increase generation capacity, and US\$2 billion to meet the Millennium Development Goals in water and sanitation. Currently Kenya spends approximately US\$1.65 billion on infrastructure each year, suggesting there is an annual infrastructure gap of US\$2.35 billion.

The Vision 2030 strategy has identified the private sector as key for reducing the infrastructure deficit and delivering high-quality service. Accordingly, it is expected that PPPs will become a larger part of Kenya’s infrastructure provision in the future and that PPP growth in the country will continue to be significant.

The Public-Private Infrastructure (PPI) database indicates that in Kenya 22 PPP projects reached financial closure between 1990 and 2012, representing a total investment of US\$7.6 billion. More than half of these projects (13) were in the energy sector. However, the majority of PPI funding is reported to have been channeled to the telecom sector. Four projects have received US\$6 billion in investment in total, and have all been fairly successful—three of the four have been deals for mobile access (the fourth being the divestiture of Kenya’s national telecom company) and accounted for 25 million connections in 2011.

Kenya has a relatively well developed legal framework for PPPs. These processes were formalized in 2009 when the Government of Kenya issued detailed PPP guidelines—Public Procurement and Disposal (PPP) Regulations. These regulations also set up the PPP Unit (PPPU) in Kenya, which is housed in the Ministry of Finance and began operating in March 2010.

Each contracting authority (ministry, state-owned enterprise, or county government) will establish PPP nodes. These will identify, screen, prioritize, and oversee the management of PPP projects. The PPP institutional framework in Kenya is summarized in figure 8.1. In February 2013, the PPP Act came into effect.

FIGURE 8.1 KENYA’S PPP GOVERNANCE STRUCTURE



This framework provides the legal capacity to government bodies to enter into PPP contracts, address legal gaps and remove conflicts in existing laws, clarify the roles and responsibilities of various bodies involved in PPPs, and establish legal institutions to prepare and approve PPP projects. The law will also provide for a procurement process for solicited and unsolicited bids, and will establish a Project Facilitation Fund to provide for

project preparation funds, viability gap funds, and any government subsidies. The Project Facilitation Fund will support contracting authorities in preparing projects and project appraisals, and provide viability gap funding to publicly desirable projects as well as liquidity to meet any contingent liabilities and settle transaction advisors' retainer fees.

The PPP Toolkit and guidelines under the PPP Act 2013 are currently under development and will be available soon. Much of this work is being financed through the Infrastructure Finance and Public Private Partnerships Project (IFPPP), a US\$40 million World Bank loan. The objective of this project is to increase private sector involvement and improve the enabling environment of the Kenyan infrastructure market, through providing technical assistance to strengthen PPP processes and in turn increase transparency.

What are the policy objectives behind disclosure?

Corruption is a widespread problem in Kenya, with 21 percent of respondents to the Global Competitiveness Report 2013-14 ranking it as the most problematic factor in doing business.<sup>180</sup> A recent survey by Transparency International in Kenya suggested that 74 percent of Kenyans believe that corruption has gotten worse or stayed the same over the past two years, with 33 percent believing that levels have increased a lot over that period.<sup>181</sup>

To address this issue, the 2010 Constitution of Kenya increased pressure on public bodies to provide adequate and quality public services, promoting more transparent governance structures. As such, the 2011 PPP Policy Statement, a precursor to the PPP Act of 2013, lists one of the principles of PPPs as ensuring good governance, transparency, and accountability in the whole process of PPP development. The policy also states that the procurement process must provide as much information into the public domain as practicable, ensuring equal access to all bidders.

Uses and users of disclosure information and the exact nature of such use

The PPPU Principal Secretary states the aim of the PPPU website as being to provide facts and information on the PPP market in the country, and to cater to the demands of the private sector, contracting authorities, and learners of the PPP practice.

The government is aware that a successful PPP program requires widespread public support. As such, a PPP communications and awareness strategy is needed, to be directed at the general public as well as key stakeholders where PPPs will be developed. A communications strategy will then be developed for each PPP project by the PPPU, focusing on the economic and social benefits of the project.

In July 2014, the PPPU issued a tender for a public relations firm to develop the communications strategy. The main aim of this strategy is to raise awareness and enhance understanding of PPPs, their aims, processes, benefits, and the work of the PPPU. This

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<sup>180</sup> <http://www.weforum.org/issues/global-competitiveness>.

<sup>181</sup> <http://www.transparency.org/gcb2013/country/?country=kenya>.

awareness raising is targeted at a broad audience, including the public, media, private sector, political leaders, and contracting authorities.

List of laws, policies, and regulations

### **PPP Act, 2013**

PPP Regulations for national and county governments have been drafted and are currently undergoing stakeholder consultations prior to preparing the final documents. The regulations will aim to provide operational details on how PPP projects will be prepared, tendered, approved, and implemented, as well as on the roles and responsibilities of the parties involved in the PPP transactions.

Proactive pre- and post-procurement disclosure in unsolicited projects

Unsolicited projects are permitted in Kenya, where they are referred to as “privately initiated investment proposals.” Part VIII of the PPP Act states that these projects may be considered if they fall within any of the following criteria:

- There is an urgent need for continuity and engaging in a competitive procurement process would be impractical, provided that the circumstances giving rise to the risk of disruption were not foreseeable.
- The costs relating to the intellectual property in relation to the proposed design of the proposal are substantial.
- There exists only one person or firm capable of undertaking the project or providing the service.
- There exists any of the circumstances as the Cabinet Secretary may prescribe.

If any of these criteria are met, then the contracting authority must prescribe evaluation criteria and submit the proposal to the PPP Unit before commencing negotiations. The project must then be shown to provide value for money, be affordable, and ensure that the appropriate risks are transferred to the private party before a contract will be awarded. However, there are no requirements to disclose any of this information.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

For information disclosure, the PPP Act only has three requirements: (i) that PPPU publishes the national priority list of all Cabinet-approved PPP projects; (ii) that the contracting authority publishes requests for qualification; and (iii) that information outlining the benefits of the project must be disclosed, all of which are required to be published in print and electronic media. This national priority list of PPP projects contains information on the contracting authority and a brief project description.

PPP tenders are also available on the PPPU website. However, no information is available on the outcome of the expressions of interest (EOIs) listed.

All tenders are to be carried out through a competitive bidding process. The PPP Act states that contracting authorities must be guided by principles of transparency, free and fair competition, and equal opportunity. The contracting authority is required to publish requests for qualification in print and electronic media, specifying the eligibility criteria. Although the PPP Act covers general policies and approaches, specific guidelines have not yet been produced that outline the specific requirements for procuring PPP projects.

What material is required to be confidential?

A contracting authority may hold a competitive dialogue with each bidder to define the technical and financial aspects of the project. These discussions will be confidential and would not be disclosed.

Collect and reference any specific templates/checklists being used for disclosure

No templates or checklists are available.

Do the documents in question have retroactive effect?

This issue is not relevant.

Validation of information

There are no requirements for information to be validated.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

The national priority list of PPP projects, which PPPU is required to publish, seems to be updated monthly. Of the 58 projects listed in the May 2014 pipeline report, all but seven projects were at the concept stage or were recruiting transaction advisors to assist with the process.

Of the three requirements at the pre-procurement stage—for the project to be included in the national priority list, for requests for qualification to be published, and for information outlining project benefits to be published—most projects only comply with the first two. Although there is no dedicated space for information to be published, requests for qualification seem to be published widely. However, often information is not provided on project benefits. It would seem that more formal guidance, such as templates or dedicated website space, would aid compliance. In general, the level of compliance seems to be dependent on the procuring agency, with some disclosing more information than others.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Kenyatta University Student Hostels**

Kenyatta University, with the assistance of the International Finance Corporation, has developed a PPP project to provide accommodation for 6,000 students in hostels on the university campus (table 8.1). This is the first PPP transaction under the new PPP Act. The private party will design, build, and operate the hostels for a minimum of 25 years. It is likely that this model will be scaled up and replicated at other public universities. The published EOI was available on the PPPU website and other recruitment websites, such as Devex. There were also media announcements, such as [www.investmentkenya.com](http://www.investmentkenya.com) and [www.businessdailyafrica.com](http://www.businessdailyafrica.com).



**TABLE 8.1 COMPLIANCE OF KENYATTA UNIVERSITY STUDENTS HOSTELS PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Project included in national priority list	Available	Yes
Requests for qualification published by Kenyatta University	Location for publication not specified in policy	Yes, available on the PPPU website and other recruitment websites, such as Jobseekerkenya and Devex
Information outlining project benefits is published	Location for publication not specified in policy	Yes, media releases outlined the benefits of the project for private investors and the public sector

### **Kisumu Port**

The Kenya Ports Authority is currently in the process of setting up a PPP project to develop Kisumu Port into a modern commercial lake port to serve the growing trade in the East African Community region on a build-operate-transfer basis (table 8.2). The published EOI is available on the PPPU website and other recruitment websites, such as Jobseekerkenya and Devex. The EOI follows the General Procurement Notice for the Kenya IFPPP project that appeared in United Nations Development Business, July 2013. The EOI includes the objective and scope of work, but gives no information on estimated budget. This stage of procurement closed in September 2013. The May 2014 pipeline reported this project as currently recruiting a transaction advisor for the request for proposals (RFP) stage. However, the Kenya Ports Authority website did not have any further information on this project.

**TABLE 8.2 COMPLIANCE OF KISUMU PORT PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Project included in national priority list	Available	Yes
Requests for qualification published by Kenya Ports Authority	Location for publication not specified in policy	Yes, available on the PPPU website and other recruitment websites, such as Jobseekerkenya and Devex
Information outlining project benefits is published	Location for publication not specified in policy	Information was available on newskenya.co.ke, but as full article now archived; unclear whether this information fully complied with the requirements

### **Nairobi Southern Bypass**

In July 2013, the Kenya National Highways Authority through the IFPPP Project released a request for EOIs for the procurement of transaction advisory services for the Nairobi Southern Bypass PPP Project (table 8.3). The main objective of the consultancy is the

provision of the transaction advisory role for a PPP tender to be awarded through competitive bidding to a project company, a 25-year concession for the operation and maintenance as well as toll collection for the 28.6 kilometer Nairobi Southern Bypass PPP Project. The May 2014 pipeline reported this project as currently recruiting a transaction advisor for the RFP stage.

**TABLE 8.3 COMPLIANCE OF NAIROBI SOUTHERN BYPASS PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Project included in national priority list	Available	Yes
Requests for qualification published by the Kenya National Highways Authority	Location for publication not specified in policy	Yes, available on the PPPU website
Information outlining project benefits is published	Location for publication not specified in policy	No; although a project description is provided on the PPPU website, it does not outline the potential benefits of the project, and no information is available on the Kenya National Highways Authority website

### **2nd Nyali Bridge**

The Kenya Urban Roads Authority (KURA) is in the process of setting up a PPP to design, build, finance, maintain and operate the 2nd Nyali Bridge, to connect the Momabasa Island with the North mainland, to ease congestion on the existing Nyali Bridge (table 8.4). The May 2014 pipeline reported this project as currently evaluating the bids for a transaction advisor.

**TABLE 8.4 COMPLIANCE OF 2ND NYALI BRIDGE PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Project included in national priority list	Available	Yes
Requests for qualification published by the Kenya Urban Roads Authority	Location for publication not specified in policy	Yes, available on the PPPU website and other recruitment websites such as Devex, DGmarket, and IJGlobal
Information outlining project benefits is published	Location for publication not specified in policy	No; although a project description is provided on the PPPU website, it does not outline the potential benefits of the project, and no information is available on the Kenya Urban Roads Authority website

## Coal Plant, Lamu

Independent Power Producers (IPPs) first began to be introduced in Kenya in the late 1990s to meet Kenya's energy demands, as a means to address shortfalls in public funds for investment and increase private financing options (table 8.5). The Ministry of Energy and Petroleum is now seeking an IPP on a build-operate-transfer basis to build and operate a coal plant to generate 980 megawatts of power. In January 2014, 16 foreign firms were prequalified to bid. Subsequently, five submissions were received at the RFP stage. This project is currently at the selection stage, as noted in the May 2014 pipeline report. The project was announced in the Kenyan press, including the *Daily Nation* and *The Star*.

TABLE 8.5 COMPLIANCE OF THE LAMU COAL PLANT PROJECT, KENYA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Project included in national priority list	Available	Yes
Requests for qualification published by the Ministry of Energy and Petroleum	Location for publication not specified in policy	Yes; a full update is provided on the Ministry of Energy and Petroleum's website, showing the number of submissions received and listing the names of successful bidders at each stage
Information outlining project benefits is published	Location for publication not specified in policy	The project was announced in the Kenyan press, although these articles did not focus on the benefits of a PPP approach



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The PPP Act requires that once a contract has been signed, the contracting authority must publish in at least two newspapers of national circulation and in the electronic media the results of the tender, as well as information on the nature and scope of the project, the successful bidder, project cost at net present value, project value and tariff, and the duration of the project. The PPP committee may prescribe the manner in which this information is

disclosed. The timeline within which this information must be disclosed is not clear, only “upon the execution of a project agreement by the parties.”

A PPP projects progress report is available on the PPPU website, which is updated monthly. This report gives a brief description of the project and an update on the status of all PPP projects at all stages of procurement and implementation. In addition, the PPPU website lists all current and past projects, but with limited to no information apart from the project title.

What material is required to be confidential?

**The PPP Act does not provide any specifications on confidentiality, and the Freedom of Information Act is currently going through Parliament.**

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

**There are currently no standard clauses available.**

Collect and reference any specific templates/checklists being used for disclosure

**No templates or checklists are available at this time.**

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

**This issue is not relevant.**

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

**The PPP Act states that monitoring project performance shall be the responsibility of sector regulatory bodies. However, no further information is provided as to how this shall be monitored and there are no requirements for reporting on performance.**

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

**There are no requirements for financial disclosure.**

Validation of information

There are no requirements for information to be validated.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

The PPP projects progress report seems to be updated regularly, although not on a monthly basis as stated on the PPPU website. However, the report provides minimal information on tender outcomes and does not fulfill the requirements of the PPP Act.

Of the two requirements at the post-procurement stage—for the contracting authority to publish the tender results and that a range of project information should be provided—projects generally tend to comply with the former, but rarely fully comply with the latter. Information on the outcomes of tenders does appear in media outlets. However, it is not always clear whether this has been circulated by the contracting authority, as information is not always available on its website. The details provided are generally quite sparse, limited to the nature and scope of the project and the successful bidder. Information on project costs, values, and duration is rarely disclosed.

Given that that the PPPU publishes regular information on project progress, this could be a central forum for more detailed information to be disclosed, in line with the requirements of the PPP Act.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Aldwych Lake Turkana Wind Farm**

The Turkana corridor, next to Lake Turkana in northwest Kenya, has a unique topography, which results in particularly favorable conditions for a wind farm (table 8.6). The total project cost of installing the wind farm and the balance of the plant is US\$795 million, 70 percent of which is senior debt, 10 percent is sub-debt, and 20 percent is equity, the largest portion coming from the United Kingdom-based Aldwych International. This project represents one of the largest private investments in Kenya's history and is the largest single wind farm in Sub-Saharan Africa, with the highest capacity factor in the world. The project aims to provide 300 megawatts of reliable, low-cost wind energy, equivalent to over 20 percent of the current installed electricity-generating capacity. The project is implemented as a special purpose vehicle, through the Lake Turkana Wind Project. A contract was signed with Kenya Power and Lighting Company (KPLC) in January 2010, confirming that power from the wind farm will be sold back to the Kenyan grid at a fixed price for 20 years on a take-or-pay basis. In March 2014, after eight years in the pipeline, financing

agreements were finally signed for this project. The time taken to reach financial close highlights the difficulty of developing this type of project and particularly to this scale. The wind farm is expected to begin operating in early 2016, with full operation by 2019.

**TABLE 8.6 COMPLIANCE OF LAKE TURKANA, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Tender results published in at least two national newspapers and electronic media	Not applicable	Not a requirement at the time of contract signing and not a competitive bidding process; however, this information has been made publicly available
Information on the project's nature and scope, successful bidder, cost value, tariff, and duration published	Not applicable	Not a requirement at the time of contract signing; however, detailed information is publicly available on all aspects of the project

### **Longonot Geothermal Power Project**

In April 2013, Africa Geothermal International Kenya Limited signed a power purchase agreement (PPA) with KPLC to develop a 140 megawatt geothermal project (table 8.7). The PPA has a 25-year term, commencing after the power plant commercial operation date, scheduled for 2018. This project came from an unsolicited bid. There is a dedicated project website ([www.africa-geothermal.com](http://www.africa-geothermal.com)), with information on project progress, although at the time of writing, this was 12 months out of date. No information is available on the KPLC website and the PPPU website states that this project is still under negotiations.

**TABLE 8.7 COMPLIANCE OF LONGNOT GEOTHERMAL PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Tender results published in at least two national newspapers and electronic media	Yes	This project came from an unsolicited bid. The contract was signed a few months after the PPP Act came into law. There are no requirements to disclose publicly showing specified criteria have been met. A press release is available on the project website.
Information on the project's nature and scope, successful bidder, cost value, tariff, and duration published	Yes	Partially. The press release provided information on the nature and scope of the project and successful bidder; no information on project cost and value.

### **Thika Power Project**

The Thika Power Project is one of Kenya's ongoing IPP projects (table 8.8). Thika Power Limited (TPL) successfully bid through a competitive tender process for the purpose of

designing, constructing, and operating a new 87 megawatt heavy fuel oil fired independent power plant located in Thika, Kenya. TPL is owned 90 percent by Melec PowerGen and 10 percent by the local Africa Energy Resources Pte Ltd. The total project cost is €112.4 million, which was financed on a limited recourse basis of 75:25. TPL has entered into a 20-year capacity-based PPA with KPLC.

**TABLE 8.8 COMPLIANCE OF THIKA POWER PROJECT, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Tender results published in at least two national newspapers and electronic media	Yes	A press release was produced on signing the contract.
Information on the project's nature and scope, successful bidder, cost value, tariff, and duration published	Yes	Partially. Information is provided on all required areas, apart from information about project cost, value, and tariff.

### **Rift Valley Railways (RVR)**

In 2004, the Kenyan and Ugandan governments agreed to concession their respective railways together and RVR signed concession agreements in 2006 to rehabilitate, operate, and maintain the rail networks as one system (table 8.9). Both governments conceded the assets to the private sector to improve the management, operation, and financial performance of the two rail networks.

**TABLE 8.9 COMPLIANCE OF RIFT VALLEY RAILWAYS, KENYA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Tender results published in at least two national newspapers and electronic media	Not applicable	This was not a requirement at the time of contract signing.
Information on the project's nature and scope, successful bidder, cost value, tariff, and duration published	Not applicable	This was not a requirement at the time of contract signing.

### **Inflight Catering Kitchen at Jomo Kenyatta International Airport**

Kenya Airports Authority (KAA) decided to bring in a second in-flight kitchen operator at Kenya's main international airport, Jomo Kenyatta International Airport, to increase competition, leading to improved service delivery and quality of service (table 8.10). In May 2014, KAA signed a deal with global airline caterer LSG Sky Chefs Consortium. The construction of the 20-year concession project was estimated to start in late summer of 2014, with the facility expected to commence operations in late 2015. The project includes \$5 million investment of public money, but there is no further information.

TABLE 8.10 COMPLIANCE OF INFLIGHT CATERING, KENYA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Tender results published in at least two national newspapers and electronic media	Yes	A press release was produced on signing the contract.
Information on the project's nature and scope, successful bidder, cost value, tariff, and duration published	Yes	Partially. The KAA press release provided information on the nature and scope of the project and the successful bidder. Project duration details differed between 20 and 25 year concession in different media outlets. Limited information was provided on project cost and value.

What are the challenges and benefits to disclosure?

*“It’s looking good in Kenya. The PPP ball is rolling.” – Charles Musau, IFPPP project manager*

This quote, from the 2013 PPP Africa Conference, sums up well the current situation in Kenya. The past decade has seen an increase in PPPs, with the process now having been formalized through the 2013 PPP Act. However, the main challenge to information disclosure is the lack of practical guidelines, leading to a lack of compliance. This is particularly the case when successful tenders are announced, as only some of the information required is actually disclosed. However, if guidelines, with templates and a dedicated space on the PPPU website, were made available, it would be easier to comply with the Act. A toolkit with procedures and standard documents is currently in production, with technical support provided by the World Bank.

Another challenge Kenya has to overcome is a general lack of public awareness and comprehensive understanding of PPPs, given that they are relatively new in the country. Increasing the amount of information disclosed about current projects will help to increase this understanding. This will become more important as the number of PPP projects is likely to increase dramatically over the coming years, with 59 projects currently in the approved pipeline.

What can we learn from this country study?

Kenya is further along the PPP development process than other Sub-Saharan countries, and the other countries can therefore learn from Kenya’s experience. Forums such as the annual PPP Africa Conference are important spaces for countries to share their experiences and Kenya is an active participant and presenter. However, Kenya still has some way to go to be closer to international best practice.



## 9. Minas Gerais



### PPP context in Minas Gerais

How are PPPs undertaken in Minas Gerais?

According to the operation manual for the Minas Gerais PPP program, several steps are followed to undertake PPP projects in the state of Minas Gerais, Brazil. The most notable steps are the following:

- Elaboration of preliminary proposals
- Analysis, approval, and inclusion of the preliminary proposals in the state plan of the PPPs
- Modeling of the approved preliminary proposals, considering the economic-financial data, required guarantees, and pertinent environmental studies
- Public hearing of the modeled project
- Approval of the project by the Managing Council of PPPs (MCP) of Minas Gerais
- Bidding on the PPP contracts
- Management, monitoring, and control of the PPP contracts being executed.

To undertake these steps, the institutional framework of the public administration involves the entities summarized in figure 9.1.

**FIGURE 9.1 INSTITUTIONAL FRAMEWORK OF PPP ADMINISTRATION IN MINAS GERAIS, BRAZIL**

<p><b>MCP</b> responsible for elaborating the State Plan of PPPs, approving bidding rules, contracts, amendments and extensions</p>	<p><b>The PPP Unit</b> integrated into the State Secretariat for the Economic Development. Coordinates PPPs and disseminates concepts related to PPP contracts</p>	<p><b>Sector Units</b> internal operating cells from each public entity responsible implementing the PPP Program.</p>
<p><b>PPP Fund</b> Supports the PPP Program. Funds come from a range of sources including state and federal budget allocations.</p>	<p><b>Coordination Group of the PPP Fund</b> provides its opinion on the PPP projects that wish to make use of the fund before the approval of the MCP</p>	<p><b>The PPP Network</b> formed by the group of people, agencies and entities involved in the R&amp;D and practices regarding PPPs in Brazil and abroad.</p>

What are the policy objectives behind disclosure?

Article 3 of the 2011 Transparency Law sets up the following objectives:

- Achieving disclosure as a general rule and secrecy as the exception
- Disseminating information of public interest proactively
- Utilizing means of communication enabled by information technology
- Fostering the development of a culture of transparency in public administration
- Developing social control of public administration.

Uses and users of disclosure information and the exact nature of such use

According to Article 3 of the 2011 Transparency Law, anyone can request information from the government.

More specifically, the PPP program’s operational manual focuses on facilitating communication and cooperation among those that are involved or interested in the projects and processes of PPPs. For example, the PPP program’s operational manual establishes that the following communication flows should be structured in the PPP network:

- Within the agencies of the PPP network among themselves
- Between the agencies of the PPP network and the bidders, potential financiers, and other interested agents in the bidding phase
- Between the agencies of the PPP network and the concessionaire at the contracting phase

- Between the agencies of the PPP network and the concessionaire with the broader society.

List of laws, policies, and regulations

### **Key Transparency Laws, Policies, and Regulations**

- Brazil 2011 Transparency Law (Lei 12,527)
- Brazil 2012 regulation of 2011 Transparency Law (Decreto 7,724).

### **Key PPP Laws, Policies, and Regulations**

- Brazil 2004 PPP Law (Lei 11,079)
- Brazil 2006 regulation of the expression of interest procedure (EOIP) (Decreto 5,977)
- Minas Gerais 2003 PPP Law (Lei 14,868)
- Minas Gerais 2007 regulation of the EOIP (Decreto 44,565)
- PPP Program Operation Manual (POM), approved by SSED Resolution 004 of 2009.

Proactive pre- and post-procurement disclosure in unsolicited projects

The PPP legal framework in Minas Gerais does not explicitly mention unsolicited projects. However, some sort of unsolicited (or solicited but less prescriptively) projects could be understood as being included in the broader umbrella of the EOIP. The EOIP is not linked to a specific stage of the bidding, but aims to obtain from the interested parties in the market feasibility studies, surveys, research, data, technical information, projects, or ideas for PPP projects.

The only requirement in the regulatory or legal framework for proactive disclosure in the context of the EOIP is that the EOIP should be triggered by publication in the official press of a notice, indicating the object, timeline, address, and, if appropriate, web link to obtain further information.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **Transparency Laws, Policies, and Regulations**

Article 8 of the Transparency Law and Article 7 of the Transparency Law Regulation establish that public bodies should proactively disclose information on ongoing tender processes. The specific documents to be published (such as the terms of reference) are not mentioned in the transparency laws, policies, or regulations.

### **PPP Laws, Policies, and Regulations**

Section 7.2 of the PPP POM discusses the communication system that should be in place to facilitate the contact, communication, and cooperation among those agents that are either involved or interested in the projects and processes of PPPs. The means of communication among agents established by the POM are as follows:

- Public hearings and sessions providing information (which must be recorded in drafts, reports, or audio-visual recordings)
- Printed mail, organized as to constitute a systematic database
- E-mail or other technological means for sharing information, texts, documents, and files, for regular procedures that do not require any high formal rigor
- Information sharing through the PPP program website ([www.ppp.mg.gov.br](http://www.ppp.mg.gov.br)).

The POM establishes that the PPP program website would provide (among other information) regular updating of information on the PPP program and related topics and insight to the decision-making process, facilitated by access to selected and useful information.

The requirements in Section 7.2 of the POM are generic and may apply to pre- and post-procurement disclosure.

However, there are several more specific pre-procurement requirements in the POM. For example, Section 4.3 of the POM establishes that sending the project to public consultation is one of the requirements for the commencement of its public bidding. The public consultation should be carried out by the sector unit with participation of the PPP unit, through the publication of the respective announcement in the official press, in newspapers of large circulation, and through electronic medium, and it should contain the following:

- Information on the justification for contracting the project
- Identification of its purpose
- Location where documentation on the project can be obtained
- Terms of the contract and its estimated value
- Duration of the consultation
- Address to which opinions should be sent and other conditions for their reception.

The minimum deadline for the reception of the suggestions resulting from the consultation is 30 days. However, this deadline must end at least seven days before the date foreseen for the publication of the public notice. During the public consultation, the sector unit, if deemed convenient, holds public hearings or presentations to explain elements of the draft of the public notice and the contract. The sector unit should ensure that there is publicity for the event by reasonable means of communication, with reasonable advance notice.

In addition, Section 6.2 of the POM establishes that the PPP unit should annually publish a PPP program monitoring report. The report should be made available in electronic medium, ensuring its access to the public in general.

Among the pre-procurement elements that should be included, the following stand out:

- Information gathered from the sector units, regarding project proposals in analysis or development
- Information pertinent to the preliminary proposals already presented to the MCP and their approval
- Information on progress of modeling studies that have already been authorized by the MCP
- Survey of the projects in public consultation in public bidding.

What material is required to be confidential?

### **Transparency Laws, Policies, and Regulations**

Article 7 of the Transparency Law establishes that disclosure requirements do not include information relating to research projects and scientific and technological developments whose secrecy is essential to the security of society and the state.

Article 23 establishes that information could be classified when its disclosure or unrestricted access could result in any of the following:

- Jeopardize defense and national sovereignty or the integrity of the national territory
- Undermine or jeopardize the conduct of negotiations or international relations of the country
- Endanger the life, safety, or health of the population

- Offer high risk to the financial, monetary, or economic stability of the country
- Undermine or cause risk to strategic plans of military operations
- Undermine or cause risk to research projects and scientific and technological development, as well as systems, goods, facilities, or areas of national strategic interest
- Jeopardize the safety of high institutions or national or foreign authorities and their families
- Jeopardize intelligence activities, as well as research and monitoring in progress related to the prevention or prosecution of offenses.

### **PPP Laws, Policies, and Regulations**

There are no proactive pre-procurement disclosure confidentiality requirements in PPP legislation.

Collect and reference any specific templates/checklists being used for disclosure

**Proactive pre-procurement disclosure templates and checklists are not available in current legislation and regulations.**

Do the documents in question have retroactive effect?

**This has not been specified in the current legislative or regulatory framework.**

Validation of information

**This has not been specified in the current legislative or regulatory framework.**

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

**The website was disabled at the time, so this part could not be completed.**

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

**The website was disabled at the time, so this part could not be completed.**



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

### **Transparency Laws, Policies, and Regulations**

Article 8 of the Transparency Law and Article 7 of the Transparency Law Regulation establish that public bodies should proactively disclose information on finished tender processes, with notices, attachments, and results; signed agreements; and performance reports.

### **PPP Laws, Policies, and Regulations**

The requirements in Section 7.2 of the POM highlighted under pre-procurement are somewhat generic and may apply to pre- or post-procurement disclosure.

However, there are several more specific post-procurement requirements in the POM. For example, Article 5 establishes that upon the formalization of the contract, the abstract will be published in the agencies of the official press of the state of Minas Gerais, thus commencing the execution of the services by the private partner.

In addition, Section 6.2 of the POM establishes that the PPP unit should annually publish a PPP program monitoring report. The report should be made available in electronic medium, ensuring its access to the general public. The report should include a survey of the already contracted projects, considering the consolidated information in the records produced by the respective sector units, with evaluation of the extent of the objectives that were originally sought with the project. For the evaluation of the objectives, the PPP unit should consider the following:

- Whether the private partner is meeting the performance indicators, keeping in mind the methodology and specific criteria of each project
- Social impacts generated by the partnership (improvement in the quality of life of the segments of the population covered by the project) and economic impacts (human development and production)
- Whether the project is meeting the contractual clauses set in the partnership (deadlines, appropriateness, and sufficiency of the reports presented during the execution of the process, etc.).

What material is required to be confidential?

See discussion under pre-procurement in section 9.2.2.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

### **Transparency Laws, Policies, and Regulations**

The Transparency Law and its regulation do not include details on how contracts, requests for proposals, or other PPP documents should be drafted.

### **PPP Laws, Policies, and Regulations**

This is not applicable.

Collect and reference any specific templates/checklists being used for disclosure

Proactive post-procurement disclosure templates and checklists are not available in current legislation or regulations.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

This has not been specified in the current legislative or regulatory framework.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

### **Transparency Laws, Policies, and Regulations**

Article 7 of the Transparency Law Regulation establishes that public bodies should proactively disclose contract performance reports.

### **PPP Laws, Policies, and Regulations**

Section 6.1.1 of the POM states that given that the payment to the concessionaire shall be linked to its performance, and aiming at contributing to transparency during the assessment of the contracted performance, the state of Minas Gerais has adopted an independent verifier. This is an entity that is not related to the concessionaire, or the state, and that is contracted to follow the execution of the PPP, especially regarding the analysis of the concessionaire's performance. The independent verifier is in charge of checking whether performance indicators are being met.



Section 6.2 of the POM then establishes that The PPP unit should periodically gather the information made available by the sector units and other agencies and entities responsible for monitoring the contracted PPP projects (presumably including the independent verifier), recording it in a specific annual report. The report should be made available in electronic medium, ensuring its access to the general public. The report should include a survey of the already contracted projects, considering the consolidated information in the records produced by the respective sector units, with evaluation of the extent of the objectives that were originally sought with the project. For the evaluation of the objectives, the PPP unit should consider whether the project has met the following objectives:

- Performance indicators by the private partner, keeping in mind the methodology and specific criteria of each project
- Social impacts generated by the partnership (improvement in the quality of life of the segments of the population covered by the project) and economic impacts (human development or economic production)
- Objectives in the contractual clauses set in the partnership (meeting of the deadlines, appropriateness and sufficiency of the reports presented during the execution of the process, etc.).

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

### **Transparency Laws, Policies, and Regulations**

The Transparency Law and its regulation do not include details on special purpose vehicle financial disclosure.

### **PPP laws, Policies, and Regulations**

As per article 6.1 of the POM, the private partner may periodically be presented with requests for financial information, such as earnings before interest, taxes, depreciation and amortization, debt coverage, capital structure, current liquidity, demands, and other pertinent financial projections and accounting records.

Validation of information

This has not been specified in the current legislative or regulatory framework.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

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Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

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## 10. New South Wales



### PPP context in New South Wales, Australia<sup>182</sup>

How are PPPs undertaken in New South Wales, Australia?

Experience with PPPs in New South Wales dates from the 1980s, when the government used PPPs to build infrastructure without having to report more debt or recognize any liability because of the accounting standards. This motive has now diminished as state borrowing limits have been removed, accounting standards have been tightened, and PPPs are used to leverage greater value for money, increase innovation in projects, simplify management processes, lower procurement costs, and ensure that assets are maintained. The main starting point of PPPs in New South Wales was the Sydney Harbour Tunnel project in the mid-1980s. PPPs have been used increasingly since then to procure infrastructure, including motorways, rail, housing, health, correctives, energy, Olympic infrastructure, landfill, household water treatment, and waste water recycling.<sup>183</sup> As of August 2014, Infrastructure Australia reported that New South Wales had contracted \$A 16.3 billion (US\$14 billion) worth of PPP projects of \$A 50 million (US\$44 million) and above, representing 32 projects in total.<sup>184</sup>

There is a marked difference in the approach to PPPs pre- and post-2000, when New South Wales adopted the U.K. private finance initiative social infrastructure policy through a Green Paper, which led to the New South Wales Treasury publishing the state's first PPP guidelines in 2001, *Working with Government: Guidelines for Privately Financed Projects*. These guidelines, which were updated in 2006, were replaced in 2012 by the current New South Wales Public-Private Partnerships Guidelines.

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<sup>182</sup> PPPs are also known as privately financed projects in New South Wales.

<sup>183</sup> A useful timeline of PPPs in New South Wales is provided in an issues background paper published by New South Wales Parliamentary Library Research Service, available at [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/IssuesBackgrounder:PublicPrivatePartnershipsInNSW:atimelineandkeysources/\\$File/Public+Private+Partnerships+in+NSW.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/IssuesBackgrounder:PublicPrivatePartnershipsInNSW:atimelineandkeysources/$File/Public+Private+Partnerships+in+NSW.pdf).

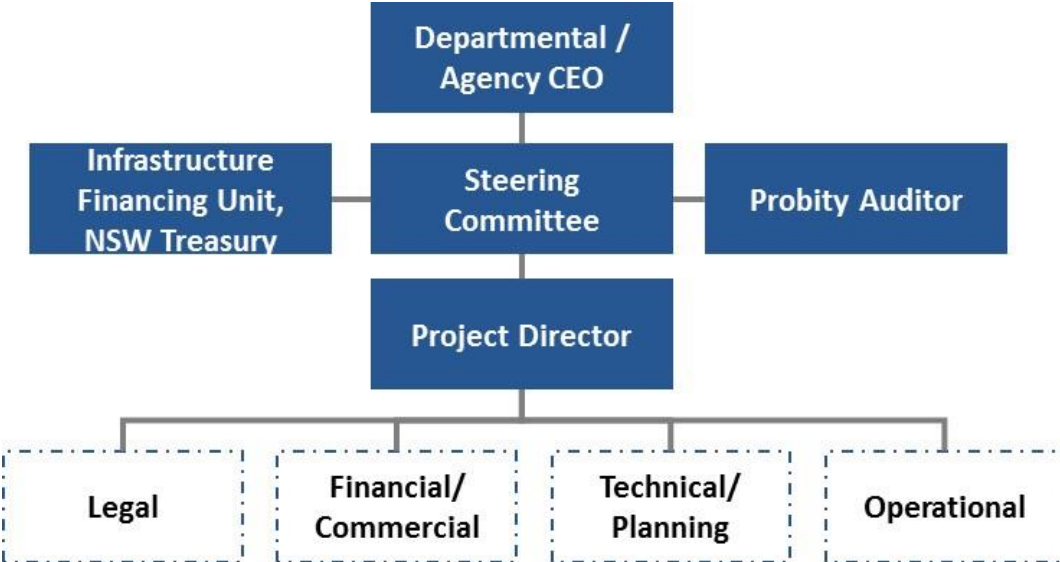
<sup>184</sup> Source: "PPP Projects Contracted," available from [http://www.infrastructureaustralia.gov.au/public\\_private/](http://www.infrastructureaustralia.gov.au/public_private/).

Australia has a National PPP Working Group, which was established in 2004 and is an intergovernmental forum designed to deliver improved project and related service outcomes through harmonizing PPP policies and processes, and encouraging better coordination and information sharing among Australian governments. This group developed the National Public-Private Partnership Policy and Guidelines, published in December 2008, which sets out the national approach to planning, funding, and implementing the nation's future infrastructure needs. That same year, the Infrastructure Australia Act 2008 came into effect, paving the way to establish Infrastructure Australia.

As with all Australian state and territory governments, New South Wales PPP projects must comply with the National PPP Policy and Guidelines and the New South Wales Public-Private Partnerships Guidelines. The national guidelines are subject to and supplemented by the specific requirements in each state. The New South Wales Public-Private Partnerships Guidelines 2012 set out specific requirements for PPP procurement and aim to complement the National Guidelines. In particular, the New South Wales PPP Guidelines require the commercial principles set out in Volumes 3 and 7 of the National Guidelines to underpin the contract. The New South Wales Treasury plays a key role in PPP procurement and policy guidance.

In New South Wales, and consistent with the National Guidelines, PPPs are managed by a project director, project steering committee, and dedicated project team, overseen by the Infrastructure Financing Unit in the New South Wales Treasury, as shown in figure 10.1.

**FIGURE 10.1 TYPICAL PROJECT MANAGEMENT STRUCTURE, NEW SOUTH WALES<sup>185</sup>**



<sup>185</sup> Taken from New South Wales PPP Guidelines, 2012.

In addition, the Infrastructure and Structured Finance Unit in the Commercial Policy and Financing Group of the New South Wales Treasury will provide policy guidance and technical support.

A detailed review of PPP bid costs by KPMG found that Australian PPPs were generally more complex than those in other countries because of a focus on value for money, the federal government system, and the complex tax system.<sup>186</sup> The average value is considerably higher than in other PPP markets, such as the United Kingdom and Canada. To reduce bidding costs, the report recommended avoiding premature project announcements and allowing sufficient time for pre-tender phase preparation.

What are the policy objectives behind disclosure?

New South Wales in general strives for openness and transparency in government, with the Government Information (Public Access) Act, 2009 (GIPA Act) promoting a pro-disclosure culture across government. Clause 6 of the GIPA Act aims to transform the freedom of information framework from one that responds to individual requests for access to documents to one that requires agencies to take a proactive approach to publishing information. The clause specifies categories of information that agencies must publish online, and encourages the proactive release of information in a consistent way. The clause is supplemented by Division 5, which deals with government contracts with the private sector.

This approach to transparency and public accountability can also be seen with PPPs. Throughout the history of PPPs in New South Wales, there have been several public inquiries, parliamentary reports, and audits, which in turn have led to policy change. The Public Accounts Committee (PAC) released a discussion paper in 2000, which called for an increase in public disclosure of information.<sup>187</sup> The paper refers back to previous reports also calling for this, including a 1993 PAC report that called for increased transparency and accountability through enhanced disclosure of information on infrastructure contracts, over and above what was required by the then Freedom of Information Act. The report also refers to the Auditor-General's 1996 report to Parliament expressing concern about the disclosure of important liabilities. In 2005-06, a Public Accounts Committee Inquiry into Public-Private Partnerships was held in New South Wales to investigate how well the government was managing its PPP program. The inquiry reflected the high level of public skepticism around PPPs at that time, in particular toward the Cross City Tunnel project and other road PPPs. The chair of the committee noted that the size and complexity of PPP projects aroused "a great deal of interest and passion."<sup>188</sup> Recommendations from this and

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<sup>186</sup> Available at: <http://www.infrastructureaustralia.gov.au/publications/barriers.aspx>.

<sup>187</sup> Available at [http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/79dfe2c5d473dd67ca256cf500144915/\\$FILE/Final%20Committee%20Report%2001%20June%202000%20-%20Inquiry%20into%20General%20Matters.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/79dfe2c5d473dd67ca256cf500144915/$FILE/Final%20Committee%20Report%2001%20June%202000%20-%20Inquiry%20into%20General%20Matters.pdf).

<sup>188</sup> Public Accounts Committee Inquiry into Public Private Partnerships: Report No. 16/53 (159) – June 2006. Page. Vii. Available at

other inquiries included the mandatory requirement for publicly disclosing a contract summary, certified by the Auditor-General, as well as the need for a public interest test and a standard contract. New South Wales' updated guidelines of 2006 reflected these recommendations, and the guidelines were further updated in 2012. Although not explicitly stated, Victoria had instigated this requirement to disclose contract information before New South Wales and this may have further influenced this decision.

In addition, the business sector has been in favor of greater transparency and accountability in information disclosure. In 2007, the New South Wales Business Chamber was reported as favoring PPP contract information to be made fully public, to “promote efficiency, accountability and public confidence.”<sup>189</sup>

Uses and users of disclosure information and the exact nature of such use

PPP disclosure information is aimed at general public use, to strengthen public trust in these large transactions that use public money. Under the GIPA Act, government agencies no longer simply respond to individual requests for access to documents, but rather are required to take a proactive approach to publishing information (open access information), subject to public interest considerations.

There does not appear to have been any comprehensive analysis of the uses and users of disclosed information.

However, in addition to use by the general public, it appears that practitioners and advisors in the PPP sector consult the disclosed contracts, and that this has assisted in standardizing contracts, and in particular risk allocation.

List of laws, policies, and regulations

#### **National Policies**

- National Public-Private Partnerships Policy and Guidelines, 2008 (the National Guidelines)
- New South Wales Acts
- Environmental Planning and Assessment Act 1979
- Public Finance and Audit (PFAA) Act 1983
- Public Authorities Financial Arrangements (PAFA) Act 1987
- State Owned Corporations Act 1989
- Local Government Act 1993

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<http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/6FB3D448CE8BF349CA2570700015952F>.

<sup>189</sup> <http://www.smh.com.au/news/national/governments-weak-hand-at-partnership-table/2007/03/06/1173166697783.html?page=3>.

- Government Information (Public Access) Act, 2009 (GIPA Act)

#### **New South Wales Guidelines and Strategies**

- Guidelines for Assessment of Projects of State Significance, 2002
- New South Wales Government Procurement Policy, 2004
- Reporting and Monitoring Policy for Government Businesses, 2005
- New South Wales Public-Private Partnerships Guidelines, 2012
- New South Wales State Infrastructure Strategy, 2012
- Guide for Submission and Assessment of Unsolicited Proposals, 2014
- Total Asset Management Guidelines (updated annually)

#### **New South Wales Premier's Memoranda**

- M2006-11 New South Wales Procurement Reforms+ Bill
- M2007-01 Public Disclosure of Information arising from New South Wales Government Tenders and Contracts (specifically relating to disclosure requirements).<sup>190</sup>

Proactive pre- and post-procurement disclosure in unsolicited projects

Unsolicited proposals are allowed in New South Wales and are seen as being able to provide innovative solutions to deliver improved government services. They are required to be consistent with the government's plans and priorities, as well as to show an overall benefit for the community. PPP projects procured through unsolicited proposals have to comply with the Guide for Submission and Assessment of Unsolicited Proposals, which was published in 2012 and then updated in February 2014 using information and lessons learned from the large number of proposals received.<sup>191</sup> Its key objective is to provide consistency and certainty to private sector participants about how their unsolicited proposals will be assessed within a transparent framework.

These guidelines stipulate that unsolicited projects can be sent to the Director-General of the Department of Premier and Cabinet, who is required to benchmark the proposal against current priorities and gauge its impact on other projects, as well as consult with relevant agencies to assess its merits. The proposal may then be tested through competitive tendering. However, where direct negotiation is approved by the Expenditure Review Committee of the Cabinet, a public statement is then required to be issued, outlining the reasons for adopting such an approach. This letter must demonstrate that all the required criteria are satisfied, such as providing better value for money than through a competitive tender process and demonstrating that the proponent has a unique ability to deliver the proposal, and the relevant expertise, experience, and financial capacity.

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<sup>190</sup> Available at [http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2007/m2007-01](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2007/m2007-01).

<sup>191</sup> Available at <http://www.nsw.gov.au/unsolicitedproposals>.

The key purpose of the guidelines is to ensure that an unsolicited proposal helps meet a strategic government objective and provides value for money. The guide sets out a four-stage assessment process:

1. Presubmission concept review
2. Assessment of initial submission
3. Assessment of detailed proposal
4. Negotiation of final binding offer.

Brief details of unsolicited proposals that progress to the third and fourth stages are required to be published on the New South Wales government website.<sup>192</sup> In exceptional circumstances, proponents may request that proposals are not listed at this stage if this would pose significant risks to commercial negotiations or intellectual property. The policy objective seems to favor such types of requests, as there is importance placed on creating a receptive environment to elicit innovative private sector proposals. Unsolicited proposals are relatively common practice in New South Wales; however, to date only four projects have progressed to the final stage and one is currently under assessment in stage 3.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The Premier's Memorandum 2006-11 New South Wales Procurement Reforms requires government agencies to make requests for tender documentation available, through the New South Wales e-tendering website (<http://tenders.nsw.gov.au>), in addition to any other location agencies choose to use. The Memorandum 2007-01 Public Disclosure of Information Arising from New South Wales Government Tenders and Contracts sets out the requirements for disclosing tender information. Tender information remains on the website until the tender call process has been concluded and a contract either awarded or the decision made not to award any contract. Agencies must disclose the following for all public calls for tender or expressions of interest: (i) concise description of the proposed works, goods, or services; (ii) date responses to the tender call close and where responses are lodged; and (iii) location of the tender call documents.

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<sup>192</sup> Available at <http://www.nsw.gov.au/your-government/unsolicited-proposals>.

In addition, government agencies are required to publish an Agency Procurement Plan (APP) on the New South Wales e-tendering site.<sup>193</sup> An APP is a statement of an agency's planned procurements for the forthcoming financial year. It consists of a short strategic procurement outlook for the agency, supported by details on planned strategic and major procurements. However, this plan does not appear to be regularly updated or fully adhered to by all agencies.

The New South Wales e-tendering site also provides information on proposed tenders. Although the main part of the invitation for expressions of interest (EOIs) is made public, it is quite common in PPPs for some sections of the invitations for EOIs containing specific project details not to be published and only to be made available to prospective respondents who sign a confidentiality deed. The request for proposals (RFP) is not disclosed to the public. It is only provided to short-listed bidders and after they sign a confidentiality deed or otherwise sign up to confidentiality undertakings. This information is therefore not proactively disclosed.

The public sector comparator (PSC) is never publicly disclosed during the procurement phase. Although this is disclosed to bidders, there is no consistent format; sometimes it is fully disclosed and other times only raw figures are provided. Although the results of a PSC will be made publicly available in the contract summary, there is some degree of flexibility about disclosing a summary of the PSC in tender documents. These are more likely to be included when it is felt this will assist the private sector's bid preparation process and thus result in higher quality and better value bids for the government. Following recommendations of the New South Wales Public Accounts Committee Inquiry in 2006, guidelines were updated so that summaries of the public interest evaluations had to be publicly disclosed.

What material is required to be confidential?

There are no requirements to disclose information publicly at this stage beyond the notice of tender information. However, although information is not proactively disclosed before a contract is signed, there are confidentiality obligations at this stage. For example, the contracting authority must not disclose the details of unsuccessful tenders.

Were a request to be made for the disclosure of pre-procurement information, Part 2 Division 2 of the GIPA Act defines what can be considered as exempt.<sup>194</sup> Section 14 provides for exemptions from information disclosure if it could reasonably be expected to prejudice against good government, security, or individual rights.

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<sup>193</sup> <https://tenders.nsw.gov.au/?event=public.APP.list>.

<sup>194</sup> Available at <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+52+2009+cd+0+N>.



Collect and reference any specific templates/checklists being used for disclosure

There are no standard contracts for PPPs. However, guidelines are provided in the Commercial Principles for Economic Infrastructure (Volume 7 of the National PPP Policy and Guidelines, 2008) and in the Commercial Principles for Social Infrastructure (Volume 5 of the National PPP Policy Guidelines, 2008).

Do the documents in question have retroactive effect?

There is no requirement for retroactive publishing. The New South Wales e-tendering website does not have retroactive information.

Validation of information

No validation of information is required in the pre-procurement stage.

## Actual practices for the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

There is a strong culture of transparency in New South Wales and this can also be seen in the procurement process, with tenders being advertised on multiple websites and the government often proactively providing additional information through dedicated websites.

The Infrastructure Australia website lists PPP projects in the marketplace. However, this information is only updated twice a year and does not provide information that is as comprehensive as the information on the New South Wales Treasury website. The New South Wales Treasury website (<http://www.treasury.nsw.gov.au/>) has a dedicated section for PPPs, developed to provide information related to PPPs and major infrastructure development in New South Wales. The website includes an e-mail notification service, where interested parties can subscribe to PPP updates, as well as a list of projects in procurement. In addition, the National PPP Working Group issues a national pipeline of PPP projects that governments have identified as potential candidates for PPPs. However, information is only updated every six months.<sup>195</sup> The New South Wales e-tendering website publishes a weekly planned procurements report, which includes contact details and the estimated date of approach to market. However, the search function for planned procurements does not have a PPP filter. It is generally felt that information for these types of projects is circulated through word of mouth much earlier than it becomes available through these pipelines. The private sector would like increased transparency in this area.

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<sup>195</sup> Available at [http://www.infrastructureaustralia.gov.au/public\\_private/](http://www.infrastructureaustralia.gov.au/public_private/).

Australia has established the National Infrastructure Construction Schedule, a national government infrastructure project pipeline.<sup>196</sup> This schedule provides industry with information on major infrastructure projects over \$A 50 million (US\$44 million) committed by each of the state governments.

At the pre-procurement stage, there is one key requirement for projects, that government agencies make request for tender documentation available through the New South Wales e-tendering website and that the documentation includes a description of the proposed works, goods, or services; the date responses to the tender call close and where responses are lodged; and the location of the tender call documents.

It is generally difficult to ascertain whether tender information was published, as this would only be available for the period during which the tender was open. It appears that projects generally adhere to and comply with these requirements. In several cases, additional information is available on dedicated project websites.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Waratah Rolling Stock**

The Rolling Stock PPP project represents the largest single order for new passenger trains ever undertaken in Australia and is equivalent to about 50 percent of Sydney Trains' current suburban fleet (table 10.1). The project included providing 78 new trains and constructing a maintenance facility. In June 2014, the final train was delivered. In August 2004, RailCorp issued a request for EOIs and applications were received from six consortia. A public sector comparator report is available as part of the contract summary, although it is unclear at what point in the process this information was made publicly available. There is no information available for this project in the archive section of the New South Wales e-tendering website. Full project details and contract information are available on the Transport for New South Wales website, although there is no information on the procurement process.<sup>197</sup>

**TABLE 10.1 ACTUAL PRACTICE FOR WARATAH ROLLING STOCK, NEW SOUTH WALES**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the New South Wales e-tendering website	Yes	It is difficult to confirm whether this project was compliant; however, full project details have been provided.

<sup>196</sup> Available at <https://www.nics.gov.au/>.

<sup>197</sup> Available at <http://www.transport.nsw.gov.au/sydneytrains/rolling-stock-ppp>.

## Northern Beaches Health Service Redevelopment Project

This project, which is currently in the procurement stage, includes construction of a new Northern Beaches Hospital, with a minimum of 423 beds to provide public and private services, and the reconfiguration of a second hospital to provide services to support the new hospital (table 10.2). The invitation for EOIs was released in May 2013, and was included on the New South Wales e-tendering website. At the same time, an industry briefing was held, which was also advertised on the e-tendering website. An RFP was released in November 2013, an executive summary of which is available on a dedicated project website.<sup>198</sup> A full assessment report, including an environmental impact statement, is available, although there is no public sector comparator report. Seven submissions were received, all of which are available on the New South Wales Planning and Environment website.<sup>199</sup> The contract for hospital operation was expected to be awarded in late 2014.<sup>200</sup>

TABLE 10.2 ACTUAL PRACTICE FOR NORTHERN BEACHES HEALTH SERVICE REDEVELOPMENT PROJECT, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the New South Wales e-tendering website	Yes	Yes and further information is available on a dedicated project website.

## New South Wales New Schools I & II Projects

These projects are viewed by many in the industry as examples of social infrastructure PPP best practice, with savings to the public in excess of 20 percent and a favorable review in the Auditor-General's performance audit (table 10.3).<sup>201</sup> The New Schools I project involves the design and construction of nine public schools and the general upkeep and running of these until 2032, when the schools will be handed over to the public sector. This was the first PPP project carried out by the Department of Education and Training (DET). As such, there was careful pre-planning and preparation, with the initial scoping work starting 16 months before an invitation for EOIs was launched, including a PSC (also the first carried out by DET).

In 2001, DET advertised for registrations of interest from private sector parties, although it is not clear where this was advertised, as it was before the 2006 procurement requirement to use the New South Wales e-tendering website. Eleven applications were received. The audit reported that the tender process was competitive with sufficient transparency, although the report recommended that contracts should be more accessible to the public. The government's Expenditure Review Committee approved the requests for tenders and

<sup>198</sup> Available at <http://nbhsredev.health.nsw.gov.au/>.

<sup>199</sup> Available at [http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=5982](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=5982).

<sup>200</sup> As per <http://nbhsredev.health.nsw.gov.au/wp-content/uploads/2014/08/Northern-Beaches-Hospital-Facts.pdf>.

<sup>201</sup> Auditor-General, New South Wales, "Auditor-General's Report Performance Audit: The New Schools Privately Financed Project," March 2006.

the selection of the preferred proponent, with the overall project overseen by a steering committee, chaired by DET.

There is no information of this project in the archive of the New South Wales e-tendering website. A public sector comparator report is available as part of the contract summary, although it is unclear at what point in the process this information was made publicly available. The post-implementation review (PIR) report states that this project met the majority of the Working with Government guidelines and the aspects that were not followed did not hinder the procurement process. Following this procurement, the Working with Government guidelines were simplified.

TABLE 10.3 ACTUAL PRACTICE FOR NEW SCHOOLS I & II PROJECTS, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the New South Wales e-tendering website	No, prior to 2006 requirement	Although this project was before this requirement had come into practice, tender documents were published.

#### **Sydney International Convention, Exhibition, and Entertainment Centre Precinct**

The vision for this project is to provide world class facilities across the 12-hectare precinct at Darling Harbour, stretching from Cockle Bay to Haymarket and Ultimo, which can successfully host the widest range of local, national, and international events (table 10.4). An invitation for EOIs was advertised on the New South Wales e-tendering website in September 2011. Three consortia applied in the first round and two in the second round, with the preferred consortium announced in December 2012. Information is still available under the archived section of the e-tendering website. However, the website that was set up for downloading the tender documents is no longer active. It has been replaced by a website from the winning consortium with details about the project, but not the procurement process.<sup>202</sup> Full contract documents, but not procurement documents, are on the Infrastructure New South Wales website.<sup>203</sup>

TABLE 10.4 ACTUAL PRACTICE FOR SYDNEY INTERNATIONAL CONVENTION CENTRE PRECINCT, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the New South Wales e-tendering website	Yes	Yes

<sup>202</sup> Available at <http://www.darlingharbourlive.com.au/>.

<sup>203</sup> Available at <http://www.insw.com/projects/darling-harbour-live.aspx>.

## Sydney Light Rail–South-East Light Rail Project

This project, which is currently under procurement, is for the finance, design, construction, operation, and maintenance of a new light rail system for the central business district and southeast Sydney and the operation and maintenance of the Inner West Light Rail (Central Station to Dulwich Hill) (table 10.5). The project, subject to demonstration of value for money, is to be delivered as a PPP. Organizations were required to register through completing a confidentiality deed poll and undertaking. Registered organizations were then issued an invitation for EOI in October 2013 and an industry briefing was held. An RFP was then released for the three short-listed bidders in March 2014, with the contract expected to be awarded in late 2014. Brief details of this procurement are available in the archive section of the e-tendering website. The submissions report and environmental impact statements are available on a dedicated project website.<sup>204</sup> Project updates are provided sporadically, with the main aim of keeping the public informed on progress and highlighting changes to the design in response to public consultations. Although there is a section of the website dedicated to procurement, copies of the EOI and RFP are not available.<sup>205</sup>

TABLE 10.5 ACTUAL PRACTICE FOR SYDNEY LIGHT RAIL, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the New South Wales e-tendering website	Yes	Yes. This procurement was published on the e-tendering website, although not enough information is available to confirm that all criteria were met.

<sup>204</sup> Available at <http://www.sydneylightrail.transport.nsw.gov.au/information/resources>.

<sup>205</sup> See <http://www.sydneylightrail.transport.nsw.gov.au/information/procurement>.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

Premier's Memorandum M2007-01: *Public disclosure on information arising from NSW government tenders and contracts* states the requirement for agencies to make a contract summary available to the Auditor-General for audit within 45 days of the contract becoming effective. Within 90 days of receipt by the Auditor-General, the audited contract summary must be tabled in Parliament by the responsible Minister. After the summary has been tabled, the agency must advertise the availability of the contract summary in the Public Notices. Contract summaries are placed on the New South Wales Treasury website (<http://www.treasury.nsw.gov.au/ppp>). Details of significant variations in the contract need to be included on the register within 60 days after the variation comes into effect. Information, including a copy of the contract, is required to be made publicly available as open access information until the period to which the contract relates is complete.

Part 3, Division 5, of the New South Wales GIPA Act requires that for all privately financed contracts up to \$A 5 million, contract documents are made available on request. Summaries of PPP contracts above \$A 5 million are required to be made available on the New South Wales e-tendering website.

Figure 10.2 shows the information that is required in the contract summary.<sup>206</sup>

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<sup>206</sup> Only required for Class 3 contracts, which are privately financed projects over \$A 5 million and therefore relate to most PPP contracts.

FIGURE 10.2 CONTRACT SUMMARY: REQUIRED INFORMATION, NEW SOUTH WALES

<p><b>Contract details</b> including tendering method, basis of payment, contract delivery system, basis for future change in price</p>	<p><b>Successful tenderer details</b> including legal name and contact details, contract commencement date</p>	<p><b>Multiple successful tenderer details</b> (when applicable)</p>
<p><b>Contracts managed by a private sector Project Manager</b> (when applicable)</p>	<p><b>Additional information</b> (particulars relating to the transfer of assets, PSC, CBA, risk sharing, guarantees, financial model)</p>	<p><b>Publication of the contract</b> (where it will be published or reasons as to why it will not be published)</p>

What material is required to be confidential?

Division 5, Part 3, of the GIPA Act defines what can be classed as confidential and therefore not required to be included in the contract summary.<sup>207</sup> This information includes the commercial-in-confidence provisions of a contract, details of any unsuccessful tender, any matter that could affect public safety or security, and any other disclosure that would be against the public interest.

If an agency does not include a copy of a contract in the register because of this section of the GIPA Act, it must include in the register why this has been undertaken, a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date, and, if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

PPP contracts include a confidentiality and disclosure clause and the National PPP Policy provides guidance on the form and commercial principles to be followed in drafting that clause. This has now become a fairly standardized clause, although there is still some negotiation over the scope of items or information that will be treated as commercial-in-confidence. The list of items that will be treated as confidential is typically agreed during the bidding.

Examples of information that is often required to be confidential in this clause are usually fairly limited, but can include the following:

- Private sector debt financiers' fees and margins
- Cost structures, profit margins, and intellectual property of the project company
- Private sector participants' base case financial model

<sup>207</sup> Available at <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+52+2009+cd+0+N>.

- Terms of equity investments in the project
- Private sector participants' directors' entitlements and voting rights and their director and shareholder simple and super majority resolution items and powers
- Terms of the projects' insurance policies.

So long as proprietary and commercially sensitive information remains confidential, it seems that bidders are reasonably comfortable with the level of disclosure required, and accept it as a consequence of doing business with the government. As PPP contracts have now become relatively standardized, there is less concern over what is being revealed by the disclosure of the appropriately redacted contracts.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

Clause 35 of Volume 7: Commercial Principles for Economic Infrastructure of the National PPP Guidelines provides specific guidance for disclosure of PPP projects. The key principle driving this guidance is that the government will be entitled to publish the project agreement and other project contracts, whereas disclosure by the private party is generally prohibited without the prior consent of the government.

Collect and reference any specific templates/checklists being used for disclosure

Chapter 5 of the New South Wales PPP Guidelines (2012) provides detailed guidelines as to what the contract summary must contain, including that it must distinguish between (i) noncontractual background information (such as project history, details of sponsors, description of the parties' obligations, results of cost-benefit analyses, and the PSC); and (ii) contractual information covering elements of the contract (such as commencement date, description of change control provisions, price to be paid by the public, and provisions for renegotiation).<sup>208</sup>

Government contract disclosure guidance forms, including standard templates, are available from [www.procurepoint.nsw.gov.au](http://www.procurepoint.nsw.gov.au).

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

Documents do not have retroactive effect.

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<sup>208</sup> New South Wales Government, New South Wales Public Private Partnerships Guidelines, August 2012.



Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

Section 5.4 of the New South Wales PPP Guidelines (2010) states that a PIR to assess project outcomes and learn lessons to improve future projects should be undertaken jointly by the procuring agency and the New South Wales Treasury for all PPPs. This PIR should be carried out 12 months after operations have commenced and is required to include reviews of project objectives and appropriateness, design performance and effectiveness of risk sharing, project delivery and operations, and the functional competence of infrastructure. However, these reports are not open access information, although the government may disclose this information if requested under the GIPA Act after considering whether there is a public interest consideration against disclosure. Some PIRs are available online, although not all have been audited.

Internal reports carried out by PPP operators are not disclosed proactively, but can be requested under the GIPA.

Clause 13 of Volume 7: Commercial Principles for Economic Infrastructure of the National PPP Guidelines provides specific guidance for key performance indicators of PPP projects. However, it does not refer to the need for any of this information to be publicly disclosed.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

Special purpose vehicles have regular reporting requirements, including the requirement to report performance against key performance indicators. However, this reporting obligation is to the contracting authority and is not open access information (that is, there is no requirement for this information to be proactively disclosed).

Validation of information

There is a legislatively mandated system of certification of information through audit and disclosure to Parliament before proactive disclosure to the public. The agency is required to submit its contract summary to the audit authority within 30 days of signing. Contract summaries are then published on the contracts register of the New South Wales e-tendering website.

## Actual practices for the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

The New South Wales e-tendering website has a contract award notice published search function, although there is no means to filter this search by PPP. The notices are only available for 20 days after the contract award date. In addition, many projects have their own dedicated website, which includes details on the project's progress.

At the post-procurement stage, an audited contract summary must be placed on the New South Wales Treasury website and details of any significant variations in the contract need to be included on the register within 60 days after the variation comes into effect. Apart from the Crown Sydney Resort project, an unsolicited proposal that in turn led to specific guidelines being created for this type of project, all the projects that were reviewed complied with the requirements and often went above what was needed. For example, post-implementation reviews, which are not required to be made public, are available for the schools and road projects cited.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Crown Sydney Resort Project**

In September 2012, the Government of New South Wales received an unsolicited proposal from Crown Limited to construct and manage a “six star” hotel resort with VIP-only gaming facilities (table 10.6). The government approved Crown's final binding offer on November 11, 2013. In addition to the outcomes and transaction summary, the New South Wales government website also provides redacted submissions, proposals, and reports from each of the four stages cited in the assessment process.<sup>209</sup>

This proposal created much debate about the New South Wales government's handling of unsolicited proposals and concerns about the lack of a competitive tender process in the guidelines, which kept the public in the dark as to whether the state was getting the best value for money. Another issue raised was the lack of transparency and the leeway for the New South Wales government not to make documents public until the very late stages of the process. These concerns were taken on board by the Government of Victoria in its unsolicited proposals guidelines, which were released in early 2014.

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<sup>209</sup> Available at: <http://www.nsw.gov.au/your-government/unsolicited-proposals>

TABLE 10.6 CROWN SYDNEY RESORT PROJECT: POST-PROCUREMENT PRACTICE, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish audited contract summary on the New South Wales Treasury website	Yes	Although this project was before this requirement had come into practice, detailed information is available for this project on the Unsolicited Proposals section of the New South Wales government website.

### New South Wales New Schools I & II Projects

Contract summaries and Auditor-General performance audit reports are available for both projects from the New South Wales Treasury website (table 10.7). The audit report found that although the reporting and monitoring system had been thoroughly prescribed and seemed to be appropriate, it was largely reliant on self-monitoring, rather than any oversight or audit by DET. In addition, a PIR report is available. A key recommendation in this report was to improve the Treasury’s non-paper-based record for budget reporting associated with PPPs to allow electronic footnoting of capital adjustments beyond the forward estimate periods. As such, the Treasury began implementing a Record Improvement Management System project. The report found guidance at that time to be ambiguous, particularly in how to interpret the requirement to table the contract summary 120 days after the contract “becomes effective,” as this could mean after financial close, after commercial close, or when the operations phase of the contract commences. This recommendation was taken on board, with the 2012 guidance clearly defining the contract as becoming effective “after all conditions precedents to the contract have been satisfied.”

TABLE 10.7 NEW SCHOOLS I & II PROJECTS: POST-PROCUREMENT PRACTICE, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish audited contract summary on the New South Wales Treasury website	Yes	Yes. A contract summary, PIR, and audit report are available on the New South Wales Treasury website.

### Royal North Shore Hospital Redevelopment Project

This \$A 950 million project involved constructing and managing a new acute hospital and community health facility (table 10.8). A contract summary and the redacted project deed are available on the New South Wales Treasury website. The New South Wales Health Infrastructure has a full list of all project-related documents.<sup>210</sup> This project was expected to be fully complete by the end of 2014. However, no audit or PIR is publicly available.

<sup>210</sup> Available at [http://www.hinfra.health.nsw.gov.au/projects/ppp-projects/related\\_documents-rnsh\\_ppp](http://www.hinfra.health.nsw.gov.au/projects/ppp-projects/related_documents-rnsh_ppp).

TABLE 10.8 ROYAL NORTH SHORE HOSPITAL REDEVELOPMENT PROJECT: POST-PROCUREMENT PRACTICE, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish audited contract summary on the New South Wales Treasury website	Yes	Yes. A contract summary, dated October 2008, is available on the New South Wales Treasury website.

### Rosehill Camellia Recycled Water Project

In 2006, the New South Wales government committed to increasing the amount of water recycled in Sydney to 70 billion liters a year by 2015 (table 10.9). The Rosehill Camellia project is part of the plan to achieve this target, by supplying industry and irrigation users with recycled water. It is the first project of its kind to be delivered by the private sector. A project agreement was signed in 2008 and became effective in 2009. The audited contract summary is available on the New South Wales Treasury website. The New South Wales Planning and Environment website has a full range of application, assessment, and determination documents, as well as details on all four modifications made to the contract.<sup>211</sup> There is no audit or PIR publicly available.

TABLE 10.9 ROSEHILL CAMELLIA RECYCLED WATER PROJECT: POST-PROCUREMENT PRACTICE, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish audited contract summary on the New South Wales Treasury website	Yes	Yes. A contract summary, dated June 2009, the start of the contract, is available on the New South Wales Treasury website.

### Westlink M7 Motorway, Cross City Tunnel, and Lane Cove Tunnel Projects

Although these three motorway projects were separate PPP projects, they are of a similar scale and were developed and delivered simultaneously, utilizing the same environmental assessment, procurement, and approval processes (table 10.10). The M7 motorway, a 40 kilometer dual carriageway motorway; Cross City Tunnel, a 2.1 kilometer two-lane tunnel; and Lane Cove Tunnel, a 3.6 kilometer two- to three-lane tunnel, complete the Sydney Orbital and provide an east-west bypass of Sydney's central business district.

Contract summaries for each of the three projects, which commenced in 2003, are available on the New South Wales Treasury website, as well as a joint PIR of all three projects. The PIR reported that the PPP procurement model developed to deliver these projects had established best practice for Australian economic infrastructure and had become a benchmark for other jurisdictions in Australia and internationally. Despite these projects

<sup>211</sup> Available at [http://majorprojects.planning.nsw.gov.au/page/development-categories/transport--communications--energy---water/sewerage---waste-water/?action=view\\_job&job\\_id=1441](http://majorprojects.planning.nsw.gov.au/page/development-categories/transport--communications--energy---water/sewerage---waste-water/?action=view_job&job_id=1441).

commencing after the Working with Government guidelines were published in 2001, the PIR assesses them retrospectively against these guidelines. Indeed the projects complied with the transparent procurement rules, as well as the disclosure of information requirement to publish an audited contract summary. In addition, there was an Auditor-General’s Performance Audit of the Cross City Tunnel project, because of the controversy this project created over high toll charges and public concern over the fairness of the contract award process. A recommendation from this audit report was that the Treasury should publicly disclose contract amendments; this recommendation was implemented by revising Ministerial Memorandum 2000-11 Disclosure on Information on Government Contracts with the Private Sector.

TABLE 10.10 WESTLINK M7 MOTORWAY, CROSS CITY TUNNEL, AND LANE COVE TUNNEL PROJECTS: POST-PROCUREMENT PRACTICE, NEW SOUTH WALES

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish audited contract summary on the New South Wales Treasury website	Yes	Yes. A contract summary and PIR are available on the New South Wales Treasury website.

### What are the challenges and benefits to disclosure?

There is a strong commitment to transparency and accountability in New South Wales and this can be clearly seen in the stringent requirements and clear guidelines around disclosure of information. There have been many PPP projects, representing significant investment, in New South Wales in recent years. The government has a clear desire to continue working in this manner, to achieve cost savings and increase innovation in projects, and is conscious of the need to ensure public confidence in this procurement mechanism. As such, there is large investment in public consultations throughout the process and public disclosure of audited information at each step.

However, there seems to be a disconnect between the objectives of disclosing information and the policies used. Public accountability and transparency are the main aims; however, contract summaries are often around 80 pages long and lack key financial information. Proactive information disclosure is far better at meeting the public’s information needs, through the creation of websites and regular leaflets with key updates on project evolution. An analysis of the extent to which each type of information is used, by whom, and for what purpose could assist in ensuring that policy adequately meets its objectives. In addition, there is little discussion about the cost of these rigorous disclosure requirements in New South Wales. This is an area that merits further investigation to analyze the benefits gained from this level of public disclosure against the costs incurred for these detailed processes.

The level of disclosure required provides unsuccessful bidders with greater access to effected contracts, which could therefore increase the risk that such bidders will bring claims in relation to those contracts.

Legislation around information disclosure is much more prescriptive on post-procurement procedures than pre-procurement. This may reflect the need to ensure public confidence in value for money in such large contracts.

A benefit to disclosure enjoyed by the private sector is linked to the sale of assets. As it has already been agreed what information can be publicly disclosed, this greatly assists the sale process, rather than having to negotiate with the government as to which pieces of information can be made public.

## What can we learn from this country study?

The main lesson that can be taken from the New South Wales case is that public disclosure of information is indeed feasible if clear policies and guidelines are put in place and regularly reviewed. The case of New South Wales could be used as an industry gold standard for lessons for other jurisdictions.

There have been many lessons learned from the PPP projects over the years, partly because of the many audits and PIRs. These have informed policies in New South Wales, which have been updated several times.

New South Wales is one of the few jurisdictions that permits unsolicited bids, and to some extent encourages them to increase innovation and cost savings. The clear framework the government has created to assess these unsolicited bids to ensure transparency and fairness is an area that other jurisdictions could use when assessing whether to permit such processes.

## 11. Philippines



### PPP context in the Philippines

How are PPPs undertaken in the Philippines?

The 1987 Philippine Constitution acknowledged the crucial role of the private sector in the country's development. This acknowledgment was followed by the first version of what is

now known as the Build-Operate-Transfer (BOT) Law, which was introduced in 1990.<sup>212</sup> PPPs in the Philippines are coordinated by the PPP Center, a government agency set up in 1993.

The main initial motivation for the encouragement of PPPs in the Philippines was the frequent power shortages experienced in the 1980s and the investment required in energy infrastructure to remedy this.<sup>213</sup> The early emphasis on the power sector is demonstrated through the sector accounting for the largest value of concluded contracts, although the emphasis has since begun to shift toward water and transport, as demonstrated through the projects in construction or in the pipeline.

The original relevant Act (*An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure projects by the private sector, and for other purposes, RA 6957*), was amended by the BOT Law (RA 6957) in 1994, which provided greater detail. The Implementing Rules and Regulations (IRR) of the BOT Law have undergone several amendments, with the most recent in 2012, which promotes transparency in pre-procurement, faster processing of proposals, and guidelines for the government to deal with unsolicited proposals.<sup>214</sup>

The distinction between the law and the IRR is important. In the Philippines, it is difficult to change the law; thus, the only change in the BOT Law itself was when RA 7718, the BOT Law, was put in place to override RA 6957. The law is designed to cover the main principles, and the IRR seeks to explain the law and provide further detail. It is easier to change the IRR than the law, but the IRR must remain within the remit of the law itself. Changes were made to the BOT Law IRR in 2006 and 2012.

The 1990 BOT Law allowed only two types of PPP: build and transfer; and build, operate, and transfer. The 1994 amendments to the BOT Law introduced more variety and creativity in the form of PPPs allowed, with nine distinct forms of PPP. Other forms of PPP are permitted if approved by the president. As the president is the chairperson of the National Economic and Development Authority (NEDA), the approval of NEDA is equivalent.

What are the policy objectives behind disclosure?

The objective of increasing transparency and developing clearer standard procedures is to reduce corruption in government. Corruption is estimated to waste up to £300 million a year of government funds.<sup>215</sup> The drive for disclosure may have been enhanced by the low

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<sup>212</sup> “An Act Authorizing the Financing, Construction, Operation and Maintenance of infrastructure projects by the private sector, and for other purposes.” Approved in July 1990.

[http://www.lawphil.net/statutes/repacts/ra1990/ra\\_6957\\_1990.html](http://www.lawphil.net/statutes/repacts/ra1990/ra_6957_1990.html).

<sup>213</sup> World Bank, unsolicited infrastructure proposals, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439\\_20071206143329/Rendered/PDF/417300Unsolic1alsOPPIAF0101PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/12/06/000020439_20071206143329/Rendered/PDF/417300Unsolic1alsOPPIAF0101PUBLIC1.pdf).

<sup>214</sup> [http://ppp.gov.ph/wp-content/uploads/2012/10/PPPBrochure\\_Sept2012.pdf](http://ppp.gov.ph/wp-content/uploads/2012/10/PPPBrochure_Sept2012.pdf).

<sup>215</sup> Senate Economic Planning Office, Policy Brief, Plugging the Loopholes of the Philippine Procurement System; <http://www.senate.gov.ph/publications/PB%202008-05%20-%20Plugging%20the%20Loopholes.pdf>.

tax revenues experienced by the Philippines, which fell in 2009 to 12.2 percent of gross domestic product, and the budget cuts experienced by government departments.<sup>216,217</sup>

Increasing transparency in the PPP process will also increase awareness of the priority projects and therefore increase the number of proposals, and thus competition and efficiency of the projects. Accordingly, Section 93 of the General Appropriations Act of FY2012 requires national government agencies to make certain information available on their website (see section 11.1.4), to enhance transparency and enforce accountability. This requirement aims to enable and encourage bidders in (or proponents of) PPPs.

A freedom of information (FOI) bill was passed through the Senate (the upper house of Congress) in March 2014. This bill needs to be passed through the House of Representatives (the lower house of Congress) before it becomes law;<sup>218</sup> the timeframe for this is unknown.<sup>219</sup> Even in the absence of an FOI Act, the right to information has been part of law in the Philippines since the 1987 Philippine Constitution, which was encouraged by the country's experience with dictatorship (1972-86).<sup>220</sup> Nonetheless, there is great public pressure to implement a concrete FOI law, with a petition set up in protest of its delay.<sup>221</sup> An FOI bill would impact disclosure by requiring the use of plain language in disclosure, to make information more accessible for the general public (Section 20).

Uses and users of disclosure information and the exact nature of such use

The disclosure of information is expected to be used by:

- Interested bidders, who will be more likely to bid if they are aware that the project is inviting proposals, are aware of how the proposals will be judged, and have more faith in the fairness of the process (which is assisted through greater transparency).
- Parties interested in developing an unsolicited proposal, as they will be more likely to submit proposals the more transparent the process is, not least as they will have a better idea of the projects that are already underway and likely to fit within the government's development plan.

The general public/electorate, who are concerned about corruption in the Philippines procurement and accordingly are pushing for an FOI Act.

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<sup>216</sup> <http://data.worldbank.org/indicator/GC.TAX.TOTL.GD.ZS/countries/1W-PH?display=graph>.

<sup>217</sup> Oxford Business Group, The Report, The Philippines, 2012, p. 150.

<sup>218</sup> The process by which a bill becomes law is outlined in Manila Rules: How a Bill Becomes Law in the Philippines; <http://manilarules.com/2013/06/25/how-a-bill-becomes-law-in-the-philippines/>.

<sup>219</sup> One suggestion is 2016: Inquirer: FOI bill Passed by Senate; <http://newsinfo.inquirer.net/584008/foi-bill-passed-by-senate>.

<sup>220</sup> Center for Media Freedom and Responsibility: FOI Philippines; <http://www.cmfr-phil.org/freedom-of-information/>.

<sup>221</sup> <http://www.change.org/TayoNaParaSaFOI>.



## List of laws, policies, and regulations<sup>222</sup>

There are three main components of the law that contribute to the disclosure of information regarding PPPs in the Philippines:

- *Republic Act (RA) 7718*: the Amended BOT Law 1994, which replaces RA 6957, which was passed in 1990.<sup>223</sup> The BOT Law explicitly covers nine types of PPP; <sup>224</sup> prior to 1994 it covered only BOT and BT.<sup>225</sup> The definitions of the PPP types covered by the BOT Law are provided in the documentation of the Act and the division of responsibilities is also laid out clearly in “A PPP Manual for LGUs: Volume 1.”<sup>226</sup> Alongside the BOT Law, there is also the BOT-IRR, the Implementing Rules and Regulations, as amended in 2006 and 2012. Unsolicited proposals are permitted according to the rules outlined in the BOT Law and IRR. There are currently some proposed changes to the IRR by the PPP Center.
- *RA 9184*: the Government Procurement Reform Act of 2003 applies to the procurement of infrastructure projects, goods, and consulting services, and provides five main principles around transparency, competitiveness, simple process, accountability, and public monitoring. As of the 2009 amendments, procurement that falls under BOT Law R.A. 7718 is not covered by R.A. 9184.
- *Section 93 of the General Appropriations Act of FY2012*: national government agencies are all required to display certain information on their website under a “transparency seal,” which is designed to enhance transparency and enforce accountability. There are certain levels of transparency that are required for an organization to be eligible to display the seal.<sup>227</sup>

There are many additional laws and regulations that contribute to the PPP framework in the Philippines, such as:

- Commonwealth Act 146: Public Services Act as amended by Presidential Decree 1 (Integrated Reorganization Plan) and Executive Order (EO) 546, limits foreign equity to 40 percent for operation of public utilities.

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<sup>222</sup> ERIA – PPP Country Profiles, Philippines, March 2013;

[http://www.eria.org/projects/PPP\\_in\\_Philippines\\_ERIASummary\\_March\\_2013.pdf](http://www.eria.org/projects/PPP_in_Philippines_ERIASummary_March_2013.pdf).

<sup>223</sup> PPP Center - BOT Law R.A. 7718 Amended 2012; [http://ppp.gov.ph/wp-content/uploads/2013/02/BOT-IRR-2012\\_FINAL.pdf](http://ppp.gov.ph/wp-content/uploads/2013/02/BOT-IRR-2012_FINAL.pdf).

<sup>224</sup> The nine types of PPP: BOT = build, operate, and transfer; BT = build and transfer; BOO = build, own, and operate; BLT = build, lease, and transfer; BTO = build, transfer, and operate; CAO = contract add and operate; DOT = develop, operate, and transfer; ROT = rehabilitate, own, and transfer; and ROO = rehabilitate, own, and operate. As discussed in ZGLaw – PPP in the Philippines, a Practical Guide for Businesses; <http://zglaw.com/public-private-partnerships.pdf>.

<sup>225</sup> PJS Law - Summary of Changes to BOT IRR, 2006 vs 2012; [http://www.pjslaw.com/Summary%20of%20Changes%20to%20BOT%20IRR%20\(2012%20vs%20%202006%20versions\).pdf](http://www.pjslaw.com/Summary%20of%20Changes%20to%20BOT%20IRR%20(2012%20vs%20%202006%20versions).pdf).

<sup>226</sup> PPP Center – A PPP Manual for LGUs, understanding PPP concepts and frameworks; <http://ppp.gov.ph/wp-content/uploads/2012/07/PPP-Manual-for-LGUs-Volume-1.pdf>. Table 1-2: RA 7718 PPP Variants.

<sup>227</sup> PPP Center – Transparency Seal; [http://ppp.gov.ph/?page\\_id=10954](http://ppp.gov.ph/?page_id=10954).

- Memorandum Circular 2011-16 (PPP Sub-Committee in the LDC)<sup>228</sup>

### Republic Acts

- *RA 7160: Local Government Code of 1991*. This Act describes the powers and authority of local government units to promote local development, among other functions.
- *RA 8179: Foreign Investments Act of 1991*. This act provides regulations on foreign exchange transactions.
- *RA 8974: Acquisition of Right of Way of 2000*. This Act facilitates the acquisition of right-of-way, site, or location for national government infrastructure projects.
- *RA 8975: 2000*. This Act prohibits lower courts from issuing temporary restraining orders, preliminary injunctions, or preliminary mandatory injunctions, so as to ensure expeditious completion of government infrastructure projects.
- *RA 9184: Government Procurement Reform Act, published in 2003 and updated in 2009*.

### Executive Orders

*EO 8, 2010*. This EO reorganized and renamed the BOT Center to the Public-Private Partnership (PPP) Center of the Philippines and transferred its attachment from the Department of Trade and Industry to the National Economic and Development Authority to improve the institutional framework for PPP. The functions of the PPP Center as created in this EO can be found at <http://ppp.gov.ph/>.

- *EO 43*.<sup>229</sup> This EO, lists key areas of the government's social contract to be transparent, accountable, and participatory governance.
- *EO 78, 2012*. This EO mandated the inclusion of provisions on the use of alternative dispute resolution mechanisms in all contracts involving PPP, BOT, and joint venture agreements between government and private entities, and those entered into by local government units.
- *EO 226, as amended (Omnibus Investments Code of 1987)*. This EO provides fiscal incentives.

*EO 423, 2005*. This EO prescribes the rules and procedures for the review and approval of government contracts to conform to RA No. 9184 (the Government Procurement Act). Section 8 of EO 423 mandated NEDA to issue guidelines regarding joint venture agreements with private entities. NEDA released the guidelines in 2008, providing the framework for PPPs that are pursued through the joint venture mode. NEDA is currently reviewing those guidelines with a view to improving them.

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<sup>228</sup> PPP Center – Memorandum circular, 2011-16 (PPP Sub-committee in the LDC); [http://ppp.gov.ph/wp-content/uploads/2012/04/DILGMC\\_2011-16.pdf](http://ppp.gov.ph/wp-content/uploads/2012/04/DILGMC_2011-16.pdf).

<sup>229</sup> Executive Order - 23, reorganization of the cabinet clusters; <http://www.dbm.gov.ph/wp-content/uploads/EO/EO43.pdf>.

## Proactive pre- and post-procurement disclosure in unsolicited projects

Unsolicited projects are allowed, and in 2012 the PPP Center published a policy brief on unsolicited projects.<sup>230</sup> The BOT Law was mainly created to facilitate solicited PPPs. However, there were more unsolicited PPPs awarded than expected because of the lower level of resources required by the government when projects originate in the private sector (particularly as, unlike in some other countries, the public sector will not at present reimburse the development cost).<sup>231</sup>

A proposal is classified as unsolicited if it is determined by the local government unit (LGU) to lie outside the current list of priority projects.<sup>232</sup> The implementing agency (IA) or LGU may accept unsolicited bids for infrastructure or development projects on three conditions:<sup>233</sup>

1. The project involves a new concept or technology (with the IA determining whether it fits the definition) *and/or* a concept or technology that is not part of the priority list of projects.
2. No direct government guarantee, subsidy, or equity is required.
3. The IA or LGU has published the proposal for three weeks in an appropriately circulated newspaper, inviting competitive proposals (which must be received within 60 days).

As noted in the PPP Center's policy brief, listed priority projects are ineligible for unsolicited proposals, unless they involve a new concept or technology, which thus changes the scope and terms of reference considerably. It would appear that, by definition, unsolicited proposals are those that have not been considered as critical to achieving development goals. This is in contrast to countries such as Chile, Costa Rica, and Italy, where unsolicited bids are used to drive alternative approaches to priority projects. The PPP Center's policy brief suggested that the Philippines should change the law to follow this example.

There are two unsolicited projects in the Philippines pipeline: NLEx-SLEx Connector Road (\$482 million, stage unclear) and the MRT Line-7 (\$1,439 million, contract awarded and ready for implementation).<sup>234</sup> It is unclear how many unsolicited proposals have been

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<sup>230</sup> PPP Center – Policy brief, unsolicited proposals; [http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals\\_20092012.pdf](http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals_20092012.pdf).

<sup>231</sup> PPP Center – Policy brief, unsolicited proposals; [http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals\\_20092012.pdf](http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals_20092012.pdf).

<sup>232</sup> ZGLaw – PPP in the Philippines, a Practical Guide for Businesses; <http://zglaw.com/public-private-partnerships.pdf>.

<sup>233</sup> PPP Center – PPP Process flow chart; [http://ppp.gov.ph/?page\\_id=514](http://ppp.gov.ph/?page_id=514). Many of these terms are described in greater detail in PPP Center – Policy brief, unsolicited proposals; [http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals\\_20092012.pdf](http://ppp.gov.ph/wp-content/uploads/2012/09/Policy-Brief-Unsolicited-Proposals_20092012.pdf).

<sup>234</sup> The NLEx-SLEx Connector Road (\$482 million) is listed as an unsolicited project, while the MRT Line-7 (\$1,439 million) is listed under “other projects for implementation” in the PPP Center pipeline, August 2014. <http://ppp.gov.ph/wp-content/uploads/2014/08/PPP-Projects-Pipeline->

accepted in the Philippines, and how many of those proposed a nonpriority project and how many proposed an alternative approach (in technology or concept) to a project from the priority list.

There are some differences in the approval process for solicited and unsolicited PPPs, with some of the key aspects regarding information disclosure outlined in the following paragraphs.

### **Pre-Procurement**

The project being proposed must be prepared by the proposing firm (original proponent) in the same manner that the government would prepare a project for solicited bids; this includes a feasibility study.<sup>235</sup> If NEDA and the LGU or Investment Coordination Committee approve the project (as is also required with solicited proposals), the proposal will then be subjected to the Swiss challenge. This challenge involves the publication of the proposal and inviting third parties to compete for the project, which introduces competition into the unsolicited procurement. These bids will then be compared against the original unsolicited bid, and the process then continues as with a solicited bid.<sup>236</sup> If the competitors submit a lower-priced proposal than the original bidder, the original bidder has 30 days to match it and win the contract. Proprietary information contained in the original proposal is confidential and will not be disclosed at this stage.<sup>237</sup>

### **Post-Procurement**

The BOT Law IRR (2006 revisions, retained in the 2012 revisions) states in Section 10.16 that, for an unsolicited project, the financial proposal of the original proponent may be revealed in the tender documents if the procuring agency and the original proponent agree. Regardless, it will be revealed at the opening of financial proposals of comparative bids.

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[Chart 2014Aug08.pdf The MRT Line-7](#) does not have its own webpage on the PPP Center website at present. The NLEx-SLEx Connector Road is delayed and its NEDA approval has expired.

<http://ppp.gov.ph/?p=24131>.

<sup>235</sup> PPP Center – PPP Manual for LGUs, Volume 2; <http://ppp.gov.ph/wp-content/uploads/2012/07/PPP-Manual-for-LGUs-Volume-2.pdf>.

<sup>236</sup> ZGLaw – PPP in the Philippines, a Practical Guide for Businesses; <http://zglaw.com/public-private-partnerships.pdf>.

<sup>237</sup>ADB - Public Private Partnership Handbook;

<http://www.apec.org.au/docs/ADB%20Public%20Private%20Partnership%20Handbook.pdf>. See Box 15, p. 73: Unsolicited proposals.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The BOT Law requires agencies and LGUs to ensure wide publicity of the List of Priority Projects through publishing it at least every six months in a national newspaper of general circulation, and ensuring that it is posted on the PPP Center website.<sup>238</sup> In addition, the Government Procurement Reform Act of 2003 lays out several requirements generally and in the pre-procurement stage, although as of the 2009 update to the Government Procurement Reform Act it does not apply to projects that fall under the BOT Law.<sup>239</sup> The requirements of the laws regarding PPP information disclosure are outlined in greater detail in annex B, the most important requirements in the BOT Law are

- *Section 4.* All eligible projects are to be made widely available in local and national newspapers, and international newspapers where applicable. Publication must take place every six months. Suppliers may register with the procuring government agencies to be notified of any new opportunities.
- *Section 5.* Invitations to qualify and bid must be published once a week for three weeks in local and national papers. The IRR adds that, for projects greater than \$10 million, they may be published internationally. The IRR (Section 10.11) indicates similar requirements for requests for comparative proposals for unsolicited procurement.
- *IRR Section 10.10.* Proprietary information must be treated with confidentiality and excluded from tender documents.

The PPP Center provides details on live and upcoming bids on its website and through occasional promotional material.<sup>240</sup>

<sup>238</sup> PPP Center - BOT Law R.A. 7718 Amended 2012; [http://ppp.gov.ph/wp-content/uploads/2013/02/BOT-IRR-2012\\_FINAL.pdf](http://ppp.gov.ph/wp-content/uploads/2013/02/BOT-IRR-2012_FINAL.pdf).

<sup>239</sup> Government Procurement Policy Board – the Government Procurement Reform Act 2003; [http://www.gppb.gov.ph/laws/laws/RA\\_9184.pdf](http://www.gppb.gov.ph/laws/laws/RA_9184.pdf).

<sup>240</sup> PPP Center – PPP @ PH, Investment Opportunities; <http://ppp.gov.ph/wp-content/uploads/2014/03/PPP-Brochure-February-2014-R2.pdf>.

What material is required to be confidential?

There are no confidentiality requirements except with respect to unsolicited proposals.

Collect and reference any specific templates/checklists being used for disclosure

The PPP Center publishes templates of bidding documents in Volume 3 of A PPP Manual for LGUs, entitled Utilizing LGU PPP Project Templates and Bid Documents.<sup>241</sup> The templates include examples from three previous PPPs.

Do the documents in question have retroactive effect?

It appears that the laws surrounding PPPs in the Philippines do not, in general, have retroactive effect. Two particular references to retroactive effect are found in the documents:

- *BOT Law, 2012 IRR revisions.* There is no retroactive effect. IRR implies that projects approved by October 22, 2012, could continue through procurement and post-procurement without being subject to the revisions: “*Upon effectivity of these revised IRR, all PPP projects, including those presently being processed and/or reviewed but not yet approved by the Approving Body shall hereafter be processed and/or reviewed in accordance with these revised IRR.*”

*Government Procurement Reform Act, 2003.* There is no retroactive effect. The Department of Public Works and Highways website states that it only applies to those projects that were put to tender on or after October 3, 2003.<sup>242</sup>

Validation of information

No information on this is available.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

There is regularly updated information on the status of many PPP projects published on the PPP Center website, with individual pages for further information on most projects.<sup>243</sup> Most bid documentation is easily available on the PPP Center website, with contact information available for senior members of the project team (that is, the project monitoring officer and

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<sup>241</sup> <http://ppp.gov.ph/wp-content/uploads/2012/07/PPP-Manual-for-LGUs-Volume-3.pdf>.

<sup>242</sup> [http://www.dpwh.gov.ph/about\\_us/reforms/rimss/tambuli/2005/jul\\_sept\\_05/ra\\_9184.htm](http://www.dpwh.gov.ph/about_us/reforms/rimss/tambuli/2005/jul_sept_05/ra_9184.htm).

<sup>243</sup> Updated website at [http://ppp.gov.ph/?page\\_id=5663](http://ppp.gov.ph/?page_id=5663). The downloadable PDF chart was most recently updated in August 2014, and before that in June 2014: PPP Center – Status of PPP Projects, June 2014; [http://ppp.gov.ph/?page\\_id=5663](http://ppp.gov.ph/?page_id=5663).

director).<sup>244</sup> It is unclear what of this information is required and what is published voluntarily. Similarly, a list of interested bidders is sometimes provided, without reference to this being a necessity.<sup>245</sup>

Some national and local government officials used the Government Procurement Reform Act (RA 9184, 2003) for PPP projects, even if these were supposed to be covered by the BOT Law.<sup>246</sup> The 2009 amendments to the IRR of the Government Procurement Reform Act addressed this issue by stating that this Act would not cover projects that are covered by the BOT Law.

The following list summarizes disclosure for five projects that span the differing legal frameworks since the introduction of the BOT Law in 1990.

- *Bauang Diesel Plant*: 1993 BOT, which was concluded in 2010. Very few details are available freely online.
- *Sual Coal-Fired Thermal Power Plant*.
- *Ninoy Aquino International Airport Terminal III*: 1997 BOT, unsolicited proposal awarded to a competitive bidder, contract made null in 2004. There is little available information and few available documents, although there is more information than for other projects from that time because of the controversies surrounding the project.
- *PPP for School Infrastructure (PSIP) Phase I*: 2013 build, lease, and transfer (BLT), approved in 2012 prior to the new BOT Law IRR amendments in October 2012.

*Modernization of the Philippine Orthopedic Center*: 2014 BOT, approved in 2013 as a solicited proposal. This is one of few projects in implementation since the new BOT Law IRR amendments in October 2012. The PPP Center website is publishing some updates on the construction of the project, and plenty of documents are available to download, but the contract is not on the website.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Bauang Diesel Power Plant**

The Bauang diesel power plant was developed by a special purpose company (SPC) established in 1992. It was a BOT arrangement, and awarded to the SPC, Bauang Private Power Corporation, in 1993. It became operational in 1995 and the 15-year BOT agreement expired in 2010; hence, the power plant has now been handed back to the government.<sup>247</sup>

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<sup>244</sup> For an example for the Daang Hari-SLEX Link Road Project: <http://ppp.gov.ph/?p=8169>.

<sup>245</sup> PPP Center – List of interested bidders; [http://ppp.gov.ph/?page\\_id=16224](http://ppp.gov.ph/?page_id=16224).

<sup>246</sup> [http://www.gppb.gov.ph/tso\\_news/CPAR2012.pdf](http://www.gppb.gov.ph/tso_news/CPAR2012.pdf), p. 9.

<sup>247</sup> <http://www.firstgen.com.ph/OurAssets.php?id=21>.

There are two relevant pieces of disclosure law that applied to this project, although given that this took place many years ago, we cannot verify whether these were adhered to:

- *BOT Law, RA 6957 1990 Section 4.* Infrastructure agencies must give wide publicity to all projects eligible under this Act, including publishing in national newspapers once every six months, and official notification to the contractors registered with them.
- *BOT Law, RA 6957 1990 Section 5.* Approved priority projects should be published once a week, for three weeks, in three newspapers (two general circulation and one local) to invite public bidding.

### **Sual Coal-Fired Thermal Power Plant**

This power plant has an installed capacity of 1,216 megawatts. It is a BOT-energy conversion agreement to the value of €1,200 million, and is currently in operation. No documents appear to exist on the PPP website, but other sources suggest that it is a 25-year concession that began in 1995.<sup>248</sup> It is therefore unclear whether it would fall under the 1990 or 1994 law; however, the relevant sections (Section 4 and Section 5 regarding publication of priority projects prior to procurement) would be similar. There is no information available to determine whether these requirements were met in the procurement process.

### **Ninoy Aquino International Airport Terminal III**

The construction of the third terminal at the main airport in Manila was awarded in 1997 on a \$650 million 25-year BOT. This project was developed through an unsolicited proposal, as permitted in BOT Law R.A. 7718 of 1994, although it is unclear on what grounds it was decided to choose to accept this unsolicited proposal and invite comparative proposals. The contract was awarded to a bidder that offered a bid less than that of the original proponent (who chose not to match the bid, as offered through the Swiss challenge system). The contract was made null in 2004 after some controversy regarding the contract terms. As this procurement took place before the 2006 (and 2012) revisions to the BOT Law IRR, and also before the Government Procurement Reform Act (2003), there were minimal requirements overall in pre-procurement, with only one disclosure requirement:

- *BOT Law, RA 7718 114 Section 4-A.* We are unsure if the project is compliant; the invitation is not available online, presumably because of the age of the project, although receipt of a competitive bid implies some public knowledge of the procurement.

### **PPP for School Infrastructure Project (PSIP) Phase I**

This project was developed as a 10-year BLT PPP, awarded in September and October 2013 (to two firms).

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<sup>248</sup> <http://ppi.worldbank.org/explore/PPIReport.aspx?ProjectID=304>.



The documents that are available<sup>249</sup> include: notification of award, invitation to prequalify, and bid. A list of prospective bidders, prequalified bidders, bidders, and winning bidders is available on the PPP Center website.<sup>250</sup>

As the invitation to prequalify and bid was submitted on January 8, 2012, the relevant and applicable laws for this project are the amendments to BOT Law 1994 and BOT Law IRR 2006. It is not clear, however, whether the project adhered to the following applicable sections of the RA:

- *BOT Law, RA 7718 1994: 2006 amendments to the IRR Section 2.4.* Publication and notice: agencies and LGUs should also ensure that their priority list from Section 4 of the R.A. is posted continuously on their own website.
- *BOT Law, RA 7718 1994: 2006 amendments to the IRR Section 5.2.* Publication of invitation to prequalify and bid should be published once a week, for three weeks, in three newspapers to invite public bidding. It should be published in one local paper (local region, province, city, or municipality of the proposed project construction) and two general circulation newspapers. These may include an international publication for projects of \$10 million and above. The procuring agency must inform any project proponents that are registered with it.
- *BOT Law, RA 7718 1994: 2006 amendments to the IRR Section 14.1.* The BOT (now PPP) Center coordinates and monitors projects according to these IRR, and is responsible for ensuring project compliance. Agencies are to submit project status updates periodically to the BOT Center, although there are no specifications regarding the BOT Center publicly disclosing this information.

### **Modernization of the Philippine Orthopedic Center**

This project is the construction of a 700-bed capacity super-specialty tertiary orthopedic hospital to be located within the National Kidney and Transplant Institute Compound. The concessionaire will build, finance, operate, and maintain the facility until the end of the concession period, then transfer the hospital to the Department of Health.<sup>251</sup>

This project is being undertaken through a \$126.44 million BOT on a 25-year contract (inclusive of construction) that was signed on March 6, 2014.<sup>252</sup> The project was approved by NEDA on November 21, 2013, and therefore the main applicable laws are BOT Law R.A. 7718 1994 and BOT Law R.A. 7718 2012 amended IRR.

There is a range of information and documents available on the PPP Center website, including: list of prospective bidders, invitation to qualify and bid, detailed information memorandum, 21 bid bulletins, notice of award, two presentations at investors' forums, and contact details for the undersecretary, an orthopedic surgeon, and the project manager. A list of prospective bidders, prequalified bidders, bidders, and winning bidders is also

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<sup>249</sup> <http://ppp.gov.ph/?p=12786>.

<sup>250</sup> [http://ppp.gov.ph/?page\\_id=16224](http://ppp.gov.ph/?page_id=16224).

<sup>251</sup> <http://www.gov.ph/2013/11/21/projects-approved-by-the-neda-board-november-21-2013/>.

<sup>252</sup> <http://ppp.gov.ph/?p=7686>.

available on the PPP Center website.<sup>253</sup> However, of the following requirements, it was only possible to verify whether one was successfully adhered to:

- *BOT Law, RA 7718 1994 Section 4.* The infrastructure agency is to give wide publicity to the priority project, including publishing in national newspapers every six months, and international newspapers where applicable. The agency must also notify any contractors registered with it.
- *BOT Law, RA 7718 IRR 2006 Section 2.4.* Procuring agencies should also ensure that the priority list is published continuously on their website, if they have a website.
- *BOT Law, RA 7718 1994 Section 5.* Invitations to bid should be published, at a minimum, once a week for three weeks in local and national newspapers.
- *BOT Law, RA 7718 IRR 2006 Section 5.2.* This requirement covers invitations to prequalify and projects above \$10 million may be published in an international newspaper. Any contractors registered with the procuring agency must be informed.
- *BOT Law, RA 7718 IRR 2012 Section 2.3.* Updates to priority lists should be submitted to the PPP Center within five days of approval, for posting on the PPP Center website. Previous priority lists are not available, so this could not be verified. Dates of approval are often difficult to determine unless an article has been written explicitly discussing dates.
- *BOT Law, RA 7718 1994: 2006 amendments to the IRR Section 14.1.* The PPP Center publishes some updates on the progress of the project.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

PPP Law in the Philippines mainly focuses on pre-procurement. However, there are some requirements outlined, mainly regarding monitoring projects. The 1994 BOT Law and the

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<sup>253</sup> [http://ppp.gov.ph/?page\\_id=16224](http://ppp.gov.ph/?page_id=16224).

2012 revisions to its IRR outline the following in terms of information disclosure in the post-procurement stage of PPPs:

- *IRR Section 10.16.* In an unsolicited project, disclosure of the financial proposal of the original proponent, in the tender documents, must be mutually agreed between the procuring agency and the original proponent. Regardless, it must be revealed at the opening of financial proposals of any comparative bids.
- *IRR Section 11.2.* The procuring agency must notify the preferred bidder within five calendar days of its decision, and also inform unsuccessful bidders, and make all decisions available to the public when requested.
- *IRR Section 11.4.* The Prequalification, Bids, and Awards Committee must post the notice of award and/or bidding results on the PHILGEPs website, the PPP Center website, and the procuring agency's website.
- *IRR Section 14.1.* The PPP Center is required to coordinate and monitor projects according to the BOT Law IRR, and is responsible for ensuring project compliance. Agencies are to periodically submit project status updates. The PPP Center is not required to disclose this information publicly.
- *IRR Section 14.3.* Each procuring agency may create a PPP unit that designates a senior official as the PPP development officer who is responsible to plan, oversee, and monitor projects authorized under this Act.

The Government Procurement Reform Act, RA 9184, was published in 2003<sup>254</sup> and laid out several requirements of disclosure. As of the 2009 IRR amendments, these requirements do not apply to PPP projects that are covered by the BOT Law. The requirements are outlined in annex B: Summary of changes in laws and regulations surrounding disclosure in PPPs.

The Aquino Administration is attempting to make amendments to the IRR of the BOT Law, which would introduce full disclosure of PPP contracts, with the exception that proprietary information in contracts could be kept confidential for a limited period (potentially five years).<sup>255</sup>

What material is required to be confidential?

There is no information on this to date, but the proposed changes to the BOT Law by the current government would clearly state that proprietary information in contracts would be kept confidential, but only for a limited period.<sup>256</sup>

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<sup>254</sup> Government Procurement Policy Board – the Government Procurement Reform Act 2003; [http://www.gppb.gov.ph/laws/laws/RA\\_9184.pdf](http://www.gppb.gov.ph/laws/laws/RA_9184.pdf).

<sup>255</sup> Philstar - Gov't pushes amendments to BOT Law; <http://www.philstar.com/business/2014/05/11/1321660/govt-pushes-amendments-bot-law>.

<sup>256</sup> Philstar - Gov't pushes amendments to BOT Law; <http://www.philstar.com/business/2014/05/11/1321660/govt-pushes-amendments-bot-law>.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

**We have not found information on this to date.**

Collect and reference any specific templates/checklists being used for disclosure

**There are sample PPP contracts available on the PPP Center website,<sup>257</sup> which are provided by Philippines-Australia Partnership for Economic Governance Reforms. The issues covered by these contracts include the following:**

- Project implementation
- Construction, testing, and commissioning
- Operation and maintenance
- Payment, insurance, and representation and warranties
- Contract management, monitoring, and evaluation
- Events of default, limitation of liability, and agency step-in rights
- Assignment of rights and ownership of the company
- Dispute resolution and contract termination conditions.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

**It appears the laws surrounding PPPs in the Philippines do not, in general, have retroactive effect.**

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

**Sample contracts are provided by the Philippines-Australia Partnership for Economic Governance Reforms.<sup>258</sup> These set out performance information, audit reports, and third-party monitoring and evaluation requirements. However, the document does not appear to require public disclosure.**

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<sup>257</sup> [http://ppp.gov.ph/?page\\_id=671](http://ppp.gov.ph/?page_id=671).

<sup>258</sup> [http://ppp.gov.ph/?page\\_id=671](http://ppp.gov.ph/?page_id=671).

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

If using the sample contracts, The company is obliged to appoint auditors approved by the agency and submit audited annual financial statements, although it is not clear whether these must be disclosed publicly. There is an Auditing Commission, which may carry out a public audit.<sup>259</sup>

Validation of information

We did not find any information on this.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

Although it is not explicitly stated what the notice of award must contain, from the PPP Center website it appears that these notices typically do not contain more than basic information (winning entity, cost, date of notice).

There is regularly updated information on the status of the PPP projects published on the PPP Center website, with individual pages for further information on each project.<sup>260</sup> All bid documentation is easily available on the PPP Center website, with contact information available for senior members of the project team (that is, project monitoring officer and director).<sup>261</sup>

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Buang Diesel Power Plant**

The Buang diesel power plant was developed by an SPC established in 1992. It was a BOT arrangement, and awarded to the SPC, Buang Private Power Corporation, in 1993. It became operational in 1995 and the 15-year BOT agreement expired in 2010. Hence, the power plant has now been handed back to the government.<sup>262</sup> Very few details appear to be available online; the disclosure rules do not appear to be applied to previous projects.

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<sup>259</sup> [http://ppp.gov.ph/?page\\_id=671](http://ppp.gov.ph/?page_id=671).

<sup>260</sup> The downloadable PDF chart was most recently updated in June 2014: PPP Center – Status of PPP Projects, June 2014; [http://ppp.gov.ph/?page\\_id=5663](http://ppp.gov.ph/?page_id=5663).

<sup>261</sup> See an example for the Daang Hari-SLEX Link Road Project; <http://ppp.gov.ph/?p=8169>.

<sup>262</sup> <http://www.firstgen.com.ph/OurAssets.php?id=21>.

*No requirements at the time of approval.*

### **Sual Coal-Fired Thermal Power Plant**

This power plant has an installed capacity of 1,216 megawatts. It is a BOT-energy conversion agreement to the value of €1,200 million, and is currently in operation. No documents appear to exist on the PPP website. Other sources suggest that it is a 25-year concession, which began in 1995.<sup>263</sup>

*No requirements at the time of approval.*

### **Ninoy Aquino International Airport Terminal III**

This is a controversial project, and the contract was made null in 2004. However, the project took place prior to the 2006 amendments of the BOT Law and therefore was not subject to many of the legal requirements, including regarding disclosure, which were later introduced.

*No requirements at the time of approval.*

### **PPP for School Infrastructure Project (PSIP) Phase I**

The contract was awarded in September/October 2013 (two firms). There does not appear to be a contract available. The project seems to have already been worked on and something of a success; therefore, it would be expected that a contract would be available.<sup>264</sup> The invitation to bid was submitted on January 8, 2012,<sup>265</sup> before the 2012 IRR BOT Law amendments came into effect on October 22, 2012; therefore, this project was subject to the 2006 revisions.

### **Modernization of the Philippine Orthopedic Center**

This project is for the construction of a 700-bed capacity super-specialty tertiary orthopedic hospital to be located in the National Kidney and Transplant Institute Compound. The concessionaire will build, finance, operate, and maintain the facility until the end of the concession period, then transfer the hospital to the Department of Health.<sup>266</sup>

The project is being undertaken through a \$126.44 million BOT on a 25-year contract (inclusive of construction), which was signed on March 6, 2014.<sup>267</sup> The project was approved by NEDA on November 21, 2013, and therefore the main applicable laws are: BOT Law R.A. 7718 1994; and BOT Law R.A. 7718 2012 amended IRR.

There is a range of pre-procurement information and documents available on the PPP Center website; however, the contract is not available on the PPP Center website.

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<sup>263</sup> <http://ppi.worldbank.org/explore/PPIReport.aspx?ProjectID=304>.

<sup>264</sup> <http://ppp.gov.ph/?tag=psip-phase-i>.

<sup>265</sup> [http://ppp.gov.ph/wp-content/uploads/2012/01/ITPB\\_PPPSchoolBldg.pdf](http://ppp.gov.ph/wp-content/uploads/2012/01/ITPB_PPPSchoolBldg.pdf).

<sup>266</sup> <http://www.gov.ph/2013/11/21/projects-approved-by-the-neda-board-november-21-2013/>.

<sup>267</sup> <http://ppp.gov.ph/?p=7686>.

## What are the challenges and benefits to disclosure?

There are not many requirements for the private or public sector to publish documents and information proactively, with much of the information in the public domain (such as on the PPP Center website) seemingly being published voluntarily. Although the sharing of documents between government agencies is often required, there is no requirement for the information to then be shared publicly.

Although individual citizens are able to request certain information, such as redacted contracts, there are no clear provisions in the law for these. The requirement of individual requests to obtain documents of interest may be seen as inefficient compared with a system where the documents are freely available online, although where the costs of making documents freely available are high, there may be a financial incentive to create barriers to access.

## What can we learn from this country study?

The focus of the PPP legal framework in the Philippines, for information disclosure and overall, is heavily focused on pre-procurement issues rather than post-procurement requirements. This is consistent with the focus on encouraging more bidders for PPP as a driver for more transparency. Transparency in the pre-procurement stage helps to reduce the scope for corruption in PPPs, which was another driver of the changes in regulation.

A lack of post-procurement transparency is not entirely consistent with the interest of the general public in accessing information on projects, although some of the gaps in the PPP legal framework would be filled by the likely implementation of the Freedom of Information Act (which has now passed through one of the two houses of Congress to become law).

## 12. South Africa



### PPP context in South Africa

How are PPPs undertaken in South Africa?

Government in South Africa consists of three spheres, national government, provincial government, and local government. The national and provincial levels of government are

jointly referred to as the public sector, while local government is referred to as the municipal sector.

The Minister of Finance is mandated to oversee and regulate the PPP framework across all three spheres. A PPP unit was set up at the National Treasury in 2000 to play a regulatory role and set up the market for PPPs in South Africa. The guiding principle for PPPs is enshrined in the Constitution, which provides that when an organ of the state in the national, provincial, or local sphere or any other institution identified in national legislation contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective.<sup>268</sup>

### **PPPs at the National and Provincial Levels of Government**

PPPs at national and provincial levels of government are regulated by the Public Finance Management Act, 1999, and Treasury Regulation 16. PPPs at the local government level are regulated by the Municipal Finance Management Act and its regulations as well as the Municipal Systems Act 2003. Municipalities are required to comply with the directives issued from two ministries, that is, the National Treasury as well as the Department of Cooperative Governance, which is responsible for ensuring effective and accountable local government. To streamline the processes between these two departments, the PPP unit in collaboration with the Department of Cooperative Governance developed the Municipal Service Delivery and PPP Guidelines.

Typically national government departments have used PPPs to build government head office buildings and for vehicle fleet management. At a provincial level, PPPs have been used to build hospitals and transportation infrastructure, as these functions may be implemented provincially. As of July 2014, 24 PPPs had been entered into by the public sector under the Public Finance Management Act.

### **PPPs at the Municipal Government Level**

Municipalities are tasked with the responsibility of service delivery, including water, solid waste, electricity, sanitation, and roads. Municipal PPPs have been procured for the delivery of municipal services as well as the building, operating, and maintenance of infrastructure that will ensure the delivery of such services. In the municipal context, PPPs have largely been used in the building of the infrastructure required to deliver water and sanitation services as well as solid waste management services.

In the South African context, it is very important to consider the enabling environment, including political support and buy-in from key stakeholders prior to embarking on a PPP.

The National Treasury has indicated that the largest challenge to procuring infrastructure via PPPs is time. Although politicians would like to produce infrastructure quickly to keep their voters happy, the process of undertaking a legitimate procurement process takes time.

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<sup>268</sup> Section 217 of the Constitution.



In the municipal context, PPPs have been opposed by the trade unions that have perceived PPPs to be a form of privatization. This resistance by the trade unions has proved to be a constraining effect for the use of PPPs in the municipal sphere.

What are the policy objectives behind disclosure?

The policy objectives behind disclosure of information in South Africa are driven first and foremost by section 217 of the Constitution, which provides that when goods and services are procured by government, it must be done in accordance with a system that is *fair, equitable, transparent, competitive, and cost-effective*. These principles are interrelated and collectively inform the regulatory framework within which PPPs are undertaken in South Africa.

With respect specifically to disclosure of information, it is important to bear in mind that South Africa has come from a past in which information was restricted and limited as part of the apartheid regime. One of the fundamental principles of the Constitution as set out in the Bill of Rights is that everyone has the right to have access to information that the government has as well as information that someone else has if they need to protect any of their rights. The right of access to information, therefore, extends to a private body or any other entity if any person needs information to protect their rights. This right may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The Promotion of Access to Information Act, Act 2 of 2000, outlines the process through which the public can access information. The Act requires disclosure of information in response to requests for information. The policy objective of this Act has been to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information as well as actively promoting a society in which the people of South Africa have effective access to information to enable them to exercise more fully and protect all of their rights.

Uses and users of disclosure information and the exact nature of such use

The key users of pre-procurement information are potential bidders, who use it to determine whether they will bid for a PPP. They would consider *inter alia* the bid requirements, bid specifications, as well as the budget allocated to the bid and determine whether it is worth their while to submit a bid.

There has been a history in South Africa of departments embarking on expensive bids for PPPs and halting the project midway. This has led to a loss in faith among bidders as to the tenders offered by such departments that have been more prone to poor technical processes in the awarding of tenders in general. The National Treasury has advised, however, that for the most part, the bidding community has developed trust in the procurement system of the public sector and uses the information disclosed in the bid process to respond to the requirements of the tendering department.

When a PPP is commissioned, other government departments, especially those that exercise oversight, such as the National Treasury, also rely on the information disclosed for their own reporting and monitoring purposes.

In terms of the policy objective of transparency in procurement processes as set forth in the Constitution, the rationale is that the public also has a right to know that public money is being spent accountably. In addition, the public, as the beneficiary of the service that is being procured, also has the right to know that the products that are being procured through the PPP demonstrate value for money.

#### List of laws, policies, and regulations

- Constitution of the Republic of South Africa, Act 108 of 1996 as amended (the Constitution)
- Promotion of Access to Information Act, Act 2 of 2000 (PAIA)
- Promotion of Administrative Justice Act, Act 3 of 2000
- Public Finance Management Act, Act 1 of 1999
- Treasury Regulations for Departments, trading entities, constitutional institutions, and public entities, issued in terms of the Public Finance Management Act, Act 1 of 1999
- Municipal Finance Management Act, Act 56 of 2003 (MFMA)
- National Treasury (2004) Standardized PPP Provisions: National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act
- National Treasury (2004) Public Private Partnership Manual: National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act
- Municipal Public-Private Partnership Regulations, 2005, issued in terms of the Local Government: Municipal Finance Management Act, Act 56 of 2003.

#### Proactive pre- and post-procurement disclosure in unsolicited projects

Unsolicited proposals are generally discouraged by the PPP unit. Government entities are under no obligation to consider an unsolicited proposal; however, recognizing that unsolicited proposals do take place, the National Treasury has provided practice notes/guidelines in terms of which unsolicited projects can be considered. The National Treasury's rationale for setting out these procedures was to create an environment where advantage can be taken of the private sector's capacity to conceptualize, package, and develop projects while ensuring and protecting public policy objectives at the same time.

Institutions may only consider an unsolicited project if it has a relevant and comprehensive project feasibility study that has established a clear business case, involves innovative design, involves an innovative approach to project development and management, or presents a new cost-effective method of service delivery.

## **Public Sector**

The National Treasury's Practice Note Number 11 of 2008/2009 provides direction to the public sector on dealing with unsolicited proposals. The Practice Note provides an obligation initially on the proponent of the unsolicited bid to ensure that the bid contains prescribed information, including the identification of any confidential or proprietary data not to be made public, as well as a declaration by the proponent that the unsolicited proposal is not as a result of any nonpublic information obtained from officials of the institution.

The Practice Note provides details around the information that should be provided in the proposal by the proponent, including a statement of how the proposal is demonstrably innovative, as well as the costs and benefits of the proposal.

If the accounting officer of an institution decides to proceed with the unsolicited bid, the parties must proceed in accordance with the provisions of the Practice Note, which will entail, initially, the completion of a feasibility study. Once the feasibility study is concluded, which demonstrates the affordability, transfer of significant risk to the unsolicited bid proponent, and value for money, then the institution can embark on a procurement process starting with a publicly advertised request for qualifications (RFQ). The RFQ is done in the same manner as solicited PPPs to test the market to determine if there may be others who can provide the service that is offered in the unsolicited bid. If there are others in the market who qualify through the RFQ process, a typical competitive bid process must be undertaken, with a request for proposals (RFP) that must be provided to all qualifying bidders.

In this formal bid process, the institution must disclose that the bid originated from an unsolicited proposal, provide the agreed costs and terms of payment to the proponent, and require that all bidders, save for the proponent, make allowance for these costs and pay such costs to the proponent directly, if their bid is successful. Excepting this, the disclosure requirements are the same for an unsolicited project as for a solicited project.

The Practice Note expressly provides that the institution cannot use the unsolicited proposal until the bid proceeds to the procurement stage, and that the entity cannot disclose any information that had been identified as confidential.

## **Municipal Sector**

Section 37 of the Municipal Supply Chain Management Regulations, as augmented by the Municipal Service Delivery and PPP Guidelines, has a section on unsolicited bids that mirrors the process at the national level outlined in National Treasury Practice Note No. 11 of 2008/09.

The National Treasury indicates that there have been some positive experiences of unsolicited bids in the municipal sector where, for instance, mines would require water for processing but are unable to access water. Another instance would be where municipalities struggle to provide electricity distribution services and collect electricity arrears. Recognizing this gap or need, private sector companies would then submit unsolicited bids to provide electricity distribution services, including installing prepaid electricity meters.

However, municipalities also bear the brunt of pressure from the private sector to succumb to unsolicited bids, which can easily lead to corrupt activities taking place if officials lack the capacity to manage this pressure.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

There is a limited requirement for proactive disclosure of information in the PPP procurement process in law and policy in the South African case.

Should the project get approval through the feasibility study, the PPP Manual provides that in the initiation of the project the basic information (for example, the project description) is proactively disclosed to the public, through advertisements, in an RFQ. The obligation to disclose information then arises during the procurement phase.

The RFQ must follow the institution's supply chain management policy, typically involving advertising the project in relevant publications, in the Government Gazette, on the institution's website, and making press statements about the project and inviting interested parties to collect or download copies of the RFQ.

The RFQ must contain the following information:

- Project description, background, and overview
- Land issues
- Black Economic Empowerment (BEE) and socioeconomic requirements
- Defined performance parameters, defined legal requirements, and statutory regulation related to the PPP
- Identified financing requirements and issues
- Identified revenue parameters
- Summary of envisioned risk transfer
- Institution requirements for consortium membership
- Stages and timelines of the procurement process
- Clarification processes and briefing notes

- Format of submissions
- Information required about the bidders
- The evaluation process, including methodology and criteria.

After the RFQ process, short-listed bidders will receive the RFP and be invited to submit proposals. The RFP is not a public document and includes a draft PPP agreement. The RFP must be approved by the National Treasury prior to distribution.

In the RFP, general information to the bidders must include:

1. Explanation of the project
2. External framework of the institutional environment
3. Project framework
4. Procurement framework and timelines
5. Instructions to bidders
6. Requirements related to third parties
7. A data room where all information that the bidders need is available; this information is not warranted as it all should be verified by the bidders
8. Environmental impact assessment data
9. Bidders' due diligence
10. Quality management system
11. Important definitions.

In terms of assets, the PPP Manual requires that all bidders are given access to all information on assets, including their condition and their maintenance records.

The RFP must also provide details of the evaluation process. South African law provides that selection of a preferred bidder must be based on the two elements of price and BEE qualifications.

The proposals received are evaluated and the preferred bidder is selected. Negotiations with the preferred bidder are undertaken and the PPP agreement is finalized.

### **Municipal PPPs**

Municipal PPPs are governed by the Municipal Systems Act (MSA) as well as the MFMA. Given the service delivery responsibility tasked to local government, there is a greater responsibility on local government to consult with their communities in the process of embarking on a PPP for the delivery of a municipal service.

The MSA provides that when a municipality decides on a mechanism to provide a municipal service, it should follow the process as outlined in Section 78 of the MSA. Hence, where a PPP is the mechanism of service provision, the municipality needs to consider the costs and benefits of the PPP. During this feasibility stage, the municipality is

required to take into consideration the views of organized labor as well as the views of the local community in determining the most appropriate mechanism to provide a municipal service.

Section 120 of the MFMA requires the submission of the PPP feasibility report to the council for a decision whether the municipality should proceed with the PPP. Section 78(2) of the MSA requires a council decision to explore the provision of a municipal service by an external mechanism prior to the council's ultimate decision on a particular service delivery mechanism. Section 120(6) of the MFMA outlines that there should be a minimum 60-day period prior to the council meeting for the feasibility study to be considered. During this period, the municipality is required to disclose publicly the particulars of the proposed PPP and the feasibility study and to solicit comments from the local community. The municipality must also solicit the views and recommendations of the National Treasury, the provincial treasury, and the national department for local government, known as the Department of Cooperative Governance and Traditional Affairs.

The MSA echoes these sentiments and provides that before a municipality enters into a service delivery agreement for a basic service, it must establish a program for community consultation and information dissemination.

At least 60 days before the meeting of the municipal council at which the matter is to be discussed in accordance with Section 21A of the MSA, the accounting officer must:

- Publicly disclose the particulars of the proposed PPP, including the report on the feasibility study
- Invite the local community and other interested persons to submit to the municipality comments of representations in respect of the proposed PPP.

Once a partner has been selected, a draft contract must be drawn up. In the case of municipalities, the Municipal Manager is required, according to the Municipal Public-Private Partnership Regulations and Section 33(1)a(i) of the Municipal Financial Management Act, to disclose publicly the draft contract at least 60 days before the council meeting at which the municipal council will discuss the contract. There are no similar requirements for public sector institutions.

What material is required to be confidential?

The feasibility study undertaken prior to initiating the procurement process is confidential. The PPP unit in the Treasury noted in a telephone interview with researchers that it is important to keep some information confidential to ensure that the bidding process is competitive, as is required by the Constitution. The unit specifically identified the financial information from the feasibility study, which, if confidential, leads to a more competitive process.

The PPP procurement process is intended to be a collaborative/partnership process and not an adversarial process. The National Treasury's view is that it is in the interests of the public institution to give enough information during the RFQ and RFP stages to enable the

bidder to submit a competitive bid. However, it is not in the interest of competition and fairness to disclose the ceiling budget identified in the feasibility study. Bidders are given an indication of the price range or limit through the points system allocated for the scoring of bids; that is, 80/20 indicates a price value under R 1 million and 90/10 indicates a value in excess of R 1 million.

In the procurement process, bidders are reminded of the importance of keeping certain information confidential. During the RFP stage, all bidders are required to sign a code of conduct that includes several conditions, including the requirement for information disclosure. The requirement states the need to “*recognize the public’s right to access information in the interest of administrative justice.*”<sup>269</sup>

Following the RFP process, the institution may undertake a best and final offers (BAFO) approach. The PPP Manual outlines that requests for BAFO must remind bidders that information provided to them is confidential, copies of any information provided to bidders should be returned on request from the institution, and bidders may not communicate with the press about the project without the institution’s prior consent.

In terms of the legislation outlining the public’s right to access information, the Public Access to Information Act outlines grounds for the refusal of access to information, which includes the mandatory protection of the commercial information of a third party. Once bids are received, the institution cannot disclose the trade secrets of any of the bids received (third party) or financial, commercial, scientific, or technical information that would most likely cause harm to the third party’s interests. However, their right to confidentiality falls away if disclosure would reveal evidence of a substantial contravention of the law or an imminent and serious public safety or environmental risk, or if public interest clearly outweighs the harm of revealing the information.

Third party information is also protected if the disclosure of information would constitute a breach of confidence in terms of an agreement or if disclosure would prejudice the future supply of similar information. This confidentiality is also subject to the same limitation outlined above.

Information relating to the commercial activities of public bodies is confidential so far as the information contains the trade secrets of the state, or a public body, or financial, commercial, scientific, or technical information that would cause harm to the commercial or financial interests of the body, or prejudice it in commercial competition or contractual negotiations. However, this is also subject to the limitation outlined above.

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<sup>269</sup> Annexure 2, Code of Conduct, Module 5, Procurement, PPP Manual.

Collect and reference any specific templates/checklists being used for disclosure

**1. Annexure 3. Template Declaration of Interest Statement in the National Treasury PPP Manual Module 5: PPP Procurement (2004)**

This template requires a list of all the names of all consortium members for all the bids submitted. Against this list, each member of the evaluation panel must declare whether they have an interest with any of the bidders, and the extent of that interest.

**2. Suggested Contents of the Request for Qualifications in the National Treasury PPP Manual Module 5: PPP Procurement (2004)**

The suggested contents of an RFQ are set out to enable bidders to present appropriate information about themselves to qualify to be short-listed. The suggested contents outline the ways in which the evaluation criteria and process, as well as all special requirements, should be stated in the RFQ. The suggested contents also provide information about the project and instructions to respondents.

**3. Suggested Contents of the Feasibility Study Report in the National Treasury PPP Manual Module 4: PPP Feasibility Study (2004)**

The suggested contents of the feasibility study are intended to help create a document that provides as much information as is necessary for the relevant treasury to assess the merits of the project. The suggested contents include the following:

- Introduction (including submission requirement)
- Needs analysis
- Solution options analysis
- Project due diligence
- Value assessment
- Economic evaluation
- Procurement plan.

Advice about how to go about developing each of these elements is included in Module 4 of the PPP Manual.

**4. Suggested Contents of the Request for Proposals Report in the National Treasury PPP Manual Module 5: PPP Procurement (2004)**

The suggested contents for the RFP are intended to assist in the development of a document that is an effective two-way communication tool between the institution and bidders. The suggested contents include the following:

- General information for bidders
- Essential minimum requirements
- Service specifications



- Payment mechanism and penalty regime
- Legal requirements and draft PPP agreement
- Commitments required from bidders
- Evaluation criteria
- Bid formalities.

Suggested information that should be included is also explained.

Do the documents in question have retroactive effect?

No. The National Treasury advised that this was not a consideration, as the documents were all adopted in 2004 and have been in use across the spheres of government for the past 10 years.

Validation of information

There is not enough proactive disclosure of information in the South African case for validation to be of concern.

In its oversight role, the PPP unit tries to ensure that the sponsoring department or contracting authorities disclose accurate information as is available at the time to enable the bid process to run effectively. The responsibility for reliability of information sits with the contracting authority.

If the bidder puts forth a new idea, the contracting authority may want to validate the information prior to awarding the tender; however, this is not common practice.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

Practices in proactive disclosures are limited, as there are relatively few requirements for proactive disclosure. However, it appears that projects tend to adhere to the requirements of the PPP Manual. The PPP unit in the Treasury points out that it is not responsible for disclosure and that access to information needs to be arranged with the contracting parties. As far as the National Treasury is concerned, there are no regulations regarding proactive disclosure.

The PPP unit in the Treasury indicates that there are no current concerns with the level of actual proactive disclosure. It is in the contracting partner's interest to disclose as much information as required by the PPP Manual. Most proactive disclosure occurs between the government entity involved and the bidding parties, and no concerns have been raised about the extent of this disclosure.

From the one case study that we carried out, it is evident that the practice of disclosure of information and consultation processes that are meant to take place at the municipal level are as per the provisions of the MSA and MFMA.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Gautrain**

The Gautrain Rapid Rail Link is a state-of-the-art rapid rail network for Gauteng Province. The project was aimed at improving the transport infrastructure between two major cities in Gauteng (Johannesburg and Pretoria) as well as between Oliver Reginald Tambo International Airport and Sandton, part of the Johannesburg/Pretoria route. The project is said to be the one of the largest PPP projects in Africa.

The Gautrain prefeasibility study was initiated in 1998. This study was followed by a conceptualization report for Gautrain in June 2000 and a feasibility report by July 2001. A range of stakeholder consultations were held as well as a very successful international investor conference in September 2001. In 2002, the PPP Treasury authorization of the project's feasibility was received, as well as permission to issue of the RFQ. During April 2002, 10 RFQ submissions were received from prospective bidders. Two prequalified bidders (Bombela and Gauliwe) for the Gautrain were announced in May 2002. The RFP Phase I documents were issued during June 2002 and the RFP documents were issued to bidders in November 2002. The bid documents set out the minimum requirements for bidders. The bid was awarded in June 2005, seven years after the process started, to Bombela. The procurement stages ran between February 2002 and September 2006.

### **Department of Environmental Affairs Head Office**

In 2012, the National Department of Environmental Affairs (DEA) entered into a PPP for the design and construction of its new head offices in Pretoria.

DEA had conducted a feasibility study in 2006 for its accommodation needs and arrived at the conclusion that its leased premises did not meet its fundamental needs.

Following the feasibility study and the identification of a suitable location by DEA's project team, DEA then engaged with the PPP unit at the National Treasury and developed and issued the bid documents as per the requirements of the PPP regulations.

The bid documents set out the specifications of the building and its requirements, including that the successful bidder would be responsible for considering and aligning the department's goals with the new building, reflecting its character and image.

The RFP specified the project timeframe and required bidders to assemble comprehensive project teams, including a full design team, a facilities management team, a contractor, and financial and legal teams. This enabled the project proposals to cover a wide range of aspects related to the building, including designs, specifications, facilities management systems, procurement policies, and management models. In the RFP documents, DEA

specified its performance requirements, such as energy efficiency, renewable energy, water efficiency, indoor environmental quality, and landscaping targets. This ensured that proposed approaches and designs could be developed within defined parameters and performance evaluated in an objective and structured manner. Procurement documents and the outcomes of the tender process were advertised on the department's website at <https://www.environment.gov.za/procurement/tenders>.

DEA awarded the PPP to Imvelo/Grinaker LTA. The PPP agreement was signed in July 2012.

### **Chapman's Peak Drive Toll PPP**

The Chapman's Peak Drive Toll Road PPP project is a 30-year design, with partial finance, build, and operate PPP that was commissioned by the Western Cape Department of Transport. The project began as an unsolicited bid from the final partner, following which a PPP bid process was then undertaken.

The toll road is located in the Table Mountain National Park. Chapman's Peak Drive is known to be a scenic route in the national park area. However, the road was closed indefinitely in 2000 because of the risk of falling rocks.

A feasibility study was conducted in 2000-01 to determine options to address the problem. It was clear that the financial limitations would be the single biggest stumbling block to the safe re-opening of Chapman's Peak Drive to traffic.

To solve these financial problems, the province commissioned a PPP and proclaimed the route a toll road under the Western Cape Provincial Toll Road Act. The feasibility study concluded that the majority of the costs attached to the re-opening and operation of Chapman's Peak Drive could be obtained through tolling the road and that a PPP with a concessionaire demonstrated value for money in terms of the risks transferred to the private sector.

The PPP process was conducted according to the National Treasury's PPP regulations published in 2000, but prior to publication of the PPP Guidelines in 2004.

The PPP was awarded to Capstone 252 (Pty) Ltd., a consortium comprised of Concor, Thebe Investments (a BEE partner), Marib Holdings, and Haw & Ingles. The PPP reached financial close in May 2003.

Concor has subsequently been taken over by the construction firm Murray and Roberts, while Thebe Investments has withdrawn from the project. The contract has subsequently been renegotiated between the provincial department and the concessionaire, as the terms of the contract were seen to be unfavorable to the province. This process started with an investigation commissioned by the Premier of the province, at the time Lynne Brown, and was completed in 2009, despite a change of political leadership. The investigation revealed that R 57.9 million (US\$5 million) was paid out over a five-year period in compensation to the concessionaire while the road was closed. According to the new contract, the two parties will determine closures jointly and the compensation system paid to Entilini, the

concessionaire, was overhauled. The province can now insist on keeping the road open if it is convinced that the risks do not pose a danger to road users.

There has been much public interest in this PPP because the toll road was going to be constructed in a national park. As a result, there has been a lot of monitoring of and reporting on this PPP during the pre-procurement phase by public interest groups.

### **Cradle of Humankind PPP**

In 2002 the Gauteng provincial government commissioned the design, building, and operation of a visitor exhibition and recreational facilities at the Cradle of Humankind, a world heritage site situated in the northwest of the province. The commissioning was carried out according to the National Treasury's regulations on PPP promulgated in 2000.

Four consortia were prequalified in December 2001 to bid for the contract. Treasury authorization was granted for the Department of Agriculture, Conservation, Environment, and Land Affairs (DACEL) to proceed to procurement.

In early 2002, DACEL issued RFPs to the identified consortia. The bid documents specified the requirements as per the feasibility study that had been undertaken by DACEL.

In the bid documents, bidders were asked to make design, construction, exhibition, and operating proposals for the optimal utilization of the R 163 million to meet the requirements of DACEL and Wits University. The bidders were required to offer an annual concession fee for the rights to operate the Interpretation Center Complex as an educational and tourism destination for visitors over an initial 10-year period, with a re-pricing mechanism for certain contract extensions thereafter. The concession fee would be in the form of a fixed annual minimum and a percentage of turnover, with incentives built-in for higher visitor numbers.

In October 2003, the Gauteng provincial government entered into a contract valued at R 163 million (US\$15 million) with the Furneaux Stewart Gapp Consortium for the construction, design, and operation of world-class exhibitions and recreational facilities showcasing the site. The special purpose vehicle (SPV) of Maropeng a' Africa Leisure (Pty) Ltd. was created to run the concession.

This PPP was the first of its kind in that it included a concession agreement that required Maropeng a' Africa Leisure (Pty) Ltd. to pay an annual concession fee, which the government would invest in projects to benefit the community and research. This project took one and a half years to complete with the implementation of two visitors' sites, one at Sterkfontein and another at Maropeng, eight kilometers apart.

We were advised in interviews that Furneaux Stewart Gapp consortium was released from the PPP before the end of the contract, because the visitors rates at the Cradle of Humankind were much lower than anticipated, making continued participation financially unviable. Management of the SPV, Maropeng a' Afrika, was transferred to the Gauteng provincial government and Wits University. This does not appear to have been publicly disclosed.

The Gauteng Tourism Authority has since published an expression of interest (EOI) for the future management, commercial use, and development of certain identified sites and facilities in the Cradle of Humankind to replace the PPP. The EOI aims to establish market interest for a possible PPP to replace the previous one, although the terms of this potential PPP are unspecified.

### **Munitoria Building**

In 2008, the Tshwane Metropolitan Municipality commissioned a design, build, finance, operate, and maintain project for its new head office. This project is known as the Munitoria PPP project.

After several contentious attempts to undertake the project as a PPP, the present PPP initiative was undertaken with the appointment of a project officer in November 2004 and a transaction advisor team in June 2005. In August 2006, the Council of Tshwane municipality granted in principle approval of the PPP project for building the new Munitoria building, along with authorization to the city manager as accounting officer to proceed with procurement of the proposed PPP at that time. The municipality then proceeded to register the project with the National Treasury according to the Municipal Service Delivery and PPP guidelines requiring Treasury Views and Recommendations at certain milestones in the PPP lifecycle.

The feasibility study prepared in December 2005 was approved by the Treasury in February 2006 and approved by the Council in August 2006.

The bid documents were then developed based on the feasibility study as approved. Over the course of the PPP procurement process, the notion that the bidders should be given the opportunity to propose a solution was introduced, provided that such decision was supported by a confirming cost-benefit analysis in terms of the project output specifications. Four bids were received at the tender office on the RFQ closing date. One bid was withdrawn and the remaining three were prequalified to submit RFPs. During the adjudication process, one of the three withdrew, leaving two. Following the PPP regulatory process from the National Treasury, the Tsela Tshweu Consortium was selected as the preferred bidder with alternative bidder Mesong Consortium, appointed as the reserve bidder.

As per the requirements of s33 of the MFMA, the municipality invited public comment on the draft PPP agreement. To make the process more accessible to the public, the municipality also published on its website the *Guide to Understanding the Public Comment Process in the context of the overall PPP process as a basis to inform your invitation to comment on the Draft Tshwane House PPP agreement*.

This guide and the PPP agreement and its accompanying schedules were made accessible at <http://www.tshwane.gov.za/Pages/Public-Comments.aspx> for public comment. In addition, the draft Tshwane House PPP agreement and all applicable schedules, along with a copy of the guide, were made available in all of the city's 57 branch libraries and in the city's seven regional offices. Invitations for public comment were advertised in the press.

The public comment period, based on adverts appearing in the press on Tuesday, March 4, 2014, was closed on midnight of Friday, April 4, 2014, for approval by the Council in May 2014. However, as of September 2014, the Council had not yet made a decision, although the delay is a result of contract negotiations, not the public participation process.

We have been advised by the transaction advisor, who is a National Treasury employee dedicated to supporting the PPP at the municipality, that all the requirements regarding conducting a feasibility study as well as disclosing the PPP agreement for public comment have been adhered to thus far.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

In terms of post-procurement disclosure, project structures and parties to the contract are disclosed on the National Treasury website once the contract has been awarded.

Bidders who have not been successful can request information regarding the outcome of the bid processes from the commissioning department.

A study conducted by the Global Network of Freedom of Information Advocates in 2013 found that compliance with South Africa's access to information law had decreased and that only 16 percent of information requested was released in full and timeframes for responses as set out in the Act were flouted. The most common reason why public bodies did not respond to requests was largely because of lack of information and/or poor record keeping. It is not clear how much of this pertains to requests for information regarding the outcomes of PPPs.

### **Contracting**

There are no requirements for the disclosure of information to the public during the negotiation phase of a PPP between the public partner and the selected bidder. The negotiations between these parties are concluded in private on the grounds of "proprietary rights" or data protection.

It is however a standard clause of the of the National Treasury's standardized PPP provisions that the public institution must warrant that it has not knowingly omitted to

disclose any material information in its possession or under its control relating to the institution's assets.

In the municipal context, the municipal manager is required to disclose publicly the draft contract at least 60 days before the council meeting at which the municipal council will discuss the contract. Section 33 of the MFMA provides that municipal PPP contracts that have multi-year budgetary implications must formally solicit the views and recommendations of the National Treasury, along with other relevant departments. In addition, the local community must be given notice of the particulars of the PPP and opportunity to submit comments. A PPP may also be amended; however, the reasons for the proposed amendment must be tabled in the council and the local community must be given notice of the amendment as well as an opportunity to submit comments on the amendment.

### **Post-Contracting**

Contract documents are not made available proactively by the public sector. However, the public can make a request for a government department to disclose a contract or a variation to a contract according to the Promotion of Access to information Act.

At the municipal level, according to Section 84(3) of the Municipal Systems Act, the municipality must make copies of the contract available for public inspection. The municipality is also required to advertise when and where these copies will be available for inspection by the public.

There are currently no mechanisms in place for the disclosure of information regarding PPP projects to the public. This disclosure is dependent on the sponsoring institution. In the case of the Gautrain rapid rail link, for instance, the government disclosed that the cost estimates had increased from R 3.5 billion to R 4 billion in 2000 (US\$320 million to US\$360 million) to R 30.4 billion (US\$2.7 billion) in 2011.

### **Project Closure**

At the end of a project, following financial closure, according to the PPP Manual, a case study must be produced and disclosed to the public. The case study is intended to build a public library of South African PPP experience, which should secure for public record a summarized history of each PPP project, identifying best practice, deficiencies in legislation, and policy, and should be a resource for PPP training and business development.

The case study report should include the following sections:

- Project summary
- Introduction
- Inception
- Options analysis
- Feasibility study

- Bid documentation
- Procurement
- Negotiations
- PPP agreement management
- Conclusions and recommendations.

The annexure to the case study must also include the following:

- Transaction advisor terms of reference
- RFQ
- RFP
- PPP agreement (with confidential clauses blacked out)
- Electronic presentation of the case study for use in training, conferences, and public accountability hearings.

The case study should in theory provide a significant amount of information on the PPP project.

What material is required to be confidential?

Information is confidential in the contracting process as far as it is confidential according to PAIA. PAIA's grounds for the refusal of access to information include mandatory protection of the commercial information of a third party.

Third party information is also protected if the disclosure of information would constitute a breach of confidence in terms of an agreement or if disclosure would prejudice the future supply of similar information.

Information relating to the commercial activities of public bodies is also confidential so far as it contains the trade secrets of the state, or a public body, or financial, commercial, scientific, or technical information that would cause harm to the commercial or financial interests of the body, or prejudice it in commercial competition or contractual negotiations.

Following the financial closure, the transaction advisor must produce a close-out report for the confidential and complete records of the institution. This report is a comprehensively summarized institutional record with all the documentation properly annexed to it. It must include all the sections outlined above for the case study report, but must also include a section on financial closure.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

The Standardized Provision of PPPs, National Treasury Practice No. 1 of 2004, Part P outlines the recommended standard clauses for access to information and audits:



- a. The private party shall provide to the institution all information, documents, records, and the like in the possession of, or available to, the private party, as may reasonably be requested by the institution for the purpose of complying with any of its statutory reporting obligations under the Public Finance Management Act, 1999, and the Auditor-General Act, 1995.
- b. To this end, the private party shall use all reasonable endeavors to ensure that all such information in the possession of any counterparty to any project document shall be available to the Institution and the private party has included, or shall include, appropriate provisions to this effect in all project documents.
- c. Without limiting the generality of the foregoing, the private party shall
  - i. Provide and procure that its subcontractors shall provide all such information as the institution may reasonably require from time to time to enable the institution to provide reports and returns as required by any responsible authority, including reports and returns regarding the physical condition of any building occupied by the institution, health and safety, national security, and environmental safety
  - ii. Note and facilitate the institution's compliance with the Promotion of Access to Information Act, 2000, in the event that the institution is required to provide information to any person pursuant to that Act.

The Standardized Provision of PPPs, National Treasury Practice No. 1 of 2004, Part C, outlines the general obligations for warranties. This provision includes that the institution warrants that it has not knowingly omitted to disclose any material information in its possession or under its control relating to the institution's assets.

Collect and reference any specific templates/checklists being used for disclosure

**There is a single template for the close-out report and the case study, to ensure consistency between the two.**

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure and, if yes, how have they been dealt with?

No.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

There is a responsibility in each contract, at the public and municipal levels, for the private partner in a PPP to achieve a certain level of performance against several outlined key performance indicators. It is the responsibility of the public institution and the project officer to monitor the private partner's performance. There is no provision for public disclosure of this performance information, only for internal disclosure to the contracting public institution.

Institutions are required to report on the performance of the PPPs in their annual reports according to Treasury Regulation 16. The accounting officer of the institution must report on the PPP in the institution's financial report on the procedures outlined in the PPP agreement. These procedures would have received approval from the Treasury as part of the approval process of the agreement. As public institutions, financial reports are in most cases publicly available.

In addition to these reports, the Auditor-General audits all the accounts and regulatory compliance of all accounting officers/authorities of all spheres of government, and of all other persons in the national, provincial, or municipal services entrusted with public assets and trust property, and reports the results to Parliament or the relevant provincial legislature. All these reports must be made public. The private party in a PPP must mirror the disclosure obligations of the public institution to the Accountant General and the Auditor-General.

In terms of budgetary reporting, the National Treasury publishes an Estimate of National Expenditure, looking back over the preceding financial year. Each national and provincial department has a line item that shows its expenditure on PPPs, which would have been budgeted for in medium-term expenditure.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

We did not find any information on this.

#### Validation of information

Treasury regulation 16.7 requires that the institution's accounting officer reports on the management of the PPP agreement in the institution's annual report. This is audited by the Auditor-General. The Auditor-General reviews the information to ensure it is consistent with the audited financial statements.

There are no specific principles or guidelines for internal and external auditing of PPPs. It is optional for the Auditor-General to conduct performance audits on any aspect of a PPP and there are no provisions for follow-ups on the Auditor-General's audit.

Although the Auditor-General's report is made public, it is at the Auditor-General's discretion whether to publish details on the assets or resources of an institution and its expenditure that the Auditor-General determines is uneconomical, inefficient, ineffective, or detrimental.

The Auditor-General has in the past also undertaken oversight visits to PPPs and provided qualified audit reports indicating areas of concern for further investigation.

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

It is not clear the extent to which practice meets the provisions for proactive disclosure in the post-procurement phase, until the project close. In line with the PPP Manual, the signed projects are listed on the website, listing the project name, institution, duration of contract, responsible official, private partner, BEE equity and subcontracting percentage, financing arrangements, transactions advisors, value to government, and net present value of benefit to the government. There is also a list of closed projects; however, this list is out of date.

The extent to which municipalities comply with the requirement to make their contracts available for public scrutiny is unknown. And it is not clear the extent to which there are failures of institutions to disclose information to partners.

Practice differs somewhat from what is outlined in the PPP Manual in terms of closed PPPs. This is because there is currently no public library of PPP case studies, as envisioned by the PPP Manual, and only a handful of case studies are available online and appear to have been completed. These case studies can be accessed at <http://www.ppp.gov.za/Legal%20Aspects/>. In addition, the PPP unit had established the practice of publishing PPP newsletters on a quarterly basis on its website; these could be accessed at <http://www.ppp.gov.za/PPPQuarterly/>. However, this practice was stopped in 2010.

In practice, the Auditor-General audits the financial statements of public agencies and municipalities. If these public agencies are formed as the result or as part of a PPP, such as the Gautrain Management Agency, the Auditor-General audits the financial statements directly and reports in the agency's annual report, which is disclosed to the public. If a PPP falls under the management of another public entity, the Auditor-General reports on that public entity's financial statements in the public entity's annual report. This annual report is also publicly disclosed, but does not include a detailed annual report on the PPP.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Gautrain Project**

The Gauteng provincial government and the Bombela Concession Company signed a comprehensive concession agreement that not only regulates the construction and implementation of the project, but also the operation and maintenance over the next 15

years and the transfer back to province at the end of 15 years. The drafting of this contract was guided by the PPP unit. In addition, the PPP unit guided the post-procurement process and ensured adherence to all the necessary disclosures.

The awarding of the tender was publicly announced in the media, through press releases and at press conferences with national and provincial political leaders.<sup>270</sup>

The Gautrain Management Agency (GMA) is a public entity that was established according to the GMA Act to ensure the proper implementation of the concession agreement on behalf of the government. The GMA publishes an annual report in which it reports on the implementation of the concession agreement.<sup>271</sup>

The parties have agreed on a set of performance indicators on which the concessionaire reports at regular intervals. The Gautrain received a clean audit report from the Auditor-General for the 2012/13 financial year.<sup>272</sup>

### **DEA Head Office**

Following the award of the tender, the Auditor-General launched an investigation into the tender process for the procurement of the head offices. The Auditor-General reported that the tender was obtained on the basis of a variation order and that a comparison of the actual against the proposed deliverables indicated delays of up to 1,445 days. According to the DEA, the tender-related price variations could be largely attributed to the fact that the project costs were originally estimated in 2005 for a conventional building. However, by 2009, the scope of the project had changed. DEA indicated that all adjustments to the original budget were approved by the National Treasury.

According to the contract, the reporting and monitoring requirements include reports on a monthly and quarterly basis. For unitary payments to be made to the concessionaire, it reports on a monthly basis. BEE reports are made on a quarterly basis. Twice a year the concessionaire is required to submit an Employment Equity Plan and a Skills Development Plan according to the Department of Labor's regulatory framework. There were no questions raised by reserve bidders. The project structure is available on request in writing and regulated by the PAIA, but none of this information is publicly available.

### **Cradle of Humankind**

The SPV Maropeng reports financial information to the Gauteng provincial government on a monthly basis. Further, Maropeng reports quarterly to the Gauteng provincial government on operational matters, such as maintenance and human resource issues, such as employment equity. Maropeng also provides an annual environmental report to the provinces. Public access to these reports in full is only available through application to the Gauteng provincial government, as are audit reports by the Auditor-General of South

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<sup>270</sup> <http://www.gautrain.co.za/newsroom/2005/07/announcement-of-preferred-bidder/#sthash.XEHcVdVq.dpuf>.

<sup>271</sup> These reports are publicly available at <http://gma.gautrain.co.za/uploads/doc/GMA-Annual-Report-2012.pdf>.

<sup>272</sup> The Auditor General's report can be accessed at [http://www.agsa.co.za/Portals/0/PFMA2012-13/2012\\_13\\_PFMA\\_Gauteng\\_general\\_report.pdf](http://www.agsa.co.za/Portals/0/PFMA2012-13/2012_13_PFMA_Gauteng_general_report.pdf).

Africa, who occasionally audits Maropeng A’Afrika. The only proactive public disclosure of information relating to Maropeng is through the province’s public reporting. This reporting includes the annual reports of the Gauteng Tourism Authority, which are available on its website at <http://www.gauteng.net>, and the Gauteng Provincial Budget and Expenditure Report.

Maropeng has a manual for adhering to Section 32 of the Constitution and the PAIA. The manual outlines who the information officer is for the SPV and the type of information for which records are kept, what is available publicly through the website and through the information officer, and what information may be requested through the PAIA and the process through which requests will be considered. The document includes a template for requests for information and the fees associated with requests.

### **Chapman’s Peak**

The Chapman’s Peak Toll Road PPP was concluded according to Treasury regulation 16 of 2000, which does not require the disclosure of information to the public. However, following financial close and the construction of the toll road by the PPP, there was some public opposition around the construction of the toll plaza for the road, and its location, the final part of the construction in the project. Details around this aspect of the PPP were written up by the province as a case study. Following the procurement process and financial close of the PPP, a public participation process was undertaken to provide information on the location of the plaza. This process was carried out in 2003, with notices published in local and national newspapers. Public meetings were held in the same year. In 2005, a record of decision was issued, following an environmental impact assessment for the construction of two toll plazas. This record of decision was challenged by several groups, and there was a second round of public participation and a second record of decision was issued in 2008 for the construction of one toll plaza.<sup>273</sup>

Other than this, the only disclosure has been reactive disclosure. This project has been controversial in some respects and has been campaigned against by several small civil society groups and resident associations. There have been several requests for information about the project that have been made in terms of the Promotion of Access to Information as well as by developers. These requests are handled centrally through the Western Cape government’s Corporate Services Centre’s legal services division. It is required that the purpose of the request is given and it needs to be approved by the office of the provincial minister.

According to the Western Cape Department of Transport and Public Works, information has been provided to these civil society groups, developers, and the media as per their requests. This information includes details of the contracts, the original and renegotiated contracts, as well as other information such as traffic volume projections, which were used to determine the payment made to the concessionaire by the province.

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<sup>273</sup> The study can be accessed at [http://www.westerncape.gov.za/other/2012/2/chapmans\\_peak\\_jan\\_2012.pdf](http://www.westerncape.gov.za/other/2012/2/chapmans_peak_jan_2012.pdf).

## **Munitoria**

The Munitoria project is not yet at this stage, so we are unable to comment on the practice of disclosure. Given the fact that this process is being guided by a transaction advisor from National Treasury, the hope is that the project will comply with all the necessary prescripts.

## What are the challenges and benefits to disclosure?

The disclosure of information that has taken place thus far during PPP bid processes has enabled bidders to submit reasonably competitive bids.

One of the challenges faced in South Africa is the issue of personnel capacity. The nature of the disclosure made by the sponsoring institution at the RFP and RFQ stages is dependent on the capacity in the institution as supported by the relevant treasury. The PPP unit, through its support and guidance, has tried to mitigate these capacity challenges where they exist.

Corruption has been a challenge and has contributed to a loss of faith in the bidding community in PPP bid processes; however, the National Treasury's view is that this is now changing for the better. The influence or intervention of political leadership in the awarding of major contracts has been one of the contributing factors to the loss of faith in the system.

The PPP unit argues that in the nature of the collaborative approach between the government and the private sector, there is no need for regulatory requirements to prescribe disclosure. The constitutional imperative to ensure a fair, transparent, and competitive bidding process enshrines a responsibility to ensure a fair process, including sufficient disclosure to enable bidders to submit competitive bids. The National Treasury's view is that the PPP market in South Africa has evolved and has developed trust in the bidding process, so there are "few secrets" in the market for major PPPs. Bidders are aware of the costs of projects and the risks involved. Measures are being put in place to combat corruption and ensure fair bidding processes.

The application of public sector reporting requirements to private partners is positive. Examples of this should be examined, as well as examples of public institutions reporting on their PPPs in their annual reports.

## What can we learn from this country study?

South Africa is 14 years into experience in PPPs. Over time, the focus was initially largely on setting up the regulatory framework for PPPs and providing guidance. The National Treasury's view is that South Africa is leading countries in Africa on the law, policy, and systems established for PPPs.

The legislative and policy framework is in place and now the practice of disclosure can be enhanced over time. There are currently no issues or disputes around the lack of proactive disclosure, but the state realizes the benefit of enabling access to information.

From the desk-top review and telephone engagement with the National Treasury, there do not appear to be any major problems with respect to the disclosure of information in the PPP procurement process. We were not privy to engaging with private sector bidders around their views on these issues.

The focus with respect to disclosure of information in the PPP process has been fairly relaxed and not highly regulated. According to the National Treasury, the spirit has been to encourage an ethos of collaboration between the public and private sectors to enable bidders to submit competitive bids that would best meet the requirements of the state in expediting the delivery of public services. The PPP unit plays a key role, in particular in the creation of PPPs. The PPP unit has the final authority in the approval of PPP agreements, although the initiation and management of PPPs rests with the sponsoring institution or municipality. By requiring that the sponsoring institution reports to and gets approval from the PPP unit at various stages in the PPP process, the PPP unit plays a critical role as an accountability structure that ensures fairness in the process.

The Twenty Year Review of Government has suggested that moving forward, there is a need for government to assess what has worked well and what has not worked well with PPP agreements, as the basis for identifying more PPP opportunities for the private sector to invest in, in a manner that is sustainable and affordable to the government and the users of the infrastructure.

## 13. United Kingdom



### PPP context in the United Kingdom

How are PPPs undertaken in the United Kingdom?

The most prevalent form of PPP in the United Kingdom is the private finance initiative (PFI), which was introduced in the United Kingdom in the 1990s to engage private sector expertise in the design, build, finance, and operation of public infrastructure. PFI had the objective of delivering good quality and well maintained assets that provided value for money for the taxpayer. It has been used across a broad range of sectors, including health, education, and transport. More than 700 projects have reached financial close, attracting £55 billion in private investment.

Under a PFI deal, the contracting authority is generally the local authority or government department that initiates the PFI deal and has primary responsibility for disclosure.

The UK PFI program has been criticized. The PFI procurement process was often slow and expensive for the public and the private sectors. In addition, there has been insufficient transparency as to the future liabilities created by PFI projects to the taxpayer and of the returns made by investors. As a result, the government revised its PFI approach, developing “PF2,” which was announced in late 2012. Among other things, the new approach aims to increase transparency, make procurement more efficient, and introduce more government and institutional investor equity finance into PFI-type deals. Introducing more equity aims to increase the alignment of interests between the public and private sectors, and create a more collaborative approach to managing risk, as well as to involve private sector partners with a longer-term investment horizon.

However, other PPP models have been used for some deals. The high-profile London Underground PPPs were not formally developed as PFIs; neither are the current Offshore Transmission Operator projects managed by the energy regulator Ofgem (Office of Gas and Electricity Markets). Although the contracting authorities for these projects are covered by the UK government’s core freedom of information legislation, they are not covered by the former PFI requirements or the more rigorous requirements under the new PF2.

What are the policy objectives behind disclosure?

The three main disclosure policies in the United Kingdom have the same objectives, but emerged from a range of different circumstances.

### **Freedom of Information Act**

The Freedom of Information Act 2000 (FOI) provides public access to information held by public authorities. The Act emerged from papers published in 1997, which emphasized the importance of open government, arguing that “unnecessary secrecy in government leads to arrogance in governance and defective decision-making.”<sup>274</sup> FOI is based on two principles:

- Public authorities are obliged to publish certain information about their activities
- Members of the public are entitled to request information from public authorities.

The FOI process is overall seen to have been a success and beneficial to British citizens since it came into force in 2005: key stakeholders and experts (such as the UK National Union of Journalists) agree that the FOI Act has increased accountability.<sup>275</sup>

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<sup>274</sup> Information Commissioner’s Office, “The Guide to Freedom of Information,” 2014.

<sup>275</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/foi-report/>.



## **Transparency Following the 2010 Election**

In 2009, the parliamentary “expenses scandal” broke in the United Kingdom through the disclosure of widespread actual and alleged misuse of the permitted allowances and expenses claimed by Members of Parliament. Parliament tried to block access to relevant information through the FOI Act (but was unsuccessful).<sup>276</sup> This led to widespread calls for greater transparency of public expenditure.

Transparency was as a result a flagship policy of the coalition government formed following the 2010 election. Shortly after taking power, the Prime Minister wrote to all government departments, instructing them to become more transparent and open by releasing data on finance, resources, and procurement in an open, regular, and reusable format. As part of this drive, the government set up a new website, Contracts Finder. This is a single system that aims to provide visibility of central government procurement activities (tenders and contracts) to the public, allow buyers to publish tender documents, and allow prospective suppliers to search for opportunities to do business with the public sector (from March 2011).

The development of transparency within PF2 was based on consultations in the public and private sectors where there was agreement that more effort on transparency was needed. This followed significant pressure from the government and media on PFI projects. Some transparency provisions already applied to existing contracts, so information was available for some projects, but it was not being implemented systematically. PF2 aimed to make disclosure more consistent and clear across projects and ensure that the public and the private partners knew what was required of them, to the benefit of both parties.

As a result of these changes, the information requirement for PPPs in the United Kingdom has been increasing over time. A summary of what is required from different actors in the PPP disclosure space at the pre- and post-procurement phases is presented in figure 13.1.

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<sup>276</sup> See, for example, <http://www.telegraph.co.uk/news/newsttopics/mps-expenses/5294350/Expenses-How-MPs-expenses-became-a-hot-topic.html>.

FIGURE 13.1 SUMMARY OF PUBLIC FINANCE INITIATIVE AUTHORITY ROLES, UNITED KINGDOM

Authority	Pre-procurement	Post-procurement
PAC	N/A	May recommend project for NAO review
NAO	N/A	May select project for value for money review
HM Treasury	Project progress by department; annual reports	Pan-government PFI databases
Government Dept.	What progress has been made of their projects	Publish the unitary charges expected to be paid each financial year
Contracting Authority	Contract notices	Contract performance

Uses and users of disclosure information and the exact nature of such use

Key users of pre-procurement information are potential bidders. In the call for evidence before the development of the PF2 scheme, there was strong feedback that the government’s approval processes under PFI at the time were drawn out, and that there was no visibility over where a business case sits at any point in time. This is particularly relevant in the pre-procurement phase, when industry is keen to understand the progress of potential projects coming to market, and during the competitive process when extended approval processes can impact directly on the private sector’s costs of bidding.<sup>277</sup> Improving transparency was hoped to lead to better deals in the long run.

The general public is also considered to be a key user of transparency data under the FOI and transparency initiatives. However, what the public is expected to use this information for—and what format and information best meets their needs—is not specified.

Another key user of the data is the government, to help keep a better hand on public spending and to develop better policy.

<sup>277</sup> HM Treasury, “A New Approach to Public Private Partnerships,” December 2012.

List of laws, policies, and regulations

The following items are relevant to *pre-procurement* and *post-procurement*:

- Freedom of Information Act 2000, specifies what can be defined as “confidential” in Part II of the Act
- Secretary of State for Constitutional Affairs Code of Practice on the discharge of public authorities’ functions under Part I of the Freedom of Information Act 2000, issued under Section 45 of the Act, November 2004, presented to Parliament by the Secretary of State for Constitutional Affairs pursuant to Section 45(5) of the Freedom of Information Act 2000
- 4ps Guidance for Local Authorities, Disclosure of Information, and Consultation with Staff and Other Interested Parties, March 2005
- Freedom of Information Act 2000: Designation of Additional Public Authorities, Response to Consultation, CP(R) 27/07, July 16, 2009
- Publication of New Central Government Contracts, Guidance Note, updated May 2012
- Local Transparency: A Practitioners Guide to Publishing New Contracts and Tenders Data, March 2011
- Chapter 31 of Standardization of PF2 Contracts, published in draft on December 5, 2012
- HM Treasury, A New Approach to Public Private Partnerships, December 2012.

Proactive pre- and post-procurement disclosure in unsolicited projects

The United Kingdom does not permit unsolicited projects.



## Provisions for proactive pre-procurement disclosure

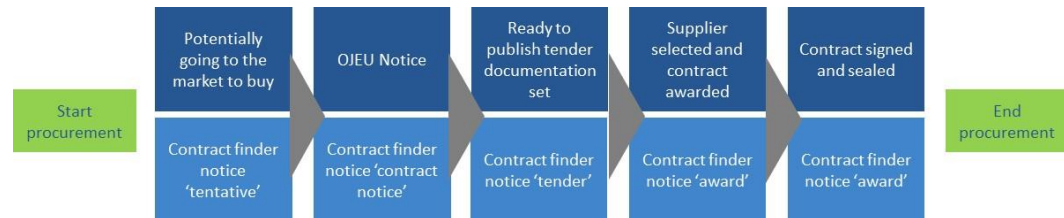
What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

The contracting authority is responsible for publishing any request for proposals (RFP) documents. In addition, central government departments are required to publish information on the government website (Contract Finder) at defined stages in the process: at the prior information stage, when the contract notice is published, when the tender

documents are published, and post-procurement when the contract is awarded and ultimately signed.

This framework is presented in figure 13.2, which shows the different stages the contracting authority will pass through, and the disclosure they will have to undertake at each stage.

FIGURE 13.2 CONTRACTING AUTHORITY STAGES, UNITED KINGDOM



From our research, it appears that once published, the notices are available indefinitely. However, to date we have found no specific policy around this.

Under new local government transparency rules, it is required that for each *invitation to tender* for contracts to provide goods and/or services with a value that exceeds £5,000, the following details must be published:

- Reference number and title
- Description of goods and/or services sought
- Start, end, and review dates
- Local authority department responsible.

The local government transparency code does not specify where its information should be published. How this is undertaken varies. For example, for the Mersey Gateway Bridge, the contract notice and award notice were published in the Official Journal of the European Union (OJEU) and the council's procurement portal (The Chest, which is joint with other councils in the North West), and the smaller government procurement site (mytenders). The development of joint council procurement websites is common, used by councils in West London by Westminster, Hammersmith and Fulham, and Kensington and Chelsea councils,<sup>278</sup> as well as by the councils in the home counties.<sup>279</sup> Other councils, such as Wandsworth council, publish directly on Contract Finders.<sup>280</sup>

<sup>278</sup> <https://www.westminster.gov.uk/capitalesourcing>.

<sup>279</sup> <https://www.businessportal.southeastiep.gov.uk/SECE/cms.nsf/vLiveDocs/SD-DEVV-6UNGEK?OpenDocument&contentid=1.001>.

<sup>280</sup> [http://www.wandsworth.gov.uk/info/200095/tenders\\_and\\_contracts/1145/selling\\_to\\_the\\_council/5](http://www.wandsworth.gov.uk/info/200095/tenders_and_contracts/1145/selling_to_the_council/5).

Government department estimates of the total value of projects in procurement that are expected to reach preferred bidder stage in the next two financial years are also published.

Alongside these standard disclosure requirements, there are some specific requirements for PFI and other types of PPP projects.

### **PFI and PF2 Projects**

As part of a wider commitment to ensuring that industry has the information it needs for business planning purposes in relation to public sector projects, the government intends to increase the visibility of its approval process. A business case approval tracker for PF2 projects, and for PFI projects in procurement, has been published on the Treasury website since spring 2013. It will provide a status update of a project's progress through the approval process.<sup>281</sup> These are published in PowerPoint form on the central government website, gov.uk. For some departments that are currently undertaking a larger number of PF2 projects, these trackers have been updated approximately monthly since they were first published in August 2013.

Her Majesty's Treasury (HMT) publication requirements do not apply to PPP procurement models (outside PFI/PF2), such as the Offshore Transmission Operators (OFTO) projects currently being procured by Ofgem.

### **Other PPPs (OFTO Example)**

As a sector regulator, Ofgem undertakes a wide range of work in the energy sector and has an overall approach to transparency, which has been set out recently in its "Simplification Plan."<sup>282</sup>

Overall, with regards to procurement, Ofgem follows best practice and has achieved the Chartered Institute of Purchasing and Supply Certification and the Standard of Excellence.

For the OFTO process specifically, at the start of the revised process in 2012, Ofgem held a consultation process on how the tender exercises would be run for the OFTOs, specifying the type of information that would be provided in the tenders, the required stages, and timings. For example, it sets out that it will publish a preliminary information memorandum at the prequalification stage that provides a high-level overview of the project, then a more detailed project-specific information memorandum before the start of the invitation to tender stage, which would provide further details on the assets and set out the investment opportunity available to bidders. It also provided information on the data room.<sup>283</sup> This was formally published as the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010.<sup>284</sup>

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<sup>281</sup> HM Treasury, "A New Approach to Public Private Partnerships," December 2012.

<sup>282</sup> <https://www.ofgem.gov.uk/ofgem-publications/83518/simplificationplan201314final.pdf>.

<sup>283</sup> <https://www.ofgem.gov.uk/ofgem-publications/51588/enduring-con-doc-may-12.pdf>.

<sup>284</sup> <http://www.legislation.gov.uk/ukxi/2010/1903/made>.

What material is required to be confidential?

There are no requirements to publish information at this stage beyond the contract notices, although some contracting authorities choose to do so.

Were a request to be made for the disclosure of pre-procurement information, the FOI Act specifies what can be considered as exempt. It provides for exemptions from disclosure on 23 grounds, with two categories of exemptions, absolute exemptions and qualified exemptions. The FOI Code gives detailed guidance on confidentiality obligations vis-à-vis the responsibility to supply information. The guidance presumes that most of the information would be disclosed.

The most commonly used exemptions for PFI/PPP projects are from Sections 41 and 43 of the Act, covering information provided in confidence and commercial information.

### **Information Provided in Confidence**

1. Information is exempt information if
  - a. It was obtained by the public authority from any other person (including another public authority)
  - b. The disclosure of the information to the public (other than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person
2. The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with Section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

### **Commercial Interests**

1. Information is exempt information if it constitutes a trade secret.
2. Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
3. The duty to confirm or deny does not arise if, or to the extent that, compliance with Section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).<sup>285</sup>

For information to be redacted based on these exemptions, the public authority must be able to identify the nature of the prejudice it is claiming would be caused by disclosure.

Collect and reference any specific templates/checklists being used for disclosure

“Publication of New Central Government Contracts” includes several checklists and helpful information, including a checklist for steps to follow for publications of contracts

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<sup>285</sup> <http://www.legislation.gov.uk/ukpga/2000/36/contents>.

from contract development to contract signature. This takes into account including transparency clauses in the contract, considering any possible redactions and their accuracy, and the requirements for publishing the contract.<sup>286</sup>

Do the documents in question have retroactive effect?

No. Tenders for central government contracts are only to be published on Contract Finder in full from January 2011. The new transparency publication requirements under PF2 also apply to ongoing PFI procurement, but not retroactively.

Validation of information

We understand there is some process for signing off information that has been disclosed, but we have not found the details on this.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

The different contracting authorities all appear to have a strong focus on transparency and routinely publish information. At the pre-procurement stage, the requirements are fairly high level, mainly that the RFP documents are published. For projects in procurement before 2011, it was not specified where this information should be published. As a result, there was a wide range of approaches from smaller UK procurement sites, OJEU, and authority-specific websites. Since then, the requirement that requests for proposals (RFPs) for central government contracts are published on Contract Finder is clear, but from our research at this stage it is not obvious that this is consistently followed, as appears to be the case for the Mersey Gateway and the Priority School Building scheme. We hope to follow up on this issue in more detail at the next stage.

The other requirement—that HMT publish a procurement process tracker for each project—appears to be met for all projects to which it applies, namely PFI/PF2 projects since early 2013. For other projects, like the OFTOs or other private deals that are not structured as PFIs, this does not apply.

The different projects generally provide additional information that is not specifically required. For example, Papworth Hospital and the Mersey Gateway have specific websites providing additional project information for members of the public who may be interested. For the OFTO project, the presentation from the bidder's event is available, while the Leeds

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<sup>286</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf).

waste project provides the original business case. Further details are provided in the case study examples.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

**Papworth Hospital**

Papworth is an ongoing PFI project, where the preferred bidder has just been selected. The original procurement was published too early to be picked up by Contracts Finder (although they can be found on another website).<sup>287</sup> The procuring authority has published on its website extensive information on the new PPP project.<sup>288</sup> It flags clearly on the website where these documents have been redacted. HMT has published its tracker for Papworth.

To date, it appears that Papworth has complied with its transparency requirements.

**TABLE 13.1 ACTUAL PRACTICE FOR PAPWORTH HOSPITAL, UNITED KINGDOM**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish RFP documents (on Contract Finder if central government supported, post 2011)	N/A	Yes; not a requirement at the time of bidding
HMT project tracker (post 2012)	Available	Yes

**Priority School Building Program: PF2 Hertfordshire, Luton, and Reading Batch**

This is the furthest advanced batch of the school building program, and is currently at the second stage of procurement. The original prequalification questionnaire for the whole program, published in March 2013, is not available on Contract Finder, although it is available on the OJEU.<sup>289</sup> There is a website page with a simple summary of the progress for this batch that has been updated recently to reflect the selection of the preferred bidder.<sup>290</sup> The contract award notice is also on OJEU, but not on Contract Finder.<sup>291</sup> The HMT tracker has been published. However, because of the omission of key documents

<sup>287</sup> <http://www.tendersdirect.co.uk/Search/Tenders/Expired.aspx?ID=%20000000002956704>.

<sup>288</sup> See [http://www.papworthhospital.nhs.uk/content.php?/about/new\\_papworth\\_hospital/project\\_documents](http://www.papworthhospital.nhs.uk/content.php?/about/new_papworth_hospital/project_documents). This includes an outline business plan and project summaries.

<sup>289</sup> See <http://ted.europa.eu/udl?uri=TED:NOTICE:212992-2013:TEXT:EN:HTML> ; also the PIN <http://ted.europa.eu/udl?uri=TED:NOTICE:230804-2011:TEXT:EN:HTML&tabId=1>.

<sup>290</sup> <https://www.gov.uk/government/publications/psbp-hertfordshire-luton-and-reading-private-finance-batch/hertfordshire-luton-and-reading-project-update>.

<sup>291</sup> <http://ted.europa.eu/udl?uri=TED:NOTICE:144991-2014:TEXT:EN:HTML>.



from Contract Finder, it does not appear that this project is meeting its disclosure requirements.

**TABLE 13.2 ACTUAL PRACTICE FOR PRIORITY SCHOOL BUILDING PROGRAM, UNITED KINGDOM**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish RFP documents (on Contract Finder if central government supported, post 2011)	No	No
HMT project tracker (post 2012)	Available	Yes

### **Mersey Gateway**

Mersey Gateway is a bridge to relieve the pressure on the aging Silver Jubilee Bridge between Widnes and Runcorn in the North West of England. The project has been in development for some time, with the government agreeing to fund the project in 2011, and the construction contract awarded in spring 2014. The project has its own website, with timelines for procurement (although these were out of date at the time of checking), introductions to the project, and planning documents.

The contract notice and award notice were published on OJEU and the council's procurement portal (The Chest) and the smaller government procurement site (mytenders).<sup>292</sup> It was not published on Contract Finder; since the project was contracted by a local council, this is not a requirement, although considering the Department for Transport's involvement, this seems inconsistent with the government transparency policy.

In addition, information on the project's government guarantee (£257 million) is available on the gov.uk website<sup>293</sup> and the HMT tracker is available.

**TABLE 13.3 ACTUAL PRACTICE FOR MERSEY GATEWAY, UNITED KINGDOM**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish RFP documents (on Contract Finder if central government supported, post 2011)	N/A	No
HMT project tracker (post 2012)	Available	Yes

<sup>292</sup>[http://www.mytenders.org/search/show/search\\_view.aspx?ID=OCT070647](http://www.mytenders.org/search/show/search_view.aspx?ID=OCT070647) ; [http://www.mytenders.org/search/show/search\\_view.aspx?ID=MAY096468](http://www.mytenders.org/search/show/search_view.aspx?ID=MAY096468).

<sup>293</sup> <https://www.gov.uk/government/publications/uk-guarantees-scheme-prequalified-projects/uk-guarantees-scheme-table-of-prequalified-projects>.

## OFTOs

The Offshore Transmission regime in the United Kingdom is competitive, with different operators competing to own and operate transmission assets divested by the windfarm developers that designed and constructed them. The procurement process is managed by the UK energy regulator Ofgem, and the third round of OFTOs was launched in February 2014. As required by Ofgem under its new process, preliminary information memoranda are available for the different projects,<sup>294</sup> although it is too early in the procurement for the other documents specified to have been published.

Ofgem presents a simple summary of the process on its website,<sup>295</sup> along with the presentation from the bidder's launch event. The prequalification questionnaires are available online.<sup>296</sup> However, as these are not structured as PFIs, they are not included in the HM Treasury trackers. The contract announcement documents are not on OJEU or Contract Finder, as Ofgem issues licenses rather than contracts.<sup>297</sup>

**TABLE 13.4 ACTUAL PRACTICE FOR OFFSHORE TRANSMISSION OPERATORS, UNITED KINGDOM**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish RFP documents (on Contract Finder if central government supported, post 2011)	No	No; not relevant as different process
HMT project tracker (post 2012)	N/A	Not applicable as not PFI/PF2

## Leeds City Council Residual Waste Treatment

This project was procured initially in 2008 and reached financial close in 2012. In this case, the information available is quite extensive at the pre-procurement stage, including the original business case to Defra published by the Leeds City Council,<sup>298</sup> the output specification (although this has been redacted),<sup>299</sup> the report given to the Council's

<sup>294</sup> For example, <https://www.ofgem.gov.uk/publications-and-updates/offshore-transmission-westermost-rough-preliminary-information-memorandum-pim>.

<sup>295</sup> <https://www.ofgem.gov.uk/electricity/transmission-networks/offshore-transmission/offshore-transmission-tenders/tender-round-3>.

<sup>296</sup> <https://www.ofgem.gov.uk/ofgem-publications/86957/enhancedpre-qualificationepqdocumentfortenderround3tr3.pdf>.

<sup>297</sup> Under these competitive tender processes, an OFTO is granted a license that provides for a revenue stream in return for providing transmission services over a specific transmission system. See KPMG, "Offshore Transmission: An Investor's Perspective," 2012.

<sup>298</sup> <http://www.leeds.gov.uk/docs/Leeds%20residual%20waste%20project%20obc.pdf>.

<sup>299</sup> [http://www.leeds.gov.uk/docs/RWT%20Contract%20Sch.%20%20Output%20Specification%20\(Redacted\).pdf](http://www.leeds.gov.uk/docs/RWT%20Contract%20Sch.%20%20Output%20Specification%20(Redacted).pdf).

Executive Board on how the bids for the project were evaluated,<sup>300</sup> a final business case, and the contract award document developed for the Council’s Executive Board.<sup>301</sup> Although the contract notice is available on OJEU,<sup>302</sup> the contract award notice does not appear to be on either OJEU or Contract Finder, neither is the final contract, which appears to be a significant omission.

TABLE 13.5 ACTUAL PRACTICE FOR LEEDS WASTE TREATMENT, UNITED KINGDOM

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish RFP documents (on Contract Finder if central government supported, post 2011)	N/A	Yes
HMT project tracker (post 2012)	N/A	Not applicable as not PFI/PF2

This highlights the wide discrepancy between the different departments. Some were publishing above and beyond the current requirements before they were introduced, but not covering the more basic procurement information. Others are yet to meet their transparency requirements for new projects.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

Since 2010, all new central government contracts over £10,000 are to be published in full by the contracting authority, including all performance indicators and penalty measures. Only limited information is expected to be withheld. This must be published after 20 days from the date of award, leaving out any standstill period. Local governments are now

<sup>300</sup><http://democracy.leeds.gov.uk/documents/s23645/Residual%20Waste%20PFI%20Report%20271008.pdf>

<sup>301</sup> <http://democracy.leeds.gov.uk/mgConvert2PDF.aspx?ID=68255>.

<sup>302</sup> <http://ted.europa.eu/udl?uri=TED:NOTICE:275286-2009:TEXT:EN:HTML&src=0>.

encouraged to publish all contracts in their entirety where the value of the contract exceeds £5,000 and where a contract runs into several hundreds of pages or more, a local authority should publish a summary of the contract or sections of the contract.<sup>303</sup>

Information on unitary charges expected to be paid on signed contracts each financial year is updated and published twice yearly by the government department.

### **PPP Projects**

The HM Treasury in the United Kingdom plays a major role vis-à-vis PPP policy. As part of the new PF2 program, in terms of transparency, its post-procurement responsibility is to publish an annual report with project and financial information on all PF2 projects in which government is a shareholder.<sup>304</sup> No such report has been published to date.

HMT also publishes UK PFI data once a year on signed projects and projects that are in procurement. These are published as an Excel sheet on the [www.gov.uk](http://www.gov.uk) website.

The National Audit Office (NAO) has a key role in auditing PPPs. It can select to review projects as part of its annual value-for-money program (through which it reviews about 60 projects or programs a year). NAO reports to the Committee of Public Accounts a subcommittee in Parliament that can make additional recommendations.

### **Other PPPs (OFTO Example)**

For the OFTO projects that have been transacted by Ofgem, a generic license that will be agreed is provided.<sup>305</sup> Once this has been approved by the Gas and Electricity Markets Authority, Ofgem provides updates on the license as required. Other information provided includes cost assessment and information provided to the EU Commission.<sup>306</sup> However, current developments suggest that Ofgem has not taken on board the lessons of other PPP programs. Earlier this year, Ofgem consulted on the requirements for annual information provision on the size and value of equity sales,<sup>307</sup> but a similar consideration and approach had already been developed for PF2 (see Standardization of PF2 Contracts, Clause 6.1).

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<sup>303</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308185/Local\\_Government\\_Transparency\\_Code\\_2014\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308185/Local_Government_Transparency_Code_2014_Final.pdf).

<sup>304</sup> HM Treasury, "Standardization of PF2 Contracts," 2012.

<sup>305</sup> For example, for TR3, <https://www.ofgem.gov.uk/ofgem-publications/86476/app3tr3v2licence.pdf>.

<sup>306</sup> Based on Greater Gabbard example, see <https://www.ofgem.gov.uk/publications-and-updates/greater-gabbard-ofto-plc-designation-under-ownership-unbundling-requirements-third-package-decision>.

<sup>307</sup> <https://www.ofgem.gov.uk/ofgem-publications/87644/consultationletterequitysalereporting.pdf>.

What material is required to be confidential?

Under the new transparency regime, redactions of contractual text are permitted in accordance with the exemptions provided under the FOI Act. (See the detail provided in section 13.2.2).

The provisions in the FOI Act are further supported by standardized contract clauses on confidentiality and the disclosure of information in PFI/PPP contracts. The standard contract provisions state that the only commercially sensitive information should be financial provisions (for example, the price and the priced elements of the payment mechanism). The provisions also highlight that confidentiality provisions can be disclosed to audit by the NAO. In the Greater Manchester Recycling and Waste Management contract, redactions were mostly made to monetary values and stated when the redacted information could become available, which was longer than four years.<sup>308</sup>

The increasing restriction on what can be considered “commercially sensitive” has been reflected in the new approach for PF2 projects. The PF2 standard contract document requires that after short-listing, the relevant authority should negotiate with bidders as early as possible to define the scope of the information to be treated as commercially sensitive. The authority should also agree with bidders when commercially sensitive matters will become nonsensitive, to ensure maximum disclosure. Contracts should be structured to facilitate easy removal of commercially sensitive elements at the post-procurement phase.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

The new PF2 guidance sets out a full chapter on transparency and information (chapter 31). This includes required and recommended drafting on confidentiality and freedom of information. Under the required drafting, it emphasizes that contractor’s must do the following:

- Maintain a full record of the costs of providing the service
- Provide a contract summary within 20 days of the signature of the contract (no provision for the publication of this document appears to be made)
- Keep accounts according to best practice
- Maintain records of health and safety incidents, maintenance, human resources issues, and helpdesk data
- Provide access to all requested project data
- Provide quarterly summaries of the information provided by the senior lenders

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<sup>308</sup><http://meetings.gmwda.gov.uk/ecSDDisplay.aspx?NAME=GMWDAFOIPASchedulesV20&ID=263&RPID=366573&sch=doc&cat=12883&path=12881%2c12883>.

- Provide the authority and HMT a calculation of the equity internal rate of return and other financial information biannually
- Support the authority in developing its understanding of the project so it can “behave as an intelligent client.”<sup>309</sup>

Under PF2, the information requirements are part of the service requirement and the contractor can face penalties if they are not met.

Collect and reference any specific templates/checklists being used for disclosure

The “Publication of New Central Government Contracts” document includes several checklists and helpful information.<sup>310</sup> This includes a checklist for steps to follow for publication of contracts from contract development to contract signature.

Do the documents in question have retroactive effect? Are there clauses in older contracts which might prevent such disclosure, and if yes, how have they been dealt with?

**No, this is not relevant.**

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed? How and who is responsible for such disclosure?

All new central government contracts over £10,000 are to be published in full, including all performance indicators and penalty measures. This is to be published by the relevant department. Under the PF2 standard contract, the performance information must be provided to the contracting authority, but there does not appear to be a specific requirement to publish it.

PFI/PPP performance is assessed by NAO from time to time. All of NAO’s publications are on its website. Other than NAO reports, the London Underground PPP contracts, as well as the M25 example, have proactively disclosed performance information. The available data for different projects are not uniform in quality and depth.

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<sup>309</sup> This highlights the key requirements. For more information see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221556/infrastructure\\_standardisation\\_of\\_contracts\\_051212.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221556/infrastructure_standardisation_of_contracts_051212.pdf).

<sup>310</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf).

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

### **SPV Disclosure**

In response to criticism from a wide range of stakeholders, including the Public Accounts Committee, PF2 introduced a range of measures designed around what is considered best practice in transparency. These measures include requiring the private sector to:

- Provide and maintain building and operating manuals, alongside regular service performance reports
- Maintain books of account recording costs, overheads, and other payments, including details of life-cycle funds on an open book basis
- Provide, on a semi-annual basis, accrued and prospective internal rate of return (IRR) of the company and its shareholders to the procuring authority and HM Treasury
- Provide ownership details, including the price of any shares sold.

However, as private partners are not covered by the FOI Act, this creates a gap in the system, especially as more public services are outsourced, and risks reducing the scope of the FOI Act over time. An FOI submission can be made only for information that is held by the public body. If a request is made for performance or financial data that are only held by the private party, it cannot be provided. As a result of this, some parties—for example, the Campaign for Freedom of Information—have called for private bodies to be covered by the FOI Act over the course of any public contract. Any such move would be strongly opposed by the Confederation of British Industry and other business bodies. The Information Commissioner’s Office is currently considering its approach to this issue.<sup>311</sup>

### **Other Financial Disclosure Requirements for SPVs**

From our research to date, there do not appear to be any listed special purpose vehicles (SPVs) in the UK. However, several SPVs have issued bonds. This has been to date the case for three social housing projects,<sup>312</sup> which are the first wrapped PPP bonds in the United Kingdom since 2008. However, to date we have struggled to find further information provided to investors, although rating information is available.<sup>313</sup>

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<sup>311</sup> <http://iconewsblog.wordpress.com/2014/03/05/ensuring-transparency-isnt-the-cost-of-outsourcing-05032014/>.

<sup>312</sup> See <http://www.socialhousing.co.uk/manchester-and-tyneside-set-to-follow-leeds-down-housing-pfi-bond-issue-route/7001216.article>.

<sup>313</sup> For example, for the Leeds Social Housing project, Moody’s assigned an A2 rating. See [https://www.moody.com/research/Moodys-assigns-a-PA2-rating-to-SC4Ls-guaranteed-bonds--PR\\_276280](https://www.moody.com/research/Moodys-assigns-a-PA2-rating-to-SC4Ls-guaranteed-bonds--PR_276280).

Where listed companies own an SPV, they will provide information on their shareholdings and amounts due to and from the joint ventures, but there is unlikely to be more specific information on individual SPVs.<sup>314</sup>

Under the new PF2 standard conditions, it is required that the procuring authority makes it a condition of it being involved in the underlying financing that it receives from the contractor a copy of any information produced for bond issues or listings if this includes information relating to the project.

### Validation of information

The former local transparency guide contained step-by-step instructions on processing data for publication. Data are extracted from the contracts register, matched to the template fields, and checked for inaccuracies; then redactions are made, before the document goes through internal review and sign off. However, there is no provision for audit or external review of the data. This is currently being updated following the publication of the new Local Authority Data Transparency Code.<sup>315</sup>

## Actual practices at the post-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for proactive disclosure in legislation, rules, regulations, policy, and guidance

In the next subsection, we present several projects from more than 10 years of PPP experience in the United Kingdom. The projects show that the provisions and practices for proactive disclosure have changed significantly in the United Kingdom. As a result, it is not straightforward to come to conclusions on actual practice opposed to requirements, as both have changed over time. In the London Underground example, public pressure led to the contracting authority proactively publishing more than it was at the time required to publish.

Later deals have very different approaches to disclosure, such as the Royal London and the M25 widening project, with significantly more information available on the Motorway project, although it appears that the Royal London deal meets the limited information requirements set at the time. Deals such as the Greater Manchester Recycling and Waste Management Contract have gone beyond the requirements, publishing contracts and detailed project updates.

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<sup>314</sup> Examples of this can be found for Galliford Try Plc in 2013, on p92 (accessible at <http://www.gallifordtry.co.uk/investors/reports-and-presentations/reports/2013>) and also for Balfour Beatty, see p. 153 onward, [http://www.balfourbeatty.com/files/reports/2013/ar2013/ar2013\\_interactive.pdf](http://www.balfourbeatty.com/files/reports/2013/ar2013/ar2013_interactive.pdf).

<sup>315</sup> <http://www.local.gov.uk/documents/10180/11541/Local+transparency+-+a+practitioners+guide+to+publishing+new+contracts+110331+outdated.pdf/86ecca8a-e609-4792-836c-be4a3fa28f76>.



Our research suggests that, in some cases, there is an unwillingness on the part of the public authority to provide as much information as is required under the FOI law in response to requests. This can be for a number of reasons, for example, a lack of capacity to go through documents properly, concern about how the disclosure may affect the public authority's relationship with the private partner, and a more conservative attitude to disclosure. However, as the FOI law has been in place for nearly 10 years, this is being eroded.<sup>316</sup>

For the PFI projects undertaken before the development of PF2, there were voluntary codes that were quite well applied. A lot of information was provided that was not required (for example, the performance information provided in the Connect Plus annual reports). Consultees on this issue suggested that the private sector is quite willing to share financial and performance information, to prove their arguments that they are not making large profits on PFI deals. What they have been unwilling to show is the estimated values of resales and secondary markets, in case this is seen as being a windfall profit. But overall there are seen to be benefits for the private sector as well from disclosure of their own deals.

In terms of the new PF2 structure introduced in early 2013, it is early days to make a judgement on the success of its approach to transparency. After its publication, however, in late 2012, there was a push for ongoing deals to take on the PF2 transparency requirements.<sup>317</sup> It is hoped that this process will make the approaches across the contracting authorities more consistent and significantly increase the amount of information available on deals.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **London Underground**

The London Underground deal used transparency primarily to engage potential bidders in the early stage. Although it was a contentious deal, its development coincided with the development of the Freedom of Information Act, and as a result the amount of information available at the procurement phase was limited.

There were limited requirements as to what information was required to be disclosed, but in part as a result of the controversy surrounding the deals, a contract summary was prepared post financial close. A detailed document was made available to those who would oversee the contracts and a redacted version, which excluded for instance commercially sensitive financial details, was published on the Transport for London (TfL) website. This proactively disclosed more than was required by legislation at the time.

The PPP contracts were also published on the TfL site, again with redactions for commercially sensitive details such as financial models. Although the redactions were not

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<sup>316</sup> Based on discussions with the Information Commissioner's Office.

<sup>317</sup> From consultations with HM Treasury.

extensive, it is likely that the latest PF2 guidance would require more significant disclosure than was the case more than 10 years ago.

NAO and the Committee of Public Accounts reviewed the transactions and their reports are publicly available.

### **M25**

In terms of transparency, this project was before the 2010 transparency rules, but a wide range of information is available. Most notably, NAO published a report on the success of the procurement,<sup>318</sup> the Highways Agency website provides a useful summary,<sup>319</sup> and the SPV publishes annual performance reports. At the time of this project, the contract was not required to be published proactively.<sup>320</sup>

### **Royal London**

This is a very contentious hospital project that has been in procurement since 2002. There is a short summary of the project on gov.uk,<sup>321</sup> but the Barts Health Trust website contains no information about the PFI deal. The project's FOI policy, which has links to the business case for the PFI and other key information, is out of date and all the links appear to be broken.<sup>322</sup> The PFI contract does not appear to be available, but it appears that the project meets the minimum requirements.

There is no NAO performance review, although it is covered in a short case study in an NAO paper on PFI procurement.<sup>323</sup>

### **Greater Manchester Recycling and Waste Management Contract**

This agreement was made in 2009 to improve recycling centers in Greater Manchester. A clear summary of the project and its progress toward targets is available, updated in 2013.<sup>324</sup> The contract is also available, with redacted schedules and contract. Details suggest that redactions have been made for monetary values (for example, equity IRRs, termination sums, persistent breach values, etc.) and details of a possible expansion phase. The Greater Manchester Waste Disposal Authority also provides information on the annual

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<sup>318</sup> <http://www.nao.org.uk/wp-content/uploads/2010/11/1011566.pdf>.

<sup>319</sup> <http://www.highways.gov.uk/our-road-network/managing-our-roads/operating-our-network/how-we-manage-our-roads/private-finance-initiatives-design-build-finance-and-operate-dbfo/m25-dbfo-design-build-finance-and-operate-contract/>.

<sup>320</sup> The contract for M25 was requested through a freedom of information request; this was "too large" to be made available over the Internet, although a redacted version was shared with the individual who made the request. The FOI response included information on what had been cut and why.

<sup>321</sup> <https://www.gov.uk/government/publications/public-private-partnerships/public-private-partnerships>.

<sup>322</sup> The Trust has also failed to meet its transparency requirements on at least one occasion, as shown on the civil society website [whatdotheyknow.com](http://www.whatdotheyknow.com), where it took 69 days to respond to a request on the PFI when the stipulated time for responses is 20 days.

[https://www.whatdotheyknow.com/request/royal\\_london\\_hospital\\_beds\\_figur\\_2](https://www.whatdotheyknow.com/request/royal_london_hospital_beds_figur_2).

<sup>323</sup> <http://www.nao.org.uk/wp-content/uploads/2007/03/0607149.pdf>.

<sup>324</sup> [http://www.gmwda.gov.uk/clientfiles/File/Authority%20at%20a%20glance%2010\\_01\\_2014.pdf](http://www.gmwda.gov.uk/clientfiles/File/Authority%20at%20a%20glance%2010_01_2014.pdf).

unitary charge and what this covers in its annual report.<sup>325</sup> The project was a case study for NAO's review of waste management PFIs. This gives information on interest rate margins for the project, as well as cost benchmarking.<sup>326</sup>

### **Building Schools for the Future (BSF): Lancashire**

BSF was an ambitious scheme to improve all the schools in England over a 20-year period. This ran from 2003 to 2010, when the scheme was scrapped by the new coalition government. Lancashire County Council developed several schools under BSF over this period and provided clear information on timelines and individual school projects.<sup>327</sup> No contract information is provided, however, or any financial information. An NAO report on the entire BSF was published in 2009.<sup>328</sup>

## What are the challenges and benefits to disclosure?

The challenges to disclosure in the past five years have been the changes introduced to the PFI system by the coalition government following 13 years of the Labor government. The shakeup in government that preceded this meant that projects were canceled, department websites were archived, the PPP unit Partnerships UK was closed, approaches were changed, new rules were implemented, and organizations were restructured, within a relatively short period of time. Because of this, changes that were introduced at the start of the government's tenure are only beginning to be felt now, less than a year before the next election, and therefore disclosing information systematically across projects and across long project development processes has proven challenging.

However, the benefits of transparency are core to the government's policy and to overcome criticisms of poor value for money and high returns to PPP projects.

## What can we learn from this country study?

The UK example shows how disclosure policies can evolve over time, from limited reactive approaches to efforts to make information automatically available and accessible to the general public. However, since many of these changes are relatively new—the transparency approach was introduced at the same time as large government budget cuts and the PF2 approach was only introduced in 2013—we are yet to see the impact of the new disclosure policies from pre-procurement straight through to post-procurement.

From the projects that have been undertaken, it is clear that the rules are not being applied consistently, with different contracting authorities interpreting the rules in very different

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<sup>325</sup><http://www.gmwda.gov.uk/clientfiles/File/Statement%20of%20Accounts%202011%202012.pdf>.

<sup>326</sup> [http://www.nao.org.uk/wp-content/uploads/2010/07/1011287\\_appendices.pdf](http://www.nao.org.uk/wp-content/uploads/2010/07/1011287_appendices.pdf).

<sup>327</sup> [http://www.lancashire.gov.uk/corporate/web/?Building\\_Schools\\_for\\_The\\_Future/19401](http://www.lancashire.gov.uk/corporate/web/?Building_Schools_for_The_Future/19401).

<sup>328</sup> <http://www.nao.org.uk/wp-content/uploads/2009/02/0809135.pdf>.

ways. Some go above and beyond their requirements, while for others these requirements do not appear to have been met.

There are also discrepancies between the disclosure approaches for those projects undertaken through the PFI scheme and those that are not. For example, the Ofgem OFTO projects are not picked up through the HMT trackers or databases. They are however captured by transparency rules and FOI requirements.

Overall, however, disclosure appears to be something that is taken seriously by government departments that are part of the PPP process, and information is available that is beneficial to businesses (such as procurement timelines and standard contract documents) and to the general public (such as contract summaries and overview evaluations undertaken by NAO). It is hoped that the discrepancies mentioned above will be ironed out in the future.

## 14. Victoria, Australia



### PPP context in Victoria, Australia

How are PPPs undertaken in Victoria, Australia?

Victoria has a history of being at the forefront of public-private partnership (PPP) projects. Victoria was the first State in Australia to publish PPP guidelines: “Partnerships Victoria” (in 2000)<sup>329</sup> and these had a strong influence on the first national PPP guidelines published in 2008.<sup>330</sup> *The National Public Private Partnerships Policy and Guidelines* (2008) applies to all Australian state and territory governments, including Victoria. In Australia, the federal government’s role in PPPs is less significant than in many other countries, as the delivery of most types of major infrastructure projects is controlled by the states and territories. PPPs may be procured by state government departments, government business enterprises, and local authorities.

Of all the Australian states, Victoria has made the most use of PPPs, in number and total value, with PPPs comprising approximately 10 percent of all public sector investment. Since the Partnerships Victoria policy was introduced in 2000, there have been 25 projects contracted worth around \$A 17.7 billion (US\$15.6 billion) in capital investment.<sup>331</sup> The “PPP Projects Contracted” data on the Infrastructure Australia website reports that Victoria

<sup>329</sup> Department of Treasury and Finance, *Partnerships Victoria*, Melbourne, June 2000.

<sup>330</sup> Infrastructure Australia, *National Public Private Partnerships Policy and Guidelines*, 2008.

<sup>331</sup> <http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships>.

has contracted a total of \$A 18.9 billion (US\$16.6 billion).<sup>332</sup> Victoria defines a PPP as the provision of infrastructure and any related ancillary service that involves private financing.

In Victoria, state government agencies must consider undertaking a project as a PPP when the value of payments to be made by the government is expected to exceed \$A 50 million fall under the Partnerships Victoria Framework, which requires compliance with the National PPP Policy and PPP Guidelines and the Victoria-specific requirements outlined in the Partnerships Victoria Requirements (2013) and annexures. The Partnerships Victoria Requirements provide specificity to areas where the National Guidelines allow flexibility, and provide a clear approach to tender processes and governance structures. For PPP projects procured by Government Business Enterprise (GBE), application of the Partnerships Victoria Requirements is considered on a case-by-case basis.

The Partnerships Victoria policy was originally introduced in 2000 to provide a framework for the provision of PPPs. Significant reforms have since been made to these guidelines. Most recently, following a public discussion paper in December 2012, revised Partnerships Victoria Requirements were released in May 2013. This updated policy makes a clear commitment to “”transparency and disclosure of the processes and outcomes.”<sup>333</sup>

Government departments and agencies play a direct role in procuring PPPs, while the Department of Treasury and Finance (DTF) is directly involved in all PPP projects in procurement and policy guidance. DTF is responsible for ensuring that procuring agencies apply the Partnerships Victoria Framework, reviewing projects and providing advice, and monitoring and advising on significant PPP issues. To assist DTF, Partnerships Victoria was created in 2000 in its Commercial and Infrastructure Risk Management Group (it has since moved to the Infrastructure Advice and Delivery area in the commercial group of DTF). It is responsible for policy guidance as well as technical support and capacity building to portfolio ministries.

In addition, Major Projects Victoria, located in the Department of State Development, Business, and Innovation, provides project delivery services to Victorian government departments engaged in the delivery of complex and unique projects of state significance. Major Projects Victoria, under the Partnerships Victoria framework, manages complex PPP construction projects and provides compliance advice. In most cases, however, the government agencies responsible for service delivery lead the PPP procurement process and manage the PPP contract.

A detailed review of PPP bid costs by KPMG found that Australian PPPs were generally more complex than those of other countries because of a focus on value for money, the federal government system, and the complex tax system.<sup>334</sup> In addition, the average value of each PPP project is considerably higher than in other PPP markets, such as the United Kingdom and Canada. To reduce bidding costs, the report recommended avoiding

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<sup>332</sup> Source: “PPP Projects Contracted,” available from: [http://www.infrastructureaustralia.gov.au/public\\_private/](http://www.infrastructureaustralia.gov.au/public_private/).

<sup>333</sup> Partnerships Victoria.

<sup>334</sup> Available at <http://www.infrastructureaustralia.gov.au/publications/barriers.aspx>.

premature project announcements and allowing sufficient time for pre-tender phase preparation.

The states of South Australia and Queensland have based their PPP contracts on the Victoria model.

What are the policy objectives behind disclosure?

The main policy objective behind disclosure in Victoria is to promote a culture of transparency and openness within government. These standardized processes have in turn led to the added benefit of greater efficiencies.

In January 2000, the new Labor Bracks state government established an independent audit review of government contracts, in response to criticism regarding the lack of transparency on the part of the government, which had created public concern. This review covered many of the PPP contracts issued under the previous Liberal Kennett government, which prior to this time had not been published. Following the recommendations of this audit review, in October 2000 the Premier of Victoria made a policy statement on “Ensuring Openness and Probity in Victorian Government Contracts,”<sup>335</sup> which made a commitment to maximum disclosure of government contracts with only trade secrets, genuinely confidential business information, or information that would seriously harm public interest if disclosed able to be withheld. The Premier committed to establishing procedures that would make continuous disclosure an integral part of daily government work and would include making contracts and performance information of major contractors publicly available. These commitments were adopted through the Partnerships Victoria Framework (2000). The audit also recommended that contracts for projects signed between 1992 and 1999 should be disclosed. This required a significant amount of negotiation by the government with the private parties and resulted in a designated website being established.<sup>336</sup>

As a result, since 2000, full disclosure of PPP contracts has been the required default position in Victoria, except where information is exempt from disclosure on the grounds that it contains trade secrets, confidential business information, or material that, if disclosed, would seriously harm the public interest. This approach to transparency and public accountability is also reflected in the language of the National PPP Guidelines, which state that “accountability of the executive government to the legislature, and freedom of information for citizens, are key principles of the Westminster system of government operating in the Commonwealth, State and Territory jurisdictions.”<sup>337</sup>

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<sup>335</sup> Available from <http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/home-contracts-publishing-system>.

<sup>336</sup> [http://www.contracts.vic.gov.au/major/contract\\_list.htm](http://www.contracts.vic.gov.au/major/contract_list.htm).

<sup>337</sup> Council of Australia Governments, “National PPP Policy and Guidelines: Volume 2: Practitioners Guide,” 2008.

Uses and users of disclosure information and the exact nature of such use

Proactively disclosed information is, for the most part, aimed for the use of the general public, to strengthen public trust in these large transactions, which use public money.

There does not appear to have been any comprehensive analysis of the uses and users of disclosed information.

In addition to use by the general public, it appears that practitioners and advisors in the PPP sector consult the disclosed contracts, and that this has assisted in standardizing contracts, and in particular, risk allocation.

List of laws, policies, and regulations

### **National Policies**

- National Public Private Partnerships Policy and Guidelines, 2008 (*the National Guidelines*), Volume 6: Jurisdictional Requirements

### **Victoria Legislation**

- Freedom of Information Act 1982, as amended from time to time (FOI Act)
- Project Development and Construction Management Act 1994, Ministerial Direction No. 1 & 2.

### **Victoria Guidelines and Strategies**

- Partnerships Victoria Requirements, 2013
- Partnerships Victoria Annexures, 2013
  - Annexure 7: Public Interest
  - Annexure 8: Project Summary Template
- The Updated Standard Commercial Principles Victoria (April 2008)
- Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry, 2013
- Policy statement on Ensuring Openness and Probity in Victorian Government Contracts, October 2000
- Victorian Government Purchasing Board: All Procurement Policies, December 2012.

Proactive pre- and post-procurement disclosure in unsolicited projects

Following the lead of New South Wales, the Victorian government released new Unsolicited Proposal Guidelines, for infrastructure projects and services from the private sector, in February 2014. These new guidelines provide a framework for private parties to

approach the government directly, as well as for the government to approach a private party directly to deliver a project.

### **Pre-Procurement Disclosure**

The guidelines use a five-stage process.

Once the government enters an exclusive negotiation with the private party, it is required to disclose headline details of the proposal on the DTF website, updating details at the end of each assessment stage as appropriate. The government may choose not to disclose details of a proposal where it poses a risk to the negotiation process or the intellectual property of the private party.

Along with increased transparency, another key aim of the Unsolicited Proposal Guidelines is to incorporate open competition wherever possible, meaning the government can make the procurement of the proposal a competitive process at stages two and three.

### **Post-Procurement Disclosure**

A project summary is to be released within 90 days of contractual close, summarizing key aspects of the proposal, including reasons why an exclusive negotiation was pursued, how the proposal was evaluated, and what value for money was achieved for the government.



## Provisions for proactive pre-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

Except in the case of unsolicited proposals, PPPs are procured through an open tendering process. Part II of the FOI Act requires agencies to publish certain documents and information.

The *Partnerships Victoria Requirements* has the following pre-procurement publication requirements in relation to PPP contracts:

- *Expression of interest (EOI)*: all Victorian government tenders, including EOIs, have to be advertised on the Victorian government tenders website ([www.tenders.vic.gov.au](http://www.tenders.vic.gov.au)) in accordance with the requirements of the Victorian Purchasing Board.
- *The request for proposals (RFP)*, however, along with the contract documentation, is only disclosed to short-listed bidders, who have signed a confidentiality agreement. This information is therefore not proactively publicly disclosed.



A full public interest test must be undertaken as part of developing the business case for PPP delivery and the results must be presented in a standard template, although this is not publicly available during the procurement process.<sup>338</sup> The RFP should include a clear description of the public interest issues.

Traditionally, the public sector comparator (PSC) was not disclosed to bidders. However, the government is increasingly disclosing the raw PSC to bidders, reflecting an understanding that this will not undermine the competitive process and will improve efficiency. Section 7 of the Partnerships Victoria Requirements (2013) states that the government will determine the level and scope of disclosure of the PSC on a case-by-case basis, with disclosure of the raw PSC the most likely action and consideration given to complex projects that may benefit from disclosing the full PSC as an affordability benchmark and scope ladder to short-listed bidders.

The Infrastructure Australia website lists potential PPP projects and those in the marketplace. However, this information is only updated twice a year. Of the four states for which potential projects were listed, only Victoria provided links to further information.

What material is required to be confidential?

In terms of pre-procurement information, Section 10 of the Partnerships Victoria Requirements states that all Victorian government tenders, including the EOIs for PPP projects, should be advertised on the Victorian government tenders website ([www.tenders.vic.gov.au](http://www.tenders.vic.gov.au)).

Documents that are not already disclosed and not exempt under the FOI Act 1982 may be accessed by making an application under the FOI Act. In this case, Part IV of the FOI Act specifies what documents or material may be treated as exempt from public disclosure. It provides for exemptions from disclosure on 13 grounds. The most commonly used exemptions for PPP projects are set out in Sections 34, 35, and 36 of the Act, covering information provided in confidence and commercial information.

#### **Section 34: Documents Relating to Trade Secrets**

A document is exempt if the information relates to trade secrets or other matters of a business, commercial, or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

#### **Section 35: Documents Containing Material Obtained in Confidence**

A document is exempt if its disclosure would divulge any information or matter communicated in confidence or the disclosure of the information would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

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<sup>338</sup> Partnerships Victoria Requirements (2013) Annexure 7: Public interest. Available from <http://www.dtf.vic.gov.au/Publications/Infrastructure-Delivery-publications/Partnerships-Victoria/Partnerships-Victoria-requirements-annexures>.

### Section 36: Disclosure Contrary to Public Interest

A document is exempt if disclosure would be reasonably likely to have a substantial adverse effect on the economy of Victoria.

Collect and reference any specific templates/checklists being used for disclosure

The DTF has developed a set of guidelines that provide practical assistance in the development of investment projects in Victoria. Detailed guidelines are available for all five stages of the project lifecycle, which is summarized in figure 14.1.<sup>339</sup>

FIGURE 14.1 PROJECT LIFECYCLE



In addition, a fully detailed business case template is provided, which clearly outlines each section to be completed.<sup>340</sup>

Do the documents in question have retroactive effect?

The transparency and publication requirements under the Partnerships Victoria Framework only apply to PPP procurement after the introduction of those requirements in 2000. However, the 2000 Labor Bracks state government independent audit review of government contracts recommended that contracts for projects signed between 1992 and 1999 should be disclosed. This required a significant amount of negotiation by the government with the private parties and resulted in a designated website being established.

Validation of information

No validation of information is required at the pre-procurement stage.

<sup>339</sup> Available at <http://www.dtf.vic.gov.au/Investment-Planning-and-Evaluation/Understanding-investment-planning-and-review/What-are-the-investment-lifecycle-and-high-value-high-risk-guidelines>.

<sup>340</sup> Available at <http://www.dtf.vic.gov.au/Publications/Investment-planning-and-evaluation-publications/Lifecycle-guidance/Full-business-case-template-Stage-2-Prove>.

## Actual practices at the pre-procurement stage

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

At the pre-procurement stage, the requirements are fairly high level and the only requirement for information to be publicly disclosed is that tenders should be published on the Victorian government tenders website. However, it is generally difficult to ascertain whether tender information was published, as this information is only available for a short period after the tender closes. However, projects do often provide additional information that is not explicitly required. For example, the Ravenhall Prison project produces newsletters on project progress and a dedicated website was established for the East West Link Motorway. Significant projects, such as the Melbourne Convention Centre, did make the public interest test information available, although this is not required. Further details are provided in the case study examples. In general, these requirements seem to be adhered to and complied with.

The Victoria tenders website has an advance tender notice page showing an estimated advertising date, although at the time of writing this did not seem to be updated. Australia has also established the National Infrastructure Construction Schedule, a national government infrastructure project pipeline.<sup>341</sup> This pipeline provides industry with information on major infrastructure projects over \$A 50 million committed by each of the state governments. There is evidence that jurisdictions use such nationwide information when scheduling project procurement. For example, Victoria considered the Queensland Sunshine Coast Hospital procurement timetable when developing its timetable to avoid peak overlaps with its Bendigo Hospital project. However, although this schedule identifies when projects include a PPP element, they do not specify which section has been chosen to be implemented through a PPP.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### **Ravenhall Prison<sup>342</sup>**

In May 2012, the government announced the Ravenhall Prison as a PPP project (table 14.1). A new medium security facility for 1,000 prisoners will be designed, constructed, maintained, and operated through a PPP. An EOI was issued that concluded with two consortia being short-listed and an RFP was then released in November 2013. However, there is no procurement information on the Victoria tenders website, despite the project still being under consideration. At each stage of procurement, press releases have been

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<sup>341</sup> Available at <https://www.nics.gov.au/>.

<sup>342</sup> <http://www.corrections.vic.gov.au/home/prison/ravenhall+prison+project.shtml>.

issued outlining the decisions made. In addition, the Department of Justice has released three newsletters since August 2013 to provide information on the progress of the project. The preferred bidder was announced in August 2014 and the contract was signed in September 2014. Construction work was scheduled to start in early 2015.

**TABLE 14.1 ACTUAL PRACTICE FOR RAVENHALL PRISON, VICTORIA, AUSTRALIA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the Victorian government tenders website	Yes	As these are no longer available, it is not possible to confirm whether these were provided at the time the tender was released. However, we have been informed by Partnerships Victoria these were available during procurement.

**Melbourne Convention Center**

In April 2004, the government committed to developing a world class convention center to accommodate 5,000 delegates. The project, overseen by Major Projects Victoria, received \$A 367 million in state funding for capital components of the project, and has an estimated total contract value of \$A 519 million. An EOI was released in October 2004 and the preferred bidder announced in February 2006. An audit, conducted by the Victorian Auditor-General’s Office in 2007, concluded that the procurement had been conducted in line with Partnerships Victoria policy requirements and Victorian Government Purchasing Board procurement policy. This included a PSC used to assess bids, a public interest test that was conducted, and output specification included in the RFP.

**TABLE 14.2 ACTUAL PRACTICE FOR MELBOURNE CONVENTION CENTER, VICTORIA, AUSTRALIA**

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the Victorian government tenders website	Yes	Although these are no longer publicly available, it is assumed this project was compliant given the positive audit report.

**East West Link Motorway<sup>343</sup>**

The East West Link will be an 18 kilometer cross-city road connection extending across Melbourne. The first stage of this procurement, which is currently underway with an estimated capital cost of between \$A 6 billion and \$A 8 billion, will be one of Victoria’s largest infrastructure projects. An EOI was released in July 2013 and an RFP was released

<sup>343</sup> <http://www.linkingmelbourne.vic.gov.au/east-west-link>.

to the short-listed bidders in October 2013. The preferred bidder was announced in September 2014 and the project reached financial close in October 2014. A dedicated website has been developed, with updated information on the procurement process and documents such as the comprehensive impact statement.

TABLE 14.3 ACTUAL PRACTICE FOR EAST WEST LINK MOTORWAY, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the Victorian government tenders website	Yes	Although tender documents were released, as these are no longer available, it is not possible to confirm whether these were provided at the time the tender was released. However, we have been informed by Partnerships Victoria that these were available during procurement.

### Royal Women’s Hospital

In June 2008, the Royal Women’s Hospital opened, providing state-of-the-art facilities for women and their newborn babies. An audit, conducted by the Victorian Auditor-General’s Office in 2008, concluded that there was adequate transparency in the procurement as well as evidence that the government was provided with comprehensive information at each major decision point or milestone. The report stated that the business case had been constructed in line with the then Partnerships Victoria Practitioners’ Guide (2001) and DTF’s Gateway Business Case Development Guidelines (2003), although the latter was only issued one month prior to the completion of the business case.

TABLE 14.4 ACTUAL PRACTICE FOR ROYAL WOMEN’S HOSPITAL, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the Victorian government tenders website	Yes	Although these are no longer publicly available, it is assumed this was the case given the positive audit report.

### Barwon Water Biosolids Management<sup>344</sup>

Estimated at a total value of \$A 77.6 million, this project delivers a sustainable program for the treatment and beneficial use of biosolids from several water reclamation plants. The contract was awarded in 2007 and a dedicated website has been created that provides regular updates on the progress of this 20-year contract, including a regular community bulletin. The website also has links to the different media releases throughout the project’s

<sup>344</sup> <http://barwonwater.plenaryprojects.com/>.

history. However, limited information is still available online to outline the pre-procurement process.

TABLE 14.5 ACTUAL PRACTICE FOR BARWON WATER, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish tender documents on the Victorian government tenders website	Yes	As these are no longer available, it is not possible to confirm whether these were provided at the time the tender was released.



## Provisions for proactive post-procurement disclosure

What elements of the project and contract are required to be proactively disclosed? Who should be undertaking this disclosure and what are their specific responsibilities (including timelines and form of information)?

Partnerships Victoria Requirements require greater disclosure of contract information than other states, including New South Wales, with all PPP contracts required to be disclosed in full on the tenders website ([www.tenders.vic.gov.au](http://www.tenders.vic.gov.au)).<sup>345</sup> Section 15 of the Partnerships Victoria Requirements, in accordance with Volume 6 of the National Guidelines, lists the following post-procurement disclosure requirements:

### **Contract**

In accordance with the Victorian Government Purchasing Board Policy, the executed contract must be published in full on the tenders website ([www.tenders.vic.gov.au](http://www.tenders.vic.gov.au)) within three months of financial close. There are limited exceptions for disclosure, as guided by the criteria of the Victorian FOI Act 1982.

### **Project Summary**

Since 2007, a project summary of all new PPP projects has been required to be published within three months of the financial close of the project (as per Section 15 of the Partnerships Victoria Requirements). Those requirements provide that part one of the

<sup>345</sup> Section 15, Partnerships Victoria Requirements, May 2013.

project summary will summarize the key project features (for example, the rationale for the project, its value, and the parties involved) and part two will summarize the key commercial features based on the project. The Treasurer and Portfolio Minister responsible for the project must approve the summary before it is released and the Portfolio Minister must table the project summary in Parliament. Section 15 of the Partnerships Victoria Requirements states that any “significant changes” must be publicly disclosed by updating the project summary, although there is no specific guidance on what this definition means in practice. One example of this occurring was the disclosure of significant changes to the PPP contract for the Southern Cross Station PPP following the global settlement of issues in 2006, following severe delays and project milestones not being met.

Project summaries often provide information on the results of the PSC evaluation, which is a key tool in deciding whether to go with a public or private partnership. The government determines the level of disclosure required of the PSC on a project-by-project basis. Detailed information on value for money is also provided and, in some instances, details of debt financing are also stated. The project summary must also include a summary of the public interest considerations. Payment amounts and disbursements made to project companies are not disclosed in older contracts, although in newer projects total payments are disclosed in project summaries. Project summaries are prepared by the contracting authority with significant involvement from the Treasury. The area that creates the largest discussion is on what is needed to meet the public awareness requirements.

The tenders Victoria website lists all the contracts awarded in the previous 30 days by agency, including the start date, expiry date, and total value, as well as the project summary.

What material is required to be confidential?

The Partnerships Victoria principle, as defined in Clause 38 of the Updated Standard Commercial Principles (2008), is that the government is entitled to publish the project agreement and associated transaction documentation, with limited exceptions for commercially sensitive information. The principles state that, in general, only information that is exempt from disclosure under the FOI Act 1982 (Vic) will be brought under such a confidentiality obligation. (For information on what can be excluded see section 14.2.2.)

The types of information that may be treated as confidential will typically include price and percentages, and the financial model, and may include innovative construction methods or payment and price mechanisms, which the private party would wish to remain confidential, or material relevant to security, which the government would wish to remain confidential.

List the standard clauses being used for disclosure in contracts, request for proposals documents, or other documentation relating to PPPs

No standardized PPP contract has been published in Victoria or at the national level to date. However, the Commercial Principles for Economic Infrastructure (Volume 7 of the National PPP Policy and Guidelines, 2011) and Partnerships Victoria: Updated Standard

Commercial Principles (2008) include recommendations on standard approaches to clauses, including, in Chapter 38, detailed provisions on confidentiality and disclosure. These require contracts to include a clause providing that the government will be entitled to disclose (on the Internet or otherwise):

- Terms and conditions of the project agreement and any associated transaction document

Any documents or information arising from or connected to the agreement or transaction documents (including the performance of those agreements), except to the extent that any documents or information are agreed by the parties to be confidential.

In addition, the Updated Standard Commercial Principles provide that the project company should acknowledge and agree that disclosure by the state or any government agency may be required:

- Under the Freedom of Information Act 1982 (Vic)
- Under the Ombudsman Act 1973 (Vic)
- To satisfy disclosure requirements of the Victorian Auditor General, the requirements of government policy concerning Partnerships Victoria projects or to satisfy the requirements of Parliamentary accountability
- In the case of the Minister, to fulfil his/her duties of office
- In annual reports of the State Department
- Pursuant to policies of the Victorian government.

Contracts reviewed that have been entered since the date of these commercial principles appear to adopt and follow this format.

Collect and reference any specific templates/checklists being used for disclosure

The exact content of project summaries will change between projects and will also evolve based on public interest. Annexure 8 of the Partnerships Victoria guidelines provides a project summary template, with the following recommendations:<sup>346</sup>

- *Length:* summaries should be up to 20 pages
- *Partnerships Victoria:* provide an explanation of the key principles of the Partnerships Victoria Policy, including a disclaimer that the information in the project summary should not be relied on as a complete description and is not intended to be a substitute for the contract

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<sup>346</sup> Available at <http://www.dtf.vic.gov.au/Publications/Infrastructure-Delivery-publications/Partnerships-Victoria/Partnerships-Victoria-requirements-Annexures>.



- *Project overview:* to include project outcomes, tender process, value for money (include some aspects of the PSC), public interest considerations, and contract milestones
- *Key commercial features:* to include key parties to the contract and their contractual relationships, risk transfer, government costs and service payments, state contributions if any, performance measures, finance and security arrangements, and state rights at the expiry of contract.

Do the documents in question have retroactive effect? Are there clauses in older contracts that might prevent such disclosure, and if yes, how have they been dealt with?

The documents described above do not have retroactive effect.

Is the performance information disclosed against key performance indicators in the contract? How and who is responsible for such disclosure? Are audit reports disclosed and how? Are third party monitoring and evaluation reports disclosed, how and who is responsible for such disclosure?

The project summary template requires that key performance measures are detailed and explanations as to how the provider will be held accountable for nonperformance are provided. General payment mechanisms are also included in the project summary. Clause 14.2.2 in the Updated Standard Commercial Principles states that there should be “adequate reporting” of performance against key performance indicators. However, there is no further explanation given as to what this means or how it should be implemented.

A Contract Management Plan must be approved by the Portfolio Minister in consultation with the Treasurer within three months of financial close. Following national policy, a post-implementation review is optional.

The government has the right to audit the project at any time up to six months after the end of the project, and the Victorian Auditor General has the right to conduct a financial or performance audit of any government contract at any time during the contract.

However, there is no requirement for the audit report to be disclosed.

Is there provision for regular financial disclosure by the special purpose vehicle? If yes, what are the elements of the financial disclosure?

Special purpose vehicles have regular reporting requirements, which are set out in the performance monitoring system in the project agreement, including the requirement to report performance against key performance indicators. However, this reporting obligation is to the contracting authority and there is no requirement for this information to be proactively disclosed. The government may disclose this information if requested under

the Government Information (Private Access) Act after considering whether there is a public interest consideration against disclosure.

### Validation of information

Section 15 of the Partnerships Victoria Requirements 2013 describes the legislatively mandated system of certification of information through disclosure to Parliament before proactive disclosure to the public. The agency is required to submit its project summary to the Treasurer and Portfolio Minister responsible for the project, who must approve the summary before it is tabled in Parliament. These summaries are then published on the DTF website.

## Actual practices at the post-procurement phase

Examine and record the actual practices in disclosure as compared with the provisions for disclosure in legislation, rules, regulations, policy, and guidance

The Victoria tenders website provides lists of contracts awarded. The DTF website lists all completed, contracted, and tendering projects, and some of these have project summaries. These project summaries follow the guidelines that have been outlined, except when it comes to recommended length, with very few adhering to the recommended 20 pages.

According to the Partnerships Victoria Requirements, only high-level assessment criteria relating to the tender process are required in the summary. However, the majority of project summaries provided more information than required, including an annex containing full evaluation criteria. In addition, public interest considerations are required to be outlined, with the option to provide more details as an annex. Again, all but the oldest project summaries include full public interest details as an annex. It seems that the project summary for the Royal Children's Hospital (February 2008) may have set the standards for this level of proactive disclosure, as all subsequent summaries include the same additional information.<sup>347</sup>

At the post-procurement stage, there are two key requirements to be fulfilled: that the contract is published on the tenders website within three months and that a project summary is published within three months, which has been approved by the Treasurer and relevant Portfolio Minister. With a few exceptions, these regulations are adhered to and often more information is provided than is required through project-dedicated websites. Although several audit reports are available, there are no publicly available post-implementation reviews. Although these are not required by law, the National Standard Commercial Principles gives the option for these to be carried out and disclosed. Further details are provided in the project examples in the next subsection.

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<sup>347</sup> <http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships/Projects/Royal-Childrens-Hospital-project>.

Check and record for five projects whether in practice all provisions of the laws, rules, regulations, policy, and guidance have been followed in the context of proactive disclosure

### Royal Children’s Hospital

The new Royal Children’s Hospital project is the largest hospital redevelopment undertaken in Victoria, with the capacity to treat an additional 35,000 patients each year. This 25-year contract was announced in late 2007, with a total value of \$A 946 million (US\$833 million). The hospital opened in 2011. A 20-page project summary, which follows the outline detailed in the guidelines, as well as the Auditor-General’s report, are available on the DTF website. The audit report concludes that there was sufficient transparency and guidelines were well observed during the procurement process. No post-implementation review is publicly available.

TABLE 14.6 ACTUAL PRACTICE FOR ROYAL CHILDREN’S HOSPITAL, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish contract on tenders website within 3 months	Yes	Yes. <sup>348</sup>
Publish approved version of project summary within 3 months	Yes, for projects since 2007	Yes. As this is available on the DTF website, it is assumed that this received the correct approvals prior to being published.

### CityLink – Tulla Widening<sup>349</sup>

This project, which is worth around \$A 850 million (US\$749 million), will upgrade and widen two sections of road to increase their capacity. This unsolicited proposal is listed on the DTF website, as one of two such proposals. This project, announced in March 2014, is the first unsolicited project to be approved since the Unsolicited Proposal Guidelines were put in place in February 2014. However, no information is provided on the five-stage assessment process with which such proposals should be evaluated. There is limited information available on the City Link Tulla Widening. The announcement in March 2014 was that the exclusive negotiations were underway. There was a subsequent media announcement on October 6 that a contract had been signed. Financial close was to occur in early 2015, and the requirement for a project summary is triggered 90 days from close.

<sup>348</sup> Available at

<https://www.tenders.vic.gov.au/tenders/contract/view.do?id=13854&returnUrl=%252Fcontract%252Flist.do%253F%2524%257Brequest.queryString%257D>.

<sup>349</sup> <http://www.transport.vic.gov.au/projects/citylink-tulla-widening>.

TABLE 14.7 ACTUAL PRACTICE FOR CITYLINK, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish contract on tenders website within 3 months	Yes	At the time of writing, only a month had passed since the contract was signed.
Publish approved version of project summary within 3 months	Yes, for projects since 2007	At the time of writing, financial close had not occurred, so no summary was available.

### Southern Cross Station

In July 2002, the government signed a 30-year PPP agreement with Civic Nexus for the redevelopment of Southern Cross Station. At the time, this was one of the largest PPP projects undertaken in Victoria. However, delays were encountered and the agreed construction milestones were not met, which resulted in a global settlement agreement worth \$A 32.3 million (US\$28 million). Although a project summary is not available, the DTF website provides a link to the Victoria tenders website, where the amended services and development agreement and project brief can be found. In 2007, an audit was carried out. This reported that although expected service standards were clearly defined, there was a lack of clarity in key performance indicator measurement.

TABLE 14.8 ACTUAL PRACTICE FOR SOUTHERN CROSS STATION, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish contract on tenders website within 3 months	Yes	Yes, including amendments to the contract.
Publish approved version of project summary within 3 months	No, this project commenced before 2007	Although this is not a formal requirement for this project, a project brief that outlines contract amendments is available.

### Royal Women's Hospital

In 2003, the state announced construction of a new hospital to provide high-quality services to women and newborn babies. This 25-year contract was executed in April 2005 and reached financial close in June of that year. A project summary and audit report are available on the DTF website. The audit report concluded that changes to the project after the signing of the project agreement were reviewed and adequate information was shared to follow guidelines.

TABLE 14.9 ACTUAL PRACTICE FOR ROYAL WOMEN'S HOSPITAL, VICTORIA, AUSTRALIA

REQUIRED	ACTIAL PRACTICE	COMPLIANT?
Publish contract on tenders website within 3 months	Yes	Yes
Publish approved version of project summary within 3 months	Yes	Yes. As this is available on the DTF website, it is assumed that this received the correct approvals prior to being published.

## What are the challenges and benefits to disclosure?

The strong commitment of the Victorian government to transparency and accountability can be clearly seen in the policies and requirements surrounding PPP projects. Victoria has been leading the way in Australia for this method of procurement, with state guidelines influencing the first national guidelines. The state has recently updated these guidelines, mainly to reduce bid costs. These reforms still ensured that information disclosure and transparent processes are a key objective of PPP procurement.

This increased disclosure has led to greater standardization of documents, which in turn has improved the efficiencies in concluding PPP contracts. Another benefit to disclosure identified by private investors is that this facilitates sale of PPP assets by reducing the extent to which disclosure of information must be agreed to by the contracting authority.

However, given the stringent disclosure requirements for PPP projects in Victoria, the benefits of making this information publicly available (the extent to which this information is used and for what purpose) compared with the costs required could be analyzed. Consumer Affairs Victoria released a paper in 2012 looking at the costs and benefits of the mandatory disclosure of information.<sup>350</sup> Although this paper was not specifically in relation to PPPs, many of the conclusions are still relevant for this context. The paper discusses various hidden costs, such as paternalism, indirect targeting, enforcement, regulatory fog, equity, and lack of sufficient economic models to measure the welfare impacts of consumer policy. The paper therefore concludes that poorly designed policy interventions can have unintended consequences that could lead to lower rather than higher welfare and could create problems with public confidence. Analyzing PPP information disclosure with these elements in mind would provide useful information for Victoria as it continues with PPP procurement.

<sup>350</sup> Consumer Affairs Victoria, "Mandatory Disclosure of Information: Costs and Benefits of Mandatory Information Policies to Influence Consumer Choice," 2012.

## What can we learn from this country study?

The state of Victoria has a wealth of experience in PPPs, in the length of time the state has been procuring through this process and the total value of projects. As such, there is a wealth of guidance, policies, audit reports, and templates available from which other jurisdictions could gain valuable information.

By looking at the evolution of policies in Victoria, we can learn how to improve public trust in the PPP process through increased transparency and accountability. We can also learn about the types of guidance and templates that can assist these processes.

Conducting a cost-benefit analysis of the case in Victoria could provide useful information as to the level of effort and investment that should be made in public disclosure of information. Currently, the stringent regulations in place have not been analyzed from this perspective, which could be useful for other jurisdictions looking to increase their disclosure requirements.

The World Bank Group provides assistance to governments in developing countries to improve access to infrastructure and basic services through public-private partnerships (PPP). When designed well and implemented in a balanced regulatory environment, PPPs can bring greater efficiency and sustainability to the provision of such public services as water, sanitation, energy, transport, telecommunications, health care and education.

The World Bank Group's unique value proposition rests with its capacity to provide support along the entire PPP cycle —upstream policy and regulatory guidance, transaction structuring advice, as well as financing and guarantees to facilitate implementation.



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