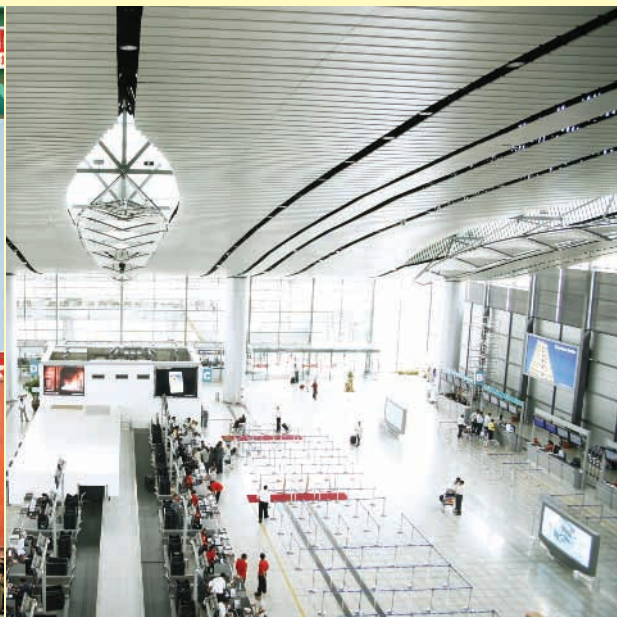


Best Practices Selection of Consultants





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Disclaimer

This volume is in the nature of Frequently Asked Questions (FAQs) to assist the Central/State Governments, statutory entities and Project Authorities in the selection of consultants. It is in conformity with the General Financial Rules, 2005 issued by the Department of Expenditure, Ministry of Finance (www.finmin.nic.in). In case of any conflict, the aforesaid Rules issued by the Department of Expenditure shall prevail.

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Preface

The Eleventh Five Year Plan recognises that the deficit in infrastructure is a major constraint in achieving the projected growth rate of 9 per cent in GDP and that public sector resources are insufficient to meet the investment requirements. It is, therefore, envisaged that about 30 per cent of the projected investment during the Eleventh Five Year Plan would be sourced from private capital, mainly through Public Private Partnerships (PPPs).

The process of structuring PPP projects is complex and the requisite expertise is not available within the government. Nor do project authorities have the time and staff resources that go into fine-tuning the documentation of PPPs. It is, therefore, necessary to rely on consultants for securing financial, legal and technical advice in formulating project proposals and documents necessary for award and implementation of PPP projects in an efficient, transparent and fair manner.

A poorly structured PPP contract can compromise user interests by recovery of higher charges and provision of low quality services. It can also compromise the public exchequer in the form of costlier or uncompetitive bids as well as subsequent claims for additional payments or compensation. Being long-term contracts, their adverse impact on users and the public exchequer would normally be far greater than in a typical construction contract. Moreover, the losses of a concessionaire often include foregone revenues over the concession period, which implies very large claims against the public exchequer. For these reasons, it is critical to ensure that PPP projects are structured properly with the help of best available expertise.

The General Financial Rules, 2005 and the Manual of Policies and Procedure for Employment of Consultants issued by the Department of Expenditure, Ministry of Finance constitute the framework that governs the selection and employment of consultants. Detailed procedures and processes to be followed in the selection of consultants have also been published in duly approved Model Request for Proposals (RFPs) for selection and appointment of consultants. All these documents provide useful guidance for engaging consultants. However, during interactions with the concerned officials on various occasions, it was apparent

that reader-friendly guidance material was necessary for facilitating a fair and transparent selection of consultants by the project authorities. Accordingly, a set of Frequently Asked Questions (FAQs) has been addressed in conformity with the extant instructions of the Department of Expenditure as well as international best practices.

The draft document prepared by the Planning Commission was circulated to all the concerned Ministries for their comments. The suggestions received have been suitably addressed and incorporated. The document 'Selection of Consultants: Best Practices' was thereafter approved by the Empowered Sub-Committee of the Committee on Infrastructure in its meeting held on April 13, 2009 under the chairmanship of Deputy Chairman, Planning Commission. It is being published for wide dissemination to serve as a useful guide in the appointment of consultants.

This booklet is expected to provide ready responses to the questions that frequently arise while engaging consultants for PPP projects. The purpose of this exercise is to provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.



(Gajendra Haldea)

Adviser to Deputy Chairman,
Planning Commission

May 15, 2009

*N-14070/10/2009-Infra
Planning Commission
Secretariat for the Committee on Infrastructure*

New Delhi, May 14, 2009

OFFICE MEMORANDUM

Subject: Selection of Consultants: Best Practices

1.1 Pursuant to the approval of the Empowered Sub-Committee of Committee on Infrastructure (ESCOI) in its meeting held on April 13, 2009, the undersigned is directed to circulate a set of Frequently Asked Questions (FAQs) titled 'Selection of Consultants: Best Practices' as a best practice document.

1.2 This set of FAQs is advisory in nature and would be useful for Ministries, State Governments and statutory / autonomous entities intending to procure consultants for award and implementation of infrastructure projects through PPP. It is in conformity with the General Financial Rules, 2005 issued by the Department of Expenditure, Ministry of Finance (www.finmin.nic.in). In case of any conflict, the aforesaid Rules issued by the Department of Expenditure shall prevail.

2. Context

2.1 The Eleventh Plan recognises that private sector participation is essential for achieving the targeted investment in infrastructure. With a view to enabling a smooth transition and for adoption of best practices, Government of India has recognised the critical role of standardising documents and processes to be adopted for award of PPP concessions. For this purpose, a number of Model Concession Agreements (MCAs) have since been evolved and adopted for different sectors. The process of pre-qualification and selection of private sector participants for award of concessions has also been standardised through adoption of model documents for a two-stage selection comprising the Request for Qualification (RFQ) and Request for Proposals (RFP).

2.2 Though the aforesaid standard documents lay down the norms, principles and parameters to be followed for PPP projects, they need to be suitably adapted for meeting the specific requirements of individual projects. The Central Ministries, State Governments and statutory / autonomous entities owning such projects would, therefore, require the assistance of professional advisers/ consultants for award and implementation of such projects in an efficient, fair and transparent manner.

2.3 Engaging legal consultants would be essential for drafting and/or adapting the bid documents, including RFQ, RFP, concession agreements, licences or other agreements. The legal consultants would also have to ensure that the project agreements are properly executed. They also play an important role in ensuring that the conditions necessary for making a contract effective and enforceable are fully met.

Technical consultants would be required for preparing the Feasibility Report and for determining the technical parameters, specifications and standards as well as the service quality and performance standards for the project. Financial consultants would be required for undertaking financial analysis, evolving a revenue model and suggesting and / or vetting the financial parameters and structure of the project.

2.4 Model RFPs for the selection of Technical Consultants (including architects) and Legal Advisers have been published by the Planning Commission. These documents are based on extant rules of the Department of Expenditure. They have been drafted after extensive consultations with ministries, stakeholders and experts. The RFP for Technical Consultants was also deliberated upon in an IMG headed by Special Secretary (Expenditure) and approved by the ESCOI. The RFP for Legal consultants is based on the same principles as the RFP for Technical Consultants and has been approved by ESCOI following detailed inter-ministerial consultations.

3. Objective

3.1 The purpose of this set of FAQs is to provide guidance to Project Authorities in selection and appointment of professional consultants. The costs as well as the quality of services to be provided by consultants would be largely dependent on the manner of their selection as well as their Terms of Reference (TOR). The FAQs provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.

4. Key Principles

4.1 Procurement of goods/services and consultants:

The appointment of consultants should not be treated in the same manner as procurement of goods/ services where the bid is awarded to the lowest bidder based on pre-determined specifications. This is so because what sets consultancy services apart from other procurements is the advisory and intellectual nature of services which are not amenable to precise quantification.

4.2 Role of experts:

The quality of advice in a consulting assignment is normally dependent on the expertise of individuals who are deployed on the project. The focus should, therefore, be on selecting experts who have the requisite qualifications, skills and experience, with a comparatively lower weightage to be assigned to the experience of their respective firms. Each such key personnel should be evaluated individually and marks assigned.

4.3 Appropriate method:

The selection of consultants should be based on the appropriate method to be chosen from among the alternatives such as Quality and Cost based selection, Combined Quality-cum-Cost based selection, Quality based selection and Cost based selection. Since PPPs are complex transactions with large financial

and other implications for the government as well as users, the consultants for structuring PPP projects should be chosen on the basis of Combined Quality-cum-Cost based selection.

4.4 'Two-envelope system' of bidding:

Consultancy services are normally procured through a 'two-envelope' system comprising a technical bid and a financial bid. The technical bid comprises the information relating to the experience and qualification of the consultant whereas the financial bid comprises the financial offer made by the consultant for performing the services as per the Terms of Reference. The technical bid is to be opened and evaluated first.

4.5 Evaluation criteria:

The technical proposal should be evaluated mainly for the experience of the applicant firm as well as the experience and qualifications of the key personnel offered for the project.

4.6 Forms of contract:

The various forms of contract that can be entered into with the consultant are lump-sum, time-based, success-fee based, percentage-based and indefinite delivery. The lump-sum contract is the preferred form of contract and should be employed under normal circumstances. It is preferable to adopt the lump-sum form of contract since the content, duration and deliverables of PPP related consultancies can be clearly defined. In the case of legal advisers, however, it may be necessary to introduce an element of time-based remuneration.

4.7 Appointments on nomination basis:

Appointments on nomination basis may be less costly and quicker in execution, however, such appointments are open to criticism for their lack of transparency. Selection by nomination may normally be restricted to a financial ceiling of Rs. ten lakh.

4.8 Procurement of consultancy services through advertisement:

In cases where the estimated cost of work is likely to exceed Rs. twenty five lakh, the bids should be obtained through open advertisement. In cases of lower value, procurement may be carried out through preparation of a list of consultants through formal/informal enquiries.

4.9 Role of Consultancy Evaluation Committee:

Technical bids should be analysed and evaluated by a Consultancy Evaluation Committee (CEC) constituted by the Ministry or Department. The CEC should be duly constituted at the level, competence and composition consistent with the value and importance of the assignment and should be able to own responsibility and have accountability for the evaluation process.

4.10 Conflict of interest:

Conflict of interest refers to the consultant or its affiliates engaging in consulting activities that conflict with the interest of the Project Authority. The consultant should hold the interests of the project authority paramount, avoid conflicts with other assignments or its own corporate interests and act without any consideration for future work.

5. Conclusion

With a view to facilitating the selection of consultants in the best interests of the Project Authorities and the users of infrastructure services, the enclosed FAQs are being published by way of guidelines. The administrative Ministries, State Governments, statutory / autonomous entities intending to procure infrastructure projects through PPP should find the document useful in selection and appointment of consultants in a fair and transparent manner.



(Ravi Mital)

Adviser (Infrastructure)

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- (3) Secretary, Department of Expenditure, North Block, New Delhi.
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- (5) Secretary, Department of Road Transport & Highways, Transport Bhawan, New Delhi.
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- (9) Secretary, Department of Telecommunication, Sanchar Bhawan, New Delhi.
- (10) Secretary, Ministry of Law and Justice, Department of Legal Affairs, Shastri Bhawan, New Delhi.
- (11) Secretary, Ministry of New and Renewable Energy, CGO Complex, New Delhi.
- (12) Chief Secretaries of all State Governments.

Copy to: PS to Secretary, Planning Commission.

PS to Adviser to Deputy Chairman.

Selection of Consultants: Best Practices

1. Context

1.1 The Eleventh Five Year Plan (2007-08 to 2011-12) recognises the deficit in existing infrastructure as also the additional demand arising out of the projected growth rate of 9 per cent in GDP. Continued shortfall in infrastructure could pose a significant constraint in realisation of the development potential of the Indian economy. Since the required investment in infrastructure cannot be met through public sector resources alone, a significant inflow of private investment in public infrastructure projects is considered necessary in the form of Public Private Partnerships (PPPs).

1.2 The shift from public sector projects to PPPs requires a significant change in governance and mindset. It involves a shift from project construction, operation and maintenance by the public sector to a 'hands off' approach where the focus shifts to quality of service delivery at competitive costs. Instead of taking day to day decisions relating to implementation and operation, the PPP approach relies on a comprehensive contract for delivery of pre-determined outcomes. In effect, the quality of a PPP project is largely dependent on the PPP contract/concession that must be preceded by a fair, transparent and competitive selection of the project sponsor.

1.3 With a view to enabling a smooth transition and for adoption of best practices, Government of India has recognised the critical role of standardising documents and processes to be adopted for award of PPP concessions. For this purpose, a number of Model Concession Agreements (MCAs) have since been evolved

and adopted for different sectors. The process of pre-qualification and selection of applicant firms has also been standardised through adoption of model documents for a two-stage selection comprising the Request for Qualification (RFQ) and Request for Proposals (RFP).

1.4 Though the aforesaid standard documents lay down the norms, principles and parameters to be followed for PPP projects, they need to be suitably adapted for meeting the specific requirements of individual projects. Moreover, the nature, extent and scope of each project needs to be determined through feasibility studies. For undertaking all these tasks with the objective of structuring bankable projects, the Central Ministries, State Governments and Statutory entities owning such projects (the 'Project Authorities') would normally require the assistance of professional advisers/ consultants.

2. What is the objective of these Guidelines?

2.1 As mentioned above, the Project Authorities would need consultants to secure financial, legal and technical advice for formulating project proposals and documents necessary for award and implementation of PPP projects in an efficient, transparent and fair manner. The purpose of these Guidelines is to provide guidance to Project Authorities in selection and appointment of professional consultants.

2.2 The costs as well as the quality of services to be provided by consultants would be largely dependent on the manner of their selection as

well as the Terms of Reference (TOR). These Guidelines provide a touchstone that would help Project Authorities in determining whether or not their process and documentation for selection of consultants is likely to deliver the expected results.

3. What are the financial rules governing the selection of consultants?

In particular, Rules 163 to 177 of the 'General Financial Rules 2005' lay down the framework that governs the selection of consultants. The Department of Expenditure has also issued a 'Manual of Policies and Procedure for Employment of Consultants' (www.finmin.nic.in). The Manual provides useful guidance for conducting the selection and appointment of consultants.

4. What is the difference between procurement of goods/services and consultants?

The appointment of consultants should not be treated in the same manner as procurement of goods and other services where the bid is awarded to the lowest financial applicant firm based on pre-determined specifications. This is so because what sets consultancy services apart from other procurements is the advisory and intellectual nature of services which are not amenable to precise quantification. For example, selection of lawyers, financial consultants and technical experts cannot be done on the basis of financial offers alone as that would lead to sub-optimal outcomes. The expertise, skills and experience of a prospective consultant should carry the dominant weightage in the evaluation process rather than the price determining the selection of the successful applicant firm. The objective is to select the economically most

advantageous applicant firm rather than the lowest financial bidder.

5. Why hire consultants?

5.1 The process of structuring PPPs is complex and the requisite expertise is normally not available within the government. Nor do the Project Authorities have the time and staff resources that go into fine-tuning the documentation for PPPs. Employing experienced consultants enables the Project Authorities to enhance the possibilities of a successful project, helps in avoiding costly mistakes, promotes capacity building within the government and builds investor confidence in the entire process.

5.2 A poorly structured PPP contract can compromise user interests by recovery of higher charges and provision of low quality services. It can also compromise the public exchequer in the form of costlier or uncompetitive bids as well as subsequent claims for additional payments or compensation. Being long-term contracts, their adverse impact on users and the public exchequer would normally be far greater than in a typical construction contract. Moreover, the claims of a concessionaire often include foregone revenues over the concession period, which implies very large claims against the public exchequer. For these reasons, it is critical to ensure that PPP projects are structured properly with the help of best available expertise.

6. Does the expertise and experience of the consultants matter?

Yes, the selection of the consultant is heavily weighed in favour of its technical qualifications and experience since the quality of services

rendered by it would be determined by its expertise, skills and experience. The Project Authority should ensure that the prospective consultant has the capacity to deliver outputs of high standards. The selected consultant should be required to perform the specified services with due diligence, efficiency and economy while conforming with generally accepted professional techniques and practices. A good consultant can also be expected to observe sound management practices and employ appropriate advanced technology in delivery of its services.

7. What are the roles and responsibilities of consultants and the Project Authority?

The term consultant(s) includes a wide variety of private and public entities, including consulting firms, engineering firms, construction management firms, management firms, procurement agents, inspection agents, auditors, investment & merchant bankers, universities, research institutions, government agencies, Non-Governmental Organizations (NGOs) and individuals/experts (See Para 1.1.2 of Manual of Policies and Procedure of Employment of Consultants issued by the Ministry of Finance). The consultant uses experience and skills in providing the Project Authority with recommendations and advice. The responsibility of accepting the recommendations of a consultant and for implementing its advice rests with the Project Authority. It is for the Project Authority to ensure that the consultants are selected and managed effectively. Employment of consultants does not in any manner diminish the responsibility and liability of the government; the consultants only assist and advise the Project Authorities in discharging their duties.

8. What is the role of individual experts in a consultancy assignment?

The quality of advice in a consulting assignment is normally dependent on the expertise of individuals who are deployed on the project though the reputation and experience of their consulting firm also plays a role as it enables the individual experts to draw upon the pool of resources available with the firm. The focus should, therefore, be on selecting experts who have the requisite qualifications, skills and experience, with a comparatively lower weightage to be assigned to the experience of their respective firms. The eligibility and evaluation criteria should be designed to achieve this outcome as it is necessary to avoid a situation where a large and experienced firm is engaged for a high fee, but the Project Authorities end up receiving advice from comparatively junior and inexperienced personnel.

9. Is it possible to hire a general consultant for handling all aspects?

9.1 Project Authorities sometimes seek the comfort of a single consultancy firm to handle all aspects of project preparation and award. While it may appear to be a convenient approach especially for Project Authorities lacking in experience, this can often lead to sub-optimal outcomes in the form of a poorly structured project which may compromise quality of service and impose avoidable costs, besides creating potential liabilities or claims arising out of the project contract. For example, if a technical consultant is also asked to provide legal advice on bidding documents and contracts, it could either do so in-house or engage an inexperienced lawyer, as it would

want to save on its cost for enhancing profit. Further, such an arrangement would deprive the Project Authority of independent legal advice as the advice of a legal counsel hired by the technical consultant would tend to be coloured by the perception of the latter. Moreover, it is an international best practice to engage technical, legal and financial consultants separately as the firms rendering such services are independent of each other and must also provide their advice independently. Where necessary, the Project Authorities may separately engage a transaction adviser to coordinate the process or ask the financial consultant to discharge this function.

9.2 To begin with, it would be essential to engage technical consultants for preparing a feasibility report. In case of complex projects, a pre-feasibility report can also be considered. When the technical feasibility and financial viability of a project are established, it would be necessary to engage financial consultants for developing a financial model for the project and for assisting the Project Authorities in conducting the bid process. It would also be necessary to engage legal consultants for adopting the model documents for individual projects. Such model documents include the RFQ, RFP and the MCAs. In case of sectors where an MCA is not available, it would be necessary to engage qualified and reputed law firms who have experience in drafting such concession agreements and can draw upon the provisions of MCAs to the extent they can be applied.

9.3 In the case of a small project, a Project Authority, especially if it is lacking in experience, may find it difficult and expensive to engage separate consultants, particularly when it is proposed to follow the model

documents. Small projects could mean projects where the value of the underlying assets or the capital costs of the project are less than Rs. 10 crore. In such cases, the Project Authority may engage a financial or technical firm with responsibility for engaging other expert firms as may be specified.

10. Can the same firm provide legal, financial and technical advice?

No, a consultant or any of its affiliates should not be hired for any assignment/job that, by its very nature, does not form part of its core competence. Combining of multiple services in one firm reduces the scope for engaging qualified legal, financial and technical consultants that are appropriate for the project. Only in situations where the Project Authority is of the view that the role to be played by a financial expert is limited, such as in the case of a Feasibility Report, the technical consultancy may include an element of financial advice.

11. What is the role of different (legal, financial, etc) consultants?

Engaging legal consultants would be essential for drafting and/or adapting the bid documents, including RFQ, RFP, concession agreements, licences or other agreements. The legal consultants would also have to ensure that the final agreement is properly executed. They also play an important role in ensuring that the conditions necessary for making a contract effective and enforceable are fully met. Technical consultants would be required for preparing the Feasibility Report and for determining the technical parameters, specifications and standards as well as the service quality and performance standards for the project. Financial consultants are required

for undertaking financial analysis, evolving a revenue model and suggesting and/or vetting the financial parameters and structure of the project. The role of different consultants is briefly explained below:

- **Lead Consultants or Transaction**

Advisers: They can play an important role in policy formulation and where new structures or arrangements such as regulation, pricing, etc. are being put in place. Lead consultants are also able to advise on industry and market structures as well as the design of the regulatory framework. They can also assist in managing the bid process of a project, including the process of selection of legal, financial or technical consultants. Where necessary or convenient, the aforesaid tasks of a Lead Consultant could be assigned to the financial consultants while separately engaging the legal and technical consultants for their respective areas of work.

- **Financial Consultants:** They are required for preparing a financial model for the project and for assisting in the bid process. The key to selecting a competent firm is a thorough investigation of the financial skills and previous relevant experience. The role of financial consultants should be confined to providing commercial and financial expertise that is not available in-house. Where required, financial consultants may also function as lead consultants and transaction advisers.
- **Legal Consultants:** Since the success of a PPP project depends on a sound contract, the role of legal consultants is critical. This includes adapting model documents and/or drafting contracts and bid documents.

Legal firms also provide consultancy on matters ranging from regulatory review to executing and enforcing the project contracts. They can draft contracts, concessions, lease agreements and licences and provide advice on the prequalification process, evaluation of bids and execution of contracts. The firm and the individuals proposed to be deployed should have the necessary experience in dealing with such commercial contracts. An important aspect of good legal advice is that the consultant should clearly explain to the Project Authorities the implications of contract terms and contingent liabilities. However, in cases where standard documents are to be applied, such as the Model RFQ, RFP and MCA, the role of legal consultants should largely be confined to adapting these documents to project-specific situations and for providing legal counsel in the course of bid process and award, including execution of the agreement and its coming into effect.

- **Technical Consultants:** They may be required for preparing Feasibility Reports, evolving standards and specifications, setting performance standards and determining the likely project costs. The preferred consultants should have specific and geographically wide-ranging experience of the particular sector. Depending on project specific requirements, they can provide a range of skills and services including engineering design, architectural design, costing and quantity surveying, traffic studies, technical feasibility studies and reviews, performance standards, lifecycle costing and analysis, implementation schedule and project monitoring and management.

12. When should lead consultants be engaged?

12.1 Management consultancy companies and large financial services companies are normally able to constitute multi-disciplinary teams to manage the PPP process. This ensures consistency over time and components. In large and complex infrastructure projects where the Project Authority's experience in PPP is limited, lead consultants may be considered. They can also be engaged where the Project Authority has no past experience in dealing with PPP projects.

12.2 Lead consultants could assist in:

- deciding the appropriate policy framework and structure of a PPP project;
- undertaking pre-feasibility studies;
- designing the implementation process and schedule; and
- selection of technical, legal and financial consultants for subsequent stages.

12.3 Lead consultants can also function as "transaction advisers" for the project. However, they should not be regarded as substitutes for technical and legal consultants.

13. What are the advantages and disadvantages of lead consultants?

Lead consultants or transaction advisers can advise the Project Authority on a wide range of issues thereby minimising the possibility of costly mistakes; can identify the areas where specialist input is needed and also assist in conducting the bid process for selection of suitable consultants for this purpose. However, lead consultants tend to be costly and may have a tendency to limit outsourcing of specialist

tasks so that they can perform the same. As a prudent practice, lead consultants or transaction advisers should be excluded from providing such specialist advice in relation to the project owing to a conflict of interest in ensuring their own selection and eliminating competent specialists.

14. On what considerations should lead consultants be appointed?

Lead consultants should have the relevant sector and project experience, both as an organization and in the deployment of personnel. This should include experience in successfully managing the bid process of PPP projects.

15. What should be the procedure for selection of consultants?

The selection of consultants should be based on the appropriate method to be chosen from among the alternatives listed below (Refer Clause 1.5.2 of Manual of Policies and Procedure of Employment of Consultants):

- **Quality and Cost based selection:-** This method requires the applicant firms to clear the minimum threshold criteria. The financial bids of all the applicant firms who clear the threshold are opened and the lowest applicant firm is awarded the contract. This method can be used where additional weightage for the technical expertise of a consultant is not considered necessary and all those who cross the threshold are to be regarded as equally competent.
- **Combined Quality-cum-Cost based selection:-** This method of selection should be used for projects where weightage needs to be given to a higher level of expertise.

PPPs being complex projects with long-term implications, the Combined Quality-cum-Cost based selection method that applies appropriate weightages to technical and financial capacities is generally preferred. The applicant firm scoring the maximum combined score is awarded the contract.

- **Quality based selection:-** This method of selection may be used in the following circumstances:
 - The outcome of the assignment will have a high impact and, hence, it is essential to engage the most qualified consultant; or
 - the assignment is very complex or highly specialised where it is difficult to define the scope of work with accuracy.
- **Cost based selection:-** This method of selection may be used for assignments of the following nature:
 - Assignment where any experienced consultant can deliver the services without requirement of specific expertise; and
 - the cost of assignment should not exceed Rs. ten lakh.

16. What is the 'two-envelope system' of bidding?

16.1 Consultancy services are normally procured through a 'two-envelope' system comprising a technical bid and a financial bid. The technical and financial bids are submitted in two separate sealed covers duly superscribed and kept inside a bigger cover which should also be duly sealed and superscribed. The technical

bid comprises the information relating to the experience and qualification of the consultant whereas the financial bid comprises the financial offer made by the consultant for performing the services as per the Terms of Reference. The technical bid is to be opened first (Refer Rule 172 of GFR).

16.2 A technical evaluation should be carried out by an evaluation committee constituted by the Project Authority for all cases having a financial implication greater than Rs. ten lakh (Refer Rule 174 of GFR). A list of applicant firms qualifying the technical criteria should be prepared at this stage, based on pre-determined criteria. The applicant firms should be ranked according to their respective technical scores. Only the applicant firms scoring the minimum prescribed marks should be pre-qualified and not more than five applicant firms should normally be short-listed so that the final selection is restricted to the five applicant firms who have the best expertise. This conforms to Rule 169 of the GFR which requires short-listing of at least three eligible applicants. However, in case eligible applicants are not available, the Project Authority may pre-qualify a lower number as per Rules.

16.3 In the second stage a financial evaluation is to be carried out. The financial bids of only the short-listed applicant firms should be opened for the purpose of further evaluation (Rule 175 of GFR).

17. What should be the evaluation criteria?

17.1 Details of the evaluation criteria must be clearly specified in the invitation notice. Normally this would relate to the experience/credentials of the applicant firm, the key personnel proposed to be deployed on the project, the proposed methodology and the work

plan. The applicant firm should be required to submit sufficient documentary evidence for meeting the evaluation criteria.

17.2 The consultants could be evaluated on the basis of the following information:

- Experience and past assignments of the firm, its revenues from consulting assignments and other relevant factors;
- details of recent assignments in the relevant sector or similar fields which demonstrate the required expertise;
- details of relevant experience and qualifications of the project team members including the CV of all team members;
- other terms and conditions of contract, especially fees; and
- details of any actual or potential conflicts of interest or any pending investigation by any governmental authority.

18. What should be the weightage for technical and financial bids?

For the purpose of arriving at combined scores, appropriate weightages should be determined for the technical and financial bids. The ratio of weightages for technical and financial bids should be established well in advance and incorporated in the Request for Proposal (RFP) document. The RFP document should be precise, transparent and explicit so that the bidders get a very clear idea of the evaluation methodology and process. The respective weightages should normally be 70 per cent for the technical bid and 30 per cent for the financial bid (Refer Clause 3.12.1 of Manual of Policies and Procedures for Selection of

Consultants). However, in contracts where quality plays a more critical role and it is important that highly experienced and qualified consultants are appointed, weightage to technical capacity may be enhanced to 80 per cent.

19. What is the purpose of the technical bid?

The technical bid provides an opportunity to the applicant firms to demonstrate their suitability for undertaking the work. Technical bids will usually contain information about the firm bidding for the project, credentials of the members of the consultancy team and a work plan.

20. What does the financial bid contain?

The financial bid normally contains the time inputs and rates of fee payable for the team members along with a breakdown of reimbursable expenses such as travel costs and other over-head expenses. The bid documents should clearly state whether the bid should be inclusive or exclusive of taxes. In many situations, a lump sum fee may be the preferred option.

21. How should the technical proposal be evaluated?

21.1 The technical proposal should be evaluated mainly for the experience of the applicant firm as well as the experience and qualifications of the key personnel offered for the project. The following indicative weightages may be used for evaluation:

- **Past experience of the firm** - 25 per cent of the maximum marks for technical evaluation may be assigned to the

experience of the applicant firm. Of these marks, about 30 per cent may be assigned for the number of relevant/ eligible assignments undertaken by the firm and the balance 70 per cent could be assigned for comparative size and quality of such assignments as well as for other relevant experience and turnover of the applicant firm.

- **Evaluation of key personnel** - The quality of the consulting assignment would largely depend on the qualifications and relevant experience of the key personnel proposed to be deployed on the project. 70 per cent of the maximum marks for technical evaluation should, therefore, be assigned to the key personnel. The Project Authority must carefully determine the nature and discipline of the advice required and identify a limited number of key personnel, including the team leader, who would play a critical role in the consulting assignment. These key personnel should be clearly specified in the bid documents and their minimum qualifications and experience should also be specified.
- **Experience of key personnel** - Each such key personnel should be evaluated individually and marks assigned. About 30 per cent of the marks for each key personnel may be awarded for the number of relevant eligible assignments the respective key personnel has worked on and the remaining 70 per cent may be awarded for the comparative size and quality of such assignments and other relevant experience. Evaluation of such key personnel is the most important component of evaluation and must, therefore, be undertaken with care and diligence.

- **Methodology and Work Plan** - Upto 5 per cent of the total marks can be earmarked for the proposed methodology and work plan of the applicant firm.

21.2 Only those applicants whose technical proposals score 70 points or more out of 100 should be ranked as per score achieved by them, from highest to the lowest technical score (S_T). Each key personnel must also score a minimum of 70 per cent mark and any key personnel who scores less than 70 per cent should be replaced during negotiations with a better candidate who meets the benchmark of 70 per cent. However, Project Authorities may, in exceptional cases, consider lowering the eligibility score but in no case less than 60 per cent.

22. What if less than two applicants are pre-qualified?

22.1 In case the number of pre-qualified applicants is less than two, the Authority may pre-qualify the applicants whose technical score is less than 70 per cent provided that in such an event the total number of prequalified and shortlisted applicants should not exceed two. This relaxation is aimed at avoiding the pre-qualification of a single applicant firm and for introducing an element of competition in financial bids. In case the next applicant firm secures low marks that are not acceptable to the Project Authority, it may either justify and accept the single bid or invite fresh bids. The Rules relating to acceptance of single bids should be followed in such cases.

22.2 In the event that no applicant firm crosses the 70 per cent mark, the Authority may, in its discretion, pre-qualify two applicant firms who secure the highest scores.

23. Should all applicants securing more than 70 per cent marks be shortlisted?

No, of the applicants ranked on the basis of technical scores, not more than five or six should be prequalified and shortlisted for financial evaluation in the second stage. The purpose of restricting the number to five or six is to ensure that only proposals of high technical standards are considered. This would also provide applicant firms an incentive to prepare sound proposals and offer the best available experts. The advantages of getting competent professionals are obvious from the perspective of the Project Authority, especially as the scope for value addition in PPP projects is significantly greater.

24. Should all financial bids be opened?

The financial proposals of the firms which are not pre-qualified and short-listed should not be opened (Refer Rule 175 of GFR) and may be kept in sealed record, to be destroyed after the consultancy assignment is completed or returned to the unsuccessful bidders along with bid security.

25. How should financial evaluation be carried out?

In the second stage, financial evaluation should be carried out by assigning a financial score (S_F) to each financial proposal. The total cost indicated in the financial proposal should be considered for the purpose of financial evaluation. The evaluation committee should determine whether the financial proposals are complete, unqualified and unconditional. The lowest financial proposal (F_M) should be given a financial score (S_F) of 100 points. The financial scores of other proposals should be computed as follows:

$$S_F = 100 \times F_M / F$$

(F = amount of financial proposal)

26. How should the final ranking of proposals be done?

Proposals should finally be ranked according to their combined technical (S_T) and financial (S_F) scores as follows;

$$S = S_T \times T_w + S_F \times F_w$$

Where T_w and F_w are weights assigned to technical and financial proposals that could be 0.8 and 0.2 or 0.7 and 0.3 respectively.

Generally the successful applicant shall be the applicant having the highest combined score. In the event two or more proposals have the same scores in the final ranking, the proposal with the higher technical score should be ranked first.

27. Whether the time input of each key personnel should be specified?

The minimum time required from each key personnel must be clearly spelt out in the bid documents so that their services are made available for the period specified in the bid documents. This would also check the tendency of including well qualified experts in the application with the objective of securing high scores, but actually deploying them superficially for brief spells when work begins. It is also necessary to ensure that the key personnel who have been offered in the application are actually deployed for project work or else the entire assignment would be vitiated.

28. Whether applicants should be allowed to form a consortium?

28.1 Generally, a firm should be selected on the strength of its own experience and capacity

rather than the capacity of multiple firms who form a consortium. It is often difficult to supervise and ensure that all members of the consortium play the expected role. It can also lead to a situation where the selection is made on the credentials of a competent firm whereas much of the consulting services are later provided by the junior partner of a consortium. In cases where more than one firm needs to be involved, it is better to enable the applicant firm to hire other firms as sub-consultants for performing specified tasks while the primary responsibility continues to remain with the applicant firm.

28.2 A consultancy assignment should normally consist of homogeneous disciplines and not very diverse fields. As such, technical consulting assignments should not normally be combined with legal or financial advice as it often leads to situations where the dominant firm assigns a less significant role to its consortium partner, who is usually not accountable to the Project Authority. In addition, though a consortium may involve joint and several liability in relation to the assignment, it may often be difficult to deal with multiple firms for enforcing the consultancy contract. It is, therefore, recommended that consultancy proposals may be evaluated only with respect to the lead firm, which should always remain responsible for delivery of services. As such, proposals from consortia should not be entertained.

29. What are the various forms of contracts for consultancy?

The various forms of contract that can be entered into with the consultant are briefly described below:

- **Lump sum:** This form of payment is mainly

used for assignments in which the content and duration of the services as well as the required output of the consultants are clearly and precisely defined. This form can be used for planning and feasibility studies, environmental studies, design of standard or common structures, preparation of data processing systems, and so forth (Refer Clause 5.1 of Manual of Policies and Procedure of Employment of Consultants).

- **Time based:** This form is appropriate when it is difficult to determine the precise scope and length of services, either because the services are related to or dependent on actions of others, which may expand the scope of services or delay completion, or because the inputs of the consultants are difficult to assess and quantify. This type of contract is widely used for complex studies, supervision of construction, legal advice etc. In such a contract, payments are based on agreed hourly, daily, weekly, or monthly rates for key personnel and on reimbursable basis for actual expenses and/or agreed unit prices for specified items (Refer Clause 5.2 of Manual of Policies and Procedure of Employment of Consultants).
- **Success fee based:** This form is used when consultants (banking and financial firms) are advising the government on sale of its equity or for mergers of firms, especially as part of privatization or disinvestment. The remuneration of the consultant includes a retainer and a success fee, the latter being normally expressed as a percentage of the sale price of assets (Refer Clause 5.3 of Manual of Policies and Procedure of Employment of Consultants).
- **Percentage based:** This form is normally

used for architectural services. It can also be used for procurement or inspection agents (Refer Clause 5.4 of Manual of Policies and Procedure of Employment of Consultants).

- **Indefinite delivery:** This form can be used for ‘on call’ specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance.

The lump sum contract is the preferred form of contract and, under normal circumstances, the employer shall use this form of contract (Clause 1.8.2 of the Manual of Policies and Procedure of Employment of Consultants).

30. Which form of contract is preferable for PPP related consultants?

It is preferable to adopt the lump sum form of contract since the content, duration and deliverables of PPP related consultancies can be clearly defined. Moreover, these consultancies normally relate to pre-award activities and do not, therefore, suffer from the uncertainties associated with project implementation as such. The terms of reference of such consultancies can normally be precise and the consultant will, therefore, be clear about the time and effort likely to be involved in the entire effort, hence, it can quote a competitive lump sum price for the assignment.

31. Is success fee an appropriate form for PPP related advisers?

31.1 Success fee based contracts are not appropriate for PPP related advisers since the success of PPP projects is mainly driven by the policy framework and not so much by the efforts of the consultants. Since infrastructure projects

comprise public goods, the government is directly accountable for their costs, user charges and performance standards. These aspects must be carefully addressed by the government with utmost caution and due diligence as they would directly determine the quality and success of the project. On the other hand, a consultancy assignment based on success fee could incentivise the consultant to cut corners and somehow award the project since its remuneration is mainly dependent on the “success” of project award. In the process, the project structure and quality could be compromised exposing the government to legitimate criticism.

31.2 Since success fee is typically linked to project costs, the consultant may have an incentive to increase project costs to the detriment of the public exchequer and the user. While the success fee concept may be useful for assignments such as disinvestment, it can actually be counter-productive in the case of PPP projects. However, if the Project Authority wishes to incentivise the consultant to deliver “success”, it can still do so by awarding a lump sum contract which can also include a pre-determined sum (not percentage based) that would be paid only if the project is successfully awarded.

32. Can consultants be selected purely on the basis of financial offers?

No, except in the case of cost-based selection method which may be adopted where any consultant having the prescribed qualifications can deliver the services without much impact on the quality of output. Such assignments could include traffic surveys, market surveys, etc. However, the cost of the assignment in such

cases should not exceed Rs. ten lakh.

33. Can consultants be appointed on nomination basis?

33.1 No, except in special circumstances and where adequate justification exists for a single source selection in the context of overall interest of the Project Authority (Rule 176 of GFR). These special circumstances (refer para 1.5.3 of 'Manual of Policies and Procedure of Employment of Consultants') may include:

- Tasks that represent a natural continuation of previous work carried out by the same consultant;
- emergencies, situations arising out of natural disasters or situations where timely completion of the assignment is of utmost importance; and
- situations where the execution of assignment may involve the use of proprietary techniques or where only one consultant has the requisite expertise.

33.2 Appointments on nomination basis may be less costly and quicker in execution; however, such appointments are open to criticism for their lack of transparency.

33.3 Selection by nomination may normally be restricted to a financial ceiling of Rs. ten lakh. In order to obtain value for money and to procure the appropriate consultancy services, it is necessary to rely on competitive bidding procedures for selection of consultants (Rule 168 of GFR).

34. Should procurement of consultancy services be through advertisement?

In cases where the estimated cost of work is likely to exceed Rs. twenty five lakh, the bids

should be obtained through open advertisement. In cases of lower value, procurement may be carried out through preparation of a list of consultants through formal/informal enquiries. The whole process of hiring consultants may sometimes be long-drawn, hence, sufficient time should be provided for the process. If the process is unduly compressed due to paucity of time, the costs are likely to be higher and the quality of output poor (Rules 168 & 169 of GFR).

35. What information should be given to enable applicants to bid?

The tender documents should normally contain the following information:

- Minimum required experience of the applicant firm;
- minimum qualifications and experience of key personnel;
- Terms of Reference;
- deadline for receiving proposals;
- the manner in which proposals should be sent;
- format of the proposal;
- details of the evaluation process including the evaluation criteria;
- timetable for making decisions;
- name and telephone numbers of contact persons;
- draft contract agreement; and
- other relevant instructions to the bidders.

36. What is the role and relevance of TOR?

36.1 The Terms of Reference (TOR) of the consultant provide a broad outline of the services the consultant is required to perform. They should normally include:

- (a) background information;
- (b) a statement of objectives;
- (c) a precise scope of work;
- (d) the nature and number of key personnel to be deployed;
- (e) the indicative work plan;
- (f) schedule for completion of each task;
- (g) the inputs to be provided by the Project Authority; and
- (h) the final outputs or deliverables that will be required from the consultant (refer Rule 170 of GFR).

36.2 The TOR should be clear and precise since the performance of a consultant would necessarily have to be measured in terms of the agreed TOR. Clarity in TOR is essential for ensuring that the consultants have a good understanding of the aims and objectives of the Project Authority and the relevance of their consultancy. The TOR should focus on mainly on the deliverables and the level of effort required.

36.3 In the event that the Project Authority requires a consultant firm for advising on a number of projects with a similar TOR, a cluster of projects could be combined into a package and a single consultant selected for the same.

37. Who should evaluate the technical bids?

Technical bids should be analysed and evaluated by a Consultancy Evaluation Committee (CEC)

constituted by the Ministry or Department (Refer Rule 174 of GFR). The CEC should be duly constituted at the level, competence and composition consistent with the value and importance of the assignment and should be able to own responsibility and have accountability for the evaluation process. The CEC can avail the services of an appraisal committee, if need be, to assist them. As a rule, bid evaluation should not be entrusted to consultants. They can at best be asked to assist the CEC in an advisory capacity or assist the appraisal committee in conducting the appraisal.

38. Is the Consultancy Evaluation Committee required in all cases?

A Consultancy Evaluation Committee (CEC) comprising at least three members of appropriate level, including a financial representative and a representative of the user entity is required in all cases having financial implications of more than Rs. ten lakh (Clause 1.6 of 'Manual of Policies and Procedure of Employment of Consultants'). This is also applicable for appointment of individual consultants (Clause 7.3 of 'Manual of Policies and Procedure of Employment of Consultants').

39. What are the international best practices for selection of consultants?

The international best practices for selection of consultants rely on the following four rules:

- **Transparency:** Transparency is achieved when as much information as possible is made publicly available. A transparent process eliminates doubt about the quality of the final winning team. Furthermore, openness is a pre-requisite to the participation of most top consultancies, which may not participate in an opaque,

difficult to understand process. Processes should also be open to the normal mechanisms for government review and appeal.

- **Fairness:** Fairness is achieved when all parties are treated equally; when they received the same information at the same time and are evaluated on the same criteria.
- **Cost effectiveness:** Cost can be minimised by choosing the appropriate method for selecting consultants, e.g., competitive bidding for lumpsum contracts. The effort should be to minimise costs without compromising on quality. Imparting clarity to the criteria for selection of consultants and specifying the scope of work precisely would also help reduce costs through the competitive process.
- **Mechanism to avoid conflict of interest:** The selection process should avoid both actual and perceived conflict of interest. These include the participation of firms that may be involved in later stages of PPP, participation of government officials who have current or recent connections to the companies involved, and the linking of rewards to anything other than performance.

40. What is conflict of interest?

40.1 Conflict of interest refers to the consultant or its affiliates engaging in consulting activities that conflict with the interest of the Project Authority. The consultant should hold the interests of the Project Authority paramount, avoid conflicts with other assignments or its own corporate interests and act without any consideration for future work. It should, at all times, render professional, objective and impartial advice. The Consultant should not

accept or engage in any assignment that would be in conflict with its prior or current obligations to other employers, or that may place it in a position of not being able to carry out the assignment in the best interests of the Project Authority. Any applicant found to have a conflict of interest should be disqualified. An applicant, and any of its associates, may be regarded as having a conflict of interest and hence ineligible for selection if:

- (i) the applicant, its consortium member or associate (or any constituent thereof) and any other applicant, its member or associate (or any constituent thereof) have common controlling shareholders or other ownership interest. However, this disqualification should not apply to a bank, insurance company or pension fund; or
- (ii) a constituent of an applicant is also a constituent of another applicant; or
- (iii) an applicant receives or has received any direct or indirect subsidy or grant from any other applicant; or
- (iv) an applicant has the same legal representative for purposes of this application as any other applicant; or
- (v) an applicant has a relationship with another applicant, directly or through common third parties, that puts them in a position to have access to each others' information about, or to influence the application of either or each of the other applicant; or
- (vi) there is a conflict among the current and other consulting assignments of the consultant (including its personnel and sub-consultant) and any subsidiaries, associates or entities controlled by such consultant or having common controlling shareholders. While providing consultancy services to the Project Authority for

the current assignment, the consultant should be required not to take up any assignment that by its nature will result in conflict with the current assignment; or

(vii) the applicant or its associates have been engaged by the Authority to provide goods or works for the same project; conversely, a firm or its associates, hired to provide consulting services for the project will be disqualified from subsequently providing goods or works or services related to the same project; or

(viii) the applicant or its associate (or any constituent thereof) and the concessionaire, its contractor(s) or sub-contractor(s) (or any constituent thereof) have common controlling shareholders or other ownership interest, however, this disqualification should not apply to a bank, insurance company or pension fund.

(Associate means, in relation to the Applicant/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant/ Consortium Member. As used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise.)

40.2 Conflicts of interest may arise among government and consultants; and consultants and future contractors/operators. In order to eliminate these conflicts, it should be ensured that:

- No potential consultant should have defined the project when previously working for the

government or Project Authority;

- no potential consultant should be privy to information not available to others;
- no potential consultant should have recently worked for the government department overseeing the project in question;
- consultants should not be offered success fee and other revenue maximization incentives for advice on industry and market design, regulation and project structure/strategy;
- no consultant should be involved in owning or operating entities arising out of or resulting from its consultancy; or
- no consultant should bid for works arising out of or relating to its consultancy.

40.3 *A Guidance Note on Conflict of Interest is at Annex-I.*

41. What are the obligations of consultants?

41.1 The obligations of the consultant refer to the responsibility the consultant owes to the Project Authority in the discharge of its services in accordance with the terms of contract. The obligations and liabilities of the consultant should be charted out carefully. Any direct loss or damage accrued or likely to accrue due to deficiency in services rendered by the consultant should be attributable to him. Reporting obligations of the consultant should also be specified. The issues relating to intellectual property rights and dispute resolution should also be suitably addressed.

41.2 The obligations of consultants would normally include/address the following:

- **Standards of Performance:** The consultant should perform services and carry out its obligations with due diligence, efficiency, economy and in accordance with generally accepted professional techniques and practices while observing sound management practices and methods;
- **Terms of Reference:** The Consultant should perform the specified tasks and provide deliverables in conformity within the stated time-schedule;
- **Applicable Laws:** The Consultant should perform the services in accordance with Applicable Laws;
- **Conflict of Interest:** Discussed in para 40 above;
- **Not to benefit from commissions, discounts, etc.:** The remuneration of the consultant should constitute his sole remuneration in connection with the assignment or services and he should not accept for his own benefit any trade commission, discount or similar payment from an interested party in connection with activities pursuant to the concerned assignment or in the discharge of his obligations;
- **Corrupt practices:** The consultant and his personnel should observe the highest standards of ethics and should not engage in any corrupt, fraudulent, coercive, undesirable or restrictive practices; and
- **Confidentiality:** The consultant, its sub-consultants and their personnel should not, for a defined reasonable period, after the expiration or termination of the assignment disclose any proprietary information or any information provided by or relating to the

Project Authority, its technology, technical processes, business affairs or finances or any information which the consultant is under an obligation to keep confidential in relation to the project or the services or the concerned assignment, except with the prior written consent of the Project Authority.

42. What are the liabilities of consultants?

42.1 The consultant's liability will be governed by applicable laws, and the contract may not deal with the matter unless it is sought to limit the liability of the consultant.

42.2 The consultant should be liable to the Project Authority for any direct loss or damage accrued or likely to accrue due to deficiency in services, negligence or willful misconduct on the part of the consultant or on the part of any person or firm acting on behalf of the consultant in carrying out the services, but its liability should be limited to the total payments expected to be made for the consultancy or the proceeds the consultant is entitled to receive against insurance, whichever is higher. The consultant should not be liable to the Project Authority for any indirect or consequential loss or damage.

42.3 The limitation of liability should not affect the consultant's liability for damage to third parties caused by the consultant or any person or firm acting on behalf of the consultant in carrying out the services.

43. Are the consultants required to take out any insurance?

Yes, the consultants should take out and maintain, for the period of its consultancy, insurance against risks and for the coverage as specified in the agreement and in accordance with good industry practice. This would

normally include, but not be limited to, the following:

- Third Party liability insurance;
- employer's liability and workers' compensation insurance; and
- professional liability insurance.

44. Are pre-bid meetings necessary?

Yes, pre-bid meetings play an important role in clarifying the applicants' doubts with the view to enabling a clear understanding of the TOR and the conditions of contract. If the Project Authority decides to make changes in the terms/scope of work as a result of pre-bid meetings or otherwise, a formal corrigendum should be issued and reasonable time should be provided to the applicant firms to submit their bids (Clause 3.5 of 'Manual of Policies and Procedure of Employment of Consultants').

45. Should the offers be checked for responsiveness?

Yes, prior to evaluation of proposals the responsiveness of each proposal should be determined. A proposal could be considered responsive provided it is received by the due date, is signed, sealed and marked as required, contains all the documents and information as required, and fulfills the conditions of eligibility.

46. What are the conditions of eligibility?

For the purpose of determining the conditions of eligibility, the minimum relevant experience of the firm and the minimum annual revenues from professional fees should be prescribed in the bid documents. Similarly, the minimum academic qualifications and relevant experience of key

personnel should also be prescribed. This is necessary for ensuring that only a well qualified and experienced applicant is selected.

47. Why should the draft contract agreement be given at the bidding stage?

The draft contract agreement specifies the terms and conditions of employment of the selected firm. A standard contract should be used for this purpose. Key elements that the contract ought to include are:

- A brief recital specifying the parties and explaining the background of the agreement;
- the term or duration of the contract;
- description of the scope of work (attached as an Annex to the draft agreement);
- provisions for modifications to the scope of work;
- responsibility for contract administration and project management (both substantive review/management and handling of invoices) by the Project Authority;
- responsibility for project management on the consultant's side, and definition of specific task responsibilities;
- provisions for identifying and eliminating conflicts of interest;
- confidentiality requirements;
- substitution of personnel;
- use of sub-consultants;
- right to audit related documents and financial statements of the consultant;
- penalties for non-performance;

- rights or restrictions for the assignment of contractual obligations to third parties, including sub-contracts;
- ownership or disposal of property used by the consultant during the course of the project;
- insurance requirements with specified level of coverage;
- indemnification of the client;
- exemption of liability from consequential damages;
- dispute resolution, including the use of specified rules for arbitration;
- provisions for dealing with events of Force Majeure;
- conditions for termination, including period of notice;
- definitions of “corrupt” or “fraudulent” practices that would lead to a termination;
- contract price and payment schedule detailing all milestones; and
- copyright and use of intellectual property as it pertains to the deliverables resulting from the contract.

48. Why is negotiation with the lowest applicant firm required?

The first ranked consultant should be called for negotiations for reconfirming the obligations specified in the RFP and for determining the course of action, apart from negotiation for reducing the price, if required. Issues such as deployment of key personnel, understanding of RFP, methodology and quality of work plan, etc, should be discussed during negotiations.

49. How can transparency be ensured in the evaluation process?

Transparency in the evaluation process can be ensured by the following:

- specifying a clear, transparent and predictable criteria for evaluation;
- opening of offers in the presence of all applicants who chose to be present;
- abiding by the evaluation criteria specified in the bid documents; and
- constituting a committee of relevant officials who should conduct the evaluation of applications in a fair and transparent manner, and submit a report.

50. What are the circumstances under which individual consultants can be appointed?

Individual consultants can be employed on assignments for which (a) teams of personnel are not required; (b) no additional outside professional support is required; and (c) the experience and qualifications of the individual are the paramount requirement.

51. Can individual consultants be appointed on direct nomination basis?

51.1 No, except with due justification in exceptional circumstances such as:

- tasks that are a continuation of previous work that the consultant has carried out and for which the consultant was selected competitively;
- assignments lasting less than six months;
- emergency situations resulting from natural disasters; and

- when the individual is the only consultant qualified for the assignment.

51.2 Selection of individual consultants should normally be carried out by advertising the requirement in at least one national newspaper of repute. The selection should be based on the qualifications and experience required for the assignment (Clause 7.2 of ‘Manual of Policies and Procedure of Employment of Consultants’).

52. How should the payment structure for the consultants be established?

The payment structure should broadly reflect the cost of expected inputs, payments against defined outputs, and retention of some leverage for final delivery.

53. What is the role of the Project Authority after the appointment of consultants?

The Project Authority should deploy the most skilled resources available with it to manage the consultants. This will serve a dual purpose. Firstly, the close involvement of Project Authority personnel will ensure the quality of deliverables which tend to have a profound effect on the implementation of the PPP Project. Secondly, it will help in capacity building within the Project Authority. If the consultants are not utilized effectively, it will only lead to a drain on the public exchequer besides a serious adverse impact on the project.

54. Does the appointment of consultants assist in capacity building?

The association with consultants may provide opportunities for the transfer of skills so that in subsequent procurement, there is less dependence on consultants. Intellectual Property

Rights to any output should rest with the Project Authority so that any future consultants can have full access to the work done earlier.

55. Will documents prepared by the consultants be their property?

No, all plans, drawings, specifications, designs, reports and other documents prepared by the consultant in performing the services shall become, and remain the property of the Project Authority. The consultant may retain a copy of such documents, but restrictions on the future use of these documents by the consultants should be specified in the agreement.

56. Are any model documents available in India for selection of consultants?

Planning Commission has published model documents for selection of consultants based on the guidelines and instructions issued by Government of India. These have been hosted on the website of the Planning Commission (www.infrastructure.gov.in) as model documents.

References for International Best Practices

- *World Bank (PPIAF) Toolkit: A guide for hiring and managing advisors for private participation in infrastructure:*
www.ppiaf.org/hiringadvisors/fulltoolkit.pdf
- *Guidelines: Selection and Employment of Consultants by World Bank Borrowers:*
www.worldbank.org
- *HM Treasury Guidance Technical Note 3:*
<http://hm-treasury.gov.uk>

Annex-I

Guidance Note on Conflict of Interest

1. This Note further explains and illustrates the provisions of Clause 40 above and should be read together therewith in dealing with specific cases.

2. Consultants should be deemed to be in a conflict of interest situation if it can be reasonably concluded that their position in a business or their personal interest could improperly influence their judgment in the exercise of their duties. The process for selection of consultants should avoid both actual and perceived conflict of interest.

3. Conflict of interest may arise between the Authority and a consultant or between consultants and present or future concessionaries/ contractors. Some of the situations that would involve conflict of interest are identified below:

(a) Authority and consultants:

(i) Potential consultant should not be privy to information from the Authority which is not available to others.

(ii) Potential consultant should not have defined the project when earlier working for the Authority.

(iii) Potential consultant should not have recently worked for the Authority overseeing the project.

(b) Consultants and concessionaires/ contractors:

(i) No consultant should have an ownership interest or a continuing business interest or

relationship with a potential concessionaire/ contractor.

(ii) No consultant should be involved in owning or operating entities resulting from the project.

(iii) No consultant should bid for works arising from the project.

The participation of companies that may be involved as investors or consumers and officials of the Authority who have current or recent connections to the companies involved, therefore, needs to be avoided.

4. The normal way to identify conflicts of interest is through self-declaration by consultants. Where a conflict exists, which has not been declared, competing companies are likely to bring this to the notice of the Authority. All conflicts must be declared as and when the consultants become aware of them.

5. Another approach towards avoiding a conflict of interest is through the use of “Chinese walls” to avoid the flow of commercially sensitive information from one part of the consultant’s company to another. This could help overcome the problem of availability of limited numbers of experts for the project. However, in reality effective operation of “Chinese walls” may be a difficult proposition. As a general rule, larger companies will be more capable of adopting Chinese walls approach than smaller companies. Although, “Chinese walls” have been relatively common for many years, they are an increasingly discredited means of avoiding conflicts of interest and

should be considered with caution. As a rule, “Chinese walls” should be considered as unacceptable and may be accepted in exceptional cases upon full disclosure by a consultant coupled with provision of safeguards to the satisfaction of the Authority.

6. Another way to avoid conflicts of interest is through the appropriate grouping of tasks. For example, conflicts may arise if consultants drawing up the terms of reference or the proposed documentation are also eligible for the consequent assignment or project.

7. Another form of conflict of interest called “scope–creep” arises when consultants advocate either an unnecessary broadening of the terms of reference or make recommendations which are not in the best interests of the Authority but which will generate further work for the consultants. Some forms of contractual arrangements are more likely to lead to scope-creep. For example, lump-sum contracts provide fewer incentives for this, while time and material contracts provide built in incentives for consultants to extend the length of their assignment.

8. Every project contains potential conflicts of interest. Consultants should not only avoid any conflict of interest, they should report any present/ potential conflict of interest to the Authority at the earliest. Officials of the Authority involved in development of a project shall be responsible for identifying and resolving any conflicts of interest. It should be ensured that safeguards are in place to preserve fair and open competition and measures should be taken to eliminate any conflict of interest arising at any stage in the process.

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