CUTS Institute for Regulation and Competition (CIRC)'s comments on draft PPP policy 2020, Government of Rajasthan

This is with reference to the letter dated October 23, 2020 by HCM Rajasthan State institute of public administration asking for public consultation and comments on the draft PPP policy 2020.

CIRC is pleased to submit its comments/suggestions on the above-mentioned subject in the tabulated format below.

Sl No	Chapter and provision in draft policy	Details about the provision	CIRC's comments	Rationale
1	Ch1: PPP Preliminaries 1.1	This state about creation of separate Infrastructure and finance department (IFD) as nodal department especially for PPP projects. Also, it covers about project conceptualization and initiation from the line ministry.	CIRC welcomes this move to create a separate dedicated entity for PPP projects formulation, coordination and assisting in project formulation to project delivery and monitoring of PPP projects.	The creation of a dedicated entity is designed to assist public sector bodies to improve the delivery of PPPs. The important function is to standardize the procurement process and work towards capacity building of internal staff in finance department of government departments. This will help in coordinating between various departments for creating a common objective and work towards it. The dedicated entity helps to avoid potential conflicts of interest between several departments. However, as international experience shows, the role of the IFD should change as the PPP program matures and government agencies build up expertise and start developing their own PPP units. There should be proper timeframe for this transition with a vision document for the unit.

				On the matter of project initiation and conceptualization, it should be open to all. It can be initiated by anyone including private sector or non-state actors describing a need from the society. This may come as an unsolicited proposals and may be given due consideration accordingly. However, its relevance and need is subjected to detailed discussion and approval from the line ministry.
2	1.3	Definition of PPP and clear statement that it is provision of public assets and service through private investments for specific period of time, payments conforming to benchmarked outputs and milestones	CIRC welcomes this move by the government.	This sends a clear message to the private partner about their role in the PPP project delivery and payment related aspects that is strictly aligned to the outputs that is benchmarked against specific set standards. The upfront statement of what is PPP and what it entails for the private partner helps in removing any ambiguity about the PPP project delivery and related payments.
3	1.4.1	Recognition of NGOs, societies, trusts and CSOs as private partner and exclusion of government entity as private partners	This is a welcome move to clearly state who qualifies as private partner for a PPP project.	The recognition of trusts and societies as private partners is a big move as there are numerous organizations that are working in the PPP mode and most specifically, in the areas of social infrastructure projects where there is no or very little existence of big private players . It is a good idea to state and specify upfront, that “private sector” include any non-govt entity - specifying the stellar role many community based organisations, specialist institutions of learning have played in public welfare and sustainability.

				This is necessary to remove the usual ideological stigma of “greedy private sector” as the only partner. This is general perception created by many who are dogmatic about such things.
4	1.4	Essential conditions of projects that can be categorized as PPP such as arrangements, investments, O&M for specific defined terms, risk sharing	It helps in removing the ambiguity in classifying whether a project qualifies for PPP project or not.	The upfront statement in the policy about the essential conditions will make it easier to categorize whether a project is categorized into PPP projects or not.
5	Ch 2: PPP governance and Institutions 2.2	The creation of IFD department. The secretary in charge of IFD shall also function ex officio as the chairperson of the state procurement facilitation cell and chairperson of board of directors of PDCOR	It will help streamlining the PPP projects and reduce the time period required from project conceptualization to project delivery as the decision taking will be fast with one person handling the intermediaries departments.	With one single person at the helm of all the departments where the PPP project would go through, the decision taking will be prompt and it will create a sense of urgency in the departments to process the things fast. This will also help in removing any bottlenecks due to mis-communication and coordination issues.
6	2.3	Provision for a separate dispute resolution authority known as Appellate and Arbitral Authority (AAT) for redressal of any pre award or post award disputes.	This is a welcome move and in line with best practices adopted in several countries for addressing the disputes.	The long-term nature of PPP projects requires parties to seek quick and efficient solutions to disputes that avoid petty actions that can endanger a project. It is therefore critical, that a separate dedicated entity look for any disputes and handle it within stipulated time frame. The most important goal of any parties involved in a dispute resolution action is making decisions, where possible, that will ensure that the project continues to move forward in a viable and profitable manner.

				In any case, having a separate independent entity for dispute resolution would ensure that partners are heard succinctly and the disputes can be managed effectively without any bias.
7	2.9	For addressing risks, PPP document should provide for appropriate designed contractual clause to mitigate any adverse impacts to any of the party.	It is also a welcome move. While the bidding conditions remains intact, other conditions can be made flexible to accommodate any risk that cannot be foreseen at the start of the project.	In situations such as force majeure conditions or any regulatory risks that may come after the agreement, it may dent the sustainability of the projects. In this case, it is required that both parties should come to the negotiation table to find a way out. In most of the cases, this clause can be included in the contract itself so that the NPV of the project would not change for any adverse conditions such as risks associated with any change in law event. This is applicable for both for windfall gains or adverse impact to profitability in case of any events that is beyond anybody's control. For Example: In the power sector Standard Bidding Document (SBD), a formula is there for compensating the private players for any change in law event. The recent change in law for installing Fluidized Gas Desulphurization (FGD)units in thermal power plants that would come under the change in law event, have provisions in the power purchase agreement (PPA) for compensation with specific provisions and the central regulator granting the same to the private players.
8	2.11	IDF department entrusted to ensure a mix of expertise from several other government departments as well as private experts and consultants.	This is a welcome step by giving due recognition to sectoral experts outside the government departments.	As there is severe resource crunch in government departments and there is no capacity to handle complex issues, it is necessary to bring in private experts to the system to handle the matters. This takes care of the human resources requirement initially through private consultants and experts and in

				a phased manner; the internal capacity can be developed with their help and support.
9	Ch 3: Transparency and Oversight mechanisms of PPPs 3.2	For PPP procurement process, dedicated dispute resolution mechanism, IT enabled monitoring system; web based PPP market place for showcasing upcoming opportunities at one place.	This comes under best practices for effective monitoring and bringing in transparency to the system.	These are good steps for bringing in transparency to the system. There should be a proper timeframe attached to these interventions so that a pressure build up within the government system to deliver these best practices in time. It should be stated upfront in the policy document. For Example: IT enabled system for monitoring within 1 year of setting up of IFD and web based market place within 6 months of setting up the IFD units can be proposed. These should be under the direct supervision of IFD unit.
10	3.4 and 4.4	The system of RFVM (Rapid Value for Money) analysis	This is a good move but more clarity is required on what is rapid value for money analysis is all about. What are the minimum conditions and parameters that would be looked into while analyzing the RVFM to make an initial decision whether the project is worthy for taking up as a PPP project?	Instead of RFVM, the policy should have highlighted the necessity of bringing in a public sector comparator for judging a PPP project initially. Most of the PPP projects do not see the light of the day because of the perception of high cost as compared to the traditional development of similar projects. While there are numerous cost elements that are not included in a project cost in traditionally developed projects, PPP projects do the costing specifically for the project itself and includes each and every cost element that can be attributed to the project only, thus making the project a little cost heavy. It is high time, state government should work towards creating a public sector comparator for various departments and projects so that a PPP project can be judged effectively along with a rapid value for money analysis for the project suitability.
11	3.5	Provision of sector regulator or through provisions in	This is specifically for the projects where there is less competition and	Generally, these are required for social sector projects where there is less competition and private sectors do not show a great interest, resulting a monopolistic or

		contractual arrangements for price controlling for the interest of users.	having natural monopolistic nature or oligopoly characteristics. This is also a welcome move but should be phased out in a timely manner once the sector matures.	oligopoly nature. There should be light regulations in such sector and the government should work towards in attracting number of players so that the need to have a regulatory approach is not required and the market determines the right pricing of a service provided with competitive nature of the business. Any provision of regulations through specific regulator may hinder the process of PPP as the private partner can see it as another layer for creating hurdles. However, in situations where the govt thinks that regulator is required, it should be on the premise of light regulations such as licensing and compliance requirements. The contract should take care of any such matters that require the provisioning of regulator.
12	Ch 4: PPP procurement Process 4.7 and 4.8	It is about identification of risks, ways to minimize risks and fair allocation of risks among the partners taking into account of legitimate concerns of stakeholders.	Optical allocation of risks is a complex process and subjected to perception of stakeholders. Efforts should be on developing a risk management framework for each sector by identifying various risk elements in several projects, enlisting it and making provisions for weightage to these elements.	Risk identification and risk allocation is a complex task and should be referred to an independent expert body within IFD cell. The experts' body should frame a comprehensive risk assessment framework and all the projects should go through the filtration procedure based on the framework and assessed. The design of such a risk assessment framework is necessary as risk factors could vary depending on the project and thus, the parameters weightage would vary based on project type, project location and overall structure. These need to be continuously evaluated for a set of projects so that risk assessment can be done on a project-to-project basis based on the parametric evaluation throughout the life cycle of the project.

				Once a standard risk management framework is developed for various sectors, these can be shared with all stakeholders for their own decision-making and these elements can be a part of the contract.
13	Ch 5: Enabling Framework for PPPs 5.8	This is on capacity building measures. IFD is entrusted to develop a strong capacity with in departments, amongst public institutions, government officials, sector regulators, private entities etc.	This is an important area and should be run parallel to all the other processes. There should be dedicated funds allocated for training and capacity building of officials.	PPP projects are quite complex to prepare, structure and transact, and usually require specialized skills that are not always available. First, acknowledging the need for training to build up the skills and experience is necessary to build human skills to deliver PPPs. The need to train public sector resources as well as private sector requires a push from the government through policy initiative. IDF should have a long-term plan for capacity building of internal as well as private institutions. A dedicated fund and an institutional set up from the very beginning is required to achieve the goal and it should be sector agnostic so that it can be taken to a wider audience including NGOs, CSOs and local institutions.

The draft is silence on unsolicited proposals and its treatment that is usually coming from the private sector based on the need. The existing capacity in the government departments/line ministry is inadequate for areas such as PPP design and implementation. The development of PPP, which is a complex task, requires diverse skills such as technical, economic, financial, procurement and legal etc. It should be long term and properly planned and a timeframe should be mentioned in the policy framework.

Also, there is no mention of investment promotion and guidelines for private sector in the draft .The policy should mention guidelines for investment for the private sector to broaden their investment opportunities, policy support for innovation and technology transfer. The focus on the kind of support requirement from the private sector and their broad involvement is missing in the document.

SDG 2030 calls for a mechanism to measure infrastructure projects with people-centric SDG compliance. There is a gradual shift from "value for money" to "value for people" in the delivery of the project. This calls for designing and promoting public awareness on PPP as a critical factor. In addition, the policy should focus towards treating the private party as a true partner and not just as another vendor in PPP projects.

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