National Public Private Partnership Policy

Draft for consultation

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Preamble

1 Government of India is committed to improving the level and the quality of economic and social infrastructure services across the country. In pursuance of this goal, the Government envisages a substantive role for Public Private Partnership (PPPs) as a means for harnessing private sector investment and operational efficiencies in the provision of public assets and services.

2 India has already witnessed considerable growth in PPPs in the last one and half decade. It has emerged as one of the leading PPP markets in the world, due to several policy and institutional initiatives taken by the central as well as many state governments. Government of India has set up Public Private Partnership Appraisal Committee to streamline appraisal and approval of projects. Transparent and competitive bidding processes have been established. To provide a broader cross-sectoral fillip to PPPs, extensive support has been extended through project development funds, viability gap funding, user charge reforms, provision of long tenor financing and refinancing as well as institutional and individual capacity building. PPPs are now seen as the preferred execution mode in many sectors such as highways, ports and airports. Increasingly, PPPs are being adopted in the urban sector and in social sectors. Over the years an elaborate eco-system for PPPs has developed, including institutions, developers, financiers, equity providers, policies and procedures.

3 The growing PPP trends, especially in the last decade, justify the need for a broad policy framework that sets out the principles for implementing a larger number of projects across diverse sectors to complement the inclusive growth aspirations of the nation. The National PPP Policy seeks to facilitate this expansion in the use of PPP approach, where appropriate, in a consistent and effective manner, through:

i. Setting out the broad principles for pursuing a project on PPP basis;

ii. Providing a framework for identifying, structuring, awarding and managing PPP projects;

iii. Delineating the cross-sectoral institutional architecture and mechanisms for facilitating and implementing PPPs.

iv. Standardising some of the vital interpretations and processes of PPP so that a clear and consistent common position is adopted in key issues.

v. Identifying the next generation issues to mainstream, upscale, broaden and expedite PPPs.

4 The Policy aims to assist the Central and State government agencies and private investors seeking PPP opportunities in:

i. undertaking PPP projects through streamlined processes and principles;

ii. ensuring that a value-for-money rationale is adopted with optimal risk allocation in project structuring with life cycle approach;

iii. developing governance structures to facilitate competitiveness, fairness and transparency in procurement; and

iv. attaining appropriate public oversight and monitoring of PPP projects.

1. Defining Public Private Partnerships

1.1 Public Private Partnership means an arrangement between a government / statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity and the private entity receives performance linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative.

1.2 Essential conditions in the definition are as under:

i. **Arrangement with private sector entity**: The asset and/or service under the contractual arrangement will be provided by the Private Sector entity to the users. An entity that has a majority non-governmental ownership, i.e., 51 percent or more, is construed as a Private Sector entity[1].

ii. **Public asset or service for public benefit**: The facilities/ services being provided are traditionally provided by the Government, as a sovereign function, to the people. To better reflect this intent, two key concepts are elaborated below:

(a) *'Public Services'* are those services that the State is obligated to provide to its citizens or where the State has traditionally provided the services to its citizens.

(b) *'Public Asset'* is that asset the use of which is inextricably linked to the delivery of a Public Service, *or,* those assets that utilize or integrate sovereign assets to deliver Public Services. Ownership by Government need not necessarily imply that it is a PPP.

[1] **Private Sector Company** means a company in which 51% or more of the subscribed and paid up equity is owned and controlled by a private entity. Private sector entity means - In case of a Company, one that is not within the purview of Section 617 and 619 B of the Companies Act, 1956. For other entities, those which are not controlled by the Government ('control' means the ownership, directly or indirectly through subsidiary(ies), of more than one-half of the voting power of the enterprise).

iii. **Investments being made by and/or management undertaken by the private sector entity**: The arrangement could provide for financial investment and/or non-financial investment by the private sector; the intent of the arrangement is to harness the private sector efficiency in the delivery of quality services to the users.

iv. **Operations or management for a specified period**: The arrangement cannot be in perpetuity. After a pre-determined time period, the arrangement with the private sector entity comes to a closure.

v. **Risk sharing with the private sector**: Mere outsourcing contracts are not PPPs.

vi. **Performance linked payments**: The central focus is on performance and not merely provision of facility or service.

vii. **Conformance to performance standards**: The focus is on a strong element of service delivery aspect and compliance to pre-determined and measurable standards to be specified by the Sponsoring Authority.

1.3 The above definition puts forth only the essential conditions for an arrangement to be designated as a Public Private Partnerships (PPP). In addition to these, some of the desirable conditions or 'good practices' for a PPP include the following:

a. **Allocation of risks in an optimal manner** to the party best suited to manage the risks;

b. Private sector entity receives cash flows for their investments in and/or management of the PPP either through a **performance linked fee payment** structure from the government entity **and/or through user charges** from the consumers of the service provided;

c. Generally a **long term arrangement** between the parties but can be shorter term dependent for instance on the sector or focus of PPP;

d. **Incentive and penalty based structures** in the arrangement so as to ensure that the private sector is benchmarked against service delivery;

e. **Outcomes of the PPP are normally pre-defined as output parameters** rather than technical specifications for assets to be built, though minimum technical specifications might be identified. Such a structure is expected to leave room for innovation and technology transfer in project execution / implementation by the private sector entity.

1.4 The models where ownership of the underlying asset remains with the public entity during the contract period and project is transferred back to the public entity after the termination contract are the preferred forms of Public Private Partnership models. The final decision on the form of PPP is a determinant of the Value for Money analysis.

1.5 Some of the commonly adopted forms of PPPs include management contracts, build-operate-transfer (BOT) and its variants, build-lease-transfer (BLT), design-build-operate-transfer (DBFOT), operate-maintain-transfer (OMT), etc.

1.6 Build-own-operate (BOO) model is normally not the supported form of Public Private Partnership in view of the finite resources of the Government and complexities in imposing penalties in the event of non-performance and estimation of value of underlying assets in the event of early termination. Government of India does not recognise service contracts, Engineering-Procurement-Construction (EPC) contracts and divestiture of assets as forms of PPP.

1.7 Government commits to the spirit of 'partnership' amongst all the stakeholders – public, private, end users and community. While the current initiatives on having a strong public community private partnerships would continue, with the growing capacity and maturity of the stakeholders concerned under a PPP arrangement, Government would in due course selectively consider newer models of 'partnerships' which would be simpler, flexible and engage increased participation amongst the contracting parties.

Box: PPP Models supported by the Government

User-Fee Based BOT models - Medium to large scale PPPs have been awarded mainly in the energy and transport sub-sectors (roads, ports and airports). Although there are variations in approaches, over the years the PPP model has been veering towards competitively bid concessions where costs are recovered mainly through user charges (in some cases partly through VGF from the government).

Annuity Based BOT models – In sectors/projects not amenable for sizeable cost recovery through user charges, owing to socio-political-affordability considerations, such as in rural, urban, health and education sectors, the government harnesses private sector efficiencies through contracts based on availability/performance payments. Implementing "annuity model" will require necessary framework conditions, such as payment guarantee mechanism by means of making available multi-year budgetary support, a dedicated fund, letter of credit etc. Government may consider setting-up a separate window of assistance for encouraging annuity-based PPP projects. A variant of this approach could be to make a larger upfront payment (say 40% of project cost) during the construction period.

Performance Based Management/ Maintenance contracts – In an environment of constrained economic resources, PPP that improves efficiency will be all the more relevant. PPP models such as performance based management/maintenance contracts are encouraged. Sectors amenable for such models include water supply, sanitation, solid waste management, road maintenance etc.

Modified Design-Build (Turnkey) Contracts: In traditional Design-Build (DB) contract, private contractor is engaged for a fixed-fee payment on completion. The primary benefits of DB contracts include time and cost savings, efficient risk-sharing and improved quality. Government may consider a "***Turnkey DB"*** approach with the payments linked to achievement of tangible intermediate construction milestones (instead of lump-sum payment on completion) and short period maintenance / repair responsibilities. Penalties/incentives for delays/early completion and performance guarantee (warranty) from private partner may also be incorporated. Subsequently, as the market sentiment turns around these projects could be offered to private sector through operation-maintenance-tolling concessions.

1.8 Unsolicited Bid/ Swiss Challenge Proposals

Unsolicited bids/Swiss Challenge proposals are not preferred by the Government. The discomfort with the use of unsolicited proposals in the public sector is on grounds of lack of transparency, and lack of fair and equal treatment of potential bidders. There are elements of "informational asymmetry" and "bidding asymmetry" between an Original Proponent (OP) and its competitors. The bidding asymmetry is due to time and price asymmetries. Since only the OP essentially gets an opportunity to make the BAFO (Best and Final Offer) after one or more rounds of negotiation—an opportunity that is denied to its competitors who are not authorized to submit an equal number of negotiated responses. In exceptional circumstances, in sectors not traditionally associated with PPP structures or where procurement of proprietary technology is involved, variants of the approach could be considered for development, with prior approval of the competent authority, provided the VfM analysis establishes such a decision.

2. Principles governing implementation of Public Private Partnerships

2.1 For broad based and sustainable growth, the Government recognizes the need to engage with the private sector in diverse sectors through PPP frameworks. The overarching objectives of such partnerships are:

2.1.1 Harness private sector efficiencies in asset creation, maintenance and service delivery;

2.1.2 Provide focus on life cycle approach for development of a project, involving asset creation and maintenance over its life cycle;

2.1.3 Create opportunities to bring in innovation and technological improvements; and,

2.1.4 Enable affordable and improved services to the users in a responsible and sustainable manner.

2.2 The PPP would be developed keeping in mind the following broad principles:

2.2.1 Provide a fair and transparent framework to facilitate and encourage PPP mode of implementation for provision of public assets and/or related services.

2.2.2 Ensure that the projects are planned, prioritized and managed to benefit the users and maximize stakeholders' economic returns.

2.2.3 Adopt an efficient, equitable, consistent, transparent and competitive process for selection of private partners, and ensure efficient governance over the project life cycle.

2.2.4 Protect the interests of end users, project affected persons, private and public sector entities and other stakeholders.

2.2.5 Encourage efficient delivery of public services by engaging proficient and innovative practices with the utilization of best available skills, knowledge & resources in the private sector.

2.2.6 Achieve increased efficiency in the deployment of investments by setting out enabling frameworks for greater private sector participation in building future public assets and ensuring their long-term maintenance.

2.2.7 Provide requisite provision in budgets for contingent liabilities for the sponsoring government, in various forms, such as, liabilities towards lenders in case of contract termination or minimum revenue guarantees.

2.3 Recognising the imperatives to accelerate the delivery of efficient Public Private Partnerships to achieve the overall development goals, the Government would develop programmes, guidelines and practices based on the broad principles enumerated above and, if deemed necessary, introduce changes to legislation and business rules to optimally deliver public services. A few critical interventions envisaged are:

2.3.1 Preferred PPP implementation models

The Government will formalise PPPs as the preferred implementation models, where adequate examples and a strong track record exist. Thus, wherever applicable, the Government will state the specific PPP model which will be used as an implementation priority. This will provide adequate clarity to Government entities and encourage them to adopt the identified PPP model as a priority.

2.3.2 Enhancing transparency in PPP projects

Ensuring transparency in Government processes is the topmost priority of the Government; PPP projects processes need to be transparent to retain the trust of the stakeholders. The Government has notified strong procedures that are to be adopted in the procurement of a PPP project. These ensure that a level playing platform is provided to all the bidders interested in the project. To further instill transparency, the Government will:

i. Publish separate mandatory disclosures and fair practices which all PPP projects should follow.
ii. Set up a dedicated dispute resolution mechanism to address issued related to bidding and award of PPP projects.
iii. Develop new market based products, such as independent pre-bid rating, to assist investors in identifying well-structured PPP projects.
iv. Explore possibilities of setting up a web based PPP market place to transparently market upcoming and ongoing PPP opportunities.

2.3.3 PPP rules

While structuring PPP projects, Government officers are required to exercise their judgment and take decisions that balance the interests of diverse stakeholders, including the interests of the Government. In order to guide the officers, the Government will publish defined set of PPP rules, including identification and procurement processes, critical clauses of a contract such as dispute resolution and arbitration, events of force-majeure and termination, monitoring of projects and management of contracts that will empower Government officers in project structuring and decision making.

2.3.4 **Auctioning**

In instances where PPP projects provide an implicit usage/ownership or exclusivity right over underlying natural resources, a process of market based price discovery of such natural resources would be the paramount consideration in PPP bidding and award. Alternatively, wherever the resources are provided for a specific use, such as use of land for a transport project, alternative exploitation of the land will be prohibited and this would be a non-negotiable position.

2.3.5 **Enabling smooth implementation of projects**

In instances where one PPP project depends on another and the two projects are not taken up as one integrated package, the public authority shall facilitate and ensure completion of each project for benefit of the other.

3. The PPP Process

3.1 To make the decisions needed to plan, develop, and execute successful PPPs, the process can be broadly divided into four phases, viz., identification stage, development stage, procurement stage and contract management and monitoring stage.

3.2 **Phase 1: PPP identification**, covers activities such as strategic planning, project pre-feasibility analysis, Value for Money analysis, PPP suitability checks, and internal clearances to proceed with PPP development.

3.3 Some of the critical drivers are discussed below.

3.3.1 **PPP Plan to generate a steady pipeline of PPP projects**
To make efficient use of existing assets and harness new investments for greater efficiency, the Government shall set out, over a period, a long term vision and plan document for each sector which defines the role of public and private participation. For each financial year, based on a pre-determined and envisaged level of public services to be rendered, different agencies would set out an annual PPP Plan which would identify a shelf of projects flowing from the overall vision and specify the extent of private investment for each project in the Plan.

3.3.2 **Pre-feasibility analysis** would be undertaken by the project proponents to assess broad viability of every project envisioned to be procured on a PPP mode. Identification of the key risk factors for the project shall also be undertaken to establish the likely cost and revenue streams of the projects.

3.3.3 **Value for Money Drivers**
Value for Money assessment plays a central role in decision around investment prioritization and in the selection and presentation of the choice of procurement approach. This is particularly relevant to annuity based payment schemes, where a framework is needed to assess whether or not it is the appropriate procurement route given the alternative of more traditional procurement approaches.

i. Value for Money (VfM) analysis shall be undertaken to support key decisions. At the outset, VfM analysis shall be undertaken to establish whether to develop a project as a PPP project. Subsequently, the VfM analysis should be undertaken to affirm whether to award a PPP contract on the basis of the bids received. A VfM analysis is most eminent upon structuring a PPP by comparing a shadow bid resulting from the financial analysis with a public sector comparator (or costs in case of conventional procurement). (A brief note on VfM is furnished at Annexure)

ii. VfM analysis should be conducted for every project in order to ascertain whether the Project being procured as a PPP is in a way offers good Value for Money to the public sector. VfM analysis would be conducted even if no fiscal support is required, as the costs may be recovered through user charges (as there is an obligation to ensure that charges users pay are fair and reasonable).

iii. VfM assessment would be based on the efficiency savings that can be realized by utilizing the private sector managerial skills, integration and synergy between the design, build and service operation, optimal risk allocation, whole of life costing, innovation, focus on outputs and a robust competitive process to elicit the best bids.

iv. It is recognized that information availability is a constraint in the formulation of VfM analysis and also that sectors have different characteristics that influence the VfM outcomes. The public sector entities, either directly or through agencies such as PPP Cells, would set in place mechanisms for creation of a database which would facilitate this exercise.

3.3.4 Conformance with State and Sector Legislation

Before structuring a PPP project, an assessment would be carried out to ascertain whether private participation in the delivery of a public service is permissible under the extant legislations. If the same is not allowed but it is deemed prudent to adopt a PPP framework, suitable modifications/amendments would be made to the legislations.

3.3.5 Adherence to Processes

In addition to the above, a project would be deemed suitable for PPP, only if risks could be allocated in such a manner that maximizes the stakeholder benefits and the implementing agency commits to adhere to the process of development, procurement and post award governance of the project. If a project is found not suitable after the PPP suitability assessment, the implementing agency would consider alternative methods of taking up the project including EPC contracts, corporate sponsor, community participation, etc.

3.4 **Phase 2: Development Stage** covers project preparation (including technical feasibility and financial viability analysis), project structuring, preparation of contractual documents and obtaining of project clearances and approval. During this stage, activities would be undertaken with the following objectives:

a. Articulate the scope of the project, implementing agency's requirements and set forth roles/ responsibilities of the parties;
b. Establish that the revenue model is robust and sustainable over the project life;
c. Ensure that the underlying risks are defined and appropriately allocated between the contracting parties;
d. Ensure that the contractual arrangements and documentation accurately reflect the scope of the project, roles and obligations of parties, performance standards, monitoring arrangements, penal provisions, reporting requirements, dispute resolution mechanism and termination arrangements as well as & and effective post award governance mechanisms;
e. Ascertain that contractual arrangements are permissible under the policy, legal and regulatory regime; and
f. Establish stakeholder buy-in and commitment is ensured throughout the process;

3.4.1 As part of the project development activities, implementing agencies would undertake studies and investigations relating to technical, market analysis, financial, legal aspects, with the assistance from advisors/consultants wherever required. The output of the project development activities, to the extent feasible, would be made available to the potential bidders during bid process. Some of the core activities critical at this stage are discussed below.

3.4.2 **Economic, Financial and Affordability Assessment**

i. To structure the projects optimally, the implementing agency would evaluate the project from an economic perspective (to ascertain whether the project is warranted – public need), then whether the project generates positive value to the private sector (financial viability), and finally ascertain whether defined viable PPP is better than conventional procurement or which of the defined viable PPPs is most attractive (VfM analysis). All these analyses would be based on the same valuation methodology – calculation of net present value where future benefits (revenues), and costs (capital, O & M), are discounted to reflect the current value.
ii. **Economic analysis** would form a key input for decisions regarding the (public) need for a project, and would encompass, in addition to the cash flows and items that have financial impact, other external costs and benefits to the stakeholders, regardless of whether they have any financial impact. The future economic benefits and costs will be assessed and discounted using a discount rate that reflects the systematic risk of the projects.
iii. **Financial analysis** would assess whether the project generates sufficient revenues for the capital providers to generate an acceptable rate of return. The future financial benefits and costs (in terms of cash flows) are discounted, using a discount rate reflecting the cost of capital, and which also takes into account the systematic risk of the project.

iv. **Affordability analysis**, with respect to both the implementing agency (viz., committed and contingent liabilities, such as land acquisition costs, rehabilitation and resettlement costs, annuity payments, management fees, etc.) and the likely users (tariffs, user charges, etc) would be a critical determinant in addition to the VfM analysis, on whether to take up the project on the PPP mode. It is also an effective tool to establish the reasonableness of assumptions underlying the financial analysis.

v. **Bankability assessment** would also be carried out to assess the debt service capabilities of the proposed project structure. A Debt Service Coverage Ratio (DSCR) (a ratio of cash flow available for debt servicing divided by the amount of debt service) is a key measure to assess the credit worthiness of a project . In case the analysis suggest that the project is not bankable, the implementing agency might consider developing credit enhancement mechanisms, such as viability gap funding, capital grant or maintenance grant, alternative revenues structures, including shadow user fees, etc. Such credit enhancement structures would be facilitated through institutional and contractual provisions.

vi. Existing loans, guarantees, other statutory and contractual liabilities and contingent liabilities affect the fiscal resources of the project proponents and would be considered while structuring PPP contracts.

3.4.3 **Value for Money Analysis**

A similar (as adopted for economic and financial analysis) methodology would be utilized for quantitative assessment of Value for Money. The future benefits and costs of applying PPP in comparison with conventional procurement are assessed and discounted using a discount rate reflecting the systematic risk of the project.

3.4.4 **Management of Risks**

i. The Government, through the implementing agencies, shall identify different types and degree of risks during the project life cycle, and configure appropriate mitigation measures. **The objective would be to optimally allocate the project risks, rather than maximize their transfer to the private sector.** The attempt would be to allocate risks, taking into account the legitimate concerns of the stakeholders, to the entity that is best suited to manage the same.

ii. In the normal course, the public sector would not retain the risk that the private sector has better ability to bear. However, **risks that the public sector is more competent to mitigate/bear in the normal course of its business, such as ensuring availability of unencumbered land for the project or obtaining mandatory clearances of regulatory authorities prior to commencement of the project, would be retained by the public sector**.

iii. The allocation of risk shall be **enshrined in the contract document** and under normal circumstances **shall not be subject to modification after the award of the project**. Contractual documentation would provide adequate protection to lenders against non-commercial risks related to force majeure, regulatory changes, contract termination etc. The contract would also prescribe the key performance indicators and output parameters to ensure that the delivery of services adheres with the aspired levels.

iv. To ensure that the projects conform to the guiding principles of PPPs, the Government has notified the **Guidelines for Formulation, Appraisal and Approval of Central Sector PPP Projects**. The procedure enshrined in these guidelines shall continue to be observed for all central sector projects. States are encouraged to put in place a similar mechanism.

v. Government, where required, would set out mechanisms for periodic review and reallocation of the risks that could not be transferred for the entire contractual period.

Box 2: Criticality of robust legal contracts

A clear legislative and regulatory foundation enabling the public entities/utilities to enter into PPP contracts and arrangements is desirable, to secure:

1. A transparent and objective process for selection of infrastructure projects taking into consideration concessionaire concerns about 'Value for Money' and welfare consideration. In doing so, the process design must be consistent with the governing framework for public procurement;

2. A clearly defined approval, compliance and performance monitoring jurisdiction. This is especially relevant in relation to the rights of local and other authorities such as the Development Authorities, Municipal Authorities and Panchayat Raj Institutions;

3. A clear definition of the role, responsibility and rights of various parties in the governing instruments including the scope of public service, service standards, pricing, and scope of governmental intervention or assistance ;

4. The participation of private parties in ownership and/or management of public assets and/or delivery of public utility services;

5. The vesting in such private party, the power to -

(a) Collect, retain and appropriate revenue to meet reasonable expenses incurred in implementation of the PPP project including a pre-determined/ agreed return on the funds employed; and

(b) Seek revision of the charges and/or collection in terms of the concession agreement, in order to facilitate business planning and financing.

6. The role of the Concessionaire in maintaining and managing the PPP asset/services and in controlling access to and usage of the infrastructure facility; and,

7. The scope of bankability and securitization of the Concession, Project Assets and revenue (including assignability) so that the Concessionaire is in a position to avail affordable debt finance by securing lenders.

3.5 **Phase 3:** **Procurement stage** would cover procurement and project award. Transparent, accountable, non-discriminatory, competitive and timely procurement processes would be followed so as to encourage maximum participation by private sector and to imbibe public confidence in the procedure. The PPP rules notified by the Government would define the norms and procedures for procuring PPP projects.

3.5.1 The bid documents used for procurement of private sector entities may comprise one or more of expressions of interest, request for qualifications, and request for proposals. Technical proposals would be invited, depending on the complexity of a project, to assess the ability of the private entity of their appreciation of the desired outcomes. Financial proposals would ideally be in the form of a single objective parameter.

3.5.2 The Government has prescribed the bid process and the model bidding documents (viz., model Request for Qualification and model Request for Proposal) for PPP projects in infrastructure sector, through notifications issued from time to time. The implementing agencies shall observe the prescribed process or take necessary approvals of the competent authority on the process, relevant to their sector, proposed to be undertaken prior to commencement of the bid process.

3.5.3 A web based market places, including e-tendering and auction would be promoted based on the project requirements to promote wider participation and transparency in the process.

3.5.4 Draft contract agreement[2], containing provisions on the roles and obligations of the parties, performance standards and monitoring arrangements, reporting requirements, penalty conditions, force majeure conditions, dispute resolution mechanism and termination arrangements, shall be provided to the prospective bidders as part of the bid documents.

3.5.5 Timelines to be followed during the procurement process would be indicated by the procurement entity in the bidding documents. In order to minimize delays, the procurement entity would endeavor to obtain all necessary approvals for a project from the agencies concerned in a timely manner.

3.5.6 Procuring entities would, on best efforts basis, facilitate all necessary clearances for speedy implementation of a PPP project.

Box 3 : Provision for Competitive Dialogue in exceptional circumstances to bring in innovation and design flair from the private sector

In complex contracts where an implementing agency is unable to objectively establish the exact project parameters needed to achieve project objectives, due to a number of possible technological, legal and /or financial options for developing a project, a competitive dialogue process might offer a solution to arrive at clarity on the optimal project scope. This would involve the working together of an implementation agency with likely bidders to explore all possible technical, commercial and legal options and arrive at the optimal solution through an iterative procedure. The dialogue ends when the authority can identify the solution or solutions which meet its needs. Any such exercise must still be followed by the development of appropriate base financial and project models by the implementing agency and a competitive, fair and transparent tendering process avoiding discrimination or bias towards any single party. Bidders then submit tenders based on the solution resulting from the dialogue. Competitive Dialogue cannot be considered as a default position, and must be used with prior approval of competent authority.

[2] Wherever Model Concession Agreement has been notified by the Government of India, the same would be used by the implementing agency. Model Concession Agreement(s) are documents approved by the Minister-in-Charge of the concerned Ministry/Department, after obtaining concurrence of all such Ministries/Departments, as are required to be consulted in terms of Rule 4 of the Government of India (Transaction of Business) Rules. Such concurrence should be obtained at the level of the Minister-in-charge of the consulted Departments and in case of disagreement between the departments; the matter can be placed before the Cabinet in accordance with the usual procedure.

3.6 **Phase 4: PPP contract management and monitoring stage**, covers project implementation and monitoring over the life of the PPP project. Contract management is not a passive box ticking/reporting exercise: it is an active process that involves a wide range of skills. Projects are not static, conditions change and the capability of the public authority at the interface with the private sector party is therefore crucial. The contract manager needs to be empowered to take action responsively and effectively only escalating up the chain issues that cannot be managed at the project interface. This calls for effective and efficient governance processes and people with the right mix of skills (or at time access to skills) including project management, commercial expertise and negotiation skills;

3.6.1 The Government and the implementing agencies shall endeavor to ensure timely and smooth implementation of the project. The implementing agency shall put in place a suitable contract administration framework for monitoring project performance milestones over the contract period.

3.6.2 The project implementing agency shall establish appropriate mechanisms for project monitoring such as Project Monitoring Unit (PMU) and inter-department committees that would oversee project implementation, facilitate coordination between departments and render assistance during events of dispute resolution or arbitration. The contract management teams identified would be well prepared and resourced in advance of the contract management stage. In particular, those charged with managing the contract would have a close knowledge and understanding of the relevant terms of the contract, especially, where relevant, the performance criteria and payment mechanisms;

3.6.3 The dispute resolution mechanism would be in accordance with contract conditions and applicable legislation. The implementing agency shall endeavor to speedily resolve and dispose disputes during the contract period through appropriate mechanisms including mediation processes.

3.6.4 The Government recognizes that appropriate capacity is critical to effectively undertake project monitoring and, therefore, appropriate human resources and management systems would be established for the above.

3.7 Management Information Systems

In order to continuously monitor the performance of the PPP projects over the project life cycle, the Government would establish the MIS for PPP projects. The evaluation of the PPP projects would also be tabulated and summarized so as to utilize the same for improving the quality of service delivery levels and sustainability of PPPs in the future. The database of the projects would not only contain information on the ongoing projects but also set out frameworks for monitoring them during various stages of the project cycle. The database would be so developed so as to generate information for undertaking VfM analysis. PPP Cells would be responsible to set up MIS systems and disseminate information to Government agencies from time to time so as to effectuate suitable policy changes based on the previous experience of managing PPP projects.

3.8 Post Project Award Negotiations

It is acknowledged that including conditions in a PPP contract that allow a party to negotiate post award and execution is not advisable, and to the extent possible, the contract must cover all possible aspects that would required subsequent adjustments. Hence, modifications in the contractual terms should be rare events and subject to the following principles:

3.8.1 The implementing agency must justify that risk sharing at allocation stage has significantly changed due to rare circumstances beyond the control of the parties.

3.8.2 Any such post award negotiations would be undertaken in the spirit of adhering to the VfM analysis established during the project development process.

3.8.3 The implementing agency would obtain prior approval of the sector regulator (if any), the appraising entity and the authority granting approval to the investment decision in the project before effecting any change in the contract.

3.8.4 All negotiations shall be undertaken in a transparent manner aimed at generating awareness among the stake holders about the original bid and contractual conditions, the proposed changes and justifications, thereof. The transparency herein would include mandatory disclosure by both parties.

3.8.5 All such negotiations and contractual modifications would be subject to audit, including stage audit, by the authorities.

4. Enabling Frameworks

4.1 The government is committed to continue to create an enabling environment for PPPs across the country, through initiatives including enabling funds and schemes, guidelines, institutional structures as well as processes. Some of these critical enabling elements are elaborated below and would be explored and extended as relevant to applicable sectors, geographies and projects.

4.2 **Financing Mechanisms**

4.2.1 The Government of India has a progressive financial support system for PPP projects. Government has put in place a number of schemes, to support PPPs either for project development or for gap financing capital and life cycle investments. A few key initiatives include the India Infrastructure Project Development Fund (IIPDF), Viability Gap Funding (VGF), resources for annuities / availability based payments, long tenor lending, re-financing facility, infrastructure debt funds, etc. The Government shall explore and provide more interventions to facilitate more PPP projects as relevant from time to time. The Government of India recognizes that in new sectors seeking PPPs, such as in health and education sectors, annuity based PPPs can make a significant impact.

4.2.2 Government would continue to provide, legislative and policy support for developing equity, debt, hybrid structures and appropriate credit enhancement structures targeted towards various domestic and international financial investors such as equity providers, debt and capital markets, insurance sector etc.

4.2.3 The implementing agencies would encourage leveraging monies available from schemes such as JNNURM, Bharat Nirman etc., and alternate sources of finance like Municipal Bonds, Pooled Finance Structures, Pension Funds, etc. for PPP.

4.2.4 The Government, where necessary and appropriate, would consider levy of user fees to generate financial resources for rehabilitation or redevelopment or construction or replacement of project assets and their ongoing operations and maintenance in order to provide good quality public assets and/ or related services. The determination of such user charges, where there is no regulator, would be based on the principles including, but not limited to, partial or full recovery of the costs, savings to users, efficiency gains, willingness to pay, need for explicit subsidies, and affordability.

4.2.5 In order to facilitate quick mobilization of financial resources and to develop new innovative financial instruments for the PPP projects, the Government shall have regular interface with banks, financial institutions and the private sector.

4.3 Land

4.3.1 Expeditious legal and physical provision of unencumbered land/ right of way in a time bound manner is critical for provision of public assets and/or related services. Government agencies sponsoring the PPP project, while retaining all responsibility for making available unencumbered land for the project and obtaining clearances from relevant regulatory authorities, shall also ensure that the interest of land owners are fully protected under the extant laws.

4.3.2 In cases, where the asset need not be located on a particular site, bidders may be allowed to propose various location specific solutions and to take responsibility for acquiring the site. The risk associated with the ground condition, geology and other factors will be preferably passed on to the private entity.

4.4 Capacity Building Measures

The Government recognizes that to identify projects that are amenable to PPPs, to structure them in a commercial format, creating contract documents that apportion appropriate risk to the public and private partners and to manage the transaction for bidding out such projects in a transparent manner, capacities have to be built in public institutions, public officials, private sector, users and other stakeholders. A number of capacity building interventions have been initiated by the Government *to develop organisational and individual capacities for identification, procurement and managing PPPs.* A few illustrations of the measures initiated are the strengthening of PPP Cells, establishment of online toolkits and manuals and the National PPP Capacity Building Programme for providing training on PPPs in a phased manner to State Governments, Urban Local Bodies and Central Government departments. The Government is committed to increasing efforts at building capacities whether at sponsor agency, community or private sector levels so that increasing understanding of the benefits of PPPs leads to a robust PPP project pipeline across diverse sectors.

4.5 Participation and Communication Mechanisms

The Government recognizes the need for clear and consistent communication while developing PPP projects PPPs often generate a range of responses among stakeholders. A coherent and strategic approach to communication so as to inform and engage stakeholders is critical for mobilising a broad-based support for successful project development and implementation. The public would be engaged during the project development process and the implications of a project would be explained and opportunity given to all stakeholders to raise their concerns. The regulatory and legal framework would also promote and protect the wider public interest, including users of public services.

4.6 Public Private Partnership Cell in the Department of Economic Affairs will provide a center of expertise and technical support to government ministries and other authorities developing PPPs. It will have specialists from different areas (finance, law, engineering, planning, etc.) and will have mixture of experience in both public and private sectors. The PPP Cell will be entrusted with – capacity building, developing initial pilot projects to test PPP models, providing technical advice and support, communicating lessons from project evaluations and coordinating the PPP programme of the country. In due course, a company in PPP mode may be created by Ministry of Finance, with both private and public sector shareholders, which will provide support to the PPP Cell in effective discharge of its responsibilities. The PPP Cell will also facilitate independent review of projects at each stage, which includes bid evaluation stage, and just prior financial closure to reconfirm that the final results offer Value for Money for the public authority. The ministry concerned will continue audit and evaluation of the projects to review whether the original objectives as to costs, service delivery and risk transfer have been met.

5. Institutional & Governance Mechanism

5.1 Institutional Framework for PPPs

5.1.1 A strong and well defined institutional structure is a cornerstone for the development of a sustainable PPP programme. In addition to governance and due diligence functions, the institutional framework nurtures and encourages new models and innovation and develops capacities to successfully discharge changing roles and responsibilities that PPPs require.

5.1.2 The Government has supported the creation of nodal agencies such as the PPP Cells at a State or sector level. The functions envisaged of a PPP nodal agency, such as a PPP Cell, are outlined below. The PPP Cells would be strengthened with appropriate resources and skilled manpower to achieve these roles.

i. Identify, conceptualize and create a shelf of projects and recommend approval of suitable projects for implementation on PPP route.
ii. Assist in preparing the pre-feasibility reports through consultants.
iii. Appoint / select consultants to develop the projects.
iv. Ensure rigorous adherence to managing effective and transparent tendering processes.
v. Create coordinated, efficient, machinery for PPPs whereby viable transactions are tendered to the market and the costs of each transaction are realizing economies of scale.
vi. Develop internal evaluation guidelines in consultation with the respective departments to evaluate and assess the projects.
vii. Act as the nodal agency for capacity building for PPP, through training and technical assistance, to increase the deal flow of eligible projects.
viii. Ensure dissemination to consumers, investors and other government entities on the benefits and procedures for PPP in a given sector.
ix. Inspect, visit, review and monitor PPP projects under implementation.

5.2 Decision-Making Process for PPP

5.2.1 In view of the initiatives by the Government of India to promote PPP projects and given the wide-ranging exposure that the Government could assume under a PPP project, the Government has established an appraisal mechanism for PPP projects. Hence, the Cabinet Committee on Economic Affairs of the Government has created the PPP Appraisal Committee (PPPAC), comprising of the following:

a. Secretary, Department of Economic Affairs (Chairman)

b. Secretary, Planning Commission

c. Secretary, Department of Expenditure;

d. Secretary, Department of Legal Affairs; and

e. Secretary of the Department sponsoring a project

5.2.2 Every PPP project at the central government level, even where no capital subsidy is required, is expected to obtain clearance from the PPPAC[3]. The intent of the clearance process is to ensure that the projects that are bid out are commercially robust, the provisions in the contract document safe guard user and public interests and the contingent liabilities of the Government are capped.

5.2.3 The PPPAC encourages the utilisation of standardized contractual documents, which lay down the standard terms relating to allocation of risks, contingent liabilities and guarantees as well as service quality and performance standards, and standardised bidding documents such as Model Request for Qualifications and Model Request for Proposals that have been notified.

5.2.4 The establishment of annual parameters and targets for the performance of the sectors, as well as decisions to enhance investments are taken by the Union Cabinet and its Committees.

5.3 Audit Mechanisms

5.3.1 To maintain transparency, equity and fairness in developing and implementing projects , the Government would continue to strengthen the governance processes and institutions that are accountable to the stakeholders. The financial management, accountability and audit obligations, to verify the robustness of the development, procurement processes adopted and functioning of the **public sector entities** would remain as per the applicable legislation.

5.3.2 The oversight would extend to the manner of selection of the private entity, procedures observed in releasing payments from time to time, review / monitoring of quality of service and Value for Money analysis, with the view to ensure adherence to key performance indicators enshrined in the contract. The oversight would also extend to ensure that the terms of contract have been adhered to in terms of

[3] or relevant authorities as per the Guidelines on Formulation, Appraisal and Approval of Public Private Partnership Projects issued by the Ministry of Finance.

ensuring condition precedents, VfM performance assessments, imposition of penalties for non-performance, reckoning of termination payments, etc. Any post award negotiation and / or contract modification would remain a critical area focus during the oversight process.

5.3.3 These provisions would not be applicable to the private sector entities (including the special purpose vehicles set up for provision of public assets and/ or related services), irrespective of whether any financial assistance (in the form of user charges, annuity, viability gap funding or any other form/ means) has been extended or not.

5.4 Regulatory Mechanisms

As provision of many public assets and/or related services has natural monopolistic characteristics, the same would be regulated to ensure that the interests of users and service providers are protected taking into consideration the affordability of the users and certainty of pricing and revenue stream to the private party. The regulation would be through independent (multi-sectoral, where applicable) regulators, wherever there is no sector specific regulator, regulation would be through contractual arrangements. Where the regulatory mechanism becomes operational subsequent to a PPP contract execution, Government commits to take cognizance of the contract provisions would prevail to minimize regulatory risk.